

Stone River Ranch

Peter & Karen Stone

Delta Landowner – at the location slated for BDCP Intake Pumping Station #1

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APN: 119-0230-009-000

Resolution of Necessity 2011-21

November 15, 2011

State of California, Resources Building

1416 Ninth Street, First Floor Auditorium

Sacramento, CA 95814

To: The California Water Commission (CWC)

Commissioner Saracino and the other Commissioners, following last month's hearing on the Resolution of Necessity 2011-21, I wanted to promptly work with DWR and get resolution on a number of matters in contention in preparation for the November 2011 hearing. Accordingly, on October 24, 2011, I sent the letter (included first after this letter) to the CWC. The primary purpose of the letter was to get answers from the CWC that would enable DWR to deal with the various issues that DWR has otherwise been unable to deal with. I was disappointed when I got Rachel Ballanti's response two days later (October 26, 2011 which is included second after this letter) indicating that I couldn't get any answer from the CWC apart from a publicly noticed meeting. Much to my chagrin, she indicated that "We would encourage you to raise these issues again at the next Commission meeting to be held on November 16 and 17, 2011 in Sacramento." She also indicated that "With your permission, I can forward your letter to DWR staff and ask that they work with you to address your concerns." I contacted Rachel and said that would be OK and suggested she send my letter to Tom O'Neil (the DWR land agent assigned to our R.O.N.) which she did.

The next day, I was in the California Resources Building participating in the first BDCP Public Financing Work Group meeting. After that meeting, I called Tom O'Neil and met with him in the building lobby for almost an hour. He acknowledged that he had received my letter to the CWC forwarded by Rachel and would be looking into it. He also indicated that he was trying to get the revised drilling site map out before the November meeting. (As a side note, this has been done.) On the other matters, his hands were tied due to not having clear

authorization and/or approvals. He apparently has submitted some proposed changes within DWR which were supposed to be completed last week. However, nothing has been forthcoming as of today Monday the 14th. Accordingly, I am going to have to proceed in accordance with Rachel's e-mail in which she encouraged me to raise these issues again at the hearing in two days.

As I have told Tom O'Neil, the DWR representatives with whom I have been chatting with for more than a year, my overall philosophy is to get the activities that DWR is seeking to do on my property and the methods of doing them to be as least damaging as possible. In all the discussions about negotiations, DWR has had a very large hammer to use which is if you don't sign we will sue you. While this is in accordance with the law and their prerogative, I believe that it has led them to an approach that hasn't been helpful in setting up a program that does the "least private injury" for ALL landowners (not just those who sign). I will freely admit that because of DWR's lost court case earlier this year, what they are now proposing has become less onerous in some points. However, there are still many points in my response to the TEP over a year ago and recent hearings that still haven't been resolved and which could result in significant damages and/or possible full loss of my property that keep me from signing.

In an attempt to have this hearing result in some actionable items that will help improve what DWR is seeking to do, I would like to make some proposed motions that I would appreciate the CWC taking action on at this meeting as follows (support for most requested motions is detailed later in this letter):

1) SUMMARY OF PROPOSED MOTIONS FOR THE CWC TO DECIDE ON:

- A) Changes or improvements to a Resolution of Necessity and its related protocols, procedures, easements, etc. that are made for the benefit of one landowner must be made available to all landowners where those changes make sense for others and result in the "least private injury" to landowners as much as possible.**
- B) DWR must provide a legal description not just for an entire parcel but for the various specific plots within that parcel that the easements pertain to. Rectangles and dots on an aerial photograph do not suffice for the requirements of meets and bounds in a legal parcel description. (See the current legal description of my entire property with general diagrams as to where the easements will be as provided by DWR third after this letter.)**
- C) DWR must provide to the landowners revised Resolutions of Necessity, Right of Way Contracts, Temporary easements, protocols, listings of tests to be performed, parcel maps, legal descriptions of easement locations, etc. and updated staff summary that reflect changes from negotiations and/or September/October/November 2011 hearings.**

- D) DWR is to be required to use temporary easements rather than permanent easements as it has been shown that the permanent easements aren't required.**
 - a. If permanent easements are somehow allowed, the nature of those easements needs to be fully disclosed**
 - b. If permanent easements are somehow allowed, then DWR must initiate the quitclaim process as soon as the drilling is done and ensure that the landowner's title is cleared of the easement as soon as possible.**
- E) DWR will provide greater specificity in the easements as to what can and can't be done now and after DWR is gone.**
- F) DWR will include language dealing with the ability to cancel the temporary easement in case of an act of God or the cancellation of the project or some other circumstance that would render the drilling/boring process not necessary.**
- G) Testing of drinking water must be done at DWR's expense if requested by the landowner before the drilling activities take place and two times afterward (one of which is to be at least one year after drilling activities are complete) to determine that there are or are not reductions in drinking water quality due to the drilling. The landowner may select a State certified laboratory of their choice for this drinking water testing. DWR will reimburse the landowner for the costs of testing incurred by the landowner or pay those costs directly at the landowner's choice.**
- H) Drilling holes to be steel cased to ensure that there isn't water contamination from a poor strata of water to the one where drinking water for the residence is sourced.**
- I) DWR must remove the three environmental tests listed in October 2011 including: 1)TPH-G, D, MO; 2) CAM-17 + Hg; and 3) Pesticides from the tests it is planning to perform and DWR must not add any other environmental tests. DWR must further include a statement in the Resolution of Necessity documentation that no specific environmental testing will be done.**
- J) DWR must be required to hold landowners harmless from any hazardous wastes discoveries.**
- K) DWR will modify all drilling sites currently slated for the toe of a levee to a distance of not less than 100 feet from the base of a levee in conformity with the Superior Court, State of California County of San Joaquin order filed February 22, 2011 its "Order Permitting Entry And Investigation Of Real Property (Other Than Geologic And Drilling), Attachment D – Special Conditions paragraph h) "Levees and Reclamation Facilities. There shall be no digging, hand auger, or drilling on or within 100 feet of the base of a levee.**
- L) DWR will further comply with that court order as follows: "DWR shall comply with any general rules or regulations of a reclamation district which have been adopted or approved by the district, applicable also to the underlying property owner regarding use or weight of vehicles on its easement area, or restricted access to pumping stations, digging near levees, and the like."**

- M) DWR will modify its Protocols to identify how it will make sure the top 10 feet of soil is restored to as it was before drilling including stopping the bentonite grout or well casing 10 feet below ground.**
- N) DWR will modify its Protocols to explain how all damages to the property if any are restored.**
- O) DWR will modify its Protocols to explain how damage to drinking water if any would be handled and restored**
- P) DWR will modify where possible its schedule to accommodate farm schedules.**

2) THE GREATEST PUBLIC BENEFIT AND LEAST PRIVATE INJURY

The CWC needs to determine if “the project is located in such a manner as to offer the greatest public benefit with the least private injury.”

1) For the overall project, I refer to my comments at the September CWC hearing where I described why I do not believe that it is in the public interest and necessity and may do more harm than good. (Contained in Agenda Item 21 Owner Comments – September 21.)

2) For my specific property, I refer to my comments and presentation graphics from the October hearing where I questioned taking my parcel 119-0230-009-0000 which is highly developed with over 8,100 square feet of residences and other structures when a 40 acre field directly adjacent to the river is available close by with much less “private injury”. (Contained in Agenda Item 21 Owner Comments – October 18)

The revised “Negotiation Fact Sheet” provided by DWR lists 4 “Areas of Main Concern to Owner” which misses many significant issues that I don’t want to have lost sight of and have repeatedly brought up since my first response to the 2010 TEP process (Contained in Agenda Item 21 Owner Comments – October 19) and more importantly to the issues I have raised as I provided input to DWR related to a proposed modification to their “Right of Way Contract - Temporary Easement” (Contained in Agenda Item 21 Owner Comments – October 12) and issues presented to the CWC during the last two hearings (Contained in Agenda Item 21 Owner Comments – September 21, 2011) and (Contained in Agenda Item 21 Owner Comments – October 18, 2011)

Many of my issues have resulted in the numerous motions or decisions I am proposing above and are detailed with other items below so that they don’t get lost in the multiple meetings notes. It should be noted that the items below were primarily designed to obtain decisions that would allow me to progress with DWR and were from my communication with the CWC October 24, 2011. Accordingly, there are many items still remaining in the other “Owner Comments” that stand in terms of my comments.

As I look at what has happened over the last few months and what you have before you as a proposed Resolution of Necessity to approve which has little in terms of modifications since September to reduce “private injury” (and this while DWR is seeking its approval), I am very concerned with what may not happen to make sure these issues are properly addressed if you approve the Resolutions of Necessities before fixes are approved by you and properly and fully documented.

NORTH DELTA WATER AGENCY NOVEMBER 4, 2011 LETTER AND COMMENTS I WANT TO MAKE AS MINE BEFORE THE CWC

I have a recorded sub-contract under North Delta Water Agency’s 1981 contract with DWR and the state guaranteeing my property suitable quantity and quality of water. (See fourth after this letter.) The North Delta Water Agency (NDWA) has analyzed the implications of the BDCP process and specifically the current Resolution of Necessity and eminent domain processes. In NDWA’s November 4, 2011 letter to John Laird, Secretary & Dr. Gerald Meral, Deputy Secretary CA Natural Resources Agency and David Hayes, Deputy Secretary U.S. Department of the Interior and Michael Connor, Commissioner U.S. Bureau of Reclamation copying both California Senators, 14 California Representatives, 4 California State Senators, 16 Assemblymembers and others related to the MOA Amendment for Development of BDCP, NDWA has many charges and claims that I agree with and wanted to bring before the CWC as mine. (The entire letter is included fifth after this letter.)

Towards the end of Page 4 and page 5 and 6 of the NDWA letter indicates the following that I want to bring to the CWC as my concerns (particularly as it relates to the definition of the project and its funding):

- “The HCP/NCCP standards regarding use of best available peer-reviewed science has been consistently ignored, which is of grave concern for a project of this magnitude.”**
- “The alternatives under consideration for the effects analysis and for purposes of environmental review have been irrationally constrained. Specifically, all of the “dual conveyance” alternatives must include screening of the South Delta pumping facilities at flows of 3,000 cfs, which would reduce take of covered species and allow higher pumping volumes in furtherance of a reliable water supply for export. Additionally, none of the project alternatives include the phasing of conveyance as requested by the fish agencies, which would provide an opportunity to gather data and make modifications as necessary before commitment of resources to a 15,000 cfs facility.”**
- “While the need for massive new diversions in the North Delta (and their designation as “conservation measures”) is premised on the need to reduce entrainment in the South Delta pumps, Appendix B to the Effects Analysis claims that entrainment in the South Delta is not a significant problem in the Delta for**

the species of concern. Moreover, even with screens in the new diversions, entrainment/entrapment will occur wherever water is diverted in large volumes.”

- **“No pathway toward take coverage for other landowners and entities in the Plan area is provided, despite the fact that if successful, the project could directly increase the probability of take of protected species.”**

“Unlawful Use of Eminent Domain Laws to Further BDCP Goals and Timeline”

“DWR’s geotechnical drilling is in some cases exposing landowners to toxic clean-up liability. Soil test results are reported to the Department of Toxic Substance Control if any toxic chemicals are detected. Landowners cannot afford for the geotechnical drilling to cause their properties to become State Toxic Clean-up Sites. DWR has refused to assume liability if the drilling and subsequent reporting results in a toxic clean-up liability; as a result, many landowners cannot agree to a Temporary Entry Permit.”

“The recent court decision clarified that geotechnical drilling is a “taking” of private property due to the permanent alteration of the property, so now DWR is pursuing the condemnation (eminent domain) of property in order to conduct this drilling. According to California law (Water Code section 11580), however, eminent domain can only be pursued by DWR once a public project has been authorized and funded. BDCP has not even released a draft EIR/EIS indicating various project alternatives and associated location of facilities, let alone a final EIR/EIS and Record of Decision. The MOA recently signed by DWR and the Bureau of Reclamation mentioned above makes it very clear that DWR may not commence with preparing “Public review draft of the BDCP and EIS/EIR or the “Final BDCP and EIS/EIR,” until and unless “the Public Water Agencies provide the Director of DWR with written authorization to proceed” (Section III-G-b pp.10-11).”

“Therefore, the State is proposing to condemn through eminent domain private property for a project that may not be completed if written authorization and funding is not forthcoming from the Public Water Agencies. Why should Delta landowners have their private property taken through eminent domain when the EIS/EIR has not yet been completed and approved pursuant to Section III-G-b of the MOA? Moreover, Deputy Secretary Jerry Meral disclosed at the October 19, 2011, Legislative Oversight hearing, that more geotechnical information is not needed to complete the public draft EIS/EIR.”

“The California statute requiring approval of the project prior to exercise of eminent domain (BDCP) is in place in order to avoid this very circumstance of a public agency “taking” private property for a project that is ultimately never built. If DWR needs to obtain more engineering information via geo-technical

drilling then it should either: (1) rely on existing information from drilling already conducted; (2) pursue drilling on public lands; or (3) put additional effort into pursuing cooperative negotiations with property owners with more favorable terms and financial compensation in order to secure voluntary agreement from the landowner.”

I further submit for your consideration and inclusion as a part of my issues and concerns a letter below from the Central Delta Water Agency dated October 18, 2011. (The entire letter is included sixth after this letter.) It expresses other concerns and refines some of the concerns I have expressed in language that ties more closely to and cites appropriate Water Code sections.

I will summarize here the portion of the letter that contends that “the Resolutions of Necessity at this time are Premature.

- **“At this time no one knows where DWR will ultimately perform its Geotechnical Activities, not even DWR “**
- **“Further CEQA Analysis is required”**
- **“It is not completely clear what activities DWR wants permission to perform”**
- **“DWR has failed to demonstrate that the “Project” is authorized and funded”**

DETAIL BEHIND THE PROPOSED MOTIONS AND OTHER KEY ELEMENTS

(Note: there is no correlation between the letter/numbering scheme here and up in the motion summary section as not all of these items result in a motion):

A) During both the September 21st, 2011 and October 19th, 2011 hearings, the Commissioners have made it very clear that the landowners need to seek to meet with DWR and negotiate with them. As I reflected back on that, and realizing that time would quickly march on to a November meeting, I felt that I needed to try and deal with things in advance so November isn’t just a rehash of October. As I mentioned to you in the October hearing, when I was trying to set up a meeting with the DWR land agent about two months ago, that would include those of us who were “Under the footprint of Intake #1”, I was told in no uncertain terms (and repeatedly) that he would not meet with more than just me and the neighbor whom DWR’s proposed access road on my property would access. Even though I told him that I was trying to get those together who all had drilling sites identified in the toe of the levee which I had described to the Commission in September how a failure of the levee at any one of those points would result in the flooding of all our homes in our reclamation district

#744, there was no change in the approach with the stated reason being “confidentiality”. I said then and still don’t understand how if a group of four or five landowners are all willing to meet together and talk about their situation in front of each other how that would be a confidentiality issue. The only thing that I can think of is that DWR wants confidentiality to prevail so one landowner doesn’t know what is happening with another. If this is true, I believe that it is not right to not allow a meeting of all the parties to an issue which could result in the flooding of an entire reclamation district. With all of the discussion over the last two months on this topic, there are still four planned drilling holes in the toe of the levee of properties within reclamation district #744 according to the revised Resolutions of Necessity as of 11-14-2011. Those two assessor’s parcel numbers are # 119-0230-044-0000 and # 119-0230-085-0000

- a. In terms of my request that improvements to the Resolution of Necessity that are made for the benefit of one landowner should be available to all, I would like you to let me know if DWR will be instructed to make sure that happens? This should help us move away from DWR’s confidentiality doctrine relating to matters that are vital not just to one landowner who is knowledgeable but gets at the heart of doing the least possible harm to all landowners in this process.**

B) One question that came up in the October 21st hearing, regarded the “legal descriptions” of the exact places on each property where the permanent and temporary easements were to be established and whether landowners had received them. I dug through my records and found the document that Al Davis was referring to that I received in early October 2011. I have attached it at the back of this letter. It does contain the “legal description” of my entire property under “UNIT A” and simply refers to the aerial photograph with red squares for the UNIT A easements and blue boxes on the aerial photograph for the UNIT B easements and white lines on the aerial photograph for UNIT C easements but does not contain a “legal description” of the bounds of each of those easements as Commissioner Delfino seemed to be requesting.

As you may recall, this was in connection with the requirement under the California Code of Civil Procedure, Section 1240.030, which provides that the power of eminent domain may be exercised to acquire property for a proposed project if the following conditions are met: (4) An offer to acquire the property in compliance with Government Code Section 7267.2 has been made to the owner of record.

It was contended that for the offer to be valid that it had to be for a specific plot(s) of ground legally identified. While it doesn’t appear to meet that

requirement based on Commissioner Delfino's comments and others, I thought that it would be useful to provide the September 27, 2011 letter from DWR containing the notarized description and map of our property for your determination. (This can be seen as the third item after this letter.)

C) At various times during the meeting, you charged us as landowners to spend the next month working with DWR to negotiate as best we could. As I mentioned in the beginning of my comments at the hearing, the process hasn't been clear. I have been ready to work with DWR to try and eliminate as many of the problems as possible. However I don't know where to start as I still have no response from you regarding most of the comments I made on specific points. I recall that you did give marching orders to DWR to provide: 1) more clarity on funding; and 2) provide a legal description. So, I am not sure that the DWR land agents would feel authorized to do anything differently than they have been doing.

D) There was no statement from the commission to me or to DWR as to what to do regarding the following of my requests: (In the absence of direction from the Commission, DWR in the past months has been unable or unwilling to negotiate some points. This may be in part due to DWR's general stated approach that doing many of the right things mentioned in the hearings and discussions with the landowners will be done if the landowner negotiates and agrees to the easement and that generally they won't be done otherwise. While I have been unable to sign due to the significantly onerous aspect of the possible loss of my property over the hazardous waste issue that neither the Commission or DWR has been able to give me any help with, I am seeking to make the rest of the issues as least damaging as possible. Despite DWR's approach stated above, there has been stated movement on some issues by DWR even though they aren't reflected in modified language in any official documents that I have seen. This is a significant concern particularly if the Resolutions of Necessity are approved with so many unresolved items.)

- 1) I would like to see what the complete set of modifications are to DWR's proposed Resolution of Necessity based on my meeting with DWR and the September hearing before the commission. Some of the changes that I would like to see in updated official documentation are as follows:**
 - a. Changed drilling sites (this HAS been done between the October and November hearings)**
 - b. Changed access road to my neighbor's drilling sites (this HAS been done between the October and November hearings)**
 - c. All other elements where DWR has been willing to make changes**

2) Temporary vs Permanent Easements

- a. **Is DWR going to be required to use temporary easements rather than permanent easements as it has been shown that the permanent easements aren't required?**
 - b. **Will greater specificity as to what can and can't be done now and after they are gone be included?**
 - c. **Will DWR include language dealing with the ability to cancel the temporary easement in case an act of God or the cancellation of the project or some other circumstance that would render the process not necessary?**
- 3) Testing of water before and after drilling to see if there are any issues with changes in drinking water quality due to the drilling**
- a. **What is the response to my request that testing of my drinking water be done before the drilling activities and two times afterward to determine that there are or are not reductions in drinking water quality due to the drilling?**
 - b. **What is the response regarding Daniel Wilson's testimony and request related to drilling around Intake #2 that the drilling holes should be steel cased (just as a well is required to be) to ensure that there isn't water contamination from a poor strata to the one the drinking water for the property is sourced from? It certainly sounds as though his approach would have a greater degree of success. I am still concerned about his comment that artesian/seepage pools could emerge a few years later where the drillings were conducted.**
- 4) Since DWR's stated purpose for the drilling is to test for soil strength and stability related to a pipeline, canal and/or pumping intake station, there is no need to include environmental tests that could needlessly result in finding pesticides that should be all over the delta wherever farming has occurred and that then might have to be reported.**
- a. **Will DWR remove the three environmental tests including: 1)TPH-G, D, MO; 2) CAM-17 + Hg; and 3) Pesticides?**
 - b. **Will a statement be inserted that no other specific environmental testing will be done?**
- 5) Drilling in the toe of the Levees**
- a. **Will DWR be required to modify drilling sites in the toe of the levee of the Sacramento River to comply with the court order quoted below? This specifically would require moving the five sites currently slated for the toe of the Sacramento River levee in reclamation district #744. The Superior Court, State of California County of San Joaquin order filed February 22, 2011 its "Order Permitting Entry And Investigation Of Real Property (Other Than Geologic And Drilling), Attachment D – Special Conditions paragraph h) "Levees and Reclamation Facilities. There shall be no digging, hand auger, or drilling on or within 100 feet of the base of a levee. DWR shall comply with any general rules or regulations of a**

reclamation district which have been adopted or approved by the district, applicable also to the underlying property owner regarding use or weight of vehicles on its easement area, or restricted access to pumping stations, digging near levees, and the like.”

6) DWR Protocols that haven't been addressed:

- a. How DWR makes sure the top 10 feet of soil is restored to as it was including stopping the bentonite grout or well casing?**
- b. How all damages to our property if any are restored?**
- c. How damage to drinking water if any would be handled and restored?**

7) Drilling Schedule

- a. Can DWR do the drilling in the late August to October time frame to miss the probable farming schedule rather than May as currently planned?**

E) As I look at the Draft Resolution of Necessity language, I see no place where any of the requirements as to what DWR may or may not do are listed. The Temporary Easement document that I have been provided by DWR does have some of the specifics and could provide a good place to contain those requirements. (I did submit my recommended changes to the Commission in that document for the October hearing.) However, if we don't sign the Temporary Easement we have very little if any official limitations as to what can and cannot be done by DWR. I respectfully request, that the Resolution of Necessity be required to have language in it similar to what is found in the Temporary Easements so we landowners can actually know what has been agreed to and what DWR can and can't do. Just as a very simple example, DWR has talked about hand augering the top ten feet of soil but I don't see it anywhere except in the Temporary Easement which isn't in the language of the Resolution of Necessity you are poised to approve.

I actually look forward to getting some official resolution to some of the items mentioned above so that I wouldn't have to keep bringing up so many points each time we meet. Perhaps that is unrealistic on my part but that is why I am trying to get these motions approved.

In conclusion, for reasons stated above, I believe that you should not approve the Resolution of Necessity and respectfully ask that you don't approve it.

Thanks for your consideration.

Sincerely,

Peter W. Stone

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Stone River Ranch

Peter & Karen Stone

Delta Landowner – at the location slated for BDCP Intake Pumping Station #1

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(916) 744-1111 (916) 744-1956

APN: 119-0230-009-000

Resolution of Necessity 2011-21

October 24, 2011

State of California, Resources Building

1416 Ninth Street, First Floor Auditorium

Sacramento, CA 95814

To: The California Water Commission

Commissioner Saracino and the other Commissioners, thanks again for the opportunity to present to the California Water Commission last week regarding the 10-19-2011 hearing on the Resolutions of Necessity. I appreciate your bearing with me in the time it took to restate many of the items that I brought up at the September hearing. As I have told the DWR representatives with whom I have been chatting with for more than a year, my overall philosophy is to get the activities that DWR is seeking to do on my property and the methods of doing them to be as least damaging as possible. In all the discussions about negotiations, they have had a very large hammer to use which is if you don't sign we will sue you. While this is in accordance with the law and their prerogative, I believe that it has led them to an approach that hasn't been helpful in setting up a program that does the least possible damage for ALL landowners (not just those who sign). I will freely admit that because of the lost court case earlier this year, what they are now proposing has become less onerous in some points. However, there are still many points in my response to the TEP over a year ago and recent hearings that still haven't been resolved and which could result in significant damages and/or possible full loss of my property that keep me from signing.

A) During both the September 21st, 2011 and October 19th, 2011 hearings the Commissioners have made it very clear that the landowners need to seek to meet with DWR and negotiate with them. As I reflect back on that, and realize that time will quickly march on to a November meeting I felt that I needed to try and deal with things in advance so November isn't just a rehash of October. As I mentioned to you in the October hearing, when I was trying to set up a meeting with the DWR land agent about a month ago, that would include those

of us who were “Under the footprint of Intake #1”, I was told in no uncertain terms (and repeatedly) that he would not meet with more than just me and the neighbor whom DWR’s proposed access road on my property would access. Even though I told him that I was trying to get those together who all had drilling sites identified in the toe of the levee which I had described to the Commission in September how a failure of the levee at any one of those points would result in the flooding of all our homes in our reclamation district #744, there was no change in the approach with the stated reason being “confidentiality”. I said and still don’t understand how if a group of four or five landowners are all willing to meet together and talk about their situation in front of each other how that would be a confidentiality issue. The only thing that I can think of is that DWR wants confidentiality to prevail so one landowner doesn’t know what is happening with another. If this is true, I believe that it is not right to not allow a meeting of all the parties to an issue which could result in the flooding of an entire reclamation district. As far as I know at this time, of the five planned drilling holes in the toe of the levee of properties within reclamation district #744 that only one may have been moved away from the toe of the levee.

- a. In terms of my request that improvements to the Resolution of Necessity that are made for the benefit of one landowner should be available to all, I would like you to let me know if DWR will be instructed to make sure that happens? This should help us move away from DWR’s confidentiality doctrine relating to matters that are vital not just to one landowner who is knowledgeable but gets at the heart of doing the least possible harm to all landowners in this process.

B) One question that came up in the October 21st hearing, regarded the “legal descriptions” of the exact places on each property where the permanent and temporary easements were to be established and whether landowners had received them. I dug through my records and found the document that Al Davis was referring to that I received in early October 2011. I have attached it at the back of this letter. It does contain the “legal description” of my entire property under “UNIT A” and simply refers to the aerial photograph with red squares for the UNIT A easements and blue boxes on the aerial photograph for the UNIT B easements and white lines on the aerial photograph for UNIT C easements but does not contain a “legal description” of the bounds of each of those easements as Commissioner Delfino seemed to be requesting.

As you may recall, this was in connection with the requirement under the California Code of Civil Procedure, Section 1240.030, which provides that the power of eminent domain may be exercised to acquire property for a proposed project if the following conditions are met: (4) An offer to

acquire the property in compliance with Government Code Section 7267.2 has been made to the owner of record.

It was contended that for the offer to be valid that it had to be for a specific plot(s) of ground legally identified. While it doesn't appear to meet that requirement based on Commissioner Delfino's comments and others, I thought that it would be useful to provide the September 27, 2011 letter from DWR containing the notarized description and map of our property for your determination.

C) At various times during the meeting you charged us as landowners to spend the next month working with DWR to negotiate as best we could. As I mentioned in the beginning of my comments at the hearing, the process hasn't been clear. I am ready to work with DWR to try and eliminate as many of the problems as possible. However I don't know where to start as I have no response from you regarding most of the comments I made on specific points. I recall that you did give marching orders to DWR to provide: 1) more clarity on funding; and 2) provide a legal description. So, I am not sure that the DWR land agents would feel authorized to do anything differently than they have been doing.

D) There was no statement from the commission to me or to DWR as to what to do regarding the following of my requests: (In the absence of direction from the Commission, DWR in the past months has been unable or unwilling to negotiate some points. This may be in part due to DWR's general stated approach that doing many of the right things mentioned in the hearings and discussions with the landowners will be done if the landowner negotiates and agrees to the easement and that generally they won't be done otherwise. While I have been unable to sign due to the significantly onerous aspect of the possible loss of my property over the hazardous waste issue that neither the Commission or DWR has been able to give me any help with, I am seeking to make the rest of the issues as least damaging as possible. Despite DWR's approach stated above, there has been stated movement on some issues by DWR even though they aren't reflected in modified language in any important official documents that I have seen.)

1) Simply seeing what the complete set of modifications are to DWR's proposed Resolution of Necessity based on my meeting with DWR and the September hearing before the commission. Some of the changes that I would like to see in updated official documentation are as follows:

- a. Changed drilling sites**
- b. Changed access road to my neighbor's drilling sites**
- c. All other elements where DWR has been willing to make changes**

2) Temporary vs Permanent Easements

- a. Is DWR going to be required to use temporary easements rather than permanent easements as it has been shown that the permanent easements aren't required?**

6) DWR Protocols that haven't been addressed:

- a. How DWR makes sure the top 10 feet of soil is restored to as it was including stopping the bentonite grout or well casing?**
- b. How all damages to our property if any are restored?**
- c. How damage to drinking water if any would be handled and restored?**

7) Drilling Schedule

- a. Can DWR do the drilling in the late August to October time frame to miss the probable farming schedule rather than May as currently planned?**

E) As I look at the Draft Resolution of Necessity language, I see no place where any of the requirements as to what DWR may or may not do are listed. The Temporary Easement document that I have been provided by DWR does have some of the specifics and could provide a good place to contain those requirements. (I did submit my recommended changes to the Commission in that document for the October hearing.) However, if we don't sign the Temporary Easement we have very little if any official limitations as to what can and cannot be done by DWR. I respectfully request, that the Resolution of Necessity be required to have language in it similar to what is found in the Temporary Easements so we landowners can actually know what has been agreed to and what DWR can and can't do. Just as a very simple example, DWR has talked about hand augering the top ten feet of soil but I don't see it anywhere except in the Temporary Easement which isn't in the language of the Resolution of Necessity you are poised to approve.

I actually look forward to getting some official resolution to some of the items mentioned above so that I wouldn't have to keep bringing up so many points each time. Perhaps that is unrealistic on my part but that is why I am trying to get this document to you so soon after the October hearing.

Thanks for your consideration and I look forward to your response.

Sincerely,

Peter W. Stone

Peter W. Stone

DEPARTMENT OF WATER RESOURCES

CALIFORNIA WATER COMMISSION

1416 NINTH STREET, P.O. BOX 942836
SACRAMENTO, CA 94236-0001
(916) 653-5791



October 26, 2011

Peter Stone
8941 River Road
Sacramento, California 95832-9714

Re: Resolution of Necessity 2011-21

Dear Mr. Stone:

This letter is in response to your letter to the California Water Commission (Commission), dated October 24, 2011 regarding Resolution of Necessity 2011-21. In your letter, you raise a number of specific questions regarding your negotiations with the Department of Water Resources (DWR) and the proposed Resolution of Necessity for your property. Your letter will be forwarded to the Commission members for their consideration.

I understand your wish for a clear decision on these issues before the next meeting; however, due to the Commission's status as a public body, the Commission cannot answer your specific questions or take any official actions outside of a publically noticed meeting. We would encourage you to raise these issues again at the next Commission meeting to be held on November 16 and 17, 2011 in Sacramento.

With your permission, I can forward your letter to DWR staff and ask that they work with you to address your concerns.

If you have any questions or need additional information, please contact me at (916) 653-8517.

Sincerely,

Rachel Ballanti

Rachel Ballanti
Policy Analyst

DEPARTMENT OF WATER RESOURCES**CALIFORNIA WATER COMMISSION**

1416 NINTH STREET, P.O. BOX 942836

SACRAMENTO, CA 94236-0001

(916) 653-5791



September 27, 2011

Peter & Karen Stone
8941 River Road
Sacramento, California 95832-9714

Subject: Notice of Intent to Adopt Resolution of Necessity

On October 19, 2011 beginning at 1:00 PM, the California Water Commission (Commission) will consider a request by the Department of Water Resources (DWR) to adopt a Resolution of Necessity that will authorize the State of California to acquire property. You are being notified as the owner of this property, or an interest therein, pursuant to California Code of Civil Procedure, Section 1245.235. You and/or your representative are invited to attend the Commission meeting and have the Commission give fair consideration to your testimony.

California Water Commission October 2011 Meeting

Date: October 19, 2011
Time: 9:00 AM *
Location: Resources Building Auditorium
1416 Ninth Street, First Floor
Sacramento, California 95814

* NOTE: The Water Commission meeting will begin at 9:00 AM to consider other Commission business. The agenda items on the proposed Resolution of Necessity actions will be heard beginning at 1:00 PM. A copy of the full agenda will be posted at www.cwc.ca.gov beginning October 7, 2011.

DWR proposes to acquire Parcel No. DCAP-110 (Sacramento County Assessor's Parcel Number 119-0230-009-0000) through the exercise of the power of eminent domain for the Geotechnical Investigations in support of the Bay Delta Conservation Plan EIR/EIS. Consistent with the Commission's Procedure for Resolutions of Necessity, this is your second advance notice regarding these proceedings.

California Code of Civil Procedure, Section 1240.030, provides that the power of eminent domain may be exercised to acquire property for a proposed project if the following conditions are established:

- (1) The public interest and necessity require the proposed project;
- (2) The proposed project is planned and located in a manner that will be most compatible with the greatest public good and the least private injury;
- (3) This property is necessary for the project; and
- (4) An offer to acquire the property in compliance with Government Code Section 7267.2 has been made to the owner of record.

At its meeting on October 19, 2011, the Commission intends to decide whether the above conditions have been met concerning your property and, if so, whether to adopt a Resolution of Necessity ("Resolution"). A Resolution, if adopted, will constitute official authorization for DWR to acquire the property, or property interest therein, by exercise of the power of eminent domain.

A map and legal description of the property that is the subject of this Resolution are enclosed with this notice and marked "Exhibit A" and "Exhibit B," respectively.

The property rights to be acquired are:

Permanent Non-Exclusive Easement:	64 square feet
Temporary Construction Easement:	40,000 square feet
Temporary Access Easement:	19,200 square feet

You are invited to appear before the Commission to comment on the four findings necessary for the proposed Resolution of Necessity. In lieu of personally appearing before the Commission at its meeting on October 19, 2011, the Commission will consider any written comments you may wish to submit pursuant to this Notice. We request written comments be filed with the Executive Officer of the Water Commission in Sacramento at least 24 hours prior to the hearing.

Please send any written comments or requests to: Susan Sims, Interim Executive Officer, California Water Commission, P.O. Box 942836, Sacramento, CA 94236-0001 or by email to cwc@water.ca.gov.

The Commission must adopt a Resolution of Necessity before an eminent domain proceeding can be commenced. Should the Commission adopt the Resolution, it is anticipated that DWR would commence eminent domain proceedings in the Superior Court of Sacramento County. In any such eminent domain proceeding, the amount of just compensation would be determined at the time of trial.

If you have any questions regarding this matter, please call Allan Davis, Supervising Land Agent, Division of Engineering, DWR, at (916) 952-2779 or Rachel Ballanti, Policy Analyst, California Water Commission at (916) 653-8517.

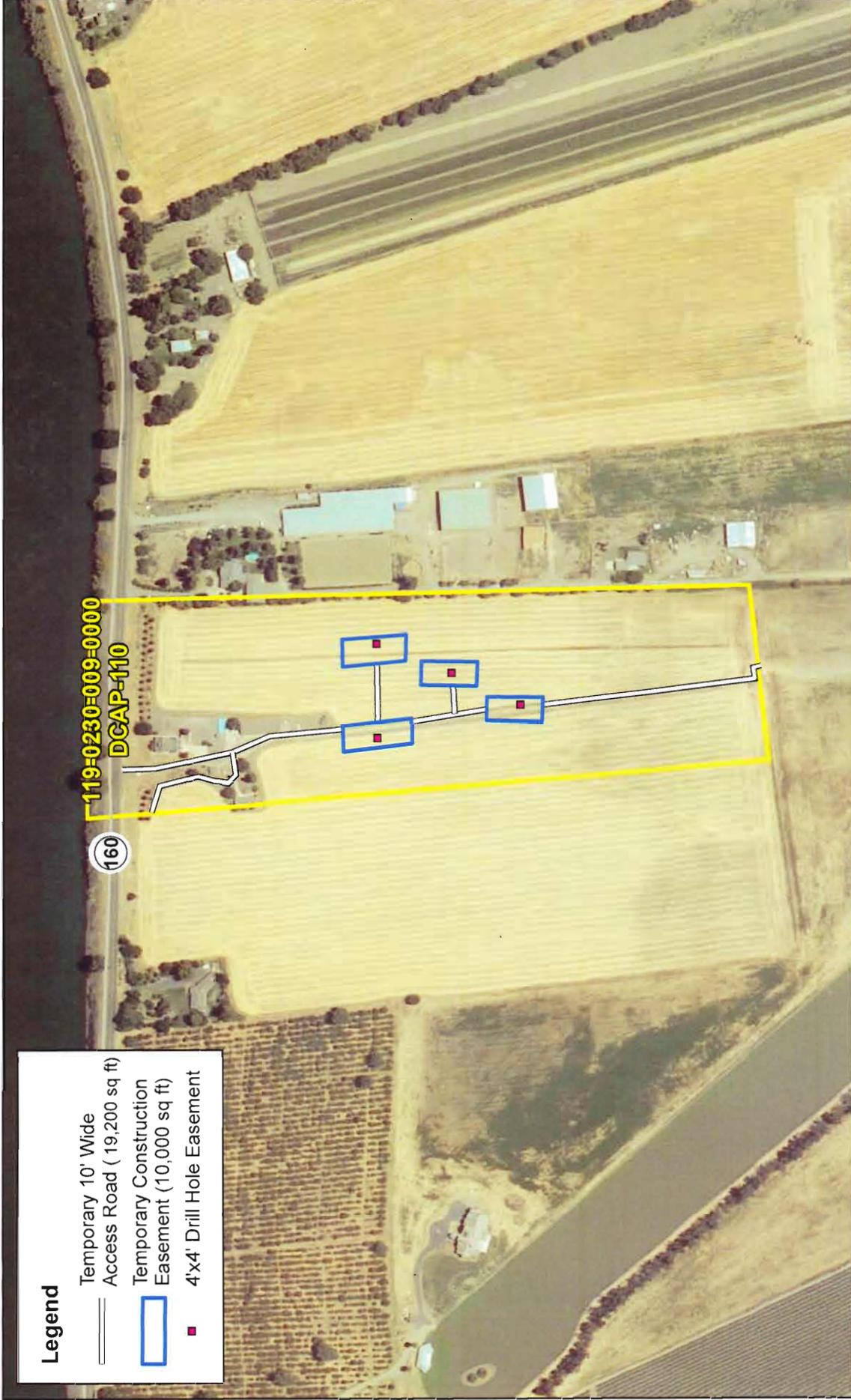
Sincerely,

A handwritten signature in blue ink, appearing to read 'Susan Sims', written over the word 'Sincerely,'.

Susan Sims
Interim Executive Officer

Enclosures

cc: Allan Davis, Supervising Land Agent
Department of Water Resources
Division of Engineering, Real Estate Branch
1416 Ninth Street, Room 425
Sacramento, California 95814



Sacramento County

DELTA HABITAT CONSERVATION AND CONVEYANCE PROGRAM EXHIBIT A

STATE OF CALIFORNIA
THE RESOURCES AGENCY
DEPARTMENT OF WATER RESOURCES
DIVISION OF ENGINEERING - GEODETIC BRANCH

N.T.S.

This exhibit does not represent a Survey and is for informational purposes only

Legend

-  Temporary 10' Wide Access Road (19,200 sq ft)
-  Temporary Construction Easement (10,000 sq ft)
-  4'x4' Drill Hole Easement

DCAP-110

UNIT A

A permanent non-exclusive easement for drilling purposes, over, upon, under and through the following described parcel of land, being all that portion described as Parcel B, as shown on Parcel Map entitled "Tract 10, 23 and a Portion of Tract 11 of Reclamation District 744, a Portion of Sections 26 and 27, Township 7 North, Range 4 East, Mount Diablo Base and Meridian", recorded May 12, 1977 in Book 32 of Parcel Maps, at Page 10, Sacramento County Records, and more particularly described as follows:

Four 4 foot by 4 foot locations as shown and delineated on attached Exhibit "A".

UNIT B

TOGETHER WITH temporary construction easements for the purpose of moving and/or maneuvering construction equipment and vehicles, the temporary storage of equipment, and materials necessary for drilling, together with the equipment used in the drilling of earthwork, the temporary storage of spoil or excavated material during the period of drilling and related construction work, and any other operations necessary and appurtenant to the drilling, over, through, and across the following described parcel of land shown on attached Exhibit "A".

UNIT C

TOGETHER WITH a 10 foot wide temporary access easement for the purpose of moving and/or maneuvering construction equipment and vehicles, during the period of drilling and related construction over and across an existing access and/or service road shown on attached Exhibit "A".

Temporary easements for access and construction shall terminate on October 31, 2013.

All works, structures and facilities remaining on said parcel of land after said termination date shall become the property of Owner and the State shall have no obligation to remove, operate, or maintain any works, structures, or facilities on said parcel of land.



Kristopher Klima
LS 8602

7/28/11



RECORDING REQUESTED BY

North Delta Water Agency

WHEN RECORDED MAIL TO:

NAME: Margaret Sorensen, North Delta Water Agency

MAILING

ADDRESS: 910 K Street, Suite 310

CITY, STATE

ZIP CODE Sacramento, CA 95814



Sacramento County Recorder

Craig A. Kramer, Clerk/Recorder

BOOK **20110425** PAGE **0692**

Monday, APR 25, 2011 1:08:34 PM
Ttl Pd \$0.00 Nbr-0006784189

TML/85/1-5

SPACE ABOVE THIS LINE RESERVED FOR RECORDER'S USE

Record fees:

Exempt under Gov't Code § 27383

Subcontract Agreement

Subcontract dated February 25, 2011 between **North Delta Water Agency** and **Peter and Karen Stone**.

SUBCONTRACT

This Subcontract is made and entered into this 25th day of Feb. 2011, by and between NORTH DELTA WATER AGENCY (herein called Agency) and Peter W. Stone and Karen L. Stone (herein called Water User).

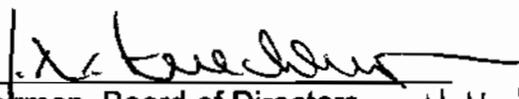
RECITAL

Article 18 of the Contract between the State of California Department of Water Resources (herein called the State) and Agency dated January 28, 1981, (herein called the Contract) provides that the Agency may enter into subcontracts with water users within the Agency boundaries in which the assurances and obligations provided in the Contract as to such water user are assigned to the area covered by the subcontract. It is the intention of this Subcontract to comply precisely with the terms of Article 18 of the Contract.

AGREEMENTS

1. It is hereby agreed by and between Agency and Water User that Water User shall have, by the Subcontract, the benefit of the assurances and obligations provided in the Contract assurances and obligations shall pertain to the real property owned by the Water User and located within the boundary of Agency, which property is described in Exhibit A attached hereto and made a part hereof.
2. Water diverted under the Contract by Water User for use within the Agency, shall not be used or otherwise disposed of outside the boundaries of the Agency by Water User, without the express consent of the state. All return flow water from water diverted within the Agency under this Subcontract, shall be returned to the Delta channels. Subject to the provisions of the Contract concerning the quality and quantity of water to be made available to Water User within the Agency, and to any reuse or recapture by Water User within the Agency, Water User relinquishes any right to such return flow, and as to any portion thereof which may be attributable to the State Water Project, Water User recognizes that the State has not abandoned such water.
3. Water User, in consideration of the execution of this Subcontract and the Contract, on behalf of itself, its successors and assign, in ownership of the property described in Exhibit A attached hereto, agrees (a) to accept the provisions for water quality set forth in the Contract as a limit of the Quality of water available from the Delta channels for use on the property, and (b) that the property described in Exhibit A attached has no greater right to the use of water from Delta channels than that from Delta channels than that set forth in the Contract.
4. It is agreed that in return for the assurances provided by the Subcontract, Water User shall be obligated for all assessments of Agency levied upon the lands described in Exhibit A, as imposed from time to time by Agency for the purpose of meeting the obligations of Agency to the State pursuant to Article 10 of the Contract, and as necessary in the determination of the Agency Board of Directors to provide for the cost of operation of the Agency as authorized under the North Delta Water Agency Act (Statutes of 1973, Chapter 283 as amended).
5. This Subcontract shall be subject to any amendment or termination of the Contract, which may be made by mutual agreement of the State and the Agency pursuant to Article 14 of the Contract, and to the North Delta Water Agency Act.
6. The benefits to, and obligations of, Water User shall benefit and bind the successors in interest of the Water User in and to the property described in Exhibit A attached hereto and shall be deemed a covenant running with the land.
7. It is not the intention of the parties to this Subcontract to imply that the assurances under the Contract are available to the lands described in Exhibit A only through the means of this Subcontract, but to make such assurances explicit.
8. This Subcontract has been approved in form by the State pursuant to paragraph 18 of the Contract. Following execution, it will be recorded by the Agency. The original recorded Subcontract will be returned to the Water User and a copy of the recorded Subcontract forwarded to the State Department of Water Resources for their records.

NORTH DELTA WATER AGENCY

BY 
Chairman, Board of Directors H. N. Kuechler

By 
Water User Peter W. Stone Karen L. Stone

EXHIBIT "A"

The land referred to herein is situated in the State of California, County of Sacramento, unincorporated area, and is described as follows:

Parcel B, as shown on Parcel Map entitled "Tract 10, 23 and a Portion of Tract 11 of Reclamation District 744, a Portion of Sections 26 and 27, Township 7 North, Range 4 East, Mount Diablo Base and Meridian", recorded May 12, 1977 in Book 32 of Parcel Maps, at page 10, Sacramento County Records.

APN: 119-0230-009

Exhibit "A" to subcontract dated February 25, 2011 between North Delta Water Agency and Peter W. Stone & Karen L. Stone

ALL-PURPOSE ACKNOWLEDGMENT

For Subcontract dated 02/25/2011

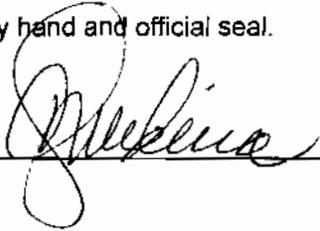
State of California

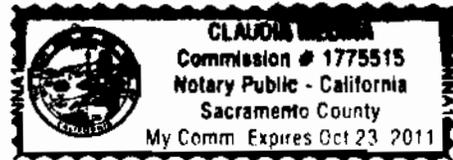
County of Sacramento

On 02/25/2011 before me, Claudia Medina, Notary Public (name, title of officer), personally appeared Karen L. Stone and Peter W. Stone, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) ~~is~~ are subscribed to the within instrument and acknowledged to me that ~~he~~ she ~~they~~ executed the same in ~~his~~ her ~~their~~ authorized capacity(ies), and that by ~~his~~ her ~~their~~ signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature 



(Seal)

ACKNOWLEDGEMENT

STATE OF CALIFORNIA)
)
COUNTY OF _____ San Mateo _____) ss:

On April 12, 2011, before me, H. Kay Hardtke, a Notary Public, personally appeared
H. N. Kuechler, III

who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the state of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

H. Kay Hardtke
Notary Public



NORTH DELTA WATER AGENCY

910 K Street, Suite 310, Sacramento, CA 95814 (916) 446-0197

LOCAL AGENCIES OF THE NORTH DELTA

1010 F Street, Suite 100, Sacramento, CA 95814 (916) 455-7300

November 4, 2011

Mr. John Laird, Secretary
Dr. Gerald Meral, Deputy Secretary
CA Natural Resources Agency
1416 Ninth Street, 13th Floor
Sacramento, CA 95814

Mr. David Hayes, Deputy Secretary
U.S. Department of the Interior
Michael Connor, Commissioner
U.S. Bureau of Reclamation
1849 C Street, N.W.
Washington, DC 20240

Dear Gentlemen:

We find it necessary at this point in the Bay Delta Conservation Plan (BDCP) process to convey to you significant unaddressed issues to date as well as grave concerns regarding problems with the substance of the BDCP, its process, and its treatment of local Delta interests.

The North Delta Water Agency (NDWA) is a state water contractor with DWR pursuant to a 1981 Contract for the availability of suitable quantity and quality of water to all North Delta water users as well as DWR's responsibility for avoiding and mitigating detrimental impacts such as erosion and seepage damage, altered surface water elevations, and reverse flows associated with Delta water conveyance.

Local Agencies of the North Delta (LAND) is a coalition comprised of eleven reclamation and water districts in the northern geographic area of the Delta.¹ LAND participant agencies have concerns about how the BDCP may eventually impact provision of water, and/or, drainage and flood control services to landowners within their respective districts. Six LAND member agencies have sought and received cooperating agency status under NEPA with the Bureau of Reclamation.

The September 30, 2011 letter by four environmental organizations raises many serious flaws and inadequacies of the BDCP documents and process which we agree need to be addressed in order to meet State and Federal laws governing HCPs and NCCPs. In addition to failing to improve the health of the estuary, we would add that the BDCP is headed toward the destruction of Delta as a Place, the Delta's vibrant economy, and the Delta's 150-year history of agriculture as the primary land use. Such a result is unacceptable.

¹/ LAND member agencies include: Reclamation Districts 3, 150, 307, 551, 554, 755, 813, 999, and 1002. Some of these agencies provide both water delivery and drainage services, while others only provide drainage services. These districts also assist in the maintenance of the levees that provide flood protection to homes and farms.

November 4, 2011

Page 2

The NDWA and LAND members have invested considerable time into participation in the BDCP process over the past four years. NDWA, moreover, was the ONLY Delta stakeholder on the BDCP Steering Committee prior to when it was dissolved by the new Governor Brown administration. Despite our attempts at active participation in this process, we continue to be disappointed by the BDCP's so-called inclusive process and the systemic, foundational, and persistent problems with the work product of the BDCP to date.

We particularly object to the following recent events associated with the BDCP:

Continued Exclusion of Delta Stakeholders from Key Meetings and Decisions

We are concerned that the BDCP process has deteriorated over the last few months and despite promises to be different than in the past, the BDCP continues to exclude and disenfranchise in-Delta stakeholders and disregards input provided by Delta stakeholders. As long as important discussions and decisions continue to be made behind closed doors, then the so-called public process and numerous public workshops being held are nothing more than a sham. Moreover, we still have no indication than any of our comments *over the last four years* have been considered as there is still no process for disposition of comments from stakeholders.

Washington D.C. Briefings

On October 3-4, 2011 a contingent of BDCP proponents and water contractors, apparently led by Natural Resources Deputy Secretary Jerry Meral, held private meetings with numerous members of Congress to provide an updated status of the BDCP development. Unfortunately, once again, and despite our previous requests to attend Congressional briefings, no local Delta stakeholders were invited to participate in these briefings. The lack of Delta stakeholder representation in these meetings is contrary to the commitment by Secretary Laird and Deputy Secretary Meral for the so-called "new process" to be open and inclusive. We hereby reiterate our request to be invited to attend any future Congressional or State Legislative briefings on the status of the BDCP.

MOA for Development of BDCP

In late August 2011 both DWR and the Bureau of Reclamation signed the First Amendment to the Memorandum of Agreement Regarding Collaboration on the Planning, Preliminary Design and Environmental Compliance for the Delta Habitat Conservation and Conveyance Program in Connection with the Development of the Bay Delta Conservation Plan (MOA). We raised concerns in the BDCP Governance Workgroup and Management Committee meetings regarding the need for public review of the MOA prior to execution by the agencies. Concerns were also raised regarding the "Public Water Agencies" (Water Contractors) becoming "permittees" of BDCP in a closed door process. The Fall 2011 memorandum written by Environmental Defense Fund, Defenders of Wildlife, and the Natural Resources Defense Council provided an analysis of why permittee status for Water Contractors is inappropriate.

Dr. Meral specifically assured us these decisions would be made with stakeholder input in an open process. Nonetheless, the MOA was executed without public review or input, as was the decision of the State and Federal governments to "support" permittee status for the Water Contractors (Section II, H). Despite our requests, the MOA language was never circulated to

stakeholders until the already signed MOA was posted on the BDCP website, *after the fact*. This is neither open nor inclusive and ultimately was done over the objections of Delta stakeholders and others.

The MOA also provides the state and federal water contractors unprecedented control of the BDCP, even more so than previously. Section II-K of the MOA explicitly grants the state and federal water contractors the right to not only see *all draft consultant work product* before the general public has access to it, but presumably the right to suggest or demand alterations to the work product before it is released to the public. This same section *also requires* that state and federal water contractors be included in addressing all *comments received* during the BDCP-DHCCP Planning Phase, including comments received during development of the BDCP and EIR/EIS. Our questions are: who is in charge of the process? How can the state and federal government agencies remain fair and impartial arbiters in a process corrupted by the control of only one stakeholder group whose interests are neither neutral nor impartial? How can in-Delta stakeholders trust their comments and concerns will be appropriately addressed in the BDCP or the EIR/EIS phases if water contractors are dictating the responses to comments received?

We understand that comments are now being requested on the MOA, now that it has already been approved by the State and Federal governments, as well as many of the Water Contractors. We will provide separate comments on the MOA, but it is clear that the recent decision to circulate an already approved MOA is too little and too late in terms of including the public in the decision-making process regarding the critical issues addressed in the MOA.

We also strenuously object to the state and federal water contractors continuing to be included in the lead agencies' monthly meetings to discuss BDCP-DHCCP Planning Phase Management unless these meetings are open to the public. The NDWA 1981 Contract with DWR makes it clear that DWR bears the responsibility of maintaining adequate water supply of a certain quality for all North Delta water users, as well as obligates DWR to avoid and mitigate detrimental impacts of erosion and seepage, altered water elevations, and creation of reverse flows associated with the SWP Delta water conveyance facilities. Therefore, NDWA and other local water agencies clearly have an interest in also participating in these monthly BDCP-DHCCP Planning Phase Management meetings where the design of the projects, the project's impacts, and the proposed mitigation of in-Delta impacts will be discussed and decided. These meetings appear to be far more important and relevant to in-Delta water agencies than the work groups have been so far.

In addition, almost all Conservation Measures in the BDCP propose altering, breaching, and modifying project levees and bypasses that are part of the State Plan of Flood Control. This could have significant public safety implications if flood protections are reduced as a result of the BDCP activities. The Delta Reclamation Districts that have flood management responsibilities should also be included in important Planning Phase meetings to assure flood protection for the Delta and Sacramento region is not detrimentally affected.

PR Propaganda Apparently Approved by Resources Agency to Justify Elimination of Delta Agricultural Economy

At the September 27, 2011 BDCP Public Meeting a summary of the findings of a so-called study on BDCP job creation was presented. The presentation was both insulting and offensive, and apparently given so that it could subsequently be used in public relation promotions touting job creation. To call this a 'study' or a 'report' is ridiculous. This is nothing more than a propaganda piece in support of a currently flawed Plan and is offensive to Delta stakeholders because it FAILS to discuss: (1) the number of JOB LOSSES in the Delta, the region, or the state pursuant to the BDCP actions; or (2) the greater potential for job creation from water/energy efficiency projects as compared to the jobs created by construction of a new BDCP tunnel.

This report was prepared at the request of the DHCCP and was presumably approved for presentation at the September 27, 2011 by the Natural Resources Agency. The report indicates that the Metropolitan Water District commissioned this "independent" research on DHCCP's behalf. Thus, we must question the impartiality of the State and Federal agencies in supporting such a lop-sided and insulting document. Why would the State and Federal agencies present such a skewed and incomplete piece at a BDCP public meeting?

Upon questioning, it was disclosed that a follow up study of the statewide economic impacts of the BDCP was underway. While a statewide perspective may be interesting, as local agencies in the BDCP project area, we are concerned about the negative economic and other impacts that will occur in the Delta from jobs lost as a result of the construction and operation of major new diversions/conveyance and conversion of mostly agricultural lands into 100,000+ acres of habitat. As explained at the public meeting, we request to participate in the development of the assumptions and inputs for the statewide study. We also request that information regarding local economic impacts be developed by BDCP for purposes of full disclosure and also as part of the socioeconomic effects analysis required for by the National Environmental Policy Act. The BDCP has as much potential to be an unemployment public works project as it does an employment boost, yet this was not presented on September 27, 2011. The exchange of sustainable long-term employment in agriculture and related activities with short-term construction jobs is not beneficial from our standpoint.

Substance of BDCP Still Lacking

While beyond the scope of this letter, we continue to have concerns about the substance of the BDCP, including:

- The HCP/NCCP standards regarding use of best available peer-reviewed science has been consistently ignored, which is of grave concern for a project of this magnitude.
- The alternatives under consideration for the effects analysis and for purposes of environmental review have been irrationally constrained. Specifically, all of the "dual conveyance" alternatives must include screening of the South Delta pumping facilities at flows of 3000 cfs, which would reduce take of covered species and allow higher pumping volumes in furtherance of a reliable water supply for export. Additionally, none of the project alternatives include the phasing of conveyance as requested by the fish agencies,

which would provide an opportunity to gather data and make modifications as necessary before commitment of resources to a 15,000 cfs facility.

- While the need for massive new diversions in the North Delta (and their designation as “conservation measures”) is premised on the need to reduce entrainment in the South Delta pumps, Appendix B to the Effects Analysis claims that entrainment in the South Delta is not a significant problem in the Delta for the species of concern. Moreover, even with screens in the new diversions, entrainment/entrapment will occur wherever water is diverted in large volumes.
- No pathway toward take coverage for other landowners and entities in the Plan area is provided, despite the fact that if successful, the project could directly increase the probability of take of protected species.
- BDCP includes no commitment to levee improvements even though it would continue to rely on pumping from the South Delta, which in turn requires that key levees be maintained to prevent saltwater intrusion.

Unlawful Use of Eminent Domain Laws to Further BDCP Goals and Timeline

The eminent domain process for just the *investigatory activities* of the BDCP is already causing difficulties. There are numerous stories of frustration from Delta landowners regarding their dealings with DWR on the Temporary Entry Permits for environmental surveys and subsequent actions by DWR to pursue eminent domain to conduct geotechnical drilling on private properties to support the preparation of the BDCP EIR/EIS. Despite alternative public lands nearby the privately-owned proposed drill sites, DWR does not appear to have actually investigated or pursued using those public lands as alternatives to disrupting and permanently altering people’s private property.

DWR’s geotechnical drilling is in some cases exposing landowners to toxic clean-up liability. Soil test results are reported to the Department of Toxic Substance Control if any toxic chemicals are detected. Landowners cannot afford for the geotechnical drilling to cause their properties to become State Toxic Clean-up Sites. DWR has refused to assume liability if the drilling and subsequent reporting results in a toxic clean-up liability; as a result, many landowners cannot agree to a Temporary Entry Permit.

The recent court decision clarified that geotechnical drilling is a “taking” of private property due to the permanent alteration of the property, so now DWR is pursuing the condemnation (eminent domain) of property in order to conduct this drilling. According to California law (Water Code section 11580), however, eminent domain can only be pursued by DWR once a public project has been authorized and funded. BDCP has not even released a draft EIR/EIS indicating various project alternatives and associated location of facilities, let alone a final EIR/EIS and Record of Decision. The MOA recently signed by DWR and the Bureau of Reclamation mentioned above makes it very clear that DWR may not commence with preparing “Public review draft of the BDCP and EIS/EIR” or the “Final BDCP and EIS/EIR,” until and unless “the Public Water Agencies provide the Director of DWR with written authorization to proceed” (Section III-G-b, pp. 10-11).

Therefore, the State is proposing to condemn through eminent domain private property for a project that may not be completed if written authorization and funding is not forthcoming from the Public Water Agencies. Why should Delta landowners have their private property taken

through eminent domain when the EIS/EIR has not yet been completed and approved pursuant to Section III-G-b of the MOA? Moreover, Deputy Secretary Jerry Meral disclosed at the October 19, 2011, Legislative Oversight hearing, that more geotechnical information is not needed to complete the public draft EIS/EIR.

The California statute requiring approval of the project prior to exercise of eminent domain (BDCP) is in place in order to avoid this very circumstance of a public agency “taking” private property for a project that is ultimately never built. If DWR needs to obtain more engineering information via geo-technical drilling then it should either: (1) rely on existing information from drilling already conducted; (2) pursue drilling on public lands; or (3) put additional effort into pursuing cooperative negotiations with property owners with more favorable terms and financial compensation in order to secure voluntary agreement from the landowner.

Lack of Respect Toward Delta Landowners is Escalating Mistrust and Resentment

Unfortunately, there are the numerous examples of in-Delta stakeholders being excluded from important BDCP discussions and decisions, but they are also being treated in an unprofessional and disrespectful manner in conducting geotechnical and other investigations for preparation of the BDCP EIR/EIS. In early October, two separate households were visited at night by employees of a company hired by the State of California to serve them with papers relating to permitting entry and investigation rights on their property for the Department of Water Resources. Arriving at people’s home in the dead of night during a rain storm is neither professional nor respectful. The residents of the Delta deserve and demand better treatment from the government agencies sponsoring the BDCP.

Changes Needed for BDCP Success

We regret the use of such a critical tone in this letter, but we do not know how else to convey the ongoing and mounting level of concern we have regarding the inadequacy of the BDCP process, the continued commitment by the State and Federal agencies to unrealistic timelines, the pervasive exclusion of local Delta stakeholders as impacted parties, and the dismissive and unprofessional treatment of Delta landowners and their concerns. In our opinion, the BDCP process has deteriorated to the point that it is unworkable, and that continued participation in the “public process” may be a waste of our limited resources.

For the numerous grievances outlined in this letter, we must adamantly OPPOSE the BDCP product and process in its current form and encourage the State and Federal agencies to immediately engage in discussions with local stakeholders of assurances and protections that need to be incorporated into this Plan before the release of the public draft of the EIS/EIR in May 2012. This decision did not come lightly, but our extensive time and energy on the process appears to have resulted in little benefit despite stated commitments by State and Federal agencies for the public process to improve. Actions we request immediate attention by the State and Federal Co-Lead Agencies:

- Written disposition of all comments on the BDCP by Delta stakeholders.
- Review of task orders, draft documents and all documents made available to the state and federal water contractors.
- Convening of regular (at least monthly) Cooperating Agency meetings with all cooperating agencies.

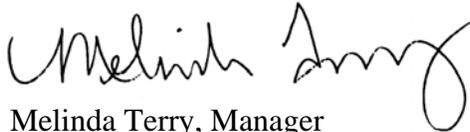
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- Access to all meetings where decisions are made.
- Rescind signatures of and provide an open and transparent process for public input and comment to the first Amendment to the MOA, which puts entirely too much decision-making authority in the water exporters despite the fact that BDCP is a public project with significant local impacts.

We look forward to your response on how and when the State and Federal governments plan to respond to the issues and concerns raised by the North Delta Water Agency, LAND and all Delta stakeholders that the BDCP affects.

Sincerely,



Melinda Terry, Manager
North Delta Water Agency



Osha R. Meserve, Representative
Local Agencies of the North Delta

cc:

Nancy Sutley, Chair, White House Council on Environmental Quality
U.S. Senator Barbara Boxer
U.S. Senator Dianne Feinstein
Representative Dennis Cardoza
Representative Jim Costa
Representative Jeff Denham
Representative John Garamendi
Representative Dan Lungren
Representative Doris Matsui
Representative Kevin McCarthy
Representative Tom McClintock
Representative Jerry McNerney
Representative George Miller
Representative Grace Napolitano
Representative Devin Nunes
Representative Jackie Speier
Representative Mike Thompson
Senator Mark DeSaulnier
Senator Darrell Steinberg
Senator Lois Wolk

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Assemblymember Bill Berryhill
Assemblymember Bob Blumenfield
Assemblymember Joan Buchanan
Assemblymember Nora Campos
Assemblymember Paul Fong
Assemblymember Cathleen Galgiani
Assemblymember Mike Gatto
Assemblymember Linda Halderman
Assemblymember Roger Hernandez
Assemblymember Alyson Huber
Assemblymember Ben Huego
Assemblymember Jared Huffman
Assemblymember Brian W. Jones
Assemblymember Ricardo Lara
Assemblymember Kristin Olsen
Assemblymember Mariko Yamada
Supervisor Mike McGowan, Yolo County
Supervisor Don Nottoli, Sacramento County
Supervisor Mary Nejedly Piepho, Contra Costa County
Supervisor Jim Provenza, Yolo County
Supervisor Mike Reagan, Solano County
Supervisor Larry Ruhstaller, San Joaquin County
Supervisor Ken Vogel, San Joaquin County
Mark Cowin, Director of Department of Water Resources
Senate Committee on Energy and Natural Resources
Subcommittee on Water and Power
House Committee on Natural Resources
Subcommittee on Water Resources and the Environment
House Committee on Transportation and Infrastructure
Phil Isenberg, Delta Stewardship Council
Michael Machado, Delta Protection Commission
Barbara Barrigan-Parrilla, Restore the Delta
Greg Gartrell, Contra Costa Water District
Phil Harrington, City of Antioch
John Herrick, South Delta Water Agency
Dante Nomellini, Central Delta Water Agency
Mark Pruner, North Delta CARES
Gary Bobker, The Bay Institute
Kimberley Delfino, Defenders of Wildlife
Zeke Grader, Pacific Coast Federation of Fishermen's Associations
Cynthia Kohler, Environmental Defense Fund
Jonas Minton, Planning and Conservation League
Barry Nelson, National Resources Defense Fund



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October 18, 2011

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California Water Commission
1416 Ninth Street
P.O. Box 942836
Sacramento, CA 94236-0001

Re: California Water Commission Meeting October 19, 2011, Agenda Items 11-35—Resolutions of Necessity.

Dear Chairperson Saracino and Commission Members:

The Central Delta Water Agency (“CDWA”) is hereby memorializing some of the concerns it raised orally at your September 21, 2011 meeting on this topic and which it plans to raise at the October 19, 2011 meeting should it be afforded the opportunity to do so.

An outline of these concerns is as follows:

- Resolutions of Necessity at this Time are Premature.
 - At this Time No One Knows Where DWR Will Ultimately Perform its Geotechnical Activities, Not Even DWR.
 - Further CEQA Analysis is Required.
 - It Still Remains a Mystery as to Precisely What Activities DWR Wants Permission to Perform.
 - DWR Has Failed to Demonstrate that the “Project” is Authorized and Funded.
 - DWR’s Activities Constitute Unreasonable Search and Seizures that Require At Least Administrative Search Warrants Which DWR has Not Yet Obtained.
- Some Specific Requested Modifications to the Draft Resolution of Necessity.
 - The Duration of the Temporary or Permanent Easements Needs to be Adjusted to Sync with the Mitigated Negative Declaration.
 - The Description of Activities in the Proposed Easement Needs to be Considerably More Specific.

- If Permanent Easements are Somehow Allowed, the Nature of Those Easements Needs to be Fully Described.
- DWR Should Be Required to Hold the Landowners Harmless From Any Hazardous Wastes Discoveries.
- DWR Should be Required to Test Drinking Water Wells Before and After its Activities at the Request of the Landowner.

1. **Resolutions of Necessity at this Time are Premature.**

There are numerous reasons why it would be premature, and fundamentally unfair, not to mention unconstitutional, for the Water Commission to issue any Resolutions of Necessity at its October 19, 2011 meeting. Some of those reasons are discussed below.

a. **At this Time No One Knows Where DWR Will Ultimately Perform its Geotechnical Activities, Not Even DWR.**

One of the central findings the Water Commission must make to issue a Resolution of Necessity is the determination that “[t]he property described in the resolution is necessary for the proposed project.” (Code Civ. Proc., § 1245.230, subd. (c)(3).) At this time, the Water Commission cannot make that determination. The reason is simple: no one knows whether the property is necessary for the proposed project, not even DWR.

The eminent domain procedures contemplate the need to conduct so-called “precondemnation” surveys wherein property can be evaluated in order to determine what part of the property, if any, is “necessary” and must be condemned.¹

DWR’s submittals for the October 19, 2011, in particular it’s “Geotechnical Clearance Process and Protocols” and “Environmental Clearance Protocols,” make it crystal clear that DWR *still needs to conduct various “precondemnation” surveys* before it can determine where any particular CPT or drill hole can and must occur.

For example, as DWR explains in section “4” of its “Geotechnical Clearance Process and Protocols,” the CPT and drill hole sites set forth in the proposed Resolutions of Necessity are merely tentative sites that can and will be moved as necessary:

“A survey checklist and consultation with landowner will be used to verify access to the drilling location and safety issues such as utilities, underground and

¹ See Code of Civil Procedure section 1245.010 which provides: “Subject to requirements of this article, any person authorized to acquire property for a particular use by eminent domain may enter upon property to make photographs, studies, surveys, examinations, tests, soundings, borings, samplings, or appraisals or to engage in similar activities reasonably related to acquisition or use of the property for that use.”

overhead, access conditions, cultural locations, potential problems, and about the daily traffic (farm equipment, public access, easement access etc.). *Modifications to the exploration location may be required based on the survey. The new location will require the same survey. If a suitable site cannot be found, drilling cannot occur at this site.*

If there are environmental or cultural issues with the location of the potential boring, then modifications to the location are made in the field during the survey. Once all survey staff (and landowner where required) has agreed upon a location (this is also based on the geotechnical site survey), then the survey for the boring location is completed. The exploration area must be marked for USA clearances. An alternative drill location near the primary location will be planned in case USA determines that there are utilities close to the primary exploration location. The alternative location should be within the area marked for USA clearances.”

DWR is jumping the gun by seeking Resolutions of Necessity for sites that it undisputedly has not yet determined are feasible much less necessary. Before DWR burdens the Water Commission and landowners with Resolutions of Necessity and threats of condemnation it must first conduct the various surveys necessary to determine whether the CPT and drill holes can and will be conducted.

At the present time, no one, not even DWR can assert in good faith that any of the particular CPT and drill hole sites in the Resolutions of Necessity are “necessary for the proposed project.” The reality is that, after the appropriate surveys are performed, the sites in those resolutions may very well be entirely unnecessary. Indeed, DWR has already changed the locations of several of them after further discussions with various landowners.

If DWR cannot obtain voluntary permission from the landowners to perform the various surveys it needs to perform in order to verify that any particular site is feasible and ultimately necessary, then as noted above, the Code of Civil Procedure provides the precise mechanism for DWR to obtain a court order to authorize such (“precondemnation”) surveys.²

b. Further CEQA Analysis is Required.

It is undisputed that the Water Commission is a “responsible agency” for CEQA purposes. As CEQA Guidelines section 15096, subdivision (a), explains:

² That is in fact exactly what DWR is doing for other parcels, but strangely not for the instant parcels. (See excerpt from DWR’s “Petition for Order Permitting Entry and Investigation of Real Property . . . ,” filed in Sacramento Superior Court on July 29, 2011, attached hereto as Exhibit “A.”)

“A responsible agency complies with CEQA by considering the EIR or negative declaration prepared by the lead agency *and by reaching its own conclusions on whether and how to approve the project involved.*”

(Emphasis added.)

One of the major conclusions the Water Commission must make is whether any subsequent or supplemental CEQA analysis is required prior to its approval of the project. In this case, it is clear that such analysis is indeed required.

When DWR prepared its Mitigation Negative Declaration for the Geotechnical Activities, the closest it came to the proposed CPT and drill hole sites was many *miles* away. The best DWR claimed it could do was place some tiny dots on a very zoomed-out aerial map. (A copy of that map is attached hereto as Exhibit “B.”)

In response to the CDWA’s comment on that Mitigated Negative Declaration “that the level of detail regarding the proposed exploration sites is unacceptable,” DWR responded as follows:

“At this time, alternatives and actions are still being considered by the parties developing the BDCP *and it is unnecessary and speculative for DWR to include additional details as to the nature and location of any proposed intake structure and tunnels* for alternative options of any water conveyance facilities associated with the BDCP. DWR has not defined specific locations because (1) DWR does not have access to Temporary Entrance Permits (TEPs) for all properties within the project, and (2) locations are estimated to allow DWR to move those locations that have potential to have significant impacts on the environment. DWR has included a map in its Initial Study (Figure 1) of the proposed exploration area and has further outlined the over-water locations under ‘Project Activities.’”

While precise locations were deemed “unnecessary and speculative” at the time of the Mitigated Negative Declaration, i.e., last September (2010), DWR now has those locations defined with a high degree of precision. Accordingly, the Water Commission, “in reaching its own conclusions on whether and how to approve the project involved” cannot rely on that information being unnecessary or speculative, since, at this stage, the precise locations are necessary for the Resolution of Necessity findings and also readily available.

At a minimum, the precise locations for the geotechnical activities constitute “new information of substantial importance” within the meaning of CEQA Guidelines section 15162, subdivision (a)(3), thereby requiring subsequent or supplemental CEQA analysis. Section 15162, subdivision (a)(3), provides:

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“New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:

(A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;

(B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;

(C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or

(D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.”

Essentially all of the foregoing subsections are applicable to the availability of new information that pinpoints the proposed locations of the geotechnical activity sites. Now, for the first time, the entire range of potential environmental impacts from those locations can be meaningfully and accurately assessed and specific mitigation measures to address such impacts, which would be deemed speculative and, hence, infeasible, when no specific location was provided, are now potentially feasible.

Moreover, the Mitigated Negative Declaration identified the following and potentially significant impacts that required mitigation measures to bring them to a level of insignificance:

“[The project would h]ave a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by the CDFG, FWS, or NMFS[.]” (MND, p. 32.)

“[The project would i]nterfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites [.]” (MND, p. 32.)

“[T]he project ha[s] the potential to degrade the quality of the environment, substantially reduce the habitat of a fish or wildlife species, cause a

fish or wildlife population to drop below self-sustaining levels, threaten to eliminate a plant or animal community, reduce the number or restrict the range of a rare or endangered plant or animal or eliminate important examples of the major periods of California history or prehistory []." (MND, p. 102.)

When the Water Commission considers the Mitigated Negative Declaration and "reach[es] its own conclusions on whether and how to approve the project involved," it must comply with its paramount CEQA duty in Public Resources Code section 21002.1, subdivision (b), which provides:

"Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so."

Since it is now feasible to meaningfully examine the potential environmental impacts associated with the pinpointed geotechnical site locations and access roads, etc., the Water Commission must perform that analysis to enable it to meaningfully mitigate or avoid any such impacts "whenever it is feasible to do so." DWR's prior defense that site-specific mitigation measures are "unnecessary" and "too speculative" to develop has no place in the instant setting.

For these reasons, the Water Commission must refrain from approving any Resolutions of Necessity until it has duly performed the foregoing subsequent or supplemental site-specific analysis.

c. It Still Remains a Mystery as to Precisely What Activities DWR Wants Permission to Perform.

While DWR has provided additional information in terms of its various protocols for its preconstruction and geotechnical activities, that information is entirely too general. DWR assured participants as well as the Judge in the "Temporary Entry Proceedings" that it had protocols which spelled out in detail exactly what would occur on the properties, including matters such as the following:

- precisely what DWR would be testing the extracted soils for that it sends to the laboratories;
- what steps DWR would take to secure the drill holes from potential artesian conditions when it leaves the drill holes open and unsealed overnight and over the weekends;
- precisely how DWR will so-called "seal" the drills holes when it is finished;
- the manner in which DWR will initiate the first 15 feet or so of a boring via a hand auger to avoid damaging underground utilities, etc.

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DWR agreed at the September 17, 2011 Water Commission meeting that there indeed “should not be any mystery” as far as what DWR will be doing on the landowners’ property. Unfortunately, based on DWR’s submission of information thus far, there is still considerable mystery and uncertainty.

The same is true with the environmental protocols. In DWR’s so-called “Environmental Clearance Protocols” DWR simply makes very general statements such as the following:

“An Environmental Scientist will conduct environmental field surveys at the geotechnical exploration locations as well as ingress and egress from those locations.” (p. 1)

“Each geotechnical location exploration location will be subject to intensive field survey before geotechnical activities begin in order to avoid any potential archaeological or cultural resources.” (p. 2.)

The important question which continues to be a complete mystery is, “What do those ‘environmental’ and ‘intensive’ archaeological and cultural ‘field surveys’ entail?”

While this lack of detail is unacceptable on many fronts, including fundamental fairness, it is also legally inadequate in the instant context where the Water Commission must make the following findings to support the issuance of Resolution of Necessity:

“(1) The public interest and necessity require the proposed project.

(2) The proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

(3) The property described in the resolution is necessary for the proposed project.” (Code Civ. Proc., § 1245.230, subd. (c).)

All of those findings require a clear understanding of precisely what DWR allegedly needs the easements to perform. Unfortunately, such a understanding remains entirely lacking at this stage.

Accordingly, the Water Commission should require DWR to provide as much detail as possible on precisely what it allegedly needs to perform including in particular all of the available protocols it will be following including the precise protocols it will be following for each of the specific environmental, archaeological, cultural and any other surveys (e.g., exactly what will those surveys entail, how many people, what types of equipment and or vehicles, where will the people be traveling or walking, will they be able to perform them without leaving the four corners of condemned easements, will they be taking soil or vegetation or species samples, etc.?).

As a final example of the unfair lack of disclosure of what DWR will be doing on the property if it obtains Resolutions of Necessity is DWR's reference to a "Phase 1 site assessment" which DWR contends will be performed on the properties. On page 2 of its "Environmental Clearance Protocols" DWR states:

"Phase 1 site assessment, which may include a records search and aerial mapping review, will be conducted to identify pre-existing site conditions on the property. This may include a property search through Assessor Parcel Maps, discussions with the Agricultural Commissioner and property owners, and a survey of the property from close proximity to the property from public roads."

While DWR states that that assessment "may include," it is not at all clear what else "may be included." For example, in DWR's Temporary Entry Permits, DWR elaborates in more detail what such an assessment "may *also*" include. The following is how DWR describes such an assessment in those permits:

"The purpose of the Phase 1 Environmental Site Assessment is to evaluate the study area for potential environmental hazards or degradation caused by the release of hazardous materials. The study area can consist of all parcels and adjacent properties within and outside the study area, including access roads and staging areas. This investigation will include the review of historic land use and land title records, federal and state regulatory agency environmental databases, consultation with local environmental health officials, and communication with the current land owners or operators.

Phase 1 Environmental Site Assessment will include entering the Property to perform site reconnaissance in accordance with the American Society of Testing Materials (ASTM), Standard Practice for Environmental Site Assessment; Phase 1 Environmental Site Assessment Process Designation 1527-05 and newly adopted federal regulations pursuant to 40 Code of Federal Regulation, Part 312 – Standards and Practices for all Appropriate Inquires. Site assessment will include the use of a 3/4 ton pickup or a kayak or canoe where appropriate, and will include walking the Property, making visual observations, and documenting visual observations and recording locations of "recognized environmental conditions" using GPS, digital photography, and tape measures. Should it be determined that the collection of samples are necessary, a hand-auger, three (3) inches in diameter will be used to auger to a maximum soil depth of fifteen (15) feet. A shovel will be used for surface work and replacement of soil extracted from the collection of samples. Any disturbance of property soils will be minor and will be returned to pre-survey conditions to the best extent possible. Whenever possible, a predetermined sampling location will be identified prior to taking samples.

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Site visits will occur only during daylight hours, most likely between the hours of 8:00 a.m. to 7:00 p.m. and will require from one (1) to three (3) staff persons on site. Visits may last up to a day and a half in duration. If the Property is large in size, multiple visits may be required, but no more than five (5) site visits will be required for Phase 1 Environmental Site Assessment activities.”

(TEP, pp. 5-6.)

Needless to say that is quite a mouthful. Again, it absolutely should not be, but very much is, a mystery as to what exactly DWR is seeking permission from the Water Commission to perform. And that lack of clarity is as unfair as it is unlawful and unconstitutional.

d. DWR Has Failed to Demonstrate that the “Project” is Authorized and Funded.

When DWR is unable to purchase property through voluntary agreement with the landowner, Water Code section 11580 allows DWR to exercise the power of eminent domain only “if the project for which the property is being acquired has been authorized and funds are available therefor.” That same requirement is also set forth in the nearly identical provision of Water Code section 250 which provides: “The department shall not commence any such proceeding in eminent domain unless the project for which the property is being acquired has been authorized and funds are available therefor.”

DWR seemingly contends that the “project” which must be authorized and funded is the Geotechnical Study itself. However, DWR has not cited to anything in the Water Code nor elsewhere in the legislative history of section 11580 or 250, or otherwise, that would in any manner suggest that the “project” the Legislature was referring to was a “study” to decide whether to develop a “project.”

For example, section 11580 is located in Division 6, Part 3 of the Water Code entitled, the “Central Valley Project Act.” For the purposes of that part, the term “project” means “Central Valley Project.” (Wat. Code, § 11104.) Accordingly, when the Legislature requires that a “project” be authorized and funded before the commencement of eminent domain proceedings it appears, at a minimum, reasonable to infer that what the Legislature was contemplating was the need to condemn property for some type of physical facility or other feature that could be deemed a part of the Central Valley Project. To equate “project” with a “study to decide whether to build a project” is a stretch that has no basis nor support in the law.

Eminent Domain is a draconian power that the Legislature went out of its way with respect to DWR to constrain. Since the construction of the various intakes, forebays, canals, tunnels, etc. which DWR is conducting the instant studies to perform have clearly not been authorized by the Legislature nor funded, DWR’s attempt to utilize condemnation in connection with those studies is contrary to law. DWR has already conducted numerous borings by way of

voluntary permission of various landowners. DWR should have more than enough information at this point to meaningfully evaluate the feasibility of such facilities.

In the event the word “project” in sections 11580 and 250 could somehow be deemed to include non-physical facilities or components of the Central Valley Project, the question remains what is the “project” at issue herein? DWR’s attempt to define the “geotechnical” portion of the development of the Bay Delta Conservation Plan (BDCP) as the “project” further misses the mark because doing so involves yet another unwarranted departure from what the Legislature could be fairly deemed to have meant by its use of the word “project.” If we can legally go down this road, then, at a minimum, the “project” must not be anything less than the *entire* development of the BDCP. To split up that development into the geotechnical portion, the non-geotechnical portion, the public outreach portion, the habitat development portion, etc., is simply unreasonable.

Therefore, even if the “project” could be narrowly defined as “the development of the BDCP,” thus far, DWR has come nowhere close to meaningfully demonstrating that such development has been duly authorized by the Legislature and is fully funded. With respect to the funding requirement, DWR’s provision of numerous funding agreements in support of the Water Commission’s October 19, 2011 hearing simply makes one scratch one’s head. A quick review of those agreements reveals that most if not all of them seemingly expire in 2011. For example, one of the agreements provides:

“This Agreement will . . . remain in effect until the DHCCP Planning Phase is completed *or until December 31, 2011, whichever comes first*, unless extended by written amendment.”

(See the 2009 Agreement with Alameda County Water District, p. 5, emphasis added.) Has that, and all other similar agreements, been so amended beyond December 31, 2011? DWR’s submittal does not appear to provide that answer.

Before any Resolutions of Necessity are issued, DWR must connect the various dots and make it clear to the landowners, the public and most importantly the Water Commission, that the “project” is indeed duly authorized and fully funded. Thus far, it has entirely failed to do so.

Lastly, even if the definition of “project” could be further distorted to only include the geotechnical studies described in the Mitigated Negative Declaration and, hence, can exclude any other geotechnical studies or non-geotechnical studies in support of the development of the BDCP, DWR has still failed to connect the dots and demonstrate that such a project is both authorized and funded. Once again, with respect to the funding requirement, providing copies of funding agreements documents that expire in December 31, 2011, and otherwise entirely failing to explain the anticipated budget for the “project” and how those soon to be expiring agreements somehow adequately cover that budget, fall far short of making that demonstration.

e. **DWR's Activities Constitute Unreasonable Search and Seizures that Require At Least Administrative Search Warrants Which DWR has Not Yet Obtained.**

DWR's invasive CPT's and drill holes, including the seizure and removal of soils from the various sites, constitutes an unreasonable search and seizure that requires an administrative, if not a criminal, search warrant.

In the Temporary Entry Permit proceedings, the Court addressed this issue in its November 19, 2010 minute order. There the Court noted the "open fields" concept with respect to the Fourth Amendment of the United States Constitution, and the decision of the United States Supreme Court, in Olive v. United States (1984) 466 U.S. 170, at 176, which held that "open fields" were not protected by the Fourth Amendment since a person does not have a reasonable expectation of privacy in an open field. Testing below the surface, however, goes far beyond what is visible in an open field, and infringes into a protected area in which there is indeed a reasonable expectation of privacy and a reasonable expectation that the government will not enter upon, drill, and test soils beneath the property, and seize the soils obtained in such drilling.

Similarly, Article I, section 13 of the California Constitution provides protection "which may on occasion afford 'a broader security against unreasonable searches and seizures than that required by the United States Constitution [citation]. . . .' [citation]." Betchart v. Department of Fish and Game (1984) 158 Cal.App.3d 1104, 1107. In Betchart, the Court quoted from People v. Bradley (1969) 1 Cal.3d 80, 84, noting that under California law a warrantless search is subjected to a balancing test: "whether the person has established a reasonable expectation of privacy, and if so, whether that expectation has been violated by unreasonable governmental intrusion [citation]." Here, the property owners most certainly have a reasonable expectation of privacy in what lies below the surface of their open fields, just as they do in their homes and buildings, and, as discussed below, DWR's intrusion below the surface is unreasonable and unlawful in the absence of at least a duly acquired administrative search warrant.

The Court in the Temporary Entry Permit proceeding already admonished DWR against such intrusions, stating the following in its November 19, 2010 Minute Order:

"However, the court finds that Fourth Amendment considerations and the nature of minimal intrusion [contemplated by the "precondemnation entry procedures"] strongly suggest that the court would include in any order a prohibition against the State entering into any inhabited residence or within 50 to 100 feet of such a residence, and a prohibition against entering any closed structure on the premises unless prior written approval of the owner and/or possessor is obtained. *The court is also for similar reason dubious about a survey of "toxic" materials since it is specifically directed at finding material that might subject the owner to criminal or civil prosecution or might impose a stigma on the property.*" (Emphasis added.)

As stated in Los Angeles Chemical Co. v. Superior Court (1990) 226 6 Cal. App. 3d 703, quoting from Michigan v. Clifford (1984) 464 U.S. 287, 291-292:

“ “[A]dministrative searches generally require warrants. [Citations] . . . Except in certain carefully defined classes of cases, the nonconsensual entry and search of property are governed by the warrant requirement of the Fourth and Fourteenth Amendments.’ [Citations omitted].

‘If a warrant is necessary, the object of the search determines the type of warrant required. *If the primary object is [for administrative purpose], an administrative warrant will suffice. . . . [para.]* If the primary object of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched (*Id., at p. 294, fn. omitted.*)’ ” (Italics added).

At the very least, a search and a seizure is being conducted for an administrative purpose, and an administrative warrant is required in accordance with Code of Civil Procedure section 1822.50, et seq. That warrant must be obtained from a judge and “issued upon cause, unless some other provision of state or federal law makes another standard applicable.” (Code Civ. Proc., § 1822.51.) As Code of Civil Procedure section 1822.52 explains:

“Cause shall be deemed to exist if either reasonable legislative or administrative standards for conducting a routine or area inspection are satisfied with respect to the particular place, dwelling, structure, premises, or vehicle, or there is reason to believe that a condition of nonconformity exists with respect to the particular place, dwelling, structure, premises, or vehicle.”

Since DWR has not yet obtained an administrative warrant it remains to be seen whether it can successfully do so. Until it does, it is premature for the Water Commission to pass any Resolutions of Necessity which authorize DWR’s requested activities. If a judge refuses to grant DWR permission to perform its activities then by definition those activities are not necessary and, hence, cannot be the lawful subject of Resolutions of Necessity.

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2. **Some Specific Requested Modifications to the Draft Resolution of Necessity.**

In the event DWR and the Water Commission take the time to properly address the forgoing matters, and it comes time to properly consider the issuance of Resolutions of Necessity, there are several modifications to the draft Resolutions of Necessity which should be implemented. Some of the major ones are discussed below.

a. **The Duration of the Temporary or Permanent Easements Needs to be Adjusted to Sync with the Mitigated Negative Declaration.**

The Resolution of Necessity should make it clear that the temporary and so-called “permanent” easements must expire and terminate on December 31, 2012 because that is as far as DWR’s Mitigated Negative Declaration covered for these activities.

In this regard see the following excerpts from the Mitigated Negative Declaration:

“The Department of Water Resources is planning to conduct overwater and land geotechnical borings, perform cone penetration tests (CPT) and dig approximately 30 small test pits in order to test soils in the Sacramento-San Joaquin Delta between August 1, 2010 and December 31, 2012.” (p. 2, emphasis added.)

“The Department of Water Resources (DWR) plans to do further geotechnical information gathering in the Delta. The work includes overwater and land geotechnical borings, cone penetration tests (CPT) and small test pits in order to investigate soils in the Sacramento-San Joaquin Delta between 2010 and 2012.” (p. ii., emphasis added.)

b. **The Description of Activities in the Proposed Easement Needs to be Considerably More Specific.**

The Draft easement states that DWR may perform “any other operations necessary and appurtenant to the drilling” That is far too broad and unspecific. As discussed above, it is currently a mystery as to precisely what DWR intends to do on the property. However, once that is clarified, the easements should make reference to a detailed description of those activities and perhaps include that list as an exhibit or else incorporate it by reference. In no event should DWR be allowed to condemn open-ended, broad and unspecific easements. It can only condemn what is constitutionally “necessary.”

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c. If Permanent Easements are Somehow Allowed, the Nature of Those Easements Needs to be Fully Described.

While it makes no sense how the Water Commission could reasonably and legally determine that a permanent easement “is necessary for the proposed project” (Code Civ. Proc., § 1245.230, subd. (c)(3)) when DWR has clearly indicated that a permanent easement is *not* necessary for the proposed project, and when the Judge in the Temporary Entry Permit litigation clearly did *not* require DWR to condemn anything it does not need, to the extent the Water Commission nevertheless insists on condemning a permanent easement, the nature of that permanent easement should be clearly and fully described.

The Draft Resolution of Necessity (“RON”) current reads as follows:

“A permanent non-exclusive easement for drilling purposes, over, upon, under and through the following parcel”

That description is woefully inadequate and leaves way too much to be desired. DWR should be required to explain precisely what that easement can be used for and what the landowner can or cannot do within the boundaries of that easement. For example, some of the questions DWR must clarify are the following:

- Does the easement include the permanent right for DWR to access the easement? Or does DWR’s right to access the easement entirely terminate after the accompanying temporary easements terminate?
- Can the landowner do whatever it wants within that easement after the temporary easements expire? For example, can the landowner build over the top of it, dig within the easement, entirely remove the bentonite “seal,” etc.?
- Similarly, and in other words, after the temporary easements expire, what, if anything, can DWR do within the permanent easement and what if anything can the landowner *not* do within that easement?

If DWR is agreeable to quit-claiming the easement after the temporary easements expire, then that agreement should be inserted into the easement so everyone is aware of such an agreement. Even if DWR ultimately quit-claims the easement after two years, there will still be a cloud over the property during that two years and, thus, the foregoing clarifications will help everyone, including prospective purchasers of the property, understand precisely what that cloud entails and prohibits, etc.

d. DWR Should Be Required to Hold the Landowners Harmless From Any Hazardous Wastes Discoveries.

It is nothing short of amazing that DWR can force its way onto a landowner’s land against the landowner’s will, dig up soil from that land, conduct laboratory testing on that soil,

report potential contaminated soil to the authorities, and then simply walk away and leave the landowner with a potential multi-million dollar cleanup liability. Even if all of the foregoing issues regarding the gross prematurity of the activities could be cured, this would still be manifestly unfair and unreasonable.

If these borings are so important to the state and so "necessary" that the draconian process of condemnation is required to obtain them, than at a minimum, the Resolution of Necessity should require DWR to hold the landowner harmless from any hazardous waste liability resulting from any discoveries of such waste in connection with its activities. That is the absolute least DWR could do.

Perhaps such a discovery is extremely rare in DWR's eyes? If so, then DWR should readily assume that liability. The consequences of such a discovery are simply far too devastating to subject the landowner to that liability.

The RON should therefore include a provision such as the following:

"DWR shall agree to indemnify and hold harmless the landowner from any liability arising out of the DWR's operations in connection with the condemned easements, including, but not limited to, any cleanup or other costs associated with the discovery of any hazardous substances in the course of those operations. DWR further agrees to assume responsibility for any damages caused by reason of those operations; and DWR will, at its option, either repair or pay for such damages. For the purposes of this paragraph, the term "hazardous substances" shall mean any substance which at any time shall be listed as "hazardous" or "toxic" in the regulations implementing the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (42 USC §§6901, et seq.), or other federal or State law, or any other substance, chemical, material or waste product whose presence, nature or quality is potentially injurious to the public health, safety, welfare, the environment or the property."

e. **DWR Should be Required to Test Drinking Water Wells Before and After its Activities at the Request of the Landowner.**

Another requirement which equity and good conscience would mandate would be a requirement that DWR conduct testing of any nearby domestic wells to ensure and confirm that its operations have not caused any contamination of such wells. Again, if gathering the geotechnical information is so important to DWR to result to condemnation, then requiring DWR to perform some basic groundwater testing at the request of the landowner is the least DWR could do.

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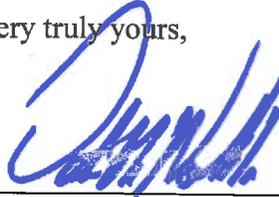
The RON should therefore include a provision such as the following:

At the request of the landowner, DWR shall perform, at DWR's sole expense, up to three (3) uniform, standard drinking well tests for each drinking well located on the landowner's property with the first tests being performed prior to the initiation of the geotechnical activities and the others approximately 2 months and 12 months, respectively, after the completion of those activities, or as otherwise agreed to by the landowner.

3. **Conclusion.**

For the foregoing reasons it is respectfully requested that the Water Commission *not* issue any Resolutions of Necessity at its October 19, 2011 meeting nor at any time prior to correction of the above-described deficiencies.

Very truly yours,



Dante John Nomellini, Jr.

Enclosures (Exhibits "A" & "B")

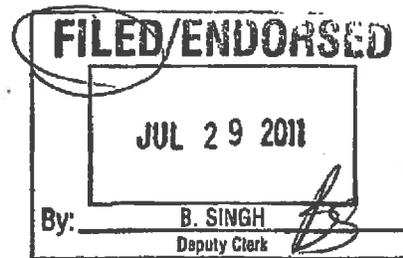
Exhibit “A”

(to Central Delta Water Agency’s Comments re “California Water Commission Meeting October 19, 2011, Agenda Items 11-35–Resolutions of Necessity.”)

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ORIGINAL

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34-2011-00108160

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 12 COUNTY OF SACRAMENTO

14 State of California, by and through the
 15 Department of Water Resources,
 16
 Petitioner,
 17
 v.
 18 Christine M. Huttinger, an unmarried
 19 woman, and Does 1 to 10, inclusive,
 20 Respondents.

Case No.
**PETITION FOR ORDER PERMITTING
 ENTRY AND INVESTIGATION OF
 REAL PROPERTY; MEMORANDUM
 OF POINTS AND AUTHORITIES**
 [Code of Civ. Proc., § 1245.010 et seq.]
 Assessor's Parcel No.: 156-0010-073-0000
"NO HEARING REQUESTED"

22 TO THE SUPERIOR COURT OF THE COUNTY OF SACRAMENTO:

23 The State of California, by and through the Department of Water Resources (DWR),
 24 respectfully petitions for an order permitting entry and investigation of real properties pursuant to
 25 Code of Civil Procedure sections 1245.010, et seq. (entry petition), and alleges as follows:
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 27
 28

1 **ATTACHMENT A – PRELIMINARY GEOLOGICAL ACTIVITIES**

2 Pursuant to Code of Civil Procedure sections 1245.010 et seq., the State of California, by
3 and through the Department of Water Resources (DWR), shall be permitted to conduct the
4 following activities:

5 **1. Identification Of The Location Of Soil Borings And Cone Penetrometer Testing Sites**

6 Preliminary geological activities will consist of entry by geologists, environmental
7 scientists, cultural scientists, appraisers and/or utilities personnel to identify the exact location of
8 soil borings and cone penetrometer testing (CPT) sites. DWR requires soil borings and CPT to
9 determine the suitability of the geological conditions of each property being studied for various
10 alternative alignment locations for a water conveyance project in the Delta, which includes
11 surface canal and underground pipeline alternatives. DWR requires access to the subject
12 properties for identification of the exact locations of soil borings and CPT to obtain easements by
13 eminent domain. DWR must acquire such easements to make soil borings and CPT it needs for
14 the necessary suitability studies.

15 **2. Activities Allowed**

16 Activities allowed for identification of soil borings and CPT sites include visual
17 observations of each parcel, environmental and cultural surveys, consultation with environmental
18 and cultural scientists, report and consultation with the Underground Service Alert, and
19 identification of all known underground utilities. Each owner may meet with and accompany
20 DWR personnel regarding the location of soil boring and CPT sites on his/her/their parcel.

21 **3. Two Days Per Parcel Allowed**

22 DWR shall be permitted to enter onto a parcel for up to two (2) days to conduct these
23 preliminary identification activities. One day shall mean 7:00 a.m. to 7:00 p.m. on Monday
24 through Friday.

25 **4. Boring And CPT Sites Per Parcel**

26 Attached and incorporated hereto is a chart showing the number of boring and CPT sites
27 allowed on each parcel and the depths of each soil boring.

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1 **5. Number Of People Allowed To Enter**

2 Up to four (4) people may enter each parcel per day. Limited, transitory access is permitted
3 for regulatory personnel from the California Department of Fish and Game, the United States Fish
4 and Wildlife Service, and personnel from any utilities to identify the locations of utilities.

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Exhibit “B”

(to Central Delta Water Agency’s Comments re “California Water Commission Meeting October 19, 2011, Agenda Items 11-35–Resolutions of Necessity.”)

Figure 1. Proposed Exploration Area Map.

