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STEPHANIE BOHRER, CLERK
By  _____
DEPUTY

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SAN JOAQUIN

<p>IN RE: DEPARTMENT OF WATER RESOURCES CASES</p>	<p>COORDINATED ACTION: JCCP 4594 STK-CV-UED-2023-8476</p> <p>ORDER PERMITTING ENTRY AND INVESTIGATION OF REAL PROPERTY FOR ENVIRONMENTAL, CULTURAL, GEOLOGICAL AND DRILLING INVESTIGATIONS ON TEN PROPERTIES</p>
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The Petitions for Orders Permitting Entry and Investigation of Real Property filed by State of California, Department of Water Resources (hereinafter "DWR") came on for hearings on October 24 and 26, 2023. After considering the arguments of counsel, the testimony of witnesses, and evidence and presentations of affected parties, as well as papers filed in support of and in opposition to the Petitions, and applicable law, the court finds and orders as follows:

1. *Authority to Initiate Petition under C.C.P. 1245.010.* The court finds that DWR is a "person authorized to acquire property for a particular use by eminent domain" under Code of Civil Procedure Section 1245.010 pursuant to Water Code sections 22, 250, 11577 and 11580. This court has previously held in its Opinion and

1 Order after the October 24 - 26, 2023 hearings that a classic eminent domain
2 case is not required for this proceeding and that DWR need not comply with the
3 acquisition requirements of Water Code sections 250 or 11580 before proceeding
4 with this petition. See Order and Opinion attached hereto and incorporated
5 herein as Attachment 1. Attachment 2 hereto, the court's October 2, 2023 Order,
6 identifies the Petitions subject to this Order Permitting Entry and Investigation on
7 its Attachment A.
8

9 2. *Particular uses.* The court finds that DWR is authorized and intends to investigate
10 the acquisition of the subject properties by eminent domain within the meaning of
11 the Water Code sections listed above and Code of Civil Procedure Section
12 1245.030, including: (1) to investigate the feasibility of alternative types of water
13 conveyance systems, the best alternative conveyance alignment location; (2) to
14 investigate the various types of conveyance systems, including surface level
15 canals, surface level pipelines, and buried tunnels; (3) to investigate conveyance
16 alternative locations; (4) to investigate micro-siting of facilities; (5) ancillary to
17 the above, to investigate potential impacts of a water conveyance system to,
18 among other things, biological resources, water resources, environmental
19 resources, geology, archeology, and utilities on the subject properties; (6) to
20 investigate whether a water conveyance system should be constructed in the
21 Delta. The court considered the above in light of current formulations, current law
22 and conditions, including Governor Newsom's single-tunnel proposal.
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1 3. *Nature and Scope of the Activities Reasonably Necessary to Accomplish*
2 *Purposes.* The court has determined the nature and scope of the activities
3 reasonably necessary to accomplish the purposes identified, taking due
4 consideration of constitutional and statutory requirements. The court has
5 provided suitable limitations to strike the best possible balance between the
6 needs of DWR and the interests of the property owners. The court has
7 determined that DWR may conduct, on ten (10) properties listed on Attachment A
8 -- Entry Petitions Spreadsheet (DWR Trial Exhibit 5), the studies described in
9 *infra*: Attachment B, Scope of Work for All Entries; Attachment C, General
10 Conditions for All Entries; and Attachment D, Special Conditions for
11 Environmental and Cultural Entries, or Attachment E, Special Conditions for
12 Geological Entries; as specifically identified for each property under Type of Entry
13 on Attachments A and B. All of the referenced Attachments are incorporated
14 herein. In case of conflict the order of priority shall be first, this Order; second,
15 Attachments A – Entry Petitions Spreadsheet (DWR Trial Exh. 5) and B – Scope
16 of Work, third, Attachment D or E Special Conditions applicable to the particular
17 activity; fourth, Attachment C, General Conditions. For those Types of Entry
18 identified on Attachment A as “Access,” the permitted scope or work includes only
19 entry and passage across existing roadways.
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23 4. *Authorization to Enter Described Properties.* The facts and law establish that
24 DWR is entitled to an order under Code of Civil Procedure section 1245.030
25 permitting entry by DWR on the subject properties. The petition was duly filed
26 and lawful prior notice was given to each owner of the property as the court
27 determined appropriate under the circumstances of the particular case for
28

1 different ownership interests. Each person who claimed an interest was given a
2 due process opportunity to be heard on all issues. The court has determined all
3 issues including the probable amount of compensation to be paid to the owner of
4 property for the actual damage to the property and interference with its
5 possession and use.

6
7 5. *Probable Amount of Compensation.* The court found that witness Allen Davis had
8 observed each parcel, was highly credible and arrived, based on extensive
9 experience, at just and reasonable estimates of probable damages. His
10 testimony was undisputed. Under Code of Civil Procedure section 1245.030 the
11 court determines that the probable amount of compensation is as set forth in
12 Attachment A, column 7 "Probable Damages". DWR shall make the deposit for
13 each property in accordance with paragraph 7 below and prior to entering into any
14 such property.
15

16 The court finds no probable damages from any environmental/cultural
17 studies to any subsurface owner. In the absence of any evidence to support
18 damage, the court finds only speculative or trivial damage to any subsurface
19 owner from CPT or drilling activity, similar to footprints on a field, and sets \$0 as
20 probable damage to subsurface owners. But DWR shall offer access to core
21 sample analysis to subsurface owner(s) and notify subsurface owners of any
22 valuable minerals contained in the core sample(s).
23

24 6. *Order of Entry.* DWR and its designated agents and employees, subject to the
25 restrictions set out above and Attachments A and B and in the General Conditions
26 and Special Conditions, are hereby permitted and authorized to enter upon each
27 property listed in Attachment A to perform the activities set out in this Order. All
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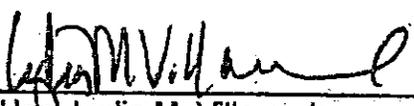
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property listed in Attachment A to perform the activities set out in this Order. All persons having notice of this Order shall refrain from interfering with the entry and activities permitted above. THE RIGHT TO ENTER SHALL COMMENCE ON NOVEMBER 27 2023 AND TERMINATE ON NOVEMBER 26, 2024, UNLESS EXTENDED BY COURT ORDER.

- 7. *Deposit*: DWR shall, within 20 days of this Order, deposit compensation as set forth above in accordance with Code of Civil Procedure section 1245.050(b) in the Condemnation Deposits Fund in the State Treasury.
- 8. *Clarification, Modification, other ex parte*: Any person seeking clarification, modification, or other *ex parte* relief regarding the contents of this order, or its implementation, shall give at least 72 hours' notice by telephone and fax or email to each party who has filed an appearance in this coordinated action and hearings will be set by the court only on Wednesday, Thursday, or Friday, in the absence of good cause, to prevent weekend notice.
- 9. *Interim Order*: This order is not a final judgment and any party may make an *ex parte* motion upon three (3) days' notice in this court to amend the terms of this order for good cause.
- 10. *CEQA*: Nothing in this Order relieves DWR of its duties and responsibilities under the California Environmental Quality Act (Pub. Resources Code § 21000, et seq. ("CEQA")).

SO ORDERED.

Dated: November 21, 2023



Hon. Lydia M. Villarreal
Judge of the Superior Court

ATTACHMENT 1

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STEPHANJE BOHRER, CLERK
By *[Signature]*
DEPUTY

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN JOAQUIN**

Coordination Proceeding Special Title
Rule 3.550

Case No.: JCCP No. 4594
(STK-CV-UED-2023-8476)

DEPARTMENT OF WATER
RESOURCES CASES

**RULING AND ORDER RE: RIGHT TO
ENTRY AND FOR PREPARATION OF
ORDER OF ENTRY**

I. INTRODUCTION

By its "Order Granting Petition for Coordination and Setting Further Hearing," filed October 2, 2023, this court granted Department of Water Resources ("DWR")'s Petition to add an additional ten (10) pre-condemnation entry petitions, filed in Sacramento, San Joaquin and Alameda Counties, to the within coordinated proceedings. DWR's ten entry petitions seek court orders under Code of Civil Procedure §§ 1245.010, *et seq.*, permitting it to enter and conduct examinations and explorations, including environmental studies and soil borings, on privately-owned property within the California Delta prior to final design and construction of a tunnel or canal to facilitate the transport of water from Northern to Central and Southern California. The court set evidentiary hearings for October 24 and 26, 2023, regarding the scope, timing and probable compensation for the

1 activities DWR wishes to complete on the properties as encompassed in the ten entry
2 petitions.

3 **Appearances:** Deputy Attorneys General Christine Garske, Kelly Smith, Michael
4 C. Gasbarro, and Colin D. Smithey, appeared on behalf of the DWR. Attorneys Thomas
5 H. Keeling, of the Freeman Firm, and Dante Nomellini, Jr., of Nomellini, Grilli &
6 McDaniel, appeared on behalf of the Respondent Landowners, and specially appeared
7 on behalf of Mr. Kevin Johnston ("Landowners").
8

9 **Evidence and Submissions:** The court heard and considered testimony from
10 Andrew Finney, Allan T. Davis, and Katherine Marquez, offered by the Petitioners. The
11 Respondents offered no witnesses. The court reviewed DWR's Petitions and their
12 supporting declarations and evidence, each side's opening, reply, and any supplemental
13 briefs, all supporting declarations and any evidence offered pursuant to stipulation of the
14 parties. The court also heard argument by the parties. The court issued a tentative
15 ruling and considered the parties' arguments submitted in response. Based on all of the
16 above, the court now issues the following opinion and orders.

17 **II. LITIGATION HISTORY**

18 The ten entry petitions before this court are the latest in a series of entry petitions
19 by which DWR seeks temporary entry on privately-owned properties within the California
20 Delta to conduct environmental and geological studies and testing towards design and
21 construction of a potential water conveyance project (sometimes the "Delta Conveyance
22 Project" below). The project would involve design and construction of a tunnel or canal
23 to facilitate the transport of water from Northern California to Central and Southern
24 California. The exact route of the tunnel or canal has not been determined; at least three
25 routes are proposed. It remains possible that no tunnel or canal will be built.

26 The constitutionality of DWR's proposed entries for this same water conveyance
27 project was examined in Property Reserve, Inc. v. Superior Court (2016) 1 Cal.5th 151,
28 168. ("Property Reserve"). The Supreme Court explained:

1 "Because the alternative potential locations for the new facilities cross or lie
2 beneath privately owned lands, the Department sought to enter the private
3 properties in question to ascertain preliminary environmental and geological
4 information about the properties. The Department maintains that the proposed
5 entries and testing are necessary for two reasons: (1) to determine the feasibility
6 and best potential location for the contemplated conveyance system, and (2) to
7 assess the potential effects of the project on biological, environmental, geological,
8 and archeological resources within the properties in order to comply with
9 numerous applicable state and federal environmental laws..."

10 *Ibid.*

11 As with prior entry petitions adjudicated in this coordinated proceeding, DWR
12 seeks temporary entries to do the same types of biological surveys of flora, fauna and
13 temporary natural conditions, such as vernal pools, to assess cultural resources (Native
14 American and subsequent historical resources) and to explore subsurface soil and water
15 conditions by way of soil borings and cone penetrometer testing (CPTs). In this round of
16 entries, DWR seeks permission to expand some of the soil borings to 300 feet from the
17 original 200 feet limitation. DWR also seeks to complete additional testing within the
18 drilled boreholes, specifically to complete hydraulic conductivity, PS logging and
19 pressuremeter testing. DWR also seeks to expand CPTs to include CPTw tests on two
20 properties. Under prior orders in this coordinated proceeding, DWR is required to leave
21 each property as DWR found it, as much as possible, but is permitted to remove dirt for
22 examination and testing and to replace it with bentonite, an absorbent clay material.

23 **III. LANDOWNERS ASSERT THAT THESE ENTRIES EXCEED DWR'S**
24 **AUTHORITY BECAUSE WATER CODE §§ 250 AND 11580 REQUIRE**
25 **THERE BE AN AUTHORIZED AND FUNDED PROJECT BEFORE DWR**
26 **MAY PROCEED**

27 Landowners do not object to the types of investigations at issue in this
28 proceeding. Landowners argue DWR is not entitled to perform these pre-condemnation
investigations because it has no eminent domain authority, for lack of an authorized and
funded project as required by Water Code sections 250 and 11580. Because the pre-
condemnation entries constitute takings, eminent domain authority is fundamental to

1 proceeding with its pre-condemnation activities. In other words, without eminent domain
2 authority, DWR lacks authority to conduct pre-condemnation investigations.

3
4 **1. Landowners Argue Water Code Sections 250 and 11580 Limit DWR's**
5 **Authority to Seek Entry Petitions by Requiring that the Project for Which**
6 **the Entries Are Sought Be Authorized and Funded.**

7 Respondents incorporate by reference earlier arguments raised by prior
8 Landowners in investigative proceedings. Before Judge Farrell, (February 16-18, 2022),
9 Landowners argued Water Code sections 250 and 11580¹ (hereinafter sections 250 and
10 11580) limit DWR's authority to exercise its eminent domain powers. These Water Code
11 provisions provide as follows:

12 "In the name of the people of the State of California, the department may acquire
13 by eminent domain any property necessary for state water and dam purposes.
14 The department shall not commence any such proceeding in eminent domain
15 unless the project for which the *property* is being acquired *has been authorized*
16 *and funds are available therefor.*"

17 Wat. Code, § 250 (Emphasis added.)

18 "When the department cannot acquire any necessary property by agreement with
19 the owner, the department may exercise the power of eminent domain to acquire
20 the property in the name of the state if the project for which the *property* is being
21 acquired *has been authorized and funds are available therefor.*"

22 Wat. Code, § 11580 (Emphasis added.)

23 Landowners argue these sections require DWR to have legislative authorization
24 and funding of the "project" in order to have the eminent domain authority that is
25 essential to conducting any pre-condemnation investigations for the Delta Conveyance
26 Project.

27 This argument was rejected by Judge Farrell. Judge Farrell held that to require
28 authorization and funding at this stage ignores *Property Reserve*, noting that the pre-

¹ Water Code section 11580 is specific to the Central Valley Project; section 250 is of more general application.

1 condemnation activities at issue here are done for the purpose of defining and testing the
2 feasibility of designs and approaches for a water conveyance system. To the extent
3 these investigations involve a "taking" under federal constitutional law, such a taking
4 under Property Reserve simply requires due process and just compensation.

5 On February 21, 2023, DWR sought entry orders with respect to a different group
6 of properties owned by other Respondent Landowners. Landowners narrowed the
7 argument at that evidentiary hearing, arguing that while DWR may not be required to
8 obtain authorization and funding for the entire Delta Conveyance Project under sections
9 250 and 11580, DWR is required to have authorization and funding for the *investigation*
10 phase of the project. Key to Landowners' argument is the determination that the pre-
11 condemnation investigation constitutes a "project" under sections 250 and 11580.
12 Authorization and funding cannot occur unless there is a "project".

13 At the conclusion of the February 2023 evidentiary hearing, the court requested
14 additional briefing on what was meant by a "project" under sections 250 and 11580. In
15 Landowners' Supplemental Brief, filed March 6, 2023, the Respondent Landowners
16 seemed to have abandoned the argument that the investigation phase was the project
17 contemplated by sections 250 and 11580; the February 2023 Landowners returned to
18 the earlier argument that the Delta Conveyance Project is the project contemplated in
19 sections 250 and 11580, requiring authorization and funding before entries could be
20 accomplished by court order. The court found the Delta Conveyance Project was not a
21 project under sections 250 and 11580, and therefore did not need legislative
22 authorization and funding before DWR could commence pre-condemnation entries.

23 In the present coordinated matter, filed August 9, 2023, the current Respondent
24 Landowners make both arguments: the Delta Conveyance Project and the Investigation
25 Phase, each, separately, constitute a "project" and therefore are subject to sections 250
26 and 11580.

27 ///

1 **A. The Delta Conveyance Project is not a Project Under Sections 250 and**
2 **11580**

3 These pre-condemnation activities extend beyond “innocuous or superficial
4 activities and rise to the level of a taking or damaging of property”. Landowners argue
5 these pre-condemnation entries can only be undertaken by authority of classic eminent
6 domain powers as set forth in Water Code sections 250 and 11580. Therefore, these
7 “takings” can only be conducted under the limitations set forth in sections 250 and
8 11580. These sections trigger the requirement for authorization and funding of the
9 project. Landowners focus on this language:

10 “...The department shall not commence any such proceeding in eminent domain
11 unless the *project* for which the property is being acquired *has been authorized*
12 *and funds are available therefor.*”

13 Wat. Code, § 250 (Emphasis added.)

14 “...(T)he department may exercise the power of eminent domain to acquire the
15 property in the name of the state if the *project* for which the property is being
16 acquired *has been authorized and funds are available therefor.*”

17 Wat. Code, § 11580 (Emphasis added.)

18 The Landowners explain their logic: the recent decision of the United States
19 Supreme Court in Cedar Point Nursery v. Hassid (2022) 141 S.Ct. 2063, supports their
20 view that some or all of the requested activities in the petition constitute “takings” under
21 the United States Constitution.² Because there is a taking, DWR must comply with

22 ² In *Cedar Point Nursery*, the United States Supreme Court held that a California regulation
23 giving labor organizers a “right to take access” to an agricultural employer’s property to solicit
24 support for the union, for up to three hours per day on 120 days per year, represented a *per se*
25 taking. Because the regulation did not require compensation to the landowner, it violated the
26 Fifth and Fourteenth Amendments to the United States Constitution. *Cedar Point Nursery v.*
27 *Hassid* (2021) 141 S.Ct. 2063, 2066, 2088.

28 *Property Reserve* assumed, without deciding, that DWR’s activities amount to a taking or
damaging of property for which compensation must be paid. *Property Reserve, supra*, 1 Cal.5th
151, at p. 167.

 The entry statutes provide for compensation to landowners where the entries result in property
damage or substantial interference with the owner’s possession and use of the property. *Code*

1 eminent domain statutes, specifically Water Code sections 250 and 11580. Because
2 the Legislature has not authorized and funded the project, DWR does not have eminent
3 domain authority and is not empowered to move forward by court order with its pre-
4 condemnation investigations.

5 Assuming sections 250 and 11580 address *any* taking, a preliminary issue in
6 Landowners' argument is what "project" must be authorized and funded? What is the
7 project? Other Respondent Landowners, in past proceedings, and again in this
8 proceeding, have argued that the "project" at issue, pursuant to 250 and 11580, is the
9 Delta Conveyance Project. Section 250 states the "department may exercise the power
10 of eminent domain to acquire any property necessary ... if the *project* for which the
11 property is being acquired *has been authorized and funds are available...*". (Emphasis
12 added.)

13 Sections 250 and 11580, in giving DWR the power of eminent domain, instruct
14 DWR that one of the first steps in the exercise of its power to acquire property under its
15 eminent domain authority is to define the "project." Next, DWR must secure funding and
16 authorization of the "project". Then, and only then, can it exercise eminent domain to
17 acquire the property necessary for the "project". The need to secure authorization and
18 funding is fundamental to the acquisition of property necessary for the "project". Thus,
19 Landowners argue without an authorized and funded project, there is no eminent domain
20 authority.

21 The court rejects the argument that the Delta Conveyance Project is a "project"
22 under sections 250 and 11580. Evidence produced at the hearing made clear DWR is
23 gathering information for the evaluation, recommendation, and development of a
24 potential future water conveyance project, under the pre-condemnation statutes, Code of
25

26 *Civ. Proc. §§ 1245.030, subd. (b), (c).* The owner may have just compensation determined by a
27 jury. *Id., § 1245.060, subd. (a).*

1 Civil Procedure sections 1245.010 – 1245.060. The decision-makers have not yet
2 chosen a “project”, and in fact cannot do so until more information is gathered.

3 Uncontradicted witnesses testified at the hearing there are at least four
4 alternatives - the Central, the Eastern, the Bethany Reservoir and “No Alternative/No
5 Project”. Without knowing which - if any - water conveyance route will be chosen, the
6 Legislature cannot authorize and fund one of these alternatives. There is no project at
7 this point.³ The Delta Conveyance Project is not a project under these sections.

8 **B. An Investigation is not a Project Under Sections 250 and 11580.**

9 In court on October 24, 2023, Landowners narrowed their definition of project,
10 asserting sections 250 and 11580 apply to the investigatory phase of projects
11 undertaken by DWR: the DWR must define the scope of the investigations and
12 demonstrate the investigations are duly authorized and funded. Landowners argued such
13 an authorization and funding requirement is properly applied to segments or phases of
14 the entire project; in this instance there is an investigation phase or “project”. The
15 Landowners argue the authorization and funding obligations for this discrete phase
16 would not impose a burden on the pre-condemnation activities. In fact, Landowners
17 argue it would be quite easy for DWR to obtain legislative authorization and funding.
18 Clearly, the investigation has already been funded. In fact, it seems the investigation is
19 near completion, so funding would not be an issue. Similarly, authorization for a project
20 that is near completion would be easily obtained. Accordingly, it is not an “enormous and
21 irrational burden” on the pre-condemnation activities to require DWR to obtain both
22 authorization and funding of this “project” to carry out the pre-condemnation entries
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24
25

26 ³ While the Landowners argue the project is the Delta Conveyance Project, subject to sections 250
27 and 11580, they also state this argument is “effectively moot in light of DWR’s anticipated approval
28 of the Delta Conveyance Project by the end of this year.” *Respondents’ Brief in Opposition to
Entry Petitions, 15:7-11.*

1 before DWR exercises its power to go beyond 'innocuous or superficial' activities - or
2 engage in a taking – in its investigations.⁴

3 Landowners assert the court has the power to decide what is and is not a
4 "project". Landowners argue an investigation can be a "project", as defined by CEQA.
5 Once the court determines there is an investigative project, DWR would need to comply
6 with the project authorization and funding requirements in Water Code section 250 and
7 11580. However, Landowners provide no authority for the imposition of CEQA rules on a
8 DWR pre-condemnation investigation. Further, Landowners do not provide guidance
9 under CEQA for defining this investigation as a "project". This attempt to define a
10 project as the investigation phase would require the court to read into the statute an
11 obligation not appearing on its face.

12 **C. Water Code Sections 250 and 11580 Do Not Limit DWR's Authority to**
13 **Conduct Pre-Condensation Activities**

14 An essential element of the above argument is that without a "project" with
15 legislative authorization and funding, as mandated by the terms of sections 250 and
16 11580, DWR has no eminent domain authority. Lacking eminent domain authority, DWR
17 cannot undertake pre-condemnation investigations. Landowners argue any
18 interpretation of sections 250 and 1580 which does not require authorization and funding
19 will "deprive DWR of the eminent domain authority it needs to acquire the property
20 interest to carry out the instant activities." This is the logic:

- 21 1. DWR only has authority under eminent domain if its project is authorized
22 and funded pursuant to 250 and 11580.
- 23 2. If DWR does not have eminent domain authority, it cannot proceed with
24 pre-condemnation proceedings (sections 250 and 11580).

25 ⁴ Landowners argue defining the investigation stage as the project would not be burdensome: the
26 court could easily define the investigation as the project, which would then require DWR to obtain
27 authorization and funding. The court cannot base a decision to define a project on how easy it
28 might be to accomplish. This alone is not the basis for a determination or definition of a project.

1 Because neither the Delta Conveyance Project, nor the Investigation Project has been
2 authorized and funded, DWR has no eminent domain authority. Without eminent domain
3 authority there is no authority for the pre-condemnation entries. The petitions must be
4 denied.

5 This logic is flawed. Landowners do not address the language in sections 250
6 and 11580 which limit the statutes to eminent domain actions to acquire property. The
7 court believes these statutes apply only to actual efforts to commence a proceeding to
8 acquire property. It is logical that any effort to exercise eminent domain and take away
9 someone's property should first have legislative approval and funding. This reading of
10 the statutes alone would address Landowners' argument.

11 **D. The Pre-Condensation Entry Statutes Do Not Require Authorization**
12 **and Funding of a Project**

13 DWR is a state entity authorized to "acquire, either in fee or in any lesser estate or
14 interest, any real property which it considers necessary for state water and dam
15 purposes" including "for future needs." *Water Code* §§ 22, 253, 258. To benefit the
16 people of the state of California, "[DWR] may acquire by eminent domain any property
17 necessary for state water and dam purposes." *Id.*, §§ 22, 250, 11580. Thus, DWR is
18 authorized to exercise eminent domain authority to acquire real property it considers
19 necessary for state water purposes where it is unable to obtain the property by
20 agreement. Pursuant to that eminent domain authority, DWR is entitled to seek pre-
21 condemnation entry of various parcels owned by the ten respondents who are the
22 subject of DWR's entry petitions.

23 The pre-condemnation entry statutes are found at Code of Civil Procedure
24 sections 1245.010 through 1245.060, inclusive. As relevant, section 1245.010 provides:

25 "Subject to requirements of this article, any person authorized to acquire property
26 for a particular use by eminent domain may enter upon property to make
27 photographs, studies, surveys, examinations, tests, soundings, borings,
28

1 samplings, or appraisals or to engage in similar activities reasonably related to
2 acquisition or use of the property for that use."

3 Code Civ. Proc., § 1245.010 (emphasis added).

4 Because DWR is a person authorized to acquire property for "state water . . .
5 purposes" by eminent domain, *Water Code* §§ 22, 250, 253, 258, 11580, it is also a
6 person that may "enter upon property to make photographs, studies, surveys,
7 examinations, . . . borings, samplings, or appraisals or to engage in similar activities
8 reasonably related to acquisition or use of the property for that use," i.e., state water
9 purposes. In making such entries it is "subject to the requirements of *this article*⁵ . . .,"
10 i.e., Code of Civil Procedure sections 1245.010 through 1245.060, inclusive.

11 As set forth in section, 1245.020:

12
13 "In any case in which the entry and activities mentioned in Section 1245.010 will
14 subject the person having the power of eminent domain to liability under Section
15 1245.060, before making that entry and undertaking those activities, the person
16 shall secure:

17 (a) The written consent of the owner to enter upon the owner's property and to
18 undertake those activities.

19 (b) An order for entry from the superior court in accordance with Section
20 1245.030.[□]

21 *Ibid.*

22 With respect to potential liability, section 1245.060 provides in relevant part:

23 "If the entry and activities upon property cause actual damage to or substantial
24 interference with the possession or use of the property, . . . the owner may
25 recover for that damage or interference *in a civil action, as a defendant in an
26 eminent domain action affecting the property, or by application to the court under
27 subdivision (c).*

28 Code Civ. Proc., § 1245.060, subd. (a). (*Emphasis added.*)

27 ⁵ Article 1, "Preliminary Location, Survey and Tests" of Chapter 4, "Precondemnation Activities"
28 of Title 7, "Eminent Domain Law" within the Code of Civil Procedure.

1 Section 1245.060's language "...as a defendant in an eminent domain action...",
2 makes clear that an eminent domain action is distinct from proceedings commenced under
3 the entry statutes. Under Water Code section 250 and Code of Civil Procedure section
4 1245.010, DWR is a "person authorized to acquire property for a particular use by eminent
5 domain" and also subject to potential liability under section 1245.060 because it is the
6 public entity seeking the entries "for water . . . purposes." With respect to the 10 petitions
7 before the court, DWR has been unable to obtain each owner's written consent to its entry
8 and activities upon the property, so it is seeking a court order in accordance with section
9 1245.030, which provides:

- 10 (a) The person seeking to enter upon the property may petition the court for an
11 order permitting the entry and shall give such prior notice to the owner of the
12 property as the court determines is appropriate under the circumstances of the
13 particular case.
- 14 (b) Upon such petition and after such notice has been given, the court shall
15 determine the purpose for the entry, the nature and scope of the activities
16 reasonably necessary to accomplish such purpose, and the probable amount
17 of compensation to be paid to the owner of the property for the actual damage
18 to the property and interference with its possession and use.
- 19 (c) After such determination, the court may issue its order permitting the entry.
20 The order shall prescribe the purpose for the entry and the nature and scope
21 of the activities to be undertaken and shall require the person seeking to enter
22 to deposit with the court the probable amount of compensation.

23 Code Civ. Proc., § 1245.030.

24 Section 1245.040 permits modification of entry orders on noticed hearing and
25 deposit of increased probable compensation, as appropriate. Section 1245.050
26 addresses disbursement and retention of the probable compensation. These are the
27 "requirements of this article" -- the pre-condemnation entry statutes -- that DWR must
28 comply with to obtain a court order to enter upon and conduct pre-condemnation
examinations, and, explicitly, borings, "or to engage in similar activities reasonably
related to acquisition or use of the property for" state water purposes. *Code Civ. Proc. §*
1245.010. Contrary to the logic of Landowners' arguments, the "requirements of this

1 article" do not include authorization and funding of the project for which the pre-
2 condemnation entries are sought.

3
4 **E. Property Reserve and the Legislative History Do Not Require Project**
5 **Authorization and Funding for Pre-Condemnation Entries**

6 A requirement that the project be already authorized and funded is also
7 inconsistent with the legislative history of the entry statutes and Water Code sections 250
8 and 11580. In Property Reserve, the Supreme Court reformed the pre-condemnation
9 entry statutes to conform with the constitutional requirement that an owner be afforded a
10 jury trial to ascertain just compensation for damages caused during the course of a court-
11 ordered entry. *Property Reserve, Inc. v. Superior Court, supra*, 1 Cal.5th 151, 208; *Cal.*
12 *Const., Article I, § 19, subd. (a)*.⁶ Subsequently, the Legislature amended the entry
13 statutes to conform with *Property Reserve* and to make technical changes. Landowners
14 whose property is damaged or substantially interfered with as a result of an agreed or
15 court-ordered entry may have a jury trial on just compensation for the damages suffered,
16 and they may seek those damages by a separate civil action, by application to the court
17 under section 1245.060, subd. (c) of the entry statutes, or as a defendant in an eminent
18 domain action. *Code Civ. Proc. § 1245.060, subd. (a)*. *Property Reserve* did not require,
19 and the Legislature has not made, any changes to Water Code sections 250 and 11580.

20 Finally, Respondent Landowners' proposed requirements of project authorization
21 and funding would be inconsistent with the Supreme Court's recognition that pre-
22 condemnation entries are a practical and fiscally prudent way of limiting the properties to
23 ultimately be condemned. The Supreme Court recognized:

24 "In view of the unquestioned need for pre-condemnation entry and testing in order
25 to avoid the ill-advised and premature condemnation of private property and the

26 ⁶ "Private property may be taken or damaged for a public use and only when just compensation,
27 ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The
28 Legislature may provide for possession by the condemnor following commencement of eminent
domain proceedings upon deposit in court and prompt release to the owner of money determined
by the court to be the probable amount of just compensation." *Cal. Const., Art. I, § 19, subd. (a)*.

1 substantial uncertainties inherent in the pre-condemnation testing context, the
2 Legislature established a statutory scheme that takes into account the significant
3 public and private interest in an expedited pre-condemnation procedure and at the
4 same time extends to a property owner the fundamental procedural protections
5 embodied in the second sentence of article I, section 19, subdivision (a) of the
6 California Constitution whether or not a public entity's proposed pre-condem-
7 nation activities actually rise to the level of a taking or damaging of property for
8 purposes of the state takings clause."

9 *Property Reserve, supra, 1 Cal.5th 151 at 200.*

10 Further, the Court explained,

11 "The entire purpose of pre-condemnation entry and testing is to enable the public
12 entity to determine whether or not the property is suitable and should be acquired
13 for a public project and whether a classic condemnation action should be
14 commenced. It is counterintuitive to maintain that the commencement of a classic
15 condemnation action is required before such pre-condemnation activities may be
16 undertaken."

17 *Property Reserve, supra, at 197. (Emphasis added.)*

18 **IV. CONCLUSION**

19 The court declines to adopt Respondent Landowners' logic. Respondents'
20 argument overlooks the pre-condemnation entry statutes that are the reason for these
21 coordinated proceedings. Nowhere do the pre-condemnation entry statutes require a
22 project, authorization or funding beyond what is necessary to satisfy an owner's quantum
23 of damages if, in pursuing and completing the court-ordered entries, DWR becomes
24 liable for such damages. The pre-condemnation entry statutes anticipate that a person,
25 such as DWR, authorized to acquire property for a particular use by eminent domain,
26 may enter upon the property to study it, survey it, make borings and engage in similar
27 activities "reasonably related to acquisition or use of the property" for such use, including
28 water conveyance. No authorized, funded project is required because DWR does not yet
seek to acquire by eminent domain, purchase or other agreement. Explicitly, at this pre-
condemnation stage of a Delta Conveyance Project only the "requirements of this
article," i.e., Code of Civil Procedure sections 1245.010 – 1245.060, need be complied
with by DWR. Nothing more is required.

V. NOTICE TO SUBSURFACE OWNERS

Petitioners, in accordance with due process to owners of property and to meet the statutory requirement of notice to owners (Code Civ. Proc. § 1245.030(a)), provided reasonable notice to subsurface owners who might be affected by its orders. DWR conducted a reasonable search of title for subsurface owners on record. For such properties, DWR mailed by certified mail a notice of hearing on the proposed drilling and/or CPT tests on the affected property to the record owner of the subsurface estate at the last known address, if available. DWR also posted a similar notice of hearing listing all the affected properties in a local newspaper for one day in each of two consecutive weeks. No party responded to the Notice.

VI. CONCLUSION AND ORDER FOR PREPARATION OF A FORMAL ORDER OF ENTRY.

The court has reviewed the evidence and listened to the testimony of witnesses and the arguments of counsel. The court determines DWR is entitled to enter the ten (10) properties for various activities as will be set forth in the final order of entry, subject to restrictions set forth in such order. The court has determined the probable amount of compensation, and such shall be set forth for each parcel in an attachment.

SO ORDERED.

Date: November 17, 2023.



Hon. Lydia M. Villarreal
Judge of the Superior Court.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN JOAQUIN STREET ADDRESS: 180 E Weber Avenue MAILING ADDRESS: 180 E Weber Avenue CITY AND ZIP CODE: Stockton, CA 95202 BRANCH NAME: Superior Court San Joaquin	<i>FOR COURT USE ONLY</i>
State of California by and through Department of Water Resources vs Cortopassi Partners, LP et al.	CASE NUMBER: STK-CV-UED-2023-0008476
CLERK'S CERTIFICATE OF SERVICE BY MAIL	

I certify that I am not a party to this cause. I certify that a copy of Ruling and Order was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at Stockton, California, on 11/21/2023.

By: Grant Preeo, Deputy Clerk

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CLERK'S CERTIFICATE OF SERVICE BY MAIL

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and Kevin C. Johnston
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Livermore, CA 94550

Maureen G. Roffoni, Trustee of the
Maureen G. Roffoni Trust; Coleen
Edwards and Robert Hather, Co-
Trustees of the John A. Roffoni
Family Trust; John James Roffoni;
Dierdre I. Roffoni, Trustee of the
Dierdre I. Roffoni Separate Property Trust
Maureen G. Roffoni/Roffoni Management, LLC
Agent for Service of Process:
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CLERK'S CERTIFICATE OF SERVICE BY MAIL

ATTACHMENT 2

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STEPHANIE BOHRER, CLERK
By Spunt Peco
DEPUTY

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN JOAQUIN

Coordination Proceeding Special Title
Rule 3.550

Case No.: JCCP No. 4594
(STK-CV-UED-2023-8476)

DEPARTMENT OF WATER RESOURCES
CASES

ORDER GRANTING PETITION FOR
COORDINATION, COORDINATING
ENTRY PETITIONS, AND SETTING
FURTHER HEARING

Date: September 26, 2023
Time: 10:00 AM
Dept. 8A – by Zoom
Hon. Lydia R. Villarreal

Petitioner, State of California, Department of Water Resources ("DWR") petitions to add an additional ten (10) Petitions for Orders Permitting DWR to Enter and Investigate Real Property to the above-titled coordination proceeding. These Entry Petitions have been previously filed in Alameda, San Joaquin, and Sacramento counties. The hearing came on pursuant to notice at 10:00 a.m. on September 26, 2023, in Department 8A before the Hon. Lydia M. Villarreal; the court and all parties appearing via Zoom. The court having read the moving, opposing and reply papers and heard and considered the parties' further arguments, it now rules on the Petition to Add Cases to the Coordinated Proceeding.

Appearances: Deputy Attorneys General Christine Garske and Kelly Smith appeared on behalf of DWR; Attorneys Thomas H. Keeling, The Freeman Firm, Dante Nomellini, Jr., Nomellini, Grilli & McDaniel appeared on behalf of Respondents

1 Cortopassi Partners, L.P., a California Limited Partnership; Ensher, Alexander &
2 Barsoom, Inc.; Patrick Kalei Estes; Jackson Land Holdings, LP, a California Limited
3 Partnership; LMT Investments, LLC, a California Limited Liability Company; Frank A.
4 Loretz, Trustee of the Frank Loretz Family Trust dated November 26, 2013; Thomas
5 McCormack and Judith Hunt; Cynthia K. Seebeck, Trustee of Family Trust A, The
6 William Garrett Seebeck Family Trust; and Silverdale Farms, Inc.

7
8 Stratton Constantinides, Nixon Peabody, LLP appeared on behalf of Respondent
9 Constellation Brands U.S. Operations, Inc., a New York corporation. Thomas Rector
10 appeared on behalf of Respondent O'Neill Beverages Co., LLC, a Delaware limited
11 liability company.

12 No appearance was made on behalf of Tim, Susan M. and Kevin C. Johnston at
13 this hearing.

14 **Filings Read and Considered:** The court read and considered the following
15 submissions: DWR's Notice of Petition to Coordinate Add-On Cases (Entry Petitions),
16 the moving memorandum of points and authorities and supporting declaration of Deputy
17 Attorney General Kelly T. Smith, including the referenced declarations and exhibits, the
18 Notice of Opposition to DWR's Petition for Coordination filed on behalf of Respondents,
19 represented by counsel Keeling and Nomellini as identified above, their Opposition
20 Memorandum of Points and Authorities, Declaration of Dante J. Nomellini, Jr. and
21 Request for Judicial Notice, and DWR's Reply Memorandum and Request for Judicial
22 Notice. No other written submissions were filed.

23 The court heard and considered the arguments of counsel supporting and
24 objecting to the petition for coordination.

25 **Service of Process:** At the hearing, counsel for DWR reported that it had
26 effectuated service on Cynthia Kay Seebeck, Trustee of Family Trust A, the William
27 Garrett Seebeck Family Trust LLC, who is represented by Messrs. Keeling and
28 Nomellini. With the exception of the Johnston respondents (Alameda County Action No.
23CV035622), it appears that all respondent parties with respect to this Petition

1 are represented or negotiating agreements with DWR and in some cases, both.
2 Counsel for DWR advised that negotiations for entry are ongoing or resolved with
3 respect to Constellation Brands (Sacramento County Superior Court Action 23 CV
4 004122), Ehlers Farms, et al., (San Joaquin County Action No.: STK-CV-UED-2023-
5 0005932), Maureen G. Roffoni, Trustee of the Maureen G. Roffoni Trust, et al. (Alameda
6 County Superior Court Action No. 23CV035749.) No party-specific objections or
7 challenges to the court's jurisdiction were raised at the hearing.

8 INTRODUCTION

9 DWR has moved to coordinate petitions filed in Alameda, San Joaquin and
10 Sacramento counties seeking to permit DWR employees and contractors to enter
11 certain private properties to conduct environmental surveys, geological drilling and
12 exploration for planning and design of a system to convey water from northern
13 California to central and southern California. DWR's Petition seeks to add fifteen (15)
14 additional entry petitions to those previously coordinated in this proceeding; with respect
15 to five (5) of the Petitions, landowners are negotiating or have negotiated agreements to
16 permit DWR's entry and investigations.

17 In the most recently resolved add-on coordination proceeding, on March 21,
18 2023, the court added sixteen (16) entry petitions to the coordination proceeding and
19 issued entry orders permitting DWR to enter subject properties to accomplish
20 above-ground surveys and underground geotechnical exploration towards design and
21 construction of the Delta Conveyance Project.

22 Respondents object to the addition of these Petitions into this coordinated
23 proceeding. Respondents argue these add-on Entry Petitions confirm the Petitioner is
24 "piecemealing" Petitions into this "stale" coordinated proceeding. Respondents object to
25 this petition and perpetuation of DWR's piecemeal approach. Respondents argue it is
26 contrary to the purposes of coordination and not supported by law. According to
27 Respondents, it is inefficient, duplicative, repetitive and burdensome to the resolution of
28 common issues of fact and law.

1 Respondents argue DWR should be required to bring in all known future
2 intended entry petitions into this coordinated proceeding before the court proceeds to
3 hearing evidence and ruling on the merits of the entries. Respondents argue Petitioner's
4 piecemeal approach resolves only a handful of petitions, rather than all petitions, as is
5 the intent of coordination. *Code Civ. Proc. § 404.1*. Further, permitting DWR to add
6 petitions *after* the court has determined – in earlier proceedings – common questions of
7 facts and law, is contrary to the intent of section 404.1 which anticipates that common
8 questions of fact and law be *pending* and not already decided.
9

10 LITIGATION HISTORY

11 DWR's entry petitions are filed pursuant to Code of Civil Procedure section
12 1245.010 *et seq.*, which requires that a hearing be held prior to any such petition being
13 granted. *Property Reserve, Inc. v. Superior Court (2016) 1 Cal.5th 151, 175-176*. The
14 referenced Supreme Court decision followed the cross-appeals of the trial court's
15 original decision granting DWR permission to enter certain properties to undertake
16 non-invasive surveys but denying DWR permission to enter those properties to
17 undertake geotechnical investigations requiring drilling and physical ground penetration.
18 *Property Reserve, Inc. v. Superior Court (2016) 1 Cal.5th 151* upheld the trial court with
19 respect to its ruling on non-invasive entries (which the trial court permitted) and
20 overruled the trial court with respect to its ruling on geotechnical investigations requiring
21 drilling (which the trial court denied). The Supreme Court remanded the case to the
22 Third District Court of Appeal, which issued its decision, *Property Reserve, Inc. v.*
23 *Superior Court (2016) 6 Cal.App.5th 1007*, consistent with the direction of the Supreme
24 Court. On remand to the trial court, after additional hearings, the trial court reformed its
25 order and permitted the petitioned-for entries to also permit geotechnical investigation,
26 with conditions to address the landowners' concerns and requirements. This trial court
27 is bound by both above-referenced published decisions.
28

1 **ARGUMENTS**

2 Respondent landowners assert that permitting DWR to bring new petitions into
3 the coordination proceeding, in piecemeal fashion, is an inefficient, duplicative,
4 repetitive, and burdensome approach to resolving common issues of fact and law.
5 Respondents argue the purpose of coordination is to resolve common questions of law
6 and fact that are "pending". This purpose is undermined if these questions have been
7 decided and brought to resolution in prior actions, and then after resolution, additional
8 actions, sharing those same common questions, are added to the coordinated
9 proceedings. Respondents assert that landowners brought in later are denied the
10 opportunity to be heard in the earlier proceedings that decided the same issues to be
11 resolved in their own current proceedings. In fact, at this later point in the proceedings,
12 there are no "pending" issues. All the common questions of fact and law have already
13 been decided. Further, Respondent landowners brought into these later proceedings
14 are denied an impartial tribunal because the court has already reached a conclusion
15 about common questions of fact and law in prior proceedings. Before the court,
16 Respondents argued that the landowners would benefit from a new judge who would
17 take a new look at these issues. Here, all the decisions are "baked in", according to
18 Respondents. For these reasons, DWR should be required to bring in all future
19 landowners into this coordination petition *before* the merits of pending questions of facts
20 and law are resolved in the coordination petition and entry petitions. Respondents
21 further suggested this coordinated proceeding could be terminated, and if there are new
22 Entry Petitions, DWR can initiate a new case.
23

24 According to Respondent landowners, piecemeal coordination does not meet the
25 standards in Code of Civil Procedure section 404.1. In fact, it entirely defeats the
26 purpose of the coordination. Allowing serial determinations of common questions of fact
27 and law undercuts the point of coordination, which is to permit consistent determination
28 of such common questions. Additionally, the convenience of parties, witnesses and

1 entry petitions and serial merit hearings. Piecemealing the coordination motions results
2 in rounds of add-on coordination petitions which do not conserve judicial resources.
3 Piecemealing the coordination proceedings and subsequent merit hearings risks
4 inconsistent rulings and undermines potential resolution of future petitions by
5 settlement.

6 Respondents argue the court should require Petitioner to advise the court and
7 parties of any additional petitions it has determined needs to be filed and how many
8 there are. DWR should be required to add these to the proceedings before the court.
9 *McGhan Medical Corp. v. Superior Court (1992) 11 Cal.App.4th 804, 812.* Respondents
10 urged that the court not go forward with a coordination hearing until DWR has added all
11 entry petitions it intends to file.
12

13 In opposition to Respondent landowners' arguments, DWR argues that Rules of
14 Court, Rule 3.554 permits coordination of additional cases into an existing coordinated
15 proceeding. The term "pending" refers to the recently filed actions sharing common
16 questions of law or fact with others already coordinated and therefore potentially
17 capable of being added to an existing coordinated proceeding. The pending cases in
18 this proceeding are those petitions filed in various superior courts seeking real property
19 entry for environmental and geological studies for design of a Delta Water Conveyance
20 and that have not yet been determined.

21 DWR points to the March 2009 California Supreme Court order which judicially
22 coordinated these proceedings – pre-condemnation real property entries to conduct
23 feasibility studies for a state water conveyance project in the Delta. These proceedings
24 involve that same question – feasibility studies for a Delta Water Conveyance project.

25 DWR believes it can minimize the number of entries to only those necessary to
26 acquire an understanding of the Delta's geotechnical and environmental conditions for
27 the benefit of California's water users and the Delta environment. The least intrusive
28 manner to do this is necessarily iterative. In addition, phasing manageable numbers of
entries provides certainty to landowners as to when entries can commence and by

1 when they must be completed. Requiring DWR to do as many entries, soils
2 investigations, drillings and environmental surveys as possible at one time, or over an
3 extended period of time, would create scheduling impossibilities, timing difficulties and
4 public cost increases requiring multiple drilling seasons which would likely increase
5 intrusion and disruption to affected landowners.

6 DWR asserts that serial coordination is consistent with the standards of
7 coordination. Each entry petition provided its respondent landowner(s) with notice of
8 DWR's intention to coordinate the petition into this proceeding. All landowners were
9 provided notice of the coordination hearing and notified of the opportunity to object.
10 Only ten parcel owners objected, and counsel submitted opposition on their behalf.
11 Landowners have received notice and taken action each deems appropriate.

12 DWR states the landowners will have an opportunity to be heard with respect to
13 the merits of the individual entries themselves. The hearing is unique to each
14 landowner, although the law and issues are the same. The landowners are not subject
15 to duplication and repetitive hearings. In *Property Reserve, Inc. v. Superior Court*
16 (2016) 1 Cal.5th 151 the Supreme Court found the statutory pre-condemnation
17 procedures provide respondent landowners with the due process to which they are
18 entitled. *Code Civ. Proc. § 1245.010*.

19 DWR argues that presenting the petitions for coordination in stages provides
20 convenience to the parties and reduces the risk of inconsistent rulings. DWR is
21 attempting to conduct the investigations only if necessary and with the minimum
22 disruption necessary. All landowners, at whatever point each may be brought into this
23 coordination proceeding, receive notice of the proceedings and activities pertinent to the
24 parcels they own.

25 DWR argues that landowners are protected because entry orders are interim
26 orders, not final ones, and can be and have been modified. DWR also points out the
27 iterative add-on process improves and updates the additional entry orders and
28 environmental protections, and thus better accommodates landowners.

1 **RULINGS**

2 **Requests for Judicial Notice:** All Requests for Judicial Notice are granted.

3 There were no objections to granting Judicial Notice.
4

5
6 **Landowners request that DWR be required to file all known petitions and to**
7 **postpone the hearing on the merits until all petitions have been added.**

8 This court DENIES this request:

- 9 1. Rules of Court, Rule 3.554 permits litigants to add on new petitions or complaints
10 into an existing coordinated proceeding where the existing proceedings and the
11 new petitions or complaints share common questions of facts and law. There is
12 no question that the new petitions seek entry to real property for environmental
13 and geologic studies for design and construction of a Delta Water Conveyance
14 System and therefore share common questions of fact and law with the
15 earlier-filed petitions. The fact that decisions have been issued on the
16 earlier-filed petitions does not prohibit a newly added respondent landowner from
17 raising any issue, or appealing a decision, or seeking a new hearing. So long as
18 proper notice and an opportunity to be heard is provided, no due process
19 deprivation of rights occurs. Each landowner has rights to object with respect to
20 its own property. The court does not perceive that an affected landowner has the
21 right to object with respect to the rights of other landowners, current or future.
22 Facts and law are specific to each case. The court has an obligation to take care
23 to craft orders responsive to the needs of each respondent landowner when
24 those concerns and needs are brought to the court's attention. By way of
25 example, the court's previous orders addressed property used as vineyards and
26 property used for hunting and treated each differently. Even when petitions are
27 'batched' the court considers each property individually, to the extent distinctions
28 are brought to its attention. Facts and law also change as the proceedings

1 continue. In the earliest proceedings, it was not necessary for DWR to undertake
2 surveys related to cultural sites significant to Native Americans. Now DWR must
3 do so, and the last round of petitions encompassed that fact. In the very earliest
4 petitions, DWR intended to place markers on property so that it could conduct
5 aerial surveys. Because of technological advances, it no longer needs to do so.
6 Presenting the petitions in groups helps the court address these changed
7 requirements in an orderly fashion. Additionally, respondents in later-filed cases
8 have the benefit of publication of the controlling Supreme Court and Third District
9 Court of Appeal case law and the trial court's previous orders, so they can focus
10 their arguments and objections.

- 11
- 12 2. Respondents request that the court order DWR to bring all petitions, current and
13 future, into the coordination proceeding before the next phase of the hearing
14 begins. Such a requirement would delay the information gathering by DWR, it
15 would create scheduling impossibilities, timing difficulties and public cost
16 increases requiring multiple drilling seasons which could increase intrusion and
17 disruption to affected landowners. Phasing manageable numbers of entries
18 provides certainty to landowner as to when entries can commence and by when
19 they must be completed. Further, DWR represents to the court that these
20 geotechnical investigations proceed only when necessary based on data as
21 acquired.
- 22 3. Allowing DWR to submit their petitions in groups permits the court to issue
23 interim orders for which landowners can request modifications and then
24 challenge based on their own specific facts.
- 25 4. Respondents argue the add-on Entry Petitions burden the landowners with
26 duplicative and repetitive proceedings. In fact, with rare exception, each
27 landowner is new to the coordinated matter.
- 28 5. The ability to reject substantively similar cases to a coordinated matter is limited

(Ford Motor Warranty Cases vs. Sup. Ct. (2017) 11 Cal.App.5th 626, 639).

1 These entry petitions are similar in nature and purpose from those previously
2 coordinated. Respondents have not identified anything that distinguishes these
3 entry petitions from those previously coordinated.

4
5 **Ruling:** Accordingly, the court GRANTS the motion for coordination as to those
6 Petitions properly filed and served on respondent landowners.

7 **CONCLUSION**

8 **The Petition to Coordinate all cases listed on Attachment A is GRANTED.**

9 The court finds in accordance with Code of Civil Procedure section 404.4 and
10 California Rules of Court, Rule 3.521(a)(7) that:

11
12 (1) common questions of fact and law are predominating and significant to the
13 litigation;

14 (2) the disadvantages of duplicative and inconsistent rulings, orders or judgments
15 call for coordination;

16
17 (3) the convenience of parties, witnesses and counsel are not significant
18 problems in this case as the locales are reasonably close;

19 (4) the efficient utilization of judicial facilities and manpower support coordination
20 in these cases.

21
22 **OTHER MATTERS**

23 **Future Hearings:** Evidentiary hearings in this matter are set for October 24
24 through 26, at 9:00 am, in Stockton, courtroom to be determined. The parties are
25 ordered to meet and confer prior to commencement of the evidentiary hearings
26 regarding the testimony they believe they reasonably require.

27 **Discovery:** The parties will exchange discovery requests. DWR will seek the
28 identity of lessees on the properties subject to this coordination order. Respondents
intend to request documents from DWR. The parties will continue to meet and confer
regarding any discovery requests and responses.

1 **Notice to Owners of Subsurface Rights:** Consistent with previous orders in
 2 these proceedings, DWR will be providing notice by publication (once a week in two
 3 consecutive weeks) to mineral rights' holders and subsurface rights' holders, of DWR's
 4 intent to enter and commence investigation on the properties subject to this coordination
 5 proceeding.

6 **Time Estimate:** The parties estimate three (3) days will be required for the
 7 evidentiary hearings and argument. In addition to DWR's witnesses, Respondents may
 8 offer a witness.

9 **Service of this Order:** Counsel for the State of California by and through the
 10 Department of Water Resources is ordered to serve a copy of this order and
 11 attachment A on all parties to the within coordinated actions and on the Chair of the
 12 Judicial Council and to file it in each of the above-entitled actions: *Rules of Court, Rule*
 13 *3,529.*

14 So ordered.

15
 16 Dated: October 2, 2023

17 
 18 Lydia M. Villarreal
 19 Judge of the Superior Court
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EXHIBIT A
(LIST OF CASES COORDINATED ON OCTOBER 2, 2023)

1 EXHIBIT A TO OCTOBER 2, 2023 ORDER IN JCCP 4594

2 The following ten (10) cases are coordinated into JCCP 4594 Department of
3 Water Resources Cases (Entry Petitions) on October 2, 2023:

- 4 1. *State of California by and through Department of Water Resources v. Cortopassi Partners, L.P., a California Limited Partnership*, San Joaquin County Superior Court Case No.: STK-CV-UED-2023-0005922.
- 5 2. *State of California by and through Department of Water Resources v. Ensher, Alexander & Barsoom, Inc.*, San Joaquin County Superior Court Case No.: STK-CV-UED-2023-0005984.
- 6 3. *State of California by and through Department of Water Resources v. Patrick Kalei Estes* Sacramento County Superior Court Case No.: 23 CV 002758.
- 7 4. *State of California by and through Department of Water Resources v. Jackson Land Holdings, LP., a California Limited Partnership*, San Joaquin County Superior Court Case No.: STK-CV-UED-2023-0006101.
- 8 5. *State of California by and through Department of Water Resources v. Tim Johnston, Susan M. Johnston and Kevin C. Johnston*, Alameda County Superior Court Case No.: 23 CV 035622.
- 9 6. *State of California by and through Department of Water Resources v. LMT Investments, LLC, a California Limited Liability Company*, San Joaquin County Superior Court Case No.: STK-CV-UED-2023-0005834.
- 10 7. *State of California by and through Department of Water Resources v. Frank A. Loretz, Trustee of the Frank Loretz Family Trust dated November 26, 2013*, Sacramento County Superior Court Case No.: 23 CV 002765.
- 11 8. *State of California by and through Department of Water Resources v. Thomas McCormack and Judith Hunt*, Sacramento County Superior Court Case No.: 23 CV 002820.
- 12 9. *State of California by and through Department of Water Resources v. Cynthia Kay Seebeck, Trustee of Family Trust A, the William Garrett Seebeck Family Trust*, Sacramento County Superior Court Case No.: 23 CV 002815.
- 13 10. *State of California by and through Department of Water Resources v. Silverdale Farms, Inc.*, San Joaquin County Superior Court Case No.: STK-CV-UED-2023-0006106.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN JOAQUIN

Coordination Proceeding Special Title
Rule 3.550

Case No.: JCCP No. 4594
(STK-CV-UED-2023-8476)

DEPARTMENT OF WATER RESOURCES
CASES

PROOF OF SERVICE OF ORDER
GRANTING PETITION FOR
COORDINATION, COORDINATING
ENTRY PETITIONS, AND SETTING
FURTHER HEARING

I, the undersigned, declare that I am a deputy of the Clerk of the Superior Court of San Joaquin County, State of California, and not a party to the within action.

On October 3, 2023 I deposited in the United States Post Office at Stockton, California, true and correct copies of the Order Granting Petition for Coordination, Coordinating Entry Petitions, and Setting Further Hearing, a printed copy of which is attached and made a part hereof, one copy of which being addressed to each of the following named persons at the following named addresses:

See Attached Service List.

I further declare that each of said copies so mailed and addressed was enclosed in a separate envelope, sealed, with the postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct. Executed at Stockton, California on the date above specified.

Deputy Court Clerk

JCCP 4594 – DEPT. OF WATER RESOURCES TEMPORARY ENTRY CASES
COURT'S SERVICE LIST – OCTOBER 2023

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William Garrett Seebeck Family Trust;
Ensher, Alexander & Barsoom, Inc.;
Frank A. Loretz, Trustee of the Frank
Loretz Family Trust dated November 26,
2013; Jackson Land Holdings, LP, a
California Limited Partnership; LMT
Investments, LLC, a California Limited
Liability Company; Patrick Kalei Estes;
Silverdale Farms, Inc, a California
Corporation; and Thomas McCormack
and Judith Hunt

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JCCP 4594 – DEPT. OF WATER RESOURCES TEMPORARY ENTRY CASES
COURT'S SERVICE LIST – OCTOBER 2023

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Maureen G. Roffoni, Trustee of the
Maureen G. Roffoni Trust; Coleen
Edwards and Robert Hather, Co-
Trustees of the John A. Roffoni
Family Trust; John James Roffoni;
Dierdre I. Roffoni, Trustee of the Dierdre
I. Roffoni Separate Property Trust
Maureen G. Roffoni/Roffoni
Management, LLC
Agent for Service of Process:
Daniel K. Rutledge
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Roffoni Family
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Dierdre I. Roffoni
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Judicial Council

Judicial Council of California
Chief Justice
c/o Shawn Parsley
Administrative Coordinator
Administrative Office of the Courts
455 Golden Gate Avenue
San Francisco, CA 94102-3660

EXHIBIT A

County	APN	DCPN	Landowner	Geotech Activities	Environmental Activities	Probable Damages
Sacramento	146-0080-036-0000	SAC-0439A	Patrick Kalei Estes	1 CPT 1 CPTW	Cultural Survey	\$ 4,000.00
Sacramento	146-0080-010-0000 146-0040-044-0000 146-0080-047-0000	SAC-0173D	Frank A. Loretz, Trustee of The Frank Loretz Family Trust dated November 26, 2013	1 CPT 2 DH 1 DH (300 ft.) Hydraulic Conductivity PS Logging Pressuremeter Tests	Cultural Survey	\$ 6,500.00
Sacramento	146-0040-025-0000	SAC-0182B	Thomas McCormack and Judith Hunt	1 DH	Cultural Survey	\$ 3,500.00
Sacramento	119-0230-044-0000	SAC-0262	Cynthia Kay Seebeck, Trustee of Family Trust A, The William Garrett Seebeck Family Trust	1 CPT	Cultural Survey	\$ 3,500.00
San Joaquin	011-040-020-000 011-040-030-000 011-040-040-000 011-040-050-000	SJC-0061	Cortopassi Partners, L.P., A California Limited Partnership	1 DH (300 ft.) Hydraulic Conductivity PS Logging Pressuremeter Tests	Cultural Survey Biological Survey (Walking/Observation)	\$ 3,500.00
San Joaquin	129-200-070	SJC-0091	Ensher, Alexander & Barsoom, Inc.	1 CPT	Cultural Survey	\$ 3,500.00
San Joaquin	071-080-480-000 071-080-530-000 071-080-540-000	SJC-0139	Jackson Land Holdings, LP, a California Limited Partnership	1 CPT (300 ft.) 1 CPTW 1 DH (300 ft.) Hydraulic Conductivity PS Logging Pressuremeter Tests	Cultural Survey Biological Survey (Walking/Observation)	\$ 4,500.00
San Joaquin	129-200-420-000	SJC-0634	LMT Investments, LLC, A California Limited Liability Company	1 DH (300 ft.) Hydraulic Conductivity PS Logging Pressuremeter Tests	Cultural Survey	\$ 3,500.00
San Joaquin	001-050-070-000	SJC-0271	Silverdale Farms, Inc., a California corporation	1 CPT	N/A	\$ 3,500.00
Alameda	099B-7030-001-00	ALA-0143	Tim Johnston, Susan M. Johnston, and Kevin C. Johnston	1 DH	Cultural Survey Biological Survey (Walking/Observation, Vernal Pools & Special Status Amphibians)	\$ 3,500.00

EXHIBIT B

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ATTACHMENT "B" -- SCOPE OF WORK FOR ALL ACTIVITIES

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

I. ENVIRONMENTAL ACTIVITIES

A. Botanical surveys

1. Activities will consist of identifying existing plants and characterizing the vegetation community; evaluating existing vegetation for its suitability as habitat for special status species; visually characterizing the soil and the existing substrate; and identifying wildlife for signs of certain special status species. Activities will include walking the subject properties to assess the habitat and determine the presence or absence of sensitive plant species; collecting samples of vegetation; recording locations using handheld Global Positioning System (GPS) equipment; photographing landscape and vegetation.

2. All surveys will be conducted during daylight hours during the months of February through October. Between 2 and 6 personnel identified by DWR will require 1 to 12 days to survey each parcel.

B. Hydrologic Surveys

1. Activities will consist of identification and characterization of drainage, streams, and creeks, and delineation of wetlands; notation of observed conditions that may impact water quality; and location of stormwater drains and notation of stormwater flow patterns. Surveys by a permitted biologist will be conducted to obtain information concerning the occurrence of threatened or endangered species at sites containing potential habitat for the species or sites designated as critical habitat for the species. Translocation surveys will be carried out to determine the presence or absence of

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1 species within critical habitat traversed by the future proposed alignments that are being
2 studied.

3 2. Between two (2) and six (6) personnel identified by DWR will require one (1) to
4 twelve (12) days to survey each parcel.

5 **C. General Surveys**

6 1. Activities will consist of surveys for sensitive bird species, and/or species
7 habitat components required by sensitive species. Access for these surveys will be by
8 motor vehicle, or where possible, by walking the properties to reach habitats. Species-
9 specific surveys will be conducted primarily by walking transects through appropriate
10 habitat. Between one (1) and two (2) personnel identified by DWR will be used for each
11 survey. Equipment to be utilized will include motor vehicle, binocular/spotting scope,
12 photography equipment, maps, GPS units, and laptop computer.

13 2. The days/hours required to complete the surveys will primarily be two days
14 with a maximum of eight hours per day. Some properties in the study area may require
15 as many as ten days per year, up to two hours per day, to complete the surveys.
16 Surveys are anticipated to be conducted from March through September, and in the
17 month of December. Between two (2) and six (6) personnel identified by DWR will
18 require one (1) to two (2) days to survey each parcel concurrently with hydrologic and
19 botanical survey activities.

20 **D. Habitat and species-specific surveys for reptiles and amphibians**

21 1. Activities will consist of detecting presence for the following sensitive
22 species of reptiles and amphibians that could be present on the properties: giant garter
23 snake ("GGS"), western pond turtle ("WPT"), California red-legged frog ("CRF"),
24 California Tiger Salamander ("CTS") and the species-specific suitability of aquatic habitat
25 (e.g., irrigation ditches, stock ponds, vernal pools, emergent marsh, sloughs, creeks,
26 rivers) and adjacent uplands (up to 1.3 miles away from certain aquatic habitats).
27 Surveys for GGS will be accomplished through "visual encounter surveys" using
28 binoculars in appropriate habitat. Surveys for WPT will require incidental observations.

1 Surveys for CRF will entail visual surveys using binoculars in appropriate habitat.

2 Surveys for CTS will require aquatic larval sampling using dipnets or seines in
3 appropriate habitat.

4 2. Habitat evaluations on each parcel will be conducted by 2 to 4 personnel
5 identified by petitioner. Equipment utilized will include one motor vehicle per crew for
6 access, binoculars, camera, field notebook and/or micro-recorder, GPS, flashlights and
7 headlamps. All habitat evaluations will be conducted during daylight hours and will likely
8 take no more than 5 days per parcel, per year, to complete. Surveys for GGS and WPT
9 will occur from April through September. Surveys for CTS and CRF will occur from
10 January through June. Surveys for CRF eggs, juveniles and adults will occur from
11 January through March and will consist of at least three surveys conducted by day (one
12 per month). Surveys for CTS and CRF larvae will occur between March and June, once
13 a month.

14 **E. Vernal Pool Surveys**

15 1. Activities will consist of office activities and activities on the subject properties.
16 In the office, aerial photograph interpretation with soil characterizations for likelihood of
17 vernal pool presence will be completed. In the field, the locations of vernal pools based
18 on vegetation, soil characteristics, ponding and the presence of invertebrates will be
19 determined. These field determinations will be made by drive-by observations, walking
20 surveys, or dip-netting of ponded pools. Digital photographs documenting the pools will
21 be taken. A handheld GPS unit will be used to document the approximate location of
22 each pool. Other equipment that may be used includes a thermometer, a depth
23 measuring tool, rubber boots, vials and binoculars. Prior to a survey season, the
24 USFWS will be contacted to provide the appropriate clearance to survey for listed
25 brachiopod species. Dip-netting in ponded pools will occur within 2 weeks following a
26 significant rain event and then every 2 weeks thereafter until the pools have completely
27 dried out for the season.

28 *///*

1 2. All survey activities in a given day will occur between the hours of 7 a.m. and 7
2 p.m. and will be conducted by 2 to 6 personnel identified by petitioner. During the rainy
3 season, survey teams may visit one subject property up to every 2 weeks from October
4 to May. Note: the times herein are limited in Special Conditions.

5 **II. ARCHEAOLOGICAL SURVEY ACTIVITIES**

6 A. Activities will consist of investigation to determine whether the study area
7 contains any previously known cultural resources (such as archaeological sites, historic
8 structures, and sacred sites) and may identify the presence of any new resources. The
9 investigation will consist of a records review (information obtained from the California
10 Historical Resources Information System, the California Native American Heritage
11 Commission, knowledgeable local Native Americans, and local historical societies); a
12 site reconnaissance or site visit; and a written report. Activities will include walking on
13 the subject properties and taking notes with paper and pencil. One passenger vehicle
14 will be used for site access only. Equipment used will be cameras and handheld GPS
15 units to confirm surveys are being conducted within the proposed project area. Shallow
16 soil scraping will be necessary if ground surface visibility is poor or non-existent. Such
17 scrapings will be made with a small mason's trowel with a 3-inch blade, and will measure
18 1 square-foot in size and 1-3 inches deep; no soils will be removed or collected. All
19 disturbed soil will be returned to the scraped area to restore the scraping area to its
20 original condition as close as possible.

21 B. All survey activities in a given day will occur between the hours of 7 a.m. and 7
22 p.m. and will be conducted by 1 to 2 personnel identified by petitioner. See Special
23 Conditions.

24 **III. CULTURAL SURVEY ACTIVITIES**

25 Tribal representatives, up to two (2) persons and two (2) cars may investigate
26 parcels so designated and all parcels designated for geologic activities for up to two (2)
27 full days and two (2) half days.
28

1 **IV. GEOLOGICAL ACTIVITIES**

2 **A. Geological Activities**

3 1. Geological activities will consist of studies, surveys and tests conducted by
4 geologists, surveyors, engineers, environmental scientists and specialists and will
5 include one or more of the following: borings with auger and/or mud rotary drill or Cone
6 Penetrometer Testing (CPT), geophysical borings and surveys, pressuremeter tests,
7 hydraulic conductivity tests, PS logging tests and CPTw tests to obtain, study and
8 examine the soil. The geological activities are necessary to identify the suitability of the
9 geological conditions of each property being studied for various alternative alignment
10 locations for a Delta water conveyance project, including surface canal and underground
11 pipeline alternatives.

12 2. Under this order one day shall mean 7:00 a.m. to 7:00 p.m. on Monday through
13 Friday.

14 **3. Geological Activities per Property**

15 The number of boring, CPT and/or CPTw sites permitted for each property is as set
16 forth on Attachment A (DWR Exhibit 5 admitted October 24, 2023 and modified on
17 October 26, 2023). No boring permitted under this entry order shall exceed 200 feet in
18 depth, except as otherwise specified in Attachment A.

19 **4. Preliminary Identification of Geological Sites – Two Days per Parcel**

20 Before commencing geological activities, DWR may enter a parcel to identify the
21 exact locations of boring, CPT and CPTw sites. Activities permitted for this purpose
22 include on-site environmental and cultural surveys, consultation with environmental and
23 cultural scientists, report and consultation with the Underground Service Alert, and
24 identification of all known underground utilities. DWR shall notify the owner and relevant
25 Reclamation District of preliminary entries. Owners may meet with and accompany
26 DWR personnel regarding the location of geological sites on the property. DWR shall be
27 permitted to enter onto a parcel for up to two (2) days to conduct these preliminary
28 identification activities.

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5. CPT Activities – Two Days per CPT Site

- a. Equipment for CPT and CPTw will include a CPT truck, a support truck, a geologist's truck, and an environmental scientist's vehicle.
- b. Personnel for CPT and CPTw may include up to four personnel on site, including a CPT operator, a CPT assistant, a geologist and an environmental scientist. Limited, transitory access is permitted for regulatory personnel from the California Department of Fish and Game and the United States Fish and Wildlife service, as well as DWR personnel required to deliver supplies.
- c. Entry for CPT and CPTw is permitted for not more than two (2) days per CPT and CPTw site.

6. Soil Boring Activities – Eleven Days per Parcel

- a. Equipment for each soil boring will include a drilling rig, a support vehicle, a geologist's truck, and environmental scientist's vehicle, a portable toilet, a forklift (if necessary), 55-gallon drums for the removal of soils from the boring holes. Borings will be made with a 6.5-inch to 8-inch diameter auger, or 3.7-inch to 6-inch diameter bit on a mud rotary drill rig. Soil samples will be obtained and removed for testing. The depth of each boring will vary between 5 feet to a maximum of 300 feet. The exploration drills used to make borings are vehicle-mounted and powered by a commercial or industrial engine.
- b. Personnel for each soil boring will include a 6-person crew, including a drill rig operator, up to two drill rig assistants, up to two geologists and an environmental scientist. Limited, transitory access is permitted for regulatory personnel from the California Department of Fish and Game and the United States Fish and Wildlife Service, as well as DWR personnel required to deliver supplies and remove soils.
- c. Entry for soil borings shall be permitted for up to eleven (11) days per parcel. The drill rig, support truck and portable toilet may remain on each boring site for the permitted duration of the geological activities, including nights, weekends and holidays. For each parcel that requires one soil boring, one 6-person crew may enter for eleven (11) days with equipment necessary for each soil boring.

EXHIBIT C

1 administrative, technical, and physical safeguards to ensure the security and
2 confidentiality of records, except as required by law.

3 4. **Limitation on Recordation of Information.** DWR will only record information of
4 the type allowed to be recorded within the areas permitted for entry, and DWR will
5 not record or disclose any inadvertently observed information of significance, such
6 as special status species or its location, outside of the areas permitted for entry
7 unless otherwise required by law.

8 5. **No Assumption of Liability by OWNER.** OWNER assumes no liability for loss
9 of property, damage to property, or injuries to or deaths of agents, contractors, or
10 employees of DWR by reason of the exercise of the rights of entry granted by this
11 Order.

12 6. **Indemnification.** DWR shall indemnify and hold OWNER harmless from any and
13 all claims, damages, injuries, demands, liability, costs, losses and expenses,
14 including without limitation court costs and reasonable attorneys' fees, arising out
15 of DWR's entry and activities conducted on the Property.

16 7. **Insurance.** DWR will ensure that prior to entering onto the property, all of DWR's
17 contractors have obtained the insurance policies and coverages that meet the
18 State's requirements.

19 8. **Transmittal of Gathered Information to OWNER.** Following compilation of the
20 data gathered, and within one hundred and fifty (150) days of OWNER's written
21 request, DWR will provide OWNER with the final results of:

22 (a) Environmental/Cultural: Any wetlands delineation or biological, cultural,
23 wetland and other surveys or reports of findings, as well as all data, including but
24 not limited to notes, surveys, reports, and photographs, obtained from any
25 investigation on the Property.

26 (b) Geological: Any geological or drilling, other surveys or reports of findings, as
27 well as all data, including but not limited to notes, surveys, reports and
28 photographs, obtained from any investigation on the Property.

1 DWR agrees not to prosecute any activities of the OWNER or prohibit OWNER'S
2 future management of the Property based upon information acquired through the
3 activities allowed by this Order, except as required by law.

- 4 9. **No Waiver of OWNER's Rights.** OWNER does not waive any claim or right of
5 legal action.
- 6 10. **Limitation of Activities.** Surveys and studies to be conducted by DWR on the
7 Property are limited to the specific surveys and studies allowed herein.
- 8 11. **Soil Disturbances.** In the event that DWR's activities on the PROPERTY include
9 any borings or other disturbances of soil, DWR shall restore the soil to a condition
10 substantially similar to its "before" condition promptly upon completion of the
11 activity for which the soil disturbance was made.
- 12 12. **Vehicles and Large Equipment.** DWR shall restrict its use of vehicles and large
13 equipment to existing roadways; no vehicles or large equipment will be allowed in
14 planted fields or orchards, except as necessary for drilling purposes.
- 15 13. **Damage to Roadways and Trails.** DWR shall repair and, to the extent possible,
16 restore to their "before" condition, any roadways and trails on the Property that
17 are damaged as a result of DWR's activities conducted on the Property under this
18 Order.
- 19 14. **Placement of Markers and Other Objects.** In placing markers and other objects
20 on the Property, DWR shall avoid placing such markers and objects in planted
21 fields and, instead, place them in non-planted areas of the Property and/or on the
22 shoulders of roads.
- 23 15. **Cattle and Livestock.** To prevent a choking hazard to cattle and livestock, no
24 flagging of any type on stakes shall be used on lands accessible by cattle or other
25 livestock. OWNER shall advise DWR of such lands and shall identify such on a
26 map within 30 days of this order. In lieu of flagging, non-toxic paint, or other
27 methods to enhance the visibility of stakes, etc., that do not present a choking or
28 digestion hazard to cattle or livestock, may be utilized. DWR shall take all
reasonable and feasible precautions necessary to ensure that any traps, netting
or other equipment or materials installed or otherwise placed on lands accessible

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by cattle or livestock do not present and unreasonable risk of harm to the cattle or livestock.

16. **Notification of Completion of Activities.** Within 30 days following completion of all activities, or the termination or abandonment of any further activities on the Property, DWR shall mail a notice to the OWNER indicating that no further activities will be performed on the Property.

END OF GENERAL CONDITIONS

EXHIBIT D

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**ATTACHMENT D -- SPECIAL CONDITIONS
FOR ENVIRONMENTAL AND CULTURAL (TRIBAL) ENTRIES**

- a) *Time and Date.* To make the order the least oppressive on the owners, the court limits the entries to 10 and one-half hour days between 7 a.m. and 7 p.m., Monday through Friday, with no entries or inspections between Wednesday and Sunday of Thanksgiving week and December 23 and January 1, or on the 4th of July, Labor Day or the Memorial Day holidays. Only five entries would be allowed at night (i.e. 7 p.m. to 7 a.m.). On vineyards and other planted land, there shall be no entries or inspections between September 1 and October 15.
- b) *Hunting Lands:* The owners of land primarily used for hunting shall identify such areas on a map with specificity and deliver it to Petitioner within 30 days from the date of entry of this Order. Between October 1 and February 25, there would be no entries or inspections on such land.
- c) *Safety Measures for Lands where Pesticides are Applied:* The California Department of Pesticide Regulation requires pesticide users to notify all personnel known to be or likely to enter a treated area on the date a pesticide application was made, or while a particular restricted entry interval is in effect, to give adequate notice of the identity of the pesticide by brand or common chemical name, and to give adequate notice of the precautions associated with that particular chemical. This information must be posted in a central location, and all employees and visitors that are within one-quarter of a mile of a treated area are required to first report to the central location. Department of Water Resources ("DWR"), its Contractors, and/or Representatives shall provide appropriate verification that its employees and representatives are fully trained, pursuant to the requirements of the California Department of Pesticide Regulations, on the application of and appropriate precautions associated with the application of pesticides utilized on the Subject Property. In addition, DWR, its contractors, and/or representatives, will adhere to all access restrictions related to pesticides in use on the Subject Property.

- 1 d) *Entry by Agreement*: Any owner and DWR could by written agreement allow
 2 entry and inspections on such owner's property on any day or time in lieu of the
 3 time or dates allowed by the Order.
- 4 e) *Notice of Entry*: DWR shall give 72-hour notice by telephone and email to the
 5 owner's designated representative or if none, to the owner. Each owner shall
 6 within 7 days of the issuance of this Order designate someone for such purpose
 7 and give a telephone number and email address. Nighttime entries would require
 8 5 days' notice. DWR shall designate the persons, their specialties, any
 9 conveyances, and the general area of the property they would be working on for
 10 each entry. DWR should make all reasonable efforts to accommodate reasonable
 11 requests to alter the dates based on the owner's necessary use of the property.
- 12 f) *Maximum Days and Personnel per Property*: The court approves the
 13 Environmental and Cultural activities set out in Attachment B -- Scope of Work for
 14 All Entries and determines that giving a fixed budget of days which can be used
 for any listed activity results in the fewest days of intrusion on the property owner.
 The Court sets out the following table:

Acreage	Days	Personnel
100 acres or fewer	12 days	up to 6 people per entry
101 to 1000	16 days	up to 6 people per entry
1001 to 2000	22 days	up to 6 people per entry
2001 to 3500	28 days	up to 8 people per entry
3501 to 8500	33 days	up to 8 people per entry.

- 20 g) *Dwellings and Closed Structures*. There shall be no inspection or entry within 100
 21 feet of an inhabited dwelling house. There will be no right to enter closed
 22 structures on the property, including, specifically, office buildings, garages, fully
 23 enclosed sheds, and buildings not considered open to the public.
- 24 h) *Levees and Reclamation Facilities*. There shall be no digging, hand auger or
 25 drilling on or within 100 feet of the base of a levee. DWR shall comply with any
 26 general rules or regulations of a reclamation district applicable also to the
 27 underlying property owner regarding use or weight of vehicles on its easement
 28 area, or restricted access to pumping stations, digging near levees, and the like.

- 1 i) *Conservation Areas.* DWR shall coordinate with Fish and Game regarding entry
2 to all areas covered by a conservation easement or grant. DWR shall obtain and
3 comply with all necessary permits as required by law. DWR shall not trap any
4 wildlife in a conservation easement without specific approval or permit of US Fish
5 & Wildlife Service, National Marine Fisheries Service or California Department of
6 Fish and Game, as appropriate. DWR shall limit activities in a conservation zone
7 to avoid injuring protected species.
- 8 j) *Identification.* DWR personnel and its contractors shall have identity cards and be
9 prepared to show them to any owner who requests to see such. DWR personnel
10 shall use their best efforts not to needlessly block or impede any activity by the
11 owner or his or her agents on the property.
- 12 k) *Railroad Rights of Way.* DWR shall contact railways prior to entry and shall
13 comply with reasonable conditions of special visible clothing near the railroad
14 tracks and shall cross the railroad tracks with vehicles only at designated public
15 crossings or in consultation with railroad personnel. DWR personnel should not
16 linger or loiter or perform work within 25 feet of the railway tracks. DWR shall use
17 designated crossing points for pedestrian crossing where reasonably available
18 and shall cross only when no trains are observable.
- 19 l) *Owners' Access:* Nothing in this Order contemplates or authorizes DWR to fence
20 any area of property or to prevent access of the owners to their properties, except
21 when DWR personnel are actually utilizing that specific area of the property.
- 22 m) *DWR to Consult:* DWR shall consult with property owners about any special
23 conditions on property, including very high water table, and shall consider such in
24 doing any testing, including digging.
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EXHIBITE

- 1 d) *Entry by Agreement*: Any owner and DWR could by written agreement allow
2 entry and drilling or geological activities on such owner's property on any day or
3 time in lieu of the time or dates allowed by the Order.
- 4 e) *Notice of Entry*: DWR shall give 14 days' notice of intended date to drill or CPT
5 test by telephone and email to the owner's designated representative or if none,
6 to the owner. Each owner shall within 7 days of the issuance of this Order
7 designate someone for such purpose and give a telephone number and email
8 address. DWR shall designate the persons, their specialties, any conveyances,
9 and the general area of the property they would be working on for each entry.
10 DWR should make all reasonable efforts to accommodate reasonable requests to
11 alter the dates based on the owner's necessary use of the property.
- 12 f) *Dwellings and Closed Structures*. There shall be no inspection or entry within 100
13 feet of an inhabited dwelling house. There will be no right to enter closed
14 structures on the property, including, specifically, office buildings, garages, fully
15 enclosed sheds, and buildings not considered open to the public.
- 16 g) *Levees and Reclamation Facilities*.
- 17 (1) Within fourteen (14) days from the date of entry of this Order, DWR shall
18 mail a copy of this Order to all reclamation districts within whose boundaries
19 DWR shall be entering pursuant to this Order. DWR shall promptly file a proof
20 of service of such mailing with the court and serve it on all parties.
- 21 (2) DWR vehicles or equipment shall not unreasonably block access by other
22 vehicles on levee roads or other reclamation district-operated roadways.
- 23 (3) DWR shall not perform any borings or CPT holes within three hundred
24 (300) feet of a landside levee toe, without first giving ten (10) days' notice of
25 the change of site plan and proposed work to both the affected reclamation
26 district and the landowner. The reclamation district, the landowner, or both,
27 may seek *ex parte* relief under paragraph 9 of the Order.
- 28 (4) DWR shall not perform any borings or CPT holes during the "wet/high
water season" from December 1st through April 30.
- h) *Conservation Areas*. DWR shall coordinate with Fish and Game regarding entry to
all areas covered by a conservation easement or grant. DWR shall obtain and
comply with all necessary permits as required by law. DWR shall not trap any

1 wildlife in a conservation easement without specific approval or permit of US Fish
2 & Wildlife Service, National Marine Fisheries Service or California Department of
3 Fish and Game, as appropriate. DWR shall limit activities in a conservation zone
4 to avoid injuring protected species.

- 5 i) *Identification.* DWR personnel and its contractors shall have identity cards and be
6 prepared to show them to any owner who requests to see such. DWR personnel
7 shall use their best efforts not to needlessly block or impede any activity by the
8 owner or his or her agents on the property.
- 9 j) *Railroad Rights of Way.* DWR shall contact railways prior to entry and shall
10 comply with reasonable conditions of special visible clothing near the railroad
11 tracks and shall cross the railroad tracks with vehicles only at designated public
12 crossings or in consultation with railroad personnel. DWR personnel should not
13 linger or loiter or perform work within 25 feet of the railway tracks. DWR shall use
14 designated crossing points for pedestrian crossing where reasonably available
15 and shall cross only when no trains are observable.
- 16 k) DWR shall confer with property owners if it necessary or appropriate to fence any
17 area of property or prevent access of the owners to their properties, and only
18 when DWR personnel are actually utilizing that specific area of the property for
19 equipment or property.
- 20 l) DWR shall consult with property owners about any special conditions on property,
21 including very high water table, and shall consider such in doing any testing,
22 including digging.
- 23 m) Tribal representatives (2) and DWR (up to 4) are granted two (2) additional full
24 days and two (2) half days to do pre-drilling site clearances prior to the
25 commencement of drilling activities.
- 26 n) DWR shall follow the guidelines in its Bulletin 74-90 with respect to the method by
27 which the exploratory boring will be sealed.
- 28 o) Upon request by an owner, DWR shall promptly provide a copy of the Delta
Conveyance Authority's "Field Work Manual" that DWR is using for the geologic
and drilling activities.

END OF SPECIAL CONDITIONS -- GEOLOGICAL