BLACK & RICE LLP
Robert N. Black, SBN 70178
rblack@attyblack.com
Martha D. Rice, SBN 262100
mrice@attyblack.com
Autumn E. Luna, SBN 288506
aluna@attyblack.com
The McNulty House
710 H Street
Crescent City, CA 95531
Telephone: 707-464-7637
Facsimile: 707-464-7647

Attorneys for Respondent-Defendant
BORDER COAST REGIONAL AIRPORT
AUTHORITY

Deborah A. Sivas (CA Bar No. 135446)
Alicia E. Thesing (CA Bar No. 211751)
Matthew J. Sanders (CA Bar No. 222757)
Jacqueline M. Iwata (CA Bar Student Cert. No. 33954)
Lauren Gollaher (CA Bar Student Cert. No. 34464)
ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School
559 Nathan Abbott Way
Stanford, California 94305-8610
Telephone: (650) 723-0325
Facsimile: (650) 723-4426
dsivas@stanford.edu
athesing@stanford.edu
msanders@law.stanford.edu

Attorneys for Defendant-Intervenors
MAXINE CURTIS, MICHAEL HEADLEY,
EARL MCGREW, MIMI and BOB STEPHENS,
NORTHCOAST ENVIRONMENTAL
CENTER, and SMITH RIVER ALLIANCE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PACIFIC SHORES PROPERTY OWNERS ASSOCIATION; and WILLIAM A. RITTER,

Petitioners and Plaintiffs,

v.

FEDERAL AVIATION ADMINISTRATION; BORDER COAST REGIONAL AIRPORT AUTHORITY; and DOES 1 – 100,

Respondents and Defendants.

MAXINE CURTIS; MICHAEL HEADLEY; EARL MCGREW; MIMI STEPHENS; NORTHCOAST ENVIRONMENTAL CENTER; and SMITH RIVER ALLIANCE,

Movant-Intervenors.

Case No. 4:13-cv-2827-PJH

NOTICE OF JOINT MOTION AND JOINT MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO FED. R. CIV. P. 12(c); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: February 19, 2014
Time: 9:00 a.m.
Courtroom: 3, Hon. Phyllis J. Hamilton

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that Defendant-Respondent Border Coast Regional Airport Authority ("Airport Authority" or "Authority") and Defendant-Intervenors Maxine Curtis, Michael Headley, Earl McGrew, Mimi and Bob Stephens, Northcoast Environmental Center, and Smith River Alliance (collectively, "Defendant-Intervenors"), do hereby jointly move for judgment on the pleadings on the grounds that (1) this Court lacks jurisdiction over Plaintiffs' federal-law claims, and lacks, or at least should decline to exercise, supplemental jurisdiction over Plaintiffs' state-law claims, and (2) Plaintiffs' claims fail on their merits.

This motion is brought pursuant to Federal Rule of Civil Procedure 12(c), and is based on this Notice of Motion and Motion, the supporting Memorandum of Points and Authorities filed concurrently herewith, the papers and pleadings on file herein, and on such oral arguments or written materials as have been or may be made or filed in this action. This motion will be heard in Courtroom 3 of the United States District Court for the Northern District of California, Oakland Division, located at 1301 Clay Street, Oakland, California, 94612, on February 19, 2014, at 9:00 a.m., or as soon thereafter as the Court may hear it.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The First Amended Complaint (or "FAC") asserts three separate causes of action which all go to the same basic allegation – namely, that the Airport Authority's wetlands mitigation purchase program for the runway safety area project *somehow* improperly deprives Plaintiffs of their property rights. *See*, FAC at ¶¶ 57-80 (First Cause of Action for Violation of Uniform Relocation Act); ¶¶ 81-83 (Second Cause of Action for Violation of Fifth Amendment and Civil Rights); ¶¶ 84-87 (Third Cause of Action for Inverse Condemnation Damages).[1] The problem with these claims is that the Airport Authority does not intend to acquire or take any action with respect to *Plaintiffs' property* within the Pacific Shores Subdivision. Rather, to satisfy its state and federal obligations to both improve runway safety

[1] The remaining two claims assert violations of state statutory and constitutional law and belong, if at all, in state court.

conditions and mitigate the wetlands impacts from those improvements, the Airport Authority is seeking willing landowners, like Defendant-Intervenors, who are interested in selling their otherwise undevelopable parcels for fair market value.

Bluntly, there will be no involuntary taking of Plaintiffs' property – or indeed, of any property. The mitigation program is entirely voluntary and will likely result in the transfer of paper title for some limited number of private parcels from willing sellers. Plaintiffs do not allege any facts to the contrary, nor could they. And because their property is not subject to acquisition by the Airport Authority, Plaintiffs cannot lay claim to the benefits conferred by the Uniform Relocation Act, the Fifth Amendment, or the civil rights laws. The Airport's potential purchase of property from some of Plaintiffs' willing neighbors as part of a mitigation program cannot possibly give rise to a compensation right or a legal claim inuring to Plaintiffs' benefit under these federal laws, whether that claim is styled as "inadequate notice," an "unlawful takings," or a "due process violation." To the extent that Plaintiffs contend that some future management action (*e.g.*, removal of roads within the Subdivision) might in some way devalue their property interests, that contention is not ripe for judicial review, before any court, because there has been no determination by the Airport Authority to undertake any particular future management action. Moreover, if and when such a claim ever ripens, the law is clear that Plaintiffs must proceed, at least as an initial matter, in state court.

By this motion for judgment on the pleadings, Defendant Airport Authority and Defendant-Intervenors jointly request that the Court dismiss the two federal claims (First and Second Causes of Action) because the first is not actionable and the second is not ripe. If the Court disposes of these claims, it should then dismiss the remaining three state-law claims (Third, Fourth, and Fifth Causes of Action) for lack of subject matter jurisdiction. Alternatively, the Court should grant judgment on the merits of all claims because under the facts alleged in the First Amended Complaint – and, indeed, the facts as they exist in the real world, Plaintiffs cannot prevail as a matter of law on any of their causes of action.

II. BACKGROUND

A. The Del Norte County Regional Airport Runway Safety Project

The Del Norte County Regional Airport, Jack McNamara Field ("the Airport") is a commercial airport located near Crescent City, California, in Del Norte County. The Airport Authority operates and maintains the Airport.[2] The Airport participates in the Federal Aviation Administration's ("FAA") Federal Essential Air Services subsidy program, which facilitates public airport services for remote rural locations like Del Norte County in the northwestern corner of California. The remote rural communities of Brookings-Harbor in southwestern Oregon and two tribal nations also rely on the Airport. In addition, the Airport provides access for emergency services and disaster relief, firefighting operations, and search and rescue operations for the Northern California and Southern Oregon coasts.

While the Airport is a critical link in all emergencies in the area, at times it is the only physical link with the rest of the world. The Airport serves communities that are isolated by mountains, river canyons, steep coastal bluffs, large tracts of heavily forested public land, and federal wilderness areas. Only two surface roads connect these areas to the rest of California and Oregon: the coastal Highway 101 and the Smith River Canyon-constrained Highway 199. These highways are primarily two-lane roads in the Crescent City area and are sometimes closed by landslides in the winter rainy season. Earthquakes, tsunamis, and winter flooding, which occasionally occur, could also compromise sections of these roads. Despite nearly-constant repair and rebuilding by the California Department of Transportation, Highway 101 continues to experience problems. In a catastrophic Cascadia subduction zone earthquake, this section of highway is vulnerable to failure. Indeed for some days or weeks after such a quake, according to local disaster relief planning officials, there will be no access at all to Del Norte County by ground travel, and the Airport will be the most important point of access for supplies and other relief.

[2] The Border Coast Regional Airport Authority is an innovative joint powers authority formed under California and Oregon laws. It consists of Del Norte County, the City of Crescent City, the Smith River Rancheria, the Elk Valley Rancheria, each a federally recognized Indian tribe, Curry County, Oregon, and the City of Brookings, Oregon. Because it is infrastructure critical to their communities, these entities have come together to govern the Airport. The Authority holds monthly public meetings and fully adheres to the California Brown Act and Public Records Act.

In 2000, the FAA completed an evaluation of the Airport's runway safety areas, concluding that the existing runway safety areas do not meet applicable design standards. The FAA defines a runway safety area as the area "surrounding a runway or taxiway that is prepared, or suitable, for reducing the risk of damage to aircraft in the event an aircraft undershoots, overshoots, or deviates from a taxiway or runway." 65 Fed. Reg. 38,636, 38,650 (June 21, 2000). The agency has explained that "[a] well-maintained safety area can prevent injuries to passengers and limit damage to aircraft that depart from paved surfaces. The safety area would allow the aircraft to come to a rest on a graded, obstacle free surface. Safety areas also allow emergency response vehicles to more quickly reach troubled aircraft." *Id.* As part of the 2005 appropriations bill for the Department of Transportation, Congress required all commercial service airports to come into compliance with FAA design standards for runway safety areas by December 31, 2015 and allocated federal funding to assist local airports with the needed improvements. Pub. L. No. 109-115, 119 Stat. 2396 (2005), codified in part as a note to 49 U.S.C. § 44706.[3]

To comply with federal certification requirements and ensure the safety of passengers and crewmembers traveling through the Airport, the Airport Authority proposed the Runway Safety Area Improvement Project ("Runway Safety Project" or "Project"). The Project is a repair and maintenance project that does not involve an addition to or enlargement of the airport facility; it will not in any way increase the capacity of the airport or allow it to accommodate larger or different aircraft. Rather, the Project will adjoin the ends and sides of the existing runways for the sole purpose of safely maintaining the continued commercial use of the existing airport at existing levels.

If the Project is not completed by the end of 2015, the citizens of the northern California and southern Oregon coastal zones may lose their critical commercial air link with the rest of the world. The small Airport Authority staff has been working with consultants on this complicated safety project for over five years and has already expended more than $2,000,000 of public money just on planning, environmental analysis, and permitting by state and federal agencies. Implementation of the Runway Safety Project is unusually complex because the Airport property contains and is surrounded by pocket

[3] Any airport that fails to bring its existing runways and security fencing into compliance with federally mandated safety standards by the end of 2015 will lose its federal certification to operate as a commercial facility. *Id.; see also* 14 C.F.R. § 139.309 (2004) (runway safety area requirements); FAA, Certification of Airports, 69 Fed. Reg. 6380, 6397, 6419 (Feb. 10, 2004) (discussing runway safety areas).

wetlands and sensitive wildlife habitat and species and is bordered by public lands, including Point St. George Heritage Area and Tolowa Dunes State Park. Additionally, some of the actual improvement work cannot be done during the winter rainy season.

The Airport Authority is the lead agency for the Runway Safety Project under the California Environmental Quality Act ("CEQA"), Cal. Pub. Res. Code § 21000 *et seq.* In July 2009 the Authority filed a Notice of Preparation, officially initiating the environmental review process. On February 25, 2011, the Authority circulated a Draft Environmental Impact Report for public comment, and it held a public meeting regarding the draft on March 9, 2011. Among other things, the Draft Environmental Impact Report observed that the Runway Safety Project would adversely affect 17 acres of wetlands and that mitigation would be required for those impacts. Accordingly, Appendix I of the Draft Report contained a detailed Draft Conceptual Mitigation Planning Technical Memorandum that discussed at length the Airport Authority's interest in the Pacific Shores Subdivision as a possible mitigation site. The Final Environmental Impact Report contained similar information. Plaintiffs did not comment on the Draft Environmental Impact Report prior to its adoption or attend the public meeting.[4]

B. The Pacific Shores Subdivision

The Pacific Shores Subdivision deserves its own chapter in the annals of the great California land frauds. The dunes between the Lake Earl coastal lagoon and the ocean were subdivided in the early 1960's into approximately 1,550 lots of about one-half acre each. These lots were then marketed – largely sight-unseen – primarily to Southern California residents, hopeful to build vacation and retirement homes "near the ocean."

Located in low-lying coastal sands, dunes, and wetlands, the Pacific Shores Subdivision has been languishing undeveloped and undevelopable for more than 50 years. No infrastructure has ever been installed – there is no sewer system or water delivery system serving the lots. The only exception is a substandard road system paved approximately 50 years ago and ditches dug in shifting sand; the system is unmaintained and decrepit. Because the soil is sand and groundwater is near the surface, state

[4] In fact, Plaintiffs allege that they did not find out about the proposed mitigation at Pacific Shores until December 2012, despite the fact that the proposed mitigation was included in both the Draft and Final EIRs in 2011. FAC at ¶ 35.

water laws prohibit the use of septic systems. There are no lawfully developed homes or structures.[5] A few lots are occupied illegally from time to time but have no apparent sanitation facilities beyond the rudimentary and no local or state permits have been issued for land use or building.[6] Most of the illegal housing involves simply parking trailers on lots. Some of these encampments have been the focus of California Coastal Commission enforcement actions during the last decade.

Pacific Shores is a logical site for mitigating safety project damage to wetlands and dunes at the Airport. It is located in a similar wet coastal environment and, as is well documented, the subdivided lots are historically and naturally dotted with a mosaic of sand dunes, wetlands and sensitive plant and animal species. These environmentally sensitive conditions are carefully protected by state and federal laws and thus are very challenging to develop. Pacific Shores is immediately adjacent to the ocean and two lobes of the large estuarine coastal lagoon called Lakes Earl and Tolowa. Because of the lagoons' dynamic nature, some of the peripheral Pacific Shores lots are flooded during the wet-weather season absent any human intervention to lower the water level. During high flood stage, the undammed and unregulated Smith River also floods into the lagoons and into Pacific Shores. The elevation of the entire subdivided area is so low that a Tsunami could engulf all of it. Declaration of Patricia McCleary ("McCleary Decl.") at ¶ 7 (ECF Dkt. No. 22-6). Given these environmental constraints and the absence of essential infrastructure at the Subdivision, Defendant-Intervenors believe that sale of their property to the Airport Authority at the appraised market value is the best – and only foreseeable – way to recoup their investment. Declaration of Earl McGrew at ¶¶ 5-6 (ECF Dkt. No. 22-3); Declaration of Mimi Stephens at ¶ 3 (ECF Dkt. No. 22-4); Declaration of Maxine Curits ("Curtis Decl.") at ¶ 25 (ECF Dkt. No. 22-1).

[5] Although plaintiffs have contended that the subdivision and its lot owners are victims of environmental over-regulation, notably, there was no development in the subdivision during the ten years *before* the creation of the California Coastal Commission.

[6] Approximately 10-20 lots are currently occupied, out of the total original 1,535 subdivided lots. None of the (illegally) occupied lots are being targeted for purchase by the Airport Authority for its mitigation measures at Pacific Shores.

III. SUMMARY OF ARGUMENT

Plaintiffs' federal question jurisdiction for this case is premised on two federal causes of action (First and Second Causes of Action). Neither of these claims is actionable, however. First, section 4655 of the Uniform Relocation Assistance and Real Property Act ("Relocation Act") does not provide a private right of action for enforcement of section 4651. In any event, because their property will not be acquired by the Airport Authority, Plaintiffs do not come within the statute's land acquisition notice requirements. Second, Plaintiffs' Fifth and Fourteenth Amendment claims, pled under section 1983, are not ripe for review by this Court because Plaintiffs have not, and have not alleged, that they first sought compensation through the state courts. Without those federal claims, this Court lacks subject matter jurisdiction over Plaintiffs' remaining state-law claims, which should therefore be dismissed.

Alternatively, if the Court exercises jurisdiction over any of Plaintiffs' claims, it should nonetheless grant judgment in Defendants' and Defendant-Intervenors' favor on all claims in the First Amended Complaint. As explained below, Plaintiffs have not alleged, and under the circumstances here cannot allege, facts that would support their Uniform Relocation Act claim, their Fifth Amendment takings and state-law inverse condemnation claims, their section 1983 due process claim, their CEQA claim, or their private gift of public funds claim.

IV. STANDARD OF REVIEW

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "[J]udgment on the pleadings is proper when, taking all the allegations in the non-moving party's pleadings as true, the moving party is entitled to judgment as a matter of law." *Ventress v. Japan Airlines*, 486 F.3d 1111, 1114 (9th Cir. 2007) (internal quotation marks omitted); *see also Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.,* 637 F.3d 1047, 1062 n.4 (9th Cir. 2011) ("Rule 12(c) is 'functionally identical' to Rule 12(b)(6) and that 'the same standard of review' applies to motions brought under either rule.").

Judgment on the pleadings is appropriate where a statute provides no private right of action, where a claim is not yet ripe for review, or where a claim (including a section 1983 claim) lacks merit. *See LeVick v. Skaggs Cos., Inc.*, 701 F.2d 777, 778 (9th Cir. 1983) (reversing district court's denial of

motion for judgment on the pleadings, as the relevant statute failed to provide for a private right of action); *Sinaloa Lake Owners Assn v. City of Simi Valley*, 882 F.2d 1398, 1401-04 (9th Cir. 1989) (affirming judgment on the pleadings on ripeness grounds), *overruled on other grounds by Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996); *Wolfe v. George*, 486 F.3d 1120, 1124 (9th Cir. 2007) (affirming grant of judgment on the pleadings in § 1983 case).

V. ARGUMENT

A. Plaintiffs' Federal Claims Are Either Not Cognizable or Not Ripe, and the Court Lacks Supplemental Jurisdiction over Plaintiffs' Remaining State Law Claims.

1. Section 4655 of the Relocation Act Does Not Create a Cognizable Claim for Judicial Review.

In their First Amended Complaint, Plaintiffs attempt to fashion a claim under section 4655 of the Relocation Act. That section provides that:

> (a) Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, an acquiring agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property … unless he receives satisfactory assurances from such acquiring agency that—
>
> (1) in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land acquisition policies in section 4651 of this title and the provisions of section 4652 of this title, and
>
> (2) property owners will be paid or reimbursed for necessary expenses as specified in sections 4653 and 4654 of this title.

42 U.S.C. § 4655(a). By its plain language, the only obligation section 4655 imposes on *any* agency, federal or state,[7] is for federal agencies to make sure that they receive "satisfactory assurances" from state agencies receiving federal assistance. For assurances to be "satisfactory," the state agencies must promise that they "will be guided, to the greatest extent practicable under State law, by the land acquisition policies in section 4651" and that "property owners will be paid or reimbursed for necessary expenses as specified in sections 4653 and 4654." *Id.*

As this Court previously concluded (ECF Dkt. No. 37), there is no cognizable claim under section 4651 itself, which sets forth land acquisition policies by which federal agencies "shall, to the

[7] The Relocation Act defines "State agencies" to mean, among other things, "any department, agency, or instrumentality of a State or of a political subdivision of a State." 42 U.S.C. § 4601(3).

greatest extent practicable, be guided." 42 U.S.C. § 4651. Section 4602, in particular, provides that section 4651 "create[s] no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation." 42 U.S.C. § 4602(a). Courts have uniformly held that this language bars judicial review of agency compliance with section 4651. *Barnhart v. Brinegar*, 362 F. Supp. 464, 472-73 (W.D. Mo. 1973) (noting that section 4651 is nothing more than an "expression of congressional policy").[8] "Simply put, if one has 'no rights or liabilities' under the provisions of section [4651] . . . then one cannot be adversely affected or aggrieved by agency action under that section," and there is nothing in section 4651 for a court to review. *Id.* at 471. "[O]ne conclusion is irresistible – Congress intended section [4602(a)] to preclude judicial review of federal and state agency actions under the real property acquisition practices of section [4651] of the Act." *Id.*

In an attempt to avoid this conclusion, Plaintiffs' First Amended Complaint recasts their section 4651 allegations as a violation of section 4655. FAC at ¶¶ 71-80 (alleging that "boilerplate" assurances of compliance with section 4651 are actionable under section 4655). Courts have properly rejected such transparent attempts by plaintiffs to "circumvent the legislative will by permitting judicial review of § 4651 through an ostensible review of § 4655." *Nelson v. Brinegar*, 420 F. Supp. 975, 978 (E.D. Wis. 1976) (noting that "[t]he Court fails to see how it lacks subject matter jurisdiction to review compliance with § 4651 under one section, but has, as the plaintiff contends, the requisite jurisdiction to review such compliance under another); *see also City of Chesapeake v. Clear Sky Car Wash, LLC*, 2012 WL 3866508, at *3 (E.D. Va. Sept. 5, 2012) (declining plaintiff's attempt to invoke section 4655 as the vehicle for asserting a violation of section 4651).

As the FAA argues in its Motion to Dismiss (ECF Dkt. No. 40), Congress must speak unequivocally when providing a private right of action to enforce a federal statute, and the typical remedy for violations of statutes enacted under Congress's spending power is not a private right of action but action by the federal government to terminate funds to the state. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002). To the contrary here,

[8] *Barnhart*'s interpretation of the Relocation Act and its legislative history has been cited approvingly by several circuits. *See United States v. 320.0 Acres of Land, More or Less in Monroe Cnty*, 605 F.2d 762, 823 n.134 (5th Cir. 1979); *Roth v. U.S. Dept' of Trans.*, 572 F.2d 183, 184 n.2 (8th Cir. 1978); *Rhode v. City of Chicago for Use of Schs.*, 6 F.2d 1373, 178 (7th Cir. 1975).

Congress was explicit that the land acquisition policies set forth in section 4651 are intended only to "guide" state agencies receiving federal funding and thus are *not* enforceable in a court of law. Allowing Plaintiffs in this case to enforce this guidance against a recipient state agency through a claim for inadequate "assurances" by the federal grantor agency under section 4655 would undermine the expressed intent of Congress.[9]

In short, Congress was clear: "This Act does not give any person a cause of action or a defense to a cause of action in any court, or create any new element of value or damage in any eminent domain proceedings." H. Rep. No. 91-1656, 1970 U.S. Code Cong. and Adm. News at 5854. That is, Congress did not intend to convey judicially enforceable individual rights or benefits under the URA, particularly with respect to the land acquisition policies of section 4651. *Id*. (noting that Committee considered and rejected proposals that would make the benefits of the statute subject to judicial review). For this reason, the Court should conclude, as other courts have, that there is no private right of action to enforce the URA against the Airport Authority or the FAA. *Delancey v. City of Austin*, 570 F.3d 590 (5th Cir. 2009) (no private right of action under any provision of URA).

2. Plaintiffs' Section 1983 and Inverse Condemnation Claims Are Not Ripe for Review by this Court.

Plaintiffs allege that the Airport Authority, "[b]y its acts, policies, and practices," has "deprived plaintiffs of their due process rights" under the Fourteenth Amendment of the U.S. Constitution, and that the Airport Authority has taken "oppressive tactics" that "deprive[] plaintiffs of their right to just compensation" under the Fifth Amendment. FAC at ¶ 82. It is unclear whether these allegations are intended to assert only a Fifth Amendment takings claim (with section 1983 as the vehicle) or separate due process and takings claims. Either way, the claims are unripe and must be dismissed for lack of jurisdiction. *See W. Linn Corporate Park L.L.C. v. City of W. Linn*, 534 F.3d 1091, 1099 (9th Cir. 2008) ("Ripeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed." (quotation

[9] In any event, Plaintiffs cannot assert a section 4655 violation against the Airport Authority because it has no affirmative duties under that provision; any affirmative legal obligations is solely within the province of the federal agency. 42 U.S.C. § 4655(a) ("[T]he *head of a Federal agency shall not approve* any program or project or any grant to, or contract or agreement with, an acquiring agency . . . *unless he receives* satisfactory assurances from such acquiring agency.")

marks omitted)).

Ripeness's "basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985). For a takings claim to be ripe, a plaintiff must first "seek compensation through the procedures the State has provided" before bringing a claim in federal court, or show that such State procedures are inadequate. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985); *see also Adam Bros. Farming, Inc. v. Cnty. of Santa Barbara*, 604 F.3d 1142, 1147-48 (9th Cir. 2010) (discussing ripeness requirements for takings claims). In California, a plaintiff must bring an inverse condemnation or section 1983 claim through a writ of mandate in state court to satisfy the ripeness requirement of *Williamson County*. *Carson Harbor Village, Ltd v. City of Carson*, 353 F.3d 824, 828 (9th Cir. 2004) (discussing holding in *Galland v. City of Clovis,* 24 Cal. 4th 1003 (2001) that property owner could not "seek section 1983 damages in state court for a violation of substantive due process before seeking a writ of mandate") (emphasis in original); *Levald, Inc. v. City of Palm Drive*, 998 F.2d 680, 687 (9th Cir. 1993) ("a plaintiff cannot bring a section 1983 action in federal court until the state denies just compensation. A claim under section 1983 is not ripe – and a cause of action under section 1983 does not accrue – until that point."). Here, Plaintiffs do not allege that they sought compensation in state court for the alleged unlawful taking of their property by the Airport Authority (they did not in fact do so) or that California's compensation procedures are inadequate. Plaintiffs' section 1983 Fifth Amendment takings claim is therefore unripe. *See Valenciano v. City & County of San Francisco*, C-07-0845-PJH, 2007 WL 3045997, *6 (N.D. Cal. Oct. 18, 2007) (Hamilton, D.J.) (dismissing takings claim because plaintiffs failed to first seek state relief). For the same reason, Plaintiffs' Third Cause of Action, for inverse condemnation damages, is also unripe.

As pled in the Second Cause of Action, Plaintiffs' due process claim is not separate or different from their takings claim. That is, while Plaintiffs allege generally that the Airport Authority has violated their "due process rights," they do not specify any such right apart from their right to just compensation. FAC at ¶ 82. Thus, any stand-alone section 1983 claim is unripe for the same reasons

Plaintiffs' takings claim is unripe. *See Harris v. Cnty. of Riverside*, 904 F.2d 497, 500 (9th Cir. 1990) (claims "arising from an alleged taking may be subject to the same ripeness requirements as the taking claim itself depending on the circumstances of the case").

3. The Court Lacks Subject Matter Jurisdiction over Plaintiffs' Remaining State-law Claims.

Plaintiffs' remaining causes of action – CEQA and the prohibition against private gifts of public money under the California Constitution – are state-law claims over which this Court ordinarily might be able to exercise supplemental jurisdiction under 28 U.S.C. § 1367(a).[10] But where, as here, as federal court lacks original jurisdiction over any of the federal claims in a case, it has no authority to exercise supplemental jurisdiction over state-law claims and must dismiss those claims. *Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 805-07 (9th Cir. 2001) (explaining that no supplemental jurisdiction can exist where a court dismisses a plaintiff's federal-law claims for lack of jurisdiction, versus on the merits).

Even if the Court could exercise supplemental jurisdiction over Plaintiffs' state-law claims, it should decline to do so. A district court "may decline to exercise supplemental jurisdiction" where, among other things, the court "has dismissed all claims over which it has original jurisdiction." Id. § 1367(c)(3). Indeed, "'in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims.'" *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 561 (9th Cir. 2010) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988)).

These factors weigh heavily in favor of dismissing Plaintiffs' state-law claims. Apart from an order and amended complaint pertaining to Plaintiffs' federal Relocation Act claim, there have been no proceedings in this Court in this case that would need to be replicated in any state court case. This Court does not have substantial familiarity with the merits of the parties' arguments; the state courts are

[10] Of course, the Court would have to determine that Plaintiffs' state-law claims "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). The Airport Authority and the Defendant-Intervenors do not concede this point.

a convenient forum for the non-federal parties; the state courts are better equipped to address the novel and complex questions of state law this case raises; and the state courts generally can dispose of cases more quickly than the overworked federal courts. *See, e.g., The Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 715 (9th Cir. 2009) (explaining that district court's determination "that the state-law claims would involve 'statutory construction or interpretation and state case law analysis' that 'should be resolved by a state court'" was reasonable). The final factor – efficiency – is especially critical in this case, since the Airport Authority must meet various requirements, including obtain suitable mitigation lands, by certain deadlines to secure the federal funding the Authority requires for its runway safety project. For these reasons the Court should decline to exercise supplemental jurisdiction over, and therefore should dismiss, Plaintiffs' state-law claims. *See Valenciano*, 2007 WL 3045997, at *6 (Hamilton, D.J.) (declining to exercise supplemental jurisdiction over state-law claims after dismissing federal takings claim as unripe).[11]

B. Plaintiffs' Claims Lack Merit.

If the Court decides to entertain Plaintiffs' claims notwithstanding these jurisdictional defects, those claims fail on their merits. Assuming the truth of all facts alleged in the First Amended Complaint, Plaintiffs do not state cognizable claims for relief and, therefore, judgment on the pleadings is warranted.

1. The Facts Do Not Support a Relocation Act Claim.

Even if the Court finds that a targeted property owner can properly use section 4655 of the Relocation Act to enforce the land acquisition policy guidance of section 4651, Plaintiffs in this case cannot avail themselves of the statute's benefits and protections because their parcels are not subject to any future acquisition effort. Section 4651 sets forth guidelines for the appraisal, negotiation, and just compensation analysis for property that a recipient state agency intends to purchase or acquire by eminent domain. 42 U.S.C. § 4651. As explained elsewhere, the Airport Authority has no desire to purchase or condemn Plaintiffs' property and, therefore, Plaintiffs cannot invoke the protections of the

[11] State courts may hear claims under 42 U.S.C. § 1983. *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980).

Relocation Act. [12]

2. The Facts Do Not Support a Takings or Inverse Condemnation Claim.

Inverse condemnation occurs where there is a public taking of, or interference with, land without formal eminent domain proceedings. *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 316 (1987). "[I]n an inverse condemnation action, the property owner must first clear the hurdle of establishing that the public entity has, in fact, taken [or damaged] his or her property before he or she can reach the issue of 'just compensation.'" *San Diego Gas & Electric Co. v. Superior Court*, 13 Cal. 4tht 893, 940 (1996). Thus, "[i]n order to state a cause of action for inverse condemnation, there must be an invasion or an appropriation of some valuable property right which the landowner possesses and the invasion or appropriation must directly and specially affect the landowner to his injury." *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 119 (1973).

Plaintiffs do not and cannot allege that the Airport Authority has taken any action that directly interferes with the use of their property. As Plaintiffs' complaint makes clear, the Airport Authority has simply announced a desire to purchase lots within the Pacific Shores subdivision to use as mitigation, evaluated the fair market value of those lots, engaged in good faith negotiations with certain willing lot owners (not including Plaintiffs) to sell their lots, and sought regulatory approvals for the mitigation plan. FAC at ¶¶ 29-46. Plaintiffs' property is not targeted for purchase or condemnation, and the Airport Authority is not interested in exercising its power of eminent domain with respect to Plaintiffs' property or purchasing land from any uninterested landowners. Rather, the Airport has identified a subset of Subdivision owners who may be interested in transferring their property in return for the offered fair market value (based on a property appraisal). Participation in the mitigation purchase plan is entirely voluntary, and the Airport Authority need only purchase a limited number of parcels to satisfy its mitigation obligations.

[12] The impetus for passage of the Relocation Act arose from congressional concern about consistency in payments for relocating urban property occupants who were increasingly being displaced by public infrastructure projects. H. Rep. No. 91-1656, 1970 U.S. Code Cong. and Adm. News, 5850-53. The claim before this Court does not concern the relocation payment provisions of the law found in subchapter II – indeed, there is no legal occupancy at Pacific Shores – but only the land acquisition policies found in subchapter III.

These facts do not support a claim for inverse condemnation:

> The mere fact that respondent has the power of eminent domain, when in fact such power is neither exercised nor remotely threatened, is insufficient to render it liable in an inverse condemnation action every time it deals in an open market transaction which results in leases or licenses being broken. . . . In an open market transaction the "power to condemn" is not enough. [T]here must be evidence of implied or actual threat of condemnation, so that the ultimate result is a foregone conclusion. . . .

Pacific Outdoor Advertising Co. v. City of Burbank, 86 Cal. App. 3d 5, 12 (1978). The policy behind this result is both compelling and self-evident: "We indulge in no hyperbole to suggest that if every landowner whose property might be affected at some vague and distant future time by any of these legislatively permissible plans was entitled to bring an action in declaratory relief to obtain a judicial declaration as to the validity and potential effect of the plan upon his land, the courts of this state would be inundated with futile litigation." *Selby*, 10 Cal. 3d at 121 (holding that "plaintiff has not stated a cause of action against the county defendants for either declaratory relief or inverse condemnation.").[13]

Plaintiffs' inverse condemnation claim in this case is premised on the Airport Authority's expression of interest in acquiring some roads within the Subdivision and on Plaintiffs' speculation concerning the impacts of any such acquisition on their property. FAC at ¶ 86.[14] These allegations are

[13] By alleging that the Airport Authority has engaged in "oppressive tactics," FAC at ¶ 82, Plaintiffs apparently seek to invoke a line of cases allowing compensation for "unreasonable pre-condemnation conduct." Such an allegation is not actionable, however, where the plaintiff does not establish "the most basic element of [an unreasonable conduct] inverse condemnation claim – that the City had condemned their properties, had an intent to eventually acquire their properties through condemnation, or had a plan for future use of their property that would someday require condemnation of their properties." *City of Los Angeles v. Superior Court*, 194 Cal. App. 4th 210, 226 (2011) (finding no inverse condemnation claim with respect to remaining landowner where city purchased neighboring property from willing sellers); *see also Cambria Spring Co. v. City of Pico Rivera*, 171 Cal. App. 3d 1080, 1096 (1985) (affirming trial court's finding of no inverse condemnation claim where redevelopment plan did not state or require that all the property would be acquired by the agency, but only that the property was "subject to condemnation"); *Hecton v. People ex rel. Dep't of Transportation*, 58 Cal. App. 3d 653, 658 (1976) (pre-condemnation conduct cases not applicable where agency acquired neighboring property from willing sellers and "plaintiffs are not subject to condemnation proceedings, delayed or timely"). Thus, judgment on the pleadings is appropriate here. *Barthelemy v. Orange Co. Flood Control Dist.*, 65 Cal. App. 4th 558, 565, 572 (1998) ("mere designation of property for public acquisition, even though it may affect the marketability of the property, is not sufficient" to state an inverse condemnation claim).

[14] Plaintiffs also allege that the Airport's future purchase of private parcels from willing sellers will damage Plaintiffs' ability "to economically acquire the infrastructure to improve their properties and the subdivision." FAC at ¶ 86(b). Even putting aside the pivotal facts that (1) no acquisition has occurred, and thus no damages could possibly have accrued and (2) property owners cannot obtain economic damages for situational changes caused by their neighbors' willing sale of property to a government entity (*see* fn. 14), it is undisputed that a lot owner-funded water and sewer district existed in the Subdivision for two decades, was never able for physical

insufficient to support an inverse condemnation claim at this juncture, for several reasons.

First, although the Airport Authority has expressed an interest in acquiring some of the roads, it has made no final determination to do so. At this point, the Authority is evaluating the options and opportunities for both achieving conservation objectives through road acquisition and avoiding access impacts on any remaining private landowners. As the court explained in *Smith v. State of California*, 50 Cal. App. 3d 529, 536 (1975), with respect to a proposed freeway project that might ultimately impact plaintiff's property:

> Without question, when the state embarks upon a plan to develop a freeway, because of the public airing which is legally attendant to such a project, marketability of property in the affected area is adversely impacted. On the other hand, invocation of the doctrine of inverse condemnation or the assessment of damages against the state upon the public announcement of the state's plan would result in acquisition of large amounts of property that may never be used and would inordinately increase the cost of any such project. The real result would be a severe hampering of the state's ability to undertake necessary and worthwhile improvements in our highway system.

Accordingly, the court affirmed dismissal of the plaintiff's inverse condemnation claim on demurrer even though the agency's announced freeway route would bisect plaintiff's property, finding that "[c]ertainly this particular property is not singled out for singular and unique treatment in contrast to property of thousands of others along the proposed route." *Id.* at 537. Here, not only has the Airport Authority not singled out Plaintiffs' property for acquisition, it is affirmative working to avoid any road acquisition that might in any way affect Plaintiffs' particular parcels or those of any other remaining private landowner within the Subdivision.

Second and related, unless and until the Airport Authority identifies particular road segments for potential acquisition from the county, Plaintiffs cannot possibly assert a claim that road acquisition directly and specially impacts or impairs their property; indeed, the Airport Authority intends to avoid doing that very thing. Whether an impaired access claim for damages is actionable necessarily depends on the specific facts concerning the road alterations at issue. *Bacich v. Board of Control of Cal.*, 23 Cal. 2d 343, 352-56; *see also Hecton v. People ex rel. Dep't of Transportation*, 58 Cal. App. 3d at 658 (explaining that the California Supreme Court has "stated its view that disadvantages resulting from isolation of a residence are not compensable"). Such a claim cannot be adjudicated before the agency

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and legal reasons to construct infrastructure, and thus was ultimately dissolved by the county. *See* Curtis Decl. at ¶ 3-22 (ECF Dkt. No. 22-1).

takes the action that will allegedly impair the claimant's access to their property and the facts as to the alleged "impairment" are thereby ascertainable.

Third, Plaintiffs' contention that acquisition and subsequent alteration (*e.g.*, "removal") of the roads to enhance conservation will cause flooding of their property is wholly speculative; the Airport has not even selected particular roads for acquisition, let alone determined how it will alter or manage them. Under these circumstances, there is no way for Plaintiffs presently to show damage to their property interest from increased flooding; indeed, as a scientific matter, quite the opposite may be true. Allowing Plaintiffs' to maintain their utterly speculative claim at this point would accomplish nothing except potential delay in the funding of the Runway Safety Project and increased risk to the Northern California and Southern Oregon communities that rely on the Airport.

Finally, if the Airport Authority ultimately decides to select roads for acquisition, the county ultimately agrees to transfer those roads, and the Authority undertakes subsequent alteration activities that allegedly damage Plaintiffs' property in some way, Plaintiffs still must exhaust their claims through an inverse condemnation in state court before they can invoke this Court's jurisdiction. *Williamson County*, 473 U.S. at 194-95.

3. The Facts Do Not Support a Due Process Violation.

Although Plaintiffs' second cause of action under section 1983 alludes to a due process violation, the due process allegation is illusory and essentially restates Plaintiffs' Fifth Amendment takings claim. Plaintiffs assert that the Airport Authority has violated their "due process rights under the Fourteenth Amendment" by "oppressive tactics" that "deprives [sic] plaintiffs of their right to just compensation under the Fifth Amendment of the U.S. Constitution" and the equivalent statute constitutional provision.[15] FAC at ¶ 82. Where an alleged violation "is actually covered by the

[15] These allegations do not sufficiently allege a due process violation. To adequately allege a section 1983 claim, a plaintiff "must plead that the officials, acting under color of state law, caused the deprivation of a federal right." *Suever v. Connell*, 579 F.3d 1047, 1060 (9th Cir. 2009) (quotation marks omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) ("[A] plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."). Here, the complaint entirely fails to identify what state law the defendants acted under, what their unconstitutional actions were, or how those actions violated their due process and just compensation rights. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("[A] plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must rise above the speculative level." (citations and quotation marks omitted) (alteration in original)).

Takings Clause," the Fifth Amendment precludes a due process challenge. *Crown Point Development, Inc. v. City of Sun Valley*, 506 F.3d 851, 855 (9th Cir. 2007); *Action Apt. Ass'n, Inc. v. Santa Monica Rent Contro Bd.*, 509 F.3d 1020, 1025-26 (9tht Cir. 2007) (explaining that an arbitrary deprivation of life, liberty or property may give rise to a substantive due process claim, but such a claim "will be preempted if the asserted substantive right can be vindicated under a different – and more precise – constitutional rubric," such as the Takings Clause of the Fifth Amendment (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Because Plaintiffs' "due process" claim here is premised on an alleged deprivation of their just compensation rights under the Fifth Amendment, it is subsumed by their Takings Claim and not cognizable as a separate cause of action. *E.g., Milpitas Mobile Home Estates v. City of Milpitas*, 2013 WL 4504877, *6 (N.D. Cal. Aug. 21, 2013) (holding that even if the due process claim "could stand apart from [the] Fifth Amendment Claim," it was nonetheless dismissible because there were no factual allegations to support a due process violation).

But even if the Amended Complaint could be fairly read to assert a stand-alone due process claim separate from the takings allegations, Plaintiffs face an "exceedingly high burden" to demonstrate that the Airport Authority's land use mitigation program creates a constitutional deprivation. *Shanks v. Dressel*, 540 F.3d 1082, 1088 (9th Cir. 2008). As the Ninth Circuit explained in *Shanks*, where plaintiffs seek something other than just compensation under the Fifth Amendment, the Takings Clause does not "foreclose altogether" a due process claim, but plaintiffs much show that the land use action in question "is so arbitrary or irrational that it runs afoul of the Due Process Clause." *Id.* at 1087-88. "[T]he 'irreducible minimum' of a substantive due process claim challenging land use action is failure to advance any legitimate governmental purpose." *Id.* (citations omitted). Thus, "only 'egregious official conduct can be said to be 'arbitrary in the constitutional sense'': it must amount to an 'abuse of power' lacking any 'reasonable justification in the service of a legitimate governmental objective.'" *Id.* at 1088-89 (citations omitted). Or, as the Supreme Court has explained, "the touchstone of due process is protection of the individual against arbitrary action of government" and the alleged offending conduct giving rise to a due process violation must, therefore, be conduct that "shocks the conscience."

County of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998).

Here, Plaintiffs' Second Cause of Action cannot withstand scrutiny as a due process claim. Nothing in the complaint even hints that the Airport Authority's Runway Safety Project and accompanying mitigation measures amount to an abuse of discretion lacking a legitimate governmental objective. To the contrary, the Project is designed to protect the public safety and to meet minimum federal aviation standards set by Congress and the FAA. And because the runway alterations will, unfortunately, result in the destruction of some coastal wetlands, the Airport Authority's mitigation program is designed to meet applicable state and federal wetlands protection standards through the purchase from willing sellers of comparable wetlands elsewhere. In short, the Airport Authority's project mitigation measures pass due process muster because "there is a legitimate governmental interest that is rationally related to Defendants' action." *Vogt v. City of Orinda*, 2012 WL 1565111, *4 (N.D. Cal. May 2, 2012) (Wilken, D.J.).

3. The Facts Do Not Support a CEQA Claim.

Plaintiffs' petition for writ of mandate alleges that the Airport Authority failed to conduct adequate environmental review of the Project in violation of the California Environmental Quality Act ("CEQA"), Cal. Pub. Res. Code ("PRC") § 21000 *et seq.* Specifically, Plaintiffs allege that the Authority "failed to conduct an environmental analysis" of the mitigation measures associated with the Pacific Shores Subdivision. FAC at ¶ 89. They argue that the Airport Authority did not conduct an environmental review of the "Pacific Shores mitigation project," did not provide public notice of its actions, did not provide a mitigation project description, and did not analyze mitigation alternatives. FAC at ¶¶ 91-92(a)-(e). These allegations are inaccurate and misstate the relevant law. In any event, Plaintiffs' CEQA claim is barred by the statute of limitations and because Petitioners failed to exhaust their administrative remedies.

a. Petitioners' Allegations Misrepresent the Law.

Plaintiffs' primary complaint is that the Airport Authority "failed to conduct an environmental analysis of the Pacific Shores mitigation project." FAC at ¶ 89. Plaintiffs' allegations misapprehend the applicable law. CEQA requires governmental agencies to prepare "an environmental impact

report on any project that they intend to carry out or approve which may have a significant effect on the environment." P.R.C. § 21151. As relevant here, "project" means "[a]n activity directly undertaken by any public agency." But not just any "activity" qualifies – rather, a "'project means the whole of an action." 14 Cal. Code of Regs. ("C.C.R.") § 15378(a); *see also* § 15378(c) ("The term 'project' refers to the activity that is being approved and which may be subject to several discretionary approvals by governmental agencies. The term 'project' does not mean each separate governmental approval."); *Save Tara v. City of W. Hollywood*, 45 Cal. 4th 116, 129 n. 8 (2008) (explaining that a "project" is the "whole of an action," not any of the individual steps a government entity takes to approve or implement it).

Mitigation measures, meanwhile, are *part* of the environmental review of a project. 14 C.C.R. § 15126.4. Thus, CEQA required the Airport Authority to prepare an Environmental Impact Report and Notice of Determination for the Runway Safety Project. In doing so, it identified the potential loss of 17 acres of wetlands and potential mitigation measures for that loss. The CEQA process identified sites for potential mitigation purchase, including the Pacific Shores Subdivision. There is no separate "mitigation project." To the extent that the Airport Authority moves forward with purchasing previously identified mitigation land – that is, transferring paper title from private property owners to the Airport Authority – there are no additional physical impacts on the environment that would trigger additional CEQA review or create a new cause of action. *See* 14 C.C.R. § 15162 (subsequent EIR required only where "[s]ubstantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects"); § 15163 (supplement to EIR where "Only minor additions or changes would be necessary to make the previous EIR adequately apply to the project in the changed situation"). If the Airport Authority subsequently undertakes post-acquisition actions that could affect the physical environment, some additional CEQA review may be required, depending on the impact. But that issue is not presently ripe for review.

b. CEQA's Statute of Limitations Bars Plaintiffs' Claim.

Whatever the merits of Plaintiffs' allegations, they are time-barred. Challenges to government action under CEQA are subject to "unusually short statutes of limitations." *Cmte. for Green Foothills v. Santa Clara Cnty. Bd. of Supervisors*, 48 Cal. 4th 32, 38 (2010). An action challenging a project after an agency has adopted an Environmental Impact Report must be filed within 30 days after the agency files a Notice of Determination. P.R.C. § 21167(c). The Airport Authority's Board of Commissioners approved the Runway Safety Project and filed the Notice of Determination on December 1, 2011. The Notice of Determination was filed with and posted by the Del Norte County clerk, and made available for public viewing on that day, thus triggering the 30-day limitations period. *See Citizens of Lake Murray Ass'n v. City Council*, 129 Cal. App. 3d 436, 440-41 (1982). Plaintiffs therefore had until December 31, 2011, to file their challenge, and clearly failed to do so. Moreover, even if the Airport Authority had failed to file the Notice of Determination after the Board of Commissioners approved the Runway Safety Project, Petitioners would have had only 180 days to file a challenge, a deadline that they have missed by almost a year. *See* 14 C.C.R. § 15112(c)(5).

CEQA "sets strict time requirements to protect the public interest in speedy resolution of CEQA challenges." *Nacimiento Reg'l Water Mngmt. Advisory Com. v. Monterey Cnty. Water Resources Agency*, 122 Cal. App. 4th 961, 968 (2004). The Airport Authority, having diligently adhered to the letter and spirit of CEQA for the Runway Safety Project, should not be required to halt or alter the Project or expend limited resources on frivolous litigation filed long after the Authority's relevant reviews and approvals.

c. Plaintiffs Failed to Exhaust Their Administrative Remedies.

Plaintiffs' CEQA claim is barred for another reason: they failed to exhaust their administrative remedies. CEQA requires that opponents to a project present their objections to an agency *before* the agency makes a final decision. P.R.C. § 21177 ("An action or proceeding shall not be brought … unless the alleged grounds for noncompliance with this division were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination.");

Cal. Clean Energy Comm. v. City of San Jose, 220 Cal. App. 4th 1325, 1344 (2013) ("[I]ssues must be first raised with the final decisionmaking authority if one wishes to seek judicial relief.").

Plaintiffs did not participate in any way during the CEQA process for the Runway Safety Project. The Airport Authority began contemplating the Pacific Shores Subdivision as a potential site for mitigation measures in 2009. A mitigation plan that included details about the Subdivision was drafted for the RSA project in early 2010, and the Airport Authority's Board of Commissioners considered and heard public comment on it several times in 2010 and 2011, prior to adopting it as part of the final Environmental Impact Report. Plaintiffs were neither present at any of these meetings, nor did they object in writing when the draft EIR, which included numerous references to the Subdivision mitigation option, was circulated for public comment in 2011. Their claim is therefore barred by CEQA section 21177.[16]

5. The Facts Do Not Support a Claim for a Gift of Public Funds.

Plaintiffs claim that the Airport Authority's intended acquisition of private property in the Pacific Shores Subdivision amounts to a violation of California's constitutional ban on gifts of public funds for private purpose. FAC at ¶¶ 94-99 (citing Cal. Const. Art. XVI, § 6). This argument fails for at least two reasons. First, because the acquisition of private property in the Subdivision has not yet occurred, their claim is not yet ripe for adjudication.

Second, even if Plaintiffs' argument were ripe, the Airport Authority's acquisition of Subdivision lots would not constitute a gift of public funds in violation of California's Constitution because it would serve a public purpose. "It is well settled that, in determining whether an

[16] Plaintiffs appear to believe that they were entitled to personal notice of the Airport Authority's interest in the Subdivision as a potential mitigation site. FAC at ¶ 92(a). However, CEQA requires notice to be given directly to individuals only when they have requested notice. *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agric. Assn.*, 42 Cal. 3d 929, 935 (1986). Defendants received requests from four individuals after the initial Notice of Preparation was distributed in 2009, each of whom is listed in Appendix A of the Final EIR. Neither of Plaintiffs, nor any other apparent member of the Pacific Shores Property Owners Association, is listed among these individuals. Had Plaintiffs been involved in the CEQA process for the Runway Safety Project, they would have understood, as early as the 2009 initial scoping process, that the Pacific Shores Subdivision was being contemplated as a potential mitigation site for Project wetlands to impacts. Instead, by their own admission, Plaintiffs "inadvertently discovered" that the subdivision was being considered for mitigation in December 2012. FAC at ¶ 35. It was not until the February 2013 meeting specifically held for Subdivision owners – long after the completion of the CEQA process – that Plaintiffs became involved. Because Plaintiffs failed to exhaust their administrative remedies under CEQA, the Court should grant defendants judgment on the pleadings as to their CEQA claim.

appropriation of public funds or property is to be considered a gift, the primary question is whether the funds are to be used for a 'public' or a 'private' purpose. If they are for a 'public purpose,' they are not a gift within the meaning of the Constitution." *Cnty. of Alameda v. Janssen*, 16 Cal. 2d 276, 281 (1940); *Mem'l Hosp. v. Cnty. of Ventura*, 50 Cal. App. 4th 199, 207 (1996) ("Money spent for public purposes is not a gift even though private persons may benefit."). The sole purpose of the Airport Authority's Runway Safety project is to improve public safety and comply with federal aviation standards so that the airport can continue to provide critical transportation services to the surrounding community. The sole purpose of the Pacific Shores Subdivision mitigation plan is to serve the public purpose of discharging the Authority's duty to "mitigate or avoid the significant effects on the environment" as mandated by CEQA, without which the Runway Safety Project cannot occur. *City of Marina v. Bd. of Trustees of Cal. State Univ.*, 39 Cal. 4th 341, 363 (2006). The Authority's actions plainly do not, as Plaintiffs erroneously assert, "use public funds without a public purpose." FAC at ¶ 97.

VI. CONCLUSION

For the foregoing reasons, Defendant Airport Authority and Defendant-Intervenors respectfully request that the Court grant their joint motion for judgment on the pleadings and dismiss this case in its entirety.

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Respectfully submitted,

BLACK & RICE LLP

By: */s/ Robert N. Black*
Robert N. Black

Attorneys for Respondent-Defendant BORDER COAST REGIONAL AIRPORT AUTHORITY

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

By: */s/ Deborah A. Sivas*
Deborah A. Sivas

Attorneys for Defendant-Intervenors MAXINE CURTIS, MICHAEL HEADLEY, EARL MCGREW, MIMI and BOB STEPHENS, NORTHCOAST ENVIRONMENTAL CENTER, and SMITH RIVER ALLIANCE