

MINUTE ITEM

This Calendar Item No. ~~C70~~ was approved as Minute Item No. ~~70~~ by the California State Lands Commission by a vote of 3 to 0 at its 08/21/96 meeting.

**CALENDAR ITEM
C70**

A 32
S 14

08/21/96
W 503.1525
J. Barbieri
C. Fossum
M. McKown

**CONSIDER APPROVAL OF SETTLEMENT OF LITIGATION IN
NICKEL ENTERPRISES, ETC. ET AL. V. THE STATE OF CALIFORNIA, EX REL.
STATE LANDS COMMISSION, ET AL., KERN COUNTY SUPERIOR COURT
NO. 199557, INVOLVING LANDS IN AND ALONG THE KERN RIVER,
KERN COUNTY**

PARTIES: STATE OF CALIFORNIA
Acting By and through the California State Lands Commission

KERN RIVER PUBLIC ACCESS COMMITTEE
% Thomas Fallgatter
1605 "G" Street
Bakersfield, CA 93301

KERN RIVER FLY FISHERMEN, INC.
% Thomas Fallgatter
1605 "G" Street
Bakersfield, CA 93301

NICKEL ENTERPRISES, INC.
% Harmon Hitt
5039 Range Horse Lane
Rolling Hills Estates, CA 90274

BACKGROUND

In 1987 Nickel Enterprises filed a quiet title action to determine the ownership of the bed of a five-mile stretch of the Kern River (known as the "Rio Bravo Ranch") which begins at the mouth of the canyon and flows through property owned by the plaintiff George Nickel. The Kern River Public Access Committee and the Kern River Fly Fisherman, both local public interest groups, are also defendants in this action. After a lengthy trial, the trial court determined that:

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- (A) the Rio Bravo stretch was not navigable under the federal test for title and therefore Nickel was the owner of the riverbed;
- (B) the public had not acquired any right of access to or along the river under the doctrine of implied dedication;
- (C) the river was navigable under the state law of navigability and the public had an easement to use the river for navigation and related recreational purposes;
- (D) the state navigational easement extends to the waters of the river as they exist from time to time and to the high water mark during periods when the waters recede below the high water mark; and
- (E) the state navigational easement does not constitute a taking of property.

A second and third phases of the trial would be necessary to determine the methodology and location of the high water mark for the purposes of the state navigational easement.

SETTLEMENT TERMS

Following extended discussions and a court-supervised settlement conference, the parties (including the Kern River Public Access Committee) have agreed to a proposed settlement of the entire litigation. The settlement would be incorporated into a Stipulation and Judgment to be signed by the court and would provide as follows:

- (1) the parties would recognize that Nickel owns the bed of the Rio Bravo stretch of the river;
- (2) the parties would recognize that the public has no right of access to or along the river under a theory of implied dedication;
- (3) the parties would recognize that the public has the right to use the river for navigation and incidental uses, as it exists from time to time, pursuant to the state navigational easement;

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- (4) subject to the exceptions set forth in paragraph five, the high water mark for the purposes of the state navigational easement, when the river recedes below the high water mark, would be set at a line reflecting an agreed flow level, as more particularly set forth in the stipulation and its exhibits.
- (5) within the following locations in T.29 S., R. 29 E., M.D.M. there would be no high water mark established: on the left bank of the river within the western 1/2 of section 11, along lots 1-8 of Tract No. 4009 within sections 11 and 12, that portion of lot 9 of Tract No. 4179 located in sections 1 and 2, and along the right and left banks of the river within the western 1/2 of section 1 (with the exception of a U-shaped peninsula within section 1). In these areas the public would continue to have the right to exercise the state navigational easement within the river as it exists from time to time, and after 40 years the left bank of the river within the western 1/2 of section 11 would become subject to the stipulated ordinary high water mark as provided in paragraph (4) above;
- (6) Nickel would dedicate an easement for public recreational use along the river frontage owned by Nickel that is adjacent to upland property owned by Wells Fargo Bank;
- (7) Nickel's claim that the state navigational easement affected a taking of his property would be dismissed;
- (8) Nickel would pay the Access Committee \$52,000 in attorney fees; and
- (9) The stipulation would make explicit that the settlement is based on the facts of the case and is not intended to control the Commission's position in future cases.

SUMMARY

For the purposes of this settlement, the parties propose to accept and not appeal the trial court's ruling that the river is not navigable under the federal test, that it is navigable under the state test, and that the state's navigation easement does not affect a taking of property.

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This settlement essentially deals with two remaining issues: a) whether the public's right to exercise the state navigational easement extends only to the waters of the river as they exist from time to time (as provided in paragraphs (3) and (5) above) or whether (as the State contends and as described in paragraph (4) above) the public also may use the shore when the waters recede below the ordinary high water mark and b) the location of the ordinary high water mark.

In compromise of the first issue, the parties have agreed that the public may use both the waters of the river and the land below the high water mark on about 82% of the river's shoreline. On the other 18% of the shoreline (the portion adjacent to the areas where the Nickels own their houses), the public would have the right to use only the river as it exists from time to time. Given the circumstances of this case and the overall settlement of issues the parties feel that this is a fair compromise.

With regard to the second issue, the agreed upon high water mark reflects a compromise of the position that the parties would advocate should the issue go to trial. The compromise location of the high water mark is reasonable, because there are legal and factual uncertainties as to the actual location of the line that would make trial on the issue difficult and the outcome uncertain. In addition, there appears to be little significant practical difference between a high water mark established at the compromise location and one set at the location that the Commission would advocate at trial. Field measurements indicate that the horizontal difference in exposed shoreline between the two flows is usually less than five feet. In addition, much of the shoreline is impassable at most flows because of dense vegetation.

The settlement on balance would be fair, cost effective and in the public interest. Staff and the Office of the Attorney General recommend the Commission's approval.

AB 884: N/A

OTHER PERTINENT INFORMATION:

1. Pursuant to the Commission's delegation of authority and the State CEQA Guidelines (14 Cal. Code Regs. 15061), the staff has determined that this activity is exempt from the requirements of the CEQA as a statutorily exempt project. The project is exempt because it involves settlements of title and boundary problems.

Authority: Public Resources Code Section 21080.11

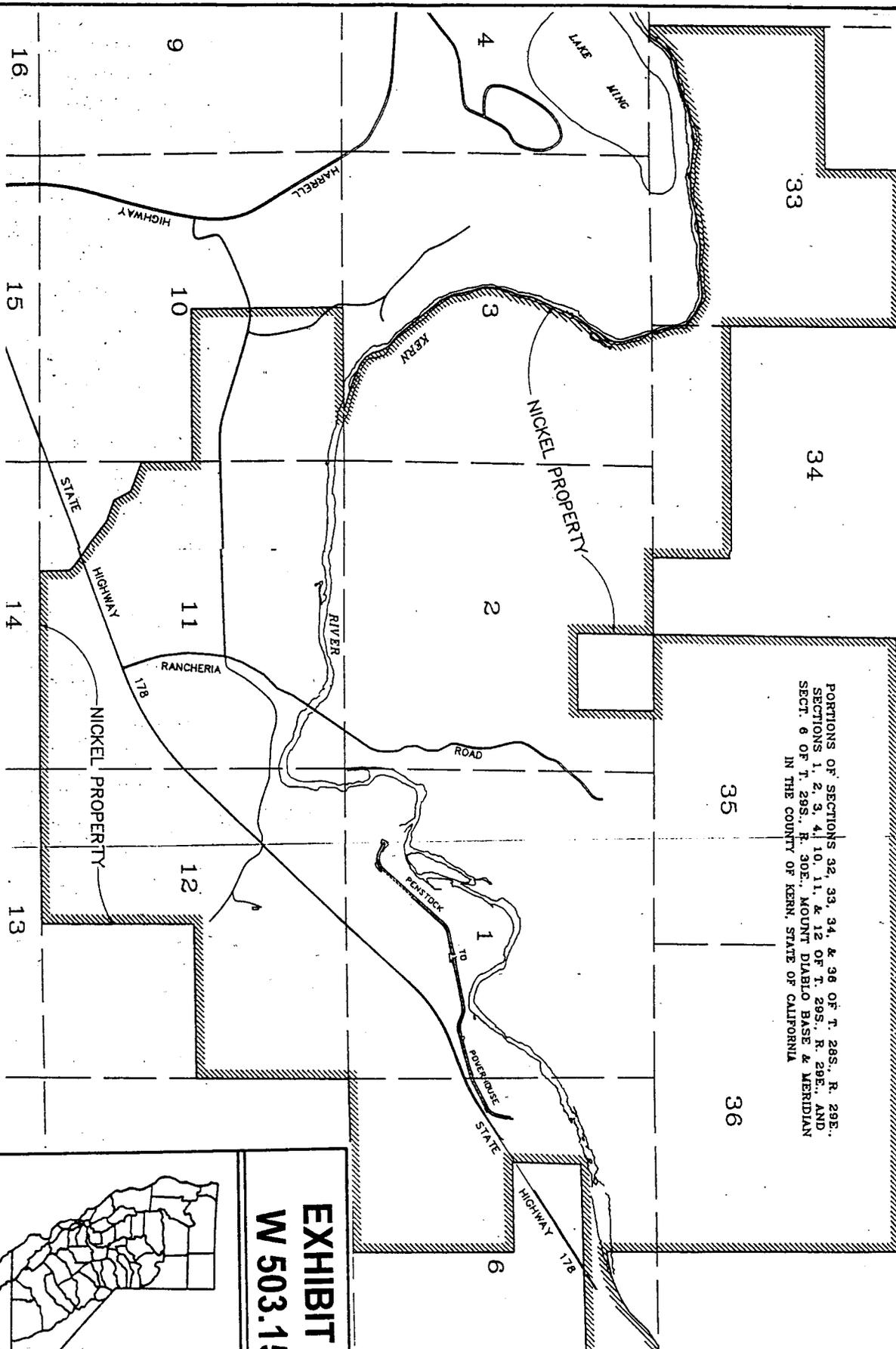
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EXHIBIT:

A. Site Map of the Litigation/Agreement Area.

IT IS RECOMMENDED THAT THE COMMISSION:

1. FIND THAT THE ACTIVITY IS EXEMPT FROM THE REQUIREMENTS OF THE CEQA PURSUANT TO 14 CAL. CODE REGS. 15061 AS A STATUTORILY EXEMPT PROJECT PURSUANT TO PUBLIC RESOURCES CODE SECTION 21080.11, SETTLEMENT OF TITLE AND BOUNDARY PROBLEMS.
2. APPROVE AND AUTHORIZE THE FILING ON BEHALF OF THE COMMISSION, THE STIPULATION FOR JUDGMENT AND JUDGMENT AGREED TO BY THE PARTIES TO THE ACTION ENTITLED NICKEL ENTERPRISES, ETC. ET AL. VS. THE STATE OF CALIFORNIA, EX REL. STATE LANDS COMMISSION; ET AL. KERN COUNTY SUPERIOR COURT NO. 199557 IN SUBSTANTIALLY THE FORM OF THE COPY OF SUCH PROPOSED STIPULATION AND PROPOSED JUDGMENT ON FILE WITH THE COMMISSION.
3. AUTHORIZE AND DIRECT THE STAFF OF THE STATE LANDS COMMISSION AND/OR THE CALIFORNIA ATTORNEY GENERAL TO TAKE ALL NECESSARY OR APPROPRIATE ACTION ON BEHALF OF THE STATE LANDS COMMISSION, INCLUDING THE EXECUTION, ACKNOWLEDGMENT, ACCEPTANCE, AND RECORDATION OF ALL DOCUMENTS THAT MAY BE NECESSARY OR CONVENIENT TO CARRY OUT THE SETTLEMENT OF THIS LITIGATION; AND TO APPEAR ON BEHALF OF THE COMMISSION IN ANY LEGAL PROCEEDINGS RELATING TO THE SUBJECT MATTER OF THE SETTLEMENT.



PORTIONS OF SECTIONS 32, 33, 34, & 36 OF T. 28S., R. 29E.,
 SECTIONS 1, 2, 3, 4, 10, 11, & 12 OF T. 29S., R. 29E., AND
 SECT. 6 OF T. 29S., R. 30E., MOUNT DIABLO BASE & MERIDIAN
 IN THE COUNTY OF KERN, STATE OF CALIFORNIA

EXHIBIT "A"
W 503.1525

