

**STAFF REPORT
C88**

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10/19/17
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J. Fabel

**CONSIDER A LEGAL SETTLEMENT CONSISTING OF A
BOUNDARY LINE AND EASEMENT AGREEMENT**

PARTIES:

Nowell Investment Co., an Arizona Limited Partnership; Levee Block Limited Partnership, an Arizona Limited Partnership; Robert M. Morton, II, Trustee of the Morton 2006 Trust, dated June 13, 2006; and, Laurie Morton, an individual (collectively known as the "Nowell Group")

State of California, acting by and through the State Lands Commission

PROPOSED SETTLEMENT:

The proposed Boundary Line and Easement Agreement ("Agreement") will settle boundary disputes related to quiet title litigation initiated by the Nowell Group titled, *Nowell Investment Co., et al. v. State of California, et al.*, Riverside County Superior Court, No. BLC1500203. The proposed Agreement will establish a common boundary line separating the State's sovereign ownership in the historic bed of the Colorado River from uplands privately held by the Nowell Group. To effectuate the Agreement, the Commission and Nowell Group will mutually grant quitclaim deeds that will confirm the parties' respective ownership. Additionally, to preserve public access to the Colorado River and to State property, the Nowell Group will grant the State an easement across its property ("Access Easement"). To ensure that the Nowell Group's property remains marketable, the Agreement also contains terms for the parties to amend the scope of the Access Easement if future development were to occur on the Nowell Group's property. The Agreement ensures that any future change in the Access Easement's scope would not diminish public access to adjacent sovereign land.

The Agreement affects lands located in Township 6 South, Range 23 East, Section 36, SBBM, adjacent to the historic bed of the Colorado River within the city of Blythe, County of Riverside. This Agreement is authorized by Public Resources Code sections 6357 and 6210.9. The location of the common boundary and the lands involved ("Subject Area") are depicted, for reference purposes only, in Exhibit A.

STAFF REPORT NO. C88 (CONT'D)

BACKGROUND:

Upon its admission to the United States of America on September 9, 1850, the State of California ("State"), by virtue of its sovereignty under the Equal Footing Doctrine of the Constitution of the United States, received in trust for the people of California all right, title, and interest in the beds of navigable rivers within its boundaries for certain Public Trust purposes including but not limited to commerce, navigation and fisheries. The Colorado River along the California–Arizona border is historically navigable.

Since the early 20th century, the Colorado River in and near the Subject Area has been affected by natural influences and human activities which have directly impacted, among other characteristics, the river's location, velocity and volume of flow, seasonal flow patterns, and sediment transport and deposition. For example, the construction of water diversion projects, extensive levees, and bank stabilization has altered the ordinary low-water mark ("OLWM") of the Colorado River on and near the Subject Area by means of natural and artificial erosion, accretion, and avulsion.

In approximately 1926, the Palo Verde Irrigation District ("PVID") commenced a large water diversion project, later known as the "Ferry Bend Cut," in an attempt to redirect the flow of the Colorado River from its natural channel. The Ferry Bend Cut entered onto and across the Subject Area. During the early to mid-20th century, Parker Dam, Davis Dam, Hoover Dam, and the Glenn Canyon Dam were completed upriver of the Subject Area and since the 1950s, PVID and the U.S. Bureau of Reclamation have performed extensive levee construction and bank stabilization along the Colorado River.

From 1930 to approximately 1953, the Colorado River adjacent to the Subject Area moved, by artificial and natural forces, southerly and westerly to approximately where it exists today. During that time, the Colorado River braided into numerous channels entering onto and adjacent to the Subject Area.

Nature of the Dispute—Location of the Last Natural OLWM

Significant natural and artificial influences within the Subject Area since 1926 have created doubt in the location of the last natural OLWM, which serves as the legal boundary separating the State's sovereign ownership in the Colorado River and the Nowell Group's upland property ownership. Both the State and the Nowell Group have informally attempted to resolve this uncertainty at various times since the 1980s; however, no agreement on the location of the boundary was ever reached.

On September 29, 2015, in order to quiet title to its property, the Nowell Group filed a complaint to quiet title against the State, in *Nowell Investment Co., et al. v.*

STAFF REPORT NO. **C88** (CONT'D)

State of California, et al., Riverside County Superior Court, No. BLC1500203.

In its complaint, the Nowell Group claimed that in 1930 the Ferry Bend Cut took the full flow of the Colorado River creating an avulsive event that froze the common boundary at the location of the OLWM as it stood in 1930 (making it the last natural OLWM and legal boundary)—well east of the river's current location—and that the river has not returned to its pre-avulsive state. Staff dispute that the Ferry Bend Cut was successful in redirecting the Colorado River and further believe the common boundary remained ambulatory after 1930.

After conducting extensive research, including a June 2016 site visit and survey of the Subject Area, staff believes that a portion of the land within the Subject Area originally formed as an island that arose from the bed of the Colorado River from the accretion of alluvium as the river moved in a south and westerly direction from 1930 to approximately 1953. Staff identified a braided channel as the likely location of the last natural channel prior to extensive fill and levee construction that occurred in the 1970s. This channel appeared to separate the island from the upland, all of which are under record title ownership by the Nowell Group.

Nature of the Settlement—Boundary Line and Easement Agreement

Based on the research conducted after September 29, 2015, staff and the Nowell Group now agree that the best available evidence supports the right bank of the channel ("Channel") separating sovereign land ("River Parcel") and uplands ("Upland Parcel") as being the last natural OLWM and common boundary separating the parties' ownership interest.

The Channel forming the common boundary is shallow, only seasonally wetted, and does not take the full flow of the Colorado River. Additionally, the channel and common boundary are no longer ambulatory due to fill or artificial accretion making them susceptible to being fixed by boundary line agreement. To effectuate the boundary line agreement, the Commission and Nowell Group will exchange quitclaim deeds to clear title to the State in the River Parcel and title to the Nowell Group in the Upland Parcel.

An important consideration is to ensure that the public retains access to the Colorado River and to the River Parcel. Currently, a well-maintained gravel road atop a levee crosses the Nowell Group's Upland Parcel. Staff and the Nowell Group believe that the road is maintained by the U.S. Bureau of Reclamation, although no recorded easement exists. This road currently provides unobstructed access to State-owned land.

STAFF REPORT NO. C88 (CONT'D)

The proposed Agreement includes provisions that maintain the current level of public access while ensuring the Nowell Group's Upland Parcel remains marketable and developable in the future. Under the proposed Agreement, the Nowell Group has agreed to grant the State a non-exclusive, public right-of-way easement along the current path of the gravel road along the Colorado River and the River Parcel. If the Nowell Group chooses to develop its lands in the future, or otherwise upon application to the Commission, the scope of the access easement can be limited to pedestrian use, during daylight hours only if an acceptable alternate easement is granted allowing full right-of-way access. The location of the alternate easement and additional terms will be negotiated in good faith and will consider existing access and the intensity of development on the Upland Parcel. All future amendments to the Access Easement under this Agreement will require Commission authorization.

LEGAL REQUIREMENTS:

Public Resources Code section 6357 authorizes the Commission to establish the OLWM by agreement with the upland owner. Typically, in conjunction with reaching an agreement on the location of the OLWM, the Commission and upland owner will permanently fix this location through a Boundary Line Agreement ("BLA").

Although Section 6357 purports to allow the Commission to fix a boundary whenever necessary and convenient, staff, as well as the Attorney General's office, have narrowly interpreted this section to adequately protect the state's sovereign property. The main requirement to enter into a BLA is that the boundary is susceptible to being fixed and no longer ambulatory due to fill or artificial accretion. Additionally, the courts require evidence that: (1) a reasonable attempt to locate the true boundary line has been made and (2) the proposed line is based on those attempts. As described in this staff report, this proposed Agreement meets all of these criteria.

ANALYSIS AND STAFF RECOMMENDATION:

Staff conducted a survey and analyzed the information available including reports, surveys, survey instructions, maps, historic photographs, and other useful information in order to determine the best evidence of the location of the last natural OLWM separating the State and the Nowell Group's property interest. Staff determined that the best evidence supports the right bank of the existing Channel separating the River Parcel and the Upland Parcel as the last natural OLWM. This determination is based in large part on the outcome of prior litigation in the early 1970s affecting lands immediately to the north of the Subject Area.

In the civil matter of *State of California v. Vincilione*, Riverside County, Case No. INDIO 15156, the State sought to stop a property owner from placing fill in side

STAFF REPORT NO. **C88** (CONT'D)

channels of the Colorado River to the north of the Subject Area. The court, in siding with the State, confirmed that the lands immediately north of the River Parcel, were an island that formed from the bed of the river and were thus sovereign land. The Nowell Group's predecessors in interest were not a party to that litigation and therefore its interests were not affected by the ruling.

Staff believes that as a result of the fill artificially placed in the 1970s, the full flow of the Colorado River no longer entered the Channel leaving that location as the last natural OLWM and the boundary line between the State's sovereign land and the private upland interests. Today, the Channel is seasonally wetted; however, because it does not take the flow of the river it is no longer ambulatory and is thus suitable for a fixed boundary line. Additionally, the current wetted main channel of the Colorado River is heavily armored, with river flows controlled by releases managed by dams operated by the U.S. Bureau of Reclamation; therefore, the entirety of the common boundary is no longer ambulatory and is susceptible to being permanently fixed.

Staff recommends that the Commission approve the proposed Boundary Line and Easement Agreement for several reasons. First, the Agreement will confirm and grant record title to the State in its sovereign land and clear title for all parties in this long-standing boundary dispute. Second, the resulting boundary line is defensible because it is based on the best available evidence and is consistent and contiguous with the State's property lines north of the Subject Area. Finally, the Agreement provides benefit to the public by ensuring that the current level of access to the river and the State's parcels are confirmed and preserved.

The proposed Agreement does not involve the sale or exchange of State sovereign land and does not involve terminating the Public Trust Easement between high and low water. This settlement and proposed Agreement are by definition consistent with Public Trust because the Agreement will give certainty as to the boundary of the Public Trust, as authorized by the Legislature. Further, since litigation of this matter would likely be extremely protracted and costly with uncertain results, the Parties to the Agreement consider it expedient, necessary, and in the best interests of the State to resolve this dispute through this BLA thereby avoiding the substantial costs and uncertainties of litigation. Commission staff and the Attorney General's Office have reviewed the proposed Agreement and believe all necessary legal elements have been met to effectuate the Boundary Line and Easement Agreement. For the reasons detailed throughout this staff report, staff recommends that the Commission approve the Agreement, in substantially the form on file at the Commission's Sacramento Office, and authorize its execution and the execution and recordation of all documents necessary to implement it.

STAFF REPORT NO. C88 (CONT'D)

OTHER PERTINENT INFORMATION:

1. Authorization of the proposed Agreement is consistent with Strategy 1.3 of the Commission's Strategic Plan to protect, expand, and enhance appropriate public use and access to and along the State's inland and coastal waterways.
2. Staff recommends that the Commission find that approval of the proposed Agreement is exempt from the requirements of the California Environmental Quality Act (CEQA) as a statutorily exempt project. The project is exempt because it involves settlement of a title and boundary dispute.

Authority: Public Resources Code section 21080.11 and California Code of Regulations, title 14, section 15282, subdivision (f).

EXHIBIT:

- A. Subject Area map

RECOMMENDED ACTION:

It is recommended that the Commission:

PUBLIC TRUST AND STATE'S BEST INTERESTS:

Find that the settlement and proposed Agreement is consistent with the Public Trust needs and values at this location, is consistent with the common law Public Trust Doctrine, and is in the best interests of the State.

CEQA FINDINGS:

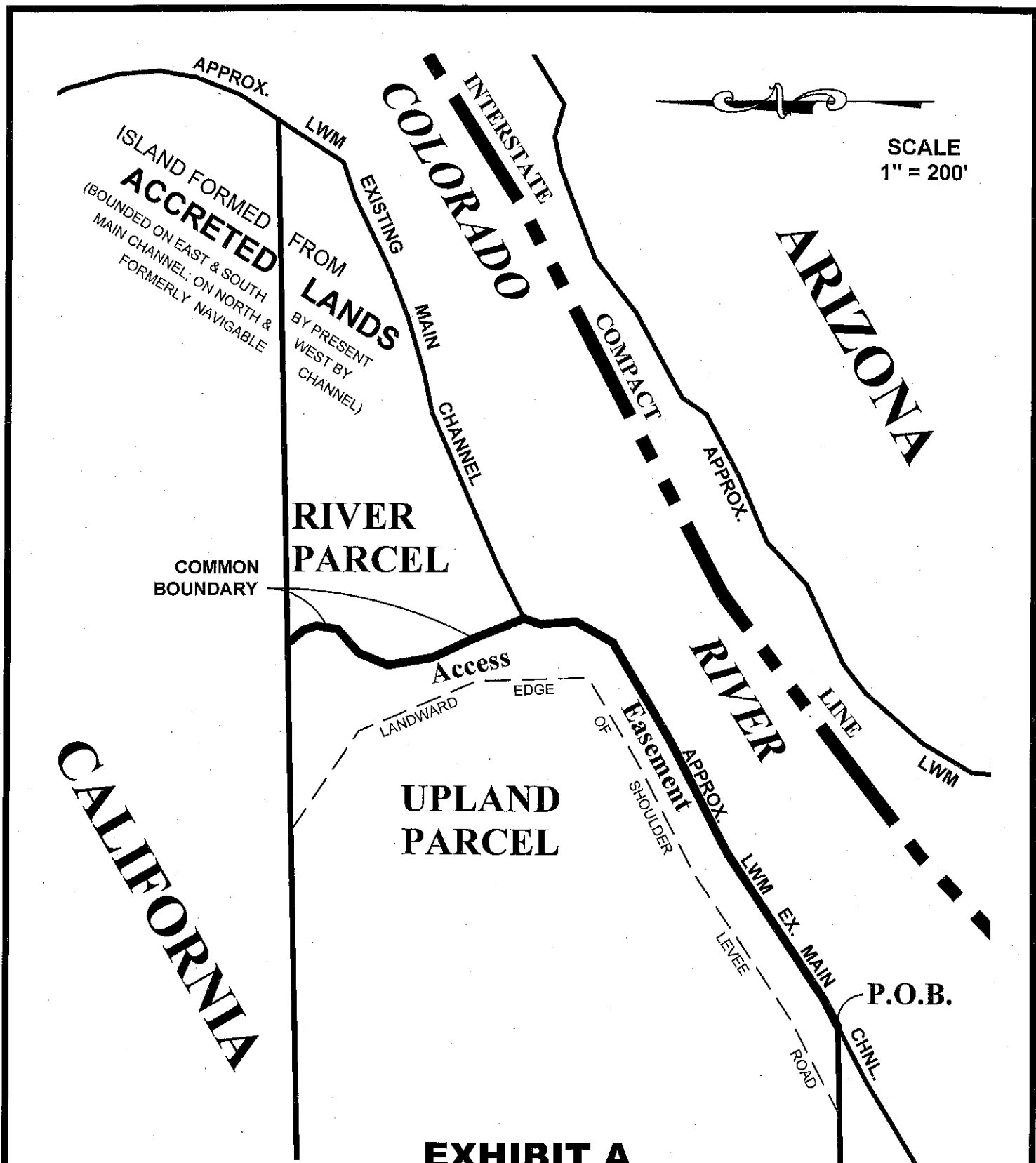
Find that the activity is exempt from the requirements of CEQA pursuant to California Code of Regulations, title 14, section 15061 as a statutorily exempt project pursuant to Public Resources Code section 21080.11 and California Code of Regulations, title 14, section 15282, subdivision (f), settlement of a title and boundary dispute.

AUTHORIZATION:

1. Authorize the Executive Officer or her designee to execute the Agreement, substantially in the form as that on file in the Commission's Sacramento office.
2. Authorize and direct the staff of the Commission and/or the California Attorney General to take all necessary or appropriate action on behalf of the Commission, including the execution, acknowledgment, acceptance, and recordation of all documents as

STAFF REPORT NO. **C88** (CONT'D)

may be necessary or convenient to carry out the settlement and Agreement; and to appear on behalf of the Commission in any legal proceedings relating to the Agreement.



SCALE
1" = 200'

EXHIBIT A "Subject Area"

Por. of Govt. Lots 4 & 5, Sec. 36, T 6 S, R 23 E, SBM

E.A. Page, PLS 7275
Date 09/18/17

Land Description Plat
W503.2084, Agreed Line
Blythe Riverside County

CALIFORNIA STATE
LANDS COMMISSION

