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September 21, 2011

VIA ELECTRONIC MAIL & HAND DELIVERY

Department of Water Resources
California Water Commission
P.O. Box 942836
Sacramento, California 94236-001
cwc@water.ca.gov

Re: Comments on Proposed Resolution of Necessity

Dear Commission Members:

By this letter, Islands, Inc. submits its written comments regarding the proposed Resolution of Necessity to authorize the Department of Water Resources ("DWR") to acquire by eminent domain certain rights over property owned by Islands Inc. for use related to the Bay Delta Conservation Plan ("BDCP") project. In addition to these written comments, I will attend the California Water Commission meeting regarding the proposed Resolution of Necessity, scheduled for September 21, 2011, and may provide additional oral comments.

Issue 1: *Whether the public interest and necessity require the proposed project.*

As noted in the August 30, 2011 letter from this Commission, the purpose of the proposed project is to conduct "geotechnical explorations" that will provide information to support preparation of a draft Environment Impact Report/Environmental Impact Statement for the proposed Bay Delta Conservation Plan. In the course of its prior interactions with the DWR and the DWR's land agent, Mr. Daniel Vasquez, Islands, Inc. has been presented with at least four different proposals for terms of entry related to this project.

The first proposal came in the form of the DWR's petition for a Temporary Entry Permit ("TEP") filed with the Solano County Superior Court. The TEP would have granted the DWR rights of entry for a variety of surveys by teams of engineers, biologists, botanists and others, employing equipment including vehicles, drilling rigs, surveying equipment and animal traps, often for extended periods of time. This petition and others like it were challenged by the affected land owners, including Islands Inc., and currently remains on appeal.

The second proposal, presented in a July 7, 2011 letter from the DWR, offered to purchase rights over a portion of Islands Inc.'s property described as DWR Parcel No. DCAS-506. DWR's desired rights consisted of a 16 square foot permanent non-exclusive easement, a 10,000 square foot temporary construction easement, and a 2,290 square foot temporary access easement, the latter two lasting for a three year time period.

The third proposal arose during subsequent negotiations pursuant to the July 7, 2011 offer, during which Mr. Vasquez indicated that the DWR's objectives could be satisfied under more

limited entry terms. It is my understanding that one proposal negotiated by the parties and favorably received by Mr. Vasquez would limit the DWR's temporary easements to a three-day period of entry over two weeks.

The fourth proposal came when Mr. Vasquez was asked to place the two week proposal into writing. Instead of the limited time period that was negotiated, Mr. Vasquez sent a proposal that would require a 16 square foot easement over two six-month periods of entry over a two year time period between May and November of 2012 and 2013.

This history reflects that the DWR has not been consistent regarding the scope of rights that are "necessary" to acquire from Islands, Inc. Based upon the representations of the DWR's land agent during ongoing negotiations, it appears that the terms of entry presented in the July 7, 2011 offer—and now the subject of the instant Resolution of Necessity—are significantly broader than necessary to achieve the DWR's objectives. Accordingly, the Commission should deny the request to adopt the Resolution of Necessity.

Issue 2: Whether 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.

Islands, Inc. is an agricultural enterprise that owns approximately 1,515 acres of Delta land on Ryer Island in Solano County. Islands, Inc. utilizes approximately 845 of these acres for its own agricultural operations, growing fruit and row crops, and leases the remainder of its land to other local agricultural enterprises. Islands, Inc. is wholly dependent upon Delta surface water for its agricultural operations.

The six-month, multi-year time frame of the temporary easements requested by the DWR threatens to cause substantial interference with Islands, Inc.'s agricultural operations. Years of uncertainty regarding the use of the affected acres during the peak of the growing season will likely interrupt planting and harvesting activities, and may require the complete removal of crops from certain areas for the entire two-year period of the temporary easement.

Further, Reclamation District 501, the district responsible for reclaiming Ryer Island has an easement interest over a portion of DWR Parcel No. DCAS-506 to conduct levee maintenance. Reclamation District 501's levee maintenance is an essential service for ensuring the continued safety and productive value of all properties located on Ryer Island. While unclear based upon the available information, it is possible that the DWR's proposed temporary easements could impact and conflict with Reclamation District 501's maintenance activities.

Accordingly, the proposed project is not planned so as to maximize the public good or to minimize private injury. The Commission should therefore deny the DWR's request to adopt a Resolution of Necessity.

Issue 3: Whether the property sought to be acquired is necessary for the proposed project.

As discussed above, the DWR has at various times made several different proposal regarding what rights are "necessary" for it to acquire from Islands, Inc. It is my understanding that in the course of ongoing negotiations for voluntary sale of the requested property rights in DWR Parcel No. DCAS-506, the DWR's land agent, Daniel Vasquez, has on several occasions informally proposed or expressed willingness to consider acquisition of substantially lesser property

interests. These negotiations have included, for example, serious discussion of an arrangement whereby DWR agents would enter the parcel for only a few days over a two-week period rather than retaining rights of entry for two six-month periods over the course of two years. The willingness of the DWR's land agent to consider such terms strongly indicates that terms of the condemnation proposal currently before the Commission are substantially broader than what is truly necessary for the project. Accordingly, the Commission should not grant the DWR's request to adopt a Resolution of Necessity.

Issue 4: Whether the offer required by section 7267.2 of the Government Code has been made to the owner or owners of record.

As described above, by letter of July 7, 2011, the DWR initiated negotiations with an offer to purchase property rights over DWR Parcel No. DCAS-506 for an assessed value of \$500. Since receiving the DWR's offer, Islands, Inc. has engaged in negotiations with the DWR's designated land agent regarding various terms of the proposed acquisition. Also as described above, it is our understanding that during negotiations with Islands, Inc. Mr. Vasquez has been receptive to the purchase of substantially lesser rights in the parcel than terms of the original offer and now before this Commission. These negotiations remain ongoing. Further, Islands, Inc. has requested but has not yet received the DWR's packet outlining procedures for obtaining a state-funded independent appraisal of the subject parcel, a right provided by Code of Civil Procedure section 1263.025(a) and specifically contemplated as a component of negotiations by the DWR within its initial offer letter. Additionally, as noted above, Reclamation District 501 has an easement over a portion of DWR Parcel No DCAS-506 for maintenance of its levee infrastructure. To my knowledge, DWR has not contacted Reclamation District 501 with regards to arranging terms for coordination of their activities and minimization of mutual interference.

Issue 5: Whether the DWR has authority to exercise eminent domain power for the BDCP project at this time.

The DWR's eminent domain power arises from Water Code section 11580, which only allows eminent domain acquisitions for projects that have been authorized and funded. As noted in the July 7, 2011 offer letter, the DWR intends to use the acquired rights for the Bay Delta Conservation Plan project. To our knowledge, the Bay Delta Conservation Plan has neither been approved nor funded. The most recent information available on the BDCP website describes the project's current status as "being prepared" and "being developed." See <http://baydeltaconservationplan.com/BDCPPlanningProcess/AboutBDCP>. The BDCP website's "Plan Development Schedule" also notes that the BDCP and its environmental review documents are not set to be finalized until 2013. See <http://baydeltaconservationplan.com/Schedule/PlanDevelopmentSchedule>. Accordingly, the DWR has no authority to acquire property for use in relation to the BDCP by eminent domain at this time. Voluntary sale through negotiation remains the only method by which the DWR may presently obtain its desired rights over DWR Parcel No. DCAS-506.

Conclusion

For these reasons, Islands, Inc. believes that it is premature for the Commission to adopt a Resolution of Necessity authorizing the DWR to obtain property rights over DWR Parcel No. DCAS-506 by eminent domain. Government Code section 7267.1 requires public entities to

"make every reasonable effort to acquire expeditiously real property by negotiation." Because negotiations for a voluntary sale—potentially on terms substantially less intrusive than those originally requested—are still in progress, because specifically-contemplated statutory procedures for fair valuation of the parcel have not been completed, and because the owner of potentially impacted existing easement rights over the parcel has not been formally notified or engaged, the DWR has not yet satisfied its obligation to "make every reasonable effort" to acquire the property by negotiation before resorting to the eminent domain process. The Commission should not grant the DWR's request to adopt a Resolution of Necessity unless and until the DWR contacts Reclamation District 501 regarding its proposed acquisitions, Islands, Inc. is afforded an opportunity to consider the results of its requested independent appraisal, and the current negotiations fail to produce an agreement for a mutually acceptable transaction. Moreover, the Water Code does not authorize the Commission to acquire Islands, Inc.'s property for purposes of the BDCP unless and until the BDCP has been both authorized and funded.

Sincerely,

A handwritten signature in black ink that reads "Timothy D. Findley". The signature is written in a cursive, flowing style.

Timothy D. Findley

cc: Tom Hester, Islands, Inc.
Theodore Kolb, Esq.
Michael Van Zandt, Esq.
Sophia B. Belloli, Esq.