

*Friends of the*



*Sacramento*  
*River Parkway*

Supporting public access and  
recreation along the Sacramento River

February 20, 2015

Delta Stewardship Council  
980 Ninth Street, Suite 1500  
Sacramento, CA 95814

Re: Delta Levees Investment Strategy: Item 8; February 26, 2015, Agenda

Dear Mr. Fiorini, Chair of the Delta Stewardship Council, and Honorable Members:

We write to provide some information that may assist in your discussion of Item 8 (Draft Levee Investment Strategy Update) on the agenda for your February 26, 2015, meeting. We assume that the Delta Levees Investment Strategy Issue Paper (January 9, 2015) (“Issue Paper”), figures into your discussion. We appreciate the Issue Paper’s acknowledgment of your statutory duty to give consideration to recreational uses of our Delta levees. We believe we have some helpful input in that regard about the Public Trust Doctrine.

First, let me describe our interest. We believe the time is long overdue to complete the Sacramento River Parkway, a plan our city council approved forty years ago. The Parkway includes a multi-use trail that remains less than half complete on the levee crown from Old Sacramento to the city’s southern limits. Our city council unanimously approved a plan to move forward in November 2012 and the city is taking tentative steps to fill in the gaps.

But our interest also includes the planning, promotion, and completion of the Great California Delta Trail, a statutorily mandated plan for a trail from Sacramento to the San Francisco Bay Trail. Our Parkway is the first link in the Delta Trail. Without the completion of our Parkway, all but a minuscule portion of Sacramento will lack a bike-friendly link to the Delta Trail. We have supported efforts by the Delta Protection Commission to convince Caltrans to incorporate protected bicycle lanes as Caltrans improves delta highways, and to convince the Central Valley Flood Protection Board (“CVFPB”) that its regulations should not discourage “bicycle trails” on levee crowns.

We applaud your Issue Paper for acknowledging the statutory duty of state agencies to fully consider opportunities for recreational uses of flood-control projects. Regrettably, we have found that you appear to be among very few agencies that recognize their duty to consider

recreational opportunities on levees. In our experience, other agencies are not even aware of this statutory mandate and, as a result, discourage rather than encourage recreation even when recreational amenities such as paved trails would enhance flood-control efforts and decrease maintenance and operation costs.

However, we believe your Issue Paper slights your ability to ensure that Delta levees provide maximum recreational access. The Issue Paper states: “Access to Delta levees for recreation is a persistent issue, because most Delta levees are private property where trespassing is prohibited.” (Issue Paper at 11, *ll.* 11-13.) In fact, no Delta levee is entirely private property and the failure to recognize this could cause the loss of opportunities to improve recreational access.

The Issue Paper briefly mentions the Public Trust Doctrine as an analog to the Reasonable Use Doctrine as water-use principles in the definition of “Co-Equal Goals.” This branch of the Public Trust Doctrine dates back only to the 1983 California Supreme Court case, *National Audubon Society v. Superior Court*. The Public Trust Doctrine’s more commonly used sense is a principle to protect the public’s access to and use of navigable waterways.

On California’s tidal waterways, such as the Delta, the State owns the land in fee simple below the “ordinary high water mark” and holds that land in trust for the public’s use, including recreational use. (*See* Civil Code § 830.) The State Lands Commission is the state agency having primary responsibility to enforce the Public Trust Doctrine, but as the *Audubon Society* case holds, all state agencies bear the responsibility to enforce the Public Trust Doctrine and are vulnerable to litigation from any member of the public to enforce these responsibilities as a private attorney general. We have found far too often that state agencies neither protect Public Trust interests nor appreciate their duty to do so.

In leasing Public Trust land for use as recreational piers, the State Lands Commission reminds lessees that their leased interest is subservient to the public’s interest:

Lessee acknowledges that the land described in Exhibit A of this Lease is subject to the Public Trust and is presently available to members of the public for recreation, waterborne commerce, navigation, fisheries, open space, or other recognized Public Trust uses and that Lessee’s use of the Leased Premises shall not interfere or limit the Public Trust rights of the public.

The Reclamation Board, now known as the Central Valley Flood Protection Board, purported to protect Public Trust interests in its encroachment permits:

The waterward end of the removable fence shall not cross the public trust easement as determined by the State Lands Commission, the Attorney General, or a court of law. . . .

We respectfully suggest that the Council use its authority to require private levee owners to acknowledge the limits of their ownership interests as a condition to any assistance from the State. You might also seek assistance from staff at the State Lands Commission about methods for maximizing and possibly expanding the public’s right to access levees throughout the Delta

Thank you for considering our suggestions. If you have any questions or need any additional information, please do not hesitate to contact the primary author of our comments, Jim Hought, by e-mail at [jhought@houptlaw.com](mailto:jhought@houptlaw.com) or by phone at 916-396-7239. If you prefer, we would be pleased to meet with you or your staff to discuss these issues.

Very truly yours,



Anne Rudin

Former Mayor, City of Sacramento

And Founding Member, FSRP

cc: Jessica Person  
Executive Officer, Delta Stewardship Council

Jennifer Lucchesi, Esq.  
Executive Officer, State Lands Commission