

MEETING
STATE OF CALIFORNIA
LANDS COMMISSION

SHERATON GRAND SACRAMENTO
1230 J STREET
SACRAMENTO, CALIFORNIA

THURSDAY, OCTOBER 22, 2009
10:07 A.M.

JAMES F. PETERS, CSR, RPR
CERTIFIED SHORTHAND REPORTER
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APPEARANCES

BOARD MEMBERS

Mr. John Garamendi, Lieutenant Governor, Chairperson

Mr. John Chiang, State Controller

Mr. Michael Genest, Director of Finance, represented by
Mr. Tom Sheehy

STAFF

Mr. Paul Thayer, Executive Officer

Mr. Curtis Fossum, Chief Counsel

Mr. Dave Brown, Chief, Administrative Services Division

Mr. Mario De Bernardo, Legislative Liaison

Ms. Barbara Dugal, Chief, Land Management Division

Ms. Kimberly Lunetta, Executive Assistant

ATTORNEY GENERAL'S OFFICE

Mr. Michael Crow, Deputy Attorney General

Mr. Daniel Siegel, Deputy Attorney General

ALSO PRESENT

Mr. Mark Gunderson, representing Marc DeSautels, Heigh Ho,
LLC

Ms. Ashley Hills

Ms. Janis Hills

Ms. Cheri Sugel

Mr. David Winkler

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1 start off by introducing the representatives from the
2 Attorney General's office who are here with us this
3 morning. There are different faces than Joe Rusconi or
4 Alan Hager. And on my far right is Dan Siegel and to his
5 left is Mike Crow. Both of them have extensive experience
6 in dealing with Public Trust matters. They're here
7 because Joe couldn't make it this morning, but we're in
8 good hands.

9 CHAIRPERSON GARAMENDI: Well, we'll cancel the
10 meeting.

11 (Laughter.)

12 EXECUTIVE OFFICER THAYER: I then wanted to move
13 on, as is our custom, during the EO Report and talk a
14 little bit about progress on resolving some of the
15 violations.

16 With respect to Jeanne Taylor, who owned the
17 floating house in the Delta, as we previously mentioned,
18 she has sold that house. And the one remaining thing that
19 she needs to do is to shorten the size of her dock, which
20 is over 100 feet long. And she is expected to begin the
21 application process with the Corps of Engineers, where she
22 needs to start, and the Central Valley Flood Protection
23 Board, formerly the Rec Board. And we expect that --
24 we've written her a letter as recently as October 8th
25 outlining this process to her.

1 The floating home that she used to own, as the
2 Lieutenant Governor knows, it's not far from his house,
3 it's still a problem. We continue to try and contact the
4 person who now owns it. We're not sure if he's living on
5 it or not. Our view is that if we're not able to resolve
6 this by our next regular meeting that we're likely to
7 bring a request for enforcement authorization to the
8 Commission in December.

9 CHAIRPERSON GARAMENDI: If you'd like I could
10 stop by tomorrow morning and drop of the enforcement
11 notice.

12 (Laughter.)

13 CHAIRPERSON GARAMENDI: I drove by it today, and
14 it's still where it shouldn't be.

15 EXECUTIVE OFFICER THAYER: There you go. Well,
16 we'll call on you. We won't be shy.

17 CHAIRPERSON GARAMENDI: Yeah, let me know and
18 I'll just drop it off one morning.

19 EXECUTIVE OFFICER THAYER: And then the other --
20 the next one is the Courtland docks. This is a very small
21 marina owned by Shawn Berrigan and Diane House. There
22 were a variety of different issues. The docks were in
23 poor shape, and the house extended out over Public Trust
24 Lands. Both those issues have been resolved. The only
25 thing left is to have them post the appropriate bond.

1 As it turns out, the two of them have both now
2 filed for bankruptcy. So we're not sure how this is going
3 to turn out, but we're pursuing it. This is the sort of
4 the thing we just need to keep dogging. And as we
5 reported at the last meeting, in her papers for bankruptcy
6 Diane House claimed that the boat there was her personal
7 residence. And as the Commission knows, residential use
8 of Public Trust Lands is prohibited. And her response
9 when we raised this issue with her is that she was merely
10 trying to come up with some mechanism to save her boat
11 from being seized in bankruptcy.

12 We hold her she couldn't have it both ways. And
13 we've notified the trustees in the bankruptcy proceeding
14 that this can't be considered a personal residence.

15 With respect to John Asuncion, we're still
16 working on the final complaint on that. We want to make
17 sure we've gotten it right. Our surveyors have been out
18 there before, but we've sent them out again. However, the
19 improvements that he has on State property there are also
20 a violation of BCDC requirements. There's no permit for
21 them. And on October 29th, BCDC will consider an
22 enforcement action of their own against him. So we're
23 continuing to work on that.

24 And then finally, as I think I told the
25 Commissioners individually, one of our counsel, Jennifer

1 Lucchesi, and I were down in Long Beach a week and a half
2 ago, and managed to serve process for the Spirit of
3 Sacramento. That's the ferry that's about two miles
4 downstream from downtown Sacramento and is half sunk. I
5 don't want to cast aspersions, but the AG's office had
6 hired two different process servers who couldn't find this
7 person. And so we went to Long Beach on this other matter
8 and went down to his tour boat there and he was sitting
9 there and he was served.

10 So at least that process will now move forward.

11 CHAIRPERSON GARAMENDI: That's kind of like the
12 little red hen, I'll do it myself.

13 (Laughter.)

14 EXECUTIVE OFFICER THAYER: Right, exactly. I
15 think Jennifer is going to open up a side business and be
16 paid more than the State can.

17 CHAIRPERSON GARAMENDI: Did you get processing
18 fees.

19 EXECUTIVE OFFICER THAYER: Right, exactly.

20 CHAIRPERSON GARAMENDI: Bill the Attorney
21 General.

22 EXECUTIVE OFFICER THAYER: We should consider
23 that. That's probably duties as assigned.

24 CHAIRPERSON GARAMENDI: Bill the Attorney General
25 and get the processing fees and help your budget.

1 EXECUTIVE OFFICER THAYER: Save them from having
2 to hire a third one.

3 And the final one that I wanted to point out was
4 the Hulbert situation. This is the overbuilt dock. It
5 was the boathouse that was built much larger than the
6 Commission had authorized. We're proceeding on that in a
7 legalistic sense. There's been depositions on both sides.
8 The Hulbert side has now asked for production of a variety
9 of documents and we have to respond next week. So I'm
10 sure there will be a lot more steps to go, but this is
11 moving along at a good pace, in terms of dealing with the
12 litigation there.

13 CHAIRPERSON GARAMENDI: This is the one here in
14 Sacramento?

15 EXECUTIVE OFFICER THAYER: It's just south, just
16 south. And again he had overbuilt and put the kitchenette
17 on top and the bathroom in there and that kind of thing.
18 I think the structure was eight feet higher than we'd
19 authorized.

20 So that concludes, unless there are any
21 questions, an update on the violations.

22 CHAIRPERSON GARAMENDI: I do have a question. We
23 were -- I don't think it was a violation. We were
24 pursuing this issue at Tahoe of another boat -- the dock
25 and boat house. I think that --

1 EXECUTIVE OFFICER THAYER: We'd had one earlier
2 this year, and that was all successfully resolved at the
3 last meeting. That they took down the second-story deck,
4 and you'll recall they had that thing out there without a
5 lease for decades. And they came in, and they applied for
6 the lease. They removed the railing and steps that made
7 it into a deck. And the Commission approved a lease for
8 that. So that's been a success story.

9 The next matter that I wanted to discuss is that
10 the Lieutenant Governor earlier this week or last week
11 asked for an update on our attempts to get more auditors
12 to look at whether or not we're getting all -- the State
13 is getting all the revenues it deserves from the leases
14 that we have.

15 The Commission had been directed -- well, several
16 years ago, we received approval for a limited term
17 additional auditor. Our auditors originally numbered
18 seven and we're down to three now because of various
19 cutbacks.

20 Back in, I think, 2007, we were authorized to
21 hire a temporary auditor for two years. And the
22 legislature, as part of that authorization, required the
23 Commission to produce a report on how efficient these
24 auditors were, what the gains were to the State in
25 additional revenues from the auditing.

1 The report was issued in 2008. And I think you
2 have copies up there, and there are copies out on the
3 table if people in the audience want to see it. And
4 basically the report concluded that the auditors returned
5 over a million dollars a piece in additional revenues.
6 And that this additional auditor specifically could be
7 credited with over a million dollars for having that
8 additional auditor. It was new money that wouldn't have
9 been produced if we only had three auditors.

10 The Lieutenant Governor asked that we update
11 this. And so we've done that. And so we have a staff
12 presentation on that, which talks about going back and
13 looking at what's happened since that report has come out.

14 And Dave Brown will give the report on that.

15 CHAIRPERSON GARAMENDI: Tom, heads up.

16 ACTING COMMISSIONER SHEEHY: I'm hanging on every
17 word, Lieutenant Governor.

18 (Laughter.)

19 (Thereupon an overhead presentation was
20 Presented as follows.)

21 ADMINISTRATIVE SERVICES DIVISION CHIEF BROWN:

22 Good morning, Mr. Chair and Commissioners. My
23 name is Dave Brown. I'm the Chief of the Administrative
24 and Information Services Division for the Commission. And
25 I will be giving you an update on the Mineral and Audit

1 Land Program.

2 As Paul said, we presented to you on December
3 3rd, 2007 Commission meeting a report that was later
4 submitted to the legislature.

5 --o0o--

6 ADMINISTRATIVE SERVICES DIVISION CHIEF BROWN:

7 This update will include the current condition of
8 the audit program, the contributions that the audit staff
9 continues to make and the continuing need for additional
10 auditors so we can audit leases that have not received
11 adequate examination in the past and add potential and
12 additional recoveries to the State.

13 Since 1997, the audit staff has been reduced to
14 seven auditors -- from seven auditors and one support
15 staff to three auditors and no support staff.

16 As a result, the projected audit frequency of the
17 largest oil and gas leases is now about every seven to
18 nine years. Such a frequency makes audits very difficult
19 due to the availability of records and knowledgeable
20 staff. Statute of limitation questions could also
21 jeopardize some of those claims.

22 A reasonable frequency would be three to a five
23 years. However, that would require at least two more
24 auditors and preferably three. As oil prices continue to
25 climb, and at the risk of loss State revenues will

1 continue to rise also.

2 As mentioned earlier, the Commission received and
3 approved a report on the audit program to the Joint
4 Legislative Budget Committee. That report demonstrated
5 the value of a two year limited term position added in
6 July 2006.

7 --o0o--

8 ADMINISTRATIVE SERVICES DIVISION CHIEF BROWN:

9 The findings in that report included that the
10 value of that additional auditor was approximately \$1.6
11 million per year. The additional auditor did not diminish
12 the recoveries on a per auditor basis. The audit findings
13 not only resulted in a immediate recoveries, but also
14 enhance the revenue flow in the future by correcting
15 reporting errors.

16 A timely audit program has a positive effect on
17 the conduct of other unaudited lessees as well. And as we
18 saw in the Hanson sand recovery, it demonstrated the value
19 of pursuing some of these unaudited leases.

20 The report further recommended that an additional
21 three auditors be added to meet these statutory
22 limitations. The current audit program conditions reveal
23 that 50 percent of the audit time is on the Long Beach
24 unit and Long Beach tidelands. And while this covers
25 about 70 percent of the Commission's total revenues, it

1 auditing that would result in a three- to five-year audit
2 frequency, an additional three auditors would be required.
3 The potential losses will only increase as oil prices
4 rise.

5 In conclusion, we continue to emphasize and
6 strongly believe that a higher level of staffing will
7 provide increased benefits to the State, and those
8 benefits will greatly outweigh the costs involved.

9 CHAIRPERSON GARAMENDI: Thank you very much for
10 your report. This has been a long time concern of this
11 commission. We recognize the difficult problems that the
12 State has. However, I would ask my fellow Commissioners
13 to approve a -- or to make a motion and then to approve a
14 letter to be sent to the Governor and the Department of
15 Finance and the appropriate legislative committees asking
16 for an immediate authorization to hire temporary auditors,
17 so that we can increase the revenue to the State of
18 California.

19 It's rather obvious from this report that there
20 are substantial revenues that can be achieved to help
21 mitigate the current crisis that the State has -- fiscal
22 crisis.

23 How many would you recommend we ask for?

24 ADMINISTRATIVE SERVICES DIVISION CHIEF BROWN: To
25 begin with at least two.

1 CHAIRPERSON GARAMENDI: At least two.

2 ADMINISTRATIVE SERVICES DIVISION CHIEF BROWN:

3 Um-hmm.

4 CHAIRPERSON GARAMENDI: What is the optimal
5 number?

6 ADMINISTRATIVE SERVICES DIVISION CHIEF BROWN:

7 Optimal, based on the schedule we provided, three
8 plus a support position.

9 CHAIRPERSON GARAMENDI: And what is the
10 approximate cost -- annual approximate cost for those
11 three plus one or two support --

12 ADMINISTRATIVE SERVICES DIVISION CHIEF BROWN:

13 About \$460,000.

14 CHAIRPERSON GARAMENDI: And the potential return?

15 ADMINISTRATIVE SERVICES DIVISION CHIEF BROWN:

16 Based on a per audit, maybe four and a half to
17 five million.

18 CHAIRPERSON GARAMENDI: So it's 10 to 1?

19 ADMINISTRATIVE SERVICES DIVISION CHIEF BROWN:

20 Um-hmm.

21 CHAIRPERSON GARAMENDI: Well, if it's the will of
22 the Commission, I would like our executive officer to
23 prepare a letter, coupled with the report, and a request
24 for three auditors, at least it would be temporary
25 positions. I assume that going for a permanent position

1 would be -- perhaps, we should ask for permanent positions
2 and settle for temporary.

3 ADMINISTRATIVE SERVICES DIVISION CHIEF BROWN:

4 Well, they'll be established temporary for the
5 first year.

6 CHAIRPERSON GARAMENDI: All right.

7 ADMINISTRATIVE SERVICES DIVISION CHIEF BROWN: By
8 procedure.

9 CHAIRPERSON GARAMENDI: Well, then let's
10 recommend perhaps two paragraphs, one a temporary one for
11 the remainder of this year and then ask for the permanent
12 positions beginning in the next budget year.

13 ADMINISTRATIVE SERVICES DIVISION CHIEF BROWN:

14 Very well.

15 CHAIRPERSON GARAMENDI: Paul, could you comment
16 on my suggestion and then the Commission can take this
17 issue up?

18 EXECUTIVE OFFICER THAYER: We'd be glad to do
19 that. I think because this is a non-noticed item, we
20 probably can't really go through the formal technicalities
21 of a motion. If you wanted to do that, we'd have to bring
22 it back. But certainly if it's the sense of the
23 Commission that it -- if the Commission is asking me to do
24 that as the Executive Officer, I'm happy to do that, and
25 it would be done in that guise.

1 CHAIRPERSON GARAMENDI: Well, perhaps to expedite
2 this and to not create uncomfortable positions amongst my
3 members, I could ask you to do that as Chair of the
4 Commission.

5 EXECUTIVE OFFICER THAYER: Certainly. And if
6 there were no objections from the Commissioners, I would
7 just go ahead and do that.

8 ACTING COMMISSIONER SHEEHY: Mr. Chairman, may I
9 comment?

10 CHAIRPERSON GARAMENDI: Yes.

11 ACTING COMMISSIONER SHEEHY: I have -- in my
12 role as a State Lands Commissioner, I have no objection at
13 all. And in my role as, taking that hat off for a minute,
14 as my role as Chief Deputy Director of the Department of
15 Finance, we always welcome communication from State
16 agencies and from government officials, elected officials
17 on suggestions on how the State can execute its programs
18 more efficiently and more effectively. So we'd be happy
19 to receive that letter.

20 I would just note that I think that your staff,
21 Mr. Thayer, already knows, which we have a timeline for
22 our budget process. This particular request coming at
23 this point doesn't -- won't dovetail in real nicely with
24 that, but it doesn't mean that it couldn't be considered
25 in the context of a spring letter in the May Revise.

1 After all, even if it was included in the
2 Governor's budget in January, it wouldn't take effect
3 until next summer. So I would urge you to consider that.

4 And I would only add that I'm delighted to see
5 that the Commission is still interested in getting more
6 revenues out of oil. And if they'd like to discuss that
7 further, I have some great ideas on how we can do that.

8 (Laughter.)

9 EXECUTIVE OFFICER THAYER: I understand.

10 CHAIRPERSON GARAMENDI: John.

11 COMMISSIONER CHIANG: I'm strongly supportive.
12 The State continues to experience significant
13 deterioration in our revenues. And we're going to have a
14 prolonged bumpy bottom in California. So to not revisit
15 the extended discussions about further cuts and increased
16 taxes, I think the State needs to be far more efficient in
17 identifying existing resources. And so I think this is
18 the appropriate path to take.

19 EXECUTIVE OFFICER THAYER: Well, I'll make sure
20 to get that letter together and get it off in the next
21 week.

22 The only other small points that I wanted to make
23 during the Executive Officer's report is to publicly
24 acknowledge the request from LADWP to remove the moat and
25 row project from consideration of the Commission at this

1 meeting. We received a fax letter on, I believe, on
2 Tuesday from David Freeman, the acting manager, requesting
3 this. And we generally accede to those requests.
4 Ultimately, of course, any project applicant can withdraw
5 an application if we don't want to accede to that request.
6 So it always make sense to go ahead and do that and give
7 them the additional time they've asked for.

8 The letter asks that the matter be reset for the
9 next Commission meeting. And in that regard, I wanted to
10 report, what I think you already know and certainly your
11 staff's do, that we're scheduled to have two meetings over
12 in -- or one meeting each in November and December. The
13 first one November 16th in Sacramento will focus
14 exclusively on the PG&E pipeline 406, 407. It's a gas
15 pipeline just north of Sacramento, and it's a special
16 meeting.

17 The next regularly scheduled meeting will be
18 December 17th in San Diego. And I would propose to put
19 the moat and row project on for that meeting for
20 Commission consideration if that works out for L.A.

21 CHAIRPERSON GARAMENDI: Paul, excuse me, Tom and
22 I were having a conversation on the previous item, the
23 audit.

24 The Commission has the power and the authority to
25 contract for services, do we not?

1 EXECUTIVE OFFICER THAYER: Yes, sir.

2 CHAIRPERSON GARAMENDI: Is it limited in a way
3 that would preclude us from contracting with someone to
4 audit these oil companies?

5 EXECUTIVE OFFICER THAYER: I would want to get
6 back to you on that, because there's some union and labor
7 contract issues here that we'd want to make sure we had
8 that ability.

9 CHAIRPERSON GARAMENDI: Let me make a suggestion.

10 EXECUTIVE OFFICER THAYER: Sure.

11 CHAIRPERSON GARAMENDI: And Tom and I were
12 talking about this just a moment ago. I'd like you to
13 pursue the notion of a contract with either individuals or
14 a company to audit the books of the oil and other of our
15 leasees. And that the recoveries would be used to pay for
16 their services. I think we want to be a little careful
17 here about how to draft such a contract. It may be --
18 this is not uncommon, at least at the federal government
19 level. But if you would look at that, and see if we
20 can -- the problem here is one of going through the rigor
21 of the hiring and permission from the normal State
22 procedures.

23 But if there's some way for the Commission itself
24 to contract with an auditor and to pay for that service,
25 either as a, for example, a percentage of the recoveries

1 or some other mechanism, it may be that we would expedite
2 this.

3 ACTING COMMISSIONER SHEEHY: Mr. Chairman, may I
4 comment?

5 CHAIRPERSON GARAMENDI: Yes, Tom.

6 ACTING COMMISSIONER SHEEHY: Of course, I agree
7 with everything the Chairman just said. And I just would
8 point out that this wouldn't -- the concept is not
9 precedent-setting. There are private sector companies out
10 there that specialize in government efficiency. That's
11 not an oxymoron.

12 And the way they get compensated is through
13 taking a percentage of the savings. And so they basically
14 offer their services as a no cost, you know, no downside
15 only upside.

16 Now, I've never heard of those firms working as
17 auditors on State mineral and oil leases. So in that
18 sense, it may be precedent setting, but the general
19 concept, in terms of that type of contract and how they
20 get compensated has been done in many states, including
21 California, and including State government.

22 So I think it is certainly worth looking into.
23 It may take some foot work and leg work in thinking a
24 little bit outside the box, but that might be a way to get
25 at this without having to go through what is clearly going

1 to be a very difficult legislative budget process
2 considering the State of our finances.

3 CHAIRPERSON GARAMENDI: Paul, I want to pick up
4 on your point about the union and State employees and the
5 like. I would see this as a temporary process, and then
6 next, either in -- I guess, it's going to have to be in
7 the budget change proposal for next year, that we then
8 bring these people -- we would then move to have permanent
9 staff on board.

10 If you could pursue that and look at the options
11 and the opportunities --

12 EXECUTIVE OFFICER THAYER: Sure.

13 CHAIRPERSON GARAMENDI: -- together with, you
14 know, short-term immediate and then a longer term program.

15 EXECUTIVE OFFICER THAYER: And I will do that and
16 I will get back to the Commission's offices either through
17 Email or at the next Commission meeting.

18 CHAIRPERSON GARAMENDI: As appropriate.

19 Thank you very much.

20 EXECUTIVE OFFICER THAYER: Sure.

21 CHAIRPERSON GARAMENDI: Please continue on with
22 your report.

23 EXECUTIVE OFFICER THAYER: Well, that essentially
24 concludes the report. As I say, the next two Commission
25 meetings are to deal with the PG&E pipeline, November 16th

1 in Sacramento. And then a general Commission meeting
2 December 17th in San Diego.

3 And that concludes the Executive Officer's
4 report.

5 CHAIRPERSON GARAMENDI: Very good.

6 Thank you very much, Paul.

7 The next order of business is the consent
8 calendar. Paul, if you would give us the items that are
9 to be included in this, and then the Commissioners, if you
10 have -- if there's any that -- any of the Commissioners
11 that would like to remove a consent item, it would be
12 appropriate following your comments, and if there's
13 anybody in the audience that would like to comment on any
14 of this.

15 EXECUTIVE OFFICER THAYER: Calendar Item 22, we'd
16 like to remove from the consent calendar and to have it
17 heard at a succeeding Commission meeting.

18 And then calendar Item 27 we've received an
19 opposition letter. We don't think that the person who
20 wrote that is here today, but by our rules of only putting
21 matters on consent where there's no opposition, we feel it
22 appropriate to remove that. And what we propose to do is
23 just -- we think the presentation can be brief. We'd also
24 like to make a staff amendment to the recommendation as
25 part of that presentation. We can get that out of the way

1 right after the consent calendar is adopted.

2 CHAIRPERSON GARAMENDI: Very good. And there is
3 an individual in the audience that would like to comment
4 on that also, if it was removed, and it has been removed.
5 So Item 22 and 27 are removed?

6 EXECUTIVE OFFICER THAYER: Yes.

7 CHAIRPERSON GARAMENDI: Any others?

8 The consent calendar is before the Commission.
9 Do I have a motion?

10 COMMISSIONER CHIANG: Move the remainder.

11 ACTING COMMISSIONER SHEEHY: Second.

12 CHAIRPERSON GARAMENDI: We have a motion?
13 Any objection?

14 No objections. Unanimous vote on the consent
15 calendar.

16 Paul, if you'd like to take up Item 27.

17 EXECUTIVE OFFICER THAYER: Thank you. Item 27
18 involves a lease for a sea wall or an improvement to a sea
19 wall in Solano Beach. And Barbara Dugal, who's Chief of
20 the Land Management Division, will give the staff
21 presentation.

22 LAND MANAGEMENT DIVISION CHIEF DUGAL: Good
23 morning, Mr. Chairman and Commissioners. For the record,
24 my name is Barbara Dugal. And I am the Chief of the Land
25 Management Division. And calendar Item 27 involves

1 staff's recommendation for the issuance of a general lease
2 protective structure use.

3 It's for the construction repair of sea wall down
4 in Solano Beach in San Diego county. The Commission first
5 approved a lease for this sea wall back in 1994. At the
6 same time, the Commission also approved a compromise title
7 settlement agreement with the then upland property owner.
8 However, that agreement was never executed by the parties.

9 What we have before you today is again the
10 issuance of a new lease, a ten-year lease for the sea
11 wall. And Surfriders has submitted objections to the
12 issuance of a lease based on basically two accounts. One
13 is that they don't believe that there's a public benefit
14 that's been derived here.

15 And staff has looked at this, and based on our
16 review, we believe that there is a minor public benefit
17 that the public will be receiving, in that it will provide
18 some stabilization of the bluff base. But we also realize
19 that there is a major private benefit to the upland
20 property owner.

21 Another item in the Surfrider's Email as to
22 asking for denial of the lease, is that they don't believe
23 that the revenue should go to the State. That the revenue
24 should be used to offset mitigation. And the Coastal
25 Commission has secured funds for sand replenishment in the

1 amount of \$15,000.

2 And so staff would recommend that you approve the
3 lease that's before you today with the augmentation that
4 Paul mentioned earlier. And that is that in the event
5 that upon staff's review and review of the as-builts for
6 the seawall, and upon staff's concurrence that if any
7 portion of the sea wall as it's constructed is it not
8 located on State lands, then the rent would be
9 proportionately reduced based on that percentage.

10 However, if it's found, based on a review of
11 those as-built drawings, that any of the sea wall is not
12 covered under the lease, then the applicant would have to
13 come in for an amendment to that lease to get that
14 additional area under lease.

15 So is there's any questions?

16 CHAIRPERSON GARAMENDI: I think Mr. Winkler is
17 here and would like to comment.

18 MR. WINKLER: Good morning, commissioners. My
19 name is David Winkler. I'm the owner of the property
20 that's requesting the land lease.

21 I had submitted to you a document that addresses
22 the benefits of sea walls. And hopefully you got that,
23 along with a card attached to it that looks something like
24 this, that talks about the City of Solano Beach urging
25 people to go nowhere near these bluffs. Five people have

1 been killed since 1995 in the north San Diego county area.

2 So we think there's a real safety issue and that
3 sea walls help to eliminate that. There have been no
4 deaths where sea walls have been built. The city of
5 Solano Beach itself holds a life guard program in front of
6 a sea wall, not where there are no sea walls.

7 So there's a real problem with the lack of safety
8 and then the increase in safety at tremendous costs to
9 homeowners, who will spend upwards of a half a million
10 dollars for 50 feet of sea wall, which not only, granted,
11 protects the property, but also ultimately protects city
12 infrastructure, and all the utilities, roads, sidewalks,
13 et cetera.

14 So we're saving the city that cost. The city's
15 own analyst said that the city is getting a free ride on
16 the homeowner's backs. And I think in the past, the city
17 also has recognized increased revenues due to higher
18 property taxes, as well as increased tourism, et cetera.

19 So considering that and that the homeowners are
20 really not responsible for the lack of upland sand supply,
21 we think there are a whole lot of public benefits. And
22 I'm sort of glossing over this memo that I gave to you,
23 but hopefully you'll introduce it in the record and
24 consider all of the benefits, because I think they're
25 substantial.

1 I would rather not build a sea wall, but my house
2 is in jeopardy and the City of Solano Beach unanimously
3 voted in favor of this, as did the Coastal Commission.

4 With respect to staff's recommendation, I
5 completely support it. The only thing I would modify is
6 whether the land area goes up or down. In order to save
7 you the time of having to hear this again, is to just
8 adjust the land lease rate on a pro rata basis. So if
9 it's more square footage, which I don't think it will be,
10 because I made a real effort to pull the sea wall back
11 onto my property. And it appears that we've been able to
12 eliminate 60 percent, which -- I'm sorry, 60 square feet,
13 which is a significant percentage of the area to be
14 occupied. It's minimal and again it's in a very hazardous
15 area. So I'm happy to answer any questions, if I can.

16 CHAIRPERSON GARAMENDI: Tom.

17 ACTING COMMISSIONER SHEEHY: Quick question.
18 Thank you for coming to Sacramento today, Mr. Winkler.

19 I don't understand this wave of opposition from
20 the Surfriders. What is it they don't like about the sea
21 wall? How does it affect their surfing?

22 MR. WINKLER: Well, to quote one of them, "I
23 don't like sitting on my surf board and looking at sea
24 walls."

25 ACTING COMMISSIONER SHEEHY: So this is a visual

1 issue for them? I mean, this doesn't impede their ability
2 to ride the waves in any way.

3 MR. WINKLER: Not at all. And frankly, a lot of
4 money is spent to color and contour the walls, so that
5 they blend in quite well. And you would potentially be
6 hard pressed in some instances to tell the differences
7 between the natural bluff and the sea wall.

8 ACTING COMMISSIONER SHEEHY: Thank you.

9 CHAIRPERSON GARAMENDI: Paul.

10 EXECUTIVE OFFICER THAYER: There are other issues
11 that are raised when this goes to the Coastal Commission
12 and elsewhere. And one of them is -- in general, this
13 project obviously does not extend very far out onto the
14 beach at all. It has a very small impact on Public Trust
15 Lands.

16 But that's not always the case with some of the
17 sea walls. And I think the Surfriders believe that if
18 Public Trust Land, which is used by surfers and other
19 members of the public recreating is used to protect
20 private property, then there's a loss. And so they
21 question very closely projects like this, because of that
22 impact to the public.

23 The other element and --

24 ACTING COMMISSIONER SHEEHY: Yeah, but Mr.
25 Thayer, wouldn't the push-back on that be if there's a

1 collapse of one of these bluffs and there's members of the
2 public nearby they're going to get killed.

3 EXECUTIVE OFFICER THAYER: Certainly.

4 ACTING COMMISSIONER SHEEHY: And to the extent
5 that this helps prevent that, that adds to the Public
6 Trust value of the State tidelands.

7 EXECUTIVE OFFICER THAYER: Right. And certainly
8 staff agrees with that, to the extent that we were
9 recommending a lease rate, which is reduced by a third
10 because of that public benefit. So I'm not trying to
11 represent what I'm saying as just being the staff's
12 position, but when you asked what the issues were that
13 were raised more generally, there's the impact generally
14 from sea walls on the public use of the beaches.

15 And the other one, which Mr. Winkler actually
16 raised in his letter is that there's at least some
17 contribution to the beach. He alleges that it's five
18 percent -- some studies say more, some say less -- from
19 the sand that would come from these bluffs. So in a
20 natural condition, if you didn't put a sea wall in there,
21 they occasionally collapse. Sometimes they get people.

22 But the point is you're interfering with the
23 natural process in reducing the size of the beach by
24 preventing that from happening. Now, there's again good
25 public policy reasons for doing that, in terms of saving

1 lives. And there's also, of course, a private benefit
2 because people's houses are saved by doing that.

3 But it has an impact on the amount of sand that's
4 on the beach. So those are kind of the two issues that
5 I've heard and probably Mr. Winkler has heard a lot of
6 too.

7 MR. WINKLER: If you don't mind, I'd like to just
8 respond quickly. All people that built sea walls have to
9 pay a sand mitigation fee the replenishes the amount of
10 sand that is held back. Most oceanographers estimate that
11 the bluffs supply two to five percent of the sand needed
12 for a healthy beach.

13 So with current erosion as well as deprivation of
14 upland sources and global warming, which may cause sea
15 level rise, most predict that without substantial
16 replenishment and retention of sand, that there will be no
17 beach. It's unfortunate, but at least we're contributing
18 to a fund that will result in significant sand
19 replenishment projects.

20 So I don't think there's any loss of use. And
21 actually one of these deaths happened 30 feet out from the
22 face of the bluff. And when you consider the relatively
23 small footprint of a sea wall, you're actually causing a
24 significant net increase in the amount of usable beach.
25 So I would argue it's the complete opposite. And, in

1 fact, my memo encourages not to charge any rent. But that
2 said, I'm happy to pay the amount that the staff's
3 recommending subject to that pro rata adjustment for the
4 actual footprint.

5 EXECUTIVE OFFICER THAYER: And in response to Mr.
6 Winkler's suggestion, yes, I think this makes sense. Why
7 don't we just say the staff's recommendation would be that
8 if further surveys, especially in the as-built condition,
9 which was the actual occupation of our land show a
10 decrease down to zero, or an increase of up to twice the
11 size, that we will accommodate that through a pro rata
12 change in the rent. I'd say if the increase were more
13 than 100 percent, then maybe we'd want to bring it back.

14 Staff would normally say this should come back to
15 the Commission. It's up to you to decide these things.
16 But because we're only starting with a base of 120 square
17 feet, we're talking about a fairly small amount and I
18 think it would be better to handle it administratively.

19 ACTING COMMISSIONER SHEEHY: Mr. Chairman, may I
20 make a motion?

21 Is it an appropriate time for a motion?

22 CHAIRPERSON GARAMENDI: Let me just ask a
23 question. The Coastal Commission has approved this
24 project?

25 EXECUTIVE OFFICER THAYER: Yes, sir, it has, and

1 imposed the sand mitigation fee that Mr. Winkler
2 references.

3 CHAIRPERSON GARAMENDI: Okay. Then we have a
4 modification to the original proposal for the lease.
5 Paul, could you just quickly review the modifications, and
6 then we'll take the motion.

7 EXECUTIVE OFFICER THAYER: Certainly. The
8 original lease contemplates renting 120 square feet of
9 Public Trust Lands for the sea wall at a cost of \$900 a
10 year. The amendment would say that this would -- the
11 amount of the rent would be reduced on a pro rata basis
12 based on a final survey agreed to by staff, which shows an
13 increase or decrease of the amount of square feet that are
14 occupied by the sea wall with a sidebar that if that
15 increases more than 120 -- an additional 120 square feet
16 that it would be brought back to the Commission.

17 CHAIRPERSON GARAMENDI: Tom, do you have a
18 motion?

19 ACTING COMMISSIONER SHEEHY: I would move
20 approval of the staff recommendation on Item number 27 as
21 amended by Mr. Thayer.

22 CHAIRPERSON GARAMENDI: Do we have a second?

23 COMMISSIONER CHIANG: Second.

24 CHAIRPERSON GARAMENDI: We have a motion and a
25 second. Without objection, it will be unanimous.

1 So done.

2 MR. WINKLER: Thank you.

3 CHAIRPERSON GARAMENDI: Moving along here, Paul.

4 EXECUTIVE OFFICER THAYER: This bring us to the
5 regular Calendar. And the first item up is Item 59. This
6 is a report by our legislative liaison, Mario De Bernardo,
7 who will talk about the results of this last legislative
8 session and recommend that the Commission sponsor three
9 new pieces of legislation.

10 LEGISLATIVE LIAISON De BERNARDO: Good morning,
11 Mr. Chair, Commissioners. My name is Mario De Bernardo,
12 as Mr. Thayer stated. I have a three slide presentation,
13 and I'll try to keep this quick.

14 (Thereupon an overhead presentation was
15 Presented as follows.)

16 LEGISLATIVE LIAISON De BERNARDO: So as stated
17 the first part of my presentation, I will give a quick
18 status update on some of the bills that staff has followed
19 this year and then I will present legislative proposals
20 for the upcoming legislative year.

21 As you can see, the first four items, as
22 indicated by the third column, are four bills that the
23 Commission voted to sponsor last January. The first bill,
24 AB 248, is regarding ballast water. It allows the
25 Commission to collect information on treatment systems on

1 vessels just in time for the first implementation date of
2 our ballast water discharge schedule that begins January
3 1st.

4 And that bill was signed by the Governor
5 recently. And it also gives the Commission the authority
6 to, but through the rule-making process, request
7 additional information from vessel operators, so that we
8 don't have to go through the legislative process again,
9 when we need additional information.

10 The Pacific Merchant Shipping Association was
11 helpful in supporting this bill and sending a letter to
12 the Governor.

13 Unfortunately, the next two bills were vetoed.
14 SB 459 was regarding abandoned vessels. It was going to
15 give the Commission the authority to administratively
16 address the problem with abandoned vessels, trespassing
17 vessels, and trespassing buoys. It was vetoed. I could
18 go into the speculation as to why it was vetoed. The veto
19 message cites hidden implementation costs.

20 We think that there is a way to fund this sort of
21 administrative action through ship salvors, TRPA is a
22 potential source, federal funding. So we may pursue this
23 in the future, but there's no plans immediately.

24 AB 368 was a bill that would have required
25 lessees to quitclaim their oil and gas or mineral leases

1 after reclamation was completed and approved by the
2 Commission. Currently, the statute states that a lessee
3 can quitclaim their lease at any time. And currently, we
4 have two situations where lessees have quitclaimed their
5 leases before reclamation, and as the reclamation period
6 progresses were unable to do anything with this land and
7 they're not paying rent or carrying insurance, as far as I
8 know. And it was vetoed as well, two weeks ago.

9 The fourth bill there is --

10 CHAIRPERSON GARAMENDI: What was the veto
11 message?

12 LEGISLATIVE LIAISON De BERNARDO: The veto
13 message was that it wasn't -- there was no indication that
14 this was a widespread problem.

15 So the fourth bill is a --

16 CHAIRPERSON GARAMENDI: Excuse me?

17 LEGISLATIVE LIAISON De BERNARDO: Yes.

18 CHAIRPERSON GARAMENDI: Does the State have to
19 accept a quitclaim?

20 I've got three lawyers down there.

21 CHIEF COUNSEL FOSSUM: That's certainly the
22 position that the mineral lessees take. There is a
23 significant question in that regard. They have not been
24 paying rent. These few individuals who have mining
25 operations have not been paying rent since then. That's

1 why we felt that it was appropriate to make it clear in
2 the legislation, that until they left -- had reclaimed the
3 premises and left the property, that they were still under
4 lease. But there is an argument to be made that they are
5 in holdover status and that is an argument.

6 LEGISLATIVE LIAISON De BERNARDO: The statute
7 expressly states that a lessee can quitclaim at any time.
8 And that language is reflected in their leases.

9 CHIEF COUNSEL FOSSUM: And so their legal
10 position is that their responsibility ceased at that
11 point.

12 CHAIRPERSON GARAMENDI: If there is
13 contamination, the responsibility remains even though the
14 ownership may have changed, correct?

15 CHIEF COUNSEL FOSSUM: Under certain laws, that's
16 absolutely right. But the Commission can also be, as a
17 property owner, be held liable for activities that take
18 place on its property. So there's problems associated
19 with that.

20 CHAIRPERSON GARAMENDI: Thank you.

21 EXECUTIVE OFFICER THAYER: The other thing that
22 we'd like to look into is whether or not in new leases we
23 can expressly contract to waive that provision of the law,
24 that the lessee would be required to do that for new
25 leases. So we're going to look into different remedies

1 that we have into this.

2 CHAIRPERSON GARAMENDI: I would urge that the
3 Commission staff to continue to pursue this issue and
4 enter into discussions with the Governor's office to try
5 to sort this thing out, because there seems to be a gray
6 area here that could leave some liability for the State
7 and somebody could walk away from obligations that they
8 had.

9 CHIEF COUNSEL FOSSUM: The Commission has
10 expressly rejected taking quitclaim deeds in other
11 circumstances where there were toxics, from the federal
12 government, for example at Honey Lake. But here, where
13 there's an expressed provision that says they can
14 quitclaim at any time, that was our dilemma, I guess,
15 if -- under those circumstances.

16 CHAIRPERSON GARAMENDI: Are we writing leases
17 that allow people to walk away with obligations
18 unfulfilled?

19 LEGISLATIVE LIAISON De BERNARDO: There are laws
20 under SMARA. And I can't remember at this time what the
21 acronym stands for. And the Department of Conservation
22 has regulations that require reclamation and abandonment.
23 The problem in these cases is that rents not being paid
24 while they continue to occupy the land, and then there's
25 not liability insurance for -- in case of a personal

1 injury, so the State could become liable.

2 CHAIRPERSON GARAMENDI: I understand that. I'm
3 just suggesting that we not write new leases, that allow
4 folks to walk away with unpaid or unfulfilled obligations.

5 EXECUTIVE OFFICER THAYER: Generally, our leases
6 require that they return the premises to, you know, the
7 original condition. But again, we're looking at putting
8 in provisions that will more expressly address the problem
9 we're talking about today, absolutely.

10 CHAIRPERSON GARAMENDI: Okay.

11 John.

12 COMMISSIONER CHIANG: Do you know, what's the
13 loss to the State for the payments that aren't being made?
14 How many instances do we have over what period of time,
15 the frequency?

16 LEGISLATIVE LIAISON De BERNARDO: There are two
17 current leases, one in Lake County and one in southern
18 California. And we're talking about tens of thousands of
19 dollars, if the lease were to continue during the
20 reclamation process on an annual basis. So nothing major,
21 but this money is -- most of these lessees are on school
22 lands. This money would go to the Teachers Retirement
23 Fund. CalSTRS has supported this bill. So we're looking
24 at not a ton of money, but tens of thousands.

25 EXECUTIVE OFFICER THAYER: I think the issue in

1 terms of revenue generally is that we charge both rent and
2 royalty rate. So the rents are fairly low, because the
3 property is off in the middle of nowhere and doesn't have
4 that high an appraised value, but then we get a percentage
5 of the royalty. So the actual income while the operation
6 is under way is sometimes significant, but it drops once
7 that production ceases.

8 COMMISSIONER CHIANG: And then how many of these
9 properties -- and I use this term very loosely -- are
10 protected under the statute from quitclaiming or allowing
11 them to quitclaim.

12 I'm worried about the exposure.

13 EXECUTIVE OFFICER THAYER: I think we'd have to
14 go back and find out how many leases we have. It might be
15 all of the existing leases. But this is a legal matter
16 and before I answer conclusively, I'd like to discuss this
17 among staff and get back to you.

18 COMMISSIONER CHIANG: Thank you.

19 CHAIRPERSON GARAMENDI: Please continue.

20 LEGISLATIVE LIAISON De BERNARDO: Thank you.

21 And I'll add that there's an omnibus bill that
22 just passed in special session, which includes item number
23 4, which is a technical flaw in the code that prevents the
24 Commission from obtaining land patents from the Bureau of
25 Land Management in certain circumstances. So the bill

1 received unanimous support and we feel like that it's a
2 legal issue and it should be signed.

3 Then the bottom three rows are bills that I'm
4 bringing to your attention, because you guys will have
5 heard these items in previous meetings or you will hear
6 about them in the future. The Candlestick Hunters Point
7 Bill was signed by the Governor. It authorizes a land
8 exchange that the Commission -- subject to the
9 Commission's approval in the next, I think the timeline
10 is, two or three years. You guys will probably be
11 presented a land exchange proposal for the San Francisco
12 Candlestick Hunters Point area.

13 ACTING COMMISSIONER SHEEHY: I'm sorry, Mr.
14 Chairman, may I ask a follow-up question?

15 CHAIRPERSON GARAMENDI: Sure.

16 ACTING COMMISSIONER SHEEHY: I don't understand,
17 Mr. De Bernardo, what exactly did SB 792 do?

18 LEGISLATIVE LIAISON De BERNARDO: So the San
19 Francisco Redevelopment Agency is the sponsor behind this
20 bill, and they have a redevelopment project for the
21 Candlestick Hunters Point area. There is sovereign land
22 in that area that is all over the place and mixed or
23 adjacent to private land. And as part of the
24 redevelopment project, they've proposed an exchange to
25 help implement their redevelopment project.

1 ACTING COMMISSIONER SHEEHY: So this bill
2 effectuated that exchange?

3 LEGISLATIVE LIAISON De BERNARDO: It authorizes
4 the exchange. There's a proposed map the Commission has
5 to ultimately --

6 ACTING COMMISSIONER SHEEHY: The Commission has
7 to ultimately act on it, but it authorizes the exchange.

8 EXECUTIVE OFFICER THAYER: Correct.

9 ACTING COMMISSIONER SHEEHY: It tees it up for
10 this body to review it and approve it, is that the idea?

11 EXECUTIVE OFFICER THAYER: Correct.

12 LEGISLATIVE LIAISON De BERNARDO: Yes.

13 And we've had legal staff, such as Jennifer
14 Lucchesi, has worked very hard on this particular bill.

15 EXECUTIVE OFFICER THAYER: We've been extensively
16 involved to make sure that when the project comes to you,
17 that it would be one that we could recommend approval on.
18 But ultimately our belief is we would oppose this
19 legislation if it didn't leave final discretion to the
20 Lands Commission on disposal of State tidelands.

21 CHAIRPERSON GARAMENDI: Is the Commission staff
22 working with the redevelopment agency as they proceed to
23 swap pieces of land around to gain, I suppose, a
24 contiguous parcel for their development?

25 EXECUTIVE OFFICER THAYER: That's right. There

1 are mutually beneficial goals here. The property there is
2 extremely disjunct. In some places, the blocks have been
3 sold off, but the Public Trust still applies to the
4 streets in front of them. And so from a land-use
5 perspective, we don't have any real way to use that Public
6 Trust land. And the same thing affects the developer,
7 where they're trying to consolidate some blocks, there's
8 some Public Trust Lands right in the middle of where
9 they're trying to put a building.

10 So it benefits all of us to move all of our
11 property as close to the shore as possible, contribute to
12 a shoreline park or something like that, and eliminate the
13 property that's inland and then similarly we gain the
14 stuff that's closest to the property. So definitely this
15 is being driven by the developer, but we also see it as an
16 opportunity for us.

17 CHAIRPERSON GARAMENDI: Yeah, I would just really
18 urge Paul, that you and your staff, engage early and as
19 often as necessary so that our interests, the public's
20 interests are brought in early in the process rather than
21 waiting until the end and then trying to sort it out at
22 that point.

23 EXECUTIVE OFFICER THAYER: We've probably been
24 working on this for three or three, maybe even four years
25 at this point. And there's some tough battles sometimes,

1 in terms of negotiations about assuring that we get equal
2 value preserved for the State and the Public Trust Lands.

3 CHAIRPERSON GARAMENDI: Thank you.

4 CHIEF COUNSEL FOSSUM: I just want to add that
5 the Department of Parks and Recreation is a big player in
6 this project as well, and in addition to your own
7 counsel's representation and the Attorney General's is
8 also involved.

9 CHAIRPERSON GARAMENDI: Well, we've had an
10 example here in Sacramento, where if you hang tough, you
11 can win.

12 Thank you.

13 LEGISLATIVE LIAISON De BERNARDO: The second to
14 last item is the fee on plastic bags, which if you recall
15 in June 1st, the Commission passed a resolution supporting
16 these two bills and the general concept of imposing fees
17 on plastic bags to prevent plastic bag pollution. It's
18 still in committee. It's a two-year bill.

19 And then the last one, I know public comment in
20 the past, especially in San Diego, has brought up the
21 concern of the Children's Pool Beach in La Jolla. A bill
22 was passed and signed by the Governor that allows the
23 allows the city of San Diego to make the ultimate decision
24 as to what happens to that beach.

25 ACTING COMMISSIONER SHEEHY: I'm sorry. May I

1 ask. What did SB 428 finally do, it punted -- it
2 essentially punted to the city?

3 LEGISLATIVE LIAISON De BERNARDO: Right, the
4 original --

5 ACTING COMMISSIONER SHEEHY: It said do
6 whatever -- you solve it.

7 LEGISLATIVE LIAISON De BERNARDO: Right. The
8 original statute in the 1930s had a specific use for that
9 beach.

10 ACTING COMMISSIONER SHEEHY: For children.

11 LEGISLATIVE LIAISON: For children.

12 ACTING COMMISSIONER SHEEHY: And then we came
13 back and we said well, it can be for children or for
14 seals.

15 LEGISLATIVE LIAISON De BERNARDO: Well, we, as a
16 Commission, remained neutral on the bill. We felt that --

17 ACTING COMMISSIONER SHEEHY: But the State's
18 position now is that we have punted the issue, is that
19 right?

20 LEGISLATIVE LIAISON De BERNARDO: We left it up
21 to the locals to decide.

22 ACTING COMMISSIONER SHEEHY: Okay. I just wanted
23 to make sure I understood that one.

24 CHAIRPERSON GARAMENDI: Would you like the
25 responsibility?

1 ACTING COMMISSIONER SHEEHY: No.

2 (Laughter.)

3 LEGISLATIVE LIAISON De BERNARDO: So that's it
4 for the 2009 legislative update.

5 The next slide, please.

6 --o0o--

7 LEGISLATIVE LIAISON De BERNARDO: There are three
8 proposals that have been noticed for this meeting, that I
9 will ask for your sponsorship at the end of the
10 presentation.

11 The first legislative proposal has to do with the
12 trespass issue that we deal with so frequently. It would
13 give the Commission the administrative authority to
14 administratively impose penalties against persons who
15 construct, maintain, own, use, possess, unauthorized
16 structures or facilities on State lands.

17 The proposal is modeled after similar statutes
18 that the State of New York, Texas, Washington, Oregon, and
19 the California Department of Transportation have against
20 people who encroach on to State lands. And I'm currently
21 in talks with Department of Parks and Rec and Fish and
22 Game because they're also interested in the idea. And so
23 I ask for your sponsorship of this particular legislative
24 proposal.

25 The second legislative proposal has to do with

1 audits. That was talked about quite a bit earlier. It
2 would create a legislative mandate for the Commission to
3 conduct full audits

4 ACTING COMMISSIONER SHEEHY: Thank you, Mr.
5 Chairman.

6 Mr. De Bernardo, I have a suggestion on the
7 legislation as you craft it. In line with the Chairman's
8 comments earlier, you may want to craft the bill where it
9 explicitly says that the costs associated with the
10 auditors shall not be paid out of the general fund, but
11 somehow recovered -- well, it's -- yeah, you know,
12 recovered through the audit proceeds or something.

13 In other words, put some language in there that
14 would put into law, make it clear, what we'd like to try
15 to achieve. Because my sense is, is that if you introduce
16 a bill asking for staff that otherwise it be general
17 funded, you'll never get the bill out of the first house,
18 okay.

19 If you want to follow up with me, I'd be happy to
20 work with you on that. But I think if you look for some
21 sort of reimbursement funding mechanism, that you'd stand
22 a better chance of actually getting that bill through the
23 process.

24 LEGISLATIVE LIAISON De BERNARDO: I appreciate
25 the suggestion. I can talk to you after the meeting.

1 And then the third legislative proposal is the --
2 deals with our Land Bank Fund. We have monies donated
3 into the Land Bank Fund to provide for management and
4 improvement of our Trust Lands.

5 It's not expressly stated that the moneys donated
6 into this fund can be used to provide access to these
7 Public Trust Lands, which do improve these Trust Lands,
8 and this would be -- it could be considered a technical
9 amendment to the Land Bank Fund, so that we could use the
10 monies to provide things, such as wheel chair access or
11 driveways or trails to Public Trust Lands.

12 So I would ask, unless there's any particular
13 proposal here, that there isn't unanimous consent on, that
14 I guess group all three proposals into one motion for
15 sponsorship.

16 ACTING COMMISSIONER SHEEHY: What does the Land
17 Bank Proposal do?

18 LEGISLATIVE LIAISON De BERNARDO: We have a Land
19 Bank Fund in which we receive donations for management
20 improvement of Trust Lands. And it is not expressly
21 provided in the statute for the Trust Fund -- or for the
22 Land Bank Trust Fund that that money could be used to
23 provide access to Trust Lands. And so this would
24 expressly --

25 EXECUTIVE OFFICER THAYER: The specific need

1 arises -- generally, this money goes into the fund for a
2 particular purpose. And the fund was originally
3 established to allow for when there are land exchanges
4 where the public is not getting full value for the land
5 that is coming out of the trust in exchange for what's
6 coming in, the person proposing the exchange can put in
7 the deficit. And then we spend that money to buy
8 replacement of Public Trust Lands.

9 So that money going in is for that very expressed
10 purpose. And we would not want this legislation to
11 undercut that purpose. But we also occasionally get money
12 in there. And the one that comes to mind are what's
13 called the NRDAs, Natural Resource Damage Assessments,
14 that occur after oil spills.

15 And different State agencies participate in that
16 process. Fish and Game generally is responsible for
17 taking a portion of the money and using it for biological
18 impacts from an oil spill. Often our part of that process
19 involves taking money for impacts to public access to
20 Public Trust Lands.

21 And so the money that we get out of those oil
22 spill funds is generally used for public access purposes.
23 But there's no authorization in the fund right now that
24 technically allows us to put that money in the fund and
25 then spend it for public access. So it's generally to

1 deal with that.

2 The intent, and in fact the reality, will be that
3 the intent is not to take money that's been put in that
4 fund for other purposes and divert it to public access.
5 It's just to allow money that comes in for that purpose to
6 be spent for that purpose.

7 CHAIRPERSON GARAMENDI: In drafting the
8 legislation, it seems to me that you want to keep the two
9 sources of money separated.

10 EXECUTIVE OFFICER THAYER: Correct. Correct.
11 And there needs to be some language that basically says --
12 and this is poorly worded -- but something to the effect
13 of "Monies put into the fund for public access
14 improvements may be spent for public access."

15 CHAIRPERSON GARAMENDI: Okay, further discussion
16 on this?

17 I don't know if we need a motion or just the
18 acquiescence of the Commission?

19 EXECUTIVE OFFICER THAYER: I think because we're
20 asking the Commission to sponsor these, that staff would
21 be more comfortable --

22 ACTING COMMISSIONER SHEEHY: Mr. Chairman, I
23 would move approval of the staff recommendation on this
24 item.

25 COMMISSIONER CHIANG: Second.

1 CHAIRPERSON GARAMENDI: Without objection, it
2 will be a unanimous vote.

3 LEGISLATIVE LIAISON De BERNARDO: Thank you
4 Commissioners.

5 CHAIRPERSON GARAMENDI: Unanimous on the motion.
6 Thank you.

7 Okay. Paul, where are we going next?

8 EXECUTIVE OFFICER THAYER: Well, as we previously
9 indicated, the next item, Item 60, has been delayed until
10 the December meeting.

11 Item 61 is our final matter and this involves the
12 exercise of the Public Trust easement in an area on North
13 Lake Tahoe. And Curtis Fossum, our Chief Counsel, will
14 make the presentation.

15 (Thereupon an overhead presentation was
16 Presented as follows.)

17 CHIEF COUNSEL FOSSUM: Chairman Garamendi.

18 CHAIRPERSON GARAMENDI: Before you start, Curtis,
19 we have a couple of comments from the public on this
20 issue. And we'll take those following your presentation.

21 CHIEF COUNSEL FOSSUM: Very good.

22 Chairman Garamendi, Commissioners Chiang and
23 Sheehy, Item 61 requests the Commission to take certain
24 action involving an approximate two-acre area in the bed
25 of Lake Tahoe lying between the ordinary high and low

1 water marks just west of the boundary separating the State
2 of Nevada and California on the north shore.

3 The proposed Commission action is to consider and
4 determine the public's needs and use of the lands subject
5 to the Public Trust and authorize the removal of a metal
6 fence located within the shore zone and to compensate the
7 property owner for its value if it's determined to be a
8 lawful improvement.

9 As outlined in the staff report, the Commission
10 exercises its authority and responsibility and makes
11 determinations involving Public Trust property of the
12 State whenever it takes action involving those interests.

13 Today, already you've exercised those rights
14 involving property interests to the State along the
15 Pacific coast from San Diego Bay and Batiquitos Lagoon in
16 the south to Humboldt Bay and the Eel River in the north.

17 You've also taken approval -- you've also taken
18 action approving projects involving public property rights
19 within four separate waterways in the Delta. And finally,
20 approved uses at Owens and Donner Lake and, of course,
21 Lake Tahoe.

22 In both San Diego Bay and San Francisco Bay, the
23 property rights managed by the Commission involved only
24 the mineral estate not the fee title.

25 In the present proposed action, the State's

1 property rights involved also do not include the fee title
2 interest, but are an easement held by the State as an
3 incident of its sovereignty in trust for the Public.

4 When the Commission takes action involving the
5 State's property rights, it's not acting as a governmental
6 agency exercising regulatory authority, such as the
7 California Coastal Commission, rather it acts as a
8 property owner managing the public's property interests
9 like the Department of Parks and Recreation.

10 On five prior occasions beginning in 1975, the
11 Commission has acted to protect the public's property
12 rights by formally exercising the State's retained
13 easement involving sovereign Public Trust Lands, in which
14 the fee interest had been conveyed into private ownership.

15 The details of those actions involving protection
16 to the Public Trust needs and uses involving thousands of
17 acres are in the staff report and I will not repeat them
18 here.

19 Those exercises of the State's retained easement
20 rights were in response to concerns raised by members of
21 the public and organizations, which sought to protect
22 areas where the State has conveyed into private ownership
23 portions of the bed of a navigable waterway. In each
24 instance, it was determined that there were threats that
25 would impact the public's trust needs and uses of those

1 lands and that formal action by the Commission was
2 necessary to protect the public's interest in the
3 property.

4 --o0o--

5 CHIEF COUNSEL FOSSUM: As early as 534 AD, Roman
6 emperor Justinian in setting forth the foundations of
7 western law, stated that by the law of nature these things
8 are in common to mankind, the air, running water, the sea
9 and consequently the shores of the sea.

10 The common law of England long acknowledged the
11 unique character of sovereign lands and the separation of
12 the jus privatum of the King's private property right he
13 could convey to his lords from the jus publicum which was
14 reserved for public use.

15 Many state and federal courts in the United
16 States have also described the significant limits on a
17 State as trustee of the public's interest. No clearer
18 statement can be made than that of the United States
19 Supreme Court in 1892 regarding Lake Michigan.

20 --o0o--

21 CHIEF COUNSEL FOSSUM: The State's title to its
22 tideland is a title held in trust for the people of the
23 states, so that citizens may enjoy the navigation of the
24 waters, carry on commerce over them, and have liberty of
25 fishing free from obstruction or interference from private

1 parties.

2 Likewise, the California Supreme Court has made
3 clear that when the State or its local trustee holding
4 ownership of the easement takes an action in furtherance
5 of Public Trust needs, the servient privately owned fee
6 interest must give way, and such action does not result in
7 a taking of private property rights.

8 In 1913, the Supreme Court in the California Fish
9 case involving San Pedro made that action. In 1936, in
10 the Newcomb case, involving Newport Bay, a similar action,
11 and in 1971 the Marks decision involving Tomales Bay
12 followed by the 1980 decision in the Berkeley case
13 involving San Francisco Bay.

14 In each one of these instances, the private
15 underlying fee interest had been conveyed by the State
16 into private ownership and the public's easement was
17 exercised in a way and the court made clear that that was
18 within the authority of the State to do so.

19 All of those are of the bifurcated nature of the
20 title of shorelands and the limitations on the private
21 property interests.

22 In 1981, the California Supreme court in State of
23 California versus Superior Court of Lake County(Lyon) --
24 known as the Lyon case -- held that shorezone area between
25 high and low water on inland tidal waterways had been

1 State owned upon admission to the Union in 1850. The
2 federal law clearly is in accord and patents of land from
3 the United States do not convey title below the high water
4 mark.

5 However, the court ruled against the State's
6 assertion of fee ownership to the high water mark, and
7 held that they would interpret the Civil Code section 830
8 enacted in the 1870s to give the State's fee interest to
9 adjacent owners of land. The court also held that the
10 legislative enactment of the Code section did not divest,
11 extinguish or abandon the public's interest in the
12 shorezone, and that, "The same incidents of the trust
13 applicable to tidelands also applied to non-tidal
14 navigable waters, and that the public's interest is not
15 confined to the water, but extends to the bed of the
16 water." That's a very important concept.

17 --o0o--

18 CHIEF COUNSEL FOSSUM: Likewise, in the Supreme
19 Court's earlier decisions involving tidelands conveyed
20 into private ownership, the court made clear that a
21 fundamental principal of California property law is that
22 the State's trust obligations and public rights involving
23 its waterways may not be blithely extinguished. These
24 rights include, but are not limited to navigation,
25 commerce, fishing and recreational uses. The Supreme

1 Court decisions of Lyon and Fogerty along with their
2 precedents, all clearly enunciate the authority of the
3 State when acting to protect the public's interest in
4 Public Trust Lands that have been conveyed into private
5 ownership.

6 --o0o--

7 CHIEF COUNSEL FOSSUM: Following the U.S. Supreme
8 Court's denial of certiorari, involving the Lyon and
9 Fogerty decisions, the Commission on December 17th, 1981,
10 unanimously approved a calendar item, number 20, relating
11 to the court's decision. A copy of that is on your screen
12 as to what the Commission's action involved.

13 It included directing staff to send this notice
14 to all waterfront property owners with leases,
15 applications for leases or proposed projects within the
16 easement informing them of the result of the court's
17 decisions, and how the Commission intended to implement
18 those decisions.

19 The court's decisions and the Commission's notice
20 also made abundantly clear that the State has the
21 obligation to compensate the owners of the underlying fee
22 when the State exercises its authority over the easement
23 to remove a lawful improvement.

24 With that background on the last 1,500 years of
25 jurisprudence, what's the action before the Commission?

1 The upland involves seven parcels of land as
2 depicted, and Mr. and Mrs. McNeil own the two parcels
3 immediately adjacent to the state line, Mr. Marc DeSautels
4 as trustee of the DeSautels 2000 Trust owns the two lots
5 west of and adjacent to the McNeils as well as the next
6 parcel to the west, which is held in the name of Heigh Ho,
7 LLC.

8 West of the Heigh Ho property is a dedicated
9 public street, Harbor Avenue, which is owned by Placer
10 County and west of Harbor Avenue is a parcel owned by 9898
11 Lake, LLC.

12 The Beach involving this parcel, the last parcel
13 mentioned, has been utilized by the public without
14 incidents or conflicts with the upland owners being
15 reported to our office. We are informed by the Placer
16 County Assessors' Office that at the locale none of the
17 property owners is being assessed or paying taxes for land
18 within the shorezone below the assessor's depiction of the
19 approximate high water mark that was on the slide that we
20 just saw.

21 --o0o--

22 CHIEF COUNSEL FOSSUM: The North Lake Tahoe
23 Public Utility District manages the street parcel for
24 Placer county. This is the street, the end of the street.

25 --o0o--

1 CHIEF COUNSEL FOSSUM: The North Tahoe Public
2 Utility District has posted a sign on the entrance to the
3 public access way that cites Placer County ordinances
4 prohibiting littering, dogs and other pets or pests,
5 depending on your predilection, glass containers,
6 alcoholic beverages and fires on the beach, limiting the
7 hours of public use to day use only between 6 a.m. and 10
8 p.m. Harbor Avenue provides access also via a stairway to
9 the lake.

10 --o0o--

11 CHIEF COUNSEL FOSSUM: An investigation in the
12 early 1970s by Commission staff included information that
13 a realtor, who would had been in the area since the 1940s,
14 stated the area had always been a public area, that the
15 public had spread east and west of Harbor Avenue, that
16 residents had chased members of the public off the beach
17 at times, and had posted an armed guard.

18 The investigation notes concluded that further
19 consideration and study clarifying the public rights to
20 the beach could prevent future conflicts, and that there
21 appears to be no problems arising from the use of the
22 beach by the public at the present time.

23 This is before -- this investigation was taking
24 place before the Commission took the position of high
25 water on the lake.

1 --o0o--

2 CHIEF COUNSEL FOSSUM: Here's a photo of a wooden
3 fence that previously existed in the shorezone along
4 Harbor Avenue in the 1980s. Staff has been informed by
5 members of the Hills family, which previously owned all of
6 the waterfront property beyond the fence to the border
7 with Nevada, that they would periodically attempt to keep
8 the people off the beach prior to the Supreme Court's
9 decision in Fogerty.

10 Staff was also informed that following the
11 decision, the Hills family abided by the Supreme Court's
12 decision and no longer excluded the public and that when
13 the DeSautels acquired the lands adjacent to the fence in
14 1989, they were informed of the public's rights in the
15 shorezone. In 1997 and 1998, the DeSautels replaced the
16 wooden fence with a metal one that you'll see on this
17 slide.

18 --o0o--

19 CHIEF COUNSEL FOSSUM: Staff is informed that no
20 county permit was required for the new fence and that a
21 TRPA, which is Tahoe Regional Planning Authority,
22 enforcement action was resolved by the TRPA staff member
23 grandfathering the structure based on the existence of the
24 prior wooden fence that had been in existence prior to
25 TRPA's creation. The documentation of that is Exhibit J

1 in your calendar item.

2 Information from the Department of Fish and Game
3 and the U.S. Army Corps of Engineers is that the new fence
4 required a permit from those agencies when constructed and
5 that they are unable to locate any application, file, or
6 permit for the fence. Although the metal fence was
7 constructed after the Fogerty decisions in 1981 and 1986,
8 the Commission staff was not made aware of it until after
9 it was constructed in 1997 or '98.

10 As stated in the calendar item and included as
11 Exhibits H and I, the staff in '98 and again this year
12 requested the DeSautels to remove the fence.

13 --o0o--

14 CHIEF COUNSEL FOSSUM: On warm sunny days on the
15 beach, westerly of the metal fence separating Harbor
16 Avenue and the Heigh Ho, LLC property, staff has observed
17 many members of the public enjoying the lake and the beach
18 easement area, while relatively few members of the public
19 venture beyond the fence with its "Subject to the control
20 of owner" signs --

21 --o0o--

22 CHIEF COUNSEL FOSSUM: -- on the fence and the,
23 "No trespassing" signs --

24 --o0o--

25 CHIEF COUNSEL FOSSUM: -- that were placed on the

1 beach area in front of Heigh Ho and the DeSautels
2 property.

3 --o0o--

4 CHIEF COUNSEL FOSSUM: For more than 10 years the
5 Commission staff has -- and let me point out that those
6 private property signs there have been removed after our
7 letter. The ones on the fence remain.

8 For more than 10 years, the Commission staff has
9 received periodic reports and complaints from members of
10 the public of their being prevented access to those
11 portions of the bed of the lake easterly of the metal
12 fence.

13 Beginning this summer, the number of complaints
14 increased. These complaints have included claims by
15 significant numbers of public users of harassment and
16 intimidation by property owners or their agents resulting
17 from the public's attempts to access the public easement
18 area between the fence and the Nevada boundary.

19 Specifically, the public has reported being
20 confronted by individuals, including private security
21 guards who assert the beach is private and who, in some
22 instances, have threatened them with arrest for trespass
23 if they do not leave the beach.

24 Some of these complaints are included in your
25 packet along with other Emails and letters submitted,

1 including those from the property owners' representatives,
2 all of which will be made part of the public record.

3 There have been complaints made of verbal
4 harassment, use of aggressive dogs, photographing of
5 individuals, including small children, at close proximity,
6 in purported attempts to drive them off the beach. In
7 past years, owners have made calls to the Placer County
8 Sheriff's office in an attempt to have the public removed
9 from the beach or cited for trespass.

10 The deputies have declined to do so when informed
11 that the public has a right to be on the beach below the
12 high water line. The elevation of 6228.75 was established
13 by the Court of Appeal in Fogerty II in 1986.

14 Commission staff has made several contacts with
15 Placer County staff and met and discussed the situation
16 there earlier this month. The members included
17 representatives of the County Counsel's office, county
18 Sheriff's office and their property management division.

19 The Sheriff's office representative indicated
20 that there had been no crimes reported on the beach this
21 year. He also indicated that in past years cable TV wire
22 had been strung on a pier there with warnings about
23 electrocution. Apparently, in one instance sand was
24 kicked in the face of someone lying on the beach to
25 intimidate them resulting in litigation.

1 And finally, these acts stopped after the
2 Sheriff's Department prevailed on the homeowners to have
3 these actions curtailed. The Sheriff's office
4 representative also indicated the belief that removal of
5 this fence would reduce a lot of the issues.

6 The portion of the metal fence within the Public
7 Trust easement area extends waterward approximately 41.7
8 feet.

9 --o0o--

10 CHIEF COUNSEL FOSSUM: Your surveyors were up
11 there a few weeks ago to locate the elevation of 6228.75,
12 which is the distant person holding the white pole there.
13 And, of course, the end of the fence is there. That's how
14 we were measuring it.

15 --o0o--

16 CHIEF COUNSEL FOSSUM: During times of high water
17 at the lake, the fence acts as a complete barrier to
18 navigation by kayak, canoe, raft, and other shallow water
19 craft, and other forms of passage, swimming, wading,
20 walking along the shorezone of the lake and the beach, and
21 also interferes with fishing and other shorezone
22 recreational activities. That prior slide was an
23 important one, because although the public obviously would
24 have trouble walking around the fence right now. Clearly,
25 this fence also, at high water, interferes with other

1 rights of the public.

2 --o0o--

3 CHIEF COUNSEL FOSSUM: As was previously stated,
4 the Commission in its prior formal trust exercises took
5 action due to evidence indicating a threat to Public Trust
6 needs and uses of lands held in private ownership that
7 were subject to the easement retained by the State and
8 under the Commission's jurisdiction, as is this area.

9 The Commission and its staff have both taken
10 prior actions seeking to remove fences or other
11 obstructions limiting public use on waterways throughout
12 the State. Other fences at Lake Tahoe, placed below high
13 water have been removed from the shorezone at the request
14 of the Commission and also by action taken by the United
15 States Army Corps of Engineers and by local government.

16 As a result of investigating new complaints from
17 the public this year, staff determined that in addition to
18 problems associated with the interference of public use of
19 the easement, the lessees of two of the Commission's
20 leases in the area were in breach of their leases.

21 When we wrote those property owners notifying
22 them of the violations, we were contacted by them. And in
23 one instance with the McNeils, they removed the barriers
24 to public access that were put underneath the pier. We
25 subsequently heard from members of the public that they

1 did that for about a day and then they placed them back.

2 When contacting the Heigh Ho and DeSautels, they
3 had an application before us. They have amended their
4 application. And on Item number 50 today, you approved a
5 new lease for two buoys that they conveyed to themselves,
6 holding title as Heigh Ho. So that has been resolved.
7 And their counsel have informed us that those no
8 trespassing signs that were on the beach have been removed
9 from their property.

10 It's important to note I believe, at this point,
11 that the lease with the McNeils that allows them to use
12 the State's property for their pier also has a specific
13 contractual obligation that they not -- that quote, "That
14 they not impair the Public Trust area by storing or
15 placing any items below elevation 6228.5."

16 So in addition to the public's trust rights that
17 exist on the property, they've also agreed to not place or
18 store anything on the -- that would impair public access
19 rights.

20 I want to also point out that -- and you'll see
21 in the last slide not now, but in the last slide that we
22 will show you, that whereas the DeSautels had placed their
23 no trespassing signs very close to the water, the evidence
24 is that the McNeils' property has placed no trespassing
25 signs, but they're very close to the high water mark. And

1 therefore, although we can't verify their location yet,
2 they may not be improper signs.

3 On August 25th, a staff letter to the DeSautels
4 once again informed them of the Public Trust easement and
5 asked them to remove the metal fence. The letter referred
6 to complaints from members of the public, informed them
7 that the signs needed to removed, and they complied with
8 that.

9 However they have not complied -- we received a
10 letter from their attorney saying that they would not
11 remove the fence at that time. Subsequent to that, we did
12 have a meeting -- excuse me, following the meeting with
13 the DeSautels, we did receive a letter from their counsel
14 saying they're willing to take the fence off there
15 subjects to certain conditions.

16 At the meeting with the DeSautels on September
17 2nd, they referred to a number of events that they allege
18 have occurred on the beach, stating they consider the
19 matter to be one of health, safety, and protection of
20 private property. They said that there had been drunken
21 parties; the property had been used as a public toilet;
22 acts of trespass, theft, vandalism, nudity, lewdness by
23 members of the public.

24 They also stated that results from their numerous
25 requests for action by the Placer County Sheriff's office

1 didn't resolve their concerns. This is one of the main
2 reasons we met with the County after that, and went over
3 their -- went over the calls that had been made on this
4 beach for the last three years to see how much concern
5 there was on these.

6 As I mentioned earlier, the Sheriff's office
7 representative who had been there working in this area for
8 16 years said there had been no criminal activity
9 complaints in the last year.

10 When we met with the Placer County staff
11 representatives, we went over some of the issues with them
12 as to enforcement of time, place, and manner restrictions
13 on the beach. We encouraged them to enforce reasonable
14 health and safety ordinances to protect not only the
15 private property owner's rights, but the public's use of
16 the beach as well. And one of the recommendations that
17 the Commission staff is putting before the Commission is
18 to direct the staff to, in fact, work with the county to
19 make sure that those ordinances are properly adopted and
20 enforced.

21 We also had offered to the McNeils to meet with
22 them early in September, the first week of September.
23 However, their counsel had scheduled a meeting with us
24 that was to take place yesterday. It's been rescheduled
25 to take place next week.

1 The Commission staff also contacted the TRPA
2 staff regarding the posting of signs for public and
3 private areas. The TRPA staff indicated that they would
4 not even be necessary to obtain a permit from them for the
5 private property owners to place small no trespassing
6 signs above the high water mark. And staff informed the
7 property owners that we had no objection to them placing
8 fences or other barriers to protect their property above
9 6228.75 on their private property where the easement does
10 not exist.

11 Specifically, a letter that we received on
12 September 16th from the DeSautels attorney informed staff
13 that quote, "We have begun the process of opening dialogue
14 with the most likely stakeholders and agencies with
15 authority to see our concerns can be addressed..."

16 He informed us that the no trespassing signs had
17 been removed, but made no commitment to either stop the
18 confrontation with public beach goers or to remove the
19 fence.

20 Nearly a month later from a new attorney
21 representing the DeSautels, they did offer to remove the
22 fence quote, "if reasonable protections for their private
23 property are agreed upon." Approval of the proposed
24 Commission's action does not preclude this from happening,
25 and, in fact, directs staff to work towards this goal with

1 the county.

2 Following the Lyon and Fogerty decisions by the
3 Supreme Court in 1981 and 1986, certain lake front
4 property owners sought to have the United States Supreme
5 Court take those cases. The Supreme Court declined.
6 Staff of the Commission and the Attorney General believe
7 the property law of California has been well settled as
8 well as that in many other states that follow the common
9 law precedence of England, regarding the retained property
10 rights of the public held in trust by the sovereign states
11 involving lands below high water.

12 Commission staff believes the interference with
13 the right of the public to access the Public Trust
14 easement area in question has reached a critical point,
15 and that it is appropriate to take all action necessary to
16 enforce that right.

17 Therefore, it requests the Commission make a
18 finding that the fence is inconsistent with the public's
19 needs and use of the trust easement below high water at
20 the subject property, and authorize the Commission to take
21 all steps necessary to remove the fence or cause it to be
22 removed, and to compensate the owners of the fee interest
23 in the property where the fence is located for the value
24 of the fence, if it's determined to be a lawful
25 improvement, as required by Public Resources Code Section

1 6312 and case law.

2 One issue that has arisen is whether the fence is
3 actually located on the Heigh Ho property or built on
4 Placer County land.

5 --o0o--

6 CHIEF COUNSEL FOSSUM: From this slide, you can
7 see this is from the Placer County Sheriff's -- or excuse
8 me, surveyors who, in a recent survey, determined at least
9 initially that the fence is constructed on their right of
10 way and not on the adjacent property. Our surveyors, when
11 they went up there to check on the elevations of high
12 water at the stairway also believed that the monuments
13 indicated on the property boundary up there are on the
14 opposite side of the fence from the County's property and
15 that this fence is, in fact, encroaching on county.

16 However, that will need to be -- before any
17 compensation or that issue is resolved, there will
18 probably be further surveys taking place.

19 It's the Commission staff's position that if the
20 owner of the fee title lands on which the metal fence is
21 located can document that they've obtained a Corps permit
22 for the fence, or that no permit is required, the
23 Commission must tender just and fair compensation for the
24 lawful improvement when it's removed. Staff therefore
25 requests the Commission authorize funds not to exceed

1 \$10,000 without additional Commission approval, be
2 available for those costs of removal and tendered to the
3 rightful owner should it be determined the fence is a
4 lawful improvement.

5 Because this may be on county property and
6 because there is no apparent Corps permit, at least none
7 has been shown to us, it may be that the Commission won't
8 have to spend any money on this.

9 The proposed Commission findings and
10 authorization also include a resolution to be recorded in
11 the Placer County Recorder's office documenting the
12 Commission's actions. The proposed actions will identify
13 the public's Trust needs and appropriate uses, and
14 determine that the existing improvements constructed on
15 the beach by the property owners, have not been determined
16 to be a significant interference with the trust needs, and
17 therefore may remain, with the exception of the metal
18 fence that blocks both navigation, access, and other
19 recreational use of the lands and its bed below high
20 water.

21 Finally, the proposed action authorizes the
22 Commission to take all steps necessary -- Commission staff
23 to take all steps necessary or appropriate to implement
24 the Commission's action, including appearance on behalf of
25 the Commission in any litigation respecting the action

1 taken by the Commission.

2 --o0o--

3 CHIEF COUNSEL FOSSUM: The unanimous decision of
4 the Supreme Court in the 1971 Marks versus Whitney
5 decision made it clear that State action is not necessary
6 to determine what Public Trust rights exist within the
7 property of privately owned shorezone easement. Those
8 rights already exist, and include the right to fish, hunt,
9 bathe, swim, to use for boating and general recreational
10 purposes, the navigable waters of the State and to use the
11 bottom of the navigable waters for anchoring, standing, or
12 other purposes.

13 The court described instead the authority of the
14 trustees -- instead the authority of the trustee of these
15 rights, here delegated to the Commission by Public
16 Resources Code Section 6301, to modify or extinguish those
17 rights.

18 In that it states that it's a political a
19 question within the wisdom and power of the legislature
20 acting within the scope of its duties as trustee to
21 determine whether Public Trust uses should be modified or
22 extinguished and to take the necessary steps to free them
23 from such burden.

24 In the absence of State and federal action, the
25 court may not bar members of the public from lawfully

1 asserting or exercising Public Trust rights on these
2 privately owned tidelands.

3 --o0o--

4 CHIEF COUNSEL FOSSUM: Again, the Supreme Court
5 in Fogerty stated, "We emphasize, as we did in Lyon, that
6 these plaintiffs may use the shorezone for any purposes
7 which are not incompatible with the Public Trust. Land
8 owners who previously constructed docks, piers, and other
9 structures in the shorezone may continue to use these
10 facilities, unless the State determines, in accordance
11 with applicable law, that the continued existence is
12 inconsistent with the reasonable needs of the Trust. In
13 that event, both statute and case law require the
14 plaintiffs be compensated for the improvements they have
15 constructed in the shorezone."

16 How is a determination to be made as to whether a
17 particular use or purpose by the owners of the fee
18 interest in the shorezone is compatible or incompatible
19 with the reasonable needs of the trust, unless the State's
20 trustee of that interest makes such a finding?

21 That's precisely why the Commission is being
22 asked to have the purpresture of the fence abated and the
23 public's exercise of their existing rights protected from
24 interference. It will now be clear that the use of the
25 shorezone to the exclusion of the public is an

1 incompatible use. That the existing improvements placed
2 by the owners of the fee interest are not incompatible
3 with the reasonable needs of the Trust, except for the
4 metal fence. And that the landowners may continue to use
5 the shorezone for any purpose or use not incompatible with
6 the public's Trust rights.

7 --o0o--

8 CHIEF COUNSEL FOSSUM: Nothing precludes
9 subsequent action by the Commission at a future date
10 regarding this determination.

11 In the last couple days we've received
12 correspondence from several interested parties. It
13 appears there's some confusion regarding the shorthand
14 terminology used by the Commission since 1975 of quote
15 "formal exercise of the Trust," unquote. And the fact
16 that this is the first occasion involving non-tidal Trust
17 property, in which it's acted.

18 As pointed out in the staff report and my
19 presentation, the Commission today has exercised its Trust
20 responsibility in scores of approval and has done so in
21 tens of thousands of times previously, including thousands
22 of times on inland non-tidal waterways. The terminology
23 of quote "formal exercise of the Trust," unquote
24 specifically refers to the five, after today, six times
25 that rather than in response to an applicant requesting

1 use of State property, it is in response to public
2 concerns of threats or interference with the public's
3 rights and interests in certain limited and defined areas.

4 In each instance, the underlying fee interest had
5 been conveyed into private ownership in the 19th century,
6 but remains subject to the Public's Trust easement. The
7 Commission held a public hearing and acted to protect the
8 public's property rights by identifying the public's needs
9 and appropriate uses of the easement and by formally
10 exercising the State's authority to protect the easement.

11 Unlike the five prior Acts of the Commission
12 exercising that right in the subject action, the
13 Commission is not determining that no further improvements
14 by the property owner are allowed, but rather that the
15 public's needs are in the existing improvements except for
16 the -- excuse me -- but rather that the public needs are
17 that the existing improvements, except for the fence, do
18 not interfere with the public's needs of access and
19 recreation and nothing in this action prevents the
20 property owners from using the shorezone for any purpose
21 not incompatible with the identified Public Trust uses.

22 Commission is not acting as a regulatory agency
23 in exercising the public's property rights. It's acting
24 in its capacity as a property owner and manager of those
25 rights. As pointed out in the several referenced Supreme

1 Court cases, the public's rights of use already exist.

2 It is the Commission's determining what, if any,
3 action by the owners of the underlying fee interfere with
4 those rights and which do not. That is the action the
5 Commission is being asked to take.

6 Some concerns have also been expressed that the
7 Commission's action will create a cloud on title. The
8 Supreme court has made clear, the state's property
9 interest, or what some refer to as a cloud on title has
10 existing on the property since September 9th, 1850, when
11 we became a state. All the Commission's action does today
12 is express the trustee of the state's easement's
13 determination of what does and does not interfere with the
14 existing easement and the rights of the public.

15 Staff of the Commission respectfully submits
16 Calendar Item 61 with a recommendation for Commission
17 approval.

18 CHAIRPERSON GARAMENDI: Mr. Fossum, thank you
19 very much for a very extensive review of history going
20 back 1,500 years.

21 (Laughter.)

22 CHAIRPERSON GARAMENDI: And the more recent
23 circumstances there at Lake Tahoe.

24 I would like now to hear -- Tom.

25 ACTING COMMISSIONER SHEEHY: Can I say a couple

1 quick questions of Mr. Fossum.

2 CHAIRPERSON GARAMENDI: Sure.

3 ACTING COMMISSIONER SHEEHY: Thank you, Mr.
4 Fossum.

5 Does the Public Trust Doctrine make any
6 distinction between salt water and fresh water?

7 CHIEF COUNSEL FOSSUM: No. The Lyon case made it
8 very clear that the same principles that apply to the
9 tidelands that were in the prior litigation cases going
10 back to 1913, I believe, in the Cal Fish case all the way
11 up to 1971 in Tomales Bay, in the Marks case, and in 1980
12 a in Berkeley. In each of those instances, the State had
13 actually sold property into private ownership and received
14 compensation for that.

15 In the Lyon and Fogerty case, the Supreme Court
16 actually ruled that the legislature had given up title in
17 1872 to the low water mark, so nobody -- the federal
18 government when they conveyed away property only conveyed
19 it to the high water mark. The State owned the rest. But
20 because of this action taken by the legislature in the
21 1870s, and finally resolved by the Lyon court, the State
22 was arguing that the State still owned to high water. But
23 the court ruled, no, you've treated this as a low water
24 boundary for such a long time, we're going to confirm that
25 the fee title to the property was conveyed by that

1 statute, but the legislature had never taken any action to
2 divest the State of its public rights in the water.

3 And so they basically said those same interests
4 that apply on the case in the tidelands, such as the Marks
5 case, applied equally to the property on non-tidal
6 waterways. So between high and low water, the rights are
7 the same.

8 ACTING COMMISSIONER SHEEHY: Okay. How is the
9 high and low water mark determined and is there legitimate
10 differences in opinion over how it's determined?

11 CHIEF COUNSEL FOSSUM: There certainly was. Just
12 as in the Fogerty case, the State of California took a
13 position it was high water. We also took the position in
14 those cases that the high water mark was 6229.1, which is
15 the high water for purposes of both TRPA's jurisdiction as
16 well as the Corps of Engineers. They believe that's the
17 high water.

18 However, in litigating the boundary in the Court
19 of Appeal in 1986, the court actually made it a lower
20 elevation, based upon a prescriptive theory. And that is
21 the dam at Lake Tahoe, which has been there well over a
22 hundred years, had created a new condition to the lake.
23 And that because California law provides for a
24 prescriptive right to attach an easement, in fact, to
25 attach to property by use for a period of five years, they

1 took a look at all the elevations the lake had been at
2 since the dam was put on --

3 ACTING COMMISSIONER SHEEHY: I'm sorry, this dam
4 holds the lake back from the Truckee river, is that it?

5 CHIEF COUNSEL FOSSUM: Yes.

6 And what they looked at was any five year period
7 of prescription, and they took the lowest elevation that
8 the lake had been during that continuous five years of
9 high waters. And so that's where they got the 6228.75.
10 So we lost a little bit there, but that was the ruling
11 that the Court of Appeal made. And that was also appealed
12 by some of the property owners of the lake, as was Fogerty
13 I. This is referred to Fogerty II.

14 And neither instance did the Commission -- excuse
15 me, did the Court, the Supreme Court of the United States,
16 take cert on that. There are some arguments that have
17 been put forward based on some of the briefs submitted on
18 behalf of the Commission by the Attorney General's office
19 saying that it wasn't right.

20 You know, it's the same arguments they're making
21 that this didn't exist until the court made the rulings.
22 But the courts rulings was, in fact, that this right had
23 existed since 1850 on the property.

24 ACTING COMMISSIONER SHEEHY: And my last
25 question, Mr. Chairman. Mr. Fossum, how do we know what

1 the high and low water marks were on September 9th, 1850?

2 CHIEF COUNSEL FOSSUM: We don't. And that's the
3 point the Court made that it's really not important to
4 know exactly where they were at that point in time.

5 The law applying to waterbodies is that those
6 elevations can change from time to time by natural
7 occurrences certainly, and, in some instances, by
8 artificial occurrences.

9 So what we've got in California is -- and there's
10 some instances -- it's very common that people refer to
11 where was the last natural location of this, because in
12 some instances people fill, they'll put out a groin,
13 they'll do something to change that waterbody. And it can
14 be that the natural position prior to that will, in fact,
15 have some impact on where the boundary is.

16 But in other instances, artificial changes will
17 not change the boundary or will change the boundary. So,
18 for example, there's a specific code section that deals
19 with accretions, that says that the accretions have to be
20 from a natural condition for them to go to the upland
21 owner. Artificial accretions stay part of the state's
22 ownership.

23 And the court again in 1986, the Court of Appeal,
24 found that based upon some other prior cases in California
25 dealing with artificial waterways that the public's rights

1 attach to that area. They did not say that the State
2 owned that in 1850. That element between high and
3 low -- or, excuse me, above the natural high to the
4 artificial high, they said that the public by its use of
5 the property, between high and low for that five-year
6 period, and by the property owner's acquiescence to that
7 could not now claim that the easement hadn't attached to
8 it.

9 ACTING COMMISSIONER SHEEHY: Thank you.

10 CHAIRPERSON GARAMENDI: I think it's time to hear
11 from witnesses. Let's hear from the public on this issue.

12 We have, let's see, I think three people that
13 would like to testify.

14 Mark Gunderson, attorney representing the Heigh
15 Ho, LLC. Janis Hills homeowner, and Ashley Hills, a
16 homeowner. And then there's Cheri Sugel, representing
17 herself.

18 Mr. Gunderson.

19 MR. GUNDERSON: Good morning. I'm Mark Gunderson
20 representing the DeSautels, the DeSautels Trust and Heigh
21 Ho, LLC.

22 As I have indicated to Mr. Fossum in my most
23 recent correspondence, this is really a question of not
24 listening to anecdotal evidence, which you've heard a lot
25 of this morning, but rather the balance between the

1 public's rights and the rights of the private property
2 owners that exist in this location.

3 As you can see from the indications of the
4 record, this beach is very heavily used. And the use is
5 focused on traversing the property by Harbor Avenue down
6 to the beach, and it's heavily used by members of the
7 public. It is not only heavily used by members of the
8 public, but it is heavily abused by members of the public.

9 Placer county has not regulated the use of this
10 beach. They have not regulated time, use, and manner of
11 this beach, even though there may be regulations that
12 exist. Placer county is unclear of the extent or the
13 manner of its jurisdiction and has not exercised its
14 jurisdiction to take care of the public nuisance that is
15 created on this beach.

16 This fence that you have seen did not come into
17 existence 10 years ago. This fence did not come into
18 existence 20 years ago. It came into existence in the
19 thirties. And this fence has existed for a substantial
20 period of time. And it is has existed so that the
21 DeSautels and its predecessors in interest could demarcate
22 their property from other property that exists that belong
23 to the county. That's why it's there.

24 We understand that does create some degree of an
25 impediment. But it has not created an impediment until

1 very recently when the State has decided to exercise its
2 jurisdiction. The concern that the DeSautels have and the
3 DeSautels family have is that without regulation this
4 beach is abused and the Public Trust is not benefited by
5 that adverse use, which flows now upstream or uphill from
6 the high water mark onto the DeSautels property.

7 They have people trespassing on their property on
8 a regular basis. They have people misusing their property
9 on a regular basis. And there is no management or use by
10 the Placer county officials to maintain this easement in a
11 manner which is compatible with adjacent and private
12 property uses.

13 That is why there should be a negotiated
14 resolution with all of the stakeholders that are involved,
15 including State Lands, Placer County and the landowners.
16 But it is precipitous to act and take this action today
17 until that process has been taken to its logical
18 conclusion. And we would suggest that this matter be
19 tabled until those discussions have been had and the
20 appropriate resolution reached among the parties.

21 CHAIRPERSON GARAMENDI: If I might ask you a
22 question. Do you disagree with the position of staff that
23 the fence creates a barrier to public access to the
24 easement -- the area that is under the easement, that is
25 the distance between the high water mark and the lake

1 itself? Is the fence a barrier?

2 MR. GUNDERSON: It is an impediment, but it is
3 not a barrier. People have certainly gone around it.
4 They've gone over it. They've certainly found numerous
5 ways to not use this, in fact, as a barrier.

6 CHAIRPERSON GARAMENDI: Therefore what purpose
7 does the fence serve?

8 MR. GUNDERSON: I'm sorry?

9 CHAIRPERSON GARAMENDI: Therefore what purpose
10 does the fence serve?

11 MR. GUNDERSON: The only thing that the DeSautels
12 have done is try to indicate where their property line is
13 versus the adjacent commercial or public property next
14 door.

15 CHAIRPERSON GARAMENDI: Then you do not argue the
16 right of the public to access on that area between the
17 high water mark and the lake itself?

18 MR. GUNDERSON: Oh, I think that's well set in
19 law. I wouldn't be so precipitous to argue that.

20 CHAIRPERSON GARAMENDI: Then your argument is
21 principally one about the rights of the property owner
22 above the high water mark to safety and trespass?

23 MR. GUNDERSON: Well, or as to the low water
24 mark, because the property that underlies the Public Trust
25 property is owned by the private property interests.

1 CHAIRPERSON GARAMENDI: But you're not arguing
2 that the public has a right to recreate on it -- to pass
3 along and to recreate on that land?

4 MR. GUNDERSON: We're not. But what we are
5 saying is that there ought to be a balance between that
6 use and the use of the underlying owner of the property.

7 CHAIRPERSON GARAMENDI: Okay. And that is a law
8 enforcement issue having to do with the conduct of the
9 public.

10 MR. GUNDERSON: Well, that's a policing issue.
11 It's a police enforcement action, because. The State
12 doesn't exercise its rights to police the Public Trust
13 property, someone must. The county has not and will not,
14 because it has stated to me, on a number of occasions, it
15 doesn't know where its jurisdiction starts or ends and has
16 been reluctant to apply these regulations on the Public
17 Trust property.

18 CHAIRPERSON GARAMENDI: Well, this Commission can
19 therefore resolve that issue by the proposed action.

20 MR. GUNDERSON: I'm not so sure that they can,
21 because the Placer county Sheriff's Department is a
22 different governmental agency.

23 CHAIRPERSON GARAMENDI: Well, at least -- I think
24 your argument was that the Placer County Sheriff's
25 Department sees ambiguity. It would seem to me that by

1 re -- by our action, forcing the removal of the fence and
2 asserting the rights of the public to pass and to use,
3 that creates clarity. And then the Sheriff can respond to
4 that by at least no longer arguing ambiguity.

5 MR. GUNDERSON: I don't think that's the issue.
6 The issue is not the fence. It's whether or not Placer
7 County wishes to exercise jurisdiction on the Public Trust
8 property, which it has been reluctant to do.

9 CHAIRPERSON GARAMENDI: Mr. Fossum, is there --

10 CHIEF COUNSEL FOSSUM: Mr. Chairman, obviously
11 staff doesn't blithely go into these kind of things. We
12 take it very seriously about the concerns of the private
13 property owners there as well. And so that's why, as I
14 indicated in the staff report, that we met with Placer
15 County and discussed with them the situation and indicated
16 that -- and they did indicate that they had confusion in
17 the past, because they did not know where the high water
18 mark was.

19 We indicated to the property owners in the
20 meetings we had so far, and in correspondence, that we
21 would be willing to use the State Lands Commission staff
22 to go out and actually locate that high water mark so that
23 there would be clarity on that, and that they could then
24 put their signs legally keeping the public off their
25 private property where no easement existed.

1 The county was very positive about that, because
2 they would like to be able to enforce the laws out there
3 and know what is private and what is public. So they
4 supported that. They supported taking the fence down.
5 They supported having a survey that would indicate where
6 the high water mark was. And the Commission, if it
7 approves this action, is directing the staff to work with
8 the County to adopt appropriate protections for that area.

9 So I think that will help resolve all of these
10 issues. And I even heard from a former property owner in
11 the area who said by removing this fence, it will take the
12 pressure off the property owner to the west who has a
13 substantial number of people using the beach in front of
14 their property. And that there's -- and if you remember
15 the math, there's a significant area of beach that very
16 few members of the public dare go on, because of the
17 harassment.

18 So it will actually spread out the use that's
19 there. Because there's limited parking in this area, the
20 most use by this area is by neighbors, frankly, people in
21 the neighborhood who just want to go down to the beach and
22 enjoy that. It is close to Cal Neva. People can walk
23 down there I've been told, a five minute walk or so.

24 And so it would be open to all the public, but
25 there's very little parking. And so the fact is that it's

1 quite unlikely that hoards of people would be going down
2 there.

3 The other thing I wanted to point out is that El
4 Dorado County, not at Lake Tahoe, but on a river in
5 California, sought to, because of the complaints of
6 property owners about trespass, very similar to these of
7 nudity and using a toilet on their private property, all
8 kinds of issues, leaving trash behind, sexual activity,
9 sought to shut down part of the American River within
10 their jurisdiction to rafting.

11 This Commission along with the Department of
12 Boating and Waterways and the Attorney General's office
13 took the county to court and says you can arrest people
14 for violating the law, you cannot prevent the public from
15 using this area.

16 And so we think that it would be precipitous to
17 not have appropriate regulations in the area. We're going
18 to work with the county and encourage them to look at the
19 issues. They've already posted the signs at the top of
20 the access way there. And we'll certainly work with them.
21 They've placed trash cans in the area so the public can
22 put trash in the area, properly dispose of that. And we
23 certainly don't want the public to go down there and
24 violate the law there any more than we would have them
25 violate it anywhere else.

1 CHAIRPERSON GARAMENDI: Having said all of that,
2 the responsibility of this Commission is to assure the
3 rights of the public. With regard to law enforcement,
4 while we are certainly encouraging the appropriate
5 enforcement of any existing law, that responsibility
6 resides with others. And therefore, our particular
7 responsibility here is to make sure that the rights of the
8 public to traverse and to use are maintained.

9 It appears as though the staff has offered to
10 provide, at no charge to the property owners, a valuable
11 service of surveying and locating the precise location of
12 the high water mark, at which point the property owners
13 can do what they want to do from that point on, or that
14 point upward.

15 Now, we have two more witnesses, if we might.

16 MR. GUNDERSON: Thank you for your time.

17 CHAIRPERSON GARAMENDI: Thank you.

18 We have the Hills, Janis Hills and Ashley Hills.

19 MS. JANIS HILLS: I'm Janice Hills. My family
20 has owned that property in the past, well, since the
21 thirties. It was sold at one time the Blixeth, the McNeil
22 property, and he sold it to the Carol McNeil and Bob
23 McNeil.

24 The DeSautels property was sold directly from my
25 father-in-law back in 1989, I believe he said today.

1 I've lived at 150 Harbor and Brockway for close
2 to 40 years. I lived there 365 days. My children were
3 raised going to the beach there. We have a tremendous
4 interest in using that beach for our neighborhood and
5 families.

6 And we have found it, in the last 10 or 11 years,
7 increasingly more difficult to access that beach. We have
8 been met with armed guards, police harassment, people
9 harassing you, photographing you. Not just a video camera
10 on a pier, but people actually following you around the
11 beach for hours, just so that you have the worst time
12 possible and you will not come back.

13 My daughter Ashley Hills, who is here today, is
14 27, received a scholarship from Sierra Nevada College. I
15 wrote a letter of thank you to the Board members there for
16 giving her this scholarship. Unbeknownst to me, Bob and
17 Carol McNeil were on the Board. I received a letter of
18 threat -- which I have at home and I haven't given to
19 anybody here, but I will make it available -- that my
20 daughter's behavior on their beach is going to cost her
21 her college career.

22 My daughter went in to see the president of
23 Sierra Nevada College, Ben Solomon, and had a four-hour
24 meeting and discussion to save her scholarship, because of
25 my daughter accessing the property that we've always used

1 for beach.

2 She was met with caretakers screaming and yelling
3 at her, kicking sand in people's faces. That's not
4 unusual. It's getting worse. This year she came up to me
5 after being on the beach in August crying, telling me that
6 they were going to arrest her for -- I said, "For what?"
7 She said for trespassing on the beach.

8 Well, I mean, it's just one thing after another.
9 A few years ago, the Payes and DeSautels hired two
10 African-American football players to collect \$4 apiece
11 from people coming down to the beach at the entrance. My
12 ex-husband was mortified because people were starting to
13 cut through the property to get down to the beach. We
14 asked them what they were doing. They said well, why
15 should we pay \$4 to come here. And it was told to them by
16 Marc DeSautels that you litter and that's what I'm going
17 to charge you.

18 Well, that didn't fly, because there were going
19 to be fights. And my ex-husband told them that -- those
20 two guys they should really leave, that they have no
21 business there.

22 So that's just one thing, and it's another thing
23 and another thing. And I am in favor of removing the
24 fence. Marc DeSautels has placed a sign and it has not
25 been removed by TRPA, although they've asked him many

1 times to do it, that the right to pass is permission of
2 subject of owner.

3 Well, people staying at the Cal Neva for a day or
4 two get turned away constantly, because they read that
5 sign and they're law abiding citizens and they leave, but
6 they're misled. And I go down there and I tell people,
7 "Oh, no, you have the right to sit there." And they look
8 at me and they say, "Well, I don't want to get arrested."

9 Well, I started making an appearance every single
10 day in August to check out this. They put up three signs
11 that were metal. You've seen them there. The orange ones
12 with the rebar in a five gallon drum cemented, three of
13 these signs.

14 One of them met you right at the end of this
15 fence. And I want to tell you about this metal fence.
16 They brought it out to a rock-out cropping that is almost
17 impossible if you're carrying a child or a towel or an
18 umbrella or a raft or anything to maneuver through.

19 There are -- and I believe they've placed these
20 rocks there on purpose. There's some foot traffic that
21 you can make there, but I think those rocks are there now.
22 And there was a sign there. And a young man who was about
23 20 who refused to give me his name just screaming and
24 yelling at people from a sitting position way up to where
25 I would say the high water mark is, which is on their land

1 property, not the beach. "Hey, you, get out of here.

2 "Hey, you, get out of here."

3 Well, I called my ex-husband when my daughter
4 came back, because we are going to support our family
5 members. And I told him to go down there and find out
6 what was happening. He went down there and explained who
7 he was, Rubin Hills, IV, and the guy just berated him all
8 over the place. Told him if he didn't leave, he was
9 calling the police. And my ex-husband said I will wait to
10 talk to the police, because we know most of the police in
11 the area. We've lived there long enough.

12 Well, they never came. He sat there for an hour
13 and a half. And the next day, I went down there and I sat
14 down, and I was told that I had to leave as well.

15 I find that this fence is a psychological and a
16 physical barrier to all the people that enjoy that beach
17 that should. And I believe that in today's technology
18 with video cameras and all the people that Marc DeSautels
19 and the McNeils hire, there's no threat of any property
20 damage.

21 I'd like to ask the McNeil's and the DeSautels
22 for any insurance claims that they've had from damage that
23 has been done to them. And I assure you they can't
24 produce any.

25 There are no pictures. There's no reason to

1 believe that there is nudity or naked things going on.
2 It's just -- there's too much security there. There's
3 three people that work for Marc DeSautels watching you at
4 all times. There's a security guard that I believe is a
5 Placer county off-duty Sheriff that walks that pier like
6 he's walking the gangplank in San Quentin telling people
7 you're being televised. You're being televised. We're
8 watching you.

9 Nobody wants to go and have interaction with
10 these people. They just want to go down to the beach and
11 go swimming. That has become impossible. My daughter
12 comes home in tears shaking every time she goes to there.
13 This girl is 27 years old. We've never done anything to
14 anybody down there. And I would say with all the
15 security, show me one example, show me some police
16 reports, show me something. It's all a bunch of bologna
17 just to keep this a private, exclusive, lake-front
18 property that they want.

19 And the people are all turned away to sit on Mark
20 Payes' property. And he's here today. He didn't have a
21 card to speak, but I bet if you asked him, he has really
22 no complaints, except for the fact that he has the
23 overload of people there. There's no property damage to
24 him. He has a caretaker that lives off-site as Marc
25 DeSautels that has one that lives on site, and so do the

1 McNeils.

2 So I think they've villainized and demonized the
3 public without any proof at all. And that I think it's
4 getting to a ridiculous level of confrontation with the
5 public.

6 And as a homeowner there, I'm afraid to go down
7 there. It's not a pleasant experience. It's a beautiful
8 piece of property. It's nice for people to go swimming,
9 and it's very popular.

10 But I will say that they have no security issues
11 in 2009 with all of the -- you know, you could put a video
12 camera up and you can be anywhere in the world and be
13 watching your property. So there's no -- there's nothing
14 to substantiate any of these claims, except for the fact
15 they want it exclusively to themselves. And I will tell
16 you I will not stand for anyone harassing or berating my
17 children at whatever age. I just won't allow it.

18 And I just ask you and tell you how grateful I am
19 for the investigation that you've done and for the
20 Commission to go ahead and remove this fence, and also the
21 debris from the previous fence. And it's in the pictures
22 that you had today. You really can't see it, but there's
23 cement pilings with sheared off timbers that if you fell
24 on it, you would be killed. And they're just sitting
25 right around loosely and have been.

1 And I could say in the 40 years that I've lived
2 there, I think there's one person that I saw being taken
3 out of there, and he had jumped off the rocks in the water
4 by himself. So there's no safety issue. There's just no
5 evidence.

6 So I just want to tell you that my ex-husband
7 couldn't be here today because he works, but he is in
8 support of removing of that fence.

9 Thank you.

10 CHAIRPERSON GARAMENDI: Thank you very much.

11 Ashley.

12 MS. ASHLEY HILLS: Hi. My name is Ashley Hills.
13 I'm 27 years old. I've lived in the Speedboat Beach
14 neighborhood my entire life.

15 I am in support of the Commission's decision for
16 removal of the fence at Speedboat Beach. I agree with the
17 staff and also with Placer County Sheriff that the removal
18 of the fence would greatly solve the problems that arise
19 at Speedboat Beach.

20 The fence is a substantial physical as well as
21 psychological barrier to the public's rights to access and
22 enjoy the Public Trust, which is already theirs.

23 The fence also enables the lake-front homeowners
24 to continually harass and intimidate the public on a
25 minute-by-minute basis. I, myself, have suffered severe

1 emotional distress as a result of this intimidation and
2 harassment. My scholarship and education opportunities
3 have been threatened during my undergraduate work by these
4 homeowners, merely for exercising my rights to use and
5 enjoy the Public Trust easement.

6 These homeowners and this fence make what should
7 and can be an enjoyable experience a horrific one.

8 I thank you again for considering the welfare of
9 the public's right to use what is ours by removing the
10 fence at Speedboat Beach. And thank you for such a
11 thorough investigation of this matter.

12 CHAIRPERSON GARAMENDI: I believe that completes
13 the testimony from the public.

14 I'm sorry, please.

15 My apologies. I slipped that to the bottom.
16 Please introduce yourself and proceed.

17 MS. SUGEL: My name is Cheri Sugel. And I am a
18 resident of the neighborhood where Speedboat Beach is
19 located. And I've frequented that beach for many years.
20 Thank you for allowing me to comment on this very
21 important issue.

22 I agree with the Commission's recommendation and
23 the recommendation of the Placer County Sheriff that the
24 fence should be removed. The fence is both a physical and
25 a psychological barrier to the public's free exercise of

1 its right to access the Public Trust at Speedboat Beach.

2 While the DeSautels and the McNeils have always
3 hired guards to harass and intimidate the public from
4 using the public beach, it has never been so bad as it was
5 last summer. And I wanted to comment on this in relation
6 to -- how it relates to the fence.

7 Last summer, I was harassed every time I went to
8 the beach beginning on July 3rd, and was threatened with
9 citations on more than one occasion, simply for sitting on
10 the beach, sometimes even while just walking in the water.

11 On July 3rd, I witnessed Ms. DeSautels yelling at
12 a group of people recreating on the beach I quote, "This
13 is my beach," quote, "Get off my beach", pointing to the
14 signs on the fence reading quote, "Right to pass by
15 permission and subject to control of owner."

16 All of these actions on behalf of the homeowners
17 have caused me, my friends, my neighbors emotional
18 distress. And many of the threats that I have encountered
19 were made in front of work colleagues, friends, and
20 neighbors.

21 On August 16th I walked up to my neighbor on the
22 beach who was engaged in a long discussion with Deputy
23 Allen from the Placer County Sheriff's Department. The
24 deputy was threatening to issue him a citation if he did
25 not leave the beach. The deputy explained to us that he

1 was following orders to issue a citizens arrest on behalf
2 of the property owner, again, pointing to the fence as the
3 division between the public and private property lines.

4 When I offered my help to the deputy in showing
5 him where the high water mark was, he responded to me that
6 he was just following orders from his superior at the time
7 to issue these citations. Myself and my neighbor agreed
8 to leave the beach that day.

9 I've also obtained a copy of a cease and desist
10 letter that was issued by the attorney of Mr. And Mrs.
11 McNeil to one of the local kayak rental companies in Kings
12 Beach, claiming that his clients quote, "Own down to
13 elevation 6223." That his clients quote "Acknowledge the
14 rights of the public to recreate in the waters of Lake
15 Tahoe," and quote, "Acknowledge the Public Trust Doctrine
16 is applicable to the lands submerged under the waters of
17 Lake Tahoe."

18 The letter further demands that the kayak shop
19 owner cease and desist aiding and abetting trespassers and
20 direct his clients to public beaches that are maintained
21 and have public toilet facilities.

22 This kind of intimidation threatens not only the
23 public, but also our local economy in Lake Tahoe at a time
24 when many local businesses are struggling to survive.

25 It is my understanding that an exhaustive review

1 of past complaints filed with the Placer County Sheriff
2 over the last five years have revealed that there have
3 been no complaints of public drunkenness, lewdness,
4 nudity, et cetera at Speedboat Beach, contrary to the
5 DeSautels and the McNeils repeated assertions, not one.

6 And as you can see in the pictures, this is a
7 very beautiful beach that the people of Lake Tahoe really
8 love and enjoy and take care of, and have acted as
9 stewards of this beach for many, many generations. And I
10 can even tell you that one of my friends who was cleaning
11 up the beach was harassed by the DeSautels guards and told
12 that they needed to leave the beach.

13 Finally, I just want to summarize by saying while
14 I agree that the fence should be removed, I also believe
15 that there needs to be continued monitoring and
16 enforcement of the public's access to Speedboat Beach. I
17 think that the homeowners have shown that they will use
18 various forms of harassment and intimidation to limit
19 access to the beach, including hiring security guards,
20 video cameras, bull horns to scare people off the beach.
21 And I believe that the letters from the State Lands
22 Commission and the removal of the intimidating no trespass
23 signs, corresponded with the end of the summer.

24 So while it appeared that the landowners were
25 complying with what was in the State Lands Commission's

1 request, that actually the homeowners were just simply no
2 longer interested in limiting access to the beach, because
3 people are only using the beach in the summertime.

4 And that it is imperative, you know, that there
5 also be signs showing where the approximate high water
6 line is, so that the public is really informed of what
7 their rights are, and which parts of the beach that
8 they're able to use.

9 I feel that the fence should be removed
10 immediately this winter while the lake is at almost its
11 record low water level, so that the removal can be
12 completed with minimal disturbance of the lakebed and the
13 environment. And I would add to the record that the
14 property owners should not be compensated for their
15 outrageous attempt to steal public property for private
16 gain. In fact, they should probably be fined.

17 And thank you for allowing me to comment on this
18 very critically important matter.

19 CHAIRPERSON GARAMENDI: Thank you very much. I
20 believe that completes the public testimony.

21 We have before us the proposed action by the --
22 proposed by the staff. But before we get to that, there
23 are two things that I would like to add to this
24 discussion.

25 First of all, I would ask that the Commission

1 staff working with the Attorney General deliver to the
2 property owners, the upland property owners, a letter
3 clearly stating the right of the public to pass and to
4 recreate on the beach below the high water mark.

5 And secondly, I would ask that the staff working
6 with the Attorney General seek a restraining order against
7 the property owners, the upland property owners,
8 prohibiting them from any harassment of the public who are
9 lawfully exercising the public's right to access and
10 recreate on the land below the high water mark.

11 I would ask that that be part of our proposed --
12 of the action taken here today. The action of the
13 property owners, the upland property owners, is
14 reprehensible. It is clearly contrary to the rights of
15 the public. And it is the -- as I see it, the
16 responsibility of this State Lands Commission to make
17 certain that the rights of the public to use the public
18 land or easements that are on private land to use that to
19 the fullest extent allowed by either the law or the Trust
20 doctrine.

21 Mr. Fossum, Mr. Thayer, would you comment on my
22 two proposals.

23 CHIEF COUNSEL FOSSUM: We're certainly prepared
24 to work with the Attorney General and communicate with the
25 property owners there. We will also look into the

1 appropriateness of issuing a restraining order at this
2 time. I think we want to talk to the attorneys
3 representing the property owners whether their clients
4 will intend to abide by the action of the Commission and
5 the existing law and rights there.

6 And I think that the suggestion of obtaining a
7 restraining order is certainly something that we were
8 looking at should the property owners take action
9 following the Commission's action, that isn't consistent
10 with that.

11 EXECUTIVE OFFICER THAYER: But to interrupt, you
12 know, I'm taking from the Chair's approach something
13 different maybe than Mr. Fossum, which is that it's
14 something that should be addressed now, and that we'll
15 work with the AG's office to do that.

16 CHAIRPERSON GARAMENDI: Well, let me make it
17 clear. It's the view of this Chairman of this Commission
18 that there's considerable evidence presented at this
19 hearing and in other documentation, that the rights of the
20 public are being abridged and that harassment is taking
21 place.

22 And therefore, I think it is appropriate to seek
23 a restraining order based upon past action during this
24 past summer, so that next summer, it does not occur. And
25 should it occur, appropriate action by the court in

1 contempt of that restraining order could take place.

2 I want to lay the law down here. I want to be
3 very, very clear about protecting the rights of the
4 public. And if they don't get it, then they can take it
5 up with the judge who issues the restraining order. I
6 think there's plenty of evidence on the record that such
7 an order is appropriate. And I want that fence out of
8 there of now.

9 Okay, we have a proposed action as modified by my
10 two suggestions.

11 John.

12 COMMISSIONER CHIANG: Can you give me a
13 historical backdrop as to any good-faith action taken by
14 the property owners to work this out with the public? As
15 the Lieutenant Governor just has alluded I find the
16 evidence overwhelming that the landowners have taken
17 action to deny access, in fact, the commentary offered
18 today, to intimidate individuals which I find, as John
19 pointed out, reprehensible, I would add offensive, to
20 people who have a legal and legitimate right to use those
21 properties.

22 And so just not to be entirely swayed by this,
23 right, I'm trying to find fairness and balance in the
24 record, and I haven't seen it.

25 So if you are aware of circumstances where the

1 landowner has tried to work this out properly, you know,
2 I'd like to hear it.

3 CHIEF COUNSEL FOSSUM: Well, let just say in
4 trying to be fair to the property owners as well, I did
5 point out that the signs on the McNeil property appear to
6 be much higher than the ones that the DeSautels put, the
7 no trespassing signs. They appear to be -- if there has
8 been actions, taken by them below those signs chasing
9 people off the beach, which it certainly sounds like,
10 based on the testimony, that's different. But the signs
11 themselves appear to be close, and we would certainly be
12 willing to work with them to make sure that they are aware
13 of the exact location of that high water mark.

14 They have on a couple of occasions removed some
15 of the things that were blocking public access underneath
16 the pier, the McNeils did. We have had testimony again
17 today that they probably did that because the season was
18 over. We've had to tell them more than once in that
19 regard.

20 There has been extensive comments made about
21 activities by both of the property owners or their
22 employees about this harassment. There's no doubt about
23 that, based upon the correspondence we've received. We
24 have had some witnesses by staff seeing the guards go down
25 on the beach and basically people leaving after talking to

1 them and so forth.

2 I think what we -- staff is prepared to follow
3 the Commission's direction. We certainly want to
4 communicate with the counsel for the property owners there
5 to see if we can't do things -- make agreements with them
6 that they will abide by the Commission's actions here, but
7 we are prepared to follow any direction that the
8 Commission gives us.

9 COMMISSIONER CHIANG: Yeah. I'm particularly
10 disturbed to see that there's harassment without an
11 offense, without certainly provocation, that's that
12 additional step.

13 But to assert right to that land to the exclusion
14 of others is undeniably the, you know, the worst offense
15 to the use of these lands.

16 CHAIRPERSON GARAMENDI: Let me add a couple of
17 points to this.

18 My suggestion and modification of the action
19 proposed by staff is to seek a restraining order. That
20 requires a court hearing, and would certainly give the
21 opportunity to the Hills and anybody else that feels
22 offended to appear before the court, to state their case
23 and their experiences and for the property owners to
24 counter, if they choose to do so.

25 But I think it is essential that we lay down a

1 clear -- that we lay down the law, and we make it clear,
2 that in the coming season, in 2010 what is expected, what
3 is lawful, and what actions cannot take place.

4 I think there's a long history here of the upland
5 property owners trying to force the public off the beach,
6 and apparently with some success, including a fence and
7 including the actions that were stated in testimony given
8 today.

9 So I want to move forward. I'm very serious
10 about this. I want to move forward. I want to see this
11 before a court, proper jurisdiction, and let the court
12 decide whether it's appropriate to have a restraining
13 order. And then if there's some other modification, an
14 agreement, short of a restraining order, then let the
15 court decide that. But we have to be very, very clear
16 here, because this isn't just about Tahoe. This is about
17 the entire State of California. We have a thousand miles
18 of coastline. And there have been numerous attempts over
19 the years for private upland property owners to prevent
20 the passage of the public along that coast. We have
21 thousands of miles of rivers, and we need to be very, very
22 clear about the Public Trust.

23 This is a beautiful document that was produced by
24 the State Lands Commission. It's worth nothing, unless
25 we're willing to make it clear that this is, in fact, the

1 right of the public and it will be enforced against those
2 who attempt to abridge it.

3 So that's where I'm coming from on this. And I'd
4 like to see, A, first, a letter delivered as quick as
5 possible to the property owners stating the position of
6 the public and the rights of the public, and follow it up
7 very quickly thereafter by a restraining order against the
8 property owners for actions that would prevent the public
9 from full enjoyment of their rights.

10 So, John, if you'd like to take the Chair here,
11 I'll make that motion.

12 Yes, Tom.

13 ACTING COMMISSIONER SHEEHY: Mr. Chairman, I want
14 to just make one comment. I'd like to echo some of the
15 comments of my fellow Commissioners today. I'm shocked
16 and very disturbed over the testimony that I've heard
17 today about the harassment going on at this beach and the
18 tactics being used. Assuming, it's true, and I have no
19 reason to believe that it's not, assuming it's true. I
20 find that those actions just completely unacceptable and
21 reprehensible. So I'm very sympathetic to that. And I
22 think that the public's use of the sovereign lands needs
23 to be clearly delineated and protected.

24 That said, there is significant correspondence
25 that I received just today dated October 21st from several

1 different attorneys representing both parties. I have not
2 had the chance to fully digest everything in there. And
3 so while I am generally supportive of the staff
4 recommendation and the comments of my colleagues on this
5 body, I would be more comfortable voting on this at our
6 next meeting, after I've had a chance to digest it more.

7 I realize that is not going to satisfy the Chair,
8 and so I have no objection at all, Mr. Chairman, to you
9 proceeding, but I will abstain today.

10 CHAIRPERSON GARAMENDI: Well, then let me pass
11 the gavel to you, and if you'll --

12 ACTING COMMISSIONER SHEEHY: Mr. Chairman, did
13 you have a motion you'd like to make.

14 CHAIRPERSON GARAMENDI: I do. I want to move the
15 staff report and amend it with two points. One is for the
16 staff, together with the Attorney General, to deliver to
17 the upland property owners a letter clearly stating the
18 rights of the public. And secondly, to work with the
19 Attorney General to seek a restraining order against any
20 harassment or any action that would prevent the public to
21 fully enjoying its rights.

22 ACTING COMMISSIONER SHEEHY: Is there a second to
23 that motion?

24 COMMISSIONER CHIANG: I second.

25 ACTING COMMISSIONER SHEEHY: We have a motion and

1 a second.

2 All in favor say aye?

3 (Ayes.)

4 ACTING COMMISSIONER SHEEHY: Those abstaining?

5 Let the record showing Mr. Sheehy is abstaining.

6 None opposed.

7 That motion carries.

8 Thank you, Mr. Chairman. The gavel is back in
9 your hand.

10 CHAIRPERSON GARAMENDI: Thank you very much, Tom.
11 Mr. Thayer, what other business is before the
12 Commission

13 EXECUTIVE OFFICER THAYER: That concludes all of
14 the agenda, and we have no closed session items.

15 CHAIRPERSON GARAMENDI: Okay. We're going to
16 move to a closed session -- no closed session. Then the
17 work of the Commission is done. I want to thank the staff
18 for the extraordinary work that they've done now and in
19 the past. It's been a pleasure working with you thus far.
20 Thank you so very, very, very much.

21 EXECUTIVE OFFICER THAYER: And let me say the
22 same is true for working with the Lieutenant Governor.
23 And don't want to do any jinxing, so we won't say anything
24 further, but nonetheless it's been a pleasure.

25 CHAIRPERSON GARAMENDI: Thank you very much.

1 We're adjourned.

2 (Thereupon the California State Lands

3 Commission meeting adjourned at 12:22 p.m.)

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