

MINUTE ITEM

This Calendar Item No. 41
was approved as Minute Item
No. 41 by the State Lands
Commission by a vote of 2
to 0 at its 8/25/83
meeting.

MINUTE ITEM
41

8/25/83
W 503.1197
W 503.1198
SLL 98
BLA 232
Patterson/
Fossum

LITIGATION AND TITLE SETTLEMENT AGREEMENT
REGARDING LANDS AT BUENA VISTA LAGOON,
CARLSBAD, SAN DIEGO COUNTY, CALIFORNIA
(NATIVE SUN INVESTMENT GROUP PROPERTY)

During consideration of Calendar Item 41 attached, Deputy Attorney General Tim Patterson summarized the item before the Commission. Chief Counsel Hight acknowledged for the record receipt of a telegram from the City of Oceanside and Carlsbad requesting that the Commission renegotiate the settlement agreement to obtain an additional weir easement desired by the Cities.

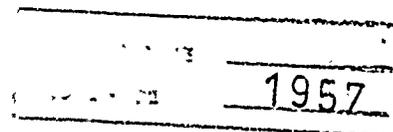
Staff Counsel Curtis Fossum explained that the cities' request was not an issue between the parties to the litigation but was a matter to be resolved between the Cities of Oceanside and Carlsbad and the private property owner.

Upon motion made by Commission-Alternate Ordway and seconded by Acting Chairman Jervis the resolution in Calendar Item 41 was approved as presented by a vote of 2-0.

Attachment: Calendar Item 41.

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CALENDAR ITEM

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Fossum

LITIGATION AND TITLE SETTLEMENT AGREEMENT REGARDING
LANDS AT BUENA VISTA LAGOON,
CARLSBAD, SAN DIEGO COUNTY, CALIFORNIA
(NATIVE SUN INVESTMENT GROUP PROPERTY)

PARTIES TO THE AGREEMENT:

STATE OF CALIFORNIA
(Acting by and through the State Lands
Commission)

PEOPLE OF THE STATE OF CALIFORNIA
(Acting by and through the Attorney General
of California)

NATIVE SUN INVESTMENT GROUP
(A limited partnership)

TICOR TITLE INSURANCE COMPANY OF CALIFORNIA
(Formerly known as TITLE INSURANCE AND
TRUST COMPANY)
(A California Corporation)

I. BACKGROUND OF DISPUTE

This Calendar Item recommends settlement of a boundary dispute among the above-named parties over approximately ten acres of property located in and adjacent to Buena Vista Lagoon, in the City of Carlsbad, County of San Diego, California. The property consists of a bluff top, bluff,

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CALENDAR ITEM NO. 41 (CONT'D)

sandy and cobbled beach adjoining the Pacific Ocean, filled lowlands, and a submerged area within the present bed of Buena Vista Lagoon.

The dispute between the parties as to their respective legal interests in the subject property was formalized in November 1981, when Native Sun Investment Group (Native Sun) filed two civil actions against the State of California and the State Lands Commission (State) seeking to quiet the title to the property and a declaration of rights in the land (San Diego Superior Court Nos. N18495 and N18496). The State contends in the litigation that portions of the property presently are, or were, in a natural state prior to the influence of man, tidelands and submerged lands and/or lands underlying a navigable waterway. The State further contends that the public has used the subject property for recreational purposes and access to the Pacific Ocean and Buena Vista Lagoon for most of the 20th Century, and as a public roadway since the late 1800s. It is the State's position that this public use has created an easement for public access and recreational use of the property in favor of the public, pursuant to the doctrine of implied dedication. The seminal decision of the California Supreme Court on implied dedication is Gion v. City of Santa Cruz (1970) 2 Cal. 3d 29.

The parties to this dispute independently have investigated the historical changes in the physical condition of the subject property, the manner in which the public has used the property and the actions of the holders of record title to the property in response to public use. Artificial influences, including the construction of a railroad and two highways across the lagoon, the filling of lowlands, construction of a weir at the mouth of the lagoon near the Pacific Ocean, and the Oceanside breakwater along with beach replenishment projects and the pier upcoast, have resulted in significant changes to the nature of the property since California achieved statehood in 1850. Consequently, there is considerable uncertainty and a bona fide dispute between the parties as to the existence, extent, nature and location of the State sovereign title and public easement interests in the subject property. A judicial resolution of this title dispute would require protracted and vigorously contested litigation.

Following extensive negotiations, representatives of the parties have reached an agreement in principle for resolving the title questions presented here by the following means:

- (1) A permanent fixing of the ordinary high water mark of the Pacific Ocean as an agreed common boundary;
- (2) A public access and recreational easement area on the sandy and cobblestone beach portion of the subject property between the foot of the bluff and the fixed ordinary high water mark; and a public access easement over an existing stairway from the first public road to the beach; and
- (3) An exchange of interests whereby fee title to the present bed of Buena Vista Lagoon within the boundaries of the subject property is conveyed to the State in exchange for the conveyance of any State sovereign title interest in the upland portion of the property to Native Sun.

The three elements of the proposed Boundary Line Agreement, Compromise Title Settlement and Exchange Agreement (referred to herein as "Settlement Agreement") are discussed below.

II. PROPOSED SETTLEMENT AGREEMENT

A. BOUNDARY LINE AGREEMENT

P.R.C. Section 6357 authorizes the State Lands Commission to establish the ordinary high water mark of State sovereign lands by agreement. Both the State and Native Sun have surveyed and reviewed prior surveys and other evidence of the location of the ordinary high water mark along the shore of the Pacific Ocean adjacent to the subject property. Because the true boundary is uncertain, the parties wish to fix the boundary by agreement in order to prevent future disputes as to ownership of this land. The negotiated boundary runs along and approximates the last natural ordinary high water mark. It separates the public trust tidelands on the oceanward side of the boundary from the private uplands located on the landward side.

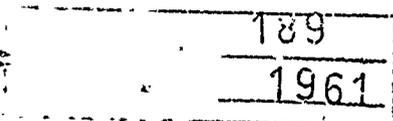
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B. EXCHANGE AGREEMENT

The pending litigation also involves a dispute as to the existence of sovereign lands within the portion of the subject property located in or adjacent to Buena Vista Lagoon. Some of the land involved in this dispute was covered by the waters of Buena Vista Lagoon. In the early 1970s, part of this land was filled in and is no longer subject to tidal action or susceptible of navigation. The State Lands Commission staff has evaluated its sovereign interest claim in the subject property both as to economic value and value to the trust needs of the public in the property. In compromise and settlement of their respective claims and in recognition of the present condition of the property, the parties have agreed to relocate the State's sovereign interest to a location which is compatible with the present condition of the property. The historical location of the State's sovereign interest claim is no longer practical for public trust needs and constitutes a relatively small portion of the historic bed of Buena Vista Lagoon, and the area to be acquired pursuant to the exchange will supplement and confirm the program being carried out by State agencies to maintain and improve Buena Vista Lagoon as an ecological reserve.

The staff analysis of the settlement indicates that the rights and interests received by the State are equal or greater in value than the State claims and interests being relinquished and extinguished pursuant to the proposed exchange. The staff believes it is in the best interests of the State, pursuant to P.R.C. Section 6307, to enter into the exchange of interests described herein.

In order to effectuate the exchange, Native Sun shall convey to the State all right, title and interest in the "Lagoon Parcel", as shown on the attached exhibit, and the State shall issue its patents conveying to Native Sun and Ticor the State's right, title and interest in and to the "Upland Parcels", as shown on the attached exhibit. The public access and recreational use easement described in Part II(C), above, will be deeded to the State by Native Sun.



C. IMPLIED DEDICATION EASEMENT

The State Lands Commission staff and the Attorney General have undertaken an investigation into the nature and extent of public use of the subject property. As a result of this investigation, which includes evidence of use of the property in the late 1800s, the State contends that the public has used all of the subject property for recreational purposes and access to the areas of the lagoon and the Pacific Ocean below the mean high tide line and as a result of that use, an implied dedication easement in favor of the public exists over the subject property. However, various holders of record title to the property have undertaken efforts to prevent public use and the accrual of implied dedication easement rights by posting signs, erecting fences, and recording notices of consent to use. Based upon these actions, it is the position of Native Sun that the public has not acquired easement rights in any portion of the property. Thus, there exists a substantial controversy between the parties as to the existence, extent and boundaries of the implied dedication easement claimed by the State.

In order to resolve the dispute, the parties have negotiated and compromised their respective claims and have agreed that the most reasonable location for the establishment of a public access and recreational use easement area (Public Easement Area) lies between the ordinary high water mark as agreed upon pursuant to the boundary line agreement discussed above, and a line running near the foot of the bluff, then to the weir. This Public Easement Area, as shown on the attached exhibit, in conjunction with the negotiated ordinary high water mark, will insure the ability of the public to use the major portion of the sandy and cobblestone beach area existing along the coastline of the subject property. The public will be able to gain access to the easement area by means of an existing public stairway located on the down-coast border of the subject property over which an easement will be granted to the State. The stairway runs from Ocean Street, the nearest public roadway, down the bluff to the beach. The Public Easement Area will be located by a conveyance to the State Lands Commission from Native Sun. The Lands Commission and the people will release, as part of the Settlement Agreement, any claims to implied dedication rights in the remainder of the subject property. The release will not affect the authority of the California Coastal Commission to require the dedication of public access or open space areas on the subject property pursuant to the Coastal Act.

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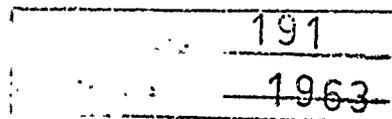
CALENDAR ITEM NO. 41 (CONTD)

On March 23, 1983, the Coastal Commission approved Native Sun's coastal permit application No. 6-83-51. The approval allows Native Sun to construct 14 condominium units on the bluff top portion of the disputed property, and requires Native Sun to dedicate the bluff face, the sandy beach, and a substantial portion of the lower area of the property as public access and open space easement areas. The implied dedication easement area to be established by the Settlement Agreement which is the subject of this Calendar Item is compatible with the permit conditions imposed by the Coastal Commission. In recognition of the pending litigation between Native Sun and the State over public easement rights on the property, the Coastal Commission has prohibited construction on the bluff top until the litigation is settled in or out of court. Native Sun is not obligated to accept the terms and conditions of the coastal permit. If it wishes, it may choose not to develop the subject property at this time. However, the settlement of the litigation between Native Sun and the State, pursuant to the proposed Settlement Agreement, is not dependent upon Native Sun's acceptance or rejection of coastal permit No. 6-83-51.

The purpose of this Settlement Agreement is to resolve questions of land title between the parties and is not intended as mitigation, dedication, or the meeting of any additional requirements of Federal, other State or local agencies. The agreement shall not affect in any manner the authority of the California Coastal Commission to require the dedication of public access of open space areas on the subject property pursuant to the California Coastal Act, P.R.C. Section 3000 et seq. Further, the agreement is intended to resolve completely the dispute between the parties concerning the subject property. As of the effective date of the agreement, each of the parties shall release the other parties of all claims to or concerning the subject matter of the agreement, including monetary claims of any kind.

This agreement is exempt from the provision of the Subdivision Map Act (Gov. Code (66412 (e)), the California Coastal Act (P.R.C. (30416 (c))), and the CEQA (P.R.C. (21080.11)).

Copies of the Settlement Agreement are on file in the office of the State Lands Commission. By this reference it is incorporated herein as if set forth in full.



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This settlement proposal has been reviewed and approved in its entirety by the Commission staff and the Office of the California Attorney General as to compliance with applicable laws and rules and regulations of the State Lands Commission.

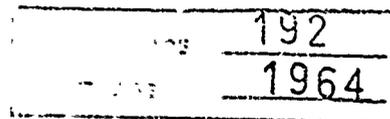
AB 884: N/A.

EXHIBIT: A. Site Map.
B. Vicinity Map.

III. RECOMMENDED FINDINGS, DECLARATIONS, APPROVALS AND AUTHORIZATIONS

IT IS RECOMMENDED THAT THE COMMISSION:

1. FIND THAT THE SETTLEMENT AGREEMENT DESCRIBED HEREIN IS NECESSARY AND CONSTITUTES AN APPROPRIATE MEANS OF RESOLVING THE DISPUTE EXISTING BETWEEN THE STATE, NATIVE SUN INVESTMENT GROUP AND TICOR TITLE INSURANCE COMPANY OF CALIFORNIA [FORMERLY KNOWN AS TITLE INSURANCE AND TRUST COMPANY], AND AUTHORIZE THE EXECUTION OF THE SETTLEMENT AGREEMENT ON BEHALF OF THE STATE.
2. FIND THAT P.R.C. SECTION 6357 AUTHORIZES THE COMMISSION TO ESTABLISH THE ORDINARY HIGH WATER MARK OF TIDELANDS ALONG THE PACIFIC SHORELINE OF CALIFORNIA BY AGREEMENT AND FURTHER FIND THAT IT IS EXPEDIENT AND NECESSARY TO ESTABLISH THE ORDINARY HIGH WATER MARK AS A FIXED BOUNDARY ALONG THE SHORELINE OF THE SUBJECT PROPERTY, AND THAT THE AGREED UPON BOUNDARY IS THE RESULT OF A GENUINE EFFORT TO DETERMINE THE TRUE BOUNDARY BETWEEN PUBLIC TRUST TIDELANDS OCEANWARD OF THE AGREED UPON ORDINARY HIGH WATER MARK AND PRIVATE UPLANDS LANDWARD THEREOF.
3. APPROVE AND AUTHORIZE THE EXECUTION OF MUTUAL QUITCLAIMS BY THE STATE AND NATIVE SUN ON THE SIDE OF THE AGREED UPON BOUNDARY, OPPOSITE THEIR RESPECTIVE OWNERSHIP INTERESTS, AS PROVIDED FOR IN PARAGRAPH 2.3 OF THE SETTLEMENT AGREEMENT.
4. FIND THAT THE EXCHANGE OF LANDS AND RIGHTS AND INTERESTS THEREIN, SET FORTH IN ARTICLE 3 OF THE SETTLEMENT AGREEMENT IS IN THE BEST INTERESTS OF THE STATE AND PUBLIC AND IN FURTHERANCE OF PUBLIC TRUST PURPOSES OF COMMERCE, NAVIGATION AND FISHERY; THAT THE EXCHANGE WILL NOT SUBSTANTIALLY



INTERFERE WITH THESE TRUST PURPOSES, BUT RATHER WILL ENHANCE AND ENLARGE THE PUBLIC RIGHTS AND UTILIZATION OF THE WATERWAYS INVOLVED IN THIS SETTLEMENT AND SUPPLEMENT AND CONFIRM THE PROGRAM BEING CARRIED OUT BY STATE AGENCIES TO MAINTAIN AND IMPROVE BUENA VISTA LAGOON AS AN ECOLOGICAL RESERVE.

5. FIND THAT THE VALUE OF THE TITLES AND INTERESTS IN THE LANDS ACQUIRED BY THE STATE FROM NATIVE SUN IS EQUAL TO OR GREATER THAN THE VALUE OF THE STATE'S INTEREST IN THE TITLES AND INTERESTS IN THE LANDS BEING EXTINGUISHED, REMOVED AND RELINQUISHED AS A RESULT OF THIS SETTLEMENT.
6. FIND THAT TO THE EXTENT THERE ARE SOVEREIGN RIGHTS AND INTERESTS IN THE UPLAND PARCEL, AS DEPICTED ON THE ATTACHED EXHIBIT AND AS DESCRIBED IN THE SETTLEMENT AGREEMENT, THE LANDS IN WHICH SUCH RIGHTS AND INTERESTS EXIST CONSTITUTE A RELATIVELY SMALL PORTION OF THE HISTORIC BED OF BUENA VISTA LAGOON AND HAVE BEEN IMPROVED, FILLED, RECLAIMED AND EXCLUDED FROM PUBLIC NAVIGATIONAL CHANNELS; SUCH RIGHTS AND INTERESTS ARE NO LONGER AVAILABLE, USEFUL OR SUSCEPTIBLE OF BEING USED FOR COMMERCE, NAVIGATION AND FISHING OR OTHER TRUST PURPOSES AND ARE NO LONGER IN FACT TIDELANDS OR SUBMERGED LANDS; AND THEREFORE IN FURTHERANCE OF A REASONABLE SETTLEMENT OF A HIGHLY DISPUTED SOVEREIGN RIGHTS CLAIM, SUCH RIGHTS AND INTERESTS SHALL BE FREED FROM THE PUBLIC TRUST UPON THE EXECUTION OF THE SETTLEMENT AGREEMENT BY ALL THE PARTIES AND RECORDATION IN ACCORDANCE WITH ITS TERMS, PROVIDED THAT SUCH AGREEMENT IS CONSUMMATED AS PROVIDED FOR AND WITHIN THE TIME SPECIFIED THEREIN.
7. APPROVE AND AUTHORIZE THE ACCEPTANCE AND RECORDATION OF A CONVEYANCE BY NATIVE SUN TO THE STATE OF ALL ITS RESPECTIVE RIGHT, TITLE AND INTEREST IN THE LAGOON PARCEL, AS DESCRIBED IN PARAGRAPH 3.2 OF THE SETTLEMENT AGREEMENT; AND FURTHER APPROVE AND AUTHORIZE THE EXECUTION OF TWO STATE PATENTS CONVEYING TO NATIVE SUN THE STATE'S RIGHTS, TITLE AND INTERESTS IN AND TO THE UPLAND PARCEL OF THE SUBJECT PROPERTY.
8. FIND THAT THE ESTABLISHMENT OF A PUBLIC ACCESS AND RECREATIONAL USE EASEMENT AREA, AS PROVIDED FOR IN THE SETTLEMENT AGREEMENT, IS A REASONABLE RESOLUTION OF THE SUBSTANTIAL CONTROVERSY BETWEEN THE PARTIES AS TO THE EXISTENCE, EXTENT AND THE BOUNDARIES OF THE IMPLIED DEDICATION EASEMENT AREA CLAIMED BY THE STATE.

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9. APPROVE AND AUTHORIZE THE ACCEPTANCE AND RECORDATION OF A CONVEYANCE OF THE PUBLIC ACCESS AND RECREATIONAL USE EASEMENT AREA TO THE STATE PURSUANT TO PARAGRAPH 4.2 OF THE SETTLEMENT AGREEMENT AND THE RELEASE OF IMPLIED DEDICATION CLAIMS ON THE REMAINDER OF THE SUBJECT PROPERTY BY THE STATE, PURSUANT TO PARAGRAPH 4.3 OF THE SETTLEMENT AGREEMENT.
10. AUTHORIZE THE ACCEPTANCE AND RECORDATION OF A CONVEYANCE OF A NON-EXCLUSIVE EASEMENT FOR USE OF THE STAIRWAY AT THE SOUTH END OF THE McMAHAN PROPERTY TO THE STATE, PURSUANT TO PARAGRAPH 4.4 OF THE SETTLEMENT AGREEMENT.
11. AUTHORIZE THE STAFF OF THE COMMISSION AND THE OFFICE OF THE ATTORNEY GENERAL TO TAKE ANY AND ALL FURTHER STEPS NECESSARY TO IMPLEMENT THE FOREGOING TRANSACTION, INCLUDING BUT NOT LIMITED TO THE EXECUTION OF DOCUMENTS AND APPEARANCE IN ANY LEGAL PROCEEDINGS CONCERNING THE SETTLEMENT AGREEMENT.

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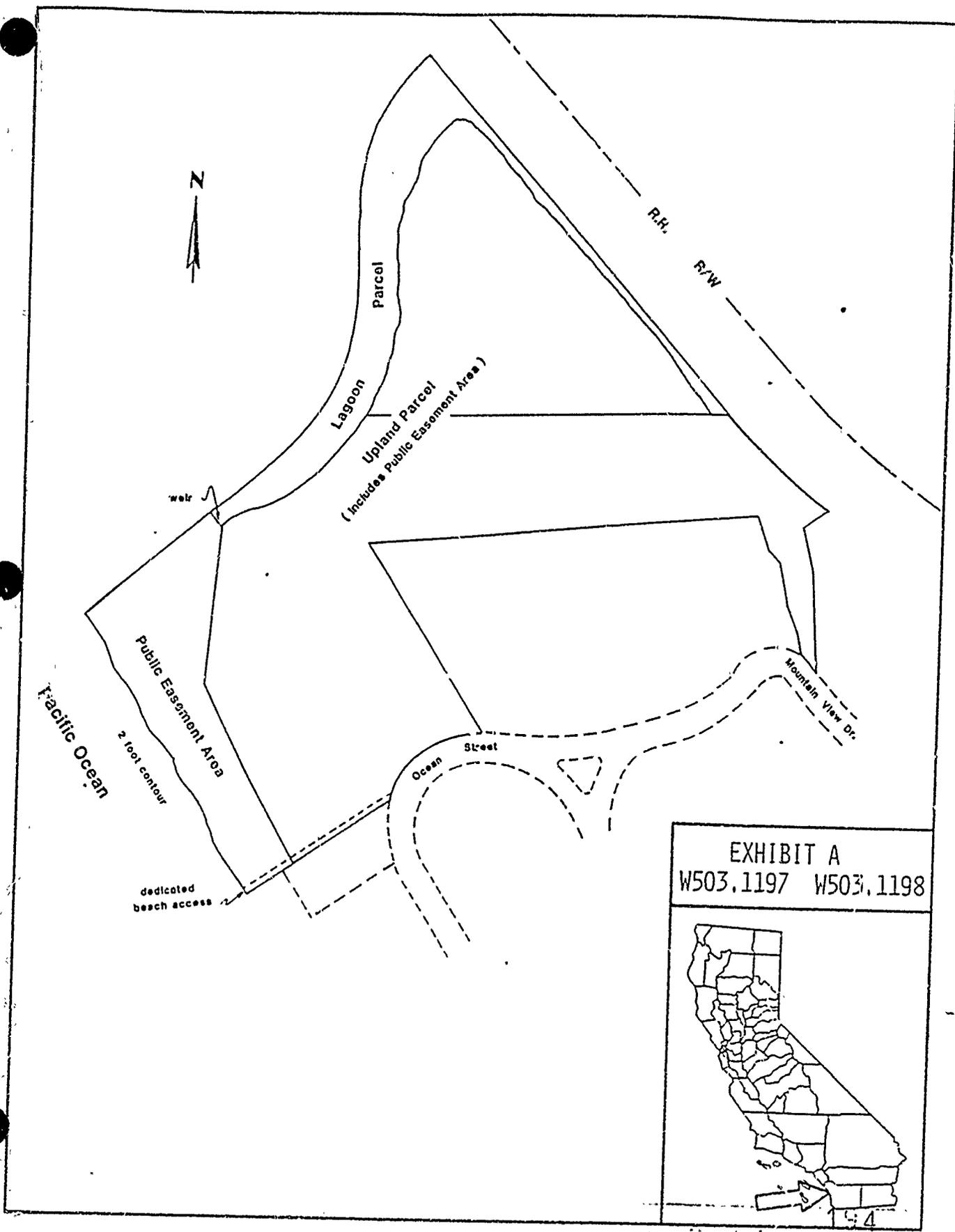


EXHIBIT A
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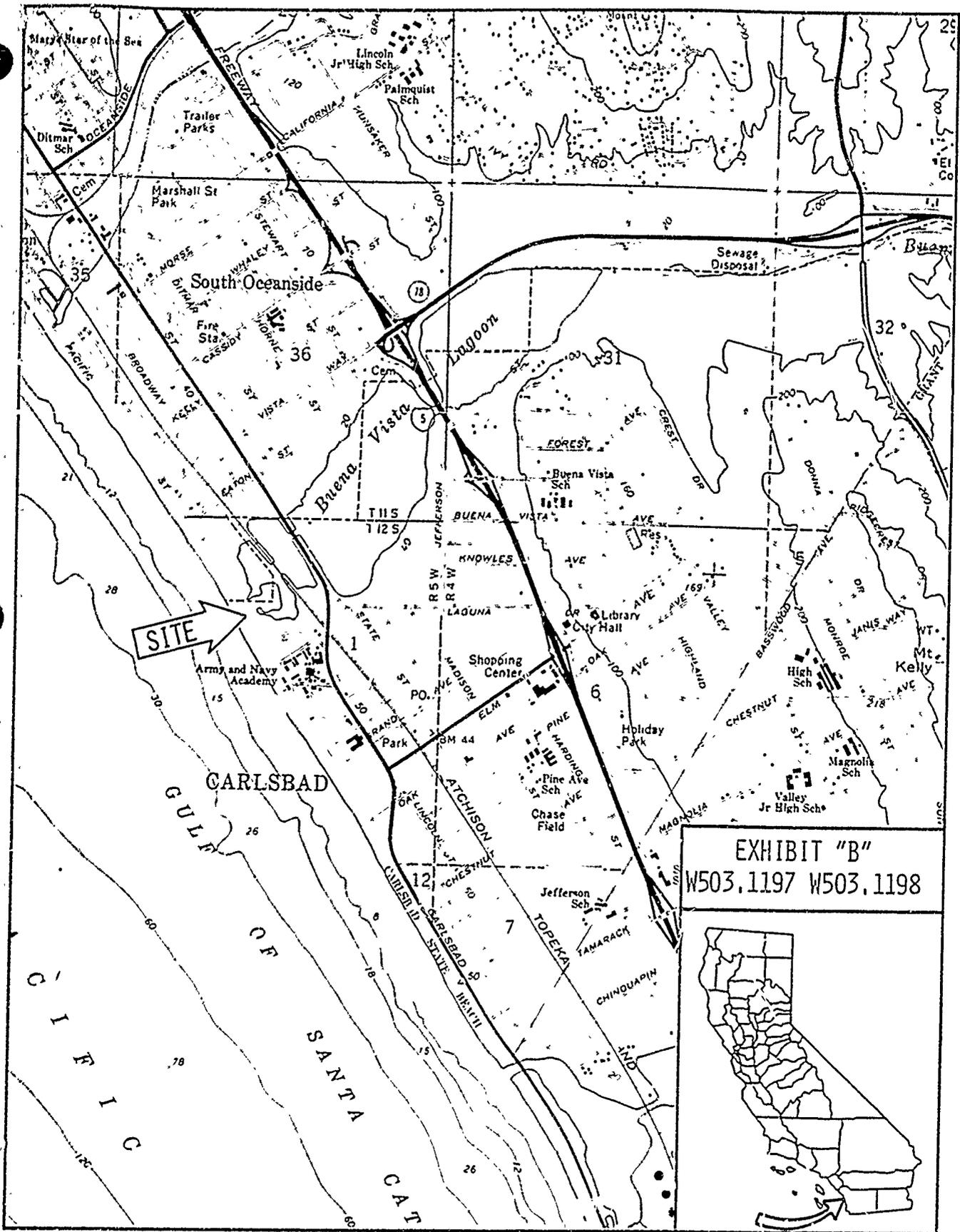


EXHIBIT "B"
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