

CALENDAR ITEM

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

PROPOSED ACTION:

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

BACKGROUND:

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

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

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

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

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

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

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

THE SUBJECT PROPERTY:

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

LEGAL BACKGROUND:

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

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

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

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navigable waterways within its borders, not previously conveyed by the Spanish or Mexican government, to the ordinary high water mark⁴. In 1872 the California Legislature first adopted codified laws. Two pertinent code sections were amended in 1874 and have not been amended since. Civil Code § 670 states:

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

Civil Code § 830 states:

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

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

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

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

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

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

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

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

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

The California Supreme Court decisions of *Lyon* and *Fogerty I*, along with their precedents⁵ all clearly enunciated the authority of the State when acting to protect the public's interest in public trust lands that have been conveyed into private ownership. Also abundantly clear is that the State has the obligation to compensate the owner of the underlying fee title when the State exercises its authority over the easement and

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

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

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

TRUST NEEDS AND USES:

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

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

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

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

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

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

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

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

⁷ Public Resources Code §§ 6301 and 6216.

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

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

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

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

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

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

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

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

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

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

EXERCISE OF THE PUBLIC’S TRUST RIGHTS:

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

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

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

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

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

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

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

CALENDAR ITEM NO. 61 (CONT'D)

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

OTHER PERTINENT INFORMATION:

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

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

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

EXHIBITS:

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

RECOMMENDED ACTION:

IT IS RECOMMENDED THAT THE COMMISSION:

CALENDAR ITEM NO. 61 (CONT'D)

CEQA FINDING:

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

SIGNIFICANT LANDS INVENTORY FINDING:

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

RESOLUTION OF EXERCISE OF PUBLIC TRUST EASEMENT:

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

AUTHORIZATION:

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

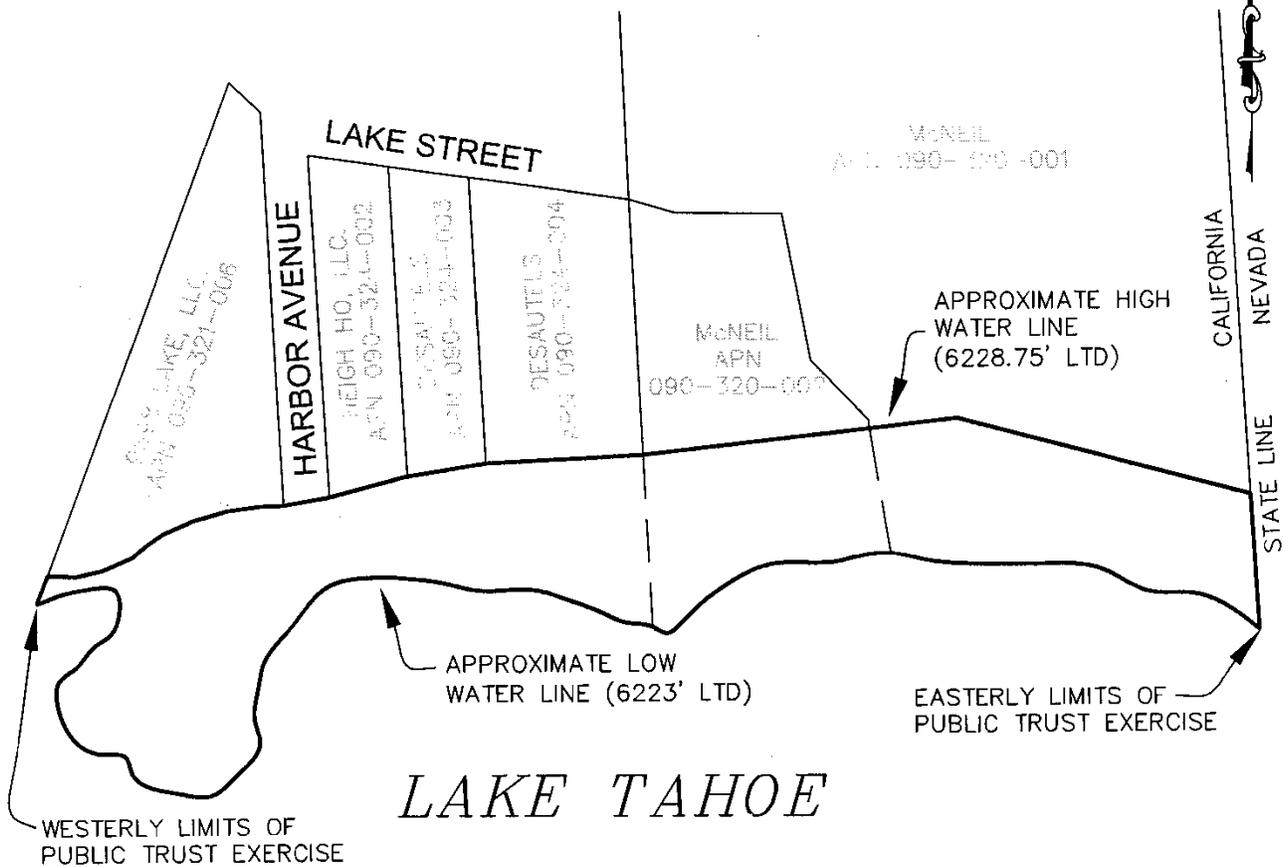
CALENDAR ITEM NO. **61** (CONT'D)

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

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

NO SCALE

SITE

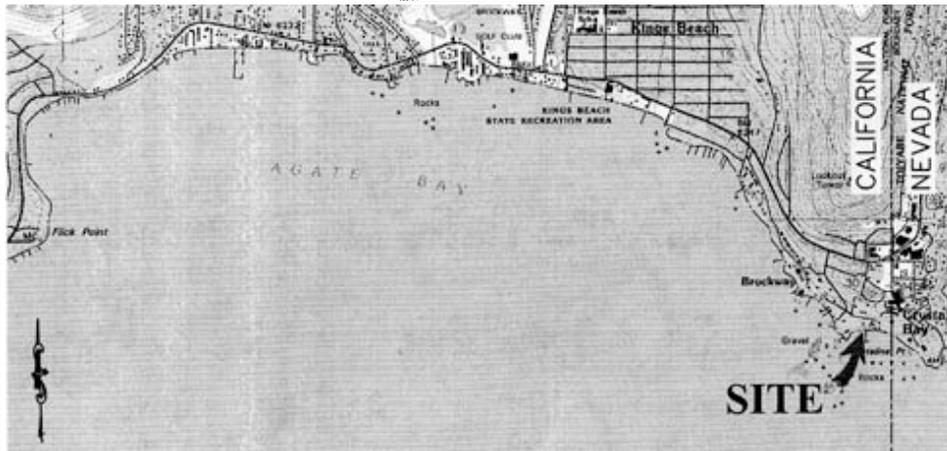


*NOTE: LINEWORK TRACED FROM ASSESSOR'S MAP BOOK 90 PAGE 32, PLACER COUNTY RECORDS.

9898 - 9950 LAKE STREET, KINGS BEACH

NO SCALE

LOCATION



MAP SOURCE: USGS QUAD

This Exhibit is solely for purposes of generally defining the Public Trust Exercise area, is based partially on unverified information provided by other parties and is not intended to be, nor shall it be construed as, a waiver or limitation of any State interest in the subject or any other property.

Exhibit A

McNEIL, DeSAUTELS,
COUNTY OF PLACER,

9898 LAKE, LLC.,
HEIGH HO, LLC.

APN 090-320-001, 002,

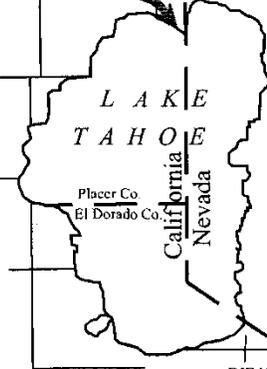
090-324-002, 003, 004,

090-321-006

PUBLIC TRUST EXERCISE

PLACER COUNTY

SITE



DJF 10/09

EXHIBIT B

PLACER COUNTY SIGN AT HARBOR AVENUE ACCESS TO BEACH

(OCTOBER 8, 2009)

SPEEDBOAT BEACH

BEACH REGULATIONS

BLACK HORSE CANYON BOAT CLUB

- NO CIGARETTES OR SMOKING
- NO DRIVING IN THE NORTH TAHOE PARK SYSTEM
- NO GLASS CONTAINERS
- NO ALCOHOLIC BEVERAGES
- NO FEEDING OF BEACH
- NO SCATTERING OF SEATED IN OTHER BEACHES WITHIN PROHIBITED AREA
- FOOD IN COOLER MUST BE OPEN ONLY
- NO BARK BARK
- REPORT WEEDS IN TRUCK CONTAINERS
- HELP KEEP PARK BEACHES CLEAN
- RESERVATIONS AVAILABLE 530-942-4212



PLACER COUNTY CALIFORNIA



OPERATED BY NORTH TAHOE PARKS REC.



EXHIBIT C

**WOODEN FENCE PHOTO TAKEN
AFTER FOGERTY I AND II DECISIONS**

(1997)

EXHIBIT D

Public Resources Code § 6312.

Prohibited taking, without tender of fair and just compensation, of lawful improvements on validly granted or patented tidelands or submerged lands; Exceptions; Construction

Neither the state, nor any political subdivision thereof, shall take possession of lawful improvements on validly granted or patented tidelands or submerged lands without the tender of a fair and just compensation for such lawful improvements as may have been made in good faith by the grantee or patentee or his successors in interest pursuant to any express or implied license contained in the grant or patent.

Nothing herein contained shall be deemed to prevent the parties to a grant or patent of tidelands from agreeing, as a part of such grant or patent, that there shall be no compensation paid for any improvement made on those tidelands to which such agreement relates.

Nothing herein contained is intended to increase, diminish, or affect the title of any person in any validly granted or patented tidelands or submerged lands.

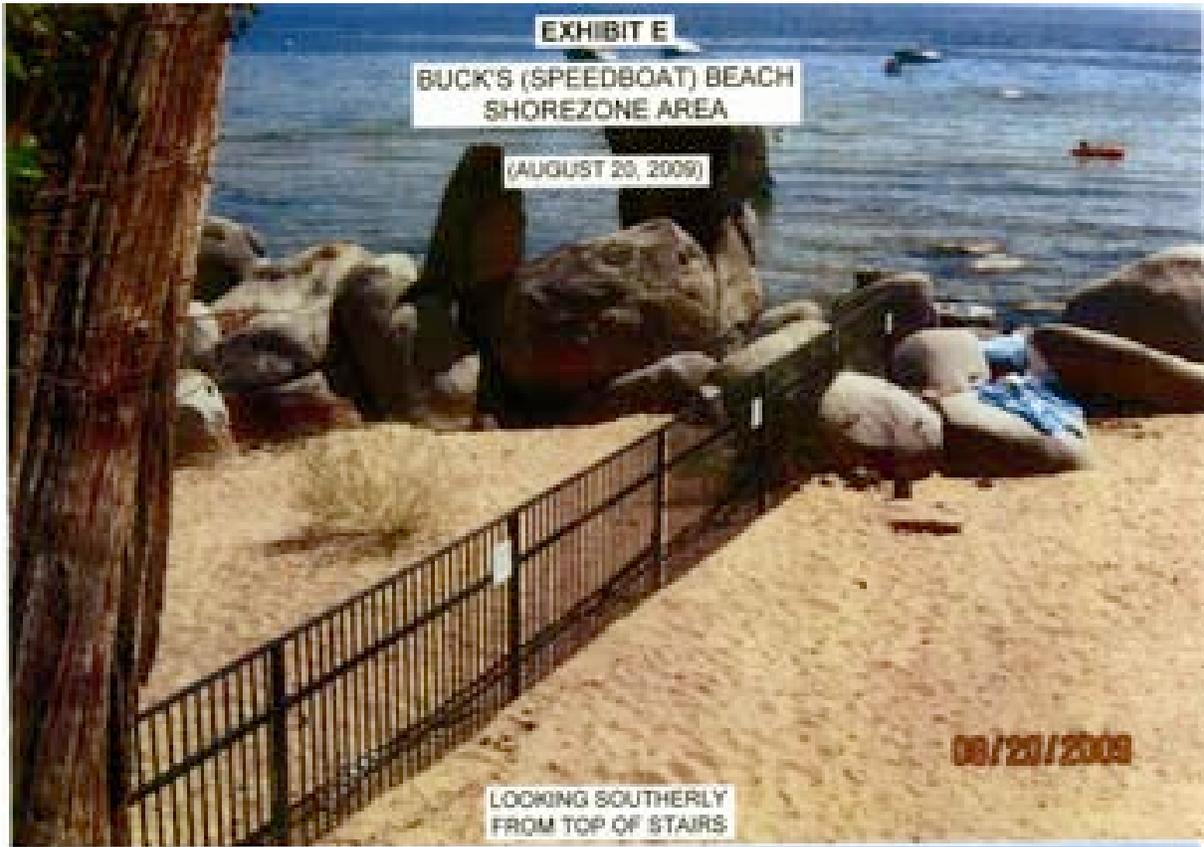
This section shall not be construed to require compensation for any change in the use of tidelands or submerged lands as a result of governmental regulation that prohibits, restricts, delays, or otherwise affects the construction of any planned or contemplated improvement.

As used in this section, the term "grant" or "granted" shall not be construed to apply to legislative grants in trust to local governmental entities.

EXHIBIT E

**BUCK'S (SPEEDBOAT) BEACH
SHOREZONE AREA**

(AUGUST 20, 2009)



08/20/2009

LOOKING SOUTHERLY
FROM TOP OF STAIRS

LOOKING WESTERLY
FROM METAL FENCE



08/20/2009

EXHIBIT F

BUCK'S (SPEEDBOAT) BEACH
SHOREZONE AREA EASTERLY OF
METAL FENCE

(AUGUST 20, 2009)

08/20/2009

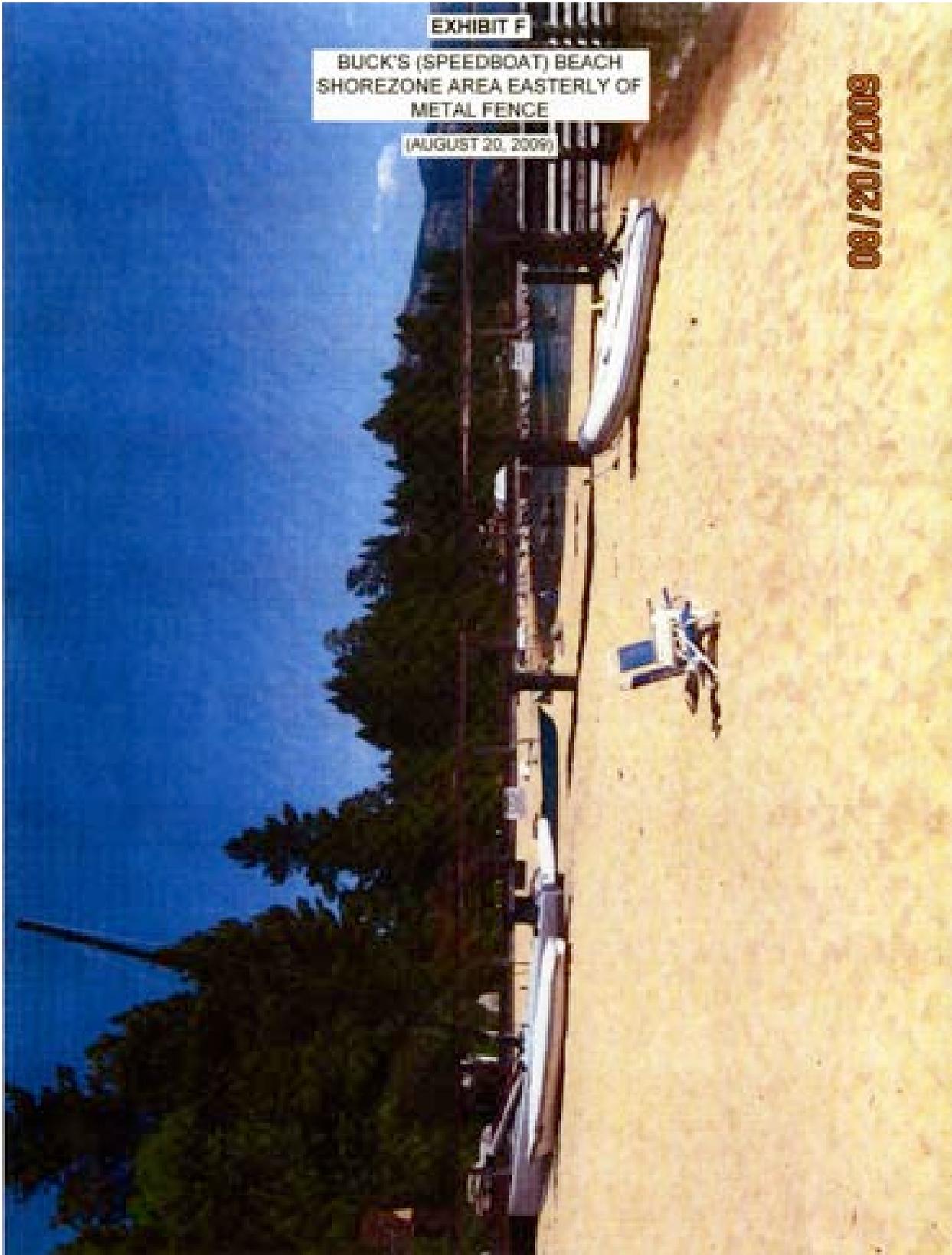


EXHIBIT G

**"NO TRESPASSING" AND
"RIGHT TO PASS" SIGNS**

(AUGUST 2009)



EXHIBIT H
1998 COMMISSION STAFF LETTER
SHEET 1 OF 2

8364

STATE OF CALIFORNIA

PETE WILSON, Governor

CALIFORNIA STATE LANDS COMMISSION
100 Howe Avenue, Suite 100 South
Sacramento, CA 95825-8202



ROBERT C. HIGHT, Executive Officer
(916) 574-1800 FAX (916) 574-1810
California Relay Service From TDD Phone 1-800-735-2922
from Voice Phone 1-800-735-2929

Contact Phone: (916) 574-1856
Contact FAX: (916) 574-1835

April 21, 1998

File Ref: 9922 Lake Street ✓

Mr. Mark Desautels
125 Lakeview Drive
Woodside, California 94062-1124

Tahoe Fence

Dear Mr. Desautels:

SUBJECT: Fence in Lake Tahoe Adjacent to 9922 Lake Street, Brockway, Placer County
Assessor's Parcel No. 090-324-001

This office has received information relative to the existence of a fence between your property and Harbor Avenue which appears to be located waterward of the high water mark of Lake Tahoe, elevation 6228.75 feet, Lake Tahoe Datum. It also has been brought to our attention that this fence is prohibiting the public access along the shoreline of the lake adjacent to the upland parcel.

As general background, the State Lands commission has jurisdiction and authority over all ungranted tidelands, submerged lands and the beds of navigable rivers, sloughs, lakes, etc. California holds a fee ownership in the bed of Lake Tahoe between the low water marks. In addition, the area between the lake's low and high water marks is subject to the Common Law Public Trust Easement.

The California Supreme Court in State of California v. Superior Court (Lyon) (1981) 29 Cal. 3d 210 and State of California v. Superior Court (Fogerty) 29 Cal. 3d 240 held that the area lying between the high and low water marks of non-tidal navigable waters is subject to a public trust easement for commerce, navigation, fishing, recreation and preservation. The high and low water marks of Lake Tahoe have been established as elevations 6228.75 feet and 6223 feet Lake Tahoe Datum. The fence has been constructed so as to interfere with the public's use of the area. It is inconsistent with the public trust easement. This office, therefore, respectfully requests that the portion of the fence located waterward of elevation 6228.75 be removed.

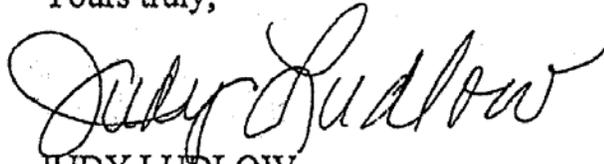
It is also our understanding that the property is currently for sale. By copy of this letter, your real estate representative is also being advised of this situation so that any and all prospective purchasers of the property can be informed of the prohibition of the existence of that portion of the fence below the high water datum. Thank you very much for your cooperation in this matter.

EXHIBIT H
SHEET 2 OF 2

2

If you have any questions, please contact me at (916) 574-1856.

Yours truly,

A handwritten signature in cursive script that reads "Judy Ludlow".

JUDY LUDLOW

Public Land Management Specialist

cc: Mr. Dave Marriner
P.O. Box 4123
Incline Village, Nevada 89450

J. Frey, Staff Counsel
J. Rump, Chief Counsel

EXHIBIT I
2009 COMMISSION STAFF LETTER
SHEET 1 OF 3

STATE OF CALIFORNIA

ARNOLD SCHWARZENEGGER, *Governor*

CALIFORNIA STATE LANDS COMMISSION
100 Howe Avenue, Suite 100-South
Sacramento, CA 95825-8202



PAUL D. THAYER, *Executive Officer*
(916) 574-1800 FAX (916) 574-1810
California Relay Service from TDD Phone 1-800-735-2929
from Voice Phone 1-800-735-2922

Contact Phone: (916) 574-1829
Contact FAX: (916) 574-1855

August 25, 2009

File Ref: PRC 8366.9

Mr. and Mrs. Marc Desautels
10 Quail Meadows Drive
Woodside, CA 94062

Re: Use of State Property in Lake Tahoe

Dear Mr. and Mrs. Desautels:

Your lease from the California State Lands Commission (Commission), which includes two mooring buoys adjacent to Placer County Assessor Parcel 090-324-02 in the bed of Lake Tahoe, is currently in breach. The upland property (APN 090-324-02) was transferred to the Heigh Ho, LLC in 2007 and your lease provides that the leasehold is to be held by the upland owner and thus must be assigned to the new owner or a new lease obtained. We have notified your agent Kevin Agan (see enclosed letter of August 8, 2008) that an application for a new lease for Heigh Ho, LLC must be submitted to the Commission. Staff again in October 2008 reminded Mr. Agan of the need to submit a new application for the buoys adjacent to the Heigh Ho, LLC property. To date we have not received one. Therefore, you are in violation of the terms of the lease. If this breach is not cured within 30 days it will be brought to the attention of the Commission for possible action.

We additionally notified Mr. Agan, as set forth in our letter of August 8, 2008, and discussed with him subsequently, that because of the change in ownership of the upland property, the buoys adjacent to the Heigh Ho parcel no longer qualify for rent free status and your use of the State's property for these buoys will require back rent as well as future rent. We will be sending you an invoice in the next few weeks for back rent commencing on July 1, 2007 (the date on which the property ownership change was recorded in the Office of the Placer County Recorder) on two buoys calculated at \$340 per buoy per year.

We have also been informed that you, or someone at your direction, have placed "No Trespassing" signs on the beach adjacent to your property at Lake Tahoe without obtaining any permits from appropriate governmental authorities. Placement of these signs is also inconsistent with the public's rights to use the public trust lands lying between high and low water. Therefore, we ask that you cease and desist from this

EXHIBIT I

SHEET 2 OF 3

Mr. & Mrs. Desautels
August 25, 2009
Page 2

activity and immediately remove all such signs from the beach located below elevation 6,228.75-feet, Lake Tahoe Datum.

Also, over the last two weeks the Commission's staff has received evidence and a large number of complaints from members of the public concerning interference with the public's right of use of the beach below the high water mark on your property in Lake Tahoe. These members of the public allege harassment and intimidation by persons acting under your direction. We also understand that you have contacted the Placer County Sheriff's Office and requested its officers remove these people from the beach and/or cite them for trespass. As I would hope you are fully aware, the California courts have affirmed the public's right of access and recreational use to all areas of Lake Tahoe below the high water elevation of 6,228.75-feet Lake Tahoe Datum (State of California v. Superior Court (Fogerty) (1981) 29 Cal.3d 240; Fogerty v. State of California (1986) 187 Cal.App.3d 224). The courts also ruled that the upland property owner holds a fee interest in the property to low water at elevation 6,223-feet Lake Tahoe Datum and that interest is subordinate to the the State's public trust interest that has burdened the property since statehood in 1850. If you have questions in this regard we suggest you consult with your title insurance company and/or legal counsel.

Finally, on August 21, 1998 (copy of letter enclosed), the staff of the Commission requested you remove a fence placed on public trust lands below high water and adjacent to Placer County's public access leading from Lake Street through Harbor Avenue to Lake Tahoe. The existence of this fence is being investigated by this office and as an unlawful structure as well as being an interference with the public's trust rights including, but not limited to, navigation. We again respectfully request that you immediately remove the subject fence or the matter will be brought to the attention of the Commission.

We want to meet with you and/or your representative and suggest a meeting at our offices on September 1, 2 or 3 to discuss these issues. We hope that the opportunity for you to discuss these issues with Commission staff and representatives of the Attorney General's office will assist in resolving the matters without the need for legal action. Otherwise, it is anticipated the Commission may find it necessary to take some formal action at a public meeting. Please contact Senior Staff Counsel Jim Frey at (916) 574-1829 and let him know if you wish to meet and what day and time is convenient for you.

Sincerely,


Curtis L. Fossum
Chief Counsel

enclosure

EXHIBIT I

SHEET 3 OF 3

Mr. & Mrs. Desautels
August 25, 2009
Page 3

cc: Bradford Fenoccio
Placer County District Attorney
10810 Justice Center Drive Suite #240
Roseville, CA 95678

Mark Rathe
Deputy County Counsel
175 Fulweiler Avenue
Auburn, CA 95603

Sheriff Edwin N. Bonner
Placer County Sheriff's Office
PO Box 6990
Auburn CA 95604

Jennifer Montgomery
Supervisor, District 5
Placer County
175 Fulweiler Avenue
Auburn, CA 95603

Nicole Rinke, General Counsel
Tahoe Regional Planning Agency
PO Box 5310
Stateline, NV 89449

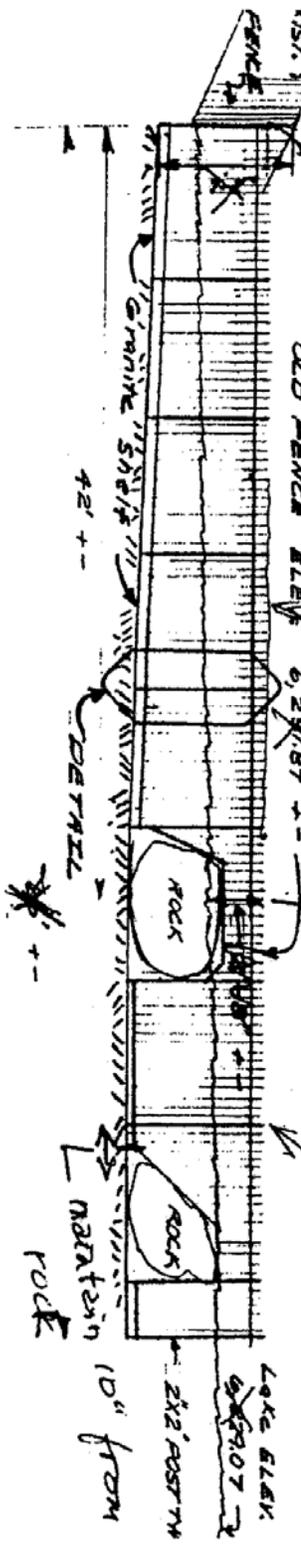
Brian Judge, Enforcement
Tahoe Regional Planning Agency
PO Box 5310
Stateline, NV 89449

Kristin Hansen
U. S. Army Corps of Engineers
300 Booth Street, Room 2103
Reno, NV 89509

Kevin Agan
Agan Consulting Inc.
P. O. Box 9180
Incline Village, NV 89452

Paul Thayer, Executive Officer
Barbara Dugal, Chief, Land Management Division
Jim Frey, Sr. Staff Counsel
Michael Crow, Deputy Attorney General

EXHIBIT J
 TRPA NOTE REGARDING FENCE
 CONSTRUCTION
 SHEET 1 OF 2



O.K. to build a stone
 in real with
 6-20-97
 Height to existing markers
 be 24" below existing
 fence, where markers
 on existing fence

60" x 60" post
 60" x 60" post

Height not to exceed
 rock
 Height of rock + 10"
 Height of rock + 10"
 Height of rock + 10"
 Height of rock + 10"

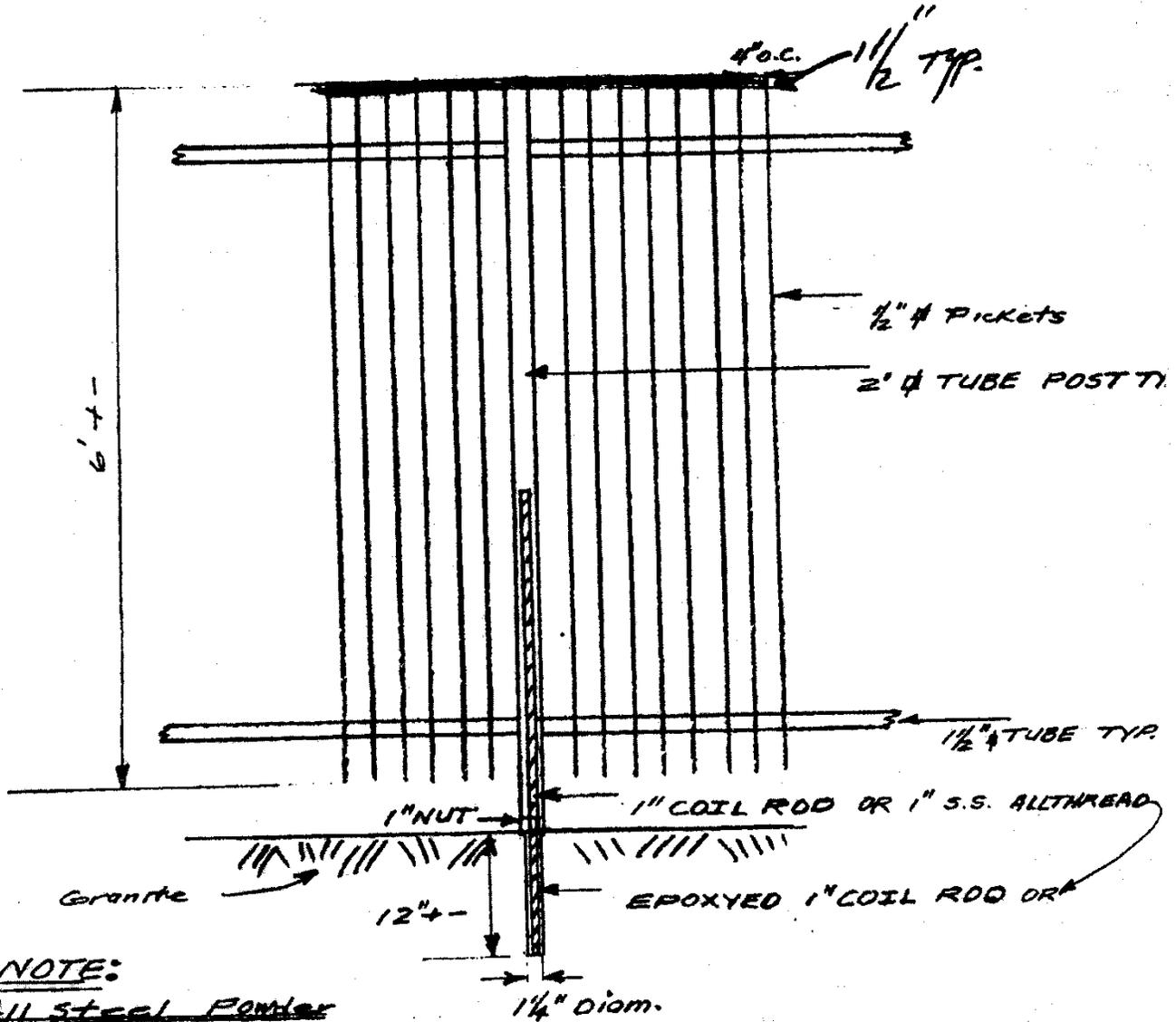
9022 LAKE STREET
 Manc DEARBORN

Scale: 1/8" = 1'-0"

1 of 2

EXHIBIT J

SHEET 2 OF 2



NOTE:
All steel Fender
Coated Black.

DETAIL

Scale: $\frac{3}{4}'' = 1'-0''$

9922 Lake Street
MARC Desautels

EXHIBIT K
UNITED STATES ARMY CORPS OF
ENGINEERS CORRESPONDENCE
SHEET 1 OF 3



CERTIFIED MAIL

RECEIPT REQUESTED

DEPARTMENT OF THE ARMY
SACRAMENTO DISTRICT, CORPS OF ENGINEERS
650 CAPITOL MALL
SACRAMENTO, CALIFORNIA 95814

REPLY TO SPKGO-0
ATTENTION OF

16 January 1976

Mr. Emil S. Von Dessonneck
123 Edgewood Avenue
San Francisco, California 94117

Dear Mr. Von Dessonneck:

This letter concerns the portion of your chain link fence which extends into Lake Tahoe adjacent to Placer County Assessor's Parcel No. 93-060-00.

An inspection of your fence was conducted by personnel of this office as part of our continuing program to see that all facilities in or over navigable waters of the United States are not an existing or potential hazard to navigation. Further, such facilities require Federal approval in the form of a Department of the Army Permit in compliance with the River and Harbor Act of 3 March 1899. This Act prohibits the placing of any structures in navigable waters, unless work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army.

The Corps of Engineers' Regulations for evaluating applications for permits to construct facilities in or over navigable waters of the United States state "A landowners general right of access to navigable waters is subject to similar rights of access held by nearby landowners and to the general public's right of navigation on the water surface. Proposals which create undue interference with access to, or use of, navigable waters will generally not receive favorable consideration." Since your fence impedes access to the waters of Lake Tahoe by extending approximately 15' into the lake beyond Elevation 6229.1 we feel that allowing this fence to remain would not be in the public interest. Therefore, you are hereby directed to take the necessary action to effect the removal of that portion of the fence which extends lakeward of the normal high water line of Lake Tahoe (Elevation 6229.1 Lake Datum), by no later than 1 May 1976. Disposal of all material is to be in a manner that will prevent reentry into the waterway. If removal of the fence is not completed by the above date appropriate action will be initiated by this office under the River and Harbor Act of 3 March 1899.



WJH

16 January 1976

SP500-0

Mr. Paul S. Von Densonneck

Thank you for your cooperation in this matter and if you have any questions concerning this action, please contact our Regulatory Section, Room 6527, or telephone (916) 440-2580.

Sincerely yours,

F. G. ROCKWELL, JR.
Colonel, CE
District Engineer

Copy furnished:
Tahoe Regional Planning Agency
P. O. Box 8896
South Lake Tahoe, CA 95705

State Lands Commission
1807 - 13th Street
Sacramento, CA 95814

Placer County Dept. of Public Works
County Administration Center
Auburn, CA 95602

Feb. 76

1121043

123 Edgewood Ave

S. 7 94117.

Phone # 687 4896

Dear Sirs

Re your letter to my late husband
File ref: S.D. 76-1-28 about a chain link fence
When the property was purchased about
18 to 20 years ago from Mr Robert Hamilton &
his mother, he had the fence put in then,
at that time it was 7 or 8 feet from the water
line - the lake was very low that year. He also
at that time retained 5 feet of property running
all the way back to the back of the property to
insure there being no road cut-through to
the Dollen side.

The entire Hamilton estate was then
taken over by Dr John Hamilton, who also disliked
the idea of opening up the property as we did
ourselves.

Many years later the entire property was
purchased by Grubb & Ellis for condominiums & they
also retained rights to the five feet for the water
sewerage for these houses.

Very Truly Yours

Wimpey van Ossenmarkt

(23-000-08)

P.S. Your people have already taken the fence down



EXHIBIT L

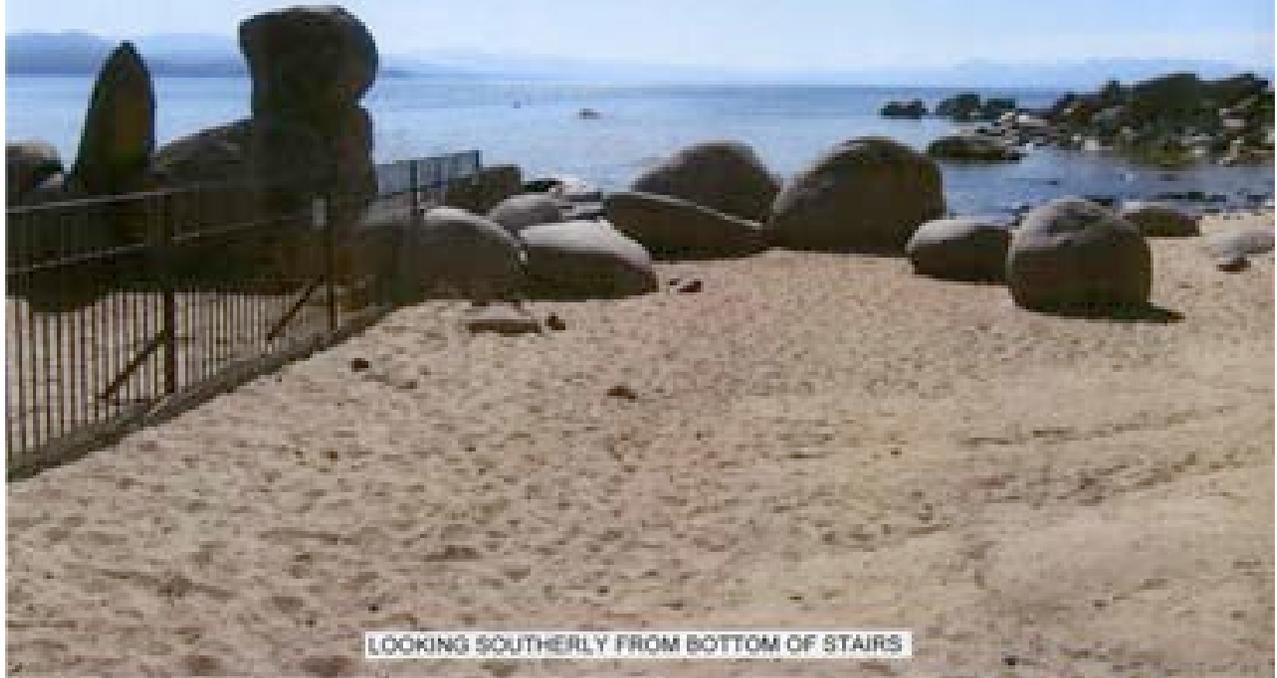
**FENCE NEAR HIGH WATER (6228.61'
LTD) LOOKING EASTERLY FROM
HARBOR AVENUE**

(AUGUST 26, 1998)

EXHIBIT M

FENCE AT LOW WATER

(OCTOBER 8, 2009)



LOOKING SOUTHERLY FROM BOTTOM OF STAIRS



LOOKING NORTHEASTERLY FROM LOW WATER (8223.0' LTD)

EXHIBIT N

LAND DESCRIPTION
Public Trust Easement

All that certain real property situate in and adjacent to Section 30, T.16N., R.18E., M.D.M. in the County of Placer, State of California, described as follows:

All that land bounded on the east by the boundary line separating the states of California and Nevada; bounded on the north by the line of elevation 6228.75 feet Lake Tahoe Datum; bounded on the west by the northwesterly line, and its southwesterly extension, of Lot 11, Block F, as shown on the map of Lake Vista Subdivision filed in Book D of Maps, Page 22, Official Records of said County; and bounded on the south by the line of elevation 6223.0 feet Lake Tahoe Datum.

END OF DESCRIPTION

Prepared 10-14-2009 by the California State Lands Commission Boundary Unit



EXHIBIT O

RESOLUTION

Calendar Item No. 61, entitled CONSIDER MOST APPROPRIATE PUBLIC TRUST NEEDS AND USES AND EXERCISE THE PUBLIC TRUST EASEMENT INVOLVING LAND IN LAKE TAHOE AT BUCK'S BEACH (AKA SPEEDBOAT BEACH), AT PARCELS LOCATED BETWEEN 9898 AND 9950 LAKE STREET, EAST OF KINGS BEACH AND WEST OF THE CALIFORNIA/NEVADA BOUNDARY IN PLACER COUNTY; AUTHORIZE THE REMOVAL OF A FENCE WITHIN THE PUBLIC TRUST EASEMENT; AND COMPENSATE THE PROPERTY OWNER FOR THE VALUE OF ANY LAWFULLY PLACED IMPROVEMENT THAT IS REMOVED, duly coming on for public hearing before the State Lands Commission of the State of California at its regular public meeting at 10:00 a.m. on October 22, 2009 in the City of Sacramento, County of Sacramento, California; upon lawful notice to interested parties and all persons having requesting an opportunity to be heard and present evidence to the Commission did so; the Commission having fully heard their testimony and considered their evidence; and having heard the statements and evidence of the staff of the State Lands Commission and the Office of the Attorney General and having considered the Calendar Item and the matters referred to therein; and upon due deliberation THE COMMISSION NOW FINDS:

1. WHEREAS, the real property described in Exhibit N of Calendar Item #61 (a copy of which is attached and made part of the Resolution), is located in the County of Placer and lies along the shore of Lake Tahoe between the high water elevation of 6228.75 Lake Tahoe Datum as determined by the California Supreme Court in *State of California, et al. v. Superior Court of Placer County (Fogerty I)*, 29 Cal 3d 240 (1981) and Court of Appeal in *Fogerty v State of California (Fogerty II)*, 187 Cal. App. 3d 224, 229 (1986) and the low water elevation of 6228 Lake Tahoe Datum; and
2. WHEREAS, the California Supreme Court has found that the public's trust interests encompass the bed of the lake, and not just the water, being subject to and available for the public uses of navigation, fishing, and lake related recreational uses such as bathing, swimming and open space, as described in the case of *State of California v. Superior Court of Lake County (Lyon)*, 29 Cal. 3d 210, 229-231; and
3. WHEREAS, it is in the public's interest and reasonable needs of the public that the public trust easment located below the elevation of high water located within the lands described in the attached Exhibit N be accessible to public use for lake and shorezone/beach related recreational purposes; and
4. WHEREAS, the continued use and maintenance of existing structures, facilities, or improvements, which have been lawfully placed in good faith within the shorezone as described in Exhibit N, other than the metal fence located either along the westerly boundary of a parcel of land owned by Heigh Ho, LLC or within the public right of way of Harbor Avenue owned by Placer

County, do not presently constitute a substantial interference with the public's trust needs and uses within the shorezone, and the exercise of trust interests does not contemplate or require removal or taking of possession of them in any manner; and

5. WHEREAS, it is in the public's interest and reasonable needs of the public that the metal fence located below the elevation of high water and within the lands described in the attached Exhibit N and either along the westerly boundary of a parcel of land owned by Heigh Ho, LLC or within the public right of way of Harbor Avenue, owned by Placer County, constitutes a substantial interference with the public's trust needs and uses; and
6. WHEREAS, California law provides for the tender of a fair and just compensation for the taking by the Commission, on behalf of the State, of such lawful improvements as may have been made in good faith by the grantee or patentee or his successors in interest of the fee title in lands subject to the public trust; and
7. WHEREAS, the California Constitutional rights of public access and fishing, as well as the common law public trust rights of recreational use of the lake and lakebed below high water can best be preserved, protected and enhanced by formal determination of the public's needs and rights and formal exercise of the public trust rights within the lands described in attached Exhibit N;

NOW, THEREFORE, upon motion duly made and approved, the State Lands Commission hereby finds and resolves:

1. The public's trust needs and appropriate uses of the shorezone below elevation 6228.75 feet Lake Tahoe Datum, involving the public trust easement area described in the attached Exhibit N, are determined to be needed for and shall be available for public uses of navigation, fishing and other lake related recreational uses such as bathing, swimming and open space, as described in *State of California v. Superior Court of Lake County (Lyon)*, 29 Cal 3d 210, 229-231(1981).
2. The public trust interest of the State is hereby formally exercised on the lands described in Exhibit N, hereto, to confirm and protect the public's rights of access to and use of the shorezone of Lake Tahoe, as described in Exhibit N, for navigation, fishing, and other lake related recreational uses and to require the removal of a metal fence extending waterward from the high water elevation of 6228.75 feet lake Tahoe Datum
3. The Commission staff is hereby authorized to tender a fair and just compensation for the taking by the Commission, on behalf of the State, of such lawful improvements as may have been made in good faith by the grantee or patentee or his successors in interest of the property underlying the metal fence located below the elevation of high water and within the lands

described in the attached Exhibit N and existing either along the westerly boundary of a parcel of land owned by Heigh Ho, LLC or within the public right of way of Harbor Avenue, owned by Placer County.

4. The jurisdiction of the Commission is continuing and nothing contained in this Resolution shall in any manner limit, prohibit or restrict the Commission on its own motion, recommendation of the Commission staff, or upon the request of lawful owners of any underlying fee interest or other parties, and, after further public hearings from amending or revoking this Resolution in the future; from establishing different criteria for exercise of the State's retained public trust easement rights; from taking possession of improvements on the lands described in Exhibit N hereto and granting compensation to the owners of lawful improvements; or from taking any action whatever which may later be deemed necessary or appropriate in the interest of the public and consistent with the public's property rights.
5. It is the intent of the Commission to fully and completely carry out its responsibilities as guardian and trustee of the public trust while recognizing the reasonable concerns of the owners of the underlying fee interest of the lands described in attached Exhibit N, to the extent such concerns do not substantially interfere with the exercise of the public's trust rights. In recognizing the concerns of owners of the upland property adjacent to Lake Tahoe, including those lands within the trust exercise area as described in attached Exhibit N, the Commission acknowledges and supports the authority of the County of Placer to adopt and enforce reasonable health and safety ordinances regulating time place and manner of use of the public trust easement area. The Commission further directs staff to provide assistance to Placer County and other local governments having jurisdiction involving Lake Tahoe to insure that both private property rights and the statewide interest of the public for protection and use of the Lake are properly considered.
6. The staff of the Commission is directed to record this Resolution in the Office of the Placer County Recorder.