



United States Department of the Interior



FISH AND WILDLIFE SERVICE

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In Reply Refer To:
FWS/LR8/IR08/IR10

By Electronic Mail

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Subject: United States Fish and Wildlife Service
Submission of Comments for the March 15, 2023, Resolution of Necessity Hearing
California Water Commission

APN 033-220-068 – DWR Parcel No. YBSH-159

Michael and Diana Kleary/Gus and Gayle Margarite - FWS Easement # 29C – 44 acres

Dear Ms. Stout:

As provided in the February 21, 2023, Notice of the Resolution of Necessity hearing, the United States Fish and Wildlife Service (“FWS” or “Service”) submits these written comments for consideration by the California Water Commission (“Commission”) and inclusion in the record for this proceeding concerning the above-referenced easement in which the United States holds an interest.

Federal Interest in DWR Parcel No. YBSH-159

First, the Commission must understand that the conservation easement held here is an interest in lands held by the United States. As such, absent a waiver of sovereign immunity, a federal interest in real property cannot be condemned. *United States v. Navajo Nation*, 556 U.S. 287, 289 (2009). (“A waiver of the Federal Government’s sovereign immunity must be unequivocally expressed in statutory text, and will not be implied. Moreover, a waiver of the Government’s sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.”); *Minnesota v. United States*, 305 U.S. 382, 386-87 (1939), *superseded on other grounds by statute as stated in Morda v. Klein*, 865 F.2d 782, 783 (6th Cir. 1989); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917). The sole extant statutory exception to this federal preemption relating to condemning real property owned by the United States is under the Quiet Title Act (“QTA”), 28 U.S.C. § 2410(a), and this is a limited waiver of sovereign immunity. *Id.* (the United States “may be made a party” in a case “to condemn . . . real or personal property on which the United States has or claims a mortgage or other lien.”); *Block v. North Dakota*, 461

U.S. 273, 286 (1983) (“Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States’ title to real property.”). Moreover, this waiver as related to a mortgage or lien is narrowly construed. *See, e.g., Hussain v. Boston Old Colony Ins. Co.*, 311 F.3d 623, 629 (5th Cir. 2002) (Section 2410 “was specifically passed to waive the sovereign immunity of the United States so that private parties could get the government into court when necessary to quiet title or resolve priority of liens or mortgages”); *Village of Wheeling v. Fragassi*, No. 09 C 3124, 2010 WL 3087462, at *4 (N.D. Ill. Aug. 2, 2010) (lease not a mortgage or lien under § 2410); *Ansonia Nat’l Bank v. United States*, 147 F. Supp. 864, 865 (D. Conn. 1956) (easement not a “lien” under § 2410).

Likewise, the doctrine of prior public use ensures that the United States’ interest, absent a contrary statutory provision enacted by Congress, triumphs over a state or local government’s effort to condemn federal lands or real property interests. The doctrine is designed to prevent courts from becoming embroiled in competing claims by governmental entities to the same property. *See United States v. Acquisition of 0.3114 Cuerdas of Condemnation Land More or Less, Located on Calle*, 753 F. Supp. 50, 54 (D.P.R. 1990) (“Without the prior use doctrine, there could be a free for all of battling entities all equipped with eminent domain power, passing title back and forth.”). Simply stated, even ignoring that the public interest of the United States may be supreme, our prior public interest reflected in the United States’ ownership of the property suffices to block any condemnation by state or local governments.

Procedural Background

Our Realty Section, Refuge Staff, and the Department of Water Resources (“DWR”) participated in a meeting concerning this Project and exchanged a few communications in February-April of 2021. FWS heard nothing further until our Realty Section began receiving letters in late 2021, concerning easement parcels that were included in DWR’s Batch A Resolution of Necessity hearing process. In connection with this particular parcel, our Realty Section first received a letter dated June 2, 2022, from DWR Right-of-Way Agent Fahmi Kassis, indicating that DWR intended to acquire a flowage easement on this conservation easement parcel, but which incorrectly identified the APN numbers. The FWS sought clarification through a letter dated June 28, 2022. DWR issued a revised letter on June 30, 2022, which identified APN 033-220-068. In response, the FWS submitted a letter to Catherine McCalvin of DWR dated July 7, 2022, setting forth the federal interest in the conservation easement. We request that these referenced letters, including the Service’s February 14, 2022, letter, to Ms. McCalvin be included in the record of this proceeding. DWR responded to the Service’s February letter on April 6, 2022.

DWR submitted written notice of the first informational hearing for this parcel on August 23, 2022, to which the Service submitted its notice of intent to be heard at that hearing on September 13, 2022. However, this matter was removed from the September 21, 2022, informational hearing agenda and not heard. DWR noticed this matter for the RON hearing on September 26, 2022. As required within 15 days of the date of the Notice of Hearing, FWS submitted its written request to be heard regarding this parcel and submitted comments on October 6, 2022. This parcel was not discussed at the October 19, 2022, RON Hearing, but has been noticed for the RON hearing on March 15, 2023.

Kenneth and Cynthia Martin Easement

Enclosed herein as Exhibit A is the Easement by which Kenneth E. Martin and Cynthia Martin granted to the United States by Grant of Easement a perpetual conservation easement over a total of 43.99 acres under authority of the Migratory Bird Conservation Act of February 18, 1929 (16 U.S.C. 715, et seq. as amended), which authorizes the Secretary of the Interior to acquire certain lands or interests therein for waterfowl habitat. The purpose of this easement is to maintain habitat for waterfowl. The United States

expended sixty-two thousand dollars (\$ 62,000.00) for the easement, which is a component part of the National Wildlife Refuge System and subject to pertinent National Wildlife Refuge system laws and regulations. The parcel is now in ownership to Michael and Diana Kleary and Gus and Gayle Margarite.

Notably, the easement in Paragraph 6 specifically provides that the Grantor “shall not grant any additional easements, rights-of-way, or other interests in the Easement Lands, other than a fee or leasehold interest, or grant or otherwise transfer to any other person or entity or to other lands or otherwise abandon or relinquish any Easement Waters without the prior written authorization of Grantee given through the U.S. Fish and Wildlife Service. Such authorization will be given unless the Secretary or his designated representative determines that the proposed interest or transfer will interfere with the use of the Easement Lands as waterfowl habitat suitable for migratory birds or interfere with the availability of Easement Waters for the Easement Lands.” Paragraph 3 of the Easement prohibits the Grantor from altering the existing topography, or from otherwise altering or using or permitting the use by third parties of the Easement Lands for any purpose without the prior written authorization of the Service. Such authorization will only be given if the Secretary of the Interior or her designated representative determines that the proposed activity will not change the character of the Easement Lands or adversely affect the use of the Easement Lands as waterfowl habitat suitable for migratory birds.

Similarly, 50 CFR 25.44 requires permits for use of easement areas administered by us where proposed activities may affect the property interest acquired by the United States. This includes instances where the third applicant is a governmental entity which has acquired a partial interest in the servient estate by subsequent condemnation. Regulations regarding rights-of-way in easement areas are found in 50 CFR part 29.21.

As required by the National Wildlife Refuge System Improvement Act of 1997, before authorizing a use that affects our easement interest, the Service must first make a compatibility determination (16 U.S.C. §668dd(d)(3)(A)(i)). A compatibility determination is a written determination signed and dated by the Refuge Manager and Regional Chief, signifying that a proposed or existing use of a national wildlife refuge is a compatible use or is not a compatible use. Compatible use means a proposed or existing wildlife-dependent recreational use or any other use of a national wildlife refuge that, based on sound professional judgment, will not materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purpose(s) of the national wildlife refuge (50 CFR 25.12(a)). In making the determination, the Refuge Manager must consider not only the direct impacts of a use but also the indirect impacts associated with the use and the cumulative impacts of the use when conducted in conjunction with other existing or planned uses of the refuge, and uses of adjacent lands or waters that may exacerbate the effects of a refuge use (603 FW 2.11B(3)). This federal compatibility determination is markedly different from the representations DWR has made that operation of the proposed Project is compatible with the existing conservation easements.

As stated in the USFWS easement, the landowner cannot grant an additional easement without the prior written authorization of the Fish and Wildlife Service. In order to facilitate this Project, we are reviewing hydrologic data provided by DWR, engaging with the landowner, and will work with DWR and the landowner to resolve identified issues. Upon receipt of an application, the Service will then engage in a compatibility determination for the Project, as required under federal refuge law and regulation. Note that the Service *cannot* make a compatibility determination on future permitted construction and operation of the fish passage and floodplain restoration projects amounting to a change in the Project not analyzed previously. Should they arise, any future changes to the Project would require additional environmental analyses. Such future projects would also require a federal compatibility determination, but this cannot occur until these projects have been sufficiently analyzed in future environmental analyses, which would allow us to ensure proposed future modifications do not impact our interest in the property.

Existing Purpose of USFWS Easement on Kleary/Margarite Parcel

The USFWS Easement was purchased to protect wetlands and easement waters in perpetuity for waterfowl and other migratory birds. Wetlands on this property are considered managed freshwater wetlands and consist of a complex of shallow wetland impoundments contained by levees that are delivered water through managed irrigation infrastructure. Landowners actively manage the water levels of these wetlands using water control structures to promote beneficial wetland vegetation and provide foraging habitat for wintering and migrating waterfowl. Although water depth varies with wetland topography, landowners typically manage for an average depth of 8-10 inches that provides optimal foraging habitat for most waterfowl and a great diversity of migratory waterbirds.

DWR's Proposed Flowage Easement

Under DWR's proposed flowage easement, the landowner would grant a perpetual right-of-way and easement in the real property, for the purposes of seasonal floodplain fisheries rearing habitat and fish passage in the Yolo Bypass. In addition, the proposed flowage easement would provide the Grantee (DWR) the right for the flowage of water over and upon the Property as may be required for the *present and future* permitted construction and operation of fish passage and floodplain restoration projects. It is not clear if the easement would allow alteration to riparian habitat. The proposed flowage easement would also include the right to flow water and materials and by said flow erode; or place or deposit earth, debris, sediment, or other material.

Anticipated Project Impacts from DWR data

According to DWR analysis, the Big Notch Project would flood the Kleary/Margarite Parcel 033-220-068 an average of 6.4 additional days above 6" within the November 1 through February 28 hunt period. The number of additional days the parcel would flood above 6" during the hunt period would range from 0 to 26 days. These days represent flood levels that could potentially impact waterfowl use and hunting quality. The parcel would flood an average of 6.9 additional days above 12" during the hunt period, with a range from 0 to 24 additional days flooded above 12". These days represent flood levels that could potentially impact landowner access in addition to waterfowl use and hunting quality. The parcel would flood an average of 7.6 additional days above 18" during the hunt period, with a range from 0 to 23 additional days flooded above 18". These days represent flood levels that could potentially impact wetland infrastructure (levees, water control structures) in addition to access, waterfowl use and hunting quality.

Standard for Resolution of Necessity

The lands covered by this United States easement are already appropriated for a public use. As such, the Commission must follow certain procedures to make determinations as to whether the proposed new use is either compatible with or more necessary than the existing use.

CCP 1240.510 requires that the proposed use will not unreasonably interfere with or impair the continuance of the public use as it then exists or may reasonably be expected to exist in the future. As noted, this easement was acquired for the purpose of waterfowl habitat suitable for migratory birds.

Under CCP 1240.610, the Commission would need to find that use for which the property is sought to be taken is a more necessary public use than the use for which the property is appropriated.

Increased flooding over 6" in depth on these wetlands would likely have a negative impact on migratory bird foraging habitat, potentially impacting waterfowl use and ultimately hunting quality. Increased

flooding over 12” would further decrease migratory bird foraging habitat and would also impact landowner access by potentially flooding roads/ levees/hunting blinds and making it unsafe for hunters to wade the wetlands. Finally, increased flooding over 18” would not only impact migratory bird habitat and landowner access, but significantly overtop roads, levees and water control structures potentially causing costly damage to wetland infrastructure. The FWS purchased a conservation easement on this property with the understanding that landowners would continue to optimally manage their lands for migratory birds as long as they had the incentive to hunt and enjoy passive recreation on their properties. Increased flooding has the potential to decrease hunting quality, decrease landowner access, and increase infrastructure maintenance costs, all of which could be impediments to future management of the property as migratory bird habitat.

The April 6, 2022, letter from DWR states without explanation that operation of the Project is compatible with the existing conservation easements and will not unreasonably interfere with or impair the continuance of the Service’s public use as it exists or may reasonably be expected to exist in the future. Citing to the Easement for the ‘Upper Swanton[sic]’ property, the DWR letter further indicates the Service’s conservation easements specify that the “properties are subject to a nonexclusive right to flood the properties between October 15 and March 1, as an existing use.[footnote omitted]. Therefore, DWR does not anticipate the need to modify the existing Service conservation easements.”

The Martin easement provides in Paragraph 5 that “[h]owever, in any year that Grantors do not flood the Easement Lands in the customary manner to their historical hunting season level, Grantee shall have, at its sole discretion, the nonexclusive right and option, but not the obligation, to flood the Easement Lands from October 15th through March first of the following year.” However, flooding by the United States in the “customary manner to their historical hunting season level” would be for the purpose of maintaining habitat for waterfowl, which is not the same as the prospective flooding under the proposed project to the levels shown in modeling, which in certain cases exceed the historic levels that were contemplated in the Martin easement.

Conclusion

The Fish and Wildlife Service has initiated contact with several easement landowners to determine if reasonable measures can be implemented to ensure landowners have access to the property and to identify other reasonable improvements, such as modifications of levees and water control structures, to ensure these properties can continue to be managed and used as private wetlands. We have not yet had discussions with the landowners of this parcel.

As stated in the USFWS Easement, the landowner cannot grant an additional easement without the prior written authorization of the Fish and Wildlife Service, which, in determining whether to grant such authorization, will be looking at whether the proposed interest interferes with the use of the Easement lands as waterfowl habitat suitable for migratory birds. To that end, we request DWR continue to work with FWS and the landowners to implement reasonable measures to help ensure this property continues to provide the migratory bird benefits for which it was acquired, regardless of a Resolution of Necessity determination for the property. As DWR moves forward, it needs to take appropriate steps to ensure that

the Project will not unreasonably interfere with or impair the vital public use to provide suitable habitat for migratory waterfowl. We look forward to cooperating with DWR and the landowners on the Project, while ensuring the US easement parcel continues to provide benefits for migratory waterfowl.

Sincerely,

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Enclosure

cc: Catherine McCalvin, DWR
Elizabeth Vasquez, DWR
Rachel Taylor, DWR
Mario Manzo, BOR