

September 20, 2011

Via Electronic Mail

California Natural Resources Agency
Department of Water Resources
California Water Commission
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Re: September 21, 2011 Meeting, Item 10 (Delta Ranch)

Dear Commission Members:

This firm represents the Delta Ranch Partnership (Delta Ranch) in connection with the Department of Water Resources (DWR) requested access to and threatened condemnation of both the Delta Ranch Partnership property and property owned by Sutter Home Winery. Sutter Home Winery, dba Trincherro Family Estates, operates both of these properties for the purpose of wine grape production for the production of table wine.

The California Water Commission (Commission) has noticed its intent to consider a Resolution of Necessity to authorize DWR to condemn certain rights in the Delta Ranch property. Sutter Home and Delta Ranch believe that DWR has not complied with the applicable legal requirements for exercising the power of eminent domain. While Delta Ranch has continued to request more detailed information regarding the need to enter the Delta Ranch property, including the disclosure of project maps showing physical features necessitating entry, DWR has continually refused to provide that information, insisting Delta Ranch and Sutter Home either provide DWR with whatever access it requests or DWR will utilize the pre-condemnation statutes and Eminent Domain Law to obtain court ordered access.

The Delta Ranch Property

The Delta Ranch property contains a total of approximately 559 acres. Viticulture is the primary activity on the property, which contains approximately 271,711 vines. When the vineyard is fully mature, it is anticipated that wine grape production from the property will be approximately 4,800 tons. Vines on the property are irrigated by way of irrigation lines installed underground throughout the vineyards. Cultivation of the vineyards on the property is an intensive and seasonal activity. From April 1 to August 1 of each year, crews are at

work in the vineyards 24 hours per day. Although the number of workers present on the property varies, there can be as many as 50 workers on the Subject Parcel at any given time.

California Environmental Quality Act (CEQA) Issues

DWR prepared a Mitigated Negative Declaration (MND) and, on September 23, 2010, filed a Notice of Determination for certain geological activities throughout the Delta Region. That MND was not site-specific, and only looked at the potential impacts associated generally with DWR's proposed geological activities. Indeed, in many of the comments on the MND, commenters noted the MND lacked specific information on drilling locations, among other things and therefore was inadequate. For example, Appendix A to the MND (Response to Comments) provides:

Comment

Commenter asserts that the MND fails to adequately identify the locations where the drilling will occur and this makes it impossible to conduct a complete analysis of the impacts and to develop site-specific mitigation measures.

DWR Response

See the discussion in Sections B and C of the General Response. The EIS/MND provides an estimate of the total number of borings proposed. The number is estimated to give DWR some flexibility in locations if there were issues with TEPs or it is determined that additional soils information is needed from a surrounding area. The avoidance measures ensured by pre-drilling observations by environmental scientists are in place for site specific mitigation measures, specifically moving the location to avoid impacts. DWR will not exceed the approximated number of borings.
(MND Appendix A, pp. A-22-23.)

The lack of any site-specific information or analysis is also seen in the MND's treatment of cultural resources. In this regard, the MND suggests the absence of cultural resources in the project area and provides that, in the event cultural resources are discovered in the project area, drilling locations will simply be moved to avoid any cultural resources. These statements and so-called mitigation measures were developed at a time when DWR thought it would have the ability to move freely around properties having either obtained unfettered access through voluntary entries or through court order entry. Now that DWR is seeking to condemn specific drill locations, site-specific analysis is required.

The Delta Ranch parcel, for example, contains a significant cultural site, the "Johnson Site (CA-Sac-65)." This site is the subject of a 1979 report prepared by the California Resources Agency, Department of Park and Recreation (California Archeological Reports No.

18). Among other things, the Johnson Site was found to contain four human burials, with human bone scattered throughout the deposit.

DWR's proposed access route runs along side of the Johnson Site and the drilling location is located not far from the site. It is clear that DWR did not consider the presence of this cultural site, or of any other possible cultural sites. In fact, it is clear that DWR did not conduct any site-specific environmental review and must do so to fulfill its CEQA responsibilities prior to the Commission authorizing the taking of any private property for public use.

Eminent Domain Authority and Funding

As DWR pointed out in its presentation to the Commission on August 17, 2011, DWR can only acquire property through eminent domain in the name of the state "if the project for which the property is being acquired has been authorized and funds are available therefore." (Staff Materials for Agenda Item 8, August 17, 2011 meeting, citing Wat. Code, § 11580.)

While DWR has, at times, suggested the "project" for the Commission's consideration is simply the geotechnical activities DWR seeks to conduct, it is quite clear that the "project" contemplated by Water Code section 11580 is the Bay Delta Conservation Plan (BDCP). Indeed, the Staff Report identifies the BDCP as the purpose of the investigations. In an apparent attempt to satisfy the funding requirement of Water Code section 11580, the Staff Report states:

Under executed funding agreements for the BDCP and DHCCP, the participating State Water Contractors and the San Luis & Delta Mendota Water Authority have provided funding for the program, including geotechnical explorations. (Staff Report, ¶4.D.)

While it is not clear what is intended by paragraph 4.D., the staff report does not include the executed funding agreements and this Commission cannot make the required findings without benefit of the actual funding agreements that evidence that the funds are available to complete the BDCP¹, the "project" for which DWR seeks to exercise its condemnation authority.

In fact, from the most recent information available on commitment to fund the BDCP and the Delta Habitat Conservation and Conveyance Program (DHCCP), it appears as though the parties have not yet committed to funding the completion of the BDCP and DHCCP. Recently, the Resources Agency released a document entitled "First Amendment to the

¹ Some have argued that DWR needs to fully fund the implementation of the BDCP and the BDCP must be "approved" prior to exercising the power of eminent domain. Whatever the merits of those arguments, at a minimum, DWR must demonstrate that the funds are available to complete the BDCP itself, as a planning document. To date, it has failed to demonstrate that the funding is in place.

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Memorandum of Agreement regarding Collaboration on the Planning, Preliminary Design and Environmental Compliance for The [DHCCP] In Connection With The Development Of The [BDCP]" (First Amendment MOA). The First Amendment MOA signed by DWR on August 30, 2011, provides, among other things, that the DHCCP is "the program that is providing funding for the necessary engineering and investigation programs and preparation of the BDCP Environmental Impact Statement and Environmental Impact Report ("EIS/EIR") . . ." (First Amendment MOA, Recital D.) The First Amendment MOA also provides for continued and future funding of the DHCCP/BDCP process. (First Amendment MOA, § III.) There, the Agreement provides for funding for the project when "milestones" are reached.

Through this Agreement, it appears as though funding commitments have been made only through the Draft BDCP and EIS/EIR stage, and there is no current funding commitment to complete a public review draft or final of the BDCP and EIR/EIS. There also appears to be no funding commitment to complete the preliminary engineering for the project.² (See First Amendment MOA, § III.G.) Moreover, the First Amendment MOA raises questions regarding funding commitments from others. (See First Amendment MOA, § III.E [regarding future funding commitments with various parties], § III.F [regarding a separate future agreement regarding the USBR's funding of the BDCP-DHCCP].)

The most recent information regarding funding commitments for the BDCP/DHCCP reveal that the funds to complete the BDCP studies have not been secured or committed. Accordingly, this Commission cannot make the required statutory finding that the funds are "available" for the project.

Findings Required by Code of Civil Procedure Section 1245.230

Among the findings required by Code of Civil Procedure section 1245.230 are the requirements that the property described in the resolution is necessary for the project *and* that the project is planned or located in a manner that will be the most compatible with the greatest public good and the least private injury. (Code of Civ. Proc., § 1245.230.) The location of the drilling on and access across the Delta Ranch parcel fail to comply with these requirements.

For example, Exhibit A to the Staff Report consists of a map of the Delta Ranch and nearby properties. At or near the southwest corner of the Delta Ranch parcel is a triangle-shaped parcel on Lambert Road bordering the Delta Ranch parcel on the west. That parcel is identified as APN 132-0210-029, owned by the County of Sacramento. Sutter Home believes that this property located a very short distance from the proposed drilling site on the Delta Ranch property, is currently used to store or stage some type of debris. This parcel, very close to the proposed drill location, already in public ownership and not being used for any

² The Staff Report identifies "preliminary engineering" as one purpose of the investigation for which DWR seeks to utilize the power of eminent domain.

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apparent commercial or residential use, appears to be an ideal location for drilling – the most compatible with the greatest public good and the least private injury. In addition to this alternate location, directly across Lambert Road from the Delta Ranch Parcel is property owned by the State of California, identified as APN 146-0030-005.

In addition to the actual drilling location, the Staff Report (and DWR) proposes an access road through the Delta Ranch parcel extending beyond the drill site to the property to the north of the Delta Ranch parcel. It appears as though DWR seeks to access the property to the north through the Delta Ranch parcel. However, I am informed that the farmers who access the property to the north do so from the entry roads off of River Road – and not from Lambert Road. If so, there is no need to cross the Delta Ranch parcel to access the property to the north. Moreover, and to the extent access is needed from Lambert Road – there is an access route to the east of the property sufficient to provide access to the property to the north, without having to transect the Delta Ranch parcel. As such, the current method of access to the Delta Ranch parcel and parcel to the north is not the most compatible with the greatest public good and the least private injury.

To the extent DWR and this Commission can satisfy the statutory and other legal prerequisites to exercising the power of eminent domain, the project as contemplated by the Staff Report is not planned or located in a way that provides the greatest public good and the least private injury.

General Comments on the Staff Report

In addition to the legal deficiencies outlined above, the Staff Report contains at least one prominent omission. The Staff Report purports to outline efforts made to negotiate with Sutter Home prior to exercising the power of eminent domain. The Staff Report outlines the following “official contacts” regarding access:

- October 2008: Temporary Entry Permit mailed. One phone message left and one phone conversation was conducted. DWR offered to have an environmental scientist meet on-site with the property owner to address concerns expressed by owner in regards to planned environmental studies; property owner declined the meeting. TEP not signed.
- August 2011: Mailed First Written Offer to secure easements for geotechnical activities. To date two (2) phone calls have been made with messages left and three (3) follow-up letters have been mailed.
- September 13, 2011: Letter mailed informing property owner of the temporary easement alternative.

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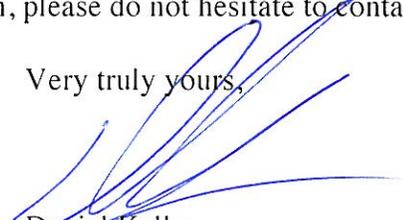
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The Staff Report fails to mention that even after DWR filed an action against Delta Ranch for court ordered access, Delta Ranch and Sutter Home continued to try to resolve the litigation. To that end, I arranged for a meeting at my office that took place on August 25, 2010. Prior to that meeting, Delta Ranch and Sutter Home requested that DWR bring maps with reasonable detail showing the activities sought to be conducted on the property and the location of any proposed facilities on the properties to enable Delta Ranch and Sutter Home to discuss potential access. Several staff members from DWR, including people familiar with the DHCCP and BDCP attended the meeting. Delta Ranch was not provided with any maps showing the location of any facilities and no detailed information was ever provided to justify the access. Delta Ranch attempted to negotiate reasonable conditions to protect both DWR and Delta Ranch employees, accommodations regarding the use of pesticides, and reasonable time limitations. DWR informed Delta Ranch that it either accepts all of DWR's terms or DWR would "sue" for court ordered access.

DWR's claim to unconditional access has been its position when it first sought access, was its position when it sought court ordered access, and appears to be its position with regard to acquiring property through eminent domain. Delta Ranch and Sutter Home renew the repeated request to be provided with detailed information regarding the "project," including plans, reports, studies, and any other information prepared or being relied upon by DWR and the Commission to justify the requested access, including the location of the drill site and the cone penetrometer testing site. Delta Ranch and Sutter Home also request information outlining what steps DWR has taken to identify and study the feasibility of obtaining the geological information from locations other than the Delta Ranch property.

Delta Ranch will likely have additional comments related to the proposed Resolution of Necessity at the September 21, 2011, and future public meetings. If you have any questions, or require additional information, please do not hesitate to contact me.

Very truly yours,



Daniel Kelly

DJK:jm