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6
7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 IN AND FOR THE COUNTY OF SACRAMENTO

9
10
11 CALIFORNIA DEPARTMENT OF WATER
12 RESOURCES,

13 Plaintiff

14 v.

15 ALL PERSONS INTERESTED IN THE
16 MATTER of the Authorization of Delta
Program Revenue Bonds, the Issuance, Sale
17 and Delivery of Delta Program Revenue
Bonds Series A, Series B, and Subsequent
18 Series, the Adoption of the Delta Program
Revenue Bond General Bond Resolution and
19 the Supplemental Resolutions Providing for
the Issuance of Delta Program Revenue
20 Bonds, and the Proceedings Related Thereto,

21 Defendants
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Case No. 34-2020-00283112

VERIFIED RESPONSE AND ANSWER
TO COMPLAINT FOR VALIDATION

Department: 31

Judge: Hon. Gerrit Wood
Complaint Filed: August 6, 2020

1 **INTRODUCTION**

2 To protect their interests and preserve their claims and rights of action, interested
3 party Delta Legacy Communities, Inc. (“DLC”), responds to and answers the Complaint for
4 Validation (“Complaint”) of Plaintiff California Department of Water Resources
5 (“Department”) as follows:

6 Delta Legacy Communities, Inc. is a California nonprofit mutual benefit corporation
7 with its principal place of business in Hood, California. The purpose of Delta Legacy
8 Communities, Inc. is to support and advocate for the eleven Delta legacy communities
9 recognized in the Delta Reform Act of 2009 (PRC 32301(f)): Freeport, Clarksburg, Hood,
10 Courtland, Locke, Walnut Grove, Ryde, Rio Vista, Isleton, Bethel Island, and Knightsen.
11 Delta Legacy Communities, Inc. has one Board member from each Delta legacy
12 community.

13 Delta Legacy Communities, Inc. has opposed the Department of Water Resources
14 rushing forward with a single tunnel project largely based on the canceled WaterFix project.
15 Delta Legacy Communities, Inc., asserts, based on information and belief, that the
16 Department’s validation action appears designed to empower the Department to rush
17 forward with preliminary design, property acquisition, and eventual construction of the
18 single tunnel project, regardless of legal challenges to the Department’s compliance with
19 applicable laws.

20 Delta Legacy Communities, Inc., further asserts that, based on information and
21 belief, the Department has failed to properly maintain the existing State Water Project
22 facilities, and the Department has diverted revenues pledged by statute to operations and
23 maintenance of the existing facilities to use for planning and engineering design for the
24 single tunnel project. The result is an unlawful shifting of the costs of maintenance, repair,
25 and rehabilitation of the existing facilities to taxpayers. The Department’s validation action
26 appears to be designed to empower the Department to continue shifting revenues pledged
27 by statute to operations and maintenance of the existing State Water Resources

1 Development System facilities to pay for planning, engineering design, property
2 acquisition, and eventually, construction, operation and maintenance of new facilities in the
3 Delta.

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5 **ANSWER TO COMPLAINT FOR VALIDATION**

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7 **Nature of the Action**

8 1. Answering Paragraph 1, DLC responds that the Delta Program described in the
9 Department’s Delta Program Revenue Bond General Bond Resolution (“Delta Program
10 Bond Resolution”) is potentially much broader than “acquisition and construction of
11 conveyance facilities.” As an example of activities which may be funded under the
12 resolution, the Department’s Second Amendment to the Joint Exercise of Powers
13 Agreement with the Delta Conveyance Design and Construction Authority¹ allows for
14 approval of a “Real Estate Acquisition Plan” which includes acquisition of “parcels to
15 be acquired for exchange purposes” as well as “disposal of surplus land.” DLC lacks
16 sufficient knowledge of the scope of the DCA’s future real estate acquisition plans to
17 determine whether the plans are beyond the scope of construction of the conveyance
18 facilities. DLC therefore lacks sufficient information on the other activities which may
19 be planned or funded under the Delta Program and on that basis denies the allegations
20 in Paragraph 1.

21 2. Answering Paragraph 2, DLC admits the allegations therein.

22 3. Answering Paragraph 3, DLC asserts that validation of the issuance of CVP
23 revenue bonds for construction of the Delta Conveyance project is wholly premature,
24 since the Department does not have an approved project for which to “prepare
25 preliminary cost estimates, an estimate of the amount required to be raised for those

26 _____
27 ¹ California Department of Water Resources, Amendment No. 2 to Amended and Restated Joint
28 Exercise of Powers Agreement Between the Department of Water Resources, State of California
and the Authority, May 2020.

1 purposes by the issuance of bonds, and a statement of the probable amount of money,
2 property, materials, or labor, if any, to be contributed from other sources in aid thereof”
3 as required under Water Code section 11701. DLC denies any and all allegations in
4 Paragraph 3.

5 4. Answering Paragraph 4, DLC admits the allegations therein.

6 5. Answering Paragraph 5, DLC asserts that the Department’s validation complaint
7 seeks to validate the Department’s future issuance of revenue bonds for unspecified
8 projects. The Department’s inclusion of “other Delta program capital costs” is not
9 connected with any specific project, and DLC asserts that the project specification
10 therefore does not conform with Water Code section 11701. DLC asserts that there is no
11 way to determine whether “other Delta program capital costs” are consistent with Water
12 Code section 11761, which enumerates the sole purposes for which CVP revenue bond
13 proceeds may be “paid out, disbursed or applied.” DLC denies the allegations in
14 Paragraph 5.

15 6. Answering Paragraph 6, DLC asserts that, were the court to rely on vague future
16 promises that the Department would only issue revenue bonds for construction
17 “following satisfaction of legal and regulatory requirements applicable to
18 implementation of the proposed conveyance facility,” it could result in irreparable harm
19 to Delta legacy communities that are at ground zero for impacts of the Delta
20 Conveyance project. DLC denies the allegations in Paragraph 6.

21 **The Parties**

22 7. Answering Paragraph 7, DLC admits the allegations therein.

23 8. Answering Paragraph 8, DLC admits the allegations therein.

24 9. Answering Paragraph 9, DLC admits the allegations therein.

25 **Jurisdiction and Venue**

26 10. Answering Paragraph 10, DLC admits the allegations therein.

27 11. Answering Paragraph 11, DLC admits the allegations therein.

1 12. Answering Paragraph 12, DLC admits the allegations therein.

2 13. Answering Paragraph 13, DLC does not have sufficient information to confirm
3 or deny the allegations therein, and on that basis denies the allegations therein.

4 **The Project**

5 14. Answering Paragraph 14, DLC admits the allegations therein.

6 15. Answering Paragraph 15, DLC admits the allegations therein.

7 16. Answering Paragraph 16, DLC asserts that the vague and undefined scope of the
8 “Delta Program” potentially allows the Department to issue bonds to reconstruct or
9 repair the existing State Water Project facilities, which would be against the Central
10 Valley Project Act. DLC asserts that the Department is not authorized to use CVP
11 revenue bonds for reconstruction and repair of the existing facilities. The Central Valley
12 Project Act mandates that the Department is required to collect sufficient revenue “so as
13 to at all times provide revenue which will afford sufficient funds to pay all costs of
14 operation and maintenance of the works authorized by this part, together with necessary
15 repairs and replacements thereto,” as well as the interest and principal on the Central
16 Valley Project revenue bonds. (Wat. Code § 11455.)

17 17. Answering Paragraph 17, DLC admits the allegations therein.

18 18. Answering Paragraph 18, DLC admits the allegations therein.

19 19. Answering Paragraph 19, DLC admits the allegations therein.

20 20. Answering Paragraph 20, DLC admits the allegations therein.

21 21. Answering Paragraph 21, DLC admits the allegations therein.

22 22. Answering Paragraph 22, DLC admits the allegations therein.

23 23. Answering Paragraph 23, DLC admits the allegations therein.

24 24. Answering Paragraph 24, DLC denies that the Department has “undertaken a
25 comprehensive plan for the effective delivery of Project water across the Delta.” A
26 comprehensive plan for effective delivery of Project water across the Delta” would
27 address the need to maintain and improve the existing system of Delta levees, as well as
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1 Clifton Court Forebay. DLC also denies that the Department’s program, as currently
2 constituted, is “consistent with” the statutory framework of the Delta Reform Act. DLC
3 asserts that the Delta Stewardship Council’s draft findings on the nine appeals of the
4 Department’s certification of consistency of the WaterFix project with the Delta Plan
5 found many inconsistencies with the Delta Plan, and thus with the Delta Reform Act.
6 The single tunnel project is based on the WaterFix project.

7 25. Answering Paragraph 25, the date “After January 2019” obfuscates the fact that
8 the Department is continuing work under contracts issued for the previous WaterFix
9 project. Governor Gavin Newsom issued an Executive Order N-10-19 on April 29,
10 2019. The Executive Order directed responsible state agencies to “inventory and assess”
11 efforts to modernize Delta Conveyance. On May 2, 2019, the Department rescinded all
12 approvals of the WaterFix project. However, work continued under contracts signed in
13 January 2019 for the WaterFix project. Continued contracts included a \$93 million
14 contract with Jacobs Engineering for engineering design, and a \$75 million contract
15 with Fugro for geotechnical exploration and field work.

16 26. Answering Paragraph 26, the Department’s statement that “Delta Program
17 facilities may include, but are not limited to, water diversion intake structures located
18 on the Sacramento River and a tunnel to convey water to Banks Pumping Plant” is an
19 open-ended definition which fails to adequately define the facilities that are part of the
20 proposed unit of the Central Valley Project.

21 27. Answering Paragraph 27, DLC admits the allegations therein.

22 28. Answering Paragraph 28, the Second Amendment of the Joint Exercise of
23 Powers Agreement with the Delta Conveyance Design and Construction Authority²
24 allows acquisition of real property for implementation of the project at 60% design.

25 There are no conditions in the Second Amendment on the Department’s approval of

26 ² California Department of Water Resources, Amendment No. 2 to Amended and Restated Joint
27 Exercise of Powers Agreement Between the Department of Water Resources, State of California
28 and the Authority, May 2020.

1 “Real Estate Acquisition” plans by the DCA. The “authorizing resolutions” provide no
2 assurance that real estate acquisition will not precede formal approval of the project
3 under the California Environmental Quality Act.

4 29. Answering Paragraph 29, DLC alleges that the Department misconstrues the
5 breadth of section 11260 of the Central Valley Project Act. Section 11260 of the Central
6 Valley Project Act authorizes resolutions for construction of specific, defined “units” of
7 the Central Valley Project, not a general program by the Department. Nor does section
8 11701 of the Central Valley Project Act authorize a resolution by the Department to
9 issue a potentially unlimited amount of bonds. DLC alleges that for the Department to
10 do so during a global pandemic and economic crisis is an abuse of discretion.

11 30. Answering Paragraph 30, the Delta Conveyance is neither undefined nor
12 hypothetical. The Delta Conveyance Design and Construction Authority has developed
13 draft facility plans for the Eastern and Central Corridor options under the engineering
14 contract signed with Jacobs Engineering in January of 2019, together with technical
15 memoranda supporting the draft plans. Based on information and belief, the Eastern and
16 Central Corridor options are the basis of the Department’s application to the US Army
17 Corps of Engineers for a Section 10 Rivers and Harbors Act permit, and a Section 404
18 Clean Water Act permit. The Department has also provided modeling of potential yield
19 of the 6,000 cfs, two-intake project to the State Water Project contractors, using the
20 same operational rules as the previous WaterFix project.

21 31. In response to Paragraph 31, DLC alleges that “the credit quality” of the
22 Department’s source of revenues *is* at issue. Every year, the Department calculates the
23 costs payable by the State Water Project contractors for the following year, and
24 publishes the results in Bulletin 132, Appendix B. Table B-7 in Bulletin 132-18 and
25 132-19, Appendix B shows the Department’s reconciliation of capital cost allocations
26 for 2018 and 2019. But Table B-7 for 2018 and 2019 simply say, “data not available.” It
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1 would appear, prima facie, that the Department has not properly determined capital cost
2 charges to the State Water Project contractors in Bulletin 132-18 and 132-19.

3 The Department's Delta Program Bond Resolution also does not keep revenues for the
4 State Water Resources Development System as defined in California Water Code
5 Section 12931 "separate and apart" from the Delta Program. Section 804 of the
6 Department's Delta Program Bond Resolution states that "[i]n the event that the Delta
7 Program consists of a portion only of a resource or facility of the Department, the
8 Department shall, subject to the availability of funds, pay all costs of acquisition,
9 construction, operation and maintenance of such resource or facility which are
10 apportioned by the Department other than to the Delta Program from funds appropriated
11 by the Burns-Porter Act or other applicable law or advanced by other parties."

12 32. In response to Paragraph 32, DLC alleges that the Department's statement that
13 "[t]he legal validity of the Delta Program revenue bond financing is not dependent on
14 the amendment or extension of the Water Supply Contracts" is incomplete and
15 misleading. Section 805 of the Delta Program Bond Resolution states that "[t]he
16 Department shall charge and collect amounts under the Water Supply Contracts
17 sufficient to return the costs of the Delta Program for which Bonds have been
18 authenticated and delivered without regard to whether or not the Department is able to
19 construct, acquire or operate any Delta Program facilities."

20 33. Answering Paragraph 33, DLC asserts that, were the Department to fully comply
21 with the cost estimate requirements of Water Code section 11701, approval of a
22 resolution to issue revenue bonds to pay for a unit of the Central Valley Project would
23 likely constitute approval of the unit as a project under CEQA.

24 34. Answering Paragraph 34, DLC denies the allegations therein.

25 35. Answering Paragraph 35, DLC denies the allegations therein.

1 **Statutory Authority for the Financing of the Delta Program**

2 **A. The Department has Broad Authority with Respect to Project Facilities**

3 36. In response to Paragraph 36, DLC alleges that the Department’s construction of
4 the Central Valley Project Act is overly broad. Under the Central Valley Project Act,
5 the Department has broad authority to construct and operate *units* of the project, as
6 specified by the legislature in Water Code sections 11200 through 11295, and to issue
7 revenue bonds to pay for *a unit*, if and when the *unit* has been sufficiently defined by
8 the Department to satisfy the requirements of Water Code section 11701.

9 37. Answering Paragraph 37, DLC admits the allegations therein.

10 38. Answering Paragraph 38, DLC admits the allegations therein.

11 39. Answering Paragraph 39, DLC asserts that the Department has not exercised
12 appropriate discretion in exercising the broad authority granted by the Burns-Porter Act.
13 For example, revenues deposited in the California Water Resources Development Bond
14 Fund (Wat. Code § 12935) are subject to the pledge and priority provisions of the
15 Burns-Porter Act (Wat. Code § 12937(b).) In recent years, the Department of Finance
16 has not done reporting mandated under the Burns-Porter Act. Water Code § 12938.2
17 requires that, “[t]he Department of Finance shall identify in the annual Governor's
18 Budget the proposed revenues and expenditures for the four purposes identified in
19 subdivision (b) of Section 12937.”

20 40. Answering Paragraph 40, DLC asserts that Water Code Section 11126, enacted
21 in 1943, should be interpreted in conjunction with the 2009 Delta Reform Act, which
22 requires that the goal of providing a more reliable water supply for California “shall be
23 achieved in a manner that protects and enhances the unique cultural, recreational,
24 natural resource, and agricultural values of the Delta as an evolving place.” (Wat. Code
25 § 85054.) Absent full compliance with Water Code section 11701, it cannot be
26 determined whether the actions proposed to be funded under the Department’s Delta
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1 Program Bond Resolution comply with Water Code section 85054 or other applicable
2 laws.

3 41. Answering Paragraph 41, “[p]ursuant to the CVP Act, the Department has broad
4 powers with respect to Project facilities, including the power to authorize the review,
5 planning, design and engineering, and, if and when appropriate, the acquisition and
6 construction of *units of the Central Valley Project*.” The Delta Program, as defined, is
7 not a unit of the Central Valley Project.

8 **B. The Department has Broad Authority to Issue Revenue Bonds to Finance**
9 **Planning and Construction of Project Facilities**

10 42. Answering Paragraph 42, DLC admits the allegations therein.

11 43. Answering Paragraph 43, DLC asserts that the Department’s Delta Program
12 Bond Resolution is overly broad and does not comply fully with Water Code section
13 11701, and therefore the Department may not issue revenue bonds under the Delta
14 Program Bond Resolution.

15 44. Answering Paragraph 44, DLC asserts that the purposes of the Delta Program are
16 so broad that compliance with Water Code Section 11761 cannot be determined.
17 Paragraph 44 must also be considered in light of Water Code sections 11451 and 11551.
18 Water Code section 11551 requires that the Department design any works that will be
19 constructed under the Central Valley Project Act. The project is not being designed or
20 engineered by the Department, but by the Delta Conveyance Design and Construction
21 Authority. Approval of the project design by the Department of Water Resources will
22 require compliance with the California Environmental Quality Act (“CEQA”), and there
23 is no CEQA document for that approval.

24 Water Code section 11451 further provides that “[t]he department shall have full
25 charge and control of the construction, operation, and maintenance of the project and
26 the collection of all rates, charges, and revenues from it.” The Joint Exercise of Powers
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1 Act provides that the DCA, not the Department shall construct the project. The
2 Department does not have full charge and control of the construction of the project.

3 45. Answering Paragraph 45, DLC admits the allegations therein.

4 **The Delta Program Revenue Bond Financing**

5 **A. The Delta Program General Bond Resolution and Delta Program Revenue**
6 **Bonds**

7 46. Answering Paragraph 46, DLC admits the allegations therein.

8 47. Answering Paragraph 47, DLC admits the allegations therein.

9 48. Answering Paragraph 48, DLC admits the allegations therein.

10 49. Answering Paragraph 49, DLC asserts that the Department did not comply with
11 the requirements of section 11701 in the Delta Program Bond Resolution, as stated in
12 the answer to Paragraph 50.

13 50. Answering Paragraph 50, DLC asserts that the Department did not comply with
14 the requirements of Water Code section 11701 in the Delta Program Bond Resolution.
15 Water Code section 11701 requires that the Department “prepare preliminary cost
16 estimates, an estimate of the amount required to be raised for those purposes by the
17 issuance of bonds, and a statement of the probable amount of money, property,
18 materials, or labor, if any, to be contributed from other sources in aid thereof.”

19 51. Answering Paragraph 51, DLC asserts that promising to deliver the cost
20 estimates required under Water Code section 11701 to the Treasurer in the future is
21 contrary to the plain meaning of section 11701.

22 52. Answering Paragraph 52, DLC asserts that the Department’s assertion of the
23 right to arbitrarily increase the amounts borrowed for a particular project appears to be
24 contrary to the intent of Water Code section 11701 and is not in the public interest.

25 DLC further asserts that although Water Code 11155 requires that “[t]he State
26 Controller, the State Treasurer, and the department shall keep full and particular account
27 and record of all their proceedings under this part,” the State Controller has not audited
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1 the Central Valley Project Construction Fund since 2009, so there is inadequate
2 oversight by the Controller of the Department’s actions with respect to the Central
3 Valley Project Construction Fund.

4 53. Answering Paragraph 53, Amendment #2 to the Joint Exercise of Powers
5 Agreement with the Delta Conveyance Design and Construction Authority states that
6 “[n]otwithstanding anything herein, and where authorized by law, the Authority may
7 utilize alternative project delivery methods for design and construction of the
8 Conveyance Project.” (p. 3.) This provision of Amendment #2 to the Joint Exercise of
9 Powers Agreement is potentially contrary to the requirement in the Central Valley
10 Project Act that “[a]ll works constructed pursuant to this chapter shall be constructed
11 under and in accordance with the provisions of the State Contract Act insofar as the
12 provisions of that act are applicable” (Wat. Code § 11544.) The State Contract Act
13 further requires that “before entering into any contract for a project, the department
14 shall prepare full, complete, and accurate plans and specifications and estimates of cost,
15 giving such directions as will enable any competent mechanic or other builder to carry
16 them out.” (PCC § 10120.)

17 54. Answering Paragraph 54, DLC asserts that it would be wholly prejudicial for the
18 Department to assume the power to certify that “all conditions precedent to the
19 commencement of acquisition or construction of any Delta Program facilities to be
20 acquired or constructed with the proceeds of such Series of Bonds established by law
21 have been satisfied” without the possibility of judicial review. DLC further asserts that
22 the legislature did not and could not grant such powers to the Department under the
23 Central Valley Project Act.

24 **B. The First and Second Supplemental Resolutions**

- 25 55. Answering Paragraph 55, DLC admits the allegations therein.
26 56. Answering Paragraph 56, DLC admits the allegations therein.

1 57. Answering Paragraph 57, Section 1304 of the First Supplemental Resolution
2 provides:

3 The Bonds of Series A are to be issued for the purposes of Sections 204 and 205
4 solely to obtain moneys to (i) pay or reimburse Delta Program Planning Costs, (ii)
5 fund a deposit to the Reserve Account in the amount of the Reserve Account
Requirement allocated to the Bonds of Series A, (iii) fund capitalized interest on the
Bonds of Series A, and (iv) pay costs of issuance of the Bonds of Series A.

6 DLC asserts that to the extent that Paragraph 57 calls for legal conclusions, the
7 Central Valley Project Act only provides for the funding of capitalized interest through
8 the first year after completion of construction. There is no such limitation in Section
9 1304 of the First Supplemental Resolution. Water Code section 11761 enumerates the
10 sole purposes for which bond proceeds may be “paid out, disbursed or applied.” The
11 purposes include Section 11761(e), “payment of interest becoming due and payable on
12 bonds prior to and during the period of actual construction and for the period of one
13 year after the completion of construction.”

14 58. Answering Paragraph 58, DLC asserts that to the extent that Paragraph 58 calls
15 for legal conclusions, the “Delta Program” is not adequately defined as a unit of the
16 Central Valley Project, and the promise to produce the information required under
17 Water Code section 11701 in the future does not adequately comply with Water
18 Code section 11701.

19 59. Answering Paragraph 59, DLC asserts that, to the extent that Paragraph 59 calls
20 for legal conclusions, DLC denies the conclusions therein.

21 60. Answering Paragraph 60, DLC asserts that, to the extent that Paragraph 59 calls
22 for legal conclusions, DLC notes that there are not limitations on capitalized interest
23 sufficient to comply with Water Code section 11761(e). DLC denies any and all
24 legal conclusions therein.

25 61. Answering Paragraph 61, DLC notes that there are no explicit provisions to assure
26 compliance with Water Code section 85059, which provides that:

27 Construction of a new Delta conveyance facility shall not be initiated until the
28 persons or entities that contract to receive water from the State Water Project and

1 the federal Central Valley Project or a joint powers authority representing those
2 entities have made arrangements or entered into contracts to pay for both of the
following:

- 3 (a) The costs of the environmental review, planning, design, construction, and
4 mitigation, including mitigation required pursuant to Division 13 (commencing
with Section 21000 of the Public Resources Code), required for the construction,
5 operation, and maintenance of any new Delta water conveyance facility.

6 DLC denies any and all legal conclusions therein.

7 **Statutory Authorization to Bring this Validation Action**

8 62. Answering Paragraph 62, DLC admits the allegations therein.

9 63. Answering Paragraph 63, DLC admits the allegations therein.

10 64. Answering Paragraph 64, DLC admits the allegations therein.

11 65. Answering Paragraph 65, no response is required because it calls for legal
12 conclusions; to the extent any facts are stated, DLC denies each and every allegation set
13 forth therein.

14 66. Answering Paragraph 66, no response is required because it calls for legal
15 conclusions; to the extent any facts are stated, DLC denies each and every allegation set
16 forth therein.

17 **Service by Publication of Summons**

18 67. Answering Paragraph 67, no response is required because it calls for legal
19 conclusions; to the extent any facts are stated, DLC denies each and every allegation set
20 forth therein.

21 68. Answering Paragraph 68, DLC lacks sufficient information or belief to answer
22 the allegations therein, and therefore denies them on that basis.

23 69. Answering Paragraph 69, DLC lacks sufficient information or belief to answer
24 the allegations therein, and therefore denies them on that basis.

25 70. Answering Paragraph 70, DLC lacks sufficient information or belief to answer
26 the allegations therein, and therefore denies them on that basis.

1 71. Answering Paragraph 71, DLC lacks sufficient information or belief to answer
2 the allegations therein, and therefore denies them on that basis.

3 **First Cause of Action**

4 72. Answering Paragraph 72, DLC incorporates responses to paragraphs 1 through
5 71 above as though fully set forth herein.

6 73. Answering paragraph 73, DLC denies the allegations therein.

7 74. Answering paragraph 74, DLC denies the allegations therein.

8 75. Answering paragraph 75, DLC lacks sufficient knowledge or belief to admit or
9 deny the allegations of Paragraph 75 and, on that basis, denies each and every
10 allegation of Paragraph 75.

11 76. Answering paragraph 76, DLC denies the allegations therein.

12 77. Answering paragraph 77, DLC denies the allegations therein.

13 78. Answering paragraph 78, DLC denies the allegations therein.

14 79. Answering paragraph 79, DLC denies the allegations therein.

15 80. Answering paragraph 80, DLC denies the allegations therein.

16 81. Answering paragraph 81, DLC denies the allegations therein.

17 82. Answering paragraph 82, DLC denies the allegations therein.

18 83. Answering paragraph 83, DLC denies the allegations therein.

19 84. Answering paragraph 84, DLC denies the allegations therein.

20 85. Answering paragraph 85, DLC denies the allegations therein.

21 86. Answering paragraph 86, DLC denies the allegations therein.

22 87. Answering paragraph 87, DLC denies the allegations therein.

23 88. Answering paragraph 88, DLC denies the allegations therein.

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1 **AFFIRMATIVE DEFENSES**

2 **First Affirmative Defense**

3 89. DLC asserts that the Department’s attempted assumption of the right to issue
4 unlimited bonds to build arbitrary, unspecified future facilities, is a de facto assumption
5 of powers reserved to the legislature, and against the separation of powers in Article III,
6 section 3 of the California Constitution. Article III, section 3 provides: “[t]he powers of
7 state government are legislative, executive, and judicial. Persons charged with the
8 exercise of one power may not exercise either of the others except as permitted by this
9 Constitution.” (*Estate of Cirone* (1987) 189 Cal.App.3d 1280, 1286, 234 Cal.Rptr. 749.)

10 **Second Affirmative Defense**

11 90. DLC asserts that to validate the issuance of bonds at this point would deprive
12 interested parties of the right to contest whether the Department has complied with
13 provisions of the Central Valley Project Act prior to funding units of the project,
14 including the requirement for sufficient legally available revenues to construct, operate,
15 and properly maintain units of the project, or whether the Department has fully
16 complied with other legal requirements prior to construction.

17 **Third Affirmative Defense**

18 91. DLC alleges that the Department is not currently collecting sufficient revenues
19 under the Water Supply Contracts to comply with the requirements of the Central
20 Valley Project Act. The Department is required to collect sufficient revenue “so as to at
21 all times provide revenue which will afford sufficient funds to pay all costs of operation
22 and maintenance of the works authorized by this part, together with necessary repairs
23 and replacements thereto,” as well as the interest and principle on the CVP revenue
24 bonds. (Wat. Code § 11455.)

25 The sections of the California Aqueduct south of “a reservoir near Los Banos in
26 Merced County” were constructed under the Central Valley Project Act, as were
27 associated facilities for “generation and transmission of electrical energy.” The State
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1 Water Project contracts describe these facilities as the “Project Transportation
2 Facilities.”³

3 The Department collects funds to pay for operation and maintenance of the
4 Project Transportation Facilities through the Transportation Charge in the State Water
5 Project contracts.⁴ DLC asserts that revenues from the Transportation Charge are
6 currently insufficient to pay for repairs for subsidence on the California Aqueduct,⁵ and
7 the Department has asked for taxpayers to pay the cost.⁶

8 **Fourth Affirmative Defense**

9 92. Delta legacy communities alleges that the Department has refused to provide the
10 Central Valley Project books for inspection, as required under the Central Valley
11 Project Act.

12 **Fifth Affirmative Defense**

13 93. Delta Legacy Communities, Inc., alleges that the Delta legacy communities have
14 been endangered by the failure of the Department of Water Resources to do needed
15 maintenance and rehabilitation of the two largest State Water Project dams, Oroville
16 dam and San Luis dam.

17 **Sixth Affirmative Defense**

18 94. As taxpayers, Delta legacy community residents are also liable for damages due to
19 the Department’s failure to adequately maintain the dams. Risk Management Solutions,
20 Inc., a risk assessment company in Newark, simulated the Oroville Dam inundation
21 area, and estimated that there was \$21.8 billion in damageable property in the
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23 _____
24 ³ State Water Project contracts, Section 1 (i).

25 ⁴ State Water Project contracts, Section 23.

26 ⁵ California Department of Water Resources, California Aqueduct Subsidence Study, June 2017.
https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/Engineering-And-Construction/Files/Subsidence/Aqueduct_Subsidence_Study-Accessibility_Compatibility.pdf.

27 ⁶ Senator Diane Feinstein, Restoration of Essential Conveyance Act, S. 3811. Available at
<https://www.congress.gov/116/bills/s3811/BILLS-116s3811is.pdf>.

1 inundation area.⁷ Dam inundation is only covered by flood insurance. Most urban
2 properties are protected by certified levees, and do not have flood insurance. Under the
3 Paterno decision,⁸ the State of California could be liable for inverse condemnation of
4 properties flooded by dam failure.

5 Metropolitan Water District of Southern California asserted in October 2019 “that a
6 provision in the Water Supply Contracts precludes the System from seeking
7 reimbursement from the Water Contractors for their allocated share of claims and
8 damages related to the control, carriage, handling, use, disposal or distribution of
9 System water prior to the delivery of water to the Water Contractors.”⁹

10 Given the condition of the State Water Project dams, all revenues from the State
11 Water Project must go first to the payment of “maintenance and operation” of the
12 existing State Water Project facilities, and “replacement of the parts thereof,” as
13 required under the pledge and priority provisions of Water Code section 12937(b).

14 **Seventh Affirmative Defense**

15 95. DLC asserts that Delta legacy communities were endangered by the failure by
16 the Department to adequately maintain the Oroville dam main spillway and auxiliary
17 spillway, which caused the 2017 Oroville spillway incident, and that this was directly
18 related by the failure of the Department to charge adequate costs for maintenance,
19 repair, and rehabilitation of Oroville dam.

20 **Eighth Affirmative Defense**

21 96. DLC alleges that the Department failed to adequately maintain the Oroville
22 division power facilities, authorized under the Central Valley Project Act, and that this
23

24 ⁷ Holly Widen, Risk Management Solutions, Inc., What if the Oroville Dam had collapsed
25 completely? <https://www.rms.com/blog/2017/03/03/what-if-the-oroville-dam-had-collapsed-completely>.

26 ⁸ *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 87 Cal.Rptr.2d 754.

27 ⁹ State Water Resources Development System, Comprehensive Annual Financial Report for the
28 Fiscal Years Ended June 30, 2019 and 2018, p. 92-93. <https://emma.msrb.org/SS1387821-SS1072344-SS1487855.pdf>.

1 failure was a contributing cause to the Thermalito Power Plant fire which preceded the
2 Oroville spillway incident. Delta legacy communities alleges, based on lack of
3 published information, that the Department of Water Resources has not provided
4 separate accounting for the Oroville Division power facilities, as required under *Warne*
5 *v. Harkness* (1963) 60 Cal.2d 579, 583.

6 **Ninth Affirmative Defense**

7 97. DLC asserts, based on information and belief, that the Department has failed to keep
8 funding for planning and engineering design of the Department’s Delta Conveyance
9 “separate and apart” from funding for the existing State Water Project facilities, as required
10 by Water Code section 11260. Specifically, it appears that the Department has redirected
11 funding authorized by the legislature to pay for Davis-Dolwig costs for existing State Water
12 Resources Development System facilities to tunnel planning.

13 The Davis-Dolwig Account of the California Water Resources Development Bond
14 Fund is managed under the Davis-Dolwig Act (Wat. Code §§ 11910 et. seq.) Under the
15 Davis-Dolwig Act, the cost of State Water Resources Development System (“SWRDS”)
16 fish and wildlife enhancements and recreation is non-reimbursable by SWP contractors.
17 According to a 2009 report by the Legislative Analyst’s Office, the Department has
18 allocated about 3% of State Water Project operations costs, and about 6% of capital costs
19 are allocated to fish and wildlife enhancement and recreation under the Davis-Dolwig Act.¹⁰
20 The 2009 LAO report concluded that the Department had over-allocated SWP costs to
21 Davis-Dolwig purposes.¹¹

22 In December 2005, 27 State Water Contractors filed notices contesting SWP
23 charges, including charges for interest on CVP revenue bonds used to pay Davis-Dolwig
24

25
26 ¹⁰ Legislative Analyst’s Office, *Reforming Davis-Dolwig: Funding Recreation in The State Water*
27 *Project*, March 19, 2009. [https://lao.ca.gov/2009/rsrc/Reforming_Davis-Dolwig/Davis-](https://lao.ca.gov/2009/rsrc/Reforming_Davis-Dolwig/Davis-Dolwig_030909.pdf)
[Dolwig_030909.pdf](https://lao.ca.gov/2009/rsrc/Reforming_Davis-Dolwig/Davis-Dolwig_030909.pdf)

28 ¹¹ *Ibid*, p. 3.

1 costs. According to the State Water Resources Development System Comprehensive
2 Annual Financial Report for FY ending 2010 and 2018,¹²

3 The System rectified the situation by restating past bills to provide appropriate credits
4 back to the Water Contractors for the contested charges and taking other actions to pay
5 for the costs of the recreation and fish and wildlife enhancement portion of System
6 facilities with sources other than charges to the Water Contractors.

6 In the 2009-2010 California state budget, the Governor proposed an annual
7 appropriation of \$7.5 million to the Department for Davis–Dolwig costs from the Harbors
8 and Watercraft Revolving Fund (mainly funded from boating–related fees and gas–tax
9 revenues).¹³ The legislature enacted an annual appropriation of \$7.5 million for “costs of
10 State Water Resources Development System, as described in Section 12931, facility
11 operations, maintenance, and capital costs attributable to recreation and fish and wildlife
12 enhancement as provided for in Section 11914.” (Wat Code § 11913.1(c).)

13 According to the SWRDS Comprehensive Annual Financial Report, the Department
14 of Water Resources has also signed Tolling and Waiver Agreements which “tolls
15 (i.e.suspends) until December 31, 2021 the running of the time period and statute of
16 limitations for filing by the Water Contractors of (1) protests regarding the System’s bills to
17 the Water Contractors for the years 2007 through 2022, (2) claims arising from the
18 System’s revisions to prior year invoices that were made to adjust for improper charges to
19 the Water Contractors for recreation and fish and wildlife enhancement costs, and (3)
20 certain other specified claims.” Given that these claims are tolled, any funds appropriated
21 from the Davis-Dolwig account for general tunnel planning could result in redirection of
22 costs to the general fund.

23 Given the dire state of California’s general fund, it was an egregious abuse of
24 discretion for the Department to redirect funds allocated by the legislature to resolve Davis-

25 ¹² State Water Resources Development System, Comprehensive Annual Financial Report for the
26 Fiscal Years Ended June 30, 2019 and 2018, op. cit., p. 92.

27 ¹³ Described in the Legislative Analyst’s Office Report for the 2009-2010 budget, “The Davis–
28 https://lao.ca.gov/analysis_2009/resources/res_an109004003.aspx

1 Dolwig claims by the State Water Project contractors to pay for the Delta tunnel planning
2 and engineering design.

3 **Tenth Affirmative Defense**

4 98. DLC Asserts that State Water Resources Development System annual reports
5 show that the Department has repeatedly capitalized interest when issuing Central
6 Valley Project Water System Revenue bonds, most recently in series BB, which
7 included \$29 million in capitalized interest.¹⁴ Payment from bond proceeds, rather than
8 from operating revenues, is contrary to Water Code section 11722, which provides in
9 pertinent part that “[a]ll bond redemption and interest payments shall constitute a first
10 and direct charge and lien on all revenues received from the operation of the project.”

11 **Eleventh Affirmative Defense**

12 99. DLC further asserts that the Department required Delta residents to submit
13 responses to the Notice of Preparation (“NOP”) during the height of the pandemic
14 shutdown in California, in spite of requests by many Delta community groups to extend
15 the deadline. DLC further asserts that for this reason, publication of the NOP is not a
16 demonstration of intent by the Department to proceed with the California
17 Environmental Quality Act process in a fair or equitable manner.

18 **Twelfth Affirmative Defense**

19 100. DLC alleges that the Department has not done the consultation with local
20 agencies and the Delta Protection Commission on the proposed facility sites, required
21 under Delta Plan Policy DP P2, although it was requested by DLC on September 11,
22 2020. DLC alleges that funding continuing engineering design of the Central and
23 Eastern Corridor options, without doing the required consultation under Delta Plan
24 Policy DP P2, is prejudicial.

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26 _____
27 ¹⁴State Water Resources Development System, Comprehensive Annual Financial Report for the
28 Fiscal Years Ended June 30, 2019 and 2018, p. 92-93. <https://emma.msrb.org/SS1387821-SS1072344-SS1487855.pdf>

1 **Thirteenth Affirmative Defense**

2 101. The Joint Powers Agreement for the Delta Conveyance Design and
3 Construction Authority¹⁵ indemnifies the member agencies from liability for the
4 activities of the Delta Conveyance Design and Construction Authority. Article XIII,
5 Liability, section 13.1 states: [t]he debt, liabilities and obligations of the Construction
6 Authority shall be the debts, liabilities and obligations of the Authority alone, and not
7 the individual Members.

8 Article 13(b) of the State Water Project contracts also states that the contractors
9 shall not be “liable for the control, carriage, handling, use, disposal, or distribution of
10 project water before such water has passed the delivery structures established in
11 accordance with Article 10; nor for claim of damage of any nature whatsoever,
12 including but not limited to property damage, personal injury or death, arising out of or
13 connected with the control, carriage, handling, use, disposal, or distribution of such
14 water before it has passed said delivery structures.”

15 Construction of the project by a Joint Powers Authority consisting of State Water
16 Project contractors is thus contrary to the Standard of Care for construction of
17 underground tunnels, as defined in the International Tunneling Association’s “Code of
18 Practice for Risk Management of Tunnel Works” and the Underground Construction
19 Association’s Guidelines for Improved Risk Management on Tunnel and Underground
20 Construction Projects in the United States of America . The Guidelines state in part:
21 “[t]he process of risk management—including risk assessment, characterization, and
22 response, as well as elimination, mitigation, avoidance, transference, or acceptance—is
23 required to identify and clarify ownership of risks and should detail clearly and
24 concisely how the risks are to be allocated, controlled, mitigated, and managed.”

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27 ¹⁵ Joint Powers Agreement Forming the Delta Conveyance Design and Construction Authority,
28 Effective May 14, 2018. <https://dcdca.org/wp-content/uploads/2020/06/DCA-JPA-2018-05-14-EXMA-JPA-Formation.pdf>.

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Fourteenth Affirmative Defense

DLC reserves all other defenses that may potentially become available as a result of information developed during the case.

Prayer for Relief

DLC prays for relief and judgment in their favor as follows:

- 1. That the Complaint for Validation be dismissed, or judgment entered in favor of DLC;
- 2. That Plaintiff take nothing by this suit;
- 3. For costs of suit;
- 4. For attorney’s fees pursuant to law including Code of Civil Procedure section 1021.5; and
- 5. For such other and further relief as the Court deems just and proper.

Dated: October 30, 2020

Law Offices of LOUIS DEMAS

By _____

1 **VERIFICATION**

2

3 I, Dan Whaley, am Chair of the Board of Delta Legacy Communities, Inc. I have

4 read the foregoing Response and Answer and know the contents thereof. The same

5 is true of my own knowledge, except as to those matters that are alleged on

6 information and belief, and as to those matters, I believe them to be true.

7

8 I declare under penalty of perjury under the laws of the State of California that the

9 foregoing is true and correct.

10 Executed this 30th day of October, 2020, in Hood, California.

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12

13 By _____

14 Dan Whaley

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1 **PROOF OF SERVICE**

2
3 I hereby certify that I am a citizen of the U.S., over the age of 18 and not a party to the foregoing action. My business address is 2713 E Street, Sacramento, CA 95816.

4 On October 30, 2020, I served a true and correct copy of the following document(s):

5 **VERIFIED ANSWER OF DEFENDANT DELTA LEGACY COMMUNITIES,**
6 **INC. TO COMPLAINT FOR VALIDATION**

7 [X] BY MAIL: By placing a true and correct copy thereof in sealed envelope(s). Such
8 envelope(s) were addressed as shown below. Such envelope(s) were deposited for collection
9 and mailing following ordinary business practices with which I am readily familiar.

<p>10 Michael Weed 11 ORRICK, HERRINGTON & SUTCLIFFE LLP 12 400 Capitol Mall, Suite 3000 13 Sacramento, California 95814-4497 14 mweed@orrick.com 15 <i>Attorney for Plaintiff</i></p>	<p>Spencer Kenner Christopher Martin CALIFORNIA DEPARTMENT OF WATER RESOURCES, OFFICE OF THE CHIEF COUNSEL 1416 Ninth Street Sacramento, California 95814 Spencer.Kenner@water.ca.gov Christopher.Martin@water.ca.gov <i>Attorney for Plaintiff</i></p>
<p>16 Marcia Scully 17 Robert C. Horton 18 Bryan M. Otake 19 THE METROPOLITAN WATER DISTRICT OF 20 SOUTHERN CALIFORNIA 21 700 N. Alameda Street 22 Los Angeles, CA 90012 23 mscully@mwdh2o.com 24 rhorton@mwdh2o.com 25 botake@mwdh2o.com 26 <i>Attorneys for Defendant: The Metropolitan Water 27 District of Southern California</i></p>	<p>Mark J. Austin BURKE, WILLIAMS & SORENSEN, LLP 1851 East First Street, Suite 1550 Santa Ana, CA 92705-4067 maustin@bwslaw.com <i>Attorneys for Defendant: The Metropolitan Water District of Southern California</i></p>
<p>Jonathan M Coupal Timothy A. Bittle Laura E. Dougherty Howard Jarvis Taxpayers Foundation 921 Eleventh Street, Suite 1201 Sacramento, CA 95814 <i>Attorney for Interested Party</i></p>	

1 [] STATE: I declare under penalty of perjury under the law of California that the foregoing is
2 true and correct.

3 Executed on October 30, 2020 at Sacramento, California. _

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By _____

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