

MINUTE ITEM

This Calendar Item No. 9
was approved as Minute Item
No. 9 by the State Lands
Commission by a vote of 3
to 0 at its 7/12/78
meeting.

MINUTE ITEM

7/78
Rasmussen

9. RESULTS OF MANAGEMENT PRACTICES AUDIT OF MOSS LANDING
HARBOR DISTRICT - G 08-03.2

During consideration of Calendar Item 9, attached, Mr. James F. Trout, Chief, Land Management and Conservation, summarized the item. He stated that the auditors of the Commission's staff had requested that he emphasize a financial audit had not been performed on the grant to the Moss Landing Harbor District and that this item concerned only the management audit.

Mr. Trout explained that the management audit focused on the inconsistencies between the granted lands statute, the common law trust, and the activities within the Harbor District, most of which have been corrected due to the good management practices instituted by the District's new general manager, Mr. William Wimmer. He summarized by stating that the audit report showed:

1. NORTH HARBOR

The present agreement between the Harbor District and the Elkhorn Yacht Club in effect made the yacht club the manager of the tidelands in the north harbor. Certain provisions of this agreement are inconsistent with the trust and not in the public interest. The District has been working very hard to correct that situation.

2. SOUTH HARBOR

More difficult problems are involved in that:
1) there are a number of wharves and piers which the District may have sold in the past for very small amounts of money; and 2) there are a number of piers and wharves paying little, if any, rent. He stated the resolution of this problem is going to require completion of a survey by the Commission's staff which should be completed by the first of the calendar year.

With regard to the agreement with the Elkhorn Yacht Club, Commission-Alternate Betty Jo Smith wanted to be sure that any new agreement would include a clause preventing discriminatory practices. Ms. Libby Rasmussen, Granted Lands Representative, stated that the Commission did not have any specific requirements to be included in such an agreement, but that the staff

would make sure this clause was inserted. Mr. Trout pointed out that with regard to other grantees which have issued leases to yacht clubs, the bylaws or constitutions have included, or have been amended to include, a nondiscriminatory policy.

Mr. Granville Perkins, Commissioner, Moss Landing Harbor Commission, and Chairman of its Property Committee, appeared in support of the item. Mr. Perkins stated that the results of this audit concerning the Elkhorn Yacht Club were not new to their Commission. They had previously been informed by a former Granted Lands Representative of the Commission that if the Harbor District entered into an agreement being proposed by the Yacht Club, they would be in violation of their grant, and the Commission would have an obligation to consider revoking the grant. He stated, though, that the District is fully aware of its management responsibilities in the north harbor, and any future lease agreement with the Yacht Club would clearly stipulate that the north harbor is under the governance of the Moss Landing Harbor District.

Mr. Perkins indicated, however, that if the problems identified in the audit with regard to the Yacht Club and the District are not resolved, the District would take over the operation of the north harbor. Ms. Smith again questioned whether a provision would be inserted in the Yacht Club's agreement preventing discrimination. Mr. Perkins assured Ms. Smith that this type of provision would be included. Mr. Perkins also pointed out some minor errors in the management audit dealing with ownership problems.

Chairman Kenneth Cory then requested that the staff's recommendation be amended as follows:

In Recommendation 2a and 2b, strike the words "shall include" and insert the words "may include". This amendment was inserted so that it would not be mandatory for the District to conclude the lease with the Yacht Club if in fact a satisfactory agreement cannot be reached.

Ms. Smith asked if the staff had contemplated performing a financial audit on this grant in the immediate future. Mr. Trout stated that in the staff's opinion, a financial audit was not justified at this time because there were other grants of higher priority needing this type of audit.

Mr. William Wimmer, General Manager, Moss Landing Harbor District, appeared in support of the item. Mr. Wimmer briefly reiterated Mr. Perkins' statements. He also stated the Harbor District is presently undergoing an annual financial audit by the firm of Haskins and Sells. He indicated the Commission will receive a copy of that report upon its completion.

Upon motion duly made and carried, the following resolution was adopted by the Commission by a vote of 3-0:

THE COMMISSION:

1. NOTIFIES MOSS LANDING HARBOR DISTRICT OF THE CONTENT AND CONCLUSIONS OF THIS AUDIT.
2. FINDS THAT EITHER OF THE FOLLOWING SOLUTIONS, WHILE NOT EXCLUDING OTHER POSSIBLE SOLUTIONS THAT THE DISTRICT MAY WISH TO ADOPT, WOULD TEND TO SATISFY SUCH REQUIREMENTS FOR COMPLIANCE:
 - (a) THE DISTRICT MAY CONCLUDE A LEASE WITH THE ELKHORN YACHT CLUB WHEREBY THE CLUB PAYS FAIR MARKET RENTAL BASED ON APPRAISED VALUE OR A SPECIFIED PERCENTAGE OF REVENUES COLLECTED FOR THE USE OF NORTH HARBOR AND TAKE WHATEVER ACTIONS ARE NECESSARY TO ESTABLISH LEASES IN SOUTH HARBOR AND TO PREVENT PRIVATE PARTIES FROM USING TIDELANDS WITHOUT PROPER AUTHORIZATION.
 - (b) THE DISTRICT MAY CONCLUDE A NEW AGREEMENT WITH THE YACHT CLUB WHEREBY THE CLUB PAYS RENT AND CLEARLY AGREES TO PROVIDE PUBLIC SERVICES AND TAKE WHATEVER ACTIONS ARE NECESSARY TO ESTABLISH LEASES IN SOUTH HARBOR AND TO PREVENT PRIVATE PARTIES FROM USING TIDELANDS WITHOUT PROPER AUTHORIZATION.
3. REQUIRES, WITHIN 1 YEAR FROM THE DATE OF SUCH NOTIFICATION, THAT THE DISTRICT, IN COOPERATION WITH COMMISSION STAFF, ADOPT APPROPRIATE MEASURES TO BRING ITS ADMINISTRATION OF THE LANDS GRANTED TO IT INTO COMPLIANCE WITH THE TERMS OF THE GRANTING STATUTES AND THE COMMON LAW TRUST OR SUBMIT A PROGRESS REPORT REGARDING THE MEASURES TAKEN TO ACHIEVE THIS END.
4. AUTHORIZES THE EXECUTIVE OFFICER TO TAKE ANY STEPS NECESSARY INCLUDING HOLDING A PUBLIC HEARING, TO DETERMINE IF THE DISTRICT HAS ADOPTED APPROPRIATE, CORRECTIVE MEASURES AT WHICH TIME THE GRANTEE WILL BE GIVEN AN OPPORTUNITY TO FULLY EXPRESS ANY DISAGREEMENT WITH THE COMMISSION FINDINGS OR DESCRIBE ANY EXTENUATING CIRCUMSTANCES CAUSING THE VIOLATIONS AND/OR DELAYS.

5. FINDS THAT, IN THE EVENT OF A DETERMINATION THAT THE DISTRICT HAS NOT ADOPTED APPROPRIATE CORRECTION MEASURES, THAT THE ATTORNEY GENERAL AND/OR STAFF COUNSEL BRING AN ACTION IN THE SUPERIOR COURT OF MONTEREY COUNTY TO DECLARE THAT THE GRANT UNDER WHICH THE TRUSTEE HOLDS SUCH TIDELANDS IS REVOKED FOR SUBSTANTIAL FAILURE TO COMPLY WITH THE TERMS OF SUCH GRANT AND THE OTHER APPLICABLE PROVISIONS OF LAW.

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RESULTS OF MANAGEMENT PRACTICES
AUDIT OF MOSS LANDING HARBOR DISTRICT

TRUSTEE: Moss Landing Harbor District
P. O. Box 102
Moss Landing, California 95039

LOCATION: Granted tide and submerged lands at Moss
Landing, County of Monterey.

PURPOSE: Audit of the administrative practices of
the District to determine compliance with
the terms of the grant and the common law
public trust.

BACKGROUND: On June 22, 1943, the Moss Landing Harbor
District was created under Section 6000
et. seq. of the Harbors and Navigation
Code.

Chapter 1190 of the Statutes of 1947 and
Chapter 131 of the Statutes of 1967 granted
certain tide and submerged lands at Moss
Landing in Monterey County to the Moss
Landing Harbor District. The grant was
made for harbor purposes and for the promotion
and accommodation of commerce and navigation.

On June 8, 1952, an agreement was signed
between the Elkhorn Yacht Club and the
Moss Landing Harbor District and filed
with the County of Monterey, Book 1404,
Page 551. By virtue of this Agreement,
the Yacht Club became the Operating Agent
of the Harbor District for the North Harbor.

Responding to charges from a member of
the Moss Landing Harbor District constituency
about alleged deficiencies in the District's
management of granted tide and submerged
lands, Commission staff undertook an audit
of the administrative and financial practices
of the District. The purpose of this Management
Practices Audit has been to determine whether
or not there has been substantial failure,

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on the part of the Moss Landing Harbor District, to comply with the terms of its granting statutes and/or with the conditions of the tidelands trust as found in the common law, herein referred to as the common law trust.

INVESTIGATION: In order to make such a determination, staff investigated the following areas as they pertain to the granted lands:

- Utilization of granted lands,
- Administration and control of granted lands,
- Policies and procedures governing leases, rents and franchises, and
- Administration of tidelands revenues.

Based on detailed examination and analysis of all records and documents judged relevant to this investigation of Moss Landing Harbor District, this Management Practices Audit concludes that there has been substantial violation of Chapter 1190, Statutes of 1967, and of the common law trust implicit in such grants.

These violations, discussed in the text, are summarized as follows:

- 1) Granted tide and submerged lands have been put to uses which favor private rather than public benefit.

The 1952 Agreement which made the Elkhorn Yacht Club the Operating Agent of the Harbor District for the North Harbor names the members of the Club as the primary beneficiaries of the harbor facilities. There is also no evidence of discrimination or a monopoly, however, the Agreement contains no specific provision to prevent this.

- 2) Granted tide and submerged lands have been put to uses which favor local rather than statewide benefit.

Again, the 1952 Agreement which names the Club members as the primary beneficiaries of the harbor facilities

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precludes uses with a statewide benefit. The fact that there is only one transient berth also indicates a lack of provision for the use of facilities by residents of other parts of the State.

- 3) Granted tide and submerged lands intended by statute to be used in furtherance of commerce, navigation and fishing have been used for private recreation while needs for commerce, navigation and fishing went unmet.

Section 9 of the 1952 Agreement declares that the North Harbor facilities shall be used only by "pleasure craft" and use by any other kind of craft, or for any other purpose, becomes incidental to that primary use.

In addition, the Legislature has, in numerous instances, made grants in which a much broader range of uses was authorized. The fact that the Legislature did not choose to adopt these varied uses when making the Moss Landing grant suggests that a more restrictive interpretation of authorized uses was intended.

- 4) Granted lands have been left under the use and control of a private organization for a prolonged and indefinite period.

Sections 1 and 2 of the 1952 Agreement make the Yacht Club the exclusive operating agent with an irrevocable option to lease the facilities, which lease may be automatically renewed from year to year. The North Harbor facilities are not now covered by lease or permit.

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- 5) Private interests have been receiving virtually free use of public property for over 20 years.

The duties that the Yacht Club performs and the charges that they agree to pay are actually among those routinely required in typical leases of State tidelands (i.e., where the lessor is the State Lands Commission), and are invariably "in addition" to the amount of rent. Nor does the fact that the Yacht Club is a non-profit organization providing certain services to the public suffice to justify their rent free use of State tidelands.

- 6) Lastly, the status of several facilities using tidelands in South Harbor is not clearly established. The District may be entitled to rent it is not now receiving.

DISCUSSION:

Most of the violations can be traced to the 1952 Agreement which gave the Elkhorn Yacht Club administrative control over North Harbor granted tide and submerged lands. Although this investigation has found no evidence that the Yacht Club or any of its members ever intended to divert tidelands revenues into private hands or to otherwise defraud the public, it appears clear that sovereign tide and submerged lands have served primarily as a convenience to a private organization, and considerations of general statewide benefit have been incidental.

Likewise, this investigation has found no mismanagement, apart from minor incidents which cannot be considered typical or characteristic of the overall pattern. The Elkhorn Yacht Club appears to have been motivated by the desire to guarantee the security of the revenue bond investment, and to maintain North Harbor facilities suitable for recreation craft. The Club has managed the area under its charge in an efficient

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manner, consistent with the goals and purposes of the Club and the terms of the Agreement with the District. It has regularly repaid its bonded indebtedness and it has contained expenditures within the limits of its revenues, so that the North Harbor facilities have been self supporting. It has kept rentals fairly low while providing necessary maintenance and utility services at reasonable cost. It has not incurred any additional indebtedness and has not received any tax revenues.

Unfortunately, such management, proper on private lands, is not necessarily suitable for sovereign tide and submerged lands, for this audit finds that the goals of the Yacht Club and the terms of the Agreement have not been directed toward the furtherance of the public trust, and that this trust has been violated.

Members of the Club undoubtedly saw themselves as shareholders in "Their Enterprise", which admittedly they had largely inspired and financed. Nonetheless, purchasers of public revenue bonds, issued pursuant to the Harbors and Navigation Code, are not shareholders in a private company and are not entitled by their purchase to exert control over the project which they are financing.

If the Club acts in the capacity of Agent for the Moss Landing Harbor District in North Harbor tidelands administration, considerations of general statewide benefit must come first. If the Club desires to use such lands primarily for its own benefit, it must execute a lease and pay fair market value.

Problems relating to ownership of South Harbor facilities and lands may be clarified when the Commission survey, required by Chapter 131 of the Statutes of 1967, is complete. The survey which was due in 1969, was delayed for 5 years because an agreement could not be reached between the Harbor District and the State Lands Commission.

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It has more recently been delayed by a shortage of staff. The District will be expected to assert and reestablish any rights it may have been neglecting.

EXHIBIT: A. Grant Map.

IT IS RECOMMENDED THAT THE COMMISSION:

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5. FIND THAT, IN THE EVENT OF A DETERMINATION THAT THE DISTRICT HAS NOT ADOPTED APPROPRIATE CORRECTION MEASURES, THAT THE ATTORNEY GENERAL AND/OR STAFF COUNSEL BRING AN ACTION IN THE SUPERIOR COURT OF MONTEREY COUNTY TO DECLARE THAT THE GRANT UNDER WHICH THE TRUSTEE HOLDS SUCH TIDELANDS IS REVOKED FOR SUBSTANTIAL FAILURE TO COMPLY WITH THE TERMS OF SUCH GRANT AND THE OTHER APPLICABLE PROVISIONS OF LAW.

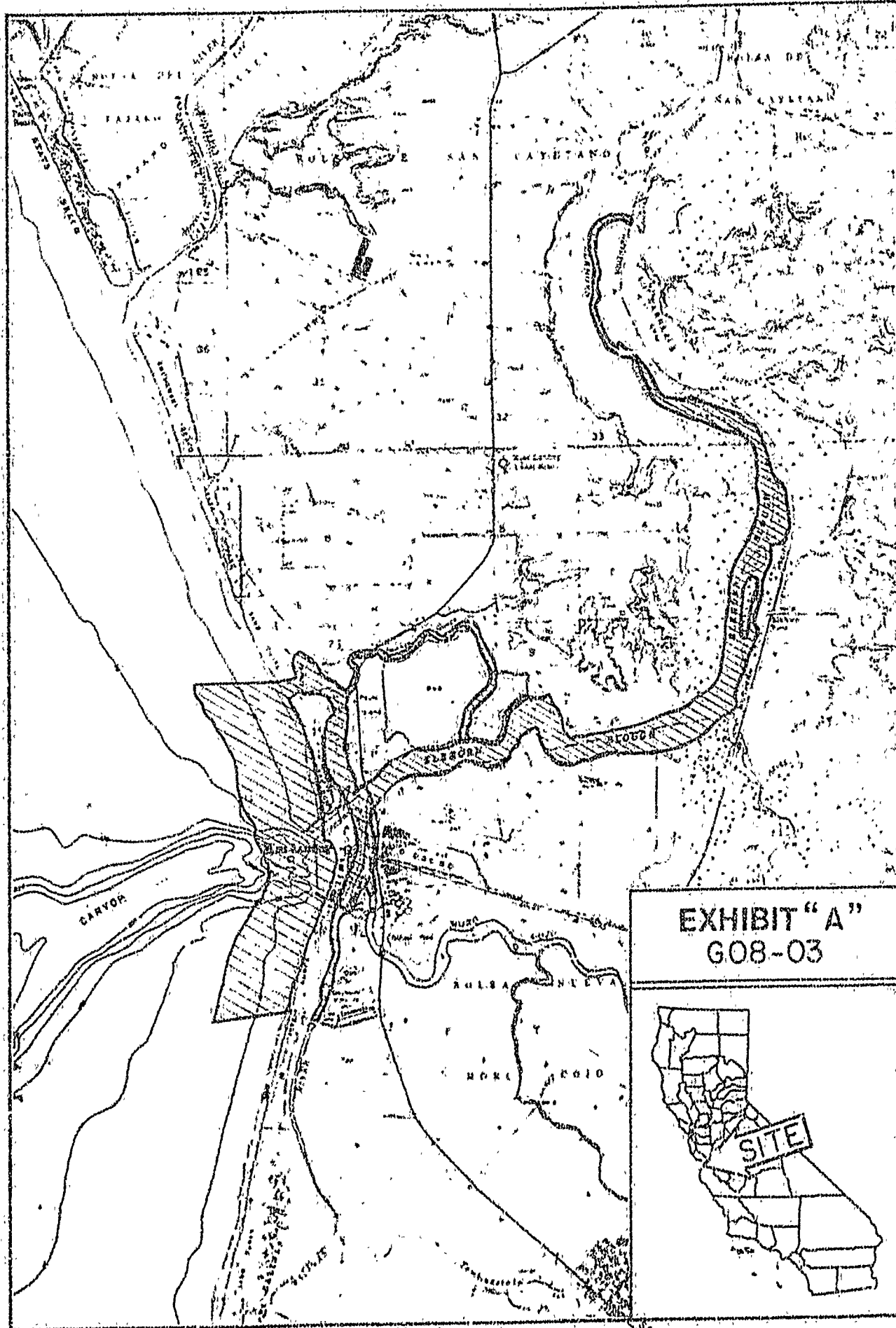


EXHIBIT "A"
G08-03

