Attorney for Protestants Save the California Delta Alliance, et al.

BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

IN RE CALIFORNIA WATERFIX
CALIFORNIA DEPARTMENT OF
WATER RESOURCES AND U.S.
BUREAU OF RECLAMATION
PETITION FOR CHANGES IN
WATER RIGHTS, POINTS OF
DIVERSION/RE-DIVERSION

PROTESTANT SAVE THE CALIFORNIA
DELTA ALLIANCE'S REPLY TO DWR'S
OPPOSITION TO DELTA ALLIANCE'S
AUGUST 6 MOTION TO COMPEL
In opposing Delta Alliance's motion to compel, DWR conflates administration of the California Environmental Quality Act ("CEQA") with this Board's authority and duty to protect public trust resources in the administration of water rights wherever feasible. DWR's opposition rests on the contention that the Board has no authority to order it to meet with the owners of Tower Park Resort because the Board has no authority to direct DWR's CEQA process.

However, Delta Alliance never asked this Board to intervene in DWR's administration of the CEQA process for the CWF Project. Rather, Delta Alliance pointed out that there is an "environmental commitment" contained in the CWF Final Environmental Impact Report ("FEIR") wherein DWR promises to meet with surrounding landowners to consider "[l]andowner concerns and preferences" in "designating sites for temporary storage [of tunnel muck]" and to consider landowner concerns when it takes steps to "refine the [tunnel muck] storage area footprint" to minimize impacts on surrounding landowners. (SWRCB-102, Appendix 3B, p. 3B-102: 6–8.)

Delta Alliance has introduced testimony supporting, and intends to seek permit conditions protective of recreation, including protection of the Tower Park Resort and Marina and its attendant recreational navigational facilities. One of those conditions is relocation of the currently proposed Bouldin Island Tunnel Muck Dump footprint, recently moved to within 350 feet of the Tower Park Resort. (See SCDA-308, p.3: 17–19 [testimony of Bill Wells seeking condition moving muck dump]; SCDA-327 [muck dump moved to less than 350 feet from navigational facilities]; SCDA-328 [muck dump moved to within 350 of Tower Park children's beach].)

There is no doubt that this Board has the authority to impose this permit condition under its water rights and public trust authority.

Where the Board has the authority to impose a permit condition, it has the authority to order the parties to meet and consider information provided by the counter-party in connection with the impact on public trust resources and the potential permit conditions needed to address those impacts. The Board has done so before in these CWF hearings, ordering DWR to meet with Clifton Court LP in order to see first-hand the impacts on Clifton Court's property. The fact that DWR has
already made a commitment to hold exactly the meeting that we are now requesting establishes that the request is reasonable and that DWR itself determined that such meetings were necessary in order for it to make informed decisions about the impacts of muck dump footprints on surrounding landowners.

DWR has repeatedly asked this Board to rely on the mitigations, "environmental commitments," and its host of "Avoidance and Mitigation Measures" ("AMMs") in testimony and briefing before the Board. (DWR-1022, p.3: 28, p.4: 1–6, p.5: 4–11 [mitigation measures will "minimize potential impacts to navigation"]). In fact, DWR has made sweeping claims about mitigation measures and environmental commitments that it has urged this Board to rely upon in executing its duty to protect public trust resources: "Mitigation measures and environmental commitments included in CWF would reduce the impacts on wildlife, visual setting, transportation, and noise conditions that could otherwise detract from the recreation experience." (DWR-1024, p.6: 5–8.) DWR argues that public trust resources are adequately protected by its various measures and therefore the Board need not impose further permit conditions in protection of public trust resources. The Board may discharge its public trust duties, according to DWR, by noting and relying upon DWR's various Avoidance and Mitigation Measures.

One of those Avoidance and Mitigation Measures key to the Board executing its duties is AMM6, entitled "Disposal and Reuse of Spoils, Reusable Tunnel Material [Tunnel Muck] and Dredged Material." (SWRCB-102, Appendix 3B, p.3B-101: 1–2.) AMM6 provides that:

Landowner concerns and preferences will be considered in designating sites for temporary storage [of tunnel muck]. DWR will consult directly with landowners to refine the storage area footprint to further minimize impacts to surrounding land uses, including agricultural operations.

(SWRCB-102, Appendix 3B, p.3B-102: 6–8.) It is undisputed that Northgate Resorts, owner of Tower Park Resort, is a surrounding landowner. (See SCDA-327.) It is also undisputed that DWR "refine[d] the storage area footprint" of the muck dump, moving it a mile closer to Tower Park--now within 350 feet--without consulting with Tower Park.

DWR's March 28, 2018, letter to the Board introducing the changes in the ADSEIR attaches a sheet entitled "Design Refinements Proposed." The design refinements include re-locating and re-
shaping the Bouldin Island tunnel muck dump footprint. The changes to the tunnel muck dump footprint were summarized by DWR as "RTM area on East side of island moved north to avoid wetland impacts." (DWR letter to SWRCB, March 28, 2018, p.2.) DWR consulted with federal resource agencies who forced it to move the muck dump away from wetland areas. However, it failed to consider impacts on Tower Park Resort, erroneously concluding that the dump could not be seen from the resort when it has been proven that it can be seen from the resort. (See ADSEIR, p.15-3:32–33; 37–38 [muck dump cannot be seen from Resort because Bouldin Island levee blocks view]; SCDA-322 [photograph from Resort looking over the top of Bouldin Island levee down to floor of Island where muck dump will be located].)

Several federal resource agencies have the authority and duty to order DWR to make changes to its project to protect wetlands [United States Army Corps of Engineers], listed species [United States Fish and Wildlife Service; National Marine Fisheries Service], and waters of the United States [United States Army Corps of Engineers, United States Environmental Protection Agency]. Each time one of these agencies orders a change, DWR changes the project to avoid the impact of concern but does not consider how the change will affect recreation. We have seen this over and over. The National Marine Fisheries Service Biological Opinion limits barge operations and in-water construction to the period from June 1 to October 31, avoiding some impacts on listed species. But it concentrates these operations in the summer-fall boating season, increasing impacts on recreational navigation. Moving the Bouldin Island Muck Dump to avoid wetlands impacts but increasing impacts on the Tower Park Resort is only the latest in this pattern.

The federal resource agencies do not have the responsibility or authority to protect recreation. This Board is the only regulatory agency involved in the CWF process with the responsibility to order conditions protective of recreation and to balance protection of recreation with protection of species and other important concerns.

Where DWR has put forth an environmental commitment as the measure that the Board should rely upon to protect recreation and other public trust resources, it can hardly complain when the Board takes an interest in the substance of that commitment and takes steps to see that the commitment is actually carried out. Such is the case for AMM6.
Delta Alliance respectfully urges the Board to order DWR to comply with AMM6 and meet with Northgate Resorts on or before September 17, 2018, at the Tower Park Resort.

Dated: August 8, 2018

Michael A. Brodsky

Attorney for Protestant Save the California Delta Alliance

Northgate Resorts has associational standing as it is a member of Delta Alliance and Delta Alliance has consistently asserted the interests of all recreational facilities in the Delta, expressly including the Tower Park Resort (and many other resort facilities by name in its filings, including Bullfrog Marina and Clarksburg Marina). The undersigned is authorized to speak on behalf of Northgate and reaffirms to the Board that Northgate requests the meeting and will attend.
STATEMENT OF SERVICE

CALIFORNIA WATERFIX PETITION HEARING
Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

PROTESTANT SAVE THE CALIFORNIA DELTA ALLIANCE'S REPLY TO DWR'S OPPOSITION TO DELTA ALLIANCE'S AUGUST 6 MOTION TO COMPEL

to be served by Electronic Mail (email) upon the parties listed in Table 1 of the Current Service List for the California WaterFix Petition Hearing, dated August 7, 2018, posted by the State Water Resources Control Board at
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml

I certify that the foregoing is true and correct and that this document was executed on August 9, 2018, at Discovery Bay, California.

Signature: _______________________
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