Case No. C070201

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

PACIFIC SHORES PROPERTY OWNERS ASSOCIATION, et al.,

Plaintiffs, Respondents, and Cross-Appellants,

v.

DEPARTMENT OF FISH AND GAME, et al.,

Defendants and Appellants.

Appeal from a Judgment
of Sacramento Superior Court
Case No. 07AS01615
Honorable David De Alba, Judge

APPLICATION FOR LEAVE TO FILE *AMICUS* BRIEF BY EARL MCGREW, MAXINE CURTIS, LYNDA SCHOONOVER, NICOLE SOLOVSKOY, and NORTHCOAST ENVIRONMENTAL CENTER; BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANTS

Deborah A. Sivas, CA Bar No. 135446
Alicia E. Thesing, CA Bar No. 211751
Matthew J. Sanders, CA Bar No. 222757
Lauren M. Gollaher, CA Student Bar 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

Attorneys for Applicant-Amici Curiae

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Facsimile: (650) 723-4426

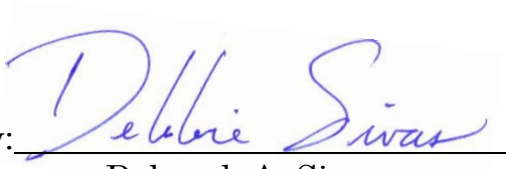
Attorneys for Applicant-Amici Curiae

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no entities or persons that must be listed in this certificate under Rule 8.208, California Rules of Court.

Dated: Mar. 17, 2014 Respectfully submitted,

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

By: 
Deborah A. Sivas

Attorneys for Applicant-Amici Curiae

APPLICATION FOR LEAVE TO FILE

Pursuant to California Rule of Court 8.200(c), the Applicants listed below respectfully request permission to file the attached brief of Amici Curiae in support of Appellants and Respondents California Coastal Commission and California Department of Fish and Wildlife. No party or counsel of record authored the proposed brief, in whole or in part, or contributed funds for the writing of the proposed brief. This application is timely made within 14 days of the filing of Cross-Appellants' reply brief on the merits.

INTERESTS OF POTENTIAL AMICI

Applicants bring the important perspective of another set of Pacific Shores Subdivision lot owners and former owners with interests divergent from those asserted by the Pacific Shores Property Owners Association ("PSPOA") and Thomas Resch. Applicants Earl McGrew and Maxine Curtis are current individual lot owners who wish to sell their lots to the State, or otherwise, and they represent dozens of other lot owners who want to do the same. Applicants Lynda Schoonover and Nicole Solovskoy, like over five hundred others, have already sold their lots through the State lot acquisition program and remain

interested in seeing the property conserved. The last Applicant, the Northcoast Environmental Center, uniquely brings the perspective of both a current lot owner and a former owner family that donated its lot to the Center. All Applicants share the common understanding that they cannot – and never could – build homes on their lots. They further agree that the State's lot acquisition program provides the best, permanent solution for these unbuildable lots.

Earl McGrew is the current owner of a Pacific Shores subdivision lot. He is one of the original lot owners and has owned his lot for over fifty years. Back in the early 1960s when he was living in an apartment in West Los Angeles, a door-to-door salesman persuaded him to buy a lot at Pacific Shores. Mr. McGrew paid $1,290 for his lot which seemed like a good deal for California beach property. The salesman did not mention the wetlands or flooding in the area. A few months after his purchase, Mr. McGrew heard that the subdivision was damaged in the 1964 tsunami that destroyed parts of nearby Crescent City.

Mr. McGrew understands that, since his purchase, he has never been, and never will be, able to build a house on his lot

because of physical and legal constraints. Over the years, Mr. McGrew has continued to pay property taxes and water district dues, with his investment totaling over $4,000. When Mr. McGrew learned about the State's lot purchase program a few years ago, he thought that the State was offering to pay a fair price, $4,000, and he thought he had more time to sell his lot. Unfortunately, the State program was suspended before he was able to take advantage of it. Mr. McGrew views the State's acquisition program as the State providing him with the best way out of this scam. Since missing the prior sale opportunity, Mr. McGrew has felt like he has been stuck in limbo as the tax-paying owner of an undevelopable lot. Mr. McGrew, now retired, is not concerned with trying to maximize a profit from his land. Rather, he is interested in recovering some of his losses and moving on with his life as soon as possible. Mr. McGrew believes that this lawsuit has had a chilling effect on the State's lot acquisition program.

Mr. McGrew has recently heard that the regional airport authority is seeking to acquire Pacific Shores lots to compensate for wetlands lost as part of the airport's runway safety project. He views this option as another welcome opportunity to sell his

lot, and perhaps another way to complete the State's stalled acquisition program. When PSPOA filed a lawsuit against the airport authority in an attempt to block its lot acquisition plan, Mr. McGrew intervened in support of the airport authority and that case was recently dismissed. Mr. McGrew believes that PSPOA's multiple lawsuits have delayed his ability to sell his lot. Mr. McGrew is interested in this lawsuit because its favorable resolution will clear the way for him to sell his lot.

Maxine Curtis is the current owner of a Pacific Shores subdivision lot that she purchased in 1987 in order to build a retirement home. Ms. Curtis lived in Del Norte County for many years and came to understand that the Pacific Shores subdivision would never be developed because it is located on sand dunes and coastal wetlands in the Smith River floodplain. Due to these legal and physical constraints on the property, Ms. Curtis recognizes that she will never be able to build a home on her lot. She has since retired to nearby Medford, Oregon.

Ms. Curtis has been paying property taxes, and beginning in 1990, special water district taxes for the ostensible purpose of obtaining water and sewer services that were never provided. Ms. Curtis directly participated and supported the Local Agency

Formation Commission ("LAFCO") during its proceedings to dissolve the Pacific Shores Water District. Ms. Curtis is aware that the State began acquiring lots from landowners within the Pacific Shores subdivision for conservation purposes as part of a larger wildlife area. Ms. Curtis believes that this lawsuit, one of many filed by PSPOA, is intended to perpetuate the illusion that development of the subdivision is possible and to continue collecting fees from unsuspecting lot owners who are members of the owners association. Ms. Curtis is convinced that PSPOA has essentially perpetuated fraud by continuing to assure lot owners that development is possible.

Ms. Curtis also supported the local airport authority as a Defendant-Intervenor, like Mr. McGrew, when PSPOA filed a challenge to the airport authority's plan to buy up lots at the subdivision as mitigation for wetlands lost to the airport's runway safety project. Ms. Curtis believes that the State's lot acquisition program and the airport lot acquisition plan represent the only available options for subdivision lot owners to sell their undevelopable property. Like Mr. McGrew, Ms. Curtis is interested in this lawsuit because its favorable resolution will clear the way for her and others to sell.

Lynda Schoonover is a former lot owner who brings the perspective of a family that bought one of the first lots within the Pacific Shores subdivision. Her family purchased a lot from the developer in the 1960s, and when the lot next door became available, they purchased that lot as well. Ms. Schoonover's family was never able to build on their lots due to the physical and legal barriers to development. In 2001, Ms. Schoonover's father passed ownership of the lots to her. When the State offered to buy her lots, Ms. Schoonover sold the lots for what she believes is a fair return on the original investment. Ms. Schoonover believes that the State's acquisition program provided her family with the best solution by allowing them to sell their lots to the State and allowing the lots to be put to their best use as a wildlife area.

Nicole Solovskoy, like the above Applicants, also represents the perspective of an original, and now former, lot owner. Ms. Solovsky inherited a lot in the Pacific Shores subdivision from her parents who purchased the lot in the 1960s. Ms. Solovskoy visited the lot on multiple occasions and discovered that it was being used as a dumping site by people trespassing on the land. Ms. Solovskoy was appalled by her lot's condition, and she

decided to sell it to the State as part of its acquisition program so that the land could be managed and preserved as part of the wildlife area. Ms. Solovsky supports the State's efforts to provide other landowners with that same divestment opportunity.

Northcoast Environmental Center ("Center"), a non-profit conservation organization, brings the perspective of a lot owner that obtained the property as a donation by another owner family that realized that it could not build a retirement home on its lot. When that family recognized that the lot it purchased in 1976 was undevelopable, they became frustrated paying special water district taxes that were wasted on incomplete studies and unauthorized litigation. The family saw its lot as useful only for wildlife habitat and eventually donated the lot to the Center.

The Center, the current owner of the lot, has been paying county property taxes on this lot and has continued to advocate in the spirit of the donor family for years. The Center has observed that the subdivision lots are in a state of disrepair, with persistent flooding and prone to illegal trespass and dumping. Like Ms. Curtis, the Center supported LAFCO in its proceedings to dissolve the Pacific Shores Water District. The Center also supported the regional airport authority in defending against the

PSPOA lawsuit to block the authority's Pacific Shores subdivision lot acquisition plan. The Center believes that PSPOA's litigation efforts are intended to perpetuate the illusion that development of the subdivision is possible and to continue collecting fees from unsuspecting lot owners who are members of the owners association. This case is important to the Center because it has a strong interest in protecting the ecological values of its lot.

THE PROPOSED BRIEF

Applicants' proposed brief will assist the Court in understanding that current and former lot owners, other than those represented by the PSPOA, have come to know that the Pacific Shores subdivision site – sand dunes and coastal wetlands on the Smith River floodplain – is not a suitable location for their retirement or vacation homes. The brief will describe the physical barriers to residential development, barriers understood by the State before the County approved the subdivision's designation on a map. The brief will explain that the combination of the high water table, porous sandy soil, and frequently flooded conditions preclude the provision of water and sewer services essential to a residential development. Next, the brief will describe the State's efforts to assist the lot owners

through a voluntary lot acquisition program. Last, the brief chronicles the PSPOA's wasteful use of consultants and litigation to hinder the State's lot acquisition program.

In sum, Applicants submit the proposed brief in the hope that it will assist the Court's understanding of the complicated facts of this case, which provide important context not included in the trial court's decision. These facts illustrate that the State's recent actions do not create any liability, but rather promise a permanent solution to a long-standing conflict.

Dated: Mar. 17, 2014 Respectfully submitted,

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

By: 

Deborah A. Sivas

Attorneys for Amici Curiae

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Mills Legal Clinic at Stanford Law School
559 Nathan Abbott Way
Stanford, California 94305-8610
Telephone: (650) 723-0325
Facsimile: (650) 723-4426

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

California Regulations

Other Authorities

INTRODUCTION

There is a long, unfortunate story behind the "Pacific Shores" subdivision, but it is not the one told by Respondents Pacific Shores Property Owners Association and Thomas Resch (collectively "PSPOA"). Rather, it is a story of misdirection by the original out-of-state land developer, who subdivided coastal dunes and wetlands and then sold these undevelopable parcels to unsuspecting distant purchasers in the early 1960s. And it is a story of the State of California's subsequent efforts, over the course of several decades, to assist the victims of this private land deal as various state agencies went about the business of managing the surrounding public lands and waters. In a graphic illustration of the old adage "no good deed goes unpunished," these same agencies now finds themselves, remarkably, on the wrong end of a "physical taking" judgment.

The State's earliest efforts, starting in 1987, took the form of assisting the County of Del Norte's periodic breaching of the adjacent coastal sandbar as a means to help reduce standing water that naturally accumulates during the wet season. But several different studies, conducted by PSPOA consultants and other entities over the half century since the subdivision was

created, have confirmed the State's earlier (pre-subdivision) conclusion that permanent development on the wet, sandy soils of Pacific Shores is neither physically nor legally possible. No amount of intermittent sandbar breaching will alter this basic fact, and as a result, no significant utility infrastructure has been or ever will be constructed at the subdivision. The State, therefore, has offered Pacific Shores lot owners a way out – the opportunity to sell their unbuildable parcels, at taxpayers' expense, for long-term conservation. A number of other, similarly undeveloped "paper subdivisions" exist throughout California, but none has garnered the kind of focused attention and financial bailout offered to Pacific Shores lot owners.

Having come to understand that their coastal dune and wetlands parcels on the floodplain of the Smith River can never be developed, many Pacific Shores lot owners, including two Amici, have taken advantage of the opportunity to sell their lots at current market value, as determined by an independent appraiser. Over 500 lot owners have willingly availed themselves of the State's purchase offer, and roughly 51 percent of the subdivision is now in public ownership. In addition, the nearby regional airport authority recently offered to purchase Pacific

Shores lots from willing sellers as wetlands mitigation for its runway safety project.

Rejecting these options, a small band of individuals, erroneously purporting to speak for all lot holders, has chosen a different course – namely, to initiate legal actions against nearly every agency, entity, or individual that has interacted with the subdivision. Each of these lawsuits, which until now have been unsuccessful, casts blame on someone else under a different legal theory. Here, PSPOA advances the startling theory that the State of California, having cooperated with the County's periodic emergency breaching efforts, now has a legal duty to continue doing so in perpetuity. In effect, PSPOA and its litigious lawyers are using the courts to leverage redress from government coffers for their own poor investment choices, even as they decline all purchase offers for their parcels. The uncertainty created by PSPOA's drumbeat of litigation, spanning more than a decade now, is hindering the ability of willing lot owners – like three Amici – to sell their parcels for fair compensation and permanent conservation.

At the end of the day, this case is not about the heavy hand of government trumping the rights of private property owners. To the contrary, the State of California has taken the unprecedented, pro-landowner step of offering to bail out the victims of a private land scam which occurred more than 50 years ago, long before state conservation agencies had any significant involvement with the area. Because, as the State Appellants' briefs plainly demonstrate, there is no merit to PSPOA's legal arguments, the Court should reverse the finding of liability for a "physical taking" and affirm the finding of no liability for a "regulatory taking," thereby paving the way for resumption of the state and local voluntary acquisition programs that promise an actual, permanent solution to this century-old conflict.

ARGUMENT

I. The Coastal Dunes and Natural Wetlands of the Pacific Shores Area Have Never Been Suitable for Residential Development.

For thousands of years before it became known as the "Pacific Shores subdivision" in 1963, the land at issue in this case has been part of a larger coastal mosaic of salt and freshwater marshes, ponds, and sloughs, located north of Crescent City near the Oregon border. Driftwood-strewn sand dunes stretch for

miles in both directions, forming a tenuous barrier between the Pacific Ocean and the adjacent coastal plain. Over the centuries, tsunamis, extreme storm events, heavy seasonal rains, and severe annual flooding have shaped this ever-shifting liquid landscape. The almost 1,500 acres that comprise the subdivision are perched on a narrow strip of dune complex, wedged between the sea and the largest coastal lagoon on the Pacific Coast. (XI CT 3083; II SCT 0398.) Just below the sandy, porous soil of the subdivision, a perennially shallow groundwater table keeps much of the land saturated year-round. (VII CT 2086; XI CT 3079.)

The coastal lagoon that abuts Pacific Shores – which actually consists of two interconnected water bodies known as Lake Earl and Lake Tolowa – rests on the historic floodplain of the Smith River, the last undammed river in California and the "crown jewel" of California's Wild and Scenic River System.[1] The Smith River runs through 300 miles of old-growth redwood, willow, fir, pine, and spruce forests before emptying into the Pacific Ocean north of the lagoon. The northwesterly summer winds that sweep the coast sculpt and continuously re-sculpt the

[1] U.S. Department of Agriculture, Forest Service, Smith River National Recreation Area Management Plan, (1992), *available at* http://www.rivers.gov/documents/plans/smith-plan.pdf.

beach and foredune with sand deposited by the Smith River and pulled south along the shore by the ocean tides. (II ST 0598.) The resulting dunes, at the western edge of the Smith River floodplain, form a natural barrier that allows water to collect in the lagoon basin, at the former mouth of the river. (XI CT 3072.)

At least once a decade and often more, the Smith River breaks from its northward course and spills through the lagoon to the ocean, flooding the entire Lake Earl landscape, including the access roads to the subdivision. (XII CT 3412 ("Smith River will overtop and flood into Lake Earl approximately every 8.2 years."); VII CT 2088; VIII CT 2151.) Indeed, studies up to 1971 show that the Smith River overflowed to Lake Earl in 1861, 1927, 1950, 1953 (twice), 1955, 1964, and 1966. (VIII CT 2151) Other tributaries, including Jordan, Yonkers, and Russell Creeks, also feed into the lagoon, which serves as the natural collection basin for a 32-square mile watershed. (XI CT 3078-79.)

Even in non-flood years, the already-high groundwater table rises during the rainy season, and the low-lying lagoon swells in response. (XI CT 3079.) Over 65 inches of rainfall drench this span of coastline every year, making it one of the wettest spots in California. (XI CT 3070.) During the wet winter

months, most of this precipitation infiltrates the shallow groundwater through the highly permeable soils surrounding the lake, especially in the Pacific Shores subdivision. (XI CT 3079.) This shallow groundwater, in turn, discharges into the lagoon, contributing to a rising water level that periodically overtops the natural sandbar separating the lagoon from the Pacific Ocean and sends freshwater rushing out to sea. (XI CT 3080; XII CT 3405.) This natural opening is short-lived, however, as the wind and waves continuously rebuild the dune, resealing the outlet to the ocean. These periodic natural breaching events allow salt and fresh water to mix in the lagoon, producing a brackish, or slightly salty, condition that is essential to the unique plant and animal life residing there. (XI CT 3090.) Even during the drier summer months, groundwater discharge saturates much of the land and fills the lagoon. (XI CT 3072; 3079; 3092; XII CT 3405.)

These unique hydrologic conditions have produced one of the richest, most biologically diverse coastal wetland complexes in North America. (II SCT 0209.) The rare Silvery phacelia blooms on the coastal dunes. (XI CT 3123.) Wet meadows and marshes filled with Pacific silverweed and widgeon grass fan out from the lagoon's edges. (XI CT 3092.) This wetland plant

habitat in turn supports a unique community of wildlife species. For thousands of migratory waterfowl, shorebirds, and other water birds, such as the federally threatened Western snowy plover, the formerly endangered California brown pelican, and the Aleutian cackling goose, the lagoon provides an essential home or stopping point on their journey along the Pacific Flyway. (XI CT 3099; 3107.) The lagoon itself is inhabited by numerous species of fish, including the largest California population of the endangered Tidewater goby. (XI CT 3104; 3115-16.) Other federally listed species, like the Oregon silverspot butterfly, depend upon the lagoon environs for survival. (XI CT 3121-22.) All in all, over 250 bird species, 40 mammal species, and 25 fish species, as well as a host of reptile and amphibian species, call the Lake Earl watershed home. (XI CT 3099.)

II. Long Before the Pacific Shores Subdivision Was Platted and Sold to Unsuspecting Buyers, the State Determined that Flood Control and Development Were Infeasible.

Hampered by natural flooding and saturated ground near the lagoon, those humans occupying the area have always been limited to intermittent, seasonal use of the land. The native Tolowa people used coastal and upland areas on a cyclic basis.

(XI CT 3062.) The first European settlers found the lagoon in its natural condition, comprised of "extensive wetlands, active sand dunes, native vegetation, wet meadows, extensive forests, and natural breaching at or above at least 10 feet above mean sea level." (*Id.*) They sought to maximize the lagoon's natural features, building a mill and using the lagoon as a waterway to store and transport logs cut from the upland forest. (XI CT 3063.) Settlers also attempted dairy farming and cattle grazing, but these activities were mostly limited to the dry season due to recurring winter floods. (*Id.*) In the hope of extending the grazing season and reclaiming inundated land, dairy farmers tried to lower the lagoon level by digging out the sandbar during high water periods, allowing the lagoon to drain into the ocean. (*Id.*; XI CT 3043.) But these efforts met with resistance from logging interests whose activities depended on the lagoon's high water levels. By 1889, the Lake Earl Timber Mill had secured a court victory and blocked the farmers' efforts to breach the sandbar, leaving the desired grazing land along the borders of Lake Earl "submerged and unfit for grazing purposes." (XI CT 3043.)

Although some artificial breaching of the sandbar continued on an *ad hoc* basis through the early 1900s, the lagoon still repeatedly filled and flooded the landscape. (XI CT 3064.) Numerous historical accounts report flooding of up to 10-12 feet between 1855 and 1930, and the lagoon level rose above 8 feet in five different years between 1950 to 1970. (XI CT 3064.)

As the area came under consideration for possible residential development in the 1940s, a series of federal and state agency evaluations, culminating in a 1962 California Legislature report, recognized that natural floodplain conditions presented an insurmountable hurdle to building at Pacific Shores. (VII CT 2058.) First, in 1948 the U.S. Army Corps of Engineers ("Army Corps") considered lowering lagoon levels through the construction of levees and drainage ditches along the eastern edges of Lake Earl. (VII CT 2061.) The Army Corps concluded that the "costs of necessary improvements would be considerably in excess of the benefits derived" by a small localized area and that further investigation was "not then warranted." (*Id*.) A few years later, in 1954, the California Department of Water Resources weighed two possible flood control proposals, either pumping water out of Lake Tolowa or channeling flood waters up

to the Smith River and out to the ocean. (VII CT 2060.) These proposals were likewise abandoned as economically infeasible. (VII CT 2060-61.)

While the federal and state agencies were evaluating permanent flood control options as infeasible and uneconomical, the County of Del Norte responded to requests from agricultural interests by breaching the sandbar numerous times each winter. (VII CT 2046; XI CT 3064.) Reprising the conflicts of an earlier era, duck hunters and other recreationalists lobbied to keep the lagoon in its natural state, while farmers and potential residential developers advocated for drainage of the lagoon. (VII CT 2046; 2053.) In spite of its efforts to accommodate the various users, the recently formed Del Norte County Flood Control District reported in 1961 that "[t]here have many times when Lake Earl was at flood stage and the bar could not be opened due to adverse weather conditions." (VII CT 2053.) Grappling with user conflicts over the flooded area, the district declared that "a major controversy [is] in the offing concerning the Lake Earl watershed." (VII CT 2052.)

Recognizing both the natural flooding problem and the Flood Control District's inability to find a viable solution for the

conflict, the County turned to the State for assistance. (VII CT 2047.) The County determined that all of the land surrounding the lagoon was regularly submerged in sheet water and that fluctuating water levels provided a breeding site for mosquitos, posing public health concerns. (VII CT 2046-47; 2054) Accordingly, it sought state funding from the California Legislature's Ways and Means Committee to conduct further feasibility studies of flood control measures. (VII CT 2058.)

To assess the County's funding request, in 1962 the State Department of Water Resources produced a report for the California Legislature in which it concluded that no flood control project should go forward. (VII CT 2066.) The report highlighted the principal problem with any permanent flood control measure: The creation of either a permanent outlet to the ocean or a barrier with a tidal gate would alter the salinity of the lagoon's waters by allowing seawater incursion or blocking the intermittent inflow of salt water. (VII CT 2059.) In either case, the fragile lagoon ecosystem would be altered with possible detrimental impacts on both the waterfowl and native aquatic plants that depend on the brackish wetland habitat. (VII CT 2059; 2063.)

The report to the California Legislature went on to explain the risks of returning to an intermittent, temporary breaching regime. Without a permanent flood control system in place, the sandbar separating the lagoon from the ocean would "require reopening as many as five or six times a year." (VII CT 2059.) During those re-openings, the level of Lake Earl would drop precipitously, "leaving duck blinds high on a waterless waste and innumerable potholes [that could serve] as breeding areas for mosquitos." (*Id.*)

Given these intractable problems, the 1962 report concluded that a flood control project in the Lake Earl watershed "would not be economically justified at this time" and that any further flood control studies "should not be undertaken." (VII CT 2066.) Thus, by summer's end in 1962, just months before a land speculator created the Pacific Shores subdivision, the State concluded and publicly announced that the Lake Earl area was unsuitable for any reliable, permanent state-funded flood control project, an essential prerequisite for permanent development. (XI CT 3064-3065; XIII CT 3842.)

III. The County Approved a "Paper Subdivision" Where Essential Water and Sewer Services Could Not Be Practically, Legally, or Cost-Effectively Provided.

Despite the State's 1962 determination, a private Arizona developer formed – and Del Norte County approved – the Pacific Shores subdivision in 1963 on the very lands deemed unsuitable for residential use. (II SCT 0399.) The subdivision was platted on the ribbon of sand dune and wetlands squeezed between the northwest edge of the lagoon and the Pacific Ocean. The developer subdivided the property into half-acre lots and dug out a rudimentary system of mostly unpaved roads and drainage ditches in sand.[2] (VIII CT 2305.) No water supply or sewage

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[2] The trial court's Statement of Decision for the liability phase of the case states, without attribution or citation, that "["[b]y 1972, the subdivision had a completed road and storm drainage system" and "[t]he drainage system for the subdivision was designed to operate with lake levels at four feet." (VI CT 1582-83.) There is no evidence in the record to support this conclusion. To the contrary, the 1995 Draft EIR prepared by PSPOA's consultant explained that the primitive roads and drainage ditches initially laid out were badly deteriorated and overgrown and, without proper drainage pipes, allow "long reaches of overland flow." (*See* Exhibit D at I-4 to I-5, I-19 to I-20 (full copy of Defendants' Trial Exhibit 427, which is truncated in the appellate record starting at XIV CT 4231).) Because the trial court's finding on this important factual issue is unsupported by any evidence in the record, the Court should review the resulting conclusions of law de novo. (*ASP Properties Group v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266 ("We review the trial court's findings of fact to determine whether they are supported by

system was installed at the time, and to this day no infrastructure of any kind has been constructed. (I SCT 0232; VII CT 2067; VIII CT 2136; 2156; 2175; 2305; XI CT 3067.)

The developer marketed the Pacific Shores lots, largely sight-unseen, to Southern California residents and other distant buyers as an ideal spot for vacation or retirement homes along the scenic Northern California coast. (*See, e.g.*, III SCT 609.) These remote purchasers received some notice, in the initial escrow documents, of the development hurdles they would face, including the absence of services for garbage collection, water supply, and sewage disposal; the responsibility of lot owners for seeking permits and paying for all such services; and the fact that the County "believes that a time could come, due to the physical location of the subdivision, that flooding could occur, where the Smith River breaks into the Lake Earl watership." (II SCT 0396.) While buyers were required to acknowledge receipt of these disclosures (*id.*), the subdivision developer did not disclose the hydrologic details of periodic surface flooding and high

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substantial evidence. To the extent the trial court drew conclusions of law based upon its findings of fact, we review those conclusions of law de novo.") (citations omitted).)

groundwater tables, the lengthy history of conflict over the lagoon level, or the State's conclusion that the area was unsuitable for flood control funding or development. Perhaps as a result of these incomplete disclosures and the buyers' lack of additional "due diligence," all of the lots sold within two years. (III CT 0617.)

Because neither the County nor the developer provided any services to the subdivision, individual lot owners were left to their own devices in figuring out requirements and options for onsite sewage disposal and water supply. Given the wet, sandy nature of the ground and the high groundwater table within the dune system, the North Coast Regional Water Quality Control Board ("Regional Water Board") foreclosed one sewage treatment option by mandating, as early as 1971, that "no septic tanks with leach lines shall be installed in the subdivision."[3] (VII CT 2071;

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[3] Septic systems, used where a sewer system is too expensive to install, consist of a large steel holding tank buried beneath the property and a drainage area, called a leach field, of gravel and soil. Sewage and other wastewater flows into the septic tank, where the solids settle out and form a sludge layer at the bottom of the tank (which must be periodically pumped out). The remaining water, which typically contains chemicals, bacteria and other pathogens, is piped out of the tank to the leach field. The pipes carrying the water away from the septic tank are perforated, buried porous material like gravel, and covered by

see also 2156 (explaining that requirements establishing 30-foot minimum separation between leach field and water table make it impossible to install septic systems in the subdivision); I SCT 171 (explaining that minimum separation requirements between septic tanks and the highest anticipated groundwater levels, combined with the existence of sandy, porous soils in the subdivision, make septic tanks infeasible).) Moreover, the Board noted that potable water at the subdivision would have to be supplied by groundwater wells rather than a central delivery system. (VII CT 2071.) The early conclusion about the infeasibility of septic systems was based on the area's high groundwater table and porous soils, unrelated to annual wet season high water or flood events, during a period of time when the County was regularly breaching the sandbar at PSPOA's desired four-foot level. Indeed, the scientific evidence in the record shows that in the 1970s and early 1980s, before the State

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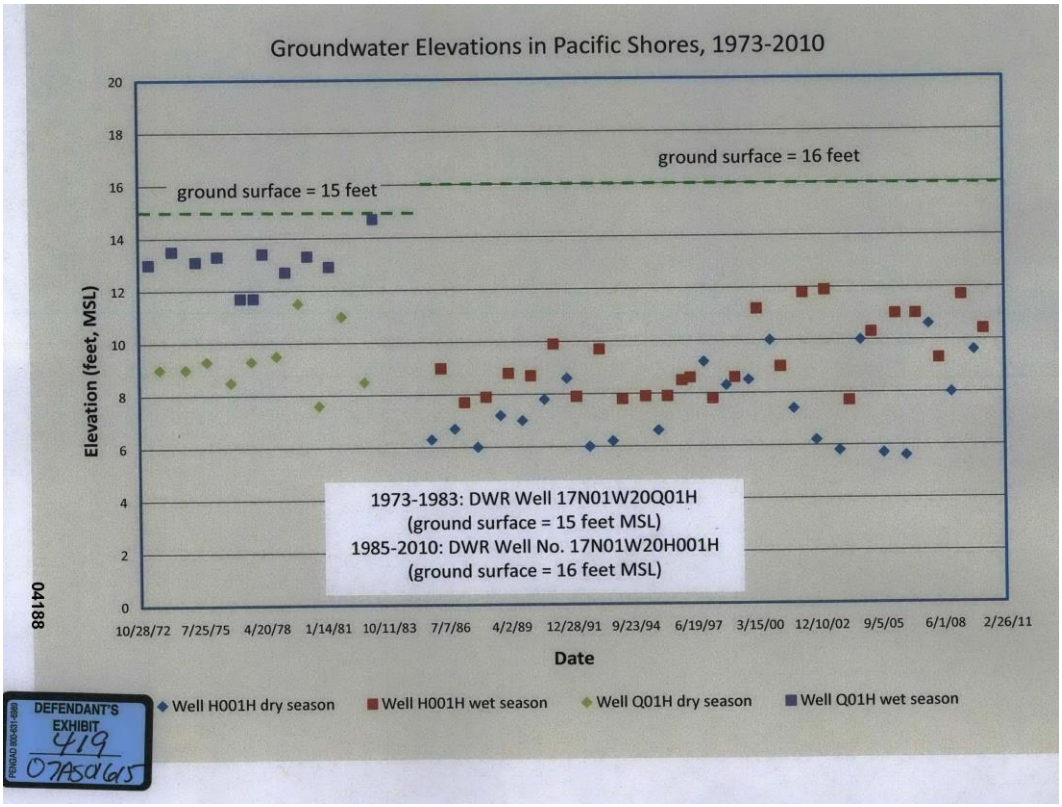
soil. These systems allow the water that has been separated from the solids to infiltrate the ground, where a community of aerobic soil microorganisms can break down and decompose the pollutants. Because leach lines carry wastes that can contaminate underlying groundwater and nearby surface waters or coastal beaches, leach fields generally must be separated by dozens of vertical feet from the underlying aquifer. (*See, e.g.*, http://news.stanford.edu/news/2010/may/ septic-wastewater-sea-052010.html.)

became involved in any breaching activities, groundwater levels beneath the subdivision during the winter months – and even during the drier summers – were within a few feet of the surface and, therefore, did not afford the requisite 30 feet of vertical separation needed for the use of septic systems:



Meanwhile, a group of lot owners banded together to form the Pacific Shores Property Owners Association and commissioned an expert report to investigate permitting requirements for development within the subdivision. This 1975 PSPOA report – the first of several – flagged a litany of concerns and costs associated raised by potential development. (VII CT

2073; VIII CT 2133; VIII CT 2309.) It confirmed that there was "no doubt that the existing high groundwater table and estimated rapid percolation rates preclude the use of individual disposal systems with leach fields." (VII CT 2087.) And the report explained that holding tanks would pose their own risks, including likely contamination of the drinking water. (VII CT 2086.) As for flooding, the PSPOA report reaffirmed earlier state and federal agency findings that permanent flood control solutions were neither practical nor economical. (VII CT 2089-90.) In addition, temporary bulldozing of the sandbar would require multiple re-openings each year, on an unpredictable basis, due to high tides and coastal storms. (VII CT 2090.)

The 1975 PSPOA report identified significant information gaps and estimated that the costs of providing essential services to the subdivision would be high. (VII CT 2086-87, 2089.) To manage those costs, the report recommended the formation of a special district that could collect fees and provide water, sewer, and other basic services. (VII CT 2082.) As discussed further below, such a district was created, wasted many years and millions of dollars on studies, and was ultimately dissolved for lack of performance.

While preparing its 1975 General Plan, Del Norte County expressed growing concern about the glut of "paper subdivisions" – subdivisions recorded on a map, but never developed – throughout Del Norte's coastal plain. (XIV CT 4099.) The County identified roughly 40 subdivisions that remained largely unbuilt. Pacific Shores was the worst offender, with only 0.1 percent of the lots "built," attributable to two mobile homes installed pre-subdivision. (XIV CT 4100; VIII CT 2136.) The County noted that this rampant subdividing practice had "encouraged the parcelization of marginal land questionably suited for residential development" and recommended taking steps to avoid the future siting of subdivisions in unincorporated areas without any services. (XIV CT 4104; 4108.) The County's summation of the general problem fit Pacific Shores to a T:

> [The] lots were subdivided and recorded without proper provision for utilities and services. The 'developer' has completed his sales program and long departed the scene. By the time the lot-owner decides to build a home on the property, his costs go far beyond what a properly developed tract would require . . . [creating] a great disappointment to many who thought they were investing in inexpensive land in Del Norte County.

(XIV CT 4099; 4104.)

Pacific Shores' lack of infrastructure soon fell into the lap of the California Coastal Commission ("Coastal Commission"), which was created by voter initiative in 1972 and permanently codified by the California Legislature's enactment of the Coastal Act in 1976. (Cal. Pub. Res. Code § 30000 *et seq*.) The following year, a Pacific Shores lot owner applied for a coastal development permit to install a sewage holding tank in the subdivision.[4] (XIV CT 3950.) Tasked by law with protecting coastal resources, the Coastal Commission sought the expertise of the Regional Water Board, which advised that holding tanks, which require regular pumping and trucking of their contents to a treatment plant, "should not be permitted for residential developments." (XIV CT 3962.) The Regional Water Board observed that sewage rapidly accumulates and that homeowners would be "tempted to drill holes" (much like leach lines) in the tank, resulting in "pollution, nuisance, and public health hazard." (*Id*.) Even when properly administered, moreover, holding tanks throughout the subdivision would be impractical due to limited disposal capacity.

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[4] The Coastal Act requires that "any person . . . wishing to perform or undertake any development in the coastal zone . . . shall obtain a coastal development permit." (Cal. Pub. Res. Code § 30600(a).)

(*Id*.) The State Water Board expressed similar concerns, based on experience with holding tanks in other locations. (XIV CT 3964.) And the California Department of Fish and Game[5] noted that holding tank failures could result in water pollution, with substantial cumulative adverse impacts on coastal habitat and wildlife. (XIV CT 3954.)

Accordingly, the Coastal Commission denied the permit application, explaining that even a single holding tank could leak or overflow and contaminate the groundwater supply and the lagoon. And given its location in a flood zone, the holding tank "may flood or even float causing the lines to crack and spill pollutants into the groundwater." (XIV CT 3932-33.) Multiple holding tanks across the subdivision, moreover, would pose cumulative risks. (XIV CT 3932.) The Commission also expressed concern about the absence of emergency (fire and police) services for the subdivision and the impacts of new development in environmentally sensitive habitat areas. (XIV CT 3932.) Thus, after fully evaluating the issue, the Coastal

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[5] The Department of Fish and Game was recently renamed the Department of Fish and Wildlife, but because all events discussed in this brief occurred before the name change, Amici refer to the agency in these papers as the Department of Fish and Game.

Commission concluded that the use of holding tanks was inconsistent with the Coastal Act and the County's General Plan. (*Id.*)

A few years later, in 1981, the Coastal Commission certified a local coastal program for the region, but carved out the Pacific Shores subdivision.[6] (VIII CT 2331; III SCT 0648-53.) This decision echoed the Commission's earlier findings in the holding tank permit denial decision – namely, that the County had not adequately addressed the subdivision's environmental impacts or provided any water and sewage services. (*Id.*) The Commission explained that the County could address these issues in a special study which would serve the purpose of "developing adequate background information upon which the

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[6] Each local government lying in the coastal zone must prepare a local coastal program for submission to and review by the Coastal Commission. (Cal. Pub. Res. Code §§ 30500-30526.) The Commission may certify the local coastal program in whole or in part, and certified programs are then administered by the local jurisdiction. Alternatively, the Commission may refuse certification in whole or in part where the land use plan in a proposed local coastal program does not conform to the Coastal Act's planning and management policies. (*Id.* § 30512.2 (citing general policies commencing at § 30200 and legislative findings of § 30001.5).) The Commission retains original coastal development permitting authority over projects proposed for any part of the coastal zone that is not covered by a certified local coastal program – often called a "white hole."

county can base a land use proposal reflective of" the Coastal Act's resource protection goals. (III SCT 0642.)

Meanwhile, Pacific Shores continued to experience persistent and severe flooding. As foreshadowed in the escrow documents, the Smith River spilled over its banks and across the entire subdivision in 1964 and again in 1966.[7] (XIV CT 4265.) Following another major flooding event in 1972, the County Public Health Director explained the rationale for not breaching the sandbar: "[W]hen the Smith River breaks through to Lake Earl it is nearly impossible to open up the lake due to the flooding all around the area and when there is the real possibility that the lake will break open by itself and take both men and equipment out into the ocean at the time of the breakthrough." (VII CT 2069.) As the County noted, the 1972 flooding was not an anomaly, but a "prelude to what may be an almost chronic condition in the Lower Smith River and Lake Earl – Lake Tolowa

[7] A powerful tsunami also struck the Crescent City area in March 1964, killing eleven people in what was known as "the worst tsunami in the history of America's lower 48 states." Richard Gonzales, California Town Still Scarred by 1964 Tsunami, NPR (Nov. 17, 2005, 12:00AM), http://www.npr.org/2005/11/17/5007860/california-town-still-scarred-by-1964-tsunami. As it turns out, the Pacific Shores subdivision also sits in a tsunami zone. (VIII CT 2313.)

area where flood stages will be such where people and property will be at risk." (VII CT 2070.)

Prompted by these natural flooding conditions, the County regularly issued warnings to Pacific Shores lot owners. (VII CT 2070.) Because the County failed to downzone the area as an undevelopable floodplain before the property was subdivided in 1963, storm warning notices and periodic – but not always successful – breaching of the sandbar were the only tools available to the County as it attempted to aid Pacific Shores lot owners. (*Id.*) But such flood warnings and periodic breaching activities during high water events were little more than the proverbial "finger in the dike," not a permanent solution to the problem created by the County's approval of the subdivision.

IV. The State Stepped in to Assist the Pacific Shores Lot Owners by Offering to Acquire and Preserve Their Undevelopable Lands.

As far back as the 1970s, the State recognized that the Lake Earl watershed was both valuable as a coastal ecosystem and largely undevelopable due to its location on the regularly inundated Smith River floodplain. Thus, after the California Legislature enacted the Keene-Nejedly California Wetlands

Preservation Act in 1976,[8] the State set about using appropriated state funds to purchase undevelopable land from willing sellers in the Lake Earl watershed. (VIII CT 2121; 2123, 2306.) Acting through the Wildlife Conservation Board, an independent body within what is now the Department of Fish and Wildlife,[9] the State began acquiring undevelopable parcels around the lagoon, ultimately purchasing 10,000 acres of surrounding land and water and establishing the 5,000-acre Lake Earl Wildlife Area. (XI CT 3056.)

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[8] The statute established a state land acquisition and preservation program to acquire coastal wetlands, deemed by the Legislature to be "of increasingly critical economic, aesthetic, and scientific value." (Cal. Pub. Res. Code § 5811(a).) It directed the California Resources Agency (acting through Department of Parks and Recreation, the Department of Fish and Game, and the California Coastal Commission) to, among other things, "identify those wetlands of particular significance in the state that are not currently in public ownership for which there is believed to be a willing seller," giving "particular recognition to opportunities for protecting and preserving wetlands lying within, or adjacent to, existing units of the state park system or other state-owned lands protected and managed primarily as wildlife habitat." (*Id.* §§ 5814(a)(4), 5815.)

[9] The Wildlife Conservation Board was created in 1947 to administer a capital outlay program for wildlife conservation and related public recreation. (Cal. Pub. Res. Code §§ 1300-1356.) Today, it allocates funds appropriated by the Legislature or through voter initiative to purchase, from willing sellers, land and waters suitable for recreation and wildlife habitat protection purposes. (*See* https://www.wcb.ca.gov/Home/About.aspx.)

Aside from its initial large purchases, the State "continued to acquire fee title or conservation easements from willing sellers in order to manage the lagoon closer to a natural condition." (XI CT 3059.) For example, in 1987 the Department offered to purchase property from users who reported inundation-related septic or grazing problems at higher lagoon levels (*see, e.g.*, I SCT 0038), and it maintained an ongoing acquisition program that focused on the purchase, from willing sellers, of private land around the lagoon which may flood at the ten-foot contour. (I SCT 089.) Approximately 67 parcels were acquired within the Pacific Shores subdivision in this way.

Through the mid-1980s, Del Norte County was the only government entity engaged in periodic artificial breaching of the sandbar. Much of that activity appears to have been undertaken on an *ad hoc* basis, in response to requests by local landowners, with no permits and little or no federal or state involvement.[10] In

[10] Although PSPOA argued below that the historic breaching regime for the lagoon was at four feet above mean sea level, that characterization is inaccurate. Even during the 1955-1987 period, when the County acted entirely alone in periodically breaching the sandbar at property owners' request, the lagoon exceeded four feet in 1955, 1964, 1966, 1970, 1971, 1972, 1979, and 1983. (VII CT 2069; VII CT 2088; VIII CT 2151; XIV CT 4265; II SCT 0424.)

1976, apparently for the first time, the U.S. Army Corps of Engineers exercised its jurisdiction under the federal Clean Water Act to issue a 10-year permit to the County, authorizing the bulldozing of sand along the dune.[11] (I SCT 0017.)

When the Army Corps breaching permit came up for renewal in 1987, the State's recent acquisition of significant property holdings within the Lake Earl watershed made it a major new stakeholder in future management decisions. The State had, by then, acquired all of Lake Earl and most of Lake Tolowa, and the Department of Fish and Game had become the key manager of these public lands and waters. Because the Department also leased (from the State Lands Commission) those public trust lands at the western edge of the Lake Tolowa on

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[11] The Army Corps is charged with issuing so-called "dredge and fill" permits under section 404 of the Clean Water Act. (33 U.S.C. § 1344.) The section 404 permit program is the successor to the Army Corps' prior permitting authority under the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 *et seq.* (*See generally* Donna M. Downing, Cathy Winer, and Lance D. Wood, *Navigating Through Clean Water Act Jurisdiction: A Legal Review*, 23 Wetlands 475, 476-78 (Sept. 2003).) It is unclear, therefore, why the County apparently did not have an Army Corps permit prior to 1975.

which the sandbar sits, the County now needed the Department's consent to continue its breaching activities.

Additionally, the Army Corps permit renewal process alerted the Coastal Commission to the fact that the County's breaching activities also required a state coastal development permit under the Coastal Act. Through the permitting process, the Department of Fish and Game expressed concern about significant impacts on fish and wildlife values at the "extremely low levels" at which the County's prior breaching had sometimes maintained the lagoon. (I SCT 037-38.) In a March 1987 letter to the Commission, the Department identified reduced fish and wetland habitat, related loss of fish and wildlife species, and increased water temperatures above survival levels needed for anadromous fish as adverse impacts caused by breaching at the four-foot level. (*Id*.) It also explained that the drainage process flushed salmon out of the estuary prematurely and, during the spring, interfered with waterfowl breeding season. (*Id*.)

In comments on the proposed parallel federal permit by the Army Corps,[12] the U.S. Fish and Wildlife Service classified the

[12] The concern expressed in 1987 delayed issuance of a new five-year Army Corps permit and breaching was authorized by the by

Lake Earl habitat complex in the most protected resource category because its "tremendous habitat diversity . . . makes it especially unique and irreplaceable"; the goal for this resource protection category "is no loss of existing habitat value." (I SCT 068.) The Service echoed the Department of Fish and Game's concerns about the impacts of breaching, including reduced wetland habitat, warmer waters that could kill salmon rearing in Lake Earl, and the premature flushing of juvenile salmonids. (*Id*.) After acknowledging that a few species may benefit from breaching, the Service, like the Department, called for additional studies of breaching impacts before issuing any long-term breaching permit. (I SCT 039; 069; 093.)

In light of these concerns, the Coastal Commission delayed issuance of a long-term coastal development permit pending further study of breaching impacts. Instead, the Executive Director issued a series of emergency permits between 1987 and 1998 that allowed the County as lead agency to breach the lagoon when it reached eight feet above mean sea level. (II SCT 424; 479-81.) After 1998, the Coastal Commission continued to

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the federal agency on a year-by-year basis for several years. The Fish and Wildlife Service's comments addressed the new five-year permit proposed by the Army Corps in 1991.

receive seasonal requests to breach the sandbar and continued to issue temporary, emergency permits that generally allowed breaching at eight feet in the fall and sometimes at five feet in February. (II SCT 425-26; 481-83) In 2010, the Coastal Commission finally issued a five-year permit for essentially the same breaching regime, valid through 2015.

Against this backdrop, the Department of Fish and Game and Del Norte County, along with a number of other state and federal agencies, formed the Lake Earl Working Group in 1996 to develop a longer-term solution for the seasonal breaching regime and to formulate alternatives for optimal lagoon management. (I SCT 147.) That effort led, in turn, to the Department's agreement to draft a management plan for the Lake Earl Wildlife Area. (I SCT 263.) Focused on properly managing the area's public lands and waters, the January 2003 final management plan examined the needs and constraints of all resources under the Department's jurisdiction and concluded that continuing to manage the lagoon at eight to ten feet above mean sea level "would maximize ecological productivity" of the refuge "to the optimal extent possible while balancing the needs of all species with the needs of the public." (XI CT 3150.) To give what

assistance it could to those private landowners whose property was subject to potential annual inundation by the natural hydraulic cycle, the management plan also endorsed continuation and intensification of the State's program to acquire remaining private properties below the ten-foot contour from willing sellers. (XI CT 3146.)

The State began to make good on this renewed acquisition effort almost immediately. In June 2003, the State Coastal Conservancy[13] funded the non-profit Smith River Alliance to determine the feasibility of public acquisition of parcels in the subdivision and to undertake initial pre-acquisition activities.[14] (II SCT 376-78.) In November 2003, the Wildlife Conservation Board allocated $3,000,000 toward the acquisition of Pacific Shores lots from willing sellers. (*See* http://scc.ca.gov/

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[13] Created by statute in 1976, the Coastal Conservancy may, among other things, award grants to non-profits for the assembly of land parcels to enhance coastal resource protection. (*See* Cal. Pub. Res. Code §§ 31111 and 31251 *et seq*.)

[14] The State's earlier purchases had focused on larger landowners due to the transaction costs associated with locating and negotiating purchase agreements with small lot owners, although the State did acquire a number of subdivision parcels bordering the lagoon before the 2000s. The State's renewed purchase efforts in the 2000s funded the more time-consuming work of arranging and consummating the bulk of the subdivision purchases.

webmaster/ftp/pdf/sccbb/2004/0405/0405Board17M_Pacific_Shores.pdf.)[15] With 135 lots acquired or in escrow by May 2004, the Coastal Conservancy authorized additional funding to continue the next phase of this acquisition activity. (*Id.*) Acquisition efforts continued through 2007, when Del Norte County adopted a local resolution against the acquisition of any more private property by state or federal agencies.[16] To date, the State has acquired over 500 lots from willing sellers within the subdivision and has purchased an additional 220 tax-defaulted lots from Del Norte County; in total, over half of the original subdivision is now in public ownership.

More recently, the Border Coast Regional Airport Authority, which operates the nearby Del Norte County Regional Airport, has made purchase offers to hundreds of the remaining

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[15] Although this second State Coastal Conservancy document does not appear to be in the appeal record, the Court can and should take judicial notice of it as an official act of a state government agency. (Cal. Evid. Code § 452(c).)

[16] *See* http://www.countyofdelnorte.us/agendas/bos/MG54531/AS54543/AS54544/AI62311/DO63081/DO_63081.pdf. Although the County resolution is not technically "binding" on the Wildlife Conservation Board, its adoption – combined with a number of lawsuits filed over the last decade by PSPOA, as discussed below – has delayed continued implementation of the State's acquisition program.

private lot owners in the subdivision as mitigation for a federally-mandated runway safety improvement project that will adversely impact coastal wetlands near the runway site. (*See* Exhibit A.)[17] A legal challenge by PSPOA, which attempted to block the Airport's purchase of undevelopable lots from willing sellers, was recently dismissed by the federal court, paving the way for the Airport acquisition program to proceed. (*Id.*) Thus, if the State acquisition program is restarted, the remaining lot owners within the Pacific Shores subdivision will now have two different options for selling their parcels, although the Airport program will be of very limited duration.

V. Through Wasteful Studies and Frivolous Litigation, PSPOA and Its Officers Have Impeded State and Local Property Acquisition Programs and Frustrated the Interests of Willing Sellers Across the Subdivision.

Rebuffing all offers to purchase their long-vacant lots, a handful of individuals who took control of PSPOA in the 1980s tried unsuccessfully for years to bring services to the subdivision,

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[17] The Court can and should take judicial notice of the findings of fact set forth in this recent U.S. District Court decision. (Cal. Evid. Code § 452(d); *see also* Airport public website (*available at* http://flycrescentcity.com/ category/public-documents/) for additional information on the runway safety project and the purchase of Pacific Shores lots from willing sellers as mitigation.)

despite the natural physical conditions and the economic constraints that make installation of sewer and water systems improbable or impossible. Frustrated by its lack of success, PSPOA eventually moved from failed studies to failed lawsuits, along the way spending millions of dollars collected through parcel assessments for consultants and lawyers. (VIII CT 2309 (statement by Dwayne Smith lamenting that subdivision decisionmakers had spent "millions of dollars" on "more lawyers, more lawsuits . . . and foolishness that is not going to get us anywhere . . . because we've done that now for 15 years.") The present lawsuit is merely the latest effort to undermine a permanent acquisition solution for those lot owners, including some of Amici, who still hold property in the subdivision but now realize that development will never occur.

Although PSPOA's 1975 study identified significant roadblocks to bringing utility services to the subdivision, the organization applied for and, in 1985, received from the Coastal Commission a coastal development permit authorizing the formation of a special district "only for the limited purpose of financing and carrying out the special study" that the Coastal Commission invited in 1981. (VIII CT 2134.) Pursuant to this

authorization, PSPOA formed the Pacific Shores Subdivision California Water District ("Water District") in 1987[18] to commission the special study and ultimately provide water and sewage services for the subdivision. (VIII CT 2306.) To complete this task, the Water District re-engaged the environmental consulting firm Winzler & Kelly, which released an initial special study of the water and sewer issues in 1989. After completing a site evaluation, the authors of the study concluded that their vegetation studies "support, rather than refute" the U.S. Fish and Wildlife Service's earlier wetlands delineation for the subdivision. (VIII CT 2145.) The special study also confirmed that the area of "indisputable wetland" within the subdivision is quite large and that the entire subdivision is considered "environmentally sensitive dunes," creating "significant" and "substantial" impediments to development. (VIII CT 2169.) In this "ground-truthing" exercise, Winzler & Kelly worked from the earlier federal wetlands delineation maps, created during the years

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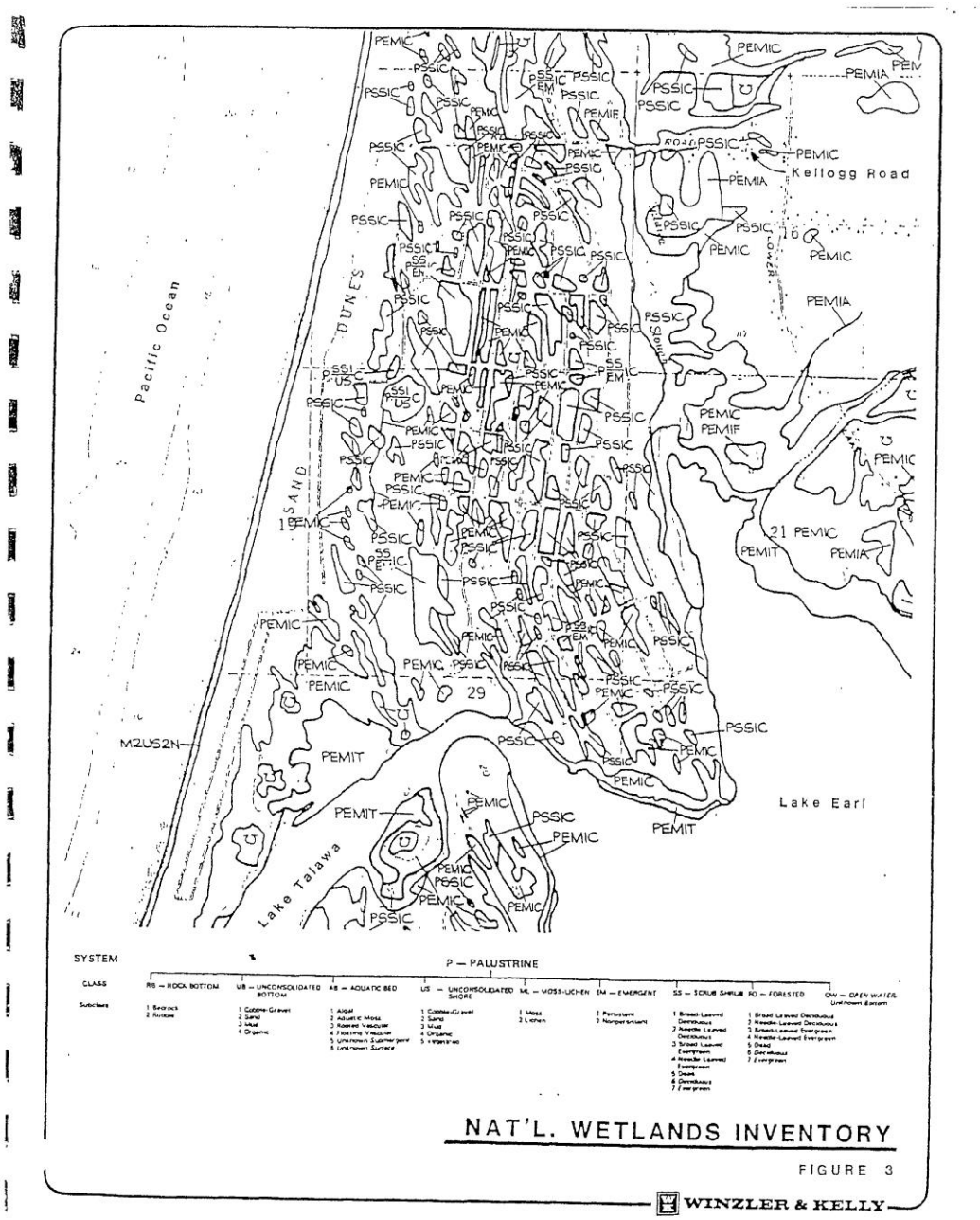
[18] The formation or dissolution of special districts like the Pacific Shores Water District must be approved under the Corteze-Knox-Hertzberg Local Government Reorganization Act by a county's Local Agency Formation Commission ("LAFCO"). The statute sets forth extensive procedures and requirements that each county LAFCO must follow. (*See* Cal Pub. Res. Code § 56000 *et seq.*)

when the County was regularly breaching at four feet, before the State became involved in the issue.



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Undaunted by this result, the District forged ahead with the creation of a funding authority under the Mello-Roos Act,

which allowed the levying of an annual special tax on every lot owner.[19] (VIII CT 2308.) Lot owners approved this self-taxing authority with the explicit understanding that the money would be used only "to pay for facilities and services and the planning, study, design, and other incidental costs associated therewith" to "construct, rehabilitate or acquire public facilities and costs incidental thereto." (VIII CT 2309.) The District's imposition of this annual fee led to an increase in tax defaults and the resulting loss of equity for hundreds of Pacific Shore lots. (VIII CT 2308.)

With an infusion of tax money, the Water District commissioned the same firm, Winzler & Kelly, to move forward with the preparation of an Environmental Impact Report ("EIR") for development of sewer and water services within the

[19] The Mello-Roos Act allows the formation of community facilities districts and associated fee assessments, but only for police protection service, fire and paramedic services, education and recreation services, park maintenance, flood and storm protection services, and hazardous waste removal services. (Cal. Gov't Code §§ 53313, 53340(d).) Moreover, only those facilities and services described in the community facilities district's resolution of formation may be financed with the resulting special tax. (*Id.* § 53330.)

subdivision.[20] This time, however, the individuals controlling PSPOA – mostly notably, Respondent Thomas Resch – repeatedly attempted to interfere with the consultant's work and to distort the scientific analysis. In December 1992, Mr. Resch urged the Water District to hire a more sympathetic wetlands consultant from San Diego, even though this individual was wholly uninformed about the site and the regulations. (XIII CT 3880.) In March 1993, Mr. Resch alleged that Winzler & Kelly was improperly speaking with the regulatory agencies and complained that the environmental review should have been completed before the discovery of another endangered species on the property. (XIII CT 3882.) In April, Mr. Resch instructed Winzler & Kelly's project director, Gregory Nesty, not to evaluate certain lake level alternatives in the EIR. (XIII CT 3884.) By June, the Water District's lawyer was compelled to write directly

[20] Pursuant to the California Environmental Quality Act, an EIR is required for any discretionary project undertaken, approved, or funded by a public agency "that may have a significant effect on the environment." (Cal. Pub. Res. Code § 21100(a); Cal. Code Regs., tit. 14 § 15378(a)(1).) Because a land use plan amendment to the local coastal program for the purpose of allowing utility infrastructure at Pacific Shores would cause a direct physical change in the environment, would require myriad public agency approvals, and would have a significant environmental effect, an EIR was and is a prerequisite for any agency approval.

to Mr. Resch, demanding that he cease his attempts to block Winzler & Kelly scientists from accessing the public roads at Pacific Shores to complete their site analysis. (XIII CT 3888-89; *see also* XIII CT 3390-93 (additional Water District counsel response to Mr. Resch's accusations).)

The escalation of Mr. Resch's rhetoric and accusations eventually prompted Mr. Nesty to write "An Open Letter to the Pacific Shores Lot Owners" in which he responded publicly to PSPOA's misinformation campaign, explaining that: "It does no good to call the regulators thieves. It does no good to pretend that there are no wetlands. . . . It does no good to pretend that you complied with the Endangered Species Act when you haven't. It does no good to charge your consultants with misconduct and to threaten them with arrest and imprisonment for conducting the studies that you need done. And finally, it does no good to threaten and malign the [Water District] Board members who have done a good job of making the tough decisions that need to be made on this complicated project." (XIII CT 3879.)

PSPOA's unhappiness with the physical realities of the subdivision and the applicable state and federal laws broke into open hostilities that spring, as Mr. Resch pressed for the recall of

two Water District board members and their replacement with PSPOA Treasurer Dwayne Smith and PSPOA Director Gerald Shaver. (VIII CT 2289-90; XIII CT 3865-69 and 3847-50 (asserting, under the heading "THE FEDS ARE TRYING TO STEAL OUR LAND," that the U.S. Fish and Wildlife Service's wetlands delineation map for the subdivision took "first place prize for sneaky, underhanded, and deceitful actions").) After the successful recall effort, with Dwayne Smith installed as the new Water District President, Messrs. Resch and Smith had a free hand to steer completion of the EIR and the work of Winzler & Kelly in a direction that was more to their liking, at a cost to lot owners of $860,000. (XIV CT 3915.) In June 1995, Mr. Smith announced in a newsletter circulated to all lot owners that a Draft EIR had been submitted to the County, that a final EIR would soon be circulated for public and agency comment, and that approval of a land use plan amendment and permission to build homes could well happen by Christmas. (XIV CT 3915.)

Unsurprisingly, the Del Norte County Community Development Department resoundingly rejected the Administrative Draft EIR as inadequate and lacking in objectivity. (VIII CT 2292-94). The County noted, among many

other things, that the document "fails by coming across as an advocacy document," including, for instance "the varied opinions of the Pacific Shores Water District [] attorney" and "other opinions [that] are simply too numerous to mention"; the County also explained how the document was "internally inconsistent" in numerous places. (*Id.*) The administrative draft was so deficient, in fact, that no public review draft was ever circulated.

In 1997, the Water District tried again, engaging a different firm to produce a revised Environmental Impact Report. (VIII CT 2310.) After three years and the expenditure of an additional $87,450, the EIR effort was finally abandoned. (*Id.*) The new consultant reported that the prior Draft EIR was "seriously inadequate," but that the subdivision wetlands surveys conducted by Winzler & Kelly appeared to be accurate and were "not favorable to the project." (*Id.*) In the end, no EIR has ever been completed.

While the Water District spent over a million dollars of lot owner assessment money on inadequate and incomplete studies that brought the subdivision no closer to obtaining services (VIII CT 2310), its new management eventually abandoned the idea of scientific evaluation and began funneling the District's property

fee assessment funding into a seemingly endless string of lawsuits. (VIII CT 2311.) With Dwayne Smith and Thomas Resch in charge, the Water District and PSPOA have now regularly use the courts – and the lot owners' money – to bring environmental law, civil rights, inverse condemnation, and conspiracy claims against numerous public agencies and private parties in various state and federal courts.

For instance, in *Pacific Shores Subdivision California Water District v. U.S. Army Corps of Engineers*, Case No. C-04-1401-SC (N.D. Cal. Aug. 20, 2004) (Order Dismissing Case), the Water District unsuccessfully sued the Army Corps, the Department of Fish and Game, and various other agencies, entities, and individuals for violations of the National Environmental Policy Act, the Endangered Species Act, and the California Environmental Quality Act in an action that was dismissed after the plaintiffs failed to respond to defendants' motion. (*See* VIII CT 2311.) In *Tolowa Nation v. California Dept. of Fish & Game*, Case No. 04CS01254 (Cal. Super. Ct. 2006), PSPOA and the Water District unsuccessfully sued the State and County – and several public employee scientists who had worked on the matter – over the Lake Earl management plan. (*See*

Exhibit B.) In *Pacific Shores Subdivision California Water Dist. v. Norton*, 538 F. Supp. 2d 242 (D.D.C. 2008), the Water District sued the Army Corps and various federal officials over the 2005 Clean Water Act section 404 breaching permit. Indeed, in the years following abandonment of the EIR process, as much as 85 percent of the Water District's annual expenditures were devoted to legal and litigation support. (VIII CT 2311.)

Concluding that development of water and sewer infrastructure within the subdivision was unlikely due to myriad physical, legal, and economic constraints identified over the years – and faced with a situation where the captured Water District appeared to have turned its focus solely to litigation – the County and Amici lot owner Maxine Curtis[21] petitioned LAFCO for dissolution of the Water District. (VIII CT 2303-45.) After extensive public proceedings, LAFCO granted the dissolution (VIII CT 2346-47), and the decision was ultimately affirmed by

[21] For the same reasons, Ms. Curtis and Amici lot owner Northcoast Environmental Center filed a taxpayer suit against the Water District and its officers and directors, in an attempt to halt the improper spending of parcel assessments and recover illegal expenditures of such fees on behalf of all lot owners. (*See* Exhibit E.) Because the Water District was subsequently dissolved, that lawsuit was never adjudicated.

the First Appellate District in an unreported decision. (*See Wilson v. Del Norte Co. Local Agency Formation Comm'n*, 2011 WL 1376594 (Apr. 12, 2011.)

Without the platform of the Water District, Thomas Resch and Dwayne Smith quickly turned back to PSPOA as the vehicle with which to wage a continued litigation battle.[22] In an earlier phase of this case, the PSPOA, the Water District, and Messrs. Resch and Smith sued over three dozen individuals (including Amici Maxine Curtis), several state agencies, the County, and the Army Corps for "conspiring" against them. In dismissing many of the individual defendants and awarding their attorneys fees

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[22] Thomas Resch, who testified in the trial court that he has been on the PSPOA board since 1971 and served as its President since 1988 (XIII CT 3833), is also a licensed real estate agent with what seems to be a vested financial interest in artificially inflating the value of the subdivision lots. The trial record includes a copy of an elaborate 2008 advertisement from Mr. Resch's real estate firm listing dozens of Pacific Shores half-acre lots for sale at $115,000 each, two larger parcels at $6,195,000, and another PSPOA parcel at $29,600,000. (XIII CT 3794-3831.) Considering that the half-acre parcels within the subdivision were originally purchased for less than $2,000, were appraised for the Wildlife Conservation Board and the Airport Authority by independent appraisers at $4,000 to $5,000, and were valued by the trial court at no more than $10,000, it appears as if Mr. Resch is engaged in the same kind of dubious marketing practices as the original Arizona developer who created the subdivision conundrum. Dwayne Smith, on the other hand, may have reevaluated his role in PSPOA's litigation scheme when he voluntarily dismissed himself from this lawsuit.

under California's anti-SLAPP suit provisions,[23] the trial court held: "Not only does the Complaint not state a cause of action against the moving defendants for any cause of action alleged therein, . . . [t]his is a classic anti-SLAPP suit in which private individuals and environmental groups are being targeted for their comments and actions in advocating the state agencies positions, speaking out against the Water District, and trying to preserve the marine environment. This case offers the prime example of why the anti-SLAPP statute was enacted." (*See* Exhibit C.)

Most recently, as noted above, PSPOA unsuccessfully challenged the Border Coast Regional Airport Authority's proposed purchase of Pacific Shores lots from willing sellers as wetlands mitigation for a critical airport runway safety improvement project. (*See* Exhibit A.) This string of futile lawsuits has chilled the ability of interested Pacific Shores lot owners, like Amici party Earl McGrew and many others, to consummate a sale of their property to potential State and local agency buyers, frustrating the majority of parcel owners who are seeking a permanent solution to decades of conflict and

[23] (*See* Cal. Civ. Proc. Code §§ 425.16-425.18.)

uncertainty. Indeed, data from PSPOA's own 1995 survey of lot owners attest that 75 percent of respondents preferred to sell their lots and 80 percent wanted to find out more about the State's purchase offer. (XIV CT 3919-21.)

It has been nearly two decades since these data revealed that most lot owners have accepted the reality of the situation and want to move on by selling their parcels. It has been more than eight years since the Sacramento Superior Court, in dismissing the challenge to the Lake Earl Management Plan, explained that the subdivision "essentially has been moribund for decades" and that "it is not reasonably foreseeable at this time that it will ever be further developed." (*See* Exhibit B at 8.) It has been decades since the State began offering lot owners a viable path forward through its acquisition programs, and the Airport has now expanded that opportunity. In contrast, PSPOA merely prolongs the controversy and perpetuates the injury to lot owners like Amici when it argues here – in the face of overwhelming historical facts to the contrary – that the State has a perpetual duty to engage in physically dangerous, environmentally destructive artificial breaching of the Lake Tolowa sandbar. Until and unless this untenable theory is laid to

rest by this Court, the ill-conceived Pacific Shores "subdivision" will remain an open wound.[24]

CONCLUSION

The long saga of the Pacific Shore subdivision makes several things clear. First, the wet, porous soils of the subdivision property were never suitable for development, as numerous studies over the decades have confirmed, regardless of seasonal flooding. Second, as far back as the 1950s and 1960s, before the land was subdivided, the State publicly announced that a long-term flood control project for the coastal lagoon's natural water level fluctuations was not practical, economical or warranted and, as a result, no flood control project has ever been undertaken by any entity. Third, while the purchasers of the Pacific Shores lots may have relied on the developer's inadequate disclosures or the County's 1963 subdivision approval and early *ad hoc* breaching measures, the State did not become involved in the Lake Earl watershed or sandbar breaching until the late 1980s, after it purchased much of the surrounding land from

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[24] If the trial court's liability ruling against the State is affirmed, litigation over the breaching of the lagoon and the alleged "taking" of subdivision lots will continue in the trailing case. (*See Fiery v. Cal. Dep't of Fish and Game,* Case No.34-2011-00095243 (Sacramento Superior Court).)

willing sellers. Fourth, there is no evidence (in the record or elsewhere) that PSPOA or any lot owner ever invested in property or infrastructure in reliance on the State's cooperation in the County's seasonal breaching activities. Fifth and finally, both the State and the local airport have offered to purchase lots from willing sellers at fair market value, thousands of dollars over their original price, but these efforts have been stymied at every turn by PSPOA's use of the courts to perpetuate needless conflict. On these facts, the trial court simply erred in finding liability against the State and rewarding PSPOA's litigious conduct.

Not only was the trial court's holding wrong on the law and the facts, it makes no practical or policy sense – for either the remaining private lot owners in the subdivision or the public interest in long-term conservation of the area's unique resources. There is no realistic possibility that Pacific Shores will ever be developed or that individual lot owners will ever be able to construct permanent structures on their lots, regardless of winter flooding. Indeed, with the Water District dissolved and the Airport's lot acquisition program now under way, the economics of an infrastructure fix for the last century's imprudent private

investment decisions become more unfavorable with each passing day. Under these circumstances, it defies all rationality to require that the State either invest tens of millions of dollars in hardscape flood control measures or continue indefinitely putting people and wildlife at risk by more frequent breaching during winter weather conditions.[25] The trial court's decision is especially frustrating for Amici when the victims of the original land fraud can recoup their original investment, and more, through voluntary State and local acquisition programs.

For all of the foregoing reasons, Amici urge the Court to reverse the finding of liability against the State and order this case dismissed in its entirety.

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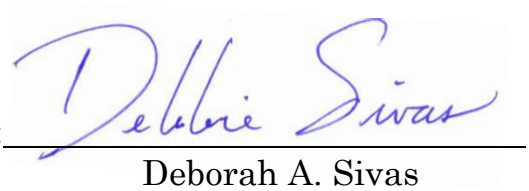
[25] Because breaching cannot always be safely or timely achieved under extreme weather events, a breaching-only solution would not protect subdivision lots from occasional surface flooding. This reality puts the State in the untenable position of choosing between incurring additional liability for each and every lot within the subdivision or investing in expensive, cost-inefficient flood control infrastructure to avoid such liability. Even under the latter scenario, moreover, taming the winter waters of the Smith River floodplain will not solve the subdivision's high groundwater table and permeable soils issues or allow water and sewer services to be economically installed.

Dated: Mar. 17, 2014 Respectfully submitted,

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

By: 

Deborah A. Sivas

Attorneys for Amici Curiae

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court 8.204(c), I certify that the text of this brief consists of 10,280 words, not including tables of contents and authorities, signature block, and this certificate of word count as counted by Microsoft Word, the computer program used to prepare this brief.

Dated: March 17, 2014 By: 

Deborah A. Sivas

CERTIFICATE OF SERVICE

LYNDA F. JOHNSTON declares:

I am over the age of eighteen years and not a party to this action. My business address is 559 Nathan Abbott Way, Stanford, California 94305-8610.

On March 17, 2014, I served the foregoing **APPLICATION FOR LEAVE TO FILE AMICUS BRIEF BY EARL MCGREW, MAXINE CURTIS, LYNDA SCHOONOVER, NICOLE SOLOVSKOY, and NORTHCOAST ENVIRONMENTAL CENTER; BRIEF OF AMICI CURIAE EARL MCGREW, MAXINE CURTIS, LYNDA SCHOONOVER, NICOLE SOLOVSKOY, and NORTHCOAST ENVIRONMENTAL CENTER IN SUPPORT OF APPELLANTS CALIFORNIA COASTAL COMMISSION and CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE** on all persons identified below by placing a true and correct copy thereof for Federal Express next-business-day delivery at Stanford, California, addressed as follows:

Deborah M. Smith
Carolyn Nelson Rowan
Deputy Attorneys General
1300 I Street, Suite 125
Sacramento, CA 95814-2919

Attorneys for Defendants and Appellants California Department of Fish and Wildlife, et al.

Kelly T. Smith, Esq.
The Smith Firm
1541 Corporate Way,
Suite 100
Sacramento, CA 9583-3889

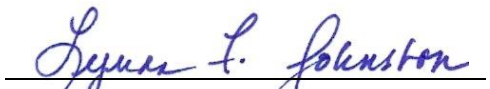
Attorney for Plaintiffs and Appellants Pacific Shores Property Owners Association, et al.

Clerk, Civil Division
Sacramento County Superior
Court
720 9th Street
Sacramento, CA 95814-1302

Trial Court

On March 17, 2014, I also served an electronic copy of the foregoing **APPLICATION FOR LEAVE TO FILE AMICUS BRIEF BY EARL MCGREW, MAXINE CURTIS, LYNDA SCHOONOVER, NICOLE SOLOVSKOY, and NORTHCOAST ENVIRONMENTAL CENTER; BRIEF OF AMICI CURIAE EARL MCGREW, MAXINE CURTIS, LYNDA SCHOONOVER, NICOLE SOLOVSKOY, and NORTHCOAST ENVIRONMENTAL CENTER IN SUPPORT OF APPELLANTS** on the Supreme Court of California by use of the utility found on the Court of Appeal's web site, at http://www.courts.ca.gov/19284.htm.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed March 17, 2014 at Stanford, California.



LYNDA F. JOHNSTON

EXHIBIT A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PACIFIC SHORES PROPERTY OWNERS ASSOCIATION, et al.,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, et al.,

Respondents.
_____/

No. C 13-2827 PJH

ORDER GRANTING MOTION TO DISMISS AND MOTION FOR JUDGMENT ON THE PLEADINGS

The motions of respondents/defendants to dismiss the petition and for judgment on the pleadings came on for hearing before this court on February 19, 2014. Petitioners/ plaintiffs appeared by their counsel Kelly Smith; respondent/defendant Federal Aviation Administration ("FAA") appeared by its counsel Michael Pyle; respondent/defendant Border Coast Regional Airport Authority ("Authority") appeared by its counsel Autumn Luna; and the defendant-intervenors appeared by their counsel Jacqueline Iwata and Deborah Sivas. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby GRANTS the motions as follows.

INTRODUCTION

Petitioners/plaintiffs Pacific Shores Property Owners Association and William A. Ritter (collectively, "PSPOA") filed the present action on June 16, 2013 as a petition for writ of mandate, and also seeking injunctive relief and damages. The Authority answered the petition, and the FAA moved to dismiss the sole cause of action asserted against it. The

court granted the motion, with leave to amend. The court also granted the motion of Northcoast Environmental Center, Smith River Alliance, and five individual landowners for leave to intervene as defendants. PSPOA filed a first amended petition and complaint ("FAC") on December 17, 2013.

BACKGROUND

The Pacific Shores Property Owners Association is an association of private owners of parcels in the Pacific Shores Subdivision ("the Subdivision"), which is located in Del Norte County, California, and was approved and recorded in 1963 with 1,535 lots on 1,486 acres. PSPOA alleges that in preparation for future development, a 26-mile road system, and drainage and flood control improvements were constructed within the Subdivision, and electrical lines were brought to the main road.

According to respondents/defendants, however, the area consists of low-lying coastal dunes that are essentially undevelopable. Moreover, no infrastructure has been developed in 50 years, there is no sewer system or water delivery system serving the lots, septic tanks are not permitted because the soil is sand and the groundwater is close to the surface, and the few structures that are located there are trailers with no apparent sanitation systems.

PSPOA asserts that beginning in the mid-1980s, agencies of the State of Califonria and the County of Del Norte began "manipulating the surface elevation" of Lake Earl, the lagoon adjacent to the Subdivision. By allowing the surface of the lake to rise, and preventing efforts to divert the water, they allegedly caused episodic flooding of the Subdivision. In 2006, certain Subdivision property owners filed an inverse condemnation suit, Smith v. Department of Fish & Game, Case No. 07AS01516 (Superior Court, County of Sacramento). The trial court ruled in favor of those plaintiffs for damages from the physical flooding of the Subdivision. Both sides appealed.[1]

According to its website, the Authority is a Joint Powers Authority with a Board of

[1] The first notice of appeal was filed in the trial court on January 12, 2012, and the appeal was fully briefed on January 30, 2014.

Directors comprised of representatives from Del Norte County, the City of Crescent City, the Elk Valley Rancheria, Smith River Rancheria, the City of Brookings, Oregon and Curry County, Oregon. It operates the Del Norte County Regional Airport ("the Airport"), also known as Jack McNamara Field.

In June 2000, the FAA completed an evaluation of the Airport's existing runway safety areas, and concluded that they did not meet applicable FAA design standards. As part of the 2005 appropriations bill for the Department of Transportation, Congress required all commercial airports to come into compliance with FAA design standards for runway safety areas by the end of 2015, and allocated federal funding to assist local airports with the needed improvements. Consequently, approximately five years ago, the the Authority initiated the Runway Safety Area Improvement Project.

In July 2009, the Authority filed a Notice of Preparation with the Governor's Office of Planning and Research, formally initiating the review mandated under the California Environmental Quality Act ("CEQA"). In 2010, consistent with the Notice of Preparation, the Authority drafted a plan that discussed the possibility of purchasing lots from Pacific Shores Subdivision landowners to use as mitigation for the wetlands that would be lost because of the Runway project.

The Authority submitted the Notice of Completion of the Draft EIR (Environmental Impact Report) to the State on February 25, 2011, listing the Subdivision as a potential wetland mitigation site. In March 2011, the Authority held a public meeting to discuss the Draft EIR. In December 2011, the Authority's Board of Commissioners approved the Runway Safety Project, and filed a Notice of Determination with the State (the final decision document under CEQA).

PSPOA claims that the expansion plans and supporting EIR did not specifically describe how the environmental impacts of the runway and terminal project would be mitigated, as required under CEQA. PSPOA alleges that prior to the time that the airport runway and terminal project EIR was certified, the Subdivision property-owners had received no notice that their properties, some distance away, were being evaluated as a

mitigation alternative for the airport expansion impacts. PSPOA asserts that it was only after they "inadvertently" discovered in December 2012 that the County Board of Supervisors was taking steps to use Subdivision roads as mitigation that any owners of the affected lots had any idea that subdivision roads were being considered for "removal."

PSPOA contends that the Authority then scheduled a meeting to disclose the Pacific Shores Subdivision "road removal plan" to the property owners. The meeting was held on February 13, 2013. PSPOA claims that at the meeting, the land owners were told that an environmental analysis of the "Pacific Shores mitigation" would be conducted, that the roads considered for "removal" would be disclosed, and that the analysis would be completed before the alternative was adopted.

PSPOA asserts, however, that the Authority later considered in closed session an appraiser's estimate of the values of the lots. This appraiser had allegedly previously conducted similar appraisals for the state agencies that had sought to acquire the Subdivision lots to create a state park, and had worked with local environmental groups. PSPOA contends that the appraisals failed to include proper comparable valuations, and instead used one valuation for all the lots without consideration of individual values.

PSPOA also alleges that notwithstanding the promise by the Authority to conduct an environmental review of the proposed road closures and property purchases, no such review has ever been conducted; and that the Authority has indicated on the one hand that other alternatives to the mitigation would be pursued, while at the same time has proceeded with the "road closure" and "lot acquisition."

PSPOA asserts that it was not until September of 2013 that the Authority formally and officially approved a mitigation project necessary to comply with the Coastal Commission coastal development permit which had been conditionally approved only the month before that. However, PSPOA alleges, it did so without adoption of the "EIR addendum" promised earlier.

In the FAC, PSPOA asserts five causes of action – (1) a claim of violation of the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and

Federally Assisted Programs ("Uniform Relocation Assistance Act" or "URA"), 42 U.S.C. § 4601, et seq., against the FAA and the Authority; (2) a claim under 42 U.S.C. § 1983 for violation of the Takings Clause of the Fifth Amendment, and the Due Process Clause of the Fourteenth Amendment, against the Authority; (3) a claim for inverse condemnation damages, against the Authority; (4) a claim of violation of CEQA, Cal. Govt. Code § 21000, et seq., against the Authority; and (5) a claim of violation of the Constitutional prohibition against private gifts of public money, Cal. Const. Art. XVI, § 6, against the Authority.

The FAA now seeks an order dismissing the one claim asserted against it, for lack of subject matter jurisdiction and failure to state a claim. The Authority and the defendant-intervenors seek judgment on the pleadings as to all causes of action alleged in the FAC.

DISCUSSION

A. Legal Standards

1. Motions to dismiss for lack of subject matter jurisdiction

Federal courts are courts of limited jurisdiction, possessing only that power authorized by Article III of the United States Constitution and statutes enacted by Congress pursuant thereto. See Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986); see also Chen-Cheng Wang ex rel. United States v. FMC Corp., 975 F.2d 1412, 1415 (9th Cir. 1992). The court is under a continuing duty to dismiss an action whenever it appears that the court lacks jurisdiction. Spencer Enters., Inc. v. United States, 345 F.3d 683, 687 (9th Cir. 2003); Attorneys Trust v. Videotape Computers Prods., Inc., 93 F.3d 593, 594-95 (9th Cir. 1996). The burden of establishing that a cause lies within this limited jurisdiction rests upon the party asserting jurisdiction. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994); Tosco Corp. v. Communities for a Better Env't, 236 F.3d 495, 499 (9th Cir. 2001).

2. Motions to dismiss for failure to state a claim

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests for the legal sufficiency of the claims alleged in the complaint. Ileto v. Glock, Inc., 349 F.3d 1191, 1199-1200 (9th Cir. 2003). Review is limited to the contents of the complaint. Allarcom

Pay Television, Ltd. v. Gen. Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995). To survive a motion to dismiss for failure to state a claim, a complaint generally must satisfy only the minimal notice pleading requirements of Federal Rule of Civil Procedure 8, which requires that a complaint include a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

A complaint may be dismissed under Rule 12(b)(6) for failure to state a claim if the plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to support a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). The court is to "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 899-900 (9th Cir. 2007). However, legally conclusory statements, not supported by actual factual allegations, need not be accepted. Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009). The allegations in the complaint "must be enough to raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations and quotations omitted).

A motion to dismiss should be granted if the complaint does not proffer enough facts to state a claim for relief that is plausible on its face. See id. at 558-59. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678 (citation omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" Id. at 679.

The Ninth Circuit has "repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and quotations omitted). Thus, where dismissal is warranted, it is generally without prejudice, unless it is clear the complaint cannot be saved by any amendment. See Sparling v. Daou, 411 F.3d 1006, 1013 (9th Cir. 2005).

3. Motions for judgment on the pleadings

A motion for judgment on the pleadings pursuant to Rule 12(c) "challenges the legal sufficiency of the opposing party's pleadings." William Schwarzer et al, Federal Civil Procedure Before Trial ¶ 9:316 (2010); Fed. R. Civ. P 12(c). The legal standards governing Rules 12(c) and 12(b)(6) are "functionally identical," Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1192 (9th Cir. 1989), as both permit challenges directed at the legal sufficiency of the parties' allegations. See also Chavez v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012). Thus, a judgment on the pleadings is appropriate when the pleaded facts, accepted as true and viewed in the light most favorable to the non-moving party, entitle the moving party to a judgment as a matter of law. Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1301 (9th Cir. 1992); see also Fleming v. Pickard, 581 F.3d 922, 925 (9th Cir. 2009).

The standard articulated in Twombly and Iqbal applies equally to a motion for judgment on the pleadings. Cafasso, U.S. ex rel. v. General Dynamics C4 Sys., Inc., 637 F.3d 1047, 1054-55 & n.4 (9th Cir. 2011); see also Lowden v. T-Mobile USA, Inc., 378 Fed. Appx. 693, 694, 2010 WL 1841891 at *1 (9th Cir., May 10, 2010) (to survive a Rule 12(c) motion, "a plaintiff must allege 'enough facts to state a claim to relief that is plausible on its face'" (quoting Twombly, 550 U.S. at 544)).

B. The FAA's Motion

The FAA seeks an order dismissing the first cause of action for lack of subject matter jurisdiction and failure to state a claim. In the first cause of action, PSPOA alleges that the FAA is required to administer and monitor the URA, for projects it funds (including the "airport mitigation" project), and that it failed to do so, in violation of 42 U.S.C. § 4655.

In relevant part, § 4655 provides that "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/she "receives satisfactory assurances from such acquiring agency" that in acquiring property the agency "will be guided, to the greatest extent practicable under State law, by

the land acquisition policies in section 4651 . . . the provisions of section 4652," and that "property owners will be paid or reimbursed for necessary expenses as specified in sections 4653 and 4654." See 42 U.S.C. § 4655(a).

PSPOA interprets § 4655 as requiring the FAA to "administer and monitor" the URA for projects it funds, including the project at issue here, and alleges that in connection with this requirement the FAA "was asked" (by PSPOA) to "provide proof" that it had complied with § 4655's requirement for adequate assurance that it had complied with the URA in connection with the Pacific Shores "mitigation project," but failed to provide "proof" that PSPOA considered "satisfactory."

PSPOA asserts that on November 20, 2013, the FAA's attorney provided them with documents purporting to show FAA compliance with § 4655. These documents included a September 10, 2012 "Grant Agreement," signed by the FAA and Authority officials, and the 36-page "Terms and Conditions" for accepting grants executed by the Authority's executive director on June 18, 2012. PSPOA contends that those documents included "boilerplate provisions whereby the signees, including the Authority, consented to the requirements of § 4651 and the Act."

PSPOA claims that between June 2012 (when the FAA received the "boilerplate 'assurances'") and the actual September 2013 approval of the "mitigation project," the Authority had solicited sales from Pacific Shores Subdivision property owners by letter. PSPOA contends that the sales were solicited by the Authority with the intent "that they would be funded by the FAA." It is the solicitation of those sales that PSPOA claims did not comply with the requirements of § 4651, in that owners were given no role in the appraisal of their properties, since "they knew nothing about it."

PSPOA asserts that because the "boilerplate assurances" were provided before the mitigation project plan, designs, acquisitions intended, or appraisals were submitted to the FAA, the FAA has not received "satisfactory assurances" under § 4655 for the Pacific Shores "mitigation project." However, PSPOA does not allege that the FAA has actually "approved" a project or program under which federal financial assistance will be provided.

PSPOA contends that the "boilerplate assurances" were not "satisfactory" for the further reason that they either were disregarded by the Authority when it designated its "mitigation project," or were not understood by the Authority such that it failed to comply with the provisions of § 4651, or were not considered at the time the Authority solicited purchase agreements for the "mitigation project." PSPOA asserts that the assurances were also not "satisfactory" because the Authority by its actions towards the owners "has shown that it will violate the most fundamental provision of § 4651 by forcing property owners to this [c]ourt to seek redress of their constitutional property rights."

In its motion, the FAA argues that neither the URA nor its corresponding regulations provide for a private right of action, and thus, the court lacks subject matter jurisdiction over this claim. In addition, the FAA asserts that PSPOA has not alleged sufficient facts against the FAA to state a claim, and moreover, that the claim is contrary to documents subject to judicial notice, which show that the FAA did comply with § 4655 of the Act.

First, the FAA contends that § 4655 of the URA does not provide a private right of action by which PSPOA can hold the FAA liable for an alleged failure to receive satisfactory assurances. The FAA asserts that it is PSPOA's burden to establish that the United States has waived its sovereign immunity with regard to the URA. Citing to the language of § 4655, the FAA argues that the only obligation on the federal agency under § 4655 is to receive satisfactory assurances from the acquiring agency (here, the Authority). The remainder of § 4655 puts obligations on the acquiring agency, not on the FAA.

The FAA asserts that § 4655 of the URA is phrased as a directive to federal agencies engaged in the distribution of public funds, and there is nothing in the text of § 4655 that evidences creation of a private right of action or remedy as against the FAA. The FAA adds that while older cases may have been more liberal in locating a private right of action, more recent cases such as Gonzaga Univ. v. Doe, 536 U.S. 273, 280 (2002), Alexander v. Sandoval, 532 U.S. 275 , 286 (2001), and San Carlos Apache Indian Tribe v. United States, 417 F.3d 1091, 1094-97 (9th Cir. 2005) have held that the court must find an

intent in the statute in question to create a private right of action and a private remedy. The FAA asserts that without a private right of action, petitioners/plaintiffs are unable to sue the FAA under the Act, and thus this court does not have jurisdiction over the only claim that has been alleged against the FAA.

Second, the FAA argues that even if there were a private right of action under § 4655, the FAC does not allege sufficient facts to state a claim. The FAA contends that the supposedly "factual allegations" in the FAC are better described as conclusions than as facts, noting that PSPOA concedes that its counsel received two documents in November 2013 from FAA counsel, but then asserts that the "assurances" in the documents are simply "boilerplate" and claims that "satisfactory assurances" must include more than "boilerplate."

In opposition, PSPOA argues that under Lathan v. Volpe, 455 F.3d 1111, 1125 (9th Cir. 1971), overruled on other grounds, Lathan v. Brinegar, 506 F.2d 677, 691 (9th Cir. 1974), the URA does provide a private right of action. PSPOA also cites Whitman v. State Highway Commission of Missouri, 400 F.Supp. 1050, 1058-59 (W.D. Mo. 1975), and La Raza Unida v. Volpe, 337 F.Supp. 221 (N.D. Cal. 1971) in support of its argument. In addition, PSPOA argues that the court has "primary jurisdiction" under the Administrative Procedures Act, 5 U.S.C. §§ 702 and 704.

PSPOA contends that the language of § 4655 clearly indicates an intent to protect the private property rights of owners being acquired – that the express language of the statute creates a private right of action by property owners that the "acquiring agency" (here, the Authority) will be required to comply with § 4651, and "will be paid or reimbursed" pursuant to § 4652 and § 4653. PSPOA argues that these are explicitly personal rights of the owners whose property is being condemned.

With regard to the motion to dismiss for failure to state a claim, PSPOA responds that the documents provided by the FAA simply provide "written assurance" that the Authority will comply with federal acquisition rules, but that "written assurance" is not the same as "satisfactory assurance." Moreover, PSPOA argues, the facts alleged in the FAC

relate to the Authority's "project" to acquire Pacific Shores Subdivision roads and lands long after the plans submitted in the FAA-offered documents, which it asserts is "a different project" that was "never provided proper environmental study" and "never even noticed to the owners of Pacific Shores until long after the airport runway plans were submitted" by the Authority to the FAA.

In its reply, the FAA makes two main arguments – that the URA does not provide a private right of action under § 4655; and that the FAA is satisfied with the assurances it received from the Authority.

First, with regard to whether there is private right of action under § 4655, the FAA asserts that the Ninth Circuit's decision in Volpe is not determinative, as it did not involve § 4655; that Whitman is not applicable, as it held that the documents provided by the state agency provided sufficient assurances, and that in any event, the court had jurisdiction under the APA to review the federal agency determinations; that none of the other cases cited by PSPOA establishes a private right of action under § 4655; and finally, that under recent Supreme Court jurisprudence (in particular, Gonzaga and Sandoval), courts must determine whether the statute in question displays a clear congressional intent to create not just a private right but also a private remedy.

The FAA contends that as against the federal government, § 4655 requires only that the agency receive satisfactory assurances, and imposes no substantive requirements on the federal agency and cannot be read as creating a right to private enforcement or a private remedy. Rather, the FAA asserts, the remedy for a violation of the URA by the Authority would be for the FAA to withhold further federal funding, per § 4604(a) and (c)(1). Finally, the FAA argues that because § 4655 is phrased as a directive to federal agencies engaged in the distribution of public funds, there is far less reason to infer a private remedy in favor of individual persons (citing Cannon v. Univ. of Chicago, 441 U.S. 677, 690-91 (1979); San Carlos, 417 F.3d. 1091 (9th Cir. 2005)).

In its second main argument, the FAA contends that it has received satisfactory assurances from the Authority (citing to the documents it provided to PSPOA on November

20, 2013), and that there is thus no basis for PSPOA's URA claim.

The court finds that the motion must be GRANTED. The URA was created "in order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many federal programs, and to promote public confidence in federal land acquisition practices . . . " 42 U.S.C. § 4651.

The URA consists of three subchapters. Subchapter I (§§ 4601-4605) is entitled "General Provisions." Subchapter II (§§ 4621-4638) is entitled "Uniform Relocation Assistance," and relates to moving expenses and replacement housing for homeowners and tenants who are displaced by federal land acquisition. Subchapter III (§§ 4651-4655), at issue in the present litigation, is entitled "Uniform Real Property Acquisition Policy." It creates guidelines for federal agencies to apply in land acquisition proceedings.

The sections of Subchapter III that are relevant to the present motion are § 4651 and § 4655.[2] Section 4651 sets forth nine separate practices and policies by which federal agencies should be guided during land acquisitions. 42 U.S.C. § 4651. However, § 4602 provides that § 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. Therefore, the URA itself plainly indicates that § 4651 does not create a right of action on the part of landowners.

Section 4655 makes the provisions of the preceding sections of Subchapter III, including § 4651, obligatory upon the states as a condition to the receipt of federal financial assistance. Thus, § 4655 incorporates the provisions of §§ 4651-4654 against the states.

The question here is whether there is a private right of action under § 4655, and if

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[2] Of the remaining three sections in Subchapter III, § 4652 sets set forth a method for compensation to be paid to the owner of a structure or building that occupies real property acquired through eminent domain; § 4653 involves compensation and reimbursement to the owner of property acquired for certain expenses involved in the transfer of title to the United States in a condemnation proceeding; and § 4654 involves payment by the acquiring agency of certain litigation expenses in limited circumstances, in actions by federal agencies to acquire title to real property by condemnation. Given that there are no formal condemnation or eminent domain proceedings at issue here, none of these three sections is applicable.

so, whether PSPOA has stated a claim. The fact that a federal statute may have been violated and some person harmed "does not automatically give rise to a private cause of action in favor of that person." Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979).

The Ninth Circuit's Lathan v. Volpe decision indicates that there may be a private right of action under Subchapter II of the URA. See id., 455 F.2d 1111, 1125 (9th Cir. 1971), overruled on other grounds by Lathan v. Brinegar, 506 F.2d 677, 691 (9th Cir. 1974). However, § 4655, the section at issue here, is part of Subchapter III, not Subchapter II. Thus, the Volpe decision is of no assistance in this analysis.[3]

Given that there is no private right of action under § 4651, the court finds that there can be no private right for landowners to assert a claim against the federal government for allegedly failing to obtain "satisfactory assurances" that a state agency has complied with § 4651. See Clear Sky Car Wash, LLC v. City of Chesapeake, Virginia, 910 F.Supp. 2d 861, 874-75 (E.D. Va. 2012) (citing City of Chesapeake, Virginia v. Clear Sky Car Wash, LLC, 2012 WL 3866508 at *3-6 (E.D. Va. Sept. 5, 2012)).

If § 4655 were construed as allowing for a private right of action, the practical effect would be that a landowner would have the right under the URA to seek review of state agency action, but would be barred by § 4602 from seeking review of federal agency action. This would create the anomaly that the court "lacks subject-matter jurisdiction to review compliance with § 4651 under one section, but has . . . the requisite jurisdiction to review such compliance under another." Nelson v. Brinegar, 420 F.Supp. 975, 978 (E.D. Wis. 1976), quoted in City of Chesapeake, 2012 WL 3866508 at *3.[4]

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[3] Similarly, La Raza Unida, cited by PSPOA (and involving a challenge to a federal-aid highway project during the course of which the state acquired property by condemnation for a right-of-way, but failed to provide satisfactory relocation assistance to the displaced owners), was also brought under Subchapter II, not Subchapter III.

[4] The court in Whitman allowed the plaintiff to seek judicial relief under § 4652 and § 4655. Id., 400 F.Supp. at 1059. PSPOA argues that this court should similarly find that it has jurisdiction to review the § 4655 claim. The court is more persuaded by the reasoning in the City of Chesapeake decisions, however. In addition, Whitman is factually distinguishable, as it involved a claim by owners of billboards located on property that had been acquired by state and federal agencies via eminent domain for a highway improvement project. The billboard owners, who leased the land for the billboards from the property owners, sought

Finally, as for PSPOA's argument that the court has "primary jurisdiction" under the APA, the court notes that there is no APA claim pled in the FAC. Moreover, PSPOA made an identical argument in opposing the FAA's prior motion to dismiss, and the court pointed out to counsel at the hearing on that motion that there was no APA claim alleged. Thus, to the extent that PSPOA proposes that the APA provides a jurisdictional basis for the claim, that position is without merit.

As for the motion to dismiss for failure to state a claim, the obligation imposed on the FAA under the statute is to refrain from approving the Authority's runway project under which federal financial assistance will be provided to cover all or part of the cost until the FAA has received satisfactory assurances from the Authority that it will be guided by the land acquisition policies in § 4651 and § 4652, and that the property owners will be paid or reimbursed as specified in § 4653 and § 4654.

Here, PSPOA has not alleged that the FAA failed to obtain any assurances from the Authority before providing funds (or even before approving a "program" or a "project" or "any grant to" or "contract or agreement with" a State agency "under which federal financial assistance will be available"). Nor has PSPOA alleged that any property has been acquired from its members for use in the project.

C. The Authority/Intervenors' Motion

The Authority and the defendant-intervenors (collectively, "defendants") seek judgment on the pleadings. They argue that the first cause of action under § 4655 of the URA should be dismissed because it is not actionable; and that the second cause of action under § 1983 should be dismissed because it is not ripe. They assert that if the court disposes of those two federal causes of action, it should decline to exercise jurisdiction over the remaining three state law claims – the claim for "inverse condemnation damages;" the claim alleging CEQA violations; and the claim alleging violation of the prohibition in the

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compensation for the loss of the billboards. Id., 400 F.Supp. at 1055-56. Here, the Authority is seeking willing landowners who wish to sell lots in the Pacific Shores Subdivision. There is no allegation that land has been acquired through eminent domain or formal condemnation proceedings.

California Constitution against "private gifts of public money." In the alternative, defendants argue that the court should grant judgment on the pleadings because none of the five causes of action states a claim.

1. URA claim

In the first cause of action, the FAC alleges that defendants have violated § 4655 of the URA. Defendants contend, however, that § 4655 does not create a cognizable claim for judicial review. They argue that the only obligation that § 4655 imposes on any agency – federal or state – is for federal agencies to make sure they receive "satisfactory assurances" from state agencies receiving federal assistance. 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."

Defendants assert that because under § 4602, there is no cognizable claim under § 4651, there can be no claim of agency failure to comply with § 4651. See Barnhart v. Brinegar, 362 F.Supp. 464, 472-73 (W.D. Mo. 1973). They also contend that – just as the FAA argued in its motion – there is no private right of action under § 4655, because the statute does not provide for one. They argue that here, Congress was explicit that the land acquisition policies set forth in § 4651 are intended only to "guide" state agencies receiving federal funding, and thus are not enforceable in a court of law.

In opposition, PSPOA makes the same arguments it made in opposition to the FAA's motion – primarily that there is a private right of action under the URA (citing Lathan, Whitman, and La Raza Unida). PSPOA also asserts that even if there is no private right of action under § 4655, it has a "clear" right to review of the FAA actions under the APA, including under 5 U.S.C. §§ 702 and 704.

The court finds that the motion must be GRANTED. As set forth above, § 4651 creates no rights or liabilities. Here, PSPOA is attempting to obtain review of § 4651 by means of a claim under § 4655, which provides no private right of action. Moreover, even were it the case that a targeted property owner could properly assert a claim under § 4655,

PSPOA has alleged no facts showing that its parcels are subject to any future acquisition effort, or that its parcel owners have been displaced by an eminent domain or condemnation proceeding.

As for PSPOA's argument that it has a right to review under the APA, the court again notes that there is no APA claim pled in the complaint; and further, that PSPOA previously raised this argument in opposition to the FAA's motion to dismiss the claim asserted against it in the original complaint, but still did not seek leave to add an APA claim when it amended the complaint, even after the court pointed out the absence of an APA claim in the complaint.

2. Section 1983 claims

In the second cause of action, the FAC alleges that the Authority deprived PSPOA of its right to just compensation under the Fifth Amendment of the U.S. Constitution and Art. 1, § 9 of the California Constitution, and its due process rights under the Fourteenth Amendment of the U.S. Constitution. Defendants argue that the takings claim is not ripe for review, and that the due process claim essentially replicates the takings claim and should be dismissed on the same basis.

The ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 808 (2003). The doctrine prevents premature adjudication, and is aimed at cases that do not yet have a concrete impact upon the parties. Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580 (1985). A Fifth Amendment takings claim "is premature until it is clear that the Government has both taken property and denied just compensation." Horne v. Dep't of Agric., 133 S.Ct. 2053, 2062 (2013); see also Levald, Inc. v. City of Palm Drive, 998 F.2d 680, 687 (9th Cir. 1993). In other words, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Texas v. United States, 523 U.S. 296, 300 (1998) (quoting Thomas, 473 U.S. at 580-81).

For a takings claim to be ripe, a plaintiff must "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. County of Santa Barbara, 604 F.3d 1142, 1147-48 (9th Cir. 2010). 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. See Carson Harbor Village, Ltd v. City of Carson, 353 F.3d 824, 828 (9th Cir. 2004).

Here, defendants argue, the FAC does not allege that PSPOA sought compensation through state procedures for the alleged unlawful taking of their property by the Authority, or that California's compensation procedures are inadequate. Thus, they contend, PSPOA's § 1983 takings claim is unripe. See Valenciano v. City & County of San Francisco, 2007 WL 3045997, *6 (N.D. Cal. Oct. 18, 2007) (dismissing takings claim because plaintiffs failed to first seek state relief)).

With regard to the due process portion of the § 1983 cause of action, defendants argue that as pled in the FAC, this claim is not separate or different from PSPOA's takings claim. They assert that while the FAC alleges generally that the Authority has violated PSPOA's "due process rights," no such right is specified apart from the right to just compensation. Thus, they contend, any stand-alone due process claim is unripe for the same reasons that the takings claim is unripe. See Harris v. County 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").

In its opposition, PSPOA does not respond to defendants' arguments regarding the takings claim – effectively conceding that a property owner cannot pursue a constitutional takings claim until he has pursued his claim through state inverse condemnation proceedings. In its place, PSPOA attempts to insert a § 1983 statutory violation claim, based on a violation of § 4655 of the URA, and argues that this alleged statutory violation sufficiently states a "civil rights" claim under § 1983.

With regard to the due process claim, PSPOA argues that it has stated a claim in that the FAC alleges that the FAA allowed the Authority to evade notice to the owners, while the Airport sought FAA funding, which PSPOA claims is sufficient to support a cause of action under § 1983 for violation of due process rights.

The court finds that the motion must be GRANTED. As noted above, counsel for PSPOA conceded at the hearing that PSPOA has abandoned the takings claim. The facts alleged in the FAC make clear that the Authority announced a desire to purchase lots within the Pacific Shores Subdivision to use as mitigation for loss of wetlands resulting from the Runway Safety Project, and that it evaluated the fair market value of those lots, engaged in good faith negotiations with certain willing lot owners (not including PSPOA) to sell their lots, and sought regulatory approvals for the mitigation plan. However, there are no facts alleged showing that the Authority is interested either in exercising its power of eminent domain with respect to PSPOA's property, or in purchasing land from any landowners who are unwilling to sell. Moreover, PSPOA has not sought "compensation through the procedures the State has provided," as required by Williamson.[5]

PSPOA also does not reasonably dispute that the due process claim essentially replicates the abandoned Fifth Amendment takings claim. Moreover, the FAC does not allege the required elements of a § 1983 claim – that government officials, acting under color of state law, caused the deprivation of a federal right. See Suever v. Connell, 579 F.3d 1047, 1060 (9th Cir. 2009); see also Iqbal, 556 U.S. at 676. Nor does the FAC state facts sufficient to show a liberty or property interest protected by the Constitution, a deprivation of that interest by the government, or a lack of process.

In particular, the FAC does not allege any facts showing what "lack of process" petitioners/plaintiffs hope to show here – apart from the allegations in the fourth cause of

[5] As for PSPOA's assertion that it sought compensation through "state procedures" by filing suit in 2007 in the Sacramento County Superior Court against the California Department of Fish and Game, the court notes that not only was that suit filed well before the Authority initiated the Runway Safety Project at issue in this case, but there is no connection between that case and the facts alleged in the present case.

action for violation of CEQA. Nor are there any facts alleged showing any deprivation of PSPOA's property interest. Any alleged deprivation is entirely speculative – roads that "may" be removed, which "may" result in flooding and impaired access. See, e.g., FAC ¶ 86. Because PSPOA does not allege facts showing that any roads have been acquired – let alone removed – there is no basis for a claim of deprivation of any property belonging to PSPOA.

With regard to the new statutory violation claim under § 1983, based on the alleged violation of URA § 4655, that claim fails for the same reason the § 4655 claim fails. It is clear that if PSPOA cannot state a claim under § 4655, as the court has already found, there is no basis for a § 1983 claim premised on an alleged violation of § 4655. PSPOA argues that because the FAC alleges that both the FAA and the Authority violated the URA – the FAA by failing to obtain "satisfactory assurances" from the Authority, and the Authority by failing to provide sufficient assurances to the FAA to meet the requirements of § 4655 that it would comply with federal acquisition policies – the FAC adequately states a claim of "civil rights violations" under § 1983. However, even had PSPOA included these allegations as part of the § 1983 claim in the FAC – which it did not – such a claim would be unsustainable because, as stated above, there is no private right of action under § 4655, and PSPOA cannot state a claim under § 4655.

In addition, in order to seek redress under § 1983, a plaintiff must assert the violation of a federal "right," not merely the violation of federal "law," see Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 106 (1989), nor simply the deprivation of statutorily provided "benefits" or "interests," see Gonzaga University v. Doe, 536 U.S. 273, 283 (2002). If Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms. Gonzaga University, 536 U.S. at 280; Blessing v. Freestone, 520 U.S. 329, 341 (1997).

Where the text and structure of a statute provide no indication that Congress intended to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action. Gonzaga, 536 U.S. at 280; see also Sanchez v.

Johnson, 416 F.3d 1051, 1062 (9th Cir. 2005) ("After Gonzaga, . . . a plaintiff seeking redress under § 1983 must assert the violation of an individually enforceable right conferred specifically upon him, not merely a violation of federal law or the denial of a benefit or interest, no matter how unambiguously conferred.") (emphasis in original). Here, there is no indication in the text and structure of § 4655 that Congress intended to create individual rights or provide a basis for a suit, either under § 1983 or under an implied right of action.

CONCLUSION

The court finds that the first and second causes of action must be DISMISSED. As PSPOA has already been afforded an opportunity to amend, the dismissal is with prejudice. The court declines to exercise jurisdiction over the supplemental state law claims for inverse condemnation damages, CEQA violations, and violations of the California Constitution, which are hereby DISMISSED without prejudice to refiling in state court. See 28 U.S.C. § 1367(c)(3); Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350-51 & n.7 (1988); Smith v. Lenches, 263 F.3d 972, 977 (9th Cir. 2001).

IT IS SO ORDERED.

Dated: March 7, 2014

PHYLLIS J. HAMILTON
United States District Judge

EXHIBIT B

BILL LOCKYER
Attorney General of the State of California
DANIEL L. SIEGEL
Supervising Deputy Attorney General
PETER SOUTHWORTH, State Bar No. 160522
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 445-1685
Fax: (916) 327-2319

Attorneys for Department of Fish & Game, State Lands Commission, Karen Kovacs, Craig Martz, Melissa Bukosky, and Linda Miller

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

TOLOWA NATION, *et al.*,

Petitioners and Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF FISH & GAME, *et al.*

Respondents and Defendants

CASE NO. 04CS01254

[PROPOSED] FINAL ORDER DENYING PETITION FOR WRIT OF MANDATE AND SETTING STATUS CONFERENCE

Hearing date: January 20, 2006
Dept: 25
Judge: Raymond M. Cadei

On January 20, 2006, a hearing was held in Department 25 of the above entitled Court. Ronald Zumbrun, Timothy V. Kassouni and Mark Teh appeared for Petitioners, Robert N. Black appeared for the County of Del Norte, Peter Southworth appeared for Department of Fish and Game; and Jason Flanders appeared for all amici. Following argument by the parties, the Tentative Ruling issued on January 19, 2006 was adopted as follows:

Preliminary Evidentiary Matter

In light of the letter from petitioners' counsel dated January 17, 2006 indicating non-opposition to respondent's motion to correct the administrative record, that motion is granted.

Petition for Writ of Mandate: Introduction and Summary of Ruling

In this proceeding, petitioners challenge several aspects of the environmental review of the project known as the Lake Earl Wildlife Area Management Plan. Specifically, petitioners allege that respondent violated the California Environmental Quality Act (CEQA) in the following particulars: the choice of an improper environmental "baseline" for review of the project; inadequate discussion of project impacts in areas such as cultural resources, potential contamination of private wells, inundation of private property, and potential increases in mosquito populations; failure to address the cumulative impacts of the project in conjunction with other reasonably foreseeable development in the area; and inadequate mitigation measures.

For the reasons set forth in detail below, the Court finds that none of petitioner's challenges have merit, and therefore denies the petition for writ of mandate.

Standard of Review

Review of this matter is governed by Public Resources Code section 21168.5, which provides that this Court's inquiry shall extend only to whether there was a prejudicial abuse of discretion, which is established if the agency has not proceeded in the manner required by law or if the determination or decision is not supported by substantial evidence. The EIR under review is presumed to be adequate and the petitioner has the burden of proving otherwise. (See, *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal. App. 4th 729, 740.) The Court must resolve all reasonable doubts in favor of the validity of the EIR and uphold it if there is any substantial evidence in the whole record to support it. (See, *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal. App. 4th 351, 369.) The Court will scrupulously enforce all legislatively-mandated requirements of CEQA but will not pass on the correctness of the EIR's environmental conclusions or on the wisdom of the project in general, limiting its review to the sufficiency of the EIR as an informational document. (See, *Citizens of Goleta Valley v. County of*

Santa Barbara (1990) 52 Cal. 3d 553, 564.) The Court has applied these standards in reaching the rulings set forth below.

Discussion

1. Choice of Environmental "Baseline"

Reduced to its essential features, the Lake Earl Wildlife Area Management Plan provides for the breaching of the sandbar separating Lake Earl from the ocean when the water level of the lake reaches 8 feet above mean sea level. It is undisputed that for over a decade before the present environmental review process began, respondent managed the lake under essentially the same regime, breaching the sandbar when the lake reached the 8 foot level, although on an ad hoc basis under a series of emergency permits rather than on a regular, established basis as the current Plan seeks to do. Respondent chose the existing conditions at the time the current process of environmental review began, i.e., the practice of breaching the sandbar when the level of the lake reached 8 feet, as the "baseline" conditions against which the effects of the project would be measured. Was this choice of "baseline" conditions improper under CEQA as a matter of law?

The Court finds that it was not. The applicable regulatory Guideline, Title 14, C.C.R., section 15125(a), provides that the EIR must include a description of the physical environmental conditions in the vicinity of the project as they exist at the time the notice of preparation is published. As set forth specifically in the regulation, this environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. By taking as the "baseline" the conditions that had been in existence for at least a decade before environmental review began, respondent complied with the requirements of CEQA. Respondent's choice of "baseline" conditions also fulfilled the informational purposes of CEQA by ensuring that the effects of the project would be measured accurately in relation to existing conditions, rather than against some hypothetical past state of facts.

While it is true that a lead agency has discretion under section 15125(a) to deviate from a time-of-review "baseline", it is under no absolute obligation to do so, and where it chooses to use time-of-review conditions as the "baseline", the Court must defer to the agency's discretion in this area as long as the existence of such conditions is supported by substantial evidence. (See. *Fat v.*

County of Sacramento (2002) 97 Cal. App. 4th 1270, 1277-1278.) In this case, it is essentially undisputed that there is substantial evidence in the record demonstrating the regular breaching of the sandbar when the lake reached the 8 foot level during the decade and more prior to issuance of the Notice of Preparation. Petitioner therefore has not established that respondent abused its discretion in any respect in the choice of the environmental "baseline".

To the extent that petitioner's claim really amounts to one that respondent should have undertaken environmental review when it began the 8 foot breaching regime in the 1980s, such claim is not cognizable in this action. Not only is any such claim barred by the statute of limitations contained in Public Resources Code section 21167(a) (180 days from the commencement of the project, where no CEQA review has occurred), but the preparation of an EIR is not the appropriate forum for determining the nature and consequences of prior conduct of the project applicant. (See, *Riverwatch v. County of San Diego* (1999) 76 Cal. App. 4th 1428, 1452.)

Finally, petitioner alleges that respondent was required to adopt findings in support of its choice of the environmental "baseline", citing as authority for this point *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506. Petitioner is wrong. *Topanga* involved a quasi-judicial act of an administrative agency, the granting of a zoning variance. The certification of an EIR pursuant to CEQA is, by contrast, a quasi-legislative act. (See, *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal. App. 4th 1170, 1182.) Findings are not required in support of quasi-legislative acts. (See, *Heist v. County of Colusa* (1984) 163 Cal. App. 3d 841, 848.)

2. Treatment of Project Impacts

A. Cultural Resources: The EIR concluded that there would not be a significant impact on cultural resources, specifically, on Native American habitation and burial sites surrounding Lake Earl, on the basis that all such sites of any real significance were located above the highest water levels that would be expected under the project. The only sites that potentially would be affected were sites of lesser significance, such as portions of middens or areas of lithic scatter. Petitioners challenge this conclusion, i.e., they challenge the sufficiency of the EIR as an informational

document with regard to Native American cultural resources; the petition for writ of mandate, which raises only CEQA-related issues, does not address the question of whether impacts on cultural resources, if they are to occur, are limited or prohibited by law.

The Court finds that the EIR adequately discloses impacts on cultural resources and that respondent's conclusions regarding those impacts are supported by substantial evidence in the record. Two detailed studies of Native American sites around the lake concluded and documented that all sites of significance, particularly village and housing sites, were located above the 10-foot level, with many considerably above that level. (See, "Tolowa Cultural Sites at Lakes Earl and Talawa in Del Norte County, California", prepared by Janet P. Eidsness, M.A., dated July 16, 2002; and "A Cultural Resources Investigation of Lakes Earl and Talawa Located in Del Norte County, California", prepared by Roscoe & Associates Archaeological Consulting, dated January, 1999, both of which have been filed with the Court under seal in the binder designated "Archeological [sic] Materials".)

Respondent's conclusions are further supported by correspondence in the record from the Smith River and Elk Valley Rancherias, which collectively represent the vast majority of the descendants of the Tolowa people who historically inhabited, and continue to inhabit, the Lake Earl area. That correspondence states, among other things, that no documented house pits, burials or other significant sites exist below the 8-foot level, which was subject to regular inundation under natural conditions. Elders of the Tolowa people firmly believe that nothing more than resource procurement and preparation would have been performed in areas subject to annual flooding. The traces of such activity, such as areas of lithic scatter and other processing remains would not, in the opinion of Tolowa representatives, be considered major archaeological sites, since those areas would have been covered annually by seasonal high water. (Copies of such correspondence are contained in the binder referred to above, as well as in Section I.D.5 of the Administrative Record.)

At most, petitioners have demonstrated that there may be a difference of opinion, or some conflicting evidence, regarding the significance of such sites as may be located below the 8-foot level. The mere existence of such conflict is not sufficient to invalidate the EIR. (See, *Barthelemy*

v. Chino Basin Municipal Water District (1995) 38 Cal. 4th 1609, 1620.) The Court accordingly finds that the EIR adequately disclosed impacts on Native American cultural resources, and that the information contained in the EIR on this subject is supported by substantial evidence.

B. Contamination of Local Wells: The EIR acknowledged concern about the possible inundation and contamination of private water wells at high lake levels but essentially concluded that it was unlikely that this would actually occur under the proposed management plan. The EIR specifically cited an incident in which the sandbar was breached when the lake level reached 11 feet in late March, 2003, stating that repeated inquiries to the Del Norte County Public Health Officer yielded no reports or other evidence of contamination at that time.

The Court finds that the EIR's discussion of potential impacts on wells was adequate and supported by substantial evidence. A letter dated September 2, 2003 from the California Regional Water Quality Control Board, Nothern Region commenting on the EIR states that there was no evidence that any lake level up to 10 feet causes contamination of drinking water. (Administrative Record, I.A.3-0044.) A letter dated August 25, 2000 from the Del Norte County Health Officer to the County Board of Supervisors cites data showing that water surface elevations in wells around the lake are uniformly higher than in the lake, and since groundwater flows towards the lake, contamination from the lake does not occur. (Administrative Record, IV.E.15-0009-0010.) Finally, another document prepared by the County Health Officer dated March 27, 2000, entitled "A Position Paper on Current Issues Involving Lake Earl from the Perspective of the Del Norte County Department of Public Health" suggests that contamination of wells does not result directly from high lake levels, but instead results from intrusion of surface water. In that document, the County Health Officer acknowledged that high water from the lake had overtopped a stock well in 1992, but stated that that particular well no longer existed, and that the next lowest wellheads near the lake were above the 10-foot level. (Administrative Record, I.D.5.-0575.) Such evidence supports the EIR's conclusion that contamination of wells would not be likely to occur under a management plan in which the lake would be managed at the 8-foot level.

C. Effect on Mosquito Populations: The EIR concluded that mosquito populations would not be a significant impact of the project because such populations are not necessarily related to the

water level of the lake. Petitioners attack that conclusion, citing evidence of an allegedly severe outbreak of mosquitoes in 1988, when the lake was at an unusually high level.

It is clear from a review of the record that the issue of mosquito populations and their relationship to lake levels has been a controversial disputed issue, and there is material in the record on both sides of the issue. It is not the role of this Court, however, to resolve disputed scientific issues or to pass upon the correctness of the EIR's environmental conclusions, but only to evaluate its sufficiency as an informational document, and to determine whether its conclusions are supported by substantial evidence. (See, *Citizens of Goleta Valley v. County of Santa Barbara* (1990) 52 Cal. 3d 553, 564.)

The Court finds that the EIR's conclusions regarding the impact of the project on mosquito populations is supported by substantial evidence. The record contains opinions from scientific and technical authorities stating that higher lake levels do not necessarily lead to long-term increases in mosquito populations, and that significant increases in mosquito populations do not occur where water levels are stable during the warmer season and only fluctuate during winter (which apparently would be the case in this situation). (See, for example, Administrative Record, IV.C.16-0022, 0027; IV.C.17-0014-0015.) Moreover, there is evidence in the record indicating that the 1988 mosquito outbreak, upon which petitioners heavily rely as an indication of what likely will happen in the future, occurred when Lake Earl was allowed to remain at a relatively full level into the warmer season in the absence of human-induced breaching of the lagoon sandbar. (See, Administrative Record, IV.C.17--0007.) This is not a condition that should occur under the proposed management plan. Petitioners therefore have not demonstrated that the EIR was inadequate on this point.

D. Cumulative Impacts in Light of Potential Future Development: It is undisputed that the EIR does not contain any discussion of the cumulative impact of the project in conjunction with future development that petitioners argue may take place in the Pacific Shores Subdivision. Was such a discussion required in order to fulfill the EIR's purpose as an informational document?

Initially, it appears that this issue was not raised by any party during the environmental review process. Petitioners have not cited to any comment in the record raising the issue. The issue

therefore is not properly before this Court on the ground of failure to exhaust administrative remedies. (See, Public Resources Code section 21177(a); *Running Fence Corp. v. Superior Court* (1975) 51 Cal. App. 3d 400, 429; *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal. App. 3d 1194, 1197.)

Even if the issue had been raised in a timely manner, the Court finds that respondent did not violate CEQA. The CEQA regulatory Guidelines define a "cumulative impact" as that which results from "...the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects." (Title 14, C.C.R., section 15355(b).) The cumulative impacts discussion in an EIR need not address future action that is merely contemplated or where there is no information to indicate that the action will actually take place. (See, *Concerned Citizens of South Central Los Angeles v. Los Angeles Unified School District* (1994) 24 Cal. App. 4th 826, 837-838.) In this case, there is substantial evidence in the record indicating that the Pacific Shores Subdivision essentially has been moribund for decades due to regulatory and other constraints on development, and that it is not reasonably foreseeable at this time that it ever will be further developed. (See, for example, Administrative Record, I.A.2--0148-0150; IV.B.4--0045; IV.B.7--0069.) Petitioners have not cited to any evidence that would suggest that the Pacific Shores Subdivision is anything other than what it was said to be in the County's General Plan (as referenced in the EIR): a "paper subdivision." The EIR therefore was not required to address the merely hypothetical possibility that future development of the subdivision might occur.

3. Mitigation Measures

Petitioners' final area of attack centers on three of the mitigation measures respondent proposed to ameliorate identified effects of the project, all of which are designed to cope with episodes of high water levels: 1) breaching the sandbar when the lake level reaches 8 feet; 2) acquiring land, access to which is affected by high water, from willing sellers; and 3) working with the County to address road improvements and changes in land use regulation. In essence, petitioners argue that these measures are wholly illusory and will have no impact on the adverse effects of high water levels.

Petitioners' argument is not supported by persuasive argument or cogent citations to evidence. Instead, it appears to be based on one of two assumptions: either that respondent is acting in bad faith in order to force landowners to sell at an artificially depressed price, or that it simply cannot implement the plan effectively. The first contention is not appropriately addressed in this proceeding, which is limited to the adequacy of the EIR as an informational document under CEQA. Instead, the effect of this project on petitioner's property rights is properly addressed in petitioner's causes of action for inverse condemnation, violation of civil rights, etc. The second contention is not supported by the record before the Court on the CEQA mandate claim. Respondent's failure to implement the plan as outlined cannot simply be presumed, and evidence of some episodes of high water under the ad hoc breaching regime in place before this plan, in which respondent was required to obtain emergency permits each time the water rose, cannot be used to prove that the current plan either will not or cannot work.

In connection with all of petitioners' challenges to mitigation measures, it is worth pointing out that the proposed plan does not posit an entirely new state of affairs leading to adverse effects, but seeks to regularize and systematize a state of affairs that had been in effect for over a decade before this plan was proposed. The proposed mitigation measures therefore do not really seek to ameliorate new adverse effects, but to continue to cope with, and gradually reduce, effects with which all parties are already familiar. Moreover, those effects appear to be an inevitable result of the lake management plan. And finally, as a practical matter, respondent must work with private property owners and the County to mitigate those effects. The chosen measures therefore represent a reasonable and logical approach to the problems created by the lake management plan. Petitioners have not demonstrated that such measures are wholly illusory or that they inevitably will fail, and, as noted above, respondent's bad faith in implementing them may not be presumed. Arguably, respondent could have chosen other mitigation measures more favorable to petitioners' interests, but it is not the role of this Court to resolve disputes over whether adverse effects could have been better mitigated. (See, *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal. 3d 376, 393.)

Conclusion

As set forth in detail above, the Court finds that petitioners have not demonstrated that the EIR for the Lake Earl Wildlife Area Management Plan was deficient. The petition for writ of mandate therefore is denied.

A status conference has been set for March 10, 2006, at 10:00 A.M. in Department 5.

Dated: Feb 7 ,2006

RAYMOND M. CADEI

HON. RAYMOND M. CADEI,
Judge of the Superior Court

APPROVED AS TO FORM:

Dated: January 25 ,2006

The Zumbrun Law Firm
3800 Watt Avenue, Suite 101
Sacramento, CA 95821
Attorneys for Petitioners/Plaintiffs

Ronald A. Zumbrun

RONALD A. ZUMBRUN

APPROVED AS TO FORM

Dated: 2/3/ ,2006

COUNTY OF DEL NORTE

ROBERT N. BLACK
County Counsel

60081437.wpd

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: Tolowa Nation, et al, v. California Department of Fish & Game

No.: Sacramento County Superior Court Case No. 04CS01254

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On February 23, 2006, I served the attached **NOTICE OF ENTRY OF ORDER** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, California, addressed as follows:

Mark Teh
The Zumbrun Law Firm
3800 Watt Avenue, Suite 101
Sacramento, CA95821

Robert N. Black
County Counsel
Del Norte County Counsel's Office
981 H Street, Suite 220
Crescent City, CA 95531

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 23, 2006, at Sacramento, California.

Julie Gomez
Declarant

Signature

30091029.wpd

EXHIBIT C

FILED
ENDORSED

08 SEP 19 PM 2:34

SACRAMENTO COURTS
DEPT. #53

Robert N. Black (SBN 70178)
299 I Street, Suite 11B
Crescent City, California 95531
Telephone: (707) 464-7637
Facsimile: (707) 464-7647

Attorney for Defendants SANDRA JERABEK, MAXINE CURTIS, SMITH RIVER ALLIANCE, FRIENDS OF DEL NORTE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

PACIFIC SHORES SUBDIVISION CALIFORNIA WATER DISTRICT, DWAYNE B. SMITH, on behalf of himself and all others similarly; THOMAS W. RESCH, on behalf of himself and all other similarly situated; and PACIFIC SHORES PROPERTY OWNERS ASSOCIATION;

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF FISH AND GAME ; CALIFORNIA STATE LANDS COMMISSION; CALIFORNIA COASTAL COMMISSION; CALIFORNIA WILDLIFE CONSERVATION BOARD; SMITH RIVER ALLIANCE; COUNTY OF DEL NORTE; COUNTY BOARD OF SUPERVISORS OF THE COUNTY OF DEL NORTE, DEL NORTE FLOOD CONTROL DISTRICT; SARAH SAMPLES, CHRISTINE BABICH, DAWN LANGSTON, ROBERT BLACK, ERNIE PERRY; FRIENDS OF DEL NORTE, MAXINE CURTIS, SANDRA JERABEK AND DOES 1-100 inclusive,

Defendants

Case No. 07AS01615

~~[PROPOSED]~~ ORDER GRANTING SPECIAL MOTION TO STRIKE COMPLAINT (ANTI-SLAPP MOTION)

DATE: August 22, 2008
TIME: 2:00 p.m.
DEPT: 53

JUDGE: Loren E. McMaster

(costs posted) SEP 25 2008

The matter of the special motion strike the complaint, made by defendants Sandra Jerabek, Maxine Curtis, the Friends of Del Norte, and the Smith River Alliance, came on for hearing on August 22, 2008, in Department 53 of the above-entitled court, the Honorable Loren E. McMasters, Judge, presiding. The moving defendants appeared by counsel, Robert N. Black. Plaintiffs appeared by counsel, Kelly T. Smith.

The court rules on defendants' objections to the evidence submitted by plaintiffs, as follows:

1. Declaration of Messina. Sustained as to paragraph 7, first sentence; as to paragraph 8, as to the truth of the contents of the letter; and as to paragraphs 17, 18, and 19. Overruled as to paragraphs 4, 6, 7 as to the second sentence, 21 and 23.
2. Declaration of Thomas Resch. All objections sustained.
3. Declaration of Kelly Smith. Sustained as to Exhibit F.

The parties' requests for judicial notice are granted.

The court has considered the Complaint, the defendants' moving papers, the plaintiffs' opposition and the admissible evidence submitted therewith, the reply of defendants, and the arguments presented at the hearing of the motion.

Good cause appearing, the court finds that as to these moving defendants, the case is subject to the provisions of Code of Civil Procedure § 425.16, that the Complaint does not state a cause of action against the moving defendants, and that plaintiffs did not submit admissible evidence sufficient to make a *prima facie* showing of facts that would, if proved at trial, support a judgment in plaintiffs' favor. The court finds that the exemptions of CCP §

425.17 do not apply to the instant case. Defendants are entitled to attorney fees and costs.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the special motion to strike the Complaint as to defendants Sandra Jerabek, Maxine Curtis, the Friends of Del Norte, and the Smith River Alliance is granted and the Complaint hereby stricken as to said defendants.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs Pacific Shores Subdivision California Water District, Dwayne B. Smith, Thomas W. Resch, and Pacific Shores Property Owners Association, jointly and severally, shall pay to defendants' counsel, Robert N. Black, $12,130.00 for attorney fees and $ 1,560.00 for costs, for the total sum of $ 13,690.00, payable within 30 days of the date notice of entry of this order is given. If not paid within the 30-day period, execution may issue as upon enforcement of a judgment.

Dated: SEP 19 2008, 2008

Loren E. McMaster, Judge of the Superior Court

Costs posted per Memorandum of Costs

SEP 25 2008

A. WOODWARD DEPUTY

Memo of Costs Clerk

APPROVED AS CONFORMING TO THE COURT'S ORDER:

Kelly T. Smith, Attorney for Plaintiffs

NOTICE:

To request limited oral argument on any matter on this calendar, you must call the Court at (916) 874-7858 (Department 53) by 4:00 p.m. the court day before this hearing and advise opposing counsel. If no call is made, the tentative ruling becomes the order of the court. Local Rule 3.04.

Department 53
Superior Court of California
800 Ninth Street, 3rd Floor
Loren E. McMaster, Judge
T. West, Clerk
C. Kato/V. Carroll, CA, Bailiff

Friday, August 22, 2008, 2:00 PM

Item 1 04AS00319

ALISON CARY. ET AL VS. STATE FARM GENERAL INS. CO.. ET AL

Nature of Proceeding: Motion to Compel a Mental Examination

Filed By: Kirk, Lisa L.

Defendant's Motion to Compel Mental Examination of Plaintiff is granted.

Plaintiffs allege defendant insurer committed bad faith arising out of a denial of a toxic mold claim. Plaintiff has placed her mental condition in issue by claiming continuing emotional distress damages due to alleged toxic mold exposure. Defendant has presented evidence that Plaintiff's own doctors have opined that plaintiff has no recognizable physical injuries caused by alleged mold exposure and that the cause of any injury may be due to a preexisting psychological condition. Since there is evidence that the claimed brain injury has a psychological basis, defendant is entitled to a mental exam. Defendant should not be limited to viewing plaintiff's mental health records to defend the claim of ongoing emotional distress.

The examination shall be governed by the notice of motion. Plaintiff is not entitled to have an attorney or attorney representative in the examination room, but she may make her own audio recording of the examination. Defendant has agreed to pay all reasonable expenses involved in travel to the examination and shall front the travel costs to plaintiff.

Defendant to prepare a formal order consistent with this ruling that will be signed on the date of the hearing. Since the exam is set for August 28 there is insufficient time for compliance with CRC 3. 1312.

Item 2 04AS00736

ALEX BOURKOV VS. ROMAN TUZYAK. ET AL

Nature of Proceeding: Motion for Reconsideration

Filed By: Biegler, Robert P.

This ruling is by Judge Loncke. If oral argument is requested, the clerk will schedule oral argument in the near future at a time when Judge Loncke is available to hear oral

as to the DOE allegations. Plaintiff has named the same does in each cause of action. Plaintiff shall amend the DOE allegations so that different DOES are liable depending on what cause of action they are named in. Plaintiff is also directed to incorporate only the general allegations into successive causes of action rather than all other causes of action.

Plaintiff may file and serve an Amended Complaint on or before September 2, 2008. Response to be filed and served within 20 days of service of the amended complaint, 25 if served by mail.

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

Item 11 07AS01615

PAC SHORE SBDV CA WTR DIST VS. CA DEPT OF FISH & GAME ETAL

Nature of Proceeding: Motion to Strike (SLAPP)

Filed By: Black, Robert N.

Defendants Jerabek, Curtis, Smith River Alliance and Friends of Del Norte's Motion to Strike (anti-SLAPP) is granted.

The defendants' evidentiary objections are ruled on as follows:
Declaration of Messina: Sustained as to para 7 first sentence, 8, as to truth of content of letter, 17, 18, 19. Overruled as to paragraphs 4 (not offered for truth), 6, 7 second sentence, 21 and 23.

Declaration of Resch: Sustained as to all objections.

Declaration of Smith, Ex. F: Sustained.

The parties' Requests for Judicial Notice are granted.

In 1963 Pacific Shores Subdivision, was formed near the shores of Lake Earl in Del Norte County. At the time the subdivision was formed, the lake, formerly known as Big Lagoon, was "breached" when the water level reached 4 feet above sea level, and the water was let out of the lake through a sandbar into the ocean. Many people, mostly from Southern California, purchased lots hoping to build future homes on the lots. No house has ever been built in the subdivision. Since that time, public agencies have set the breach level at 8 foot above sea level. When the lake is allowed to reach this level, parts of the subdivision are flooded and plaintiff Water District contends it is not possible to have a working water/sewer system.

Plaintiffs allege that the public entity defendants have unlawfully prevented them from developing their property by intentionally causing their property to flood, reducing the value. Plaintiffs allege that when the public entity defendants realized how much the lots were worth in the 1970s, they decided not to pursue lawful eminent domain proceedings but instead decided to raise the lake level with the intent to destroy the value of the plaintiffs' property. Plaintiffs sue for inverse condemnation and other constitutional violations. Plaintiffs also seek injunctive and declaratory relief.

Defendants Curtis and Jerabeck are private citizens that have expressed concerns about what the Water District is doing. Friends of Del Norte is an environmental group. Defendant Smith River Alliance is another environmental group that has obtained grants from state agencies to purchase lots in the subdivision from willing sellers. Plaintiffs allege that defendants "conspired" with the public entities to commit constitutional violations. The conspiracy apparently consists of Defendants alleged role, on behalf of the environmental organizations that have obtained grant money from the state, in soliciting and purchasing lots from subdivision owners and then deeding the lots to the state.

Defendants have met the threshold requirement of showing that the action falls within the parameters of the anti-SLAPP statute. Defendants have submitted declarations outlining the history of their involvement in appearing a public hearings and taking other actions in opposition to plaintiff Water District's attempts to lower the level of the lake and Water District's failure to respond to questions about where the property owners' tax money is going.

Defendant Jerebek is a property owner in the general vicinity of Lake Earl Lagoon who is an environmentalist concerned about the health of the Lagoon. She has frequently expressed her view that the Pacific Shores Subdivision will be difficult if not impossible to develop in the manner envisioned by plaintiffs and that plaintiff Water District should be dissolved. (Declaration of Jerebek)

Curtis is one of the landowners in Pacific Shores subdivision who has concerns about where her tax money is going. She has expressed the opinion that the $225,000 received by the County from the sale of tax-defaulted Pacific Shores lots should be redistributed to owners within Pacific Shores and not given to plaintiff Water District. She has frequently asked Water District about where her tax money is going and has sent a copy of a Del Norte Local Agency Formation Commission report to other property owners concerning the proposed dissolution of the Water District. (Declaration of Curtis)

Friends of Del Norte is a nonprofit environmental advocacy organization which has been based in Del Norte County since the 1970s. The organization has addressed many public meetings of the Board of Supervisors and the Del Norte County Local Agency Formation Commission on subjects related to Lake Earl. (Declaration of Cooper.)

Smith River Alliance was selected by the California Coastal Conservancy to manage the process of acquiring lots from the Pacific Shores subdivision with the $3 million in funds allocated by the Wildlife Conservation Board. (Declaration of McCleary.)

Plaintiffs contend that moving defendants are not being sued for any act in furtherance of their right to free speech but rather are only being sued for non-protected activities in "conspiring" to violate the plaintiff's constitutional rights. However, plaintiffs have not articulated any unlawful act committed by moving defendants that would make them liable for "conspiracy" to perform that unlawful act. To the extent that defendants were involved in either advocating the public agencies activities, asking where their tax money is going, or assisting the state in acquiring the lots for environmental organizations, the court finds these are acts in furtherance of defendants exercise of right of free speech in connection with a public issue or an

issue of public interest. CCP 425.16(e)(4).

Not only does the Complaint not state a cause of action against the moving defendants for any cause of action alleged therein, including inverse condemnation, plaintiffs have submitted no admissible evidence in opposition to the motion that moving defendants are liable for inverse condemnation and the related constitutional violations. To establish a probability of success on the merits, plaintiffs are required to make a prima facie showing of facts that would, it proved at trial, support a judgment in plaintiffs' favor. Taus v Loftus (2007) 40 Cal.4th 683, 742. Plaintiffs have not made such showing.

The Court rejects plaintiffs' argument that this case is brought in the "public interest" and therefore exempt from the anti-SLAPP statute under CCP 425.17. This is a classic anti-SLAPP suit in which private individuals and environmental groups are being targeted for their comments and actions in advocating the state agencies positions, speaking out against the Water District, and trying to preserve the marine environment. This case offers the prime example why the anti-SLAPP statute was enacted.

Moving defendants are awarded reasonable attorneys fees in the requested amount of $12,130. CCP 425.16(c).

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

Item 12 07AS02431

JAMES G MICKELSON VS. WORLD OF GOOD TASTES. INC.

Nature of Proceeding: Motion to Compel Further and Complete Discovery Responses

Filed By: Lunde, Michelle M.

This matter was before the Court on July 24, 2008 over a discovery dispute. Plaintiff sought contact information for defendant's employees and defendant refused to provide the information on the grounds of privacy. The matter was continued to permit further briefing on the case of Brinker Restaurant Corp. v Superior Court of San Diego County, (2008) WL 2806613 which was decided on July 22, 2008.

Like this case, Brinker involved alleged violations of rest and meal breaks. The trial court certified the class and the appellate court determined this was erroneous because the court did not properly consider the elements of plaintiff's claims in determining if they were susceptible to class treatment. The court concluded that "because the rest and meal breaks need only be 'made available' and not 'ensured,' individual issues predominate and...are not amenable to class treatment." 2008 WL 2806613, 4

Based on that decision, defendant contends plaintiff here will never be able to obtain class certification and is not entitled to contact information for current past employees.

EXHIBIT D

ADMINISTRATIVE
DRAFT ENVIRONMENTAL IMPACT REPORT

PACIFIC SHORES SUBDIVISION
LOCAL COASTAL PROGRAM LAND USE PLAN
ADOPTION AND CERTIFICATION

June 1, 1995

Prepared for:

Pacific Shores Subdivision California Water District
Dwayne Smith, President

for submittal to
Del Norte County Planning Department
Ernie Perry, Director

Prepared by:

Winzler & Kelly, Consulting Engineers
633 Third Street, Eureka, CA 95501-0417
P.O. Box 1345, Eureka, CA 95502-1345
(707) 443-8326

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

Page

LIST OF TABLES

TABLE OF CONTENTS (continued)

LIST OF FIGURES

TABLE OF CONTENTS (continued)

LIST OF PLATES
(Located in folders inside back cover)

APPENDICES

APPENDIX W A Review of Mosquito Problems in the Lake Earl/Talawa Area

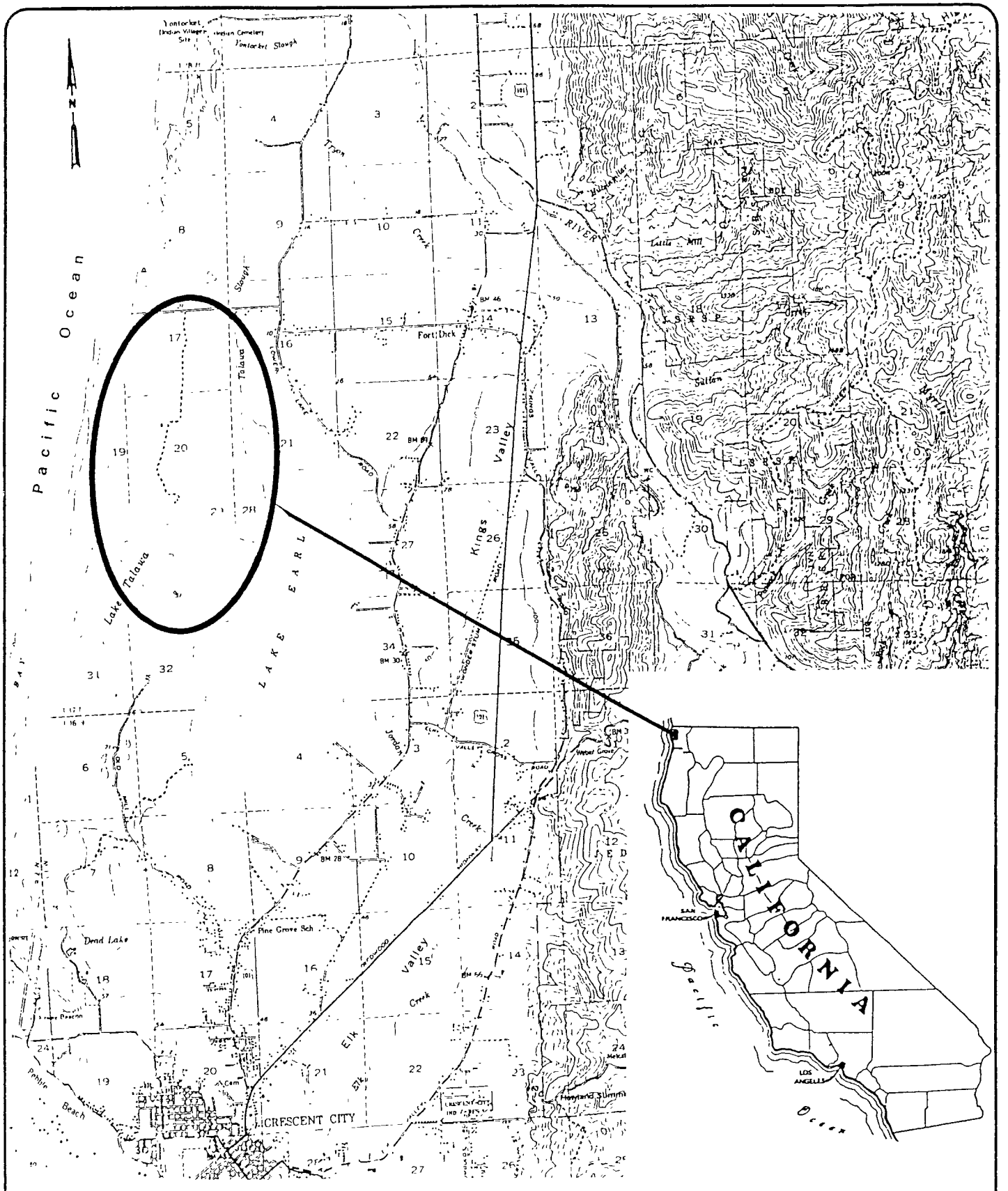
APPENDIX X Traffic Data

I. INTRODUCTION

A. BACKGROUND AND SUMMARY

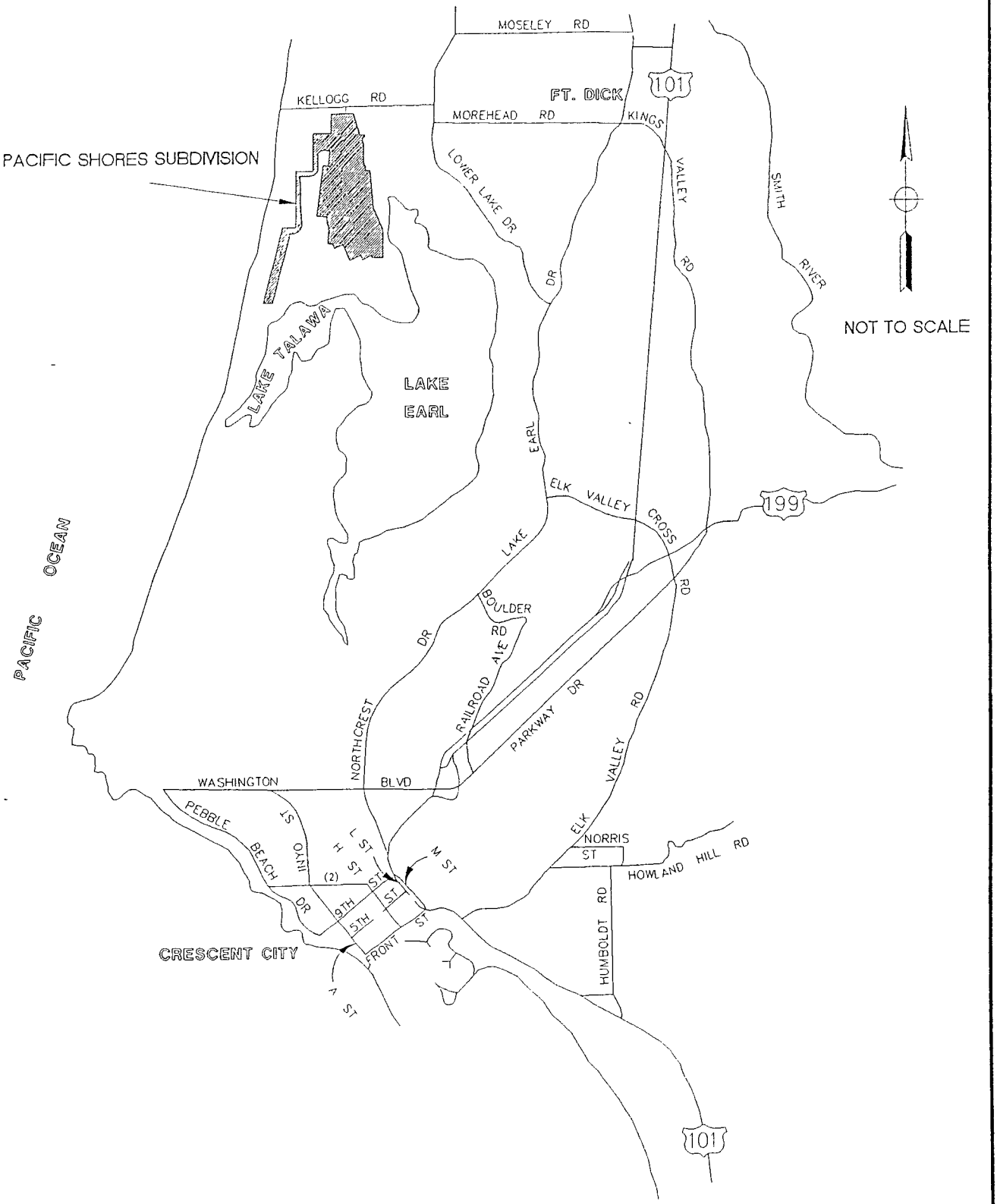
Pacific Shores Subdivision (PSS) is an existing subdivision consisting of 1,438 private parcels averaging 0.5 acres in size. It is located along the north and west shores of Lake Earl and Lake Talawa, and is also bordered by the Pacific Ocean and Kellogg Road. See Figures I-1 and I-2 and Plate 1. The project area, including larger parcels owned jointly by the property owners association, consists of 1,140 acres under 1,280 separate ownerships. The subdivision was approved in 1963 by the County of Del Norte and sales authorized by the California Department of Real Estate. Shortly thereafter, 27 miles of paved roads were constructed to County standards and were accepted by the County as public streets. In 1971, the California Regional Water Quality Control Board adopted requirements for separation between septic systems and the highest anticipated groundwater. Due to sandy soils and high groundwater, development within PSS could not comply with these newly adopted standards. In 1972, the California Coastal Zone Conservation Act (superseded by the Coastal Act of 1976) gave authority to the State to regulate development through a Coastal Commission. Consequently, except for two existing mobile homes, PSS was never further developed. In 1981, the Coastal Commission approved the County's Local Coastal Plan (LCP) but denied certification of the PSS area. Further study of impacts to resource areas was required by the Coastal Commission. Subsequently, the Pacific Shores Subdivision California Water District (PSSCWD) was formed, which commissioned Winzler & Kelly to conduct several area studies.

PSSCWD is currently applying to the County of Del Norte Planning Department (Lead Agency) for certification of a Local Coastal Plan for PSS. PSSCWD is currently proposing a low density urban residential land use designation similar to the proposal denied by the Coastal Commission in 1981. The land use designation would allow up to two units per acre served by water and sewage facilities to be constructed by PSSCWD. This proposal is consistent with the existing subdivision lot layout. In



PACIFIC SHORES VICINITY MAP

FIGURE I-1



LOCATION MAP

FIGURE I-2

addition, a light commercial designation is proposed for 8 acres along Tell Boulevard, the primary access to the subdivision.

B. PROJECT OBJECTIVE

The objective of the project is to develop public utilities and a regulatory framework to allow construction of homes within the PSS in accordance with the development approved by the State and County in 1963 and consistent with the expectations of those who purchased in the subdivision. In order for this construction to proceed, a Land Use Plan (LUP) must be approved for the area by the County and the Coastal Commission and incorporated into the Del Norte County LCP.

C. PROJECT DESCRIPTION

1. Summary

The project includes the following components:

- Provision of all utilities, including water, sewer, power, telephone and cable TV.

- Improvements to existing roads and drainage.

- A land use plan designation which would allow construction of homes on all lots in PSS remaining in private ownership, including associated grading. Excepted would be 8 acres of neighborhood commercial zoning along Tell Boulevard, on parcels to be designated later.

- Regulatory approvals, including a LUP amendment to the Del Norte County LCP, allowing 4 acres of Neighborhood Commercial (C-1), 4 acres of Commercial Recreational district (C-R) and the remaining area Single-family residential (R-1). PSSCWD is asking that the commercial zoning designations include a combining zone that specifically excludes gasoline filling stations and other uses that have a potential to cause groundwater contamination.

2. Utilities Systems

The following utilities are proposed:

- Sewer system consisting of the following components:

It is proposed that a Septic Tank Effluent Pumping system (STEP) be constructed. Essentially, this system utilizes a septic tank for the retention of solids. At the end of the septic tank is an effluent pump, which is used to convey the effluent from the septic tank to the final treatment facilities and disposal site. Laterals from the septic tank to the street are typically 1 inch in diameter and the effluent pumps vary from 1/3 to 1 horsepower.

Pressure mains in the street right-of-way will vary from 2 inches to 10 inches in diameter and will be buried 2 to 3 feet deep.

Wastewater treatment would consist of a series of Sequencing Batch Reactors (SBR). The SBR system provides secondary treatment using a version of the activated sludge process which operates in time rather than in space. All steps of the treatment process take place in a series of pre-manufactured fiberglass tanks.

Typical SBR operation involves filling the tanks with the raw wastewater, in this case septic tank effluent, aerating the wastewater to convert the organics into microbial mass, providing a period for settling, discharging the treated effluent to the chlorination vault for disinfection, then final discharge pumping to disposal facilities.

Based upon approximately 1,438 homes with an average of 2.85 people per home and a flow rate of 75 GPD per person, a total flow rate of about 310,000 GPD will be realized at buildout. Using this total flow rate and using an SBR tank size of 12,000 gallons, a total of 26 tanks will be required, consuming approximately one acre of ground in one or multiple locations. The SBR system can be installed in modules, and as the development grows, additional units can be added as needed.

The wastewater effluent disposal method is an ocean outfall. The ocean outfall would consist of a 4-inch diameter pipeline extending approximately 3/4 of a mile into the ocean to the 40-foot water depth. The outfall line would be installed by directional drilling using the 4-inch outfall line as the driving force behind the drilling bit. The bit would be removed and a diffuser with tie-downs added to the end of the line for a completed system. Figure III-1 shows the ocean outfall discharge system.

A complete description of the proposed sewer system, including investigated alternatives, is provided in Appendix A. Ocean Outfall Dilution Calculations are shown in Appendix B.

- Water supply system

The water system would consist of hookup to the Crescent City water system at Kings Valley Road by construction of in-pavement 8-inch pipeline extension to PSS. A subdivision water system roughly paralleling the sewer system would be constructed. Two 500,000 gallon water tanks will be needed at full buildout. One tank would be constructed initially until the second is needed. Each tank would be 32 feet in diameter by 20 feet high.

- Electric/phone extensions

Overhead electric lines and underground telephone lines have been installed in the subdivision along Tell Boulevard. Existing cable service extends to the last house on Kellogg Road. Pacific Power currently produces sufficient power and has a transmission facility in place to serve the subdivision Electric/phone service will need to be extended throughout the subdivision and a substation may need to be installed.

3. Improvements to Existing Roads and Drainages

There are approximately 27 miles of roads within the subdivision that are in a serious state of disrepair and must be regraded, widened, and repaved.

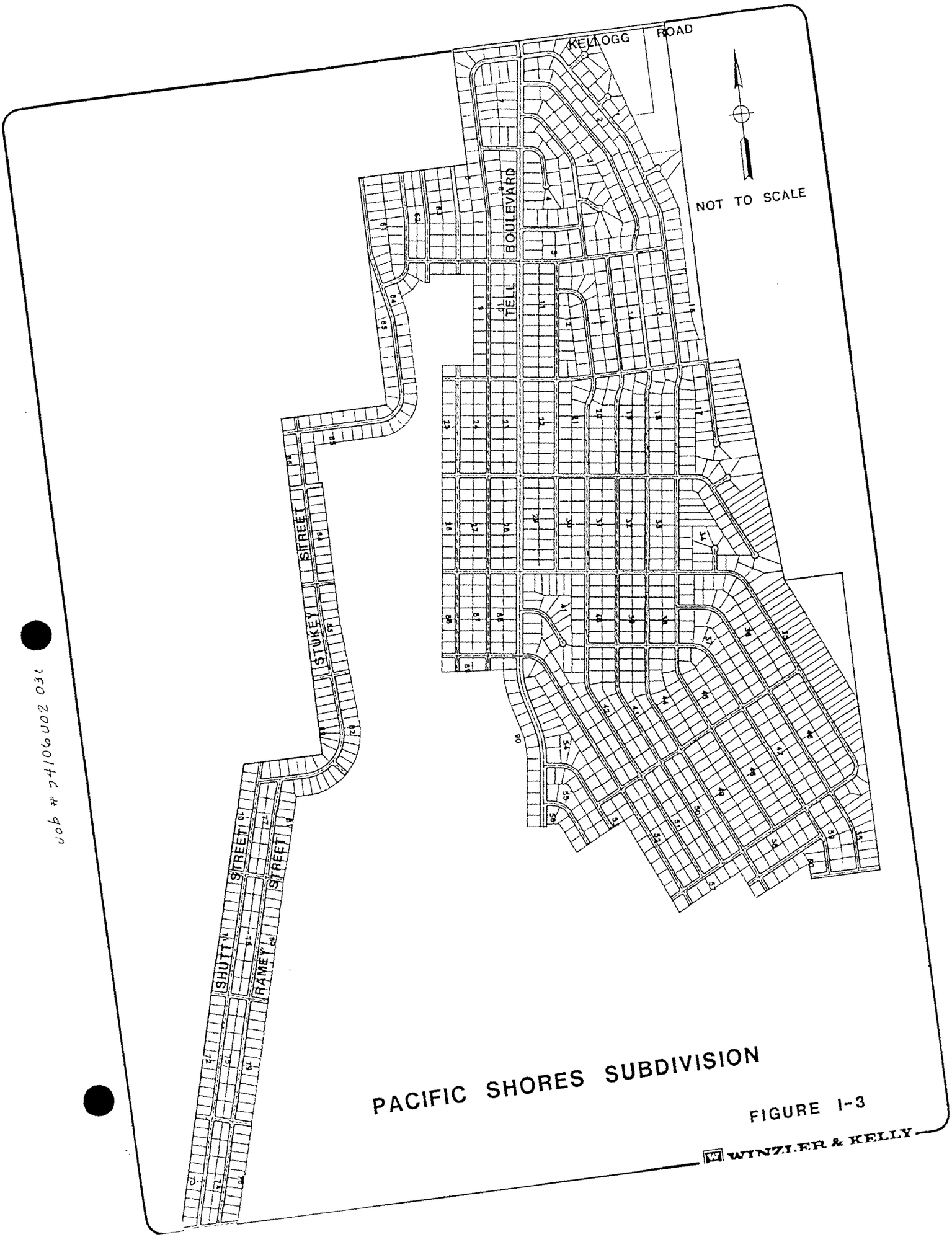
In addition, several of the roads are below the potential 10-foot lake elevation. If the lake is allowed to operate at elevations close to 10 feet MSL and not at the historical management levels maintained prior to 1987, roads will experience periodic flooding.

The drainage system for the subdivision consists of a series of ditches, which are constructed within street right-of-way, and designed to drain to Lake Earl. These drains have not been maintained since construction in the mid-1960's and need to be cleared and regraded to allow proper drainage to proceed. The renovated drainage is also part of the proposed project. The existing road system and PSS lot distribution is shown on Figure I-3. All roads have been accepted into the County road system. The responsibility for road and drainage improvements lies with the County.

4. Lot Development and Home Construction: Context for Impacts Analysis

In developing its definition of the proposed project for the proposed land use amendment to the Del Norte County Local Coastal Program, PSSCWD recognized that state and federal protection of wetlands resources would require avoidance to the maximum extent feasible. This maximum was defined as that amount of wetlands that could be preserved on any individual lot and still allow the development of a 6000-square-foot development pad (see Appendix C for a discussion of related legal issues). To provide a land use proposal that was consistent with wetlands protection policy, PSSCWD included the following provision in its land use application:

> In the wetland areas, property which is at least 50% outside wetland areas could be developed on the portions outside the wetland. No uses altering the wetland portion would be permitted and perimeter fencing intruding in the wetland would be prohibited but fencing around the wetland to protect wildlife would be permitted. House siting and finished grades would be required to drain to the street and not to require alterations of the wetland area for proper drainage.
>
> For lots more than 50% in a wetland, siting of a structure and all improvements (fencing, yards, accessory buildings, etc.) would be limited to the greater of the non-wetland area or 6,000 square feet. Again, no uses in the wetland area, including perimeter fencing would be permitted but fencing around the wetland to protect wildlife would be permitted. Where



PACIFIC SHORES SUBDIVISION

FIGURE I-3

WINZLER & KELLY

Job # 2410602 03L

less than 6,000 square feet of non-wetland is available, the 6,000 square feet minimum area would be selected as least likely to cause damage to the overall environment of the wetland.

This aspect of the project definition is regarded as a significant step toward mitigating wetlands and associated biological impacts on the site. However, PSSCWD recognizes that the Del Norte County LCP maps the entire PSS as "Coastal Sand Dunes" and defines "Coastal Sand Dunes" as a "Sensitive Habitat Type." LCP "Policies and Recommendations" that apply to PSS include the following:

a. Coastal sand dunes, as mapped on the County constraint maps should be maintained in their existing states or returned to their natural states where feasible to ensure their values as groundwater recharge regions and wildlife habitats.

b. Enforceable regulations should be developed to limit the use of motorized vehicles to non-vegetated dunes.

c. The removal or unnecessary disturbance of dune vegetation should be avoided.

Mitigation responding to policy "b." is proposed elsewhere in this EIR. To respond to policies "a." and "c." the following "Master Mitigation Measure" is proposed:

Master Mitigation Measure

To maintain coastal sand dune habitats and to avoid the removal or unnecessary disturbance of dune vegetation, development pads at PSS shall be limited to 6000 square feet of building pad/driveway/activity area. This 6000 square-foot maximum will include all cut/fill slopes. All subsequent homeowner improvements and lot management activities (lawns, developed activity areas, outbuildings, fences, and septic tanks) would be restricted to the development pad. The remaining lot area would be an open space easement subject to various deed covenants and restrictions to implement this mitigation measure.(Master Mitigation Measure continued below)

This mitigation measure would supersede the discussion of wetlands limitations in the LCP land use amendment application. All subsequent impacts analyses in this EIR assume that the subdivision will be developed with this Master Mitigation Measure in force. Plate 2 shows a hypothetical layout of the development pads on existing parcels, created by a computer Geographic Information System (GIS). The development pad locations were "randomly" assigned to the lots for the purposes of quantitative GIS impacts analysis using the following conventions:

1. Development pads were defined as 70-foot by 80-foot rectangles attached to 20-foot by 20-foot driveways.

2. Driveways were centered on the street frontage perpendicular to the road.

3. For corner lots, the driveway was located on the longest street frontage.

4. For curved street frontages, the driveway was located midway along the street frontage, perpendicular to a line connecting the end points of the curve. The driveway was then dimensioned to total 400 square feet.

5. For cul de sacs, the configuration was individually inspected and the driveway was located so as to create a favorable pad orientation. The driveway was then dimensioned to total 400 square feet.

6. In all cases, if a pad intersected a property line, the pad was truncated.

These "random" development pad locations were necessary to perform quantitative analysis of impacts on various resources, but do not necessarily represent the final development pad location for any lot.

Master Mitigation Measure, continued:

Actual development pad locations will be determined by the lot owners, in consultation with the Del Norte County Building Department, which will insure that all lots conform to County requirements with regard to property line setbacks and geotechnical issues. Additionally, the County Building Department will be responsible for insuring that each development pad is located in the most environmentally sensitive

manner, based on the resource plates supplied in this EIR or other information that may subsequently become available.

As the Summary of Impacts table in Chapter II shows, this Master Mitigation Measure reduces numerous biological and physical impacts.

D. RELATIONSHIP TO LAKE LEVEL MANAGEMENT

The Pacific Shores Property Owners Association (PSPOA) is pursuing authority to regulate the level of Lake Earl at a winter maximum of about 4 feet MSL. That level was historically maintained for many years by artificial breaching by ranchers and, more recently, Del Norte County, to avoid flooding impacts. In 1991 the California Department of Fish & Game gained control of the breaching site, and insisted that the lagoon return to a natural breaching regime. Since then, the lake has been breached each year at an elevation of about 10 feet under emergency permits obtained by Del Norte County from the U.S. Army Corps of Engineers. The 10-foot level has considerable impact on private property and roads, including lots and roads in PSS (see Chapter V). However, this approximate level has caused the granting of a Corps of Engineers emergency permit on several occasions, and is thus considered to be a "worst case" scenario from the standpoint of flooding in PSS. Lake level management is not a part of the project covered by this EIR, but, at the request of several agencies, the EIR does analyze subdivision impacts at alternate lake levels. The levels chosen for analysis are 4 feet MSL (preferred by PSSCWD) and 10 feet MSL (considered by PSSCWD to constitute a "taking" of private property). Flooding impacts are also calculated at 8 feet MSL at the request of PSSCWD. Plate 2 shows the contours of Lake Earl at the various pertinent elevations.

E. REGULATORY ISSUES

Regulatory Issues concerning adoption of the Land Use Plan and development of the subdivision are discussed in detail in Appendix C.

V. HAZARDS

A. INTRODUCTION

The 1984 Del Norte County LCP inventories the following hazards at PSS.

> Portions of Pacific Shores lies within the Lake Earl/Talawa floodplain. Additionally, flood potential exists in numerous small pocket areas throughout the subdivision owing to poor drainage and a high water table. The potential for renewed activity of the generally stabilized dune system is unknown. Other potential geologic hazards within the area include: liquefaction throughout the area; and lurching along Talawa Slough and other steep faced drainages and dunes.

Area geology is shown on Figure V-1.

B. GEOLOGIC HAZARDS

1. Sand Movement

EXISTING CONDITIONS

The dune system at PSS is part of a larger system that follows a gently concave shoreline extending in a southwesterly direction from the mouth of the Smith River to Point St. George. Formed over 5,000 years ago by littoral drift, the dunes created and maintain the natural barrier that is vital to the formation of Lake Earl (Department of Fish & Game, 1975).

This coastline is called a receptive shoreline, because it is a receiving or depositional site for sand transported by littoral drift along the coast. Sources of sand for the dune strips are cliffs north of Pyramid Point and the Smith River. The orientation of the dunes is controlled by northwesterly winds predominant in the late spring and summer (United States Geological Survey, 1971). At this time the sand is dry and is easily moved, explaining why most landscape features at PSS are oriented northwest/southeast. Although strong winds blow in the winter, large amounts of sand are not moved as the sand is wet and adheres.

Two episodes of dune advance are currently recognized. The younger dunes form a rather uniform 300- to 400-foot-wide belt next to the beach (United States Geological Survey, 1971). These younger dunes are almost completely stabilized with European beach grass (*Ammophila arenaria*). An older, more stable dune system lies eastward of the younger dune system.

PSS residents should evacuate inland immediately on receiving a tsunami warning, or feeling an earthquake of high magnitude. Tsunamis are events of relatively brief duration. For the 100-year event, it is not anticipated that homes in PSS will be left uninhabitable by a tsunami. Very few, if any, PSS residents will require emergency services (shelter, rescue or hospital care) following such a tsunami.

The above discussion of tsunami inundation assumes calm weather conditions. If a tsunami happens to occur during stormy sea conditions, waves will pound the inundated areas with considerably more force, causing significantly greater danger to structures and threat to human life and health.

Due to the extremely low probability of damage to life, health or property occurring from a tsunami at PSS, **tsunami impacts are not considered significant.** Implementation of Mitigation Measure V-5 will be further reduced tsunami risks.

Seiches are similar to tsunamis, but occur in lakes due to vertical displacement of the lake bottom or a landslide into the lake. The sudden change in the lake bottom topography may displace a large amount of water, and flooding occurs in the form of a large wave. The topography surrounding lakes Earl and Talawa is generally flat, and it is not likely that a slide will impact the lake bottom elevations. No faults are known to pass beneath the lakes. Vertical displacement of the lake bottom elevation during an earthquake is a remote possibility, but the lakes are so shallow that a seiche large enough to cause damage or injury would probably not result. **Risk to PSS from lake seiching is considered a non-significant impact.**

2. Flooding

EXISTING CONDITIONS

PSS was developed in the mid 1960's. At that time, an extensive access system consisting of approximately 27 miles of roads was constructed. Except for the main entrance road which consisted of separated traffic lanes, the streets consisted of a 24-foot paved section with 8-foot wide shoulders constructed in a 50-foot wide easement. In

addition, approximately 15,500 feet of on-site drainage facilities and 9,400 feet of off-site drainage facilities consisting mainly of ditches ranging in width from 10 to 20 feet were either constructed or improved. Most of the roads also had minor ditches graded at their edges to provide proper drainage.

The lots themselves were left ungraded and no driveways were constructed. The subdivision was actually approved at this time and the road and drainage system turned over to Del Norte County. Thereafter, little maintenance has been done and the roads and drainage facilities have deteriorated. The brush has encroached onto the road right-of-ways, the pavement has broken down with large pot holes and flooded sections, and, in many instances, grass and shrubs are growing up through cracks in the paved sections. The drainage ditches are heavily overgrown and silted, which prevents adequate drainage. This exacerbates the ponding situations along many of the roads, which causes further deterioration.

Flooding, particularly in the interior road systems, is much more extensive than can be accounted for by just lake flooding. Considerable effort has been expended in attempting to determine whether the road system drained properly when first constructed, and what improvements might be necessary in order to achieve acceptable drainage. Unfortunately, the conclusions that can be reached from available records and inadequate topography mapping are somewhat speculative.

A 300-scale contour or topographic map with 5-foot contours dated April 6, 1963 is available (Note: the datum varies from USGS by +3.15 feet). This map was completed prior to construction of the extensive road system. The original road design plans for the subdivision completed by McIntire Surveying and Engineering, Inc. in August of 1963 were obtained from the County. The plans consist of 29 sheets of plan and profiles. The vertical datum used is unclear, although it is assumed to be MSL. Three additional sheets that supposedly show as-built drainage facilities are also available. The elevations appear to match elevations shown on the street plans and profiles.

This road system was superimposed on the available contour map and an attempt was made to correlate elevations. Although there appear to be some areas of agreement, other areas appear to have major discrepancies. The road system, for the most part, appears to be designed properly for road drainage to occur. The roads slope to key areas where drainage is picked up. There is no drainage pipe network except for miscellaneous culvert crossings of roadways, and the entire system is dependent on the roadside ditches and drainage ditch system. There are long reaches of overland flow and, if the design were done today, a pipe system most likely would have been required. However, due to the sandy nature of the site, the designer may have anticipated significant infiltration to aid in drainage.

During the course of various field investigations, Winzler & Kelly survey teams have taken elevations at a number of intersections throughout the road network and there appears to be little correlation between these elevations and the elevations indicated on the original plan and profile sheets or on the original topography map. There is poor correlation among all the available topography and grading data and it is unclear what was actually constructed.

Lake Earl was maintained at approximately elevation 4 MSL by manually breaching the lake until 1987. This pattern had existed for more than 100 years and may even predate that time as Indians are reported to have manually breached the sand bar to assist in gathering waterfowl and fish (Helen Ferguson, area resident, pers. comm., March, 1995). The ecosystem surrounding the lakes has adapted to this pattern and is now being substantially altered as the lake was allowed to fill and lake elevations rose significantly during the winter in the past three years. Emergency permits from Army Corps of Engineers have allowed manual breaching on several occasions when lake levels rose to 9 or 10 feet MSL or more and threatened water wells and road access, creating serious health hazards and flooding roads.

This higher lake level has exacerbated flooding conditions within the subdivision and is likely encouraging more widespread encroachment of vegetation on the street and drainage system.

Two lake level scenarios are being reviewed that would have varying impacts on the future development of PSS. PSSPOA is requesting that the lake level again be manually controlled, much as it has been for the majority of the last 75 years or more. Their goal is to maintain the lake close to elevation 4 feet MSL. The PSS existing drainage system was designed to function at lower lake levels than those allowed to occur since 1987.

Regulatory agencies, including Fish & Game and USF&WS, want to see the lake level rise to its condition before human intervention, which would basically allow the lake to fluctuate annually between elevation 2 MSL and 10 MSL or perhaps higher.

The California Department of Water Resources, Red Bluff office, has recently compiled sufficient data to complete the topographic mapping shown on Plate 2. (Bill Mendenhall, DWR, pers. comm., 1994 and 1995). The mapping does not include the entire subdivision but includes that portion that would be impacted by lake levels of up to elevation 10. Prior to this data being made available, a rough estimate of flooding impacts at elevations 4 and 10 was derived from various aerial photos. An aerial photo (scale 1"= 1,000') dated March 7, 1988 corresponds to a lake level of 4.06 MSL. Photos from the California Department of Fish & Game dated February 24, 1992 correspond to a lake elevation of approximately 9-1/2 feet MSL. This rough data has since been tentatively compared with a much more accurate estimate of flooding impacts at lake levels 4, 8, and 10 based on the DWR mapping shown on Plate 2. The correlation, for the most part, was very close.

These lake levels would need to be dealt with annually as opposed to "flood" elevations. Higher "flood" elevations at PSS can occur from two sources: Smith River flooding and sandbar buildup.

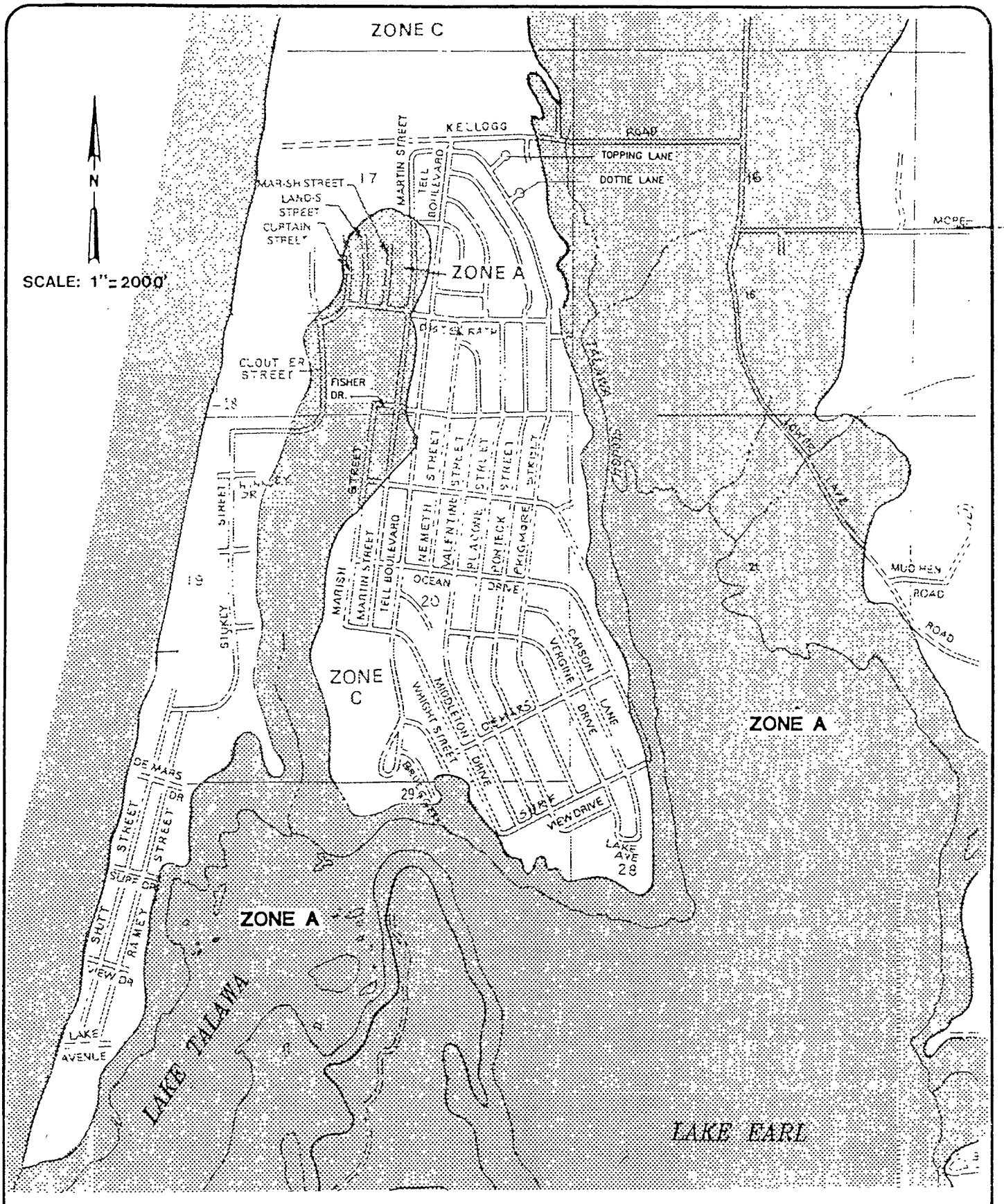
The Smith River has overflowed its banks in the past, causing flooding of the site. The maximum flood elevation was in 1964 due to backwater from the Smith River and only reached an elevation of 8 feet MSL at which time the sand bar was breached by local ranchers (Flood Plain Information Lake Earl-Lake Talawa and Lower Smith River, USACE, June 1971).

A second source of flooding can occur when the sandbar builds up, preventing normal breaching from occurring. The maximum elevation noted was 10 feet MSL in January 1970 according to the 1971 Corps report referenced above. The same report indicates that an elevation 12 feet MSL should be used as a maximum flood height (although the absence of any record of natural breaching does not assure that 12 feet is the maximum that could be reached).

The FEMA Flood Insurance Rate study and map revised July 3, 1986 show a 100-year flood plain that appears to be based on a flood elevation of 10 feet MSL. See Figure V-2. However, elevations for the FEMA study were evidently determined from the USGS Quad Map of the area and indicate less flooding than shown on Plate 2 for lake level 10 feet MSL taken from the much more accurate DWR mapping.

The extent of flooding to elevation 12.0 feet MSL is unknown as the topography mapping available is inadequate to properly show this elevation as it relates to PSS. It is expected that impacts would be significantly greater than flooding at elevation 10 feet MSL. A good portion of Tell Boulevard would likely be under water. It should be noted that this elevation is a hypothetical elevation with maximum floods to date much closer to elevation 10 feet MSL, although emergency permits have been granted for the past several years by the U.S. Army Corps of Engineers to breach the lake to maintain this elevation.

Elevation 12 MSL is not analyzed in this report. There are no records of past flooding events reaching this elevation. As emergency breaching at elevation 10 MSL has been allowed in the past to protect existing residences and domestic wells, it is



ZONE A — Areas of 100-Year flood; Base Flood Elevations and Flood Hazard Factors Not Determined.

ZONE C — Area of Minimal Flooding.

100-YEAR FLOOD AREA

FEMA/FIRM — DEL NORTE COUNTY — 1983

FIGURE V-2

WINZLER & KELLY

JOB NO. 93UB002.03F

assumed that this elevation is the maximum flood elevation from any type of flooding event. However, it is possible that storm conditions or regulatory agencies would prevent breaching when the lake reaches 10 feet MSL. Depending on the precipitation, runoff, and river conditions that occurred before breaching was accomplished, flooding greater than 10 feet MSL could occur.

The County made an analysis of potential flooding of roads at elevations ranging from 9 feet to 12 feet MSL in a memo dated May 5, 1992. It should be noted that access roads to PSS (Lower Lake Road, Kellogg Road and Lake View Road) begin to flood at elevation 9 to 10. The County estimate for PSS roads impacted are:

9 feet MSL	2.73 miles
10 feet MSL	6.54 miles
11 feet MSL	11.1 miles
12 feet MSL	14.87

However, their estimates are based on the original 1963 plan sheets and there appears to be significant discrepancy between design and what actually exists on site. Much of Tell Boulevard is shown to be at just above elevation 9 feet MSL on the plans and yet survey data indicates the majority of the road is above elevation 10 feet to 11 feet MSL. Thus, it would appear that the County analysis is not valid.

On April 13 and 22, 1993 actual flooded areas were mapped, including areas directly flooded from the lake level estimated to be between 1.6 and 2.4 MSL as well as flooding from high groundwater and poor drainage. There were approximately 10,000 feet of road system flooded to depths in excess of 2 feet.

REQUIRED IMPROVEMENTS RELATED TO FLOODING AND LACK OF MAINTENANCE

The PSS road and drainage systems are presently in a poor state of repair and many portions will require rehabilitation prior to lot development.

The existing road system consists of a 24-foot-wide paved section (except for Tell Blvd.) with no curbs. The pavement appears to be only about 1 inch thick. It is likely that the existing section will not be acceptable to the County. The Del Norte County Planning Department has indicated a 32-foot paved section with rolled AC curbs as a possible improved section (Ernie Perry, Del Norte County Planning Department, pers. comm., February, 1994).

The right-of-ways will need to be cleared of encroaching vegetation, potholes must be filled and roadside ditches must be regraded along with the repairing efforts discussed above. Appendix V summarizes estimated costs for this effort.

The drainage ditches are heavily overgrown and silted. Vegetation must be cleared and the ditches regraded to allow proper drainage. Ditches must then be lined with 12 inches of loamy material and re-seeded (see Chapter III, Water Quality). All the ditches have dedicated easements, but access for maintenance might be a problem. It appears that the ditches can, for the most part, be accessed from various road intersections. It might be necessary to dedicate certain access easements to help maintain drainage facilities.

As both the roads and drainage facilities are presently owned by the County, the County has the responsibility to maintain these facilities. Appendix V indicates rough costs for completing the initial improvements.

Proper maintenance of ditches would have the additional benefit of reducing mosquito populations at and around PSS. Noting that mosquito outbreaks seemed more severe with the higher lake levels maintained since 1987, PSPOA commissioned a study of the causes of mosquito outbreaks (Lauck & Lee, 1994). A summary of the study is provided in Appendix W. The study basically concludes that summer and fall outbreaks of *Culex tarsalis* are related to lake level management, but that other mosquito problems are more related to heavy rainfall. Problems from both *Culex* and *Aedes* mosquitos could be partially alleviated by better drainage of ditches.

SIGNIFICANT FLOODING IMPACTS, MITIGATION MEASURES, AND CHANGES IN LEVELS OF SIGNIFICANCE

Once the needed road and drainage improvements have been made, only lake elevation 10 MSL (of the three elevations analyzed) has a significant flooding impact on homes, roads, and water supply tanks within PSS. (1991 CEQA Guidelines, Appendix G (q) "Cause substantial flooding, erosion or siltation" and (r) "Expose people or structures to major geologic hazards.") The following analysis of flood impacts on roads and properties comes from Plate 2, which was developed from various aerial photos taken at known lake levels as indicated above. At elevation 10 MSL, approximately 25,800 feet of the road system is flooded by direct inundation from the lake level. Additional impacts from the combination of high groundwater, intense rainfall, and backup of drainage facilities due to the high water could vary widely. The entire road system should be elevated to above elevation 10 to allow lot access. It is unknown exactly how much fill would be required but it is estimated that some existing roads may need to be raised 2 feet or more. Appendix V gives estimated costs to raise the road system to above elevation 10, based on available data.

In addition, approximately 318 lots are directly affected by the high lake level 10 MSL. This is a rough estimate and counts lots that are inundated to the point that a house could not be properly constructed without flood-avoidance measures. These measures might include filling the lots to create a building pad above elevation 10. Another, though less desirable, option would be to construct the dwelling with the garage on the lower level subject to flooding and the dwelling unit on a second floor above flood elevation. These lots would also most likely require raised driveways and culverts installed along the roadway ditch crossings. Again, it needs to be stressed that it is difficult to determine actual flooding limits or depth of flooding on individual lots from the aerial photos. This estimate is very rough and only includes lots affected by direct lake flooding. It does not include lots that may be affected by high groundwater or improper drainage. However, once proper drainage is established it is anticipated that high groundwater and drainage problems will not create significant flooding.

If elevation 12 MSL were assumed to be the 100-year flood elevation, impacts to the subdivision would be much more significant. Some lots could flood 2 to 4 feet deep, requiring either major fill for building pads, or significant garage flooding during the major flood events. Raising all pads to elevation 12 MSL may not be cost effective as no flood has yet been shown to approach this elevation.

Mitigation Measure V-5

If the lake is to be maintained at elevation 10 feet MSL, all roads and lot pads will be raised to at least elevation 10 MSL as this is a potential yearly flood event.

The proposed location of the sewage treatment plant is above 10 feet MSL. The water tanks, however, may be located within the potentially inundated 10 MSL contour. To protect PSSCWD infrastructure from flood damage, Mitigation Measure V-6 will be implemented.

Mitigation Measure V-6

The building pads for the water tanks will be constructed to an elevation of 11 MSL in order to elevate the water tanks out of the 100-year flood plain.

The potential for flooding impacts on constructed homes, roads, and infrastructure is viewed as a non-significant impact after mitigation, assuming that the lake will be breached at elevation 10 feet MSL.

CUMULATIVE IMPACTS

Flooding conditions at PSS are the result of a unique situation involving the breaching status of Lake Earl. Flooding events around the lake will not usually coincide with regional flood events along the Smith and Klamath Rivers. Demand for emergency services by PSS residents during a flood event will therefore not interfere with provision of those services to other Del Norte residents. Impacts from exposure of people to flood hazards are not cumulatively significant.

NON-SIGNIFICANT IMPACTS AND ASSOCIATED MITIGATION MEASURES

Based on aerial photos indicating various lake levels as depicted on Plate 2, it would appear that **a lake level of 4 feet MSL would have non-significant flooding impacts on PSS.** There would be no direct flooding of the road system or lots. As mentioned above, there are significant improvements to the road and drainage system that are required unrelated to lake level.

D. EMERGENCY SERVICES

The Del Norte County Civil Defense organization is responsible for coordinating and planning emergency services in Del Norte County. Potential disasters which could affect Del Norte County include earthquake, tsunami, flooding, acts of war and hazardous materials spills. Most likely to affect PSS are earthquakes and floods. The Del Norte County Civil Defense Department considers tsunami hazard at PSS to be "very minute" (Angie Brown, Del Norte County, Civil Defense Department, pers. comm., September, 1993).

Flooding normally occurs slowly at PSS, with several days warning and a gradual deepening of inundation rather than flash flooding. Residents would have plenty of time to evacuate, if necessary. There is only one access in and out of the subdivision, along Tell Boulevard to Kellogg Road. At Lower Lake Road, evacuees would probably turn south to Morehead Road, then travel east along Morehead to the higher ground at Fort Dick and Highway 101. Kellogg and Lower Lake Roads begin to flood at lake level 8.5 feet MSL (Dwayne Smith, PSSCWD Board President, pers. comm., January, 1995). Roads become impassable at lake levels of 9 to 10 feet MSL. Inundation to this elevation takes about a week of notable lake overflow (John Wilson, Del Norte County DPW, pers. comm., September, 1993).

In the event long-term evacuation became necessary, Red Cross provides emergency food and shelter. Small numbers of evacuees would be given vouchers for motel rooms. If large numbers of people were displaced, an emergency shelter would

be located at Redwood School in Fort Dick. Red Cross funds shelter services from private charitable donations.

If search and rescue services were required, the Del Norte County Sheriff, Fort Dick Fire Department, or other local agencies would perform the service and initially absorb the cost. Paramedic and fire department vehicles would have difficulty reaching PSS and other areas due to flooding when the lakes exceed 9 feet (Dwayne Smith, PSSCWD Board President, pers. comm., January, 1995). In the event of a major disaster, Del Norte County would declare a State of Emergency and apply to the State or Federal government for reimbursement.

In the event of an earthquake or tsunami, evacuation and emergency housing procedures would be the same as described above for floods. These events are of shorter duration than flooding, but residents may require emergency housing if homes are rendered uninhabitable.

As discussed throughout this chapter, PSS is subject to a variety of natural hazards. However, no agency has chosen to single out PSS as an area of unusual risk. **Exposure of people and property to risk of flooding and seismic hazards and local, state and federal agencies to expense of rescue services is, therefore, classed as a non-significant impact.**

EXHIBIT E

Deborah A. Sivas (Cal Bar No.135446)
Travis Brandon (Certified Law Student)
STANFORD ENVIRONMENTAL LAW CLINIC
Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, California 94305-8610
Telephone: (650) 723-0325
Facsimile: (650) 725-4426

Robert N. Black (Cal. Bar No. 70178)
831 5th Street
Crescent City, California 95531
Telephone: (707) 464-7637
Facsimile: (707) 464-7647

Attorney for Plaintiffs-Petitioners

IN THE SUPERIOR COURT OF CALIFORNIA

COUNTY OF DEL NORTE

MAXINE CURTIS; and THE NORTHCOAST ENVIRONMENTAL CENTER,

Plaintiffs-Petitioners,

v.

PACIFIC SHORES SUBDIVISION CALIFORNIA WATER DISTRICT, a California Community Facilities District; DWAYNE B. SMITH in his official capacity as President of the Pacific Shores Subdivision California Water District; DONNA FIERY in her official capacity as Vice President of the Pacific Shores California Water District; ANTOINETTE B. SEYDOUX in her official capacity as Secretary of the Pacific Shores Subdivision California Water District; LORETTA J. TURNER in her official capacity as Treasurer of the Pacific Shores Subdivision California Water District; and MADELYN B. WELCH in her official capacity as Director of the Pacific Shores Subdivision California Water District,

Defendants-Respondents.

Case No.: CVCV 07-1345

COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF AND DAMAGES PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE §§ 526(a) AND 1060; PETITION FOR WRIT OF MANDATE PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE § 1085 AND CALIFORNIA GOVERNMENT CODE §§ 6258 AND 6259

INTRODUCTION

1. Plaintiffs-Petitioners Maxine Curtis and The Northcoast Environmental Center ("Plaintiffs") bring this action for declaratory judgment and injunctive relief pursuant to Code of Civil Procedure section 526(a), section 1060, and California common law against Defendants-Respondents Pacific Shores Subdivision California Water District ("PSSCWD"), Dwayne B. Smith in his official capacity as President of the PSSCWD, Donna Fiery in her official capacity as Vice President of the PSSCWD, Antionette B. Seydoux in her official capacity as Secretary of the PSSCWD, Loretta J. Turner in her official capacity as Treasurer of the PSSCWD, and Madelyn B. Welch in her official capacity as a Director of the PSSCWD ("Defendants"). Plaintiffs request that the Court declare unlawful and enjoin any further expenditure of PSSCWD funds derived from special taxes on two lawsuits currently being maintained by PSSCWD, including (i) an action against the United States Army Corps of Engineers, the U.S. Army, various federal officials pursuant to the Endangered Species Act, the National Environmental Policy Act, and the Administrative Procedure Act that is currently pending in United States District Court for the District of Columbia ("ESA Suit") and (ii) an action against multiple state and county agencies and individuals pursuant to the civil rights laws and the California Constitution that is currently pending in the Superior Court of Sacramento County ("Civil Rights Suit"). The expenditure of PSSCWD funds on these lawsuit is illegal under the Mello-Roos Community Facilities Act of 1982 ("Mello-Roos Act"), as amended. Cal. Gov't Code §§ 53311-53368.3.

2. Defendants have violated the Mello-Roos Act because the proceeds of a special tax levied by a Mello-Roos Community Facilities District ("CFD") may only be used to pay the cost of providing public facilities, services and incidental expenses that are authorized by the Mello-Roos Act and that are specified in the resolution of intention establishing the CFD. Cal. Gov't Code §§ 53330, 53330.7, 53340(d), 53343.

3. Because the PSSCWD formed a CFD formed under the Mello-Roos Act to levy and collect tax revenues, its expenditures of those tax revenues on legal fees in the current ESA and Civil Rights Suits – expenditures that do not by any means constitute the providing of public facilities, services, or incidental expenses authorized by the Mello-Roos Act – are unauthorized

by the Mello-Roos Act and constitute an illegal expenditure and waste of taxpayer funds.

4. Accordingly, as taxpayers to the PSSCWD, Plaintiffs seek an order from this Court (i) declaring that the PSSCWD's expenditures on the ESA Suit and the Civil Rights Suit, as well as on any other unauthorized lawsuit, are illegal, and (ii) restraining the "illegal expenditure, waste of," and "injury to, the estate, funds, or other property" of the PSSCWD, pursuant to Code of Civil Procedure section 526(a) and common law taxpayer standing principles.

5. Moreover, based upon Plaintiffs' information and belief, Defendant PSSCWD has in the past engaged in similarly illegal and unauthorized litigation against state agencies in regard to the management of the Lake Earl Lagoon and has shown by its actions that it is likely to do so again in the future.

6. Additionally, based on Plaintiffs' information and belief, Defendant PSSCWD has made numerous other expenditures of special Mello-Roos tax funds unauthorized by the Mello-Roos Act, and has shown by its actions that it is likely to do so again in the future.

7. Therefore, Plaintiffs seek (i) a judicial declaration that any expenditures by PSSCWD not directly authorized by the Mello-Roos Act, including but not limited to all expenditures on litigation regarding management of the Lake Earl lagoon, are illegal and (ii) recovery for past illegal expenditures on such litigation and other unauthorized activities.

8. As taxpayers of the PSSCWD, Plaintiffs and other members of the public have an interest in enforcement of the Mello-Roos Act, and in preventing the waste of taxpayer dollars on unauthorized and unfruitful litigation.

9. If successful, this action will enforce an important public right and confer a significant benefit on the general public in that it will prevent the wasting and illegal expenditure of the special taxes paid by Pacific Shores Subdivision lot owners.

10. In addition, Plaintiff Maxine Curtis has made several requests to the PSSCWD for public records pursuant to the California Public Records Act, Gov't Code §§ 6250-6278.48 ("PRA"), to which she has never received a full and adequate response.

11. Therefore, Plaintiff Maxine Curtis seeks a writ of mandate compelling the PSSCWD to comply fully with the PRA and to provide immediately all public records requested pursuant to the PRA.

PARTIES

12. Plaintiff MAXINE CURTIS, along with others, purchased a lot in the Pacific Shores Subdivision in 1987 for the purpose of retiring there. For over one and a half decades, Ms. Curtis has faithfully paid special taxes to the PSSCWD for water and sewer services that she has never received. Ms. Curtis paid taxes to the PSSCWD within one year of the commencement of this action. As a taxpayer, Ms. Curtis has no administrative remedies to exhaust, and if there were administrative remedies available, exhaustion of them would be futile.

13. Plaintiff THE NORTHCOAST ENVIRONMENTAL CENTER ("NEC") is a community-supported, non-profit organization that serves as an umbrella coalition for citizen groups involved in education and advocacy on behalf of the environment in the Klamath-Siskiyou region of northwestern California. NEC owns a lot in the Pacific Shores Subdivision. This property came into NEC's possession as a charitable donation by a family that purchased the lot in 1976 with the intent of developing a retirement home. When it became apparent that there was no ability to develop the property as advertised, the original lot owners began protesting the continued collection of taxes by the PSSCWD. Disappointed and frustrated by the PSSCWD's continued demand for special taxes and the ongoing waste of these tax receipts on uncompleted studies and unauthorized legal services, the family eventually donated the property to NEC. NEC has been assessed and has paid taxes to the PSSCWD within one year of the commencement of this action. As a taxpayer, NEC has no administrative remedies to exhaust, and if there were administrative remedies available, exhaustion of them would be futile.

14. Defendant PACIFIC SHORES SUBDIVISION CALIFORNIA WATER DISTRICT is a local agency created for the purpose of providing water services to the Pacific Shores Subdivision. PSSCWD subsequently formed a Community Facilities District under the Mello-Roos Act to collect special taxes from property owners for the purposes of providing water supply and distribution and sewage treatment and disposal. PSSCWD has collected and continues to collect these special taxes from property owners.

15. Defendant DWAYNE B. SMITH is the President of the PSSCWD Board of Directors.

16. Defendant DONNA FIERY is the Vice President of the PSSCWD Board of Directors.

17. Defendant ANTOINETTE B. SEYDOUX is the Secretary of the PSSCWD Board of Directors.

18. Defendant LORETTA J. TURNER is the Treasurer of the PSSCWD Board of Directors

19. Defendant MADELYN B. WELCH is a member of the PSSCWD Board of Directors.

JURISDICTION AND VENUE

20. This Court has jurisdiction over Plaintiffs' claims for injunctive relief and damages under section 526(a) of the California Code of Civil Procedure ("CCP") and for declaratory judgment under section 1060 of the CCP. The Court also has jurisdiction over Plaintiffs' petition for writ of mandate pursuant to section 1085 of the CCP and sections 6258 and 6259 of the California Government Code.

21. Defendant PSSCWD is a local agency within Del Norte County and each individual Defendant named here is a public officer of that agency. Accordingly, venue is proper in this Court pursuant to CCP sections 393 and 394.

FACTUAL BACKGROUND

22. The Pacific Shores Subdivision, located on the northwest shore of the Lake Earl lagoon in Del Norte County, was established in 1963. The subdivision is comprised of approximately 1535 half-acre lots spread over an area of approximately 1500 acres along the California coast. Most or all lots in the subdivision were sold within approximately two years of establishment. Many of these lots were sold originally to buyers in Southern California. Wetlands exist throughout the subdivision.

23. Although streets were constructed within the Pacific Shores Subdivision, no houses or other significant facilities have ever been built. The passage of state and federal environmental protection laws in the 1970's and 1980's, including but not limited to the California Coastal Act, the federal Clean Water Act, and the federal Endangered Species Act, imposed restrictions that made development of the subdivision lots difficult. As a result of resources protection laws, individual lot owners are unlikely ever to be able to build on their

property, and the PSSCWD is unlikely to ever receive approval to construct sewer and water facilities there.

24. Nevertheless, the Pacific Shores Property Owners Association petitioned the County of Del Norte Local Agency Formation Commission ("LAFCO") to form a water district, and in 1983, LAFCO adopted Resolution No. 84-01 conditionally approving the formation of the Pacific Shores Subdivision California Water District "for the purposes of providing water supply and distribution and sewage treatment and disposal" to the Pacific Shores Subdivision. Among other things, this approval was conditioned on prior approval of new public works facilities by the California Coastal Commission.

25. In 1985, the California Coastal Commission issued a Coastal Development Permit No. 1-85-38 for the limited and sole purpose of allowing the PSSCWD to finance and carry out a special study necessary for the Commission's subsequent consideration of a Local Coastal Plan for the Pacific Shores Subdivision.

26. In 1987, after a vote of the property owners in the Pacific Shores Subdivision, LAFCO issued a Certificate of Compliance with the conditions of its Resolution 84-01.

27. In 1989, a draft special study on the Pacific Shores Subdivision concluded that a large portion of the subdivision consists of undevelopable wetlands and that attempts to pursue the development of this area would be costly and potentially unsuccessful.

28. Despite these conclusions, in 1989, the Board of Directors of the PSSCWD adopted Resolution No. 89-1 stating its intention to form a Community Facilities District ("CFD") pursuant to the Mello-Roos Act as a means of funding the construction of water and sewer facilities in the Pacific Shores Subdivision. The PSSCWD Board of Directors instituted the proceedings to form a CFD "on its own initiative" in order "to provide funds to plan for, study, design, acquire, construct or finance the costs of public facilities authorized to be funded pursuant to the Act including sewer facilities and water facilities."

29. In 1990, the PSSCWD Board of Directors adopted Resolution 90-5 levying the first special tax for the newly formed CFD.

30. Since 1990, lot owners have been assessed a yearly special tax ranging from $125 to $149.50, and yet no sewer or water facilities have been constructed. Instead, the PSSCWD has

spent millions of dollars obtained through special tax assessment on inadequate environmental studies, none of which has ever been completed, and on unsuccessful lawsuits against local, state, and federal agencies.

31. The Pacific Shores Subdivision is located adjacent to California's largest coastal lagoon, which is one body of water misnamed as Lake Earl and Lake Tolowa and commonly known as Lake Earl or the Lake Earl lagoon. The lagoon is regularly open to the sea, and salt water intermixes with fresh water. Under natural conditions, the Lake Earl lagoon would reach 12 to 14 feet above mean sea level ("msl") before water would breach the sand bar that separates the lagoons from the Pacific Ocean. Under federal law, artificial breaching of the natural sand bar that separates the coastal lagoons from the Pacific Ocean is allowed only pursuant to, and in accordance with the terms of, a permit issued by the U.S. Army Corps of Engineers. State permits also are required.

32. In 1988, the California Department of Fish and Game ("CDFG") began restoration of the natural Lake Earl lagoon by requiring that Lake Earl reach 8 to 10 feet above msl before breaching the sand bar would be allowed.

33. In 1994, Defendant Dwayne Smith, acting on behalf of the PSSCWD, hired a bulldozer crew to dig a ditch for the purpose of illegally breaching the lagoon, thereby causing it to be partially drained and open to the sea for a number of months. For this crime, Mr. Smith entered a guilty plea in federal court to a criminal violation of the River and Harbors Act. This same criminal conduct also resulted in a complaint for injunction and civil penalties against the PSSCWD. The civil complaint was settled through a consent decree which required the PSSCWD to pay a civil penalty. Plaintiffs are informed and believe, and on that basis allege, that the attorneys fees incurred by Mr. Smith and the PSSCWD and the fines assessed against the PSSCWD for this violation of law were paid from PSSCWD special tax funds.

34. In 2003, CDFG released a draft plan and Environmental Impact Report ("EIR") for maintaining water levels in the Lake Earl lagoon by continuing the practice of breaching the lagoon when the water level reached 8 to 10 feet above msl.

35. In 2004, the PSSCWD filed suit against the CDFG, the California State Lands Commission, and the County of Del Norte challenging the CDFG's EIR. The lawsuit alleged

that the CDFG had failed to satisfy CEQA requirements and that the management plan constituted a Fifth Amendment taking of the property of Pacific Shores landowners ("CDFG Suit").

36. In 2006, a California superior court found that the PSSCWD's lawsuit against the CDFG had no merit, and went on to describe the Pacific Shores Subdivision as a "paper subdivision" about which "there is substantial evidence in the record indicating that [it] essentially has been moribund for decades due to regulatory and other constraints on development" and that "it is not reasonably foreseeable at this time that it ever will be further developed." Tolowa Nation v. California Dept. of Fish & Game, No. 04CS01254 (Cal. Super. Ct. Feb. 23, 2006) (order denying petition for writ of mandate).

37. In 2004, the PSSCWD filed suit in the United States District Court for the Northern District of California against the United States Army Corps of Engineers, the United States Army, the County of Del Norte, the California Department of Fish and Game, the California State Lands Commission, the California Coastal Commission, and various individual state and federal officials alleging that the named defendants had violated the federal Endangered Species Act, the National Environmental Policy Act, and the California Environmental Quality Act. Following the filing of motions to dismiss by local, state, and federal Defendants, the PSSCWD voluntarily dismissed this lawsuit without responding to the motions. Pacific Shores Subdivision California Water District v. U.S. Army Corps of Engineers, No. C-04-1401 SC (N.D. Cal. Aug. 20, 2004 (Order Dismissing Case).

38. In 2005, the PSSCWD filed another lawsuit, this time in the United States District Court for the District of Columbia, against the United States Army Corps of Engineers, the United States Army, and ten individual federal officials alleging similar claims under the federal Endangered Species Act, the National Environmental Policy Act, and the Administrative Procedure. Pacific Shores Subdivision California Water District v. Norton, Case No. 04-2091 (HHK) (D.D.C. Aug. 9, 2005) (Second Amended Complaint). Motions for summary judgment have been filed in this case and the matter is pending.

40. In 2007, the PSSCWD filed yet another suit in the Superior Court for the County of Sacramento against the four state agencies, the County of Del Norte and its Board of Supervisors,

and various non-governmental organizations and individuals for damages and injunctive and declaratory relief, alleging various civil rights claims, inverse condemnation, and "conspiracy." Pacific Shores Subdivision California Water District v. California Department of Fish and Game, Case No. 07AS01615 (Cal. Super. Ct., Apr. 6, 2007) (Complaint).

41. Plaintiffs are informed and believe, and on that basis allege, that Defendants have wasted hundreds of thousands of dollars, or more, levied from special Mello-Roos taxes on these unauthorized, unfruitful, and illegal lawsuits and intend to continue to do so. For example, in 2006, the PSSCWD expended $129,735, or 85 percent of its total expenditures, on legal and litigation support fees. In 2005, the PSSCWD expended $106,019, or 79.3 percent of its total expenditures, on legal fees. In 2004, the PSSCWD expended $53,479, or 63.2 percent of its total expenditures, on legal fees. In 2003, the PSSCWD expended $84,984, or 61.4 percent of its total expenditures, on legal fees. In 2002, the PSSCWD expended $68,625, or 55.1 percent of its total expenditures, on legal fees. And in 2001, the PSSCWD expended $92,101, or 58.6 percent of its total expenditures, on legal fees.

42. Plaintiffs are informed and believe, and on that basis allege, that the Defendants have expended special Mello-Roos tax funds on numerous other unauthorized activities, including the purchase of 26 lots within the Pacific Shores Subdivision, reimbursement of inappropriate expenditures incurred by officers and directors of the PSSCWD, funding of activities by the Pacific Shores Property Owners Association, and similar inproper activities, and intend to continue to do so.

43. On October 11, 2006, Plaintiff Maxine Curtis submitted a PRA request to the PSSCWD, to which the District did not respond within the 10 days required under Gov't Code § 6253(c).

44. After numerous delays, Defendants offered to provide Ms. Curtis with access to all of the documents she had requested at the office of the Defendants' hired counsel in Southern California, in January 2007.

45. However, when a representative of the Plaintiff traveled from Del Norte County to Southern California and arrived at the Defendants' counsel's office on the agreed-upon date in February, after a costly airplane trip, she was informed that the documents were incomplete and

that some were in a garage in Northern California, others with the PSSCWD Secretary in Ventura, and others in a storage locker near the President's house.

46. The records provided to Plaintiff's representative were inadequate and included no board agendas or minutes, except for a complete set from 1993, incomplete financial records, no invoices or contracts with consultants or attorneys, and no newsletters.

RELEVANT LAW

The Mello-Roos Act

47. Under the Mello-Roos Act, the proceeds of a special tax levied by a CFD may only be used to pay the cost of providing public facilities, services, and incidental expenses authorized by the Mello-Roos Act. Cal. Gov't Code §§ 53340(d), 53343.

48. The only public services that may be financed by a CFD are police protection services, fire and paramedic services, education and recreation services, park maintenance, flood and storm protection services, and hazardous waste removal services. Cal. Gov't Code § 53313.

49. Only the public facilities and services described in a CFD's resolution of formation may be financed by the special taxes levied by the CFD. Cal. Gov't Code § 53330.

50. The resolution of formation for the PSSCWD specifies that the facilities and services to be provided by the PSSCWD "include the construction, acquisition, rehabilitation, expansion, relocation and financing of sewer facilities and water facilities" as well as "the study, planning and design work related thereto." Resolution 90-1, Section 5. The PSSCWD is not authorized to finance any other types of facilities or services.

51. None of the civil or criminal lawsuits described in paragraphs 33 through 40 are authorized facilities or services under the Mello-Roos Act generally or under Resolution 90-1 specifically.

The Public Records Act

52. Under the PRA, public records must be "open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record" not exempt from disclosure. Cal. Gov't Code § 6253(a). State or local agencies shall make these records "promptly available" upon request. Cal. Gov't Code § 6253(b). While agencies may take a reasonable amount of time to collect and examine records, they are not permitted "to delay

or obstruct the inspection or copying of public records." Cal. Gov't Code § 6253(d). Any person may bring an action for injunctive or declaratory relief or a writ of mandate to enforce her right to inspect public records. Cal. Gov't Code § 6258. These proceedings shall be heard at the "earliest possible time." Id.

FIRST CAUSE OF ACTION

(Claim for Declaratory Relief under Code of Civ. Proc. § 1060 for Violation of Gov't Code §§ 53311-53368.3)

53. Plaintiffs reallege and incorporate by reference the allegations set forth in paragraphs 1 through 52, inclusive, as though fully set forth herein.

54. A dispute has arisen between Plaintiffs and Defendants, in that Plaintiffs believe and contend for the reasons set forth above that Defendants' expenditures on the ESA Suit, the Civil Rights Suit, and the CDFG Suit, as described above, and on other activities, including but not limited to, the purchase of property lots within the Pacific Shores Subdivision, by Defendants constitute an unlawful and unauthorized expenditure under the Mello-Roos Act. Plaintiffs are informed and believe, and on that basis contend, that the Defendants dispute these allegations in all respects and intend to continue to litigate over the water level of the Lake Earl lagoon and other issues and otherwise illegally expend special tax funds of the PSSCWD on unauthorized activities.

55. An actual, present, and continuing controversy exists between Plaintiffs and Defendants concerning the legality of the Defendant's current and future legal expenditures under the Mello-Roos Act. A judicial declaration as to the legality of these expenses is therefore necessary and appropriate to determine the respective rights and duties of the parties, pursuant to California Code of Civil Procedure section 1060.

SECOND CAUSE OF ACTION

(Claim for Permanent Injunction under Code of Civ. Proc. § 526(a) for Violation of Gov't Code §§ 53311-53368.3)

56. Plaintiffs reallege and incorporate by reference the allegations set forth in paragraphs 1 through 52, inclusive, as though fully set forth herein.

57. Defendants have expended and are continuing to expend special taxes collected under the Mello-Roos Act for the wasteful and illegal purpose of paying legal expenses incurred

in unauthorized, ongoing litigation against the United States Fish and Wildlife Service, the National Marine Fisheries Service, the U.S. Army Corps of Engineers, and others, and for such other unauthorized and illegal purposes as purchasing Pacific Shores Subdivision property lots and reimbursing individuals engaged in activities that are not within the scope of those allowed by the Mello-Roos Act. These PSSCWD expenditures are illegal and unauthorized under the Mello-Roos Act. Cal. Gov't Code §§ 53311-53368.3.

58. Plaintiffs are entitled to injunctive relief for these violations pursuant to CCP section 526(a).

THIRD CAUSE OF ACTION

(Claim to Recover Illegal Expenditures under Code of Civ. Pro. § 526(a) for Violation of Gov't Code §§ 53311-53368.3)

59. Plaintiffs reallege and incorporate by reference the allegations set forth in paragraphs 1 through 52, inclusive, as though fully set forth herein.

60. Defendants have expended and continue to expend hundreds of thousands or millions of dollars of special tax money for unauthorized and improper purposes, including but not limited to attorneys' and other legal fees to pursue frivolous lawsuits, the purchase of property within the Pacific Shores Subdivision, and reimbursement for activities of Directors and others beyond those expenses authorized by law, in violation of the Mello-Roos Act. Cal. Gov't Code §§ 53311-53368.3.

61. Plaintiffs are entitled to recover these illegally expended special tax moneys on behalf of themselves and the County of Del Norte pursuant to CCP section 526(a).

FOURTH CAUSE OF ACTION

(Petition for Writ of Mandate under Code of Civ. Pro. § 1085 for Violation of Gov't Code §§ 6250-6278.48)

62. Plaintiffs reallege and incorporate by reference the allegations set forth in paragraphs 1 through 52, inclusive, as though fully set forth herein.

63. Plaintiff Maxine Curtis has properly sought certain public records from the PSSCWD, and Defendant PSSCWD has unreasonably failed to produce the requested records, causing obstruction and delay, in violation of the California Public Records Act. Cal. Gov't Code §§ 6250-6278.48.

64. Plaintiffs are entitled to a writ of mandate ordering Defendants to produce the requested public records forthwith pursuant to CCP section 1085 and California Government Code section 6258.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court:

1. Adjudge and declare unlawful the expenditure of any PSSCWD funds that derive from special Mello-Roos taxes for (1) litigation that is not an authorized facility or service under the Mello-Roos Act, and (2) on any other activity or expense that is not an authorized facility or service under the Mello-Roos Act;

2. Enjoin Defendants and Defendants' agents, employees, and all other persons acting on behalf of or in concert with them from expending any PSSCWD funds (1) on litigation that is not an authorized facility or service under the Mello-Roos Act and (2) on any other activity or expense that is not an authorized facility or service under the Mello-Roos Act;

3. Order that Defendants reimburse Plaintiffs and other the PSSCWD taxpayers or the County of Del Norte for all special tax moneys that were illegally expended in violation of the Mello-Roos Act;

4. Enjoin Defendants and Defendants' agents, employees, and all other persons acting on their behalf or in concert with them to comply fully with Plaintiff Maxine Curtis's Public Records Act requests;

5. Award Plaintiffs' attorneys' fees and costs incurred in this matter pursuant to Code of Civil Procedure section 1021.5;

6. Award Plaintiff Maxine Curtis attorneys' fees and costs incurred in connection with her Public Records Act request pursuant to Government Code section 6259(d);

7. Retain jurisdiction of this case until Defendants have fully complied with the orders of this Court, and there is reasonable assurance that Defendants will continue to comply in the future absent continuing jurisdiction; and

8. Award such other and further relief as the Court deems just and proper.

Dated: July 13, 2007

Respectfully submitted,

STANFORD ENVIRONMENTAL LAW CLINIC

By: _____
Deborah A. Sivas

Attorneys for Plaintiffs MAXINE CURTIS and THE NORTHCOAST ENVIRONMENTAL CENTER

VERIFICATION

I, MAXINE CURTIS, am a plaintiff in this action. I have read the foregoing "Complaint for Declaratory Judgment, Injunctive Relief and Damages Pursuant to California Code of Civil Procedure §§ 526(a) and 1060; Petition for Writ of Mandate Pursuant to California Code of Civil Procedure § 1085 and California Government Code §§ 6258 and 6259" and know the contents thereof. The same is true of my own personal knowledge, except as to those matters which are set forth on information and belief and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Verification was executed on July 16, 2007 at Crescent City, California.

MAXINE CURTIS

CERTIFICATE OF SERVICE

LYNDA F. JOHNSTON declares:

I am over the age of eighteen years and not a party to this action. My business address is 559 Nathan Abbott Way, Stanford, California 94305-8610.

On March 17, 2014, I served the foregoing **APPLICATION FOR LEAVE TO FILE AMICUS BRIEF BY EARL MCGREW, MAXINE CURTIS, LYNDA SCHOONOVER, NICOLE SOLOVSKOY, and NORTHCOAST ENVIRONMENTAL CENTER; BRIEF OF AMICI CURIAE EARL MCGREW, MAXINE CURTIS, LYNDA SCHOONOVER, NICOLE SOLOVSKOY, and NORTHCOAST ENVIRONMENTAL CENTER IN SUPPORT OF APPELLANTS CALIFORNIA COASTAL COMMISSION and CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE** on all persons identified below by placing a true and correct copy thereof for Federal Express next-business-day delivery at Stanford, California, addressed as follows:

Deborah M. Smith
Carolyn Nelson Rowan
Deputy Attorneys General
1300 I Street, Suite 125
Sacramento, CA 95814-2919

Attorneys for Defendants and Appellants California Department of Fish and Wildlife, et al.

Kelly T. Smith, Esq.
The Smith Firm
1541 Corporate Way,
Suite 100
Sacramento, CA 9583-3889

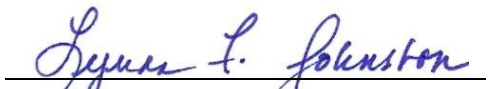
Attorney for Plaintiffs and Appellants Pacific Shores Property Owners Association, et al.

Clerk, Civil Division
Sacramento County Superior
Court
720 9th Street
Sacramento, CA 95814-1302

Trial Court

On March 17, 2014, I also served an electronic copy of the foregoing **APPLICATION FOR LEAVE TO FILE AMICUS BRIEF BY EARL MCGREW, MAXINE CURTIS, LYNDA SCHOONOVER, NICOLE SOLOVSKOY, and NORTHCOAST ENVIRONMENTAL CENTER; BRIEF OF AMICI CURIAE EARL MCGREW, MAXINE CURTIS, LYNDA SCHOONOVER, NICOLE SOLOVSKOY, and NORTHCOAST ENVIRONMENTAL CENTER IN SUPPORT OF APPELLANTS** on the Supreme Court of California by use of the utility found on the Court of Appeal's web site, at http://www.courts.ca.gov/19284.htm.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed March 17, 2014 at Stanford, California.



LYNDA F. JOHNSTON