

CALENDAR ITEM

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10/22/09

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**CONSIDER MOST APPROPRIATE PUBLIC TRUST NEEDS AND USES AND EXERCISE THE PUBLIC TRUST EASEMENT INVOLVING LAND IN LAKE TAHOE AT BUCK'S BEACH (AKA SPEEDBOAT BEACH), AT PARCELS LOCATED BETWEEN 9898 AND 9950 LAKE STREET, EAST OF KINGS BEACH AND WEST OF THE CALIFORNIA/NEVADA BOUNDARY IN PLACER COUNTY; AUTHORIZE THE REMOVAL OF A FENCE WITHIN THE PUBLIC TRUST EASEMENT; AND COMPENSATE THE PROPERTY OWNER FOR THE VALUE OF ANY LAWFULLY PLACED IMPROVEMENT THAT IS REMOVED.**

**PROPOSED ACTION:**

Exercise of the State's retained property rights in the bed of Lake Tahoe involving the public trust easement existing in land lying between the elevations of 6,223 feet (Low Water Mark) and 6,228.75 feet (High Water Mark) Lake Tahoe Datum. The proposed Commission action would consider and determine the public's needs and uses of the easement and authorize the removal of a metal fence and compensate the property owner for its value, if it is determined by Commission staff that it is a lawful improvement. Authorize the Commission staff to take all actions necessary to implement the Commission's action.

**BACKGROUND:**

On five prior occasions the Commission has taken formal action to exercise the State's retained easement involving sovereign public trust lands in which the fee interest had been conveyed into private ownership. The first action was taken in 1975 when the Commission formally exercised the State's retained public trust easement rights over three parcels of land owned by Leslie Salt and CalTrans, consisting of approximately 220 acres in San Francisco Bay in Hayward, Alameda County that had been sold into private ownership in the 1870s (Minute Item 3, May 27, 1975). In 1976 the Commission formally exercised the State's public trust property interests over approximately 2000 acres of land, 566 acres of which were owned by the Morro Bay Land Company in Morro Bay, San Luis Obispo County, and had been sold into private ownership in 1885 and 1900 (Minute Item 19, March 25, 1976). In 1982 the Commission formally exercised the State's retained public trust easement interest over 160 acres of land owned by the Santa Fe Land Improvement Company in San Francisco Bay, Albany, Alameda County

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that had been sold into private ownership in the 1870s (Minute Item 3, October 28, 1982). In 1984 the Commission formally exercised the state's public trust interests over 1100 acres of land in San Rafael Bay, Marin County, portions of which had been sold into private ownership in the 1870s (Minute Item 11, March 3, 1984). In 1985 the Commission formally exercised the State's public trust property interests in approximately 1800 acres including approximately 300 acres of land owned by Santa Fe Land Improvement Company in San Francisco Bay, Albany, Alameda County that had been sold into private ownership in the 1870s (Minute Item 47, June 26, 1985).

Each time the Commission takes action to approve or reject a project it is exercising its authority and responsibility as trustee of the State's public trust lands as authorized by law (Public Resources Code Sections 6301 and 6216). The five above referenced actions, however, were in response to concerns raised by members of the public and organizations which sought to protect areas where the State had conveyed into private ownership portions of the bed of a navigable waterway, but retained an easement held by the State for public trust purposes. In each instance it was determined that there were threats of activities or development that would impact the public's trust needs and uses of those lands and that formal action by the Commission was necessary to protect the public's interest in the property. In each instance the Commission acted to prevent those activities that would interfere with the public's trust needs and uses by determining what needs and uses were consistent with the easement and preventing actions that would interfere with them. By doing so the Commission has protected thousands of acres of lands that are subject to the public trust easement but held in fee by private parties or other public entities.

State, federal and even the Common Law Courts of England have long acknowledged the unique character of sovereign public trust lands and the significant limits on the owner of an underlying fee interest. When the public's trust needs are determined by state or federal authorities exercising reserved powers to protect the public's interest, the fee interest, as the subservient estate to the trust easement's dominant character, must give way to the public's interest.<sup>1</sup> The federal government, acting through Congress, has authority to protect the nation's waterways through its powers granted by Article I, Section 8 (Commerce Clause). Likewise, the United States Supreme Court has ruled that each of the 50 United States holds its navigable and tidal waters as a sovereign trust for the public.<sup>2</sup> Public access and the right to fish are two constitutional

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<sup>1</sup> Lord and Chief Justice of the King's Bench, Sir Matthew Hale's *De Jure Maris*, pg 22; *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 457-459 (1892); *Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 163 (1897); *People v. California Fish Co.*, 166 Cal. 576, 597-599 (1913); *Newcomb v. City of Newport Beach*, 7 Cal. 2<sup>nd</sup> 393 (1936); *Marks v. Whitney*, 6 Cal 3d 251 (1971); and *City of Berkeley v. Superior Court*, 26 Cal 3d 515 (1980)

<sup>2</sup> *Martin v. Waddell*, 41 U.S. 367 (1842); *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 460 (1892).

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protections of public rights adopted by the People of California in 1879 and 1910, respectively.<sup>3</sup>

### **THE SUBJECT PROPERTY:**

This Item concerns approximately 1,100 lineal feet (2± acres) of shorezone land (also referred to as public trust easement or beach area) on the north side of Lake Tahoe between Brockway and Kings Beaches to the west, and the California/Nevada border to the east. The upland involves seven parcels of land as depicted on Exhibit A. Mr. and Mrs. Robert McNeil own the two parcels immediately adjacent to the state line and Mr. Marc P. Desautels, as trustee of the Desautels 2000 Trust (hereafter Desautels), owns two lots west of and adjacent to that of the McNeils, as well as the next parcel to the west, which is held in the name of Heigh Ho, LLC. West of the Heigh Ho property is a dedicated public street (Harbor Avenue) owned by Placer County. The North Tahoe Public Utility District (NTPUD) manages the street parcel for Placer County. Harbor Avenue provides public access via a staircase to the shore of the lake. The NTUPD has posted a sign at the entrance to the public access way (Exhibit B) that cites Placer County Ordinances prohibiting littering, dogs and other pets, glass containers, alcoholic beverages, and fires on the beach and limiting the hours of public use to day use only between 6am and 10pm. West of Harbor Avenue is the upland parcel owned, according to Placer County Assessor Records, by 9898 Lake LLC. This parcel was previously owned by a family trust, with Mark Howerth Paye, Trustee. The Commission issued a ten-year rent free recreational pier lease to the family trust, effective February 1, 2000 (PRC 4856.9). The terms of the lease prohibit transfer of the lease without the Commission's consent. Because an LLC does not qualify for rent free status, Commission staff will be notifying the Trust and 9898 Lake LLC of their respective obligations. The beach involving this parcel has been utilized by the public without incidents or conflicts with the upland owners being reported to this office.

### **LEGAL BACKGROUND:**

Upon its admission to the Union on September 9, 1850, the State of California took title in trust as a sovereign state, on behalf of its citizens, to the beds of all tidal and

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<sup>3</sup> **California Constitution, Article X, § 4**, formerly Article XV, §2: "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall always be attainable for the people thereof."

**California Constitution, Article I, § 25**: The people shall have the right to fish upon and from the public lands of the State and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; and no law shall ever be passed making it a crime for the people to enter upon the public lands within this state for the purpose of fishing in any water containing fish that have been planted therein by the State; provided, that the Legislature may by statute, provide for the season and the conditions under which the different species of fish may be taken."

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navigable waterways within its borders, not previously conveyed by the Spanish or Mexican government, to the ordinary high water mark<sup>4</sup>. In 1872 the California Legislature first adopted codified laws. Two pertinent code sections were amended in 1874 and have not been amended since. Civil Code § 670 states:

The state is the owner of all land below tide-water, and below ordinary high-water mark, bordering upon tidewater within the state; of all land below the water of a navigable lake or stream; of all property lawfully appropriated by it to its own use; of all property dedicated to the state; and all property of which there is no other owner.

Civil Code § 830 states:

Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tidewater, takes to the ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.

For most of the 20<sup>th</sup> century, Civil Code § 830 was assumed by most parties to indicate the boundary between public and private ownership along inland navigable waterways. Since its creation in 1938 the Commission and its staff have sought to protect and manage the State's property interests in the State's waterways including Lake Tahoe. In the early 1950s, a survey and investigation of Lake Tahoe was conducted by the Commission in order to try and bring all unpermitted structures under lease. Opposition from some littoral property owners to the State's attempts to manage the resource for the people of the state occurred and has continued since that time.

A 1964 formal Opinion of the Attorney General (43 Ops. Cal. Atty. Gen. 291, 293) stated that "Since the cases cited by the court held that the state owned all land below high water mark of tidal waters, and since the same principle is to be applied to all navigable water, it is clear that the state may claim land below high water mark in non-tidal navigable lakes and non-tidal navigable streams." While the opinion assumed the boundary on non-tidal waterways was at the low water mark as set forth in Civil Code § 830, the opinion goes on to note that the state acquired all lands below high water mark on navigable waters, whether tidal or non-tidal at statehood (citing *inter alia* the Submerged Lands Act, 67 Stats. 29 (1953) 43 U.S.C. §1301 (a) (1)) and that that title is held in trust for the People of the State.

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<sup>4</sup> *Barney v. Keokuk*, 94 U.S. 324, 338 (1876); *State of California v. Superior Court (Lyon)*, 29 Cal. 3d 210, 219.

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By the 1960s threats to the environmental and recreational values of Lake Tahoe became evident. In 1965 both the California and Nevada Legislatures created a Joint Study Committee to study Lake Tahoe and in 1967 enacted bills authorizing the creation of the Tahoe Regional Planning Agency (TRPA). In 1967 the Commission (represented by Lt. Governor, Robert H. Finch, Controller, Houston Flournoy and Governor Reagan's Director of Finance, Casper Weinberger, directed the Commission staff to seek legislation repealing the rent free status set forth in Public Resources Code Section 6503 for private piers owned by littoral property owners. In a letter to Assemblyman Eugene Chappie in 1968, Commission Chairman, Houston Flournoy stated the bill (AB 693 – Badham) was to remove inequities in the law and produce revenue for the State. The bill passed the Assembly, but died in the Senate.

Also in 1968 the Legislature enacted Public Resources Code § 6225 (which it amended in 1969). That code section directed the Commission to conduct research and investigations regarding the beaches at Lake Tahoe to determine what beaches might be county owned and, if so determined by a court, directed the county to convey those beaches to the State. That investigation produced a significant amount of new information regarding property title and boundary issues and revealed the existence of many unpermitted structures in the lake. One result of the investigation was that in 1970 the State of California began asserting that the State owned its non-tidal navigable waterways to the high water mark. Information from that investigation also noted the existence of “a very nice small cove area with a beach at the end of Harbor Avenue.” It also indicated that a wooden gate had been placed across Harbor Avenue *circa* 1970 or 1971, but that the beach had been used by the public for fishing and bathing for many years. The information from the investigation also included that a realtor, who had been in the area for 26 years, stated that the area had always been a public area, that the public had spread east and west of Harbor Avenue, that residents had chased members of the public off of the beach and had at times posted an armed guard. The investigation notes conclude that further consideration and study clarifying the public rights to the beach could prevent future conflicts, and that “there appears to be no problems arising from use of the area by the public at the present time.”

In 1974 the California Legislature adopted Public Resources Code §6312. This section codifies case law prohibiting the State from taking “possession of lawful improvements on validly patented tidelands or submerged lands without the tender of a fair and just compensation for such lawful improvements as may have been made in good faith by the grantee or patentee or his successors in interest....” (Exhibit D)

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In 1977, California Attorney, General Evelle J. Younger, in a letter addressed to the Commission's Executive Officer, set forth the rationale for the State's claim of ownership to high water. He acknowledged the issue before the courts was a difficult and controversial one, but also made clear that the enactment of Civil Code §830 contains "no granting language" and if it had it might have been struck down by the courts. That was the action taken by the United States Supreme Court, following the Illinois Legislature's grant of the lands underlying Lake Michigan fronting the City of Chicago, in *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 460 (1892). The Attorney General went on to cite the California Constitution's protections of public access to waterways as well as the congressional Act for the Admission of California Into the Union and numerous court cases affirming public access rights over both public and private lands involving waterways.

In 1981 the California Supreme Court in *State of California v. Superior Court of Lake County (Lyon)*, 29 Cal. 3d 210, 219, in a quiet title action, held that the shorezone area between high and low water on inland non-tidal waterways had been State owned upon admission to the Union in 1850, but the Court would give effect to Civil Code §830, in part due to administrative construction given to that section for nearly a century, with the practical affect being that of conveying the fee title to the adjacent property owners. The Court also held that §830 did not extinguish or abandon the public trust in the shorezone and that "the same incidents of the trust applicable to tidelands also applied to nontidal navigable waters and that the public's interest is not confined to the water, but extends to the bed of the water." *Lyon, supra* at 231. These rights include but are not limited to navigation, commerce, fishing and recreational uses. *Lyon, supra* at 230. In the companion case of *State of California, et al. v. Superior Court of Placer County (Fogerty I)*, 29 Cal 3d 240 (1981), the Court ruled against private parties' claims seeking declaratory relief, inverse condemnation and violation of their civil rights (42 U.S.C. §1983). The private parties alleged that they held a fee title absolute to low water at Lake Tahoe and the State had no property interest above low water. They also alleged estoppel against the State and that the boundary between private and public ownership was the "last natural" location of the low water mark. The Court ruled against these assertions as well.

The California Supreme Court decisions of *Lyon* and *Fogerty I*, along with their precedents<sup>5</sup> all clearly enunciated the authority of the State when acting to protect the public's interest in public trust lands that have been conveyed into private ownership. Also abundantly clear is that the State has the obligation to compensate the owner of the underlying fee title when the State exercises its authority over the easement and

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<sup>5</sup> *Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 163 (1897); *People v. California Fish Co.*, 166 Cal. 576, 597-599 (1913); *Newcomb v. City of Newport Beach*, 7 Cal. 2<sup>nd</sup> 393 (1936); *Marks v. Whitney*, 6 Cal 3d 251 (1971); and *City of Berkeley v. Superior Court*, 26 Cal 3d 515 (1980).

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removes a lawful improvement.<sup>6</sup> Specifically, the Supreme Court in *Fogerty I* at 249 stated as follows:

“We emphasize, as we did in *Lyon*, that these plaintiffs may use the shorezone for any purposes which are not incompatible with the public trust. Landowners who have previously constructed docks, piers and other structures in the shorezone may continue to use these facilities unless the state determines, in accordance with applicable law, that their continued existence is inconsistent with the reasonable needs of the trust. In that event, both statute and case law require that plaintiffs be compensated for the improvements they have constructed in the shorezone.”

**TRUST NEEDS AND USES:**

The subject property involves an area commonly referred to as “Buck’s Beach” or “Speedboat Beach” and is one of Lake Tahoe’s most scenic locales with sandy beaches and dramatic boulder outcroppings. The area is well known for its sandy bottom and is a popular swimming spot. On warm summer days the beach, westerly of the metal fence (Exhibit E) separating Harbor Avenue from the Heigh Ho LLC property, Commission staff have witnessed many members of the public enjoying the lake and beach/easement area, while relatively few if any of the public were observed venturing beyond the fence (Exhibit F) with its “subject to the control of owner” signs on the fence and the “no trespassing signs” placed on the beach area (Exhibit G).

For more than ten years the Commission’s staff has received periodic reports and complaints from members of the public of their being prevented access to those portions of the bed of the lake (beach below high water) easterly of the metal fence. Beginning this summer, the number of complaints increased. These complaints have included claims by a significant number of public users of harassment and intimidation by property owners or their agents resulting from the public’s attempts to access the public easement area between the fence and the California/Nevada boundary. Specifically the public has reported being confronted by individuals, including private security guards, who assert that the beach is private, and who in some instances have threatened them with arrest for trespass if they do not leave the beach.

There have been complaints made of verbal harassment, use of aggressive dogs and the photographing of individuals including small children, at close proximity, in purported attempts to drive them off the beach. “No Trespassing” signs on the beach and “Right to Pass by Permission and Subject to Control of Owner” signs (Exhibit G) posted on the metal fence discourage the public from going around the fence to access the easterly portion of the beach. In past years owners have made calls to the Placer County Sheriff’s Office in an attempt to have the public removed from the beach or cited for

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<sup>6</sup> Public Resources Code §6312 and *Fogerty I*, at 249; *Illinois Central* at 455 and *City of Berkeley* at 534.

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trespass. The Deputies have declined to do so when informed that the public has a right to be on the beach below the high water line. The elevation of high water and boundary of the public trust lands of 6228.75 feet (Lake Tahoe Datum) was established by the Court of Appeal in *Fogerty v State of California (Fogerty II)*, 187 Cal. App. 3d 224, 229 (1986).

Commission staff has made several contacts with Placer County staff, and met and discussed the situation on October 13, 2009 with representatives of the Placer County Counsel, Placer County Sheriff's Office and Placer County Property Management Division. Placer County Sheriff's Office indicated that there have been no crimes reported at the beach this year. They also indicated that in past years cable-tv wire was strung on a pier with warnings against electrocution and that caretakers or security guards reportedly kicked sand in the faces of people lying on the beach to intimidate them. Apparently this stopped after the Sheriff's department prevailed on the homeowners to have these actions curtailed. Finally the Sheriff's office representative indicated the belief that the removal of the fence would reduce a lot of issues.

As was previously stated, the Commission in its prior formal "trust exercises" took action due to evidence indicating a threat to public trust needs and uses of lands held in private ownership, that were subject to the public trust easement retained by the State and under the Commission's jurisdiction.<sup>7</sup> The Commission and its staff have both taken prior actions to remove fences or other obstructions limiting public use on waterways throughout the State. Other fences at Lake Tahoe placed below high water have been removed from the shorezone at the request of the Commission and also by action taken by the United States Army Corps of Engineers (USACOE) (Exhibit K) and local government.

Commission staff in 1998 and again this year requested that the existing metal fence, which is within the proposed trust exercise area, be removed (Exhibits H and I). This metal fence was constructed in 1997 or 1998 to replace a wooden fence that was located near boundary between the Heigh Ho LLC property and the Harbor Avenue parcel. The wooden fence existed at the time of the *Fogerty I* decision in 1981 and *Fogerty II* in 1986. The metal fence was the subject of an enforcement action by TRPA in 1998, and apparently resolved by TRPA staff, by lowering the fence 24 inches and shortening its length; no permit was issued (Exhibit J). Commission staff is informed by the USACOE office that no permit or even notice of the fence exists in their files. They also have informed staff that a USACOE permit was required to replace the wooden fence in 1997 or 1998. While a permit from Placer County may not have been required to construct or reconstruct the fence, it remains to be determined whether the fence can or will be permitted by the USACOE, because it extends below high water. The portion of the metal fence within the public trust easement extends waterward from high water

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<sup>7</sup> Public Resources Code §§ 6301 and 6216.

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41.7 ± feet. During times of high water at the lake, the fence acts as a complete barrier to navigation by kayak, canoe, raft and other shallow watercraft and other forms of passage (swimming, wading, walking) along the shorezone of the lake and the beach, and also interferes with fishing and other shorezone recreational activities (Exhibit L). When lake levels are above low water and below high water, the fence continues to act as a barrier to this area even though the public can at times walk around the fence by entering the water and wading between rock outcroppings. At lower water elevations the public can physically walk around the fence without entering the water to access the beach and lake (Exhibit M).

In 1998, following numerous complaints from the public and an investigation of the beach, Commission staff sent a letter to Desautels requesting that the metal fence be removed from public trust easement lands within the shorezone below high water (Exhibit H). Their attorney responded by indicating that he disagreed “with the Commission’s point of view as to the public trust easement as it affects fences and other shorezone facilities that were in place prior to the judicial review that led to the public trust’s creation. Should we ever be forced to litigate this issue, I remain confident that structures that have been in the lake for many decades (the fence in question goes back at least to the 1930s) are not in any way affected by the State claims reflected in the Lyon and Fogerty decisions.”

As result of investigating new complaints from the public this year, Commission staff determined that in addition to problems associated with the interference with public use of the public trust easement area, the lessees of two Commission leases in the area were in breach of their leases. On August 25, 2009 Commission staff wrote both Desautels and the McNeils, notifying them of the violation of covenants set forth in their rent free Recreational Pier Leases. DeSautels’ lease is for four mooring buoys. They had not properly obtained the Commission’s approval for transfer of two of the buoys when they conveyed their westerly parcel to Heigh Ho LLC in July 2007. They have subsequently resolved this matter and the Commission’s approval for amending their current lease and issuing a new revenue generating General Lease Recreational Use to Heigh Ho LLC is on the consent calendar for the October 22, 2009 meeting as Calendar Item C50. DeSautels also has an incomplete application with the Commission to obtain a rent free recreational pier lease to construct a new joint use (DeSautels and Heigh Ho LLC) pier fronting their lots. It is not expected that the Commission will consider the application until at least next year. The McNeils also reportedly complied with the staff’s August 25<sup>th</sup> letter regarding breach of their lease provisions and removed obstructions to public passage placed under their pier located within the public trust easement area. The August 25<sup>th</sup> staff letter to DeSautels once again informed them of the public’s right of use of the public easement area and requested that they remove the no trespassing signs and the metal fence from the public easement. The letter referred to the complaints from members of the public concerning interference with the public’s right of use of the beach below the high water mark. We have been informed that the signs

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placed on the beach have been removed, but not those on the fence. In the two letters the staff also offered to meet with Desautels and the McNeils to discuss the matter in the first week of September. On September 2, 2009, Mr. and Mrs. Desautels and their legal counsel met with Commission staff. Commission staff is scheduled to meet with the McNeils and/or their legal representatives on October 21, 2009.

At the meeting on September 2<sup>nd</sup>, the Desautels referred to a number of events they allege have occurred on the beach, stating that they considered the matter to be one of health, safety and protection of private property. They said that there had been drunken parties, that their property had been used as a public toilet and that there were acts of trespass, theft, vandalism, nudity, and lewdness, by members of the public. The Desautels also stated that the results from their numerous requests for action from the Placer County Sheriff's Department did not resolve their concerns.

At the meeting Commission staff reiterated its request that the property owners remove the fence and recognize the right of the public to access the beach. Commission staff offered to conduct a survey of the high water boundary of the public trust easement located at elevation 6228.75 feet (Lake Tahoe Datum), as set by the court, and to work with Desautels and other property owners to both locate and visibly demarcate the location of the high water elevation so that the public will know the limits of their access rights.<sup>8</sup> An additional benefit of the survey would be to answer the concerns of the Placer County Sheriff's Office, which has reportedly declined to act because it does not know where the high water boundary is located on the ground. Thus, not only would the public and property owners know the limits of access rights, but law enforcement would be able to make arrests or issue citations when they found members of the public violating laws or the property rights of property owners. Commission staff also has offered to work with the TRPA staff on the posting of signs indicating public and private areas. Finally, Commission staff acknowledged that access to and use of the shorezone area can and should be regulated by reasonable health and safety provisions relating to time, place and manner of use, such as those posted by the NTPUD (Exhibit B).

By letter dated September 16, 2009 Desautels' attorney informed staff that "we have begun the process of opening dialogue with the most likely stakeholders and agencies with authority to see our concerns can be addressed..." He informed staff that the "No Trespassing" signs have been removed, but made no mention of halting the confrontation with public beachgoers. Finally he made no commitment to remove the fence other than to say that removal would be considered in the context of the "greater problem". Since the meeting, Desautels has declined to remove the fence.

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<sup>8</sup> It should be noted that the USACOE and TRPA use the higher elevation for high water of 6229 feet (Lake Tahoe Datum) for their jurisdictional boundaries.

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The *Marks* decision (at 261) made clear that “in the absence of state or federal action the court may not bar members of the public from lawfully asserting or exercising public trust rights on these privately owned tidelands.” The court (at 259) also described those public trust rights to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing or other purposes.” Finally, the court stated (at 260) that “It is not necessary to here define precisely all the public uses which encumber tidelands.”

Commission staff believes the interference to the right of the public to access the public trust easement area in question has reached a critical point and that it is appropriate to take all action necessary to enforce that right. Therefore, it requests that the Commission make a finding that the fence is inconsistent with the public’s needs and use of the trust easement below high water at the subject property and authorize the Commission’s staff and Office of the Attorney General to take all steps necessary to remove the fence or cause it to be removed and to compensate the owners of the fee interest in the property, where the fence is located, for the value of the fence, if it is determined to be a lawful improvement, as required by Public Resources Code §6312 and case law.

**EXERCISE OF THE PUBLIC’S TRUST RIGHTS:**

As described above, the Commission has on five prior occasions, following public hearings, made findings of public needs and taken formal action to protect those needs involving lands held in private ownership, but which remained subject to the State’s retained public trust easement rights. The first two such formal exercises followed the unanimous decision of the California Supreme Court in *Marks v. Whitney*, 6 Cal. 3d 251 (1971). That case involved tidelands patented into private ownership in the 1800s and affirmed the legal precepts involving the respective private and public property rights set forth in prior decisions of the Court in *Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 163 (1897); *People v. California Fish Co.*, 166 Cal. 576, 597-599 (1913); *Newcomb v. City of Newport Beach*, 7 Cal. 2<sup>nd</sup> 393 (1936). In 1980 the California Supreme Court in *City of Berkeley v. Superior Court*, 26 Cal 3d 515 again addressed the issue of the State’s retained public trust rights in tide and submerged lands sold into private ownership in the 1800s (Board of Tide Land Commissioners lots). Three trust exercises by the Commission involving these BTLC lots followed.

In 1981, the California Supreme Court in *State of California v. Superior Court of Lake County (Lyon)*, 29 Cal. 3d 210 and *State of California, et al. v. Superior Court of Placer County (Fogerty I)*, 29 Cal 3d 240, addressed the issue of the title to lands between high and low water on nontidal inland navigable waterways based on California code sections adopted in 1872-1873. The Court concluded the same principles and property rights applied to these nontidal “shorezone” areas as applied to the lands conveyed by

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the State by tideland patents and Board of Tide Land Commissioners deeds in the 1870s.

The action proposed by this agenda item is the first formal trust exercise by the Commission involving the public trust easement on nontidal shorezone areas. The *Fogerty I* decision (at 245) referenced the recreational uses of “picknicking, hunting, fishing, hiking, birdwatching and nature study”. The *Marks* decision (at 261) made clear that “in the absence of state or federal action the court may not bar members of the public from lawfully asserting or exercising public trust rights on these privately owned tidelands.” The *Marks* court (at 259) also described those public trust rights to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing or other purposes.”

The proposed action is the first time the Commission is being asked to authorize “the tender of a just and fair compensation for such lawful improvements as may have been made in good faith by the grantee or patentee or his successors in interest pursuant to any express or implied license contained in the grant or patent” as set forth in Public Resources Code §6312. It is the Commission staff’s position that if the owner of the fee title lands on which the metal fence is located can document that they have obtained a USACOE permit for the fence or that no such permit is required the Commission must tender just and fair compensation for the lawful improvement when it is removed. In this eventuality, funds exist within the Land Bank Fund provided for in Public Resources Code §8610, *et seq.* Funds designated for improvement of real property for open space and public access have been deposited into the fund pursuant to Public Resources Code §8625(c) and would be used if necessary for removal and compensation to the owner. Staff therefore requests that the Commission, acting as the Land Bank trustee, authorize funds from the account, not to exceed \$10,000 without additional Commission approval, be available for costs of removal and tender of compensation to the rightful owner, and delegate to staff the authority to tender compensation should the property owner document that the fence has complied with USACOE requirements and is a lawful improvement. T

he California Environmental Quality Act (CEQA) Guidelines found in the California Code of Regulations provides a categorical exemption for removal of existing small structures, including fences (Title 14, California Code of Regulations, section 15301 (I) (4)).

The proposed Commission findings and authorizations also include a Resolution to be recorded in the Placer County Recorder’s Office documenting the Commission’s actions. The proposed action identifies the public’s trust needs and appropriate uses of water related recreation in the shorezone and determines that the existing improvements constructed on the beach by the property owners have not been determined to be a significant interference with trust needs and therefore may remain,

CALENDAR ITEM NO. 61 (CONT'D)

with the exception of the metal fence that blocks both navigation and other recreational use of the lake and its bed below high water. Finally, the proposed action will authorize Commission staff and the Office of the Attorney General to take all steps necessary or appropriate to implement the Commission's action, including appearance on behalf of the Commission in any litigation respecting the action taken by the Commission.

**OTHER PERTINENT INFORMATION:**

1. Pursuant to the Commission's delegation of authority and the State CEQA Guidelines (Title 14, California Code of Regulations, section 15061), the staff has determined that this activity is exempt from the requirements of the CEQA as a categorically exempt project. The project is exempt under Class 1, Existing Facilities; Title 14, California Code of Regulations, section 15301 (l)(4) .

Authority: Public Resources Code section 21084 and Title 14, California Code of Regulations, section 15300.

2. This activity involves lands identified as possessing significant environmental values pursuant to Public Resources Code sections 6370, *et seq.* Based upon the staff's consultation with the persons nominating such lands and through the CEQA review process, it is the staff's opinion that the project, as proposed, is consistent with its use classification.

**EXHIBITS:**

- A. Site and Location Map
- B. Photo of Placer County beach use restrictions
- C. Photo of wooden fence taken after *Fogerty I* and *II* decisions
- D. Public Resources Code §6312
- E. Photos of Buck's (Speedboat) Beach shorezone area westerly of metal fence
- F. Photo of Buck's (Speedboat) Beach shorezone area easterly of metal fence
- G. Photos of No Trespassing and Right to Pass signs
- H. 1998 Commission staff letter
- I. 2009 Commission staff letter
- J. TRPA note regarding fence construction
- K. United States Army Corps of Engineers correspondence
- L. Photo of fence at high water
- M. Photos of fence at low water
- N. Legal description of Public Trust Easement area
- O. Resolution of Exercise of Public Trust Easement Rights and Interests

**RECOMMENDED ACTION:**

IT IS RECOMMENDED THAT THE COMMISSION:

CALENDAR ITEM NO. 61 (CONT'D)

**CEQA FINDING:**

FIND THAT THE ACTIVITY IS EXEMPT FROM THE REQUIREMENTS OF THE CEQA PURSUANT TO TITLE 14, CALIFORNIA CODE OF REGULATIONS, SECTION 15061 AS A CATEGORICALLY EXEMPT PROJECT, CLASS 1, EXISTING FACILITIES; TITLE 14, CALIFORNIA CODE OF REGULATIONS, SECTION 15301(l)(4).

**SIGNIFICANT LANDS INVENTORY FINDING:**

FIND THAT THIS ACTIVITY IS CONSISTENT WITH THE USE CLASSIFICATION DESIGNATED BY THE COMMISSION FOR THE LAND PURSUANT TO PUBLIC RESOURCES CODE SECTIONS 6370, *ET SEQ.*

**RESOLUTION OF EXERCISE OF PUBLIC TRUST EASEMENT:**

ADOPT A RESOLUTION, AS SET FORTH IN EXHIBIT O, BEING AN EXERCISE OF THE STATE'S PUBLIC TRUST EASEMENT RIGHTS AND INTERESTS BY DETERMINING THE PUBLIC TRUST NEEDS AND APPROPRIATE USES WITHIN THE EASEMENT ON THOSE LANDS DESCRIBED IN EXHIBIT N AND AUTHORIZING THE REMOVAL OF AN EXISTING METAL FENCE LOCATED WITHIN THE EASEMENT; AUTHORIZE THE TENDER OF A FAIR AND JUST COMPENSATION FOR SUCH LAWFUL IMPROVEMENTS AS MAY HAVE BEEN MADE IN GOOD FAITH BY THE GRANTEE OR PATENTEE OR HIS SUCCESSORS IN INTEREST; AND DIRECTING THAT THE RESOLUTION BE RECORDED IN THE OFFICE OF THE RECORDER FOR PLACER COUNTY.

**AUTHORIZATION:**

1. AUTHORIZE STAFF OF THE COMMISSION TO TAKE ALL STEPS NECESSARY FOR THE REMOVAL OF THAT PORTION OF A FENCE WITHIN THE PUBLIC TRUST EASEMENT EXTENDING WATERWARD FROM THE ORDINARY HIGH WATER LINE OF ELEVATION 6228.75 FEET LAKE TAHOE DATUM AND LOCATED EITHER ALONG THE WESTERN BOUNDARY OF A PARCEL OF LAND OWNED BY HEIGH HO LLC OR WITHIN HARBOR AVENUE OWNED BY PLACER COUNTY.
2. AUTHORIZE THE EXPENDITURE OF FUNDS DEPOSITED IN THE LAND BANK FUND PURSUANT TO PUBLIC RESOURCES CODE SECTION 8625 (C), IN A SUM NOT TO EXCEED \$10,000.00 WITHOUT ADDITIONAL COMMISSION APPROVAL, FOR THE REMOVAL OF THE METAL FENCE WITHIN THE PUBLIC TRUST EASEMENT AND TENDER OF A FAIR AND JUST COMPENSATION FOR SUCH LAWFUL IMPROVEMENTS AS MAY HAVE BEEN MADE IN GOOD FAITH BY THE GRANTEE OR PATENTEE OR HIS

CALENDAR ITEM NO. **61** (CONT'D)

SUCCESSORS IN INTEREST INVOLVING THE PROPERTY FROM WHICH THE FENCE IS REMOVED.

3. AUTHORIZE COMMISSION STAFF AND REQUEST THE OFFICE OF THE ATTORNEY GENERAL TO TAKE ALL FURTHER STEPS NECESSARY OR APPROPRIATE TO IMPLEMENT THE COMMISSION'S ACTION, INCLUDING THE APPEARANCE ON BEHALF OF THE COMMISSION IN ANY LITIGATION RESPECTING THIS ITEM.