

# CALIFORNIA WATER COMMISSION

## The Commission's Role in Eminent Domain

July 20, 2011

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## INTRODUCTION OF STAFF

- Allan Davis, Supervising Land Agent, DWR
- Ward Tabor, Assistant Chief Counsel, DWR
- Karin Shine, Senior Staff Counsel, DWR

## PURPOSE OF THIS PRESENTATION

To explain the role of the California Water Commission (CWC) in the eminent domain process.

- Roles and Responsibilities of DWR and CWC
- Resolution of Necessity

# Overview of Eminent Domain and Land Acquisition Process

## AUTHORITY

### U.S. Constitution

Private property may not be taken by a public entity without the payment of just compensation as established by the Fifth Amendment of the U.S. Constitution.

### California Constitution, Article I, Section 19(a)

“Private property may be taken or damaged for public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into the court for, the owner. The 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.”

### California Water Code Section 11580

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

# The Commission's Role

## Authority of the Commission

For purposes of eminent domain, the Commission is the governing body for DWR.

(Code of Civil Procedure §1245.210(h))

## Vote Requirement

“Unless a greater vote is required by statute, charter, or ordinance, the resolution shall be adopted by a vote of two-thirds of all the members of the governing body of the public entity.”

(CCP § 1245.240)

# The Role of the Department of Justice

The State Attorney General is DWR's legal representative for eminent domain actions.

## Preparation of Eminent Domain Action

- Lis pendens
- Summons and complaint
- Discovery
- Trial
- Order of possession
- Legal descriptions, exhibit maps and parcels lists

# Review of the Commission's Role

## AUTHORITY

- Water Code section 11575 outlines DWR's authority to acquire property rights through various means, including eminent domain.
- Water Code Section 11580 specifically states that DWR may acquire property rights through eminent domain if the project has been authorized and funded.

# Review of the Commission's Role (cont'd)

## THE COMMISSION'S CONSIDERATIONS

- Whether the public interest and necessity require the project;
- Whether the project and acquisition are planned or located in the manner that is the most compatible with the greatest public good and least private injury;
- Whether the property to be acquired is necessary for the project; and
- Whether the written offer required by Government Code section 7267.2 has been made to the owner of record or whether the offer has not been made because the owner cannot be located.

## Review of the Commission's Role (cont'd)

### WHAT IS NOT CONSIDERED BY THE COMMISSION

The overall merits of the project;

The amount of the Fair Market Value determination (offer of just compensation).

## Review of the Commission's Role (cont'd)

### TYPICAL BOARD PACKET INCLUDES:

- Copy of Proposed Resolution;
- Project Information;
- Copy of Notice to landowner;
- Copy of CEQA compliance;
  - Notice of Intent to Adopt a Supplemental Mitigated Negative Declaration.
  - Notice of Determination
  - Mitigated Negative Declaration
- Proposed CWC Notice of Determination;
- Acquisition summary sheet and property owner response (if any).

# Overview of Eminent Domain and Land Acquisition Process

## DEFINITIONS

Eminent Domain - The power and authority by which property is acquired for public purposes through legal proceedings.

Appraisal - An opinion of value.

Fair Market Value – The highest price on the date of valuation that would be agreed to by a willing seller, under no particular or urgent necessity for selling, nor obligated to sell, and a willing buyer, being ready, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all uses and purposes for which the property is reasonably adaptable and available.

# Overview of Eminent Domain and Land Acquisition Process (cont'd)

## DEFINITIONS

Resolution of Necessity – The public entity's formal decision to acquire property by eminent domain. The Resolution of Necessity must be adopted before the condemning agency can commence an eminent domain action in court.

*Unless there are extraordinary circumstances (such as gross abuse of discretion, fraud or bribery), the agency's finding of necessity for the property is generally considered conclusive.*

## Land Acquisition Process: Appraisal

- Notice of decision to appraise sent to owner;
- Owner invited to accompany appraiser;
- Appraisal must be written, highest and best use determined;
- Appraiser physically inspects subject property and reviews comparable sales;
- Value approaches: market data, income approach, cost approach;
- The product of an appraisal is an opinion of value.

# Land Acquisition Process: Offer

- First offer is in writing, based on approved appraisal, and usually delivered in person.
- First offer package contains: First offer letter, Right of Way contract, Map of the proposed Acquisition Area, Deed, and Appraisal Summary Statement.

# Land Acquisition Process: Resolution of Necessity

- Request a Resolution of Necessity from appropriate Governing Authority (Water Commission) to acquire real property rights.
  - Notice of Intent to adopt Resolution of Necessity mailed to owner not less than 15 calendar days postmarked prior to Resolution hearing date.

# Land Acquisition Process: Resolution of Necessity (cont'd)

- Required Findings
  - The public interest and necessity required by the proposed project.
  - The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.
  - The property described in the Resolution of Necessity is necessary for the proposed project.
  - The required offer has been made to the owner of record or the offer has not been made because the owner cannot be located through reasonable diligence.



**Legend**

- East Option
- Pipeline/Tunnel Option
- Separate Corridors Option (SCO)
- West Option

**Proposed Facilities**

- Intake
- Operable Barrier (SCO)
- Pipeline
- Siphon
- Tunnel
- Canal
- Fish Movement Corridor (SCO)
- Water Supply Corridor (SCO)
- Forebay

**West**

- Up to 5 intake facilities with fish screens along the Sacramento River
- 6 pump stations
- 9 siphons
- 36 miles of canals
- 17-mile tunnel (2 bores, each 33 feet inside diameter)
- 630-acre forebay near the existing Clifton Court Forebay

**Pipeline/Tunnel**

- Up to 5 intake facilities with fish screens along the Sacramento River
- 6 pump stations
- 5-mile single bore tunnel (29 feet inside diameter)
- 35-mile dual bore tunnel (33 feet inside diameter)
- 750-acre forebay near Courtland
- 600-acre forebay near the existing Clifton Court Forebay

**Intakes**

A number of possible intake locations are under consideration in the area from Freeport to Courtland. River intakes with pumping plants transfer water to conveyance facilities on the East, West, and Pipeline/Tunnel Options.

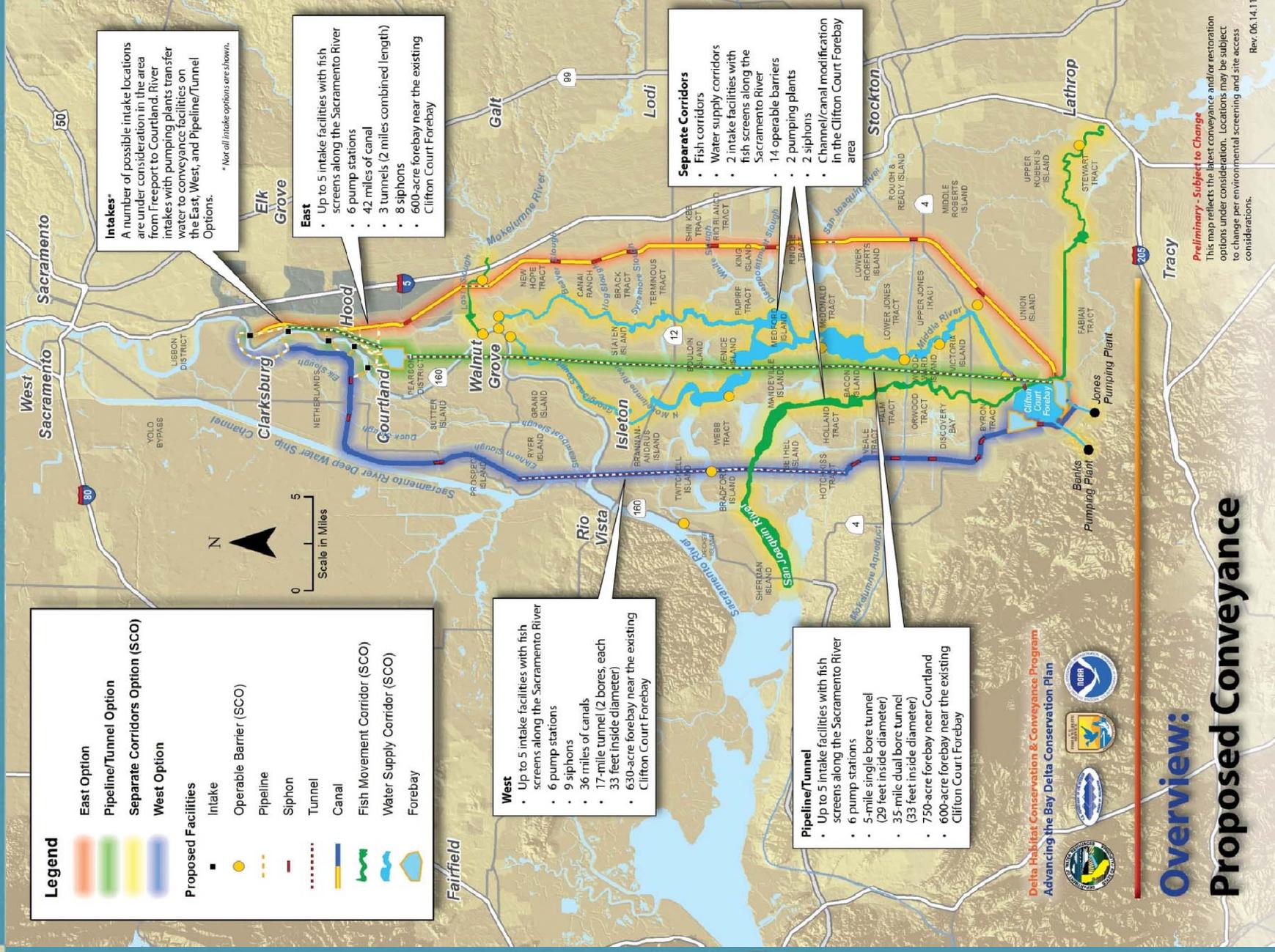
*\* Not all intake options are shown.*

**East**

- Up to 5 intake facilities with fish screens along the Sacramento River
- 6 pump stations
- 42 miles of canal
- 3 tunnels (2 miles combined length)
- 8 siphons
- 600-acre forebay near the existing Clifton Court Forebay

**Separate Corridors**

- Fish corridors
- Water supply corridors with fish screens along the Sacramento River
- 14 operable barriers
- 2 pumping plants
- 2 siphons
- Channel/canal modification in the Clifton Court Forebay area



Delta Habitat Conservation & Conveyance Program  
 Advancing the Bay Delta Conservation Plan



# Overview: Proposed Conveyance

**Preliminary - Subject to Change**  
 This map reflects the latest conveyance and/or restoration options under consideration. Locations may be subject to change per environmental screening and site access considerations.

# Delta Habitat Conveyance and Conservation Plan (DHCCP)

- In 2009, the Legislature crafted an approach to meet California's growing water challenges. A comprehensive deal was reached, representing a major step towards ensuring a reliable water supply for future generations, as well as restoring the Sacramento-San Joaquin Delta and other ecologically sensitive areas.
- The two co-equal goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta's ecosystem were established.
- These goals must be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta.

# Bay Delta Conservation Plan (BDCP)

- DWR has worked collaboratively with federal resource agencies, conservation organizations, water agencies, local agencies, and others in a groundbreaking effort to improve the Delta ecosystem and California's water supplies. This effort will result in the Bay Delta Conservation Plan (BDCP).
- When complete, the BDCP will provide the basis for the issuance of endangered species permits for the operation of the state and federal water projects.
- The plan would be implemented over the next 50 years.
- The heart of the BDCP is a long-term conservation strategy that sets forth actions needed for a healthy Delta.

# EIR/EIS

- EIR - Environmental Impact Report (adopted under California Environmental Quality Act [CEQA]).
- EIS - Environmental Impact Statement (adopted under federal National Environmental Policy Act [NEPA]).
- Agencies developing the EIR/EIS will evaluate ecosystem restoration, water conveyance, and other alternatives identified by the BDCP.
- DWR formed the DHCCP to provide engineering and real estate services in support of the environmental review process.

# Temporary Entry Permit (TEP) HISTORY

## **July 2008**

- Real Estate began negotiations to obtain Temporary Entry Permits from land owners.

## **February 2009**

- DWR files petition with court in each county for entry permission.

## **April 2009**

- First Court Hearing.

## **March 2010**

- Judicial Council Coordination Judge approves coordination of cases. (All cases heard in one venue – San Joaquin County Superior Court).

## **October 2010**

- Court severs environmental surveys and geotechnical activities from each other.

## **December 2010**

- First hearing held regarding environmental surveys.

# Temporary Entry Permit (TEP) HISTORY (cont'd)

## February 2011

- Court grants Order for Entry to conduct environmental surveys.
- First hearing on geotechnical activities.

## April 2011

- Court Order denying entry for geotechnical activities.

## March 2012

- Expiration date for Court Order for Entry (environmental).

# Order Denying Entry for Geological Activities

Unedited excerpts from Court regarding need for drilling and just compensation for a taking:

**“OVERVIEW:** The evidence presented supports the conclusion that DWR needs to do CPT and core drilling along the lines indicated in the proposal in order to determine the best feasible alternative for the water conveyance project. The evidence also supports the conclusion that the water conveyance project is a matter of public interest and that DWR is authorized to investigate the project and is seriously considering the acquisition of the properties identified for the purposes of the project. However, DWR’s genuine need for the Project does not necessarily mean that the statutes or constitution authorize DWR to proceed by manner of a petition for entry. DWR could instead acquire by contract with the property owners the right to proceed. DWR could acquire the necessary easement for drilling in an eminent domain action. See Section 1240.110. It could utilize the “quick take” provisions of the code for this purpose, if it chose. Section 1255.410.

The issues are whether the Project involves a “taking” under the United States Constitution and damage or taking under Article I, Section 19 of the California Constitution and, whether the Project is authorized under Title 7, Chapter 4, Article 1 of the Code of Civil Procedure, commencing with Section 1245.010, and, if so, is that section constitutional.

# Order Denying Entry for Geological Activities (cont'd)

**Taking under U.S. and California Constitutions.** The United States Supreme Court held that the permanent installation of a cable television box and wires, occupying about 1 and ½ cubic feet in space on an apartment building constituted a taking which required just compensation. Loretto v Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419, 438. In this case each bore hole removes from the property about 2.04 cubic yards of native soil and replaces it permanently with about 2.04 cubic yards of bentonite grout.”

# What is the Current Project?

Because of the Courts denial of Entry for Geotechnical activities, the current project is to acquire permanent rights (easements) for geotechnical activities.

# Acquiring Permanent Rights

- An appraisal of the property rights being sought;
- A written offer of just compensation to the property owner and a Real Estate Contract for geotechnical activities;
- When negotiations come to an impasse, DWR will seek relief through the eminent domain process;
- Resolution of Necessity must be approved by CWC in order for DWR to continue the eminent domain process in Court.
- Complaints for eminent domain would be filed in the relevant county.

# Acquiring Permanent Rights (con't)

Under “normal” circumstances acquisition of permanent rights as described above does not occur until a preferred alternative is selected.

The preferred alternative is presented in the final EIR/EIS, a published document which reports the analysis of the various alternatives to complete the project.

The final report incorporates and addresses public comments.

Environmental and geotechnical survey results are essential for the analysis of alternatives that results in a final alternative being selected.

## HOWEVER:

- In order to select the preferred alternative, geotechnical studies need to occur and in light of the court's ruling DWR must first acquire the necessary easement for drilling in an eminent domain action and provide just compensation.
- DWR is appealing the April 8, 2011 court decision, but in order to avoid further delay, DWR will be obtaining permanent and temporary rights for geotechnical activities.

# ENVIRONMENTAL DOCUMENTATION

DWR issued a Notice of Intent (Supplemental) on July 1, 2010 and approved a final Mitigated Negative Declaration on September 23, 2010.

As a CEQA responsible agency, the Commission would be relying on DWR's Mitigated Negative Declaration when making its decision on whether to adopt a Resolution of Necessity.



July 1, 2010

**Notice of Intent  
To Adopt  
A Supplemental  
Mitigated Negative Declaration**

**Geotechnical Engineering Studies for the Bay Delta Conservation Plan and/or for  
Preliminary Engineering Studies for the Delta Habitat Conservation and Conveyance  
Program**

**Department of Water Resources, Division of Environmental Services**

**Contact Information**

The Department of Water Resources (DWR) is the Lead State Agency under the California Environmental Quality Act and has prepared a Draft Initial Study and Mitigated Negative Declaration. DWR is planning additional land and overwater geotechnical borings in the Sacramento-San Joaquin Delta to obtain information for proposed alignments of the water conveyance facilities associated with the Bay Delta Conservation Plan and preliminary engineering studies for the Delta Habitat Conservation and Conveyance Program.

DWR is supplementing the Draft IS/MND due to proposed minor technical changes to give the public and agencies ample time to review these changes.

Copies of the documents may be obtained from:

Department of Water Resources  
Division of Environmental Services  
3500 Industrial Boulevard  
West Sacramento, California 95691  
(916) 376-9826

The County Clerks Office of the following counties:  
Sacramento, San Joaquin, Yolo, Solano, and Contra Costa counties

The document may also be obtained online at <http://www.water.ca.gov/delta/init/bdcp.cfm>.

**Public Review Period**

The public comment period is open from July 1, 2010 to July 31, 2010. To file written comments on the proposed project, you may fax comments to (916) 376-9688, Attention Michelle Beachley; email comments to [mbeachle@water.ca.gov](mailto:mbeachle@water.ca.gov); or mail comments to:

Department of Water Resources  
Division of Environmental Services  
Attn: Michelle Beachley  
P.O. Box 942836  
Sacramento, California 94236-0001





**Mitigated Negative Declaration**

**Project:** Engineering Geotechnical Studies for the Bay Delta Conservation Plan and/or Preliminary Engineering Studies for the Delta Habitat Conservation and Conveyance Program

**Lead Agency:** California Department of Water Resources (DWR)

**Availability of Documents:**

The Department of Water Resources (DWR) prepared a Draft Initial Study in support of this Mitigated Negative Declaration. Copies of the draft Initial Study/Mitigated Negative Declaration were provided to the State Clearinghouse on June 15, 2010 initiating a 30-day review period. DWR made minor changes to the IS/MND and filed a supplemental IS/MND with the State Clearinghouse on June 30, 2010, initiating an additional 30-day review period. The review period was open from June 15, 2010 to July 31, 2010.

**Statement of No Significant Effect**

Pursuant to section 21082 of the California Environmental Quality Act, DWR has independently reviewed and analyzed the IS/MND for the proposed project and finds that this study reflects the independent judgment of DWR. In addition, DWR has reviewed and responded to comments from attorney's offices and individuals as well as state, federal, and local agencies. The comments are addressed in Appendix A; actual comments to the IS/MND are shown in Appendix B.

As the lead agency for the project, DWR further finds that the project mitigation and conservation measures will be implemented as stated in the MND. With implementation of these mitigation and conservation measures, the proposed project as modified would have no significant effect on the environment.

I hereby approve these project activities for geotechnical exploratory drilling.

Dean F. Messer, Chief  
Division of Environmental Services

Date