CALENDAR ITEM
C05

A Statewide 06/02/14

S Statewide S. Pemberton

CONSIDER SPONSORING STATE LEGISLATION THAT WOULD MAKE CLARIFYING AND TECHNICAL CHANGES TO SEVERAL STATUTES TO ASSIST THE STATE LANDS COMMISSION IN ITS ADMINISTRATION AND OVERSIGHT OVER PUBLIC LANDS, INCLUDING:1) CHANGING THE DEFINITION OF MARINE WATERS IN THE PUBLIC RESOURCES CODE TO MATCH THE GOVERNMENT CODE DEFINITION; 2) CHANGING THE DUE DATE FOR FINANCIAL REPORTS FROM TRUSTEES OF LEGISLATIVELY GRANTED PUBLIC TRUST LANDS TO ALIGN WITH AUDITING TIMEFRAMES; 3) MODIFYING A LEGISLATIVE GRANT TO THE COUNTY OF ORANGE; AND 4) MAKING TECHNICAL CHANGES TO THE COMMISSION'S AUTHORITY TO CEDE CONCURRENT CRIMINAL JURISDICTION TO THE UNITED STATES WITHIN CERTAIN LANDS HELD BY THE UNITED STATES

INTRODUCTION:

State Lands Commission (Commission) staff has been reviewing various legislative proposals introduced in the 2013-14 legislative session that involve lands under the Commission's jurisdiction. This report describes proposed legislation (AB 2764, Assembly Natural Resources Committee), that is intended to assist the Commission by giving it more concise and up-to-date statutory language to follow in its administration of granted public trust lands, oil spill prevention programs, and cession of concurrent criminal jurisdiction to the United States.

LEGISLATIVE PROPOSAL:

<u>AB 2764 (Assembly Natural Resources Committee): State Lands Commission; administration of state property</u>

SUMMARY:

AB 2764 would modernize and improve the Commission's granted public trust lands and oil spill prevention programs by aligning the financial reporting due dates with local auditing timeframes and harmonizing the definition of "marine waters" in the Government and Public Resources Code. It would also make improvements and code cleanup changes to a statute addressing cession of concurrent criminal jurisdiction to the United States, and modify the terms of a grant to Orange County to allow the County to administer and manage its trust grant more effectively.

BACKGROUND AND ANALYSIS:

Granted public trust lands statements of revenues and expenditures

Existing law requires every local trustee of granted public trust lands to file with the Commission on or before October 1st of each year a detailed statement of all revenues and expenditures relating to its trust lands and assets, including obligations incurred, but not yet paid, covering the fiscal year preceding the submission of the statement.

To better align the due date with the auditing timeframe and alleviate the need to request extensions, AB 2764 would change the due date the statement is required to be filed with the Commission to December 31 of each year.

Lempert-Keene-Seastrand Oil Spill Prevention and Response Act of 1990

The statutory authority provided in this Act is split between the Government Code, which provides the requirements for the Department of Fish and Wildlife, and the Public Resources Code, which provides the requirements for the Commission. For purposes of the provisions in the Public Resources Code and primarily under the jurisdiction of the Commission, "marine waters" is defined to exclude waters in the Sacramento-San Joaquin Rivers and Delta, while the "marine waters" definition in the Government Code does not. For clarity and consistency purposes, AB 2764 would revise the "marine waters" definition in the Public Resources Code to align it with the definition in the Government Code. As a result, the definition of "marine waters" in the Public Resources code would no longer exclude waters in the Sacramento-San Joaquin Rivers and Delta and would further revise the definition of "marine waters" to include waterways used for waterborne commercial vessel traffic to the Port of Sacramento and the Port of Stockton.

Orange County granting statute

The Dana Point Harbor is a 277 acre regional recreational and commercial harbor with commercially operated marinas, waterfront businesses, public anchorage, and public launching facilities. There are approximately 2,400 vessels stored in slips/docks and 516 vessels are in surface storage.

The Dana Point Harbor includes sovereign lands granted in trust to the County of Orange by the California Legislature, pursuant to Chapter 321, Statutes of 1961, as amended, with minerals reserved to the State.

AB 2764 amends Chapter 321 to provide the Dana Point Harbor District with the authority to purchase, lease, or acquire adjacent and non-adjacent lands for vessel storage during upcoming harbor redevelopment work. The amendments also address concerns about the use of tideland trust revenue to fund the Dana Point Harbor Patrol patrolling areas outside of the geographic region of the grant, including on ungranted sovereign lands managed by the State Lands Commission. The use of public trust revenues for harbor patrol purposes is not inconsistent with the common law Public Trust Doctrine.

Ceding concurrent criminal jurisdiction to the United States

Government Code section 126 is an amalgamation of a number of older statutes which are generally referred to as either "consent to purchase" or "cession statutes" and which reflect how the United States acquired title to its lands. For instance "consent to purchase" refers to lands acquired by purchase or condemnation or donation. "Cession statutes" historically referred to transfers of legislative jurisdiction over lands the United States acquired by treaty, i.e. lands today characterized the term "public domain" or purchase prior to the creation of a state, e.g. the Louisiana Purchase. Both statutes are founded on the premise that the United States cannot exercise any of a state's legislative jurisdiction without the state's consent and on the premise that a state could limit the amount of its jurisdiction to be shared. Typically today the statutes are jointly referred to as "cession statutes" and, indeed, section 126 contains elements of both.

Over the last 160 years California has had both types of statutes. Political Code section 34 ceded all of the State's legislative jurisdiction over lands acquired by purchase or condemnation. Chapter 56, Statutes of 1897 applied to public domain lands used for military purposes and also ceded all of California's legislative jurisdiction. Additionally the Legislature enacted a number of special statutes ceding jurisdiction over other various federally owned lands used for other purposes such as national parks. The degree or quantum of jurisdiction has also varied over the years ranging from a cession of all (exclusive) to some (partial) and finally to an equal sharing (concurrent) of its jurisdiction (referred to as "exclusive") to now sharing only all of its criminal jurisdiction (concurrent criminal) with the United States but reserving the right to exercise the same amount of jurisdiction.

The below information addresses each section of the existing statute and explains the proposed changes, or lack thereof:

Subsection (a): this paragraph of the statute actually makes the cession of jurisdiction and the subparagraphs describe, condition and limit it. The first phrase of this subsection is a remnant of Section 34 and reflects the conditions of use by the US Constitution. Historically California ceded jurisdiction if the United States used the lands for "forts, magazines, and arsenals…or other needful buildings", etc. The second phrase of the paragraph refers to the Weeks Act which established the national forests and the third phrase refers to "any other federal purpose." This last phrase was added to the statute in 1976 at the recommendation of the California Attorney General so that jurisdiction could be ceded over various national parks and monuments and, for that matter, over any other parcel not falling within the first two phrases.

In a nod to history and custom, AB 2764 leaves the first and third phrases in the statute. The second phrases are omitted for two reasons. First, the establishment of a national forest is clearly a federal purpose; and secondly the United States has never sought a cession over national forest lands. Indeed Title 16, section 480 of the United States Code expresses Congress' intent not to disturb the civil and criminal jurisdiction of the states in establishing national forests. This was borne out in 1983 when portions of Fort Hunter-Liggett were transferred to the Los Padres National Forest only after there had been a retrocession.

Subsection (b): the existing language is retained and no comment is necessary.

Subsection (c): keeps the first phrase in the existing statute and deletes the second. There is no argument that the United States should ask for a cession and that it should be willing to agree to any limitations imposed by the State. The U.S. Supreme Court has characterized a cession as a contract between two governments and held that a state could condition a cession. c.f. Fort Leavenworth Railroad Company v. Percival G. Lowe (1885) 114 U.S. 525, 29 L.Ed. 264.

The second phrase concerns the United States complying with local law. This was important when cessions transferred all or most of California's legislative (exclusive or partial) jurisdiction. Under the present statute this is not the case and California retains all of its civil jurisdiction and shares its criminal jurisdiction in an equal manner with the United States. So there is no need to retain this phrase.

Subsection (d): This subsection describes the obligations Commission when it makes a cession. These obligations are retained.

Subsection (e): This subsection details the duration of a cession and the use of the property consistent with the terms of the cession. This subsection is retained.

However, the duration of a cession is extended to the lesser of 10 years or so long as the United States owns the property. Commission staff knows of no instance in the last 45 years where there has been opposition to a cession. Secondly, and more importantly under the current practice of ceding concurrent jurisdiction, California is never deprived of exercising its legislative jurisdiction. It retains all of its civil jurisdiction and shares its criminal jurisdiction but does not fully relinquish it. Consequently, except as limited by federal law, California always has a right to enact and enforce its civil and criminal laws on federal lands.

Subsection (f): Here there are echoes of the old "consent to purchase" and "cession" statutes and the lands covered by each. Taken together the four designations identified in this subsection embrace all types of land owned or leased by the United States. In another nod to history, this subsection is retained.

Subsection (g): The existing language is retained and no comment is necessary.

Subsection (h): Here the Legislature purports to reserve mineral deposits and mining rights to itself. This is something that is typically done upon the sale or other transfer of an interest in land and indicates that there was some confusion over the meaning of a "cession" at its enactment. The term "cession" refers to a transfer and is probably familiar to most people as a "cession" or transfer of land. However, Section 126 does not in any of its other provisions refer or purport to effect a transfer of land title or an interest in land. This subsection is misplaced and therefore deleted. Deleting this subsection will not diminish the Legislature's intent of protecting minerals owned by the State. Public Resources Code section 6401 reserves all minerals to the State whenever state owned land is sold and Public Resources Code section 6404 requires state agencies to seek Commission approval prior to disposing of a mineral interest. Nevertheless, the Legislature, in Public Resources Code section 6402, gives the Commission the discretion to grant the mineral estate to the United States when it makes a sale of the surface estate. In practice the Commission has done both.

Subsection (i): The Legislature here declares that a cession shall not vest until a copy of the Commission's orders/resolution has been recorded in the county where the property is located. There is no reason to quibble with this as it defines the moment of vesting. However Section 3112 of Title 40 of the United States Code must be considered in setting the moment of vesting. Briefly section 3112 says that cession of jurisdiction shall not vest until the United States has notified state officials that it has accepted the cession and that, absent such an acceptance, there is a conclusive presumption that the cession has been rejected. Thus the vesting of a cession is dependent upon both state and federal requirements being satisfied and the cession statute should be amended to reflect that.

Noticed Public Hearing: Existing law states the Commission cannot make a cession without first having held a noticed public hearing. While Commission staff is unsure of the origin of this requirement, we surmise that it came out of correspondence between Governor Earl Warren and the Secretary of War during World War II. Prior to that time there was no notice requirement or administrative procedure in order for there to be a cession. In short, the cession statutes were self-executing. However, during WWII both the Navy and War Departments acquired countless parcels of land and were required by section 3112 to give a notice of acceptance to the states for jurisdiction over each parcel. The Navy complied by writing letters to the Governor describing the various tracts of land with a metes and bounds or other legal description.

In contrast the War Department, between 1943 and 1945, sent what are often referred to as "blanket letters of acceptance" indicating that the Department accepted cessions over all lands acquired since February 1, 1940. None of the lands were described in detail. Governor Warren protested this and requested detailed descriptions. A compromise was reached wherein the War Department provided a list of facilities by name and county and an occasional brief remark.

The Commission held noticed hearings of a formal nature in the 1950s and federal officials provided testimony on the acquisition and use of its lands. There is no indication in the files staff has seen that members of the public attended. Commission staff has processed all cession and retrocession requests since 1981, conducting hearings both at the federal facility concerned and here at the Commission's offices. Federal officials have attended on occasion but not the general public. There are only two exceptions that staff is aware of. In 1975 the Sheriff of Riverside County objected to a cession at Joshua Tree National Monument and Death Valley National Park. The other exception was on the occasion of a retrocession concerning federal lands at Wawona within Yosemite National Park. Several hundred people attended a hearing there and another in San Francisco.

While the public should be offered an opportunity to be heard on this, the gravity of the matter has lessened considerably over the years as evidenced by the lack of public participation. In the past living on a federal base under exclusive or partial jurisdiction meant that a lot of the public's civil rights such as voting in local elections were limited. But over the years this has eroded and now there is no limitation that staff is aware of. The courts are also recognizing that some state social services can be enforced on federal lands without lessening the rights of the United States where there is exclusive or partial jurisdiction.

Considerable time and effort and expense are required to set up a hearing that is not attended by either the United States or the general public for whom it is intended. Thus, AB 2764 proposes that the noticed hearing requirement be satisfied by being combined with a regularly scheduled meeting of the Commission which is a noticed public meeting. The Commission traditionally gives the public an opportunity to speak and can give staff direction to conduct a separate hearing if the need arises. The current statute does not prohibit this, but administrative interpretation over the years casts some doubt on whether that would be an appropriate interpretation of the statute. From a legal perspective, it would be better to clearly identify a regularly scheduled meeting as the appropriate forum thus eliminating a challenge on that basis.

In summary, the primary motivation for this amendment is the lack of attendance by the public at the public hearing mandated by the current statute. By combining the traditional hearing with a regularly noticed meeting of the Commission, the hearing requirement is preserved as is the right of the public to attend and comment, but the process is better streamlined. This is also an opportunity to do some cleanup of language that was an outgrowth of older jurisdiction concepts and which is not consistent with today's understanding of jurisdiction law.

OTHER PERTINENT INFORMATION:

AB 2764 was approved on May 15, 2014 by the State Assembly on a 78-0 vote and is pending in the Senate Rules Committee. It has not received any opposition.

RECOMMENDED ACTION:

IT IS RECOMMENDED THAT THE COMMISSION:

1. Adopt a sponsorship position on AB 2764 (Assembly Natural Resources Committee).