

DESMOND, NOLAN, LIVAICH & CUNNINGHAM

ATTORNEYS AT LAW

April 8, 2022

SENT VIA U.S. MAIL & EMAIL

Executive Officer
California Water Commission
P.O. Box 942836
Sacramento, CA 94236-0001
cwc@water.ca.gov

Re: Request to Appear and Be Heard at Hearing on Proposed Resolution of Necessity to Acquire Property Owned By LOKI INVESTMENTS, LLC AND DANIEL ENGSTROM, INDIVIDUALLY; APNs 042-260-019 and 042-270-007, DWR Parcel No. YBSH-135; Objections to Adoption of Resolution of Necessity

To Executive Officer and Commission Members:

Our office represents Loki Investments, LLC and Dan Engstrom (“Owners”), owners of the above-referenced real property (“Subject Property”). We are in receipt of the California Water Commission’s (“Commission”) Notice of Intent to Adopt Resolution of Necessity to Acquire Certain Real Property or Interest in Real Property by Eminent Domain for the Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project (“Project”), dated March 24, 2022 (“Notice”).

This letter constitutes the Owners’ formal request, and reservation of right, for one or more of their representatives to appear and be heard at the Resolution of Necessity (“RON”) Hearing scheduled virtually for April 20, 2022 at 9:30 a.m.

The Owners further submit this correspondence to serve as a statement of written objections to be included in the official record of the proceeding.

15th & S Building
1830 15th Street
Sacramento, California 95811-6649
Telephone: 916/443-2051
Facsimile: 916/443-2651
E-mail: glivaich@dnlc.net

J. Russell Cunningham
Brian Manning
Kristen Ditlevsen Renfro
Benjamin C. Tagert
Mikayla Kutsuris
Josh Dalavai

Of Counsel
William W. Nolan (Ret.)
Gary Livaich
Edward K. Dunn

Earl D. Desmond
(1895-1958)
E. Vayne Miller
(1904-1965)
Richard F. Desmond
(1923-2004)
William C. Livaich
(1950-2007)

The Owners object to adoption of the proposed RON for the following reasons:

1. There Is Ongoing CEQA Litigation in Yolo County, Which, if Successful, Will Result in the Termination of the Project.

The Swanston Ranch Owners Association has filed a CEQA action against the California Department of Water Resources (“DWR”) (Case No. PT19-1724), which is currently pending in Yolo County. The property owners in that case allege that DWR has violated CEQA by failing to prepare an adequate Environmental Impact Report (“EIR”) for the Project. Specifically, the Swanston Ranch owners allege, among other things, that the EIR fails to adequately describe the environmental setting and fails to adequately disclose, analyze, and/or mitigate the following: (1) the Project’s environmental impacts, (2) the Project’s impacts to terrestrial resources, (3) the Project’s impacts to existing land uses, (4) the Project’s impacts to recreational uses, and (5) the Project’s environmental justice issues. One of the remedies that the Swanston Ranch owners seek is a peremptory writ of mandate ordering DWR to vacate and set aside its approval of the Project. In other words, if the pending CEQA litigation is successful, the Project will be terminated.

2. Public Interest and Necessity Do Not Require the Project, The Proposed Project Is Not Planned or Located in the Manner that Will Be Most Compatible With the Greatest Public Good and Least Private Injury, and the Subject Property is Not Necessary for the Project.

Among the findings that must be made before adopting the RON are (1) that the public interest and necessity require the project (CCP § 1240.030(a)), (2) that the project is planned in the manner that will be most compatible with the greatest public good and the least private injury (CCP §1240.030(b)), and (3) that the property sought to be acquired is necessary for the project (CCP §1240.030(c)). In this instance, none of these conclusions can be reasonably drawn. The Commission has not made an adequate showing that public interest and necessity require the Project. Further, the Project has been aligned in a fashion that will create extreme private injury to Owner, and the Commission has neither adequately assessed, nor made any effort to either

mitigate, or adequately compensate for, these injuries. Finally, the Commission has failed to adequately address the necessity of acquisition of the Subject Property for the Project.

3. Requirements of Government Code Section 7267.2 Have Not Been Complied With.

Although amount of compensation will not be considered at the hearing, the issue of compensation is distinct from the question of whether a condemnor has complied with Government Code section 7267.2. (*People ex rel. Dept. of Transportation v. Cole* (1992) 7 Cal.App.4th 1281, 1286.) A condemnor must consider the property owner's objections that the mandatory requirements of section 7267.2 have not been complied with, including objections concerning the adequacy of the appraisal upon which an offer is based. (*Id.* at 1285-86 (*City of San Jose v. Great Oaks Water Co.* (1987) 192 Cal.App.3d 1005, 1011-1013).)

Section 7267.2, subdivision (a)(1) requires: "Prior to adopting a resolution of necessity pursuant to Section 1245.230 of the Code of Civil Procedure and initiating negotiations for the acquisition of real property, the public entity shall establish an amount that it believes to be just compensation therefor, and shall make an offer to the owner or owners of record to acquire the property for the full amount so established." (*Id.*) "The amount shall not be less than the public entity's approved appraisal of the fair market value of the property." (Cal. Gov. Code § 7267.2.)

Further: "The public entity shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount it established as just compensation." (Gov. Code § 7267.2(b).) The written statement must "contain detail sufficient to indicate clearly the basis for the offer" and ***must separately state "damages to real property," with included "calculations and narrative explanation supporting the compensation."*** (Gov. Code § 7267.2(b), (b)(3) (emphasis added).) When a taking involves only a portion of a larger parcel, ***"compensation must be awarded for the injury, if any, to the remainder."*** (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 740.) CCP section 1263.420 defines damage to the remainder as being caused by "[t]he severance of the remainder from

the part taken” and/or “[t]he construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the damage is caused by a portion of the project located on the part taken.” (CCP § 1263.240(a), (b).)

The Commission has failed to fully comply with the requirements of section 7267.2. The appraiser’s thoughts, calculations, and other bases for ultimate determination of the value of the easement as “20% rights” in the Subject Property were undisclosed and undiscernible from the rest of the Appraisal Summary Statement (Date of Value: September 22, 2021).

The appraisal and offer to purchase based thereon clearly fail to reflect the full measure of just compensation mandated by Article I, section 19 of the California Constitution and the Eminent Domain Law. And although a report was supplied to the Owners, it did not contain anywhere close to statutorily adequate detail concerning severance damages as required by the Government Code.

Should the RON be adopted and a condemnation suit initiated, the Owners will be compelled to challenge the right to take, and will assert the objections stated herein, as well as any additional objections raised at the RON Hearing, or which exceed the parameters set forth in the Notice. The bases for objection stated herein are informed by the Notice’s stated parameters, and the objections are limited to those the Owners are reasonably capable of making prior to being afforded an opportunity to review the text of the proposed Resolution and final plans for the project. The Owners reserve the right to raise additional arguments objecting to the right to take both at the RON Hearing and in any future proceedings.

We request that the Commission provide by email transmission a copy of the proposed resolution and any other materials relating to consideration of the resolution ahead of the RON Hearing, at the earliest time the documents are available.

We would appreciate confirmation of your timely receipt and filing of this correspondence, and we expect its inclusion in the official record of the proceeding. We have attempted to transmit copies to multiple relevant staff contacts, through multiple means, in addition to mailing as directed in the Notice, to ensure that one

way or another the correspondence is timely processed. In the event there is any delay in receipt and/or filing of this correspondence, which may be attributable to irregularities caused by the current coronavirus situation with respect to timeliness of mail service or processing by staff, we respectfully request and presume that the correspondence will nonetheless be filed and included in the record of the proceeding and be deemed timely filed.

Sincerely,

DESMOND, NOLAN, LIVAICH & CUNNINGHAM

Gary Livaich

Gary Livaich
GL/kms

cc: Client

Holly Stout, Esq.
California Water Commission
P.O. Box 942836
Sacramento, CA 94236-0001
Holly.stout@water.ca.gov

Joe Yun
Executive Director, California Water Commission
P.O. Box 942836
Sacramento, CA 94236-0001
joseph.yun@water.ca.gov