CALIFORNIA COASTAL COMMISSION
SOUTH CENTRAL COAST AREA
89 SOUTH CALIFORNIA ST., SUITE 200
VENTURA, CA 93001
(805) 585-1800

Item Fr12

Staff: TS-VNT
Staff Report: November 25, 2003
Hearing Date: December 12, 2003

STAFF REPORT AND FINDINGS FOR
RESTORATION ORDER AND CEASE AND DESIST ORDER

RESTORATION ORDER: CCC-03-RO-009

CEASE AND DESIST ORDER: CCC-03-CD-015

RELATED VIOLATION FILE: V-4-03-018

PROPERTY LOCATION: Northeast of Latigo Canyon Road, and north of and adjacent to Castro Motorway, Los Angeles County.

DESCRIPTION OF PROPERTY: The subject properties include:

Cease and Desist Order:

APN 4464-019-010 (80 acres)
APN 4464-019-008 (40 acres)
APN 4464-022-001 (25 acres)
APN 4464-022-010 (44.5 acres)
APN 4464-019-900 (which includes approximately 11 acres in the Coastal Zone)

Restoration Order:

APN 4464-019-010 (80 acres)
APN 4464-019-008 (40 acres)
APN 4464-022-001 (25 acres)
APN 4464-022-010 (44.5 acres)

PROPERTY OWNER: The Los Angeles County Assessor indicates legal ownership of the five (5) parcels is as follows:
Panorama Ranch, LLC, APN 4464-019-008
Deer Valley Ranch, LLC, APN 4464-019-010
United States Government, APN 4464-019-900
Communications Relay Corp., APN 4464-022-001
Panorama Ranch, LLC, APN 4464-022-010

VIOLATION DESCRIPTION: Unpermitted removal of major vegetation and disturbance of Environmentally Sensitive Habitat,

including but not limited to removal of native chaparral and damage to native oak trees; grading and clearing of new roads and pads; unpermitted streambed alteration, including but not limited to grading, filling, and manipulation of channel substrate, installation of metal culverts and creosote-treated railroad ties, and construction of an Arizona crossing in a blue line stream; and construction of unpermitted structures including but not limited to metal gates, and metal and wood gate posts with chain barriers set with concrete bases.

PERSONS SUBJECT TO THESE ORDERS:

1) James A. Kay, Jr., as representative, owner, and manager of four of the subject properties, and as member and officer of the Limited Liability Companies subject to the proposed Orders, and as President and Managing Officer of Communications Relay Corporation.
2) Deer Valley Ranch, LLC
3) Communications Relay Corporation
4) Panorama Ranch, LLC

RESTORATION SOUGHT:

Restoration of approximately two miles of graded and/or cleared roads and graded pads to the contours that existed prior to the unpermitted development and revegetation of all disturbed areas with appropriate native plant species typical of the disturbed sites; removal of unpermitted rock and soil fill material, creosote-treated railroad ties, and metal culverts from stream crossings and other natural drainages.

SUBSTANTIVE FILE DOCUMENTS:

ED Cease and Desist Order ED-03-CD-146
ED Cease and Desist Order ED-03-CD-147
Coastal Development Permit 4-96-084
Malibu/Santa Monica Mountains Land Use Plan
Los Angeles County General Plan
City of Malibu Local Coastal Plan
Los Angeles County Significant Ecological Area Update Study 2000
File Background Exhibits 1 through 13

CEQA STATUS:

Categorically exempt (CEQA Guidelines (CG) §§ 15060(c)(3), 15061(b)(2), 15307, 15308 and 15321)

I. SUMMARY OF STAFF RECOMMENDATION

Staff recommends that the Commission approve Cease and Desist and Restoration Orders set forth below, to 1) cease and desist from performing unpermitted development on all of the subject properties, both private and public, and 2) require the restoration on four of the subject properties to the condition they were in prior to the occurrence of the unpermitted development. The unpermitted development includes removal of major vegetation and disturbance of Environmentally Sensitive Habitat, including but not limited to removal of native chaparral and damage to native oak trees; grading and clearing of new roads and pads; unpermitted streambed alteration, including but not limited to grading, filling, and manipulation of channel substrate, installation of metal culverts and creosote-treated railroad ties, and construction of an Arizona crossing in a blue line stream; and construction of unpermitted structures including but not limited to metal gates, and metal and wood gate posts with chain barriers set with concrete bases.

The development that is the subject of these Cease and Desist and Restoration Orders began prior to September 16, 2002, and includes unpermitted development on four privately owned parcels, which are subject to both the Restoration Order and Cease and Desist Order, and unpermitted development on a Federally owned National Park property, which is subject to the Cease and Desist Order only.

There were no permits in place for the development work performed by Respondents. The development addressed by these Orders has previously been the subject matter of two Executive Director Cease and Desist Orders. The first was issued on July 2, 2003 and expired on October 1, 2003, after which time additional development was performed on the site. Therefore, a second Executive Director Cease and Desist Order was issued on October 24, 2003. The Orders here before the Commission would both extend a prohibition on unpermitted development at the site, and would require restoration of the affected areas under Section 30811 of the Coastal Act.

Respondents admit that the development was conducted, and do not contest the fact that no permits were obtained, but assert that most of the work was exempt from the permitting requirements as "repair or maintenance activities" under Section 30610 (d) of the Coastal Act. They assert, the work was done on "pre-existing roads and trails" and therefore falls within this exemption.

There are a number of flaws with this argument. First of all, most, if not all of the roads do not appear to be pre-coastal. Moreover, even if they had been, Section 30610 only exempts "repair and maintenance activities" and the work performed here goes well beyond normal repair and maintenance activities. Section 30610 (d) reads as follows:

> (d) Repair or maintenance activities that do not result in an addition to, or enlargement or expansion of, the object of those repair or maintenance activities; provided, however, that if the commission determines that certain extraordinary methods of repair and maintenance involve a risk of substantial adverse environmental impact, it shall, by regulation, require that a permit be obtained pursuant to this chapter.

Section 30610 (d) specifically limits the exemption to repair or maintenance activities which "do not result in an addition to, or enlargement or expansion of, the object of those repair or maintenance activities." Clearly here, even if it were somehow established that some sort of path was preexisting, the work performed would have clearly enlarged and expanded it, and therefore under the very Section cited by Respondents as a defense, a permit would still be required.

However, it should be noted that, even if the work performed had been on some precoastal development, and even if it had been limited to repair or maintenance activities, a permit was clearly required under the Coastal Act. Under Section 30610 (d) and the relevant implementing regulations, a permit is clearly required even for repair and maintenance, if it occurs in areas involving a risk of substantial adverse environmental impact, such as environmentally sensitive habitat areas.

Under Section 13252 (a) of the Regulations, a coastal development permit is specifically required for "[a]ny repair or maintenance to facilities or structures or work located in an environmentally sensitive habitat area" if it includes: (A) the placement or removal, whether temporary or permanent, of...any solid materials; or (B) the presence, whether temporary or permanent, of mechanized equipment. This case involves both the removal of solid materials and the presence of mechanized equipment since the unpermitted development involved placement or removal of solid materials (i.e., plants, dirt, rocks, culverts, concrete, gates, posts and chains). The unpermitted development also included the presence of mechanized equipment (wood chipper and Polaris vehicle).

This policy is reiterated in Section 13253, pertaining to improvements to structures other than single family residences, which states, in relevant part:

> (b) ...the following classes of development require a coastal development permit because they involve a risk of adverse environmental effect, adversely affect public access, or involve a change in use contrary to the policy of Division 20 of the Public Resources Code:
>
> > ...(2) Any significant alteration of land forms including removal or placement of vegetation...in an environmentally sensitive habitat area...

As noted above and discussed further in the full staff report, the properties which were the subject of the unpermitted development here have all been specifically designated ESHA, and therefore, even if all of Respondents' assertions were correct, a permit was clearly required for this work.

Under Section 30810 of the Coastal Act the Commission may issue a Cease and Desist Order if it finds that any person has undertaken or is threatening to undertake any activity which requires a permit from the Commission without such a permit. The findings for this Cease and Desist

Order demonstrate that there was no permit issued for the various development activities performed at the site.

Under Section 30811 of the Coastal Act, to order restoration, the Commission must find that development has occurred without a coastal development permit, is inconsistent with the Coastal Act and is causing continuing resource damage. The findings for this Restoration Order set forth the basis for the conclusion that the development is 1) unpermitted, 2) inconsistent with the Coastal Act, and 3) causing continuing resource damage, and that, therefore, the standards for a restoration order are satisfied.

II. HEARING PROCEDURES

The procedures for a hearing on a proposed Cease and Desist Order are described in Section 13185, and procedures for a proposed Restoration Order are described in Section 13195, incorporating by reference Sections 13185 and 13186 of the California Code of Regulations (CCR), Title 14, Division 5.5, Chapter 5, and Subchapter 9. The Cease and Desist and Restoration Order hearing procedure is similar in most respects to the procedures that the Commission utilizes for permit and Local Coastal Program matters.

For a Cease and Desist and Restoration Order hearing, the Chair shall announce the matter and request that all alleged violators or their representatives present at the hearing identify themselves for the record, indicate what matters are already part of the record, and announce the rules of the proceeding including time limits for presentations. The Chair shall also announce the right of any speaker to propose to the Commission, before the close of the hearing, any question(s) for any Commissioner, in his or her discretion, to ask of any other speaker. The Commission staff shall then present the report and recommendation to the Commission, after which the alleged violator(s) or their representative(s) may present their position(s) with particular attention to those areas where an actual controversy exists. The Chair may then recognize other interested persons after which staff typically responds to the testimony and to any new evidence introduced.

The Commission should receive, consider, and evaluate evidence in accordance with the same standards it uses in its other quasi-judicial proceedings, as specified in CCR Section 13195, incorporating by reference Sections 13185, 13186, and 13065. The Chair will close the public hearing after the presentations are completed. The Commissioners may ask questions to any speaker at any time during the hearing or deliberations, including, if any Commissioner chooses, any questions proposed by any speaker in the manner noted above. Finally, the Commission shall determine, by a majority vote of those present and voting, whether to issue the Cease and Desist and Restoration Order, either in the form recommended by the Executive Director, or as amended by the Commission. Passage of a motion, per staff recommendation or as amended by the Commission, will result in issuance of the order.

III. MOTION/STAFF RECOMMENDATION OF APPROVAL/RESOLUTION

Staff recommends that the Commission adopt the following two motions:

1. A. MOTION:

> I move that the Commission issue Cease and Desist Order No. CCC-03-CD-015 pursuant the staff recommendation.

1. B. STAFF RECOMMENDATION OF APPROVAL:

Staff recommends a **YES** vote. Passage of this motion will result in issuance of the Cease and Desist Order. The motion passes only by an affirmative vote of a majority of Commissioners present.

1. C. RESOLUTION TO ISSUE CEASE AND DESIST ORDER:

The Commission hereby issues Cease and Desist Order No. CCC-03-CD-015, as set forth below, and adopts the findings set forth below on grounds that the development described in the order has occurred without a coastal development permit. Upon approval, the Commission authorizes and orders that the actions set forth in the Cease and Desist Order be taken.

2. A. MOTION:

> I move that the Commission issue Restoration Order No. CCC-03-RO-009 pursuant to the staff recommendation.

2. B. STAFF RECOMMENDATION OF APPROVAL:

Staff recommends a **YES** vote. Passage of this motion will result in issuance of the Restoration Order. The motion passes only by an affirmative vote of a majority of Commissioners present.

2. C. RESOLUTION TO ISSUE RESTORATION ORDER:

The Commission hereby issues Restoration Order number CCC-03-RO-009, set forth below, and adopts the findings set forth below on grounds that the development described in the order 1) has occurred without a coastal development permit, 2) is inconsistent with the Coastal Act, and 3) is causing continuing resource damage. Upon approval, the Commission authorizes and orders that the actions set forth in the restoration order be taken.

IV. FINDINGS FOR RESTORATION ORDER CCC-03-RO-009 and CEASE AND DESIST ORDER CCC-03-CD-015

Staff recommends the Commission adopt the following findings in support of its action.

A. Description of Unpermitted Development

The development that is the subject of these Cease and Desist and Restoration Orders (hereafter "Orders") consists of: removal of major vegetation and disturbance of Environmentally Sensitive Habitat, including but not limited to removal of native chaparral and damage to native oak trees; grading and clearing of new roads and pads; unpermitted streambed alteration, including but not limited to grading, filling, and manipulation of channel substrate, installation of metal culverts and creosote-treated railroad ties, and construction of an Arizona crossing in a blue line stream; and construction of unpermitted structures including but not limited to metal gates, and metal and wood gate posts with chain barriers set with concrete bases.

Based on inspections of the site by Commission staff, and review of aerial photographs and maps, staff estimates that approximately 10,000 linear feet of six to twenty-foot wide roads and trails have been constructed without permits on the subject properties. Two graded and cleared pads have been constructed on parcel 4464-019-010. A third graded "pad" area, which Kay's agent Schmitz describes as the "beginning of a new road," is located on parcel 4464-022-010. Schmitz has advised staff that the new road was graded and cleared "by mistake."[1] Two additional level areas have been cleared of vegetation on parcel 4464-022-010 with little or no grading.

Staff estimates that approximately five acres of native vegetation, primarily native chaparral, has been cleared from the five subject properties. Brush clearance that is legally authorized and required by the L.A. County Fire Department extends to areas within 200 feet of legal, habitable structures. There are no such structures near the roads and graded pads that warrant clearance of these areas. In addition, Kay claims that the roads are pre-existing "fire roads" that predate the Coastal Act. Pursuant to the Los Angeles County Fire Department, there are no fire roads located on the subject properties other than Castro Motorway and a dirt road that crosses parcel 4464-019-900, and bisects parcel 4464-019-008 near the northwest section of the parcel. Both of these roads predate the Coastal Act and are not subject to these Orders. A map from the Los Angeles County Forester and Fire Warden, dated 1970, indicates that no other roads exist on the subject site.

The Respondents have also altered drainages on at least two of the properties, including placement of creosote-treated railroad ties and a metal culvert in a natural drainage on parcel 4464-022-001, and grading, vegetation removal, and manipulation of channel substrate to construct an Arizona crossing in a blue line stream on parcel 4464-019-008. The Respondents have installed wood and metal posts with chains across Castro Motorway, blocking an important fire road in the Santa Monica Mountains area, and across the boundary of National Park property to divide the illegally cleared road across parcels 4464-019-008 and 4464-019-900.

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[1] During an on-site meeting on November 10, 2003, staff questioned Schmitz regarding a section of hillside, which had been cleared of vegetation for approximately 150 feet in length and 10 to 20 feet in width across a steep slope, and down into a blue line stream. Schmitz stated that the road was cleared "by mistake," and indicated that the respondents believed it was a road, but stopped once they determined no road existed.

The graded roads and areas where vegetation was removed are clearly visible in photographs of the site. Much of the new roadways are located on steeply sloping portions of the site and are visible from both Latigo Canyon road and National Park lands, and at least one road has been cleared without a permit on National Park Service property.

The subject properties consist of four privately owned parcels, totaling approximately 189.5 acres of native chaparral and oak woodland in the Santa Monica Mountains of Los Angeles County. The fifth parcel is Federally owned property, which is administered by the National Park Service as part of the Santa Monica Mountains National Recreation Area.

The four privately held parcels subject to both the Restoration Order and Cease and Desist Order are described as follows: Los Angeles County APN 4464-022-001, a 25-acre parcel owned by Communications Relay Corp, which includes a portion of legally existing Castro Motorway and a "pre-Coastal" driveway entering the site from Castro Motorway; APN 4464-022-010, a 44.5-acre parcel owned by Panorama Ranch, LLC, located adjacent to and east of APN 4464-022-001, which also includes a portion of legally existing Castro Motorway; APN 4464-019-010, an 80-acre parcel owned by Deer Valley Ranch, LLC, located adjacent to and to the north of APNs 4464-022-001 and 010; and APN 4464-019-008, a 40-acre parcel owned by Panorama Ranch, LLC, located to the west of APN 4464-019-010, which has a 500 foot long legally existing dirt road crossing the northwest corner of the property.

The fifth parcel, which is subject only to the Cease and Desist Order, is a publicly owned property, administered by the National Park Service, with approximately 11 acres located within the Coastal Zone. Respondents have constructed a road, approximately 450 feet long, through Park property.

B. Background

There has been prior Commission action on one of the four parcels subject to these Orders. On December 12, 1996, the Commission approved Coastal Development Permit No. CDP 4-96-084 for construction of a 250-square-foot modular home, three amateur radio antennae, chain link fencing surrounding the three antennae, a new 4,700-gallon water tank, and an entry gate, and approximately 40 cubic yards of grading, all on existing graded pads on parcel 4464-022-001. The proposed small modular home and radio antennae were intended for periodic personal use for up to four radio contests per year. CDP 4-96-084 also addressed prior violations on the property, and required removal of an unpermitted, pre-existing, two-story geodesic dome structure, an unpermitted residential trailer and various refuse dumped on site, as well as restoration and revegetation of approximately 850 feet of unpermitted extensions to the existing access road from Castro Motorway, which were created between 1989 and 1991. In this action, the Commission recognized approximately 970 linear feet of roadway on parcel 4464-022-001 entering the parcel from Castro Motorway.

In addition, between 1989 and 1991, approximately 1.5 acres of vegetation was cleared without permits on parcel 4464-022-001. This violation was not addressed by CDP 4-96-084; however, the site was substantially revegetated by June of 2001. However, in actions that are partially the

subject matter of these Orders, Kay has subsequently cleared several thousand square feet of the re-established vegetation and has graded roads throughout the site.

On August 25, 1997, Coastal Development Permit No. 4-96-084 was issued to Mr. Peter Von Hagen. The unpermitted geodesic dome, trailer, and debris were subsequently removed pursuant to the permit; the residence and antennae were never constructed. However, restoration of the unpermitted roads was implemented in September of 1997. Since that time, the restoration efforts implemented by the previous property owner have been destroyed.

Commission staff first learned of the recent violations on the property in mid April 2003. Staff received reports that a large crew of laborers was grading new roads under the direction of Mr. James A. Kay, Jr. ("Kay"), and under the supervision of Kay's representative, Mr. Donald W. Schmitz III, of Schmitz & Associates ("Schmitz"). The work was allegedly being performed on Kay's property as well as on National Park Service land. Staff contacted Schmitz by telephone and Schmitz assured staff that the work on the property was only minor brush clearance for the purpose of locating property boundaries and for maintenance on existing roads, and was being carried out under the direct supervision of Schmitz. Staff received subsequent reports of additional unpermitted development being undertaken by Kay.

On April 17, 2003, Los Angeles County Public Works Department ("LACPWD") issued a STOP WORK, NOTICE OF VIOLATION for unpermitted cut/fill grading on parcels 4464-019-010 and 4464-022-010.

Staff conducted a site visit to the area on May 1, 2003, which confirmed that major vegetation removal and grading of roads was occurring on the site. On May 2, 2003, staff met with Schmitz at the Coastal Commission office in Ventura. Schmitz asserted that no grading had occurred on the site and stated that all roads on the property predate the Coastal Act. Staff requested that Schmitz 1) allow staff on the property for the purpose of reviewing the alleged violations, and 2) arrange for all grading and vegetation removal to cease immediately until staff had the opportunity to evaluate the situation.

On May 8, staff met at the subject properties with Mr. James A. Kay, Jr., and representatives from Schmitz, and the law firm of Gaines and Stacey ("Gaines"). Staff inspected the site and confirmed that unpermitted development had occurred, including construction of several thousand of linear feet of unpermitted roads through either grading and/or removal of native vegetation, installation of metal culverts and creosote-soaked railroad ties in a drainage, and grading and construction of an Arizona crossing in a blue line stream. The construction of the roads continued through May 8, 2003, despite the request from staff on May 2, 2003 that work on the roads cease immediately. Staff advised Kay that he was in violation of the Coastal Act and, upon completion of the inspection issued Kay a Notice of Intent ("NOI") to issue an Executive Director Cease and Desist Order, directing Kay to cease all unpermitted development on the subject properties, as well as eight (8) other parcels, including adjacent National Park Service parcels, on which unpermitted development had allegedly occurred under the direction of Kay. The NOI also directed Kay to cease use of the unpermitted new roads. Kay and Schmitz both asserted that nearly all of the properties referenced in the NOI were out of the Coastal Zone

and were therefore not under the jurisdiction of the Commission; however Kay and Schmitz both agreed to stop work on the roads.

On May 9, 2003, LACPWD issued additional STOP WORK, NOTICES OF VIOLATION for unpermitted grading on parcels 4464-019-010 and 4464-022-010.

Pursuant to the requirements of the NOI, Schmitz gave verbal assurance to staff on May 9, 2003, that unpermitted work on the site had stopped. However, Kay and Schmitz failed to provide required written assurance by the deadline given in the NOI that use of the unpermitted roads had also ceased. On May 12, 2003, Commission staff received reports that Kay was continuing to drive vehicles on the roads in violation of the NOI. On May 12, 2003, Schmitz submitted a letter asserting that work on the roads had stopped, and that they intended to provide staff with a map delineating the location of roads, although Schmitz objected to the prohibition on use of the roads.

On May 13, 2003, staff advised Schmitz that they had failed to fulfill the standard set forth in the NOI for a response that would stop issuance of the Order, since they had failed to give written assurance that use of the roads had ceased. After discussions with staff, Schmitz submitted a facsimile letter agreeing to stop use of the roads. Therefore, based on these representations of Kay's representative Schmitz, the EDCDO was not issued at that time.

On May 15, 2003, Schmitz submitted a letter alleging the NOI was deficient because 1) the Executive Director's NOI did not specify the exact locations of the unpermitted development, 2) the NOI included properties not owned by Kay, 3) Parcel 4464-019-008 is traversed by the Coastal Zone boundary, and therefore Schmitz alleged that, without a conducting a Coastal Zone boundary determination, staff had no basis for determining whether or not unpermitted development had even occurred in the within the Coastal Zone, and 4) the work conducted on the roads was exempt "repair and maintenance," and therefore not subject to coastal development permit requirements.

On June 23, 2003, Schmitz advised staff in writing that the owners intended to resume work and use of the subject roads, alleging that the roadwork and vegetation removal is beneficial to wildlife and is exempt from Coastal review.

On June 27, 2003, Commission staff issued a Notice of Intent to Commence Restoration Order Proceeding, to seek an order compelling Kay to restore the subject parcels to their pre-violation condition. The Notice included parcels 4464-019-008, 4464-019-010, and 4464-022-010. A second Notice of Intent to Commence Restoration Order Proceeding was issued on July 1, 2003, which included parcels 4464-022-001 and 4464-022-014. APN 4464-022-014, which is owned by Parkland Ranch, LLC, of which Kay is a member, is the subject of an ongoing investigation regarding alleged unpermitted development and is not covered under these proposed Orders. The notices informed Kay and the corporate entities that own the parcels that pursuant to California Code of Regulations, Title 14, Section 13191(a), the Commission intended to initiate restoration order proceedings against him, and outlined steps in the restoration order process.

On July 17, 2003, Respondents submitted a Statement of Defense pursuant to the NOI for the Restoration Order. Kay protested the Commission's actions, and asserted that no violations have occurred on any of the subject properties, and that the Commission had no legal basis for issuing a Restoration Order. The substance of the Statement is outlined in subsequent sections below.

On July 17, 2003, Kay submitted four incomplete Coastal Development Permit ("CDP") applications for parcels 4464-019-008, 4464-019-010, 4464-022-001, 4464-022-010, for brush clearance/repair and maintenance for existing agricultural roads. The applications do not address the unpermitted development, and remain incomplete as of the date of this report.

In spite of the issuance of the Executive Director Cease and Desist Order No. ED-03-CD-146 on July 2, 2003, as well as clear direction from staff regarding requirements for coastal development permits, Kay has continued to conduct unpermitted development on the subject properties.

Despite assurances from Kay, Schmitz, and Gaines that development, including use of the roads, had ceased, staff found evidence that Kay continued to use the roads in violation of the EDCDO, including driving heavy equipment on the roads. On August 15, 2003, Commission staff and Los Angeles Regional Water Quality Control Board (RWQCB) staff met with Schmitz to view the property. Staff found evidence of new heavy tire tracks matching the tire tread pattern of the six-wheel Polaris®. Development has continued on the subject parcels in violation of the Coastal Act and the EDCDO.

On July 29, 2003, staff conducted a site visit to National Park Service Parcel 4464-019-900, and located additional unpermitted development located on parcels 4464-019-900 and 4464-019-008, which was conducted at the direction of Kay and under the supervision of his agents, including unpermitted road construction resulting in removal of native chaparral vegetation, material damage to several oak trees, and placement of metal posts and chain barriers.

During on-site field meetings with Schmitz on August 4, 2003, August 15, 2003, and November 10, 2003, staff confirmed with Schmitz the location of unpermitted development on the subject properties, and advised Schmitz as to the location of a 970-foot-long existing dirt road located on parcel 4464-022-001 that predates the Coastal Act, and that was recognized by the Commission in CDP 4-96-084. Staff also found physical evidence that Kay had violated the terms of the EDCDO.

On August 26, 2003, staff informed Gaines in writing that only a 970-foot-long access road on Parcel 4464-022-001 is considered legally existing. In CDP 4-96-084, the Commission recognized that this portion of the roadway legally existed prior to the Coastal Act. Kay and Schmitz maintain that all roads were pre-existing roads; however, neither Kay nor Schmitz have produced evidence to support their claim. Regardless, even assuming that any other roads did exist on site prior to the Coastal Act, other than the 970-foot-long segment referenced above, the unpermitted development performed by the Respondents increased the size, width and/or length of such roads without a coastal permit. In addition, the Respondents constructed new culverts at streams and constructed new pads, and this constitutes new development for which there can be no vested right. Respondents have not filed a claim of Vested Rights, in accordance with the

Commission's regulations, seeking a determination by the Commission that the roads at issue were legally constructed prior to the Coastal Act.

On September 29, 2003, and September 30, 2003, staff received additional reports of work crews driving up to the Castro Peak area toward the subject properties and transporting heavy equipment, including a bulldozer and large trucks. During the afternoons, work crews were seen leaving the area, and trucks loaded with vegetation were seen leaving the site.

On October 1, 2003, Commission staff conducted a site visit to adjacent NPS property. At approximately 11:45 a.m. staff observed a six-wheel Polaris® work vehicle traveling at a high rate of speed on the unpermitted roads across parcels 4464-022-001 and 4464-022-010.

On October 7, 2003, Commission staff spoke with Ms. Donna Shen ("Shen") of Schmitz and Associates. Shen asserted that Kay had abided by the terms of the EDCDO despite the expiration of the EDCDO and denied that any work or use of the roads had occurred. Shen confirmed that Kay had recently purchased a bulldozer and stated that Schmitz was the only one with keys to the vehicle. Shen advised staff that Schmitz had taken possession of the keys to the bulldozer because Kay can be "a little difficult."

On October 16, 2003, at 2:10 p.m., NPS Rangers observed a work crew clearing and chipping vegetation from parcel 4464-019-008. NPS Rangers observed at least three laborers on site using a Polaris® work vehicle, and mechanical chipper on the parcel.

On October 20, 2003, NPS Rangers observed a work crew of at least nine (9) laborers clearing and chipping vegetation from parcel 4464-019-008. Laborers were again working on site with a Polaris® work vehicle, and mechanical chipper. NPS Rangers also located two new wooden posts set in concrete at the property boundary with NPS Parcel 4464-019-900. Staff later found evidence that corroborated the Rangers' reports.

On October 23, 2003, staff received additional reports that work crews were conducting additional roadwork on the subject properties, using a Backhoe Tractor, mechanical wood chipper, and the Polaris® vehicle.

On October 23, 2003, the Executive Director sent Respondents a Notice of Intent to 1) commence Cease and Desist Order Proceedings and 2) issue an Executive Director Cease and Desist Order (NOI) to Kay, Panorama Ranch, LLC, Deer Valley Ranch, LLC and Communication Relay Corporation, Inc., in accordance with the provisions of Coastal Act Section 30809(b). The NOI specifically required cessation of all unpermitted work at the site. It stated that the Executive Director intended to issue a CDO unless a satisfactory response was received, as referenced by Section 30809(b) of the California Coastal Act. The NOI specifically stated:

"Such a satisfactory response must include an assurance that no further development will be undertaken at the site unless specifically authorized by a permit granted by the Commission."

The NOI specifically stated that:

To prevent the issuance of the Executive Director Cease and Desist Order, you must confirm by telephone no later than 1:00 p.m., Friday, October 24, 2003, that all unpermitted development, including but not limited to the unpermitted development described above has ceased and will not resume without authorization from the Commission, and you must also submit an appropriate response by facsimile, followed by hard copy sent via U.S. Mail Service, no later than 12:00 pm (noon), Monday, October 27, 2003, including a letter of agreement, which unequivocally states:

1. That no further unpermitted development, including but not limited to construction of roads, pads, gates, streambed alteration, or removal of native vegetation will occur unless and until a permit for such activities has been issued by the California Coastal Commission and any necessary work plans have been approved; and

2. That no further use of the unpermitted roads on parcels 4464-019-008, 4464-019-101, 4464-022-001, 4464-022-010 and 4464-019-900 will occur unless and until such time as such use were to be legally authorized by the Commission.

3. A COMPLETE Coastal Development Permit Application will be submitted to the California Coastal Commission on or before November 5, 2003, proposing restoration of all unpermitted development on the subject properties, including but not limited to restoration of unpermitted roads, graded and cleared pads, streambed alterations including damage to oak trees, as applicable, or areas where native vegetation was removed, on parcels 4464-019-008, 4464-019-101, 4464-022-001, and 4464-022-010.

4. A comprehensive interim erosion control plan to stabilize and control erosion from exposed cut and fill slopes on parcels 4464-019-008, 4464-019-101, 4464-022-001, and 4464-022-010 will be submitted to the California Coastal Commission on or before November 5, 2003 and after notification of approval by Commission staff, the plan shall be fully implemented within 10 days.

5. All unpermitted gates, gateposts, and chain barriers, will be removed from the subject properties no later than 5:00 p.m., Thursday, October 30, 2003, and that removal of these unpermitted objects shall be completed by hand tools, without the use of motorized vehicles or other heavy mechanical machinery.

On October 24, 2003, Kimberly Rible ("Rible") of Gaines & Stacey, LLC, informed staff by telephone that the subject property owners did not intend to comply with the request in the Notice of Intent to confirm that the unpermitted development described in the Notice has ceased and would not resume without authorization from the Commission. Therefore, Kay, Panorama Ranch, LLC, Deer Park Ranch, LLC and Communications Relay Corporation did not respond to the Notice of Intent in a "satisfactory manner", as required by section 30809 of the Coastal Act.

The activities referenced herein are within the Coastal Zone and within the Commission's jurisdiction. Any development conducted therein requires a coastal development permit from the Commission under section 30600 of the Coastal Act. No CDP was obtained. Failure to obtain a CDP is a violation of the Coastal Act and can subject persons performing such development to remedies in Chapter 9 of the Coastal Act, including the issuance of Executive Director Cease and Desist Orders under Section 30809 of the Coastal Act.

On October 24, 2003, the Executive Director issued Executive Director Cease and Desist Order ("EDCDO") No. ED-03-CD-147, directing Kay to cease all unpermitted development on the subject parcels. The EDCDO was issued in response to notification by Gaines that Kay did not intend to comply with the request to stop unpermitted development in the Notice of Intent.

On October 27, 2003, Gaines submitted written correspondences advising staff that Kay was unwilling to comply with the NOI. Gaines also stated that the Respondents demanded "the Commission retract the CDO immediately on the basis that they have not violated the Coastal Act." Gaines also requested that the Commission address each of the parcels separately, asserting that the Respondents are entitled to separate hearings for each of the subject properties.

On November 10, 2003, Commission staff met with Deputy Attorney General Daniel Olivas, Gaines, Rible, Schmitz, and Shen, to conduct an inspection of the subject properties. Staff confirmed that additional unpermitted development and use of the roads had occurred after issuance of the previous EDCDO. Staff asked Schmitz about the bulldozer and the continued reports of laborers and heavy equipment seen entering and leaving the area. Schmitz confirmed that Kay had recently purchased the bulldozer and was using the bulldozer and other heavy equipment to clear brush on adjacent property and to provoke the residents in the area. Schmitz also recanted his prior assertions that he was supervising Kay's laborers.

C. Admissions:

1. Kay admits he is "an officer of Park Lands Ranch, LLC, Deer Valley Ranch, LLC, Panorama Ranch, LLC and Communications Relay Corporation (the "Kay entities")." (Kay Declaration, exhibit N to the July 17, 2003 Statement of Defense, and Statement of Defense p. 1).

2. Kay admits that the Kay entities own the properties "which are the subject of the California Coastal Commission's... [Restoration Order] Notices of Intent." (Kay Declaration, exhibit N to the July 17, 2003 Statement of Defense, and Statement of Defense pgs. 3-4).

3. Kay admits that work was done which "exceeded exempt routine repair and maintenance." In particular, he admits that activities on APN 4464-019-1010 went beyond brush clearance and repair and that Kay's employees "made some significant cuts" into roadbeds he contends were "existing". (July 17, 2003 Statement of Defense, Letter from Fred Gaines, pgs. 7 and 11).

4. Kay admits that activities on APN 4464-019-008 also had "gone beyond repair and maintenance work." Specifically, he admits that about 900 linear feet of roadbed work exceeded repair and maintenance. (July 17, 2003 Statement of Defense, Letter from Fred Gaines, pgs. 7 and 26).

5. Kay admits that he is an officer of another entity (LT-WR, LLC) which owns other property in the immediate vicinity of the properties which are the subject of these Orders, which has had extensive dealings with the California Coastal Commission, including addressing Coastal Act violations. (Kay Declaration, exhibit N to the July 17, 2003 Statement of Defense, and Statement of Defense, pgs 2-3).

6. Kay admits that "In early 2003, [he] began undertaking work on the Properties" to "clear brush" along what he alleges to be "existing roadways and trails." (Kay Declaration, exhibit N to the July 17, 2003 Statement of Defense, and Statement of Defense p. 5).

7. Kay admits that "I enlisted employees to undertake the work on some of the Properties." He notes that he "monitored these employees to ensure that Coastal Act guidelines" were "being adhered to." (Kay Declaration, exhibit N to the July 17, 2003 Statement of Defense).

8. Schmitz told the Commission that it was true that "laborers were removing brush and clearing debris". July 17, 2003 Statement of Defense, Letter from Fred Gaines, p.5.

9. Kay's agent, Schmitz, has admitted that unpermitted vegetation clearance and grading conducted on parcel 4464-022-010, was completed "by mistake." As noted on p. 5, above, during an on-site meeting on November 10, 2003 between Coastal Commission staff and representatives of Kay, staff questioned Schmitz regarding a section of hillside, which had been cleared of vegetation for approximately 150 feet in length and 10 to 20 feet in width across a steep slope, and down into a blue line stream. Schmitz stated that the road was cleared "by mistake," and indicated that the Respondents believed it was a road, but stopped once they determined no road existed.

10. Panorama Ranch, Deer Valley Ranch, Park Lands Ranch and Communications Relay admit the "same facts which [were] admitted in the July 17th Statement of Defense." November 12, 2003 Statement of Defense, Letter from Kimberly Rible.

D. Basis for Issuance of Cease and Desist Order:

The statutory authority for issuance of this Cease and Desist Order is found in Section 30810 of the Coastal Act, which states:

> *(a) If the commission... determines that any person... has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing the permit or (2) is inconsistent with any permit previously issued by the commission, the commission may issue an order directing that person to cease and desist.*

Section 30810 also provides that:

> *(b) The cease and desist order may be subject to such terms and conditions as the commission may determine are necessary to ensure compliance with this division, including immediate removal of any development or material or the setting of a schedule within which steps shall be taken to obtain a permit pursuant to this division.*

E. Basis of Issuance of Restoration Order

The statutory authority for issuance of this Restoration Order is provided for in §30811 of the Coastal Act, which states:

> *In addition to any other authority to order restoration, the commission, a local government that is implementing a certified local coastal program, or a port governing body that is implementing a certified port master plan may, after a public hearing, order restoration of a site if it finds that the development has occurred without a coastal development permit from the commission, local government, or port governing body, the development is inconsistent with this division, and the development is causing continuing resource damage.*

The Commission has the authority to order restoration of the site if it determines that the development a) has occurred without a coastal development permit, b) is inconsistent with the Coastal Act, and c) is causing continuing resource damage. Commission staff has already verified that there was no permit issued for this development, a determination that the alleged violator does not dispute. The following paragraphs provide evidence that the development is also inconsistent with the Coastal Act and is causing continuing resource damage.

Unpermitted Development is Inconsistent with the Coastal Act

The unpermitted development is inconsistent with the following resource protection policies of the Coastal Act:

a) Section 30231 (water quality),

b) Section 30240 (environmentally sensitive habitat areas or ESHA),
c) Section 30251 (scenic and visual qualities; minimization of natural landform alteration), and
d) Section 30253 (geologic stability, protection against erosion).

Description of Resource Impacts

The following paragraphs present an analysis of the respects in which the unpermitted development is inconsistent with specified resource protection policies of the Coastal Act and is causing continuing damage to resources protected by such policies.

Water Quality

Section 30231 of the Coastal Act states, in part, that "the quality of coastal waters, [and] streams appropriate to maintain optimum populations of marine organisms...shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff [and] preventing depletion of ground water supplies and substantial interference with surface water flow." Grading and vegetation removal on the site has removed surface vegetation, ground cover, subsurface rootstock, and left substantial areas of bare soil throughout the property, including areas with road cuts of one to ten feet high on oversteepened hillsides exceeding 60 percent slopes. These areas are highly susceptible to erosion and may contribute directly to the degradation of water quality in the surrounding coastal waters and streams through increased sediment input.

Unpermitted stream alterations were completed to facilitate vehicle crossing of the unpermitted roads, including removal of native vegetation along the stream corridors, placement of soil and rock fill material, creosote-soaked railroad ties and metal pipe culverts within natural drainages, as well as manipulation of boulders and cobbles for construction of an Arizona Crossing in a designated blue line stream near the southeast corner of parcel 4464-019-010. (Exhibit 5).

Therefore, based on these facts, the unpermitted development that is the subject of these Orders is inconsistent with Section 30231 of the Coastal Act.

Environmentally Sensitive Habitat Areas

Section 30240 of the Coastal Act states, in part, that "Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas." Several natural drainages and ravines are located on site including three designated blue line streams. The area is dominated by chaparral habitat, interspersed with individual oak trees, stream channels and mature oak woodlands. The unpermitted grading and vegetation clearance caused the direct removal and discouragement of the growth of watershed cover, including native chaparral, which is Environmentally Sensitive Habitat Area ("ESHA"), resulting in a reduction in the amount and quality of the habitat and watershed cover in the area. The Commission Biologist, Dr. John Dixon, has found that healthy chaparral habitat in the Santa Monica Mountains is ESHA. Dr.

Dixon's findings are set forth in the Memorandum dated March 25, 2003, attached as Exhibit 6, and incorporated herein.

In addition to being inconsistent with Section 30240 of the Coastal Act, the unpermitted development is inconsistent with resource protection policies of the 1986 Malibu/Santa Monica Mountains Land Use Plan ("LUP"). The site consists of primarily native chaparral vegetation and has been verified by Commission staff to be ESHA. The LUP maps specifically include designated oak woodlands and significant watersheds on this site. At least two of the blue line streams identified by the U.S. Geological Survey are impacted by unpermitted development, including a graded road and Arizona crossing through a blue line stream on parcel 4464-019-008, and vegetation clearance through a blue line stream on parcel 4464-022-010. Commission Biologist Dr. John Dixon has viewed the site and confirmed that the area is substantially native chaparral ESHA (Exhibit 6).

The unpermitted roads, pads, and vegetation clearance on the subject properties are inconsistent with the policies of the Coastal Act, and far exceed the standards of development allowed pursuant to the LUP. Development on the site is not clustered and does not minimize landform alteration or disturbance to natural drainages, native vegetation, or impacts to public parklands. In fact, the roads and pads have been constructed in a diffuse manor though steeply sloping terrain and significant chaparral habitat, stream channels, and oak woodlands. It is not known if the roads will provide access to any future structures that might be proposed for the site, where the appropriate location for future structures may be, or if additional access roads will be sought to access proposed structures.

The LUP policies addressing protection of Significant Watersheds and ESHAs are among the strictest and most comprehensive set forth in the LUP. The Commission, in certifying the LUP, emphasized the importance placed by the Coastal Act on protecting sensitive environmental resources. The LUP includes several policies designed to protect ESHAs and address stream protection and erosion control, from both the individual and cumulative impacts of development. These policies include:

> P68 Environmentally sensitive habitat areas (ESHAs) shall be protected against significant disruption of habitat values, and only uses dependent on such resources shall be allowed within such areas. Residential use shall not be considered a resources dependent use.
>
> P74 New development shall be located as close as feasible to existing roadways, services, and existing development to minimize the effects on sensitive environmental resources.
>
> P82 Grading shall be minimized for all new development to ensure the potential negative effects of runoff and erosion on these resources are minimized.
>
> P84 In disturbed areas, landscaping plans shall balance long-term stability and minimization of fuel load. For instance, a combination of taller, deep-rooted

plants and low-growing covers to reduce heat output may be used. Within ESHAs and Significant Watersheds, native plant species shall be used, consistent with fire safety requirements.

P88 In ESHAs and Significant Watersheds and other areas of high potential erosion hazard, require site design to minimize grading activities and reduce vegetation removal based on the following guidelines:

- ✓ Structures should be clustered.
- ✓ Grading for access roads and driveways should be minimized; the standard new on-site access roads shall be a maximum of 300 feet or one-third the parcel depth, which ever is less. Longer roads may be allowed on approval of the County Engineer and Environmental Review Board and the determination that adverse environmental impacts will not be incurred. Such approval shall constitute a conditional use.
- ✓ Designate building and access envelopes on the basis of site inspection to avoid particularly erodible areas.
- ✓ Require all sidecast material to be recompacted to engineering standards, re-seeded, and mulched and/or burlapped.

P90 Grading plans in upland areas of the Santa Monica Mountains should minimize cut and fill operations in accordance with the requirements of the County Engineer.

P91 All new development shall be designed to minimize impacts and alterations of physical features, such as ravines and hillsides, and processes of the site (i.e., geological, soils, hydrologic, water percolation and runoff) to the maximum extent feasible.

P96 Degradation of the water quality of groundwater basins, nearby streams, or wetlands shall not result from development of the site. Pollutants, such as chemicals, fuels, lubricants, raw sewage, and other harmful waste shall not be discharged into or alongside coastal streams or wetlands.

As illustrated above, the unpermitted development, which is the subject of these Orders, is inconsistent with the Section 30240 of the Coastal Act or the development policies of the LUP.

Scenic and Visual Qualities; Minimization of Natural Landform Alteration

Coastal Act Section 30240 (b) states that:

> **Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.**

Coastal Act Section 30251 states that:

> **The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.**

The subject properties are surrounded by the Santa Monica Mountains National Recreation Area, which is a popular visitor destination point for recreation, and includes several trails. Several hundreds of acres of public parklands and public trails lie adjacent to the subject properties, and represent a substantial public investment in adjacent open space and recreational lands. (In fact, laborers at the direction of Kay actually encroached onto National Park Service property and damaged park resources, removing native chaparral vegetation and damaging several oak trees.)

The properties are also in a highly scenic area due to the rural atmosphere, open spaces and vistas, large continuous areas of native vegetation and extensive network of publicly owned lands. The unpermitted development is contributing significantly to the degradation of scenic resources and the community character of the surrounding rural area through the alteration of the natural landform on the site's steep hillsides and ridge tops.

The roads and pads cleared on the subject properties are located in a sparsely developed area of the Santa Monica Mountains, and can be easily seen from public parklands and from Latigo Canyon Road. The LUP specifically identifies the area containing the site as a designated view shed, and Castro Peak as a significant ridgeline. Castro Peak is one of the most visible landmarks in the Santa Monica Mountains. Unpermitted construction of roads and clearance of vegetation on the subject properties degrades scenic views in this area.

With regard to the protection of visual resources, the specifically applicable LUP policies include:

> P91 All new development shall be designed to minimize impacts and alterations of physical features, such as ravines and hillsides, and processes of the site (i.e., geological, soils, hydrological, water percolation, and runoff) to the maximum extent feasible.

P125 New development shall be sited and designed to protect public views from LCP-designated scenic highways to and along the shoreline and to scenic coastal areas, including public parklands. Where physically and economically feasible, development on sloped sites should be set below road grade.

P130 In highly scenic areas and along scenic highways, new development (including buildings, fences, paved areas, signs, and landscaping) shall:

- ✓ be sited and designed to protect views…
- ✓ minimize alteration of landforms…
- ✓ be landscaped to conceal raw-cut slopes…
- ✓ be visually compatible with and subordinate to the character of its setting…
- ✓ be sited so as not to significantly intrude in the skyline as seen from public viewing places.

P13 Where feasible, prohibit placement of structures that will break the ridgeline view, as seen from public places.

P134 Structures shall be sited to conform to the natural topography, as feasible. Massive grading and reconfiguration of the site shall be discouraged.

P135 Ensure that any alteration of the natural landscape from earthmoving activity blends with the existing terrain of the site and the surroundings.

As illustrated above, the unpermitted development, which is the subject of these Orders, is inconsistent with the Sections 30240 and 30251 of the Coastal Act or the development policies of the LUP.

Geologic Stability

Section 30253 of the Coastal Act states, in part, that "New development shall: (1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard, [and] (2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area." The grading of roads and removal of vegetation has left substantial areas of bare soils or thinly vegetated soils exposed on steep slopes. Such areas will contribute significantly to erosion at the site. There has been no proactive revegetation of the graded areas on the site to provide erosion control or to stabilize the disturbed areas. Some of the removed vegetation has been chipped and scattered over portions of the site; however most of the roads and steep cut and fill slopes remain stripped of vegetative cover and exposed to erosion hazard.

The unpermitted graded roads and pads, which have been cleared and graded on steep slopes and through stream channels on the subject property, do not minimize landform alteration on the site, as is required by Section 30253. Roads have been graded on steep hillsides exceeding 60 percent

slopes in some sections, dislodging bedrock and soil material, which has been sidecast down slope, burying live vegetation, creating unstable, oversteepened fill slopes that are unengineered, unstable, and visibly eroding. On May 8, 2003, August 15, 2003, and November 10, 2003, staff observed boulders in excess of 24 inches in diameter lying unsecured along the fill slopes of the roads, which were easily dislodged by hand and rolled down slope. On November 10, 2003 staff inspected the cut and fill slopes along the roads and pads. Rock, soil, and vegetative material, which has been loosely piled down slope of the roads and pads, is easily dislodged and pushed down slope. Superficial excavation of sidecast fill slopes at several locations along the roads and pads revealed that pieces of the cleared vegetation, including limbs and trunks, have been buried beneath the fill material, providing inadequate support for the sidecast fill material. In some areas, rock and soil is piled up against and supported by live vegetation, including chaparral vegetation and the trunks of oak trees.

As illustrated above, the unpermitted development that is the subject of these Orders is inconsistent with the Section 30253 of the Coastal Act or the development policies of the LUP.

Unpermitted Development is Causing Continuing Resource Damage

The unpermitted development is causing continuing resource damage, as defined in Section 13190 of the Commission's regulations:

> *'Continuing,' when used to describe 'resource damage,' means such damage which continues to occur as of the date of issuance of the Restoration Order.*
>
> *'Resource' means any resource which is afforded protection under the policies of Chapter 3 of the Coastal Act, including but not limited to public access, marine and other aquatic resources, environmentally sensitive wildlife habitat, and the visual quality of coastal areas.*
>
> *'Damage' means any degradation or other reduction in quality, abundance, or other quantitative or qualitative characteristic of the resource as compared to the condition the resource was in before it was disturbed by unpermitted development."*

Since the unpermitted development continues to exist at the subject property and, as described in detail in the sections above, is causing adverse impacts to resources protected by the Coastal Act that continue to occur as of the date of this proceeding, damage to resources is "continuing" for purposes of Section 30811 of the Coastal Act.

F. <u>CEQA</u>

The Commission finds that the cease and desist activities and removal of the unpermitted development and restoration of the property to the conditions that existed prior to the unpermitted development, as required by these Cease and Desist and Restoration Orders, is consistent with any applicable requirements of the California Environmental Quality Act (CEQA) of 1970 and will not have significant adverse effects on the environment, within the meaning of CEQA. The Cease and Desist and Restoration Orders are categorically exempt from

the requirement for the preparation of an Environmental Impact Report, based on Sections 15060(c)(3), 15061(b)(2), 15307, 15308 and 15321 of the CEQA Guidelines.

G. Allegations

1. Respondent James A. Kay, Jr., is an officer, member, and the responsible representative for Panorama Ranch, LLC, owner of APN 4464-019-008 and APN 4464-022-010, Deer Valley Ranch, LLC, owner of APN 4464-019-010, and is the President and Managing Officer of Communications Relay Corp., owner of APN 4464-022-001. Unpermitted development has been undertaken at the direction of Kay on parcels 4464-019-008, 4464-019-010, 4464-022-001, and 4464-022-010, and on United States Government parcel 4464-019-900.

2. James A. Kay, Jr., acting as the responsible representative for Panorama Ranch, LLC, Deer Valley Ranch, LLC, and Communications Relay Corporation, has undertaken development, as defined by Coastal Act Section 30106, at the subject properties, including removal of major vegetation and destruction and disturbance of Environmentally Sensitive Habitat, including but not limited to removal of native chaparral and damage to native oak trees; grading and clearing of new roads and pads; unpermitted streambed alteration, including but not limited to grading, filling, and manipulation of channel substrate, installation of metal culverts and creosote-treated railroad ties, and construction of an Arizona crossing in a blue line stream; and construction of unpermitted structures including but not limited to metal gates, and metal and wood gate posts with chain barriers set with concrete bases.

3. No exemption from the permit requirements of the Coastal Act applies to the unpermitted development on the property. Except as discussed herein, the Commission has not made a determination that the unpermitted roads and pads, which are subject to these Orders predate the Coastal Act.

   CDP file No. 4-96-084 indicates legally existing development on the subject properties that the Commission recognized in CDP No. 4-96-084 predates the Coastal Act. This includes Castro Motorway, which crosses parcels 4464-022-001 and 4464-022-010, and a dirt road entering parcel 4464-022-001 from Castro Motorway. In addition, a dirt road, which crosses the northwest quadrant of parcel 4464-019-008, predates the Coastal Act.

   A series of aerial photographs of the Castro Peak area, which date back to the 1920's, shows a progression of development in the area, and clearly demonstrates that the additional roads, Arizona crossing, pads and clearings on the subject properties, which are the subject of these Orders, are not established development predating the Coastal Act.

   The Respondents claim that the development, which is the subject of these Orders, was "hidden" by the thick chaparral vegetation, and is thus is not visible in aerial photographs of the area. However, most of the unpermitted roads and pads lie on exposed, open terrain, and would be clearly visible in aerial photographs if they did in fact exist during the last 50 years, just as they are clearly visible in aerial photographs taken during 2002 and 2003.

Furthermore, the Respondents have not submitted a claim of Vested Rights seeking a Commission determination regarding their allegation that the roads predate the Coastal Act. Moreover, Respondents have admitted that some of the roads were only a trail prior to Kay's unpermitted development.

H. Violators' Defenses and Commission's Response

On July 17, 2003, Attorney Fred Gaines ("Gaines") submitted a Statement of Defense in response to the NOI for the Restoration Order, on behalf of "James A. Kay, Jr. ("Kay"), an officer of entities which own property in unincorporated Malibu" (Exhibit 7). On November 12, 2003, Gaines submitted a second Statement of Defense responding to allegations in the NOI for the Cease and Desist Order. Kay does not admit to any of the allegations contained in the NOIs. Kay denies that any Coastal Act violations have occurred on the subject properties. Kay acknowledges that while certain activities conducted on APN 4464-019-008 and APN 4464-019-010 "went beyond typical brush clearance, repair, and maintenance, they still constitute development that is consistent with the Coastal Act." Kay also denies that the subject properties are located within the Coastal Zone, and therefore Kay denies that the properties are within the Commission's jurisdiction to issue the proposed Restoration Order. The following sections describe the defenses contained in the Statements of Defense and set forth the Commission's response to each defense.

Respondents' Statements of Defense raised both general issues, which they would have address all parcels subject to these Orders, and some issues, which they raise with respect to particular parcels. They have indicated a desire to have the parcels addressed separately, so although much of the work appears to have been conducted across parcel boundaries and without obvious regard for legal boundaries between them, as a courtesy, our discussion below adopts their general format, and addresses both general issues and issues raised by Respondents with respect to each individual parcel.

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In the November Statement of Defense, Respondents requested separate hearings on the alleged violations on each of the five parcels to avoid undue prejudice and irrelevant evidence and to provide due process. As noted above, two of the parcels have the same owner, Panorama Ranch, LLC, and one of the parcels is not owned by any of the Respondents, but is owned by the National Park Service. In addition, Kay is a respondent against whom relief is sought for the unpermitted development on each parcel. Separate hearings are not necessary to insure a fair hearing. The staff report addresses the specific development that occurred on each parcel, and identifies and responds separately to the

defenses that Respondents assert that are specific to development on a particular parcel. Many of the issues are common to all parcels, such as the nature of the ongoing damage to coastal resources and the common defenses that Respondents raise with respect to the development on all five parcels. At the hearing, Respondents may further identify any factual issues that relate to a particular parcel or legal defense regarding a particular parcel. None of the Respondents will be prejudiced by conducting one hearing. In fact, one hearing is a more efficient way of dealing with the issues, avoids duplication of effort, and still allows for distinctions to be made regarding each of the parcels.

ALL PARCELS

Defenses Set Forth in Gaines' July 17, 2003 Cover Letter to SOD

Kay's Defense:

A. and B. In these defenses, Kay asserts that the work performed on the subject properties is not "development" under the definition of section 30106 and therefore no violation of the Coastal Act occurred.

Commission's Response:

As explained in more detail in this report, the unpermitted activities on the subject properties include the following, which constitute "development" pursuant to section 30106: 1) removal of large amounts of native vegetation, including chaparral, riparian vegetation and portions of oak trees constitutes "removal or harvesting of major vegetation"; 2) placement of dirt, rocks, railroad ties, culverts, concrete, posts, gates and chain barriers constitutes "placement or erection of any solid materials or structure" as well as "construction … of any structure"; 3) grading occurred which constitutes "grading, removing, dredging, mining, or extraction of any materials"; 4) creation of roads and a stream crossing to bring vehicles onto areas of the subject properties that previously could not be accessed by vehicles constitutes "change in the density or intensity of use of land"; and 5) construction of the roads constitutes "construction, reconstruction, demolition, or alteration of the size of any structure."

Kay's Defense:

Kay also asserts that the brush clearance, repair and maintenance that was conduced occurred on existing roadways or trails that were not expanded, and that these activities were exempt "repair and maintenance" under section 30610.

Commission's Response:

This defense is based on the assertion that the unpermitted development was repair and maintenance of roads that were legally constructed prior to the Coastal Act, for which a vested right exists. The Commission has not made a determination that a vested right exists for the

roads at issue. Respondents have not filed a Claim of Vested Rights in accordance with Commission regulations seeking such a determination. Such a proceeding before the Commission would require a determination of: whether the roads at issue were legally constructed prior to the Coastal Act; whether they were abandoned and ceased to exist and, if so, whether there is a vested right to reconstruct them at this time; whether existing roads or trails were enlarged or extended and, if so, whether there was a vested right to do so; and whether under the Commission's regulations, repair and maintenance of pre-existing roads (if any) in this location requires a coastal development permit. Under the Commission's regulations (section 13252(a)(3) of Title 14, California Code of Regulations), repair and maintenance of existing development is *not exempt* from permit requirements if it is work located in an environmentally sensitive habitat area that includes (A) placement or removal of any solid materials; or (B) presence, whether temporary or permanent, of mechanized equipment. This action concerns unpermitted development that occurred in native chaparral, riparian areas, and oak woodland, which constitute environmentally sensitive habitat areas. The unpermitted development involved placement or removal of solid materials (i.e., plants, dirt, rocks, culverts, concrete, gates, posts and chains). The unpermitted development also included the presence of mechanized equipment (wood chipper and Polaris vehicle).

In addition, as discussed in more detail in this report, the available evidence indicates that the roads at issue did not exist prior to the Coastal Act, except with the possibility of a road on the National Park Service Property that was revegetated and no longer existed at the time the Respondents' unpermitted activities occurred. Therefore, since the Commission has not determined that the roads at issue were legally constructed, pre-existing roads, the disputed development is not exempt as repair and maintenance. Kay also admits that the above defenses do not apply to certain work performed on APN 4464-019-008 and APN 4464-019-010. Therefore, Kay admits that certain development that was conducted on these parcels is *not* repair and maintenance that is exempt from the permit requirements of the Coastal Act.

Kay's Defense:

Kay also asserts that all work was conducted by hand tools (rather than mechanized equipment).

Commission's Response:

This is controverted by Commission staff and National Park Service staff observations of a gas wood chipper and Polaris vehicle being used for development on the subject properties. Moreover, as noted elsewhere in this discussion, even if true, this would not provide a defense to the enforcement action at hand.

Kay's Defense:

C. **Kay asserts that he should not be liable for violating the Coastal Act because he sought legal advice before proceeding.**

Commission's Response:

While this is a factor that a court might consider in assessing civil penalties and punitive damages, it is not relevant to the determination of whether Kay conducted, supervised, ordered and/or directed unpermitted development that violated the Coastal Act. Nor is it relevant to whether Kay should be ordered to cease conducting unpermitted development that violates the Coastal Act and to restore the areas where such unpermitted development occurred. Such an order is appropriate to respond to the violations that already occurred, regardless of Kay's intent, and to insure no further violations occur. Likewise, Kay's assertion that he has complied with requests to cease all work and use of the roads is not relevant to whether Kay should be ordered to restore the areas where unpermitted development occurred. In addition, as explained in more detail elsewhere in this report, there have been observations of continuing road construction activities on the subject parcels, and an order directing Kay to cease all such unpermitted development will insure that these activities do not continue. Kay also asserts that the Commission has not provided evidence supporting its claim of ongoing biological damage. The ongoing damage to water quality, visual resources and native habitat caused by the unpermitted development is described in detail elsewhere in this report and constitutes evidence of ongoing damage to resources.

Kay's Defense:

D. **Kay asserts that the roads at issue pre-date the Coastal Act and he has a vested right under section 30608 to use, repair and maintain them without a CDP.**

Commission's Response:

This is addressed above in the discussion of defenses A. and B. The Commission has not determined that such vested rights exist.

Kay's Defense:

E. Kay asserts that the Commission's actions constitute an unlawful taking of private property under the California and United States Constitutions.

Commission's Response:

The Coastal Act requirement that a person must obtain a coastal development permit prior to conducting development in the coastal zone does not constitute an unlawful taking of property. Furthermore, this action does not constitute a final action by the Commission regarding the type or extent of allowed development on the properties. The Commission has not made a final determination on any application for a permit authorizing any residential, commercial or industrial structures or use of the properties.

Kay's Defense:

F. **Kay asserts that the Commission's actions violated his civil rights by singling him out, by denying him use of the properties and by failing to provide due process.**

Commission's Response:

It does not violate Kay's civil rights to order that he not use roads that were constructed in violation of the Coastal Act and that he restore them. The ordered restoration is intended to eliminate the illegal development and restore the properties to the condition they were in at the time Respondents purchased the properties. The Commission hearing procedures and statutes provide procedural and substantive due process. As stated above in the response to defense E., the Commission has not made a final determination on any application for a permit authorizing any residential, commercial or industrial structures or use of the properties.

Kay's Defense:

G. **Kay asserts that the Commission's actions constitute pre-condemnation activity with regard to the Kay properties.**

Commission's Response:

The Commission does not have the authority to acquire property through purchase or condemnation and is not involved in any efforts of another agency to purchase or condemn the subject properties. The Commission's enforcement action is not part of a strategy by the Commission to permanently preserve or acquire the subject properties. The Commission's enforcement action is intended to insure that no development occurs on the subject properties unless it is authorized in a coastal development permit, as required under the Coastal Act, and that any development on the properties will be consistent with the resource protection policies of the Coastal Act.

Kay's Defense:

Kay objects to issuance of the order because the commission has "failed to provide... any sort of hearing (either a restoration order hearing, a coastal development permit application hearing, and/or a hearing with regard to the matters contained in the CDOs)." He also claims this is a "violation of ... due process rights." He goes on to say that 30621 requires that a hearing be set no later than 49 days after the application is filed with the Commission.

Commission's Response:

It should be noted that Respondents submitted their applications for Coastal Development Permits *in response* to the enforcement action, after they had received numerous enforcement letters, including an Executive Director Cease and Desist Order. Moreover, the deadlines for hearing this late-filed application are far from run. This packet was received on Nov. 12, 2003.

This packet was, even if complete, far too late for the matter to be heard at the December hearing. The applications are not yet deemed filed at this time, under the Commission's regulations for submittals. The 30-day review period for the additional materials submitted ends on December 12 and the Commission staff will review the additional information in order to determine if the applications are complete. Once the applications are filed, assuming the applicant has submitted all necessary information, the 180 days permit streamlining act deadline would fall sometime in June, 2004.

Finally, it should be noted that the applications submitted by Respondents were for after the fact authorization of "repair and maintenance" only. They do not address in any way restoration of the site or the other measures addressed in these Orders.

While the Commission will of course address Respondents' applications in a timely way, it would be patently unfair to give their application preferential treatment, and address and hear their application before other applicants who have filed in a timely way prior to Respondents' application.

The Coastal Act clearly provides for hearings for all Commission Restoration and Commission Cease and Desist Orders, as we are doing here.

Kay's Defense:

1. **"Kay does not know with certainty and, on that basis, denies that this parcel [all parcels] is within the coastal zone and within the Commission's jurisdiction. Based on the foregoing, the Commission has no authority under §30811 to issue a Restoration Order and no authority under §30830 to impose civil liability on Kay."**

Commission's Response:

Kay asserts that the subject properties are not within the Coastal Commission's jurisdiction; however, on May 8, 2003, Commission staff notified Kay that the properties are located in the Coastal Zone, and are therefore within the jurisdiction of the Commission. Although Kay asserts that the unpermitted development is out of the Coastal Zone, Kay has submitted portions of Real Estate property assessments prepared for the previous owner. These brochures indicate that parcels 4464-019-008, 4464-019-010, and 4464-022-010 are in the Coastal Zone. These documents were available to Kay when he purchased these properties on June 16, 2002. Parcel 4464-022-001 is farther seaward of 4464-019-008 and 010; as such, it should have been obvious to Kay that all four parcels were in the Coastal Zone and subject to the Coastal Act.

In addition, prior to April 25, 2003, Kay's representative Schmitz requested a Coastal Zone Boundary Determination from the Coastal Commission GIS/Mapping Unit in San Francisco for a separate parcel (4464-019-007). On April 25, 2003, the boundary line determination for 4464-019-007 was sent to Schmitz and Associates, and clearly indicates that the subject properties are within the Coastal Zone. Despite this determination, Kay and Schmitz continue to assert that the properties are not located within the Coastal Zone.

In addition, Kay has continued and maintained unpermitted development on an adjacent property, including unpermitted development on public parkland, which has been the subject of ongoing Commission enforcement action since 1997 and a recent settlement agreement involving the California Attorney General's Office. As such, Kay has been made well aware of the proximity of the Coastal Zone as well as the requirements for Coastal Development Permits for the development in the Coastal Zone.

Kay's Defense:

"The vegetation in the areas in question consists of mixed chaparral, and not coastal sage scrub. The dominant plant species throughout the area consist of robust shrub species that grow to more than six feet in height and form extremely dense stands (chamise, canothus, manzanita, and toyon). Mixed chaparral is not considered by any authoritative agency as either coastal sage scrub or sensitive vegetation."

Commission's Response:

Kay's consulting biologist, Mr. Steve G. Nelson, asserts that chaparral of the Santa Monica Mountains is not considered "sensitive vegetation." The Commission has found that the vegetative community of the site meets the definition of ESHA under the Coastal Act. Section 30107.5 of the Coastal Act defines environmentally sensitive areas as "Any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments."

On July 22, 2003, Dr. John Dixon, Coastal Commission biologist, conducted a site visit to the area, and confirmed that the site is substantially classified as ESHA (chaparral habitat). The value of chaparral habitat is well documented by the Coastal Commission. In a memorandum dated March 25, 2003, entitled, "*Designation of ESHA in the Santa Monica Mountains*" Dr. Dixon explicitly confirms, "because of its important roles in the functioning of the Santa Monica Mountains Mediterranean ecosystem, and its extreme vulnerability to development, chaparral within the Santa Monica Mountains meets the definition of ESHA under the Coastal Act."[2] The parcels that are the subject of these Orders are specifically included in the area described as ESHA by Dr. Dixon in this memorandum.

In adopting the local Coastal Program ("LCP") for the City of Malibu on September 13, 2002, the Commission recognized the importance of chaparral ESHA, such as the property at issue here, as an integral part of the Santa Monica Mountains ecosystem. Moreover, the LUP specifically identifies several acres of the subject properties as sensitive habitat, including oak woodlands and significant watersheds. In addition, three blue line streams identified by the U.S. Geological Survey are identified on the parcels.

[2] Memorandum from John Dixon to Ventura Commission staff entitled "Designation of ESHA in the Santa Monica Mountains," dated March 25, 2003.

In addition, despite the Respondents' assertion that native chaparral does not meet the definition of ESHA under the Coastal Act; other entities have similarly recognized the importance of the chaparral habitat in this area, as illustrated below.

The subject properties are surrounded by, and are contiguous with, significantly undeveloped areas of the Santa Monica Mountains region, including large tracts of National Park Service lands. The *Los Angeles County Significant Ecological Area Update Study 2000*, prepared for the Los Angeles County Department of Regional Planning, includes the subject properties in a proposed Significant Ecological Area ("SEA"), which includes approximately 99,430 acres of land in the Santa Monica Mountains.

The Los Angeles County General Plan identifies SEAs as "ecologically important fragile land and water areas that are valuable as plant or animal communities and often important to the preservation of threatened or endangered species. Each SEA includes areas that contain examples of plants and animals that cumulatively represent biological diversity. Preservation of this biological diversity is the main objective of the SEA designation and connecting important natural habitats plays an important role in maintaining biotic communities."[3]

The Santa Monica Mountains North Area Plan component of the Los Angeles County General Plan further states that "Coastal sage scrub, chaparral, and rock outcrops tend to support similar species, with such reptiles as western fence lizards, western whiptails, western rattlesnakes, and gopher snakes; birds such as towhees, sparrows, California thrashers, bushtits, and wrentits; and mammals such as bats, woodrats, mule deer, and bobcats."[4]

Kay's Defense:

The Roads and Trails Pre-Date The Coastal Act.

Commission's Response:

The unpermitted development that is the subject of these Orders does not predate the Coastal Act, was constructed without coastal development permits, is not exempt from coastal development permits pursuant to per § 30610 of the Coastal Act, and is therefore in violation of the Coastal Act. Respondents repeatedly refer to the work completed as "maintenance related" work on "existing" roads, but provide no persuasive documentation that the roads predate the Coastal Act. The Respondents have provided only generalized opinions from a consulting biologist that the "roads appear to have been originally graded many years ago."

[3] Los Angeles County General Plan

[4] The Santa Monica Mountains North Area Plan was prepared by the Los Angeles County Department of Regional Planning, and was adopted by the Los Angeles County Board of Supervisors, October 24, 2000.

As noted in further detail below and in attached exhibits, staff acknowledges that specific roads on parcels 4464-019-008, 4464-022-001, and 4464-022-010 predate the Coastal Act, and these "pre-Coastal" developments have been described and presented to the Respondents. However, substantial unpermitted development has occurred on each of the five parcels subject to the Cease and Desist Order, and is described in further detail below, and throughout this report.

Kay's representative, Schmitz, has acknowledged that "mistakes" were made, including clearing of large swaths of vegetation on parcels 4464-019-008 and 4464-022-010, and removal of vegetation from a blue line stream; however Schmitz incorrectly asserts that these actions are not Coastal Act violations.

On May 8, 2003, Schmitz and Kay claimed that a "large ranching operation" existed on the properties during the 1950s, and the roads were part of an existing network of roads on the covering the subject properties. Aerial photographs provide no evidence of a ranching operation on the properties, and indicate that the alleged extensive network of roads did not exist prior to Kay's ownership of the property. A 1953 aerial photograph submitted by Kay shows only two sections of existing road on parcel 4464-019-008. At the northwest corner of the property, a pre-Coastal Act road, which still exists today, bisects the property. The 1953 photograph also shows a graded road approximately 1,000 feet long, of which approximately 600 feet was located on parcel 4464-019-008. An additional 450 feet of road existed on what is now National Park Service land (APN 4464-019-900), purchased in 1982. By at least 1991, the roadbed on NPS property was completely revegetated and overgrown to the extent that it was no longer discernable or functional as a road.[5] During the spring of 2003, without authorization from the National Park Service, Kay's laborers entered onto NPS property under the supervision of Kay's agent, Don Schmitz and cleared native chaparral and cut several oak tree branches to reopen the former road. Therefore, Kay has conducted new development without at permit to create a road in this location. In addition, Kay placed an unpermitted metal gate across the road and constructed a new road across parcel 4464-019-008 to parcel 4464-019-010.

Castro Motorway and a dirt road entering onto parcel 4464-022-001 from Castro Motorway both predate the Coastal Act by several decades. The pre-Coastal dirt road on parcel 4464-022-001 has been extended without permits and, numerous extensions have been constructed as described in sections above and below.

In addition, numerous unquantified trails have been cleared through the vegetation on the parcels. Kay's representative Schmitz has advised staff that these unpermitted trails were constructed for the convenience of the laborer working on the roads.

Finally, Kay claims to have a vested right to the development existing on all the subject parcels. Kay has not applied for Vested Rights determination under Coastal Act Section 30608, therefore

[5] During a meeting with Commission staff on July 28, 2003, NPS Ranger Bonnie Clarfield stated that the vegetation on the 1950s era roadbed on NPS parcel 4464-019-900 was so thick that she had to "bushwhack" to crawl through the area.

no such Vested Rights determination has been granted. Only the Commission can approve and grant a claim of vested rights. Coastal Act Section 30608 states that:

> *No person who has obtained a vested right in a development prior to the effective date of this division or who has obtained a permit from the California Coastal Zone Conservation Commission pursuant to the California Coastal Zone Conservation Act of 1972 (commencing with Section 27000) shall be required to secure approval for the development pursuant to this division; provided, however, that no substantial change may be made in any such development without prior approval having been obtained under this division.*

Violators' Defenses and Commission's Response

PARCEL 4464-019-008, PANORAMA RANCH, LLC

Kay's Defense:

> **"Kay should be exonerated from any responsibility for the following alleged violation regarding the Panorama Ranch Property No. 1 [APN 4464-019-008]. Neither Kay nor anyone acting on his behalf has at any time graded one or more 'fill pads' on this parcel."**

Commission's Response:

> Staff does not allege that illegally cleared or graded pads exist on parcel 4464-019-008. At the time of the completion of this report, no unpermitted cleared and graded pads have been identified on parcel 4464-019-008. The unpermitted pads referenced in the NOI exist on parcels 4464-019-010 and 4464-022-010. In addition, illegally cleared areas exist on parcel 4464-022-001 and 4464-022-010.

Kay's Defense:

> **"The majority of the work performed on the roads and trails was maintenance related and consisted of clearing and trimming the mixed chaparral and moving fallen boulders and rocks from the roadbeds. In fact, no more than .48 acres of brush was cleared from the Panorama Ranch property No. 1 or 1.2% of the entire parcel. About 900 linear feet of existing roadway was cleared."**
>
> **"It is important to distinguish this parcel from the rest. On the Commission's May 8, 2003 site visit, staff was, in fact, concerned with only one portion of this parcel to the extent that Kay's activities had gone beyond repair and maintenance work (even though it was still all performed with hand tools). The area on which the work exceeded repair and maintenance activity is very small – about 900 linear feet of roadbed work. (The entire existing roadway on this parcel consists of 2,100 linear feet.) Kay acknowledges, as should the Commission, that these 900 linear feet should**

be viewed differently. Any other activity on this parcel, if any, was entirely limited to brush clearance, repair, and maintenance work."

Commission's Response:

On May 1, 2003, staff observed a crew of laborers removing native chaparral and excavating a roadway on steep slopes on 4464-019-008. The laborers were utilizing hand tools to excavate the road and a wood chipper and a six-wheel Polaris® vehicle to ram and drive over native chaparral vegetation. On May 8, 2003, staff observed road cuts into soil and bedrock up to ten (10) feet high, streambed alteration, including grading and construction of a boulder and cobble Arizona crossing through a blue line stream channel. Vegetation in and around the stream had been completely cleared. Accordingly, staff observed construction of a new road.

On May 8, 2003, Schmitz and Kay claimed that a "large ranching operation" existed all on the property during the 1950s, and that the roads were part of a pre-existing network of roads on the property. However, Kay has not sought a determination by the Commission of whether there is a vested right for such roads and there precise location. Nevertheless, aerial photographs provide no evidence of a ranching operation or other significant development on the property predating the Coastal Act. A 1953 aerial photograph submitted by Kay shows only two sections of existing road on parcel 4464-019-008. At the northwest corner of the property, there was an access road, which still exists today, but is not the subject of these Orders. The 1953 photograph also shows a graded road approximately 1,000 feet long, of which approximately 600 feet was located on parcel 4464-019-008. Aerial photographs indicate the road was completely revegetated prior to recent road construction. Thus, new development was conducted without a permit to create a road on parcel 4464-019-008.

Based on aerial photographs of the site, 450 linear feet of roadway existed was located on what is now National Park Service land (APN 4464-019-900), which was purchased in 1982. This section of road was illegally cleared and reopened by Kay's work crews, and is addressed in detail in subsequent sections below.

Finally, whether or not the unpermitted development was performed using only hand tools is irrelevant. The work was completed over a long period of time with work crews of several individuals. In addition, the laborers utilized a Polaris® work vehicle to transport equipment, haul soil, and drive into and knock down vegetation. A mechanical chipper was used to break down cut vegetation, and chain saws were used to cut chaparral vegetation and oak trees.

Kay's Defense:

Neither Kay nor anyone acting on his behalf has at any time performed work on this parcel that resulted in streambed alteration, including grading or filling. Furthermore, neither Kay nor anyone action on his behalf has at any time placed new culverts or railroad ties.

Commission's Response:

A road has been graded through a designated blue line stream on parcel 4464-019-008. Boulders and cobbles have been placed across the lower section of the stream crossing to construct an Arizona crossing through a through the stream channel. Vegetation in and around the stream had been cleared to accommodate the road crossing. Staff questioned Schmitz regarding a large section of cleared brush paralleling the road near the stream; Schmitz stated that the clearance was a "mistake," and indicated that they initially thought it was the location of the roadbed. Staff questioned Schmitz regarding fresh graded road cuts, and the new sidecast rock and soil; staff pointed out to Schmitz that the road and Arizona crossing was obviously new, and asked Schmitz if he believed the road in fact did exist. Schmitz replied there may have existed "a goat trail or something."

Aerial photographs and maps of the area demonstrate that no such road existed prior to May 1, 2003. On May 8, 2003, staff inspected the roadcuts graded adjacent to the stream channel. Freshly cut, exposed and bleeding live roots were clearly visible throughout the profile of the roadcuts. Freshly cut grooves, carved by shovels and other hand tools, were observed in the road cuts, indicating the road cuts were new. Kay and Schmitz presented no evidence that the roads existed prior to the May of 2003.

Kay's Defense:

"Neither Kay nor anyone acting on his behalf has at any time performed work on this parcel resulting in destabilization of slopes."

Commission's Response:

During sites visits on May 1, 2003, May 8, 2003, August 15, 2003, and November 10, 2003, staff observed recently constructed vertical road cuts several feet in height on parcel 4464-019-008. Portions of the cut/fill grading are located on steep hillsides and ravines exceeding 60 percent slopes. Road cuts have been carved into both bedrock and soil material. Many of the road cuts are several feet in height and have been cut vertically without benefit of stabilization. Unconsolidated soil rocks, as well as cut stems and trunks of vegetation have been dumped down-slope of the graded roads. Staff observed that the sidecast fill material readily dislodges when stepped on or moved by hand. No erosion control or other slope stabilization devices were in place anywhere on the property.

Violators' Defenses and Commission's Response

PARCEL 4464-019-010, DEER VALLEY RANCH, LLC

Kay's Defense:

"Neither Kay nor anyone acting on his behalf has at any time graded one or more "fill pads" on this parcel."

Commission's Response:

Two unpermitted cleared and graded pads exist on parcel 4464-019-010 at the terminus to two access roads (Exhibit 4). The pads are located in the southwest quadrant of the property at high topographic points on the property. The westernmost pad (Pad No.1) is approximately 5,000 square feet in size (80' x 60'). The easternmost pad (Pad No. 2), is approximately 2,500 square feet in size, and includes an additional area of vegetation clearance of approximately 5,000 square feet (50'x100').

Staff inspected the two pads on November 10, 2003, and found that boulders, cobbles, and soil material had been cleared and mounded to form perimeters around each cleared site. The material around the edges of each pad is loosely stacked, unconsolidated, and easily dislodged by hand.

The locations of these pads correspond closely to the locations of two proposed building sites depicted and labeled as "proposed Building Pad" in a Property Assessment and Potential Use brochure prepared for the previous owner.

Kay's Defense:

> **"The majority of the work performed on the roads and trails was maintenance related and consisted of clearing and trimming the mixed chaparral and moving fallen boulders and rocks from the roadbeds." "In fact, no more than 1.03 acres of brush was cleared from the Deer Valley Ranch property, or 1.3% of the entire parcel. About 900 linear feet of existing roadway was cleared."**
>
> **"It is important to distinguish the work done on the westerly portion of from the rest of the work performed on the remainder of the Deer Valley Ranch Property and on the other parcels. On the Commission's May 8, 2003 site visit, staff was, in fact concerned with the westerly portion of this parcel to the extent that Kay's activities went beyond repair and maintenance work. The area on which the work exceeded repair and maintenance activity is very small – about 900 linear feet of roadbed work. (The entire existing roadway on this parcel consists of 4,500 linear feet.) Kay acknowledges, as should the Commission, that these 900 linear feet should be viewed differently. Any other activity on this parcel was entirely limited to brush clearance, repair, and maintenance work."**

Commission's Response:

As stated above, the Commission has not determined that the roads and pads on parcel 4464-019-010 predate the Coastal Act. The Respondents have not submitted a claim of Vested Rights, seeking such a determination. The roads and pads were constructed without Coastal Development permits; therefore "maintenance related" work on these roads and pads is not exempt from Coastal Development Permits pursuant to per § 30610 of the Coastal Act. During

the site visit of May 8, 2003, staff was concerned with all of the unpermitted development on all of the parcels, and found no evidence indicating that work on this property is exempt from Coastal Development Permits requirements. Kay does not specify what portion of the 4,500 linear feet of roads and pads should be viewed "differently" from the remaining development, and no evidence has been provided to substantiate his claims that the development predates the Coastal Act, or that a large ranching operation existed on the site during the 1950s.

In fact, aerial photographs, maps of the area, and statements of the previous property owners of adjacent parcel No. 4464-022-001 contradict Kay's claims that the roads predate the Coastal Act. On September 4, 2003, and September 5, 2003, staff spoke with the former owners of parcel 4464-022-001, who owned the property during the 1950s, and continued ownership of the site through the 1980s. The previous owners advised staff that there was never a working ranch on any of the parcels, and that they had to "bushwhack" through the area due to the density of the vegetation. Aerial photographs of the parcels confirm their statements.

As noted above, staff has also obtained a copy of a "Property Assessment and Potential Use" brochure, which the Respondents indicate was prepared for the previous owner. The brochure indicates that no roads existed on parcel 4464-019-010. In fact, the brochure shows a proposed driveway, which follows a route that does not match any of the roads that Kay and Schmitz purport to be "pre-Coastal."

During site inspections on May 8, 2003, August 15, 2003, and November 10, 2003, staff observed fresh roadcuts from one to ten feet in height on parcel 4464-019-010, and several tons of boulders, freshly broken rocks, soil, and cut stems and trunks of vegetation, dumped down slope of several sections of the newly constructed roads.

While the development existing on the westerly portion of the property is more extensive and includes the most intrusive road cuts, as well as both of the graded pads on parcel 4464-019-010, staff is concerned with *all* of the unpermitted development on all of the parcels. Staff has made no representation to Kay or Schmitz that the unpermitted development on the southeastern section of the property is not a violation. The grading, and vegetation removal and disturbance are significant violations of the Coastal Act.

Kay's Defense:

> **Neither Kay nor anyone acting on his behalf has at any time performed work on this parcel that resulted in streambed alteration, grading, filling, or removal of in-channel riparian vegetation. Furthermore, neither Kay nor anyone acting on his behalf has at any time placed new culverts or railroad ties or manipulate boulders or cobbles within stream channels.**

Commission's Response:

Staff does not allege that streambed alteration has occurred on APN 4464-019-010. At the time of the completion of this report, no streambed alteration has been identified by Commission staff

on parcel 4464-019-010. As noted above and below, Commission staff has verified that unpermitted stream alteration has occurred on parcels 4464-019-008 and 4464-022-001, and that vegetation clearance has occurred within a designated blue line stream on parcel 4464-022-010. Staff does note that the excessive vegetation removal and exposure of bare soil this parcel is causing soil erosion, which will result in potentially significant adverse impacts to stream habitat in the area.

Kay's Defense:

Neither Kay nor anyone acting on his behalf has at any time performed work on this parcel that resulted in destabilization of slopes or alteration of drainages.

Kay should be exonerated from any responsibility for work performed on the remaining portions of the Deer Valley Ranch property for the following reasons. Specifically, the exempt work performed on the subject parcel consisted of the following:

1) **Clearance and trimming of mixed chaparral from existing roadways.**

2) **Clearance and removal of fallen rocks and boulders from existing roadbeds.**

The Roads and Trails Pre-Date The Coastal Act.

The roads and trails located on this parcel pre-date the Coastal Act (See Declaration of James A. Kay, Jr., the Biologists Report and Addendum, map, and Whittier College 1953 aerial photo, attached hereto as Exhibits N, D, C, and B.) As such, Kay has a vested right per § 30608 to use, repair, and maintain the existing roadway and does not require a CDP to continue to do so.

No Development (Except for the Westerly Portion of the Property) or Coastal Act Violations Have Occurred on the Property.

The Work performed on the property, except for the work performed on the westerly portion of this parcel, does not constitute development as defined by § 30106.

Exemptions to § 30106 are contained in §30610(d) provides exemptions from the CDP requirement.

Here, the work performed on the subject property (except for the work performed on the westerly portion of the parcel) does not constitute development as defined by § 30106 and is exempt from CDP requirements per § 30610. Courts have held for example, that development under § 30106 may include activities such as: a change in density or intensity of use of land (Stanson v. San Diego Coast Regional Commission) (App. 4 Dist. 1980) 101 Cal.App.3d 38.) a division of land (Ojavan Investors, Inc. v. California Coastal Commission. (App. 2 Dist. 1997) 54 Cal.App.4th 373), and lot line adjustments (La Fe, Inc. v. Los Angeles County (App. 2 Dist. 1999) 73 Cal.App.4th 231). All of these cases can be

easily distinguished from this situation. The brush clearing, repair, and maintenance has not resulted in a change in the density of the use of land, nor has it resulted in an addition to, or enlargement or expansion of the existing roadways or trails. The work undertaken was all preformed by hand tools (picks and shovels).

In addition, the work performed on the subject property (except for the work performed on the westerly portion of the parcel) does not constitute repair and maintenance activities that require a permit under § 13252 of Title 14 of the California Administrative Code.

Furthermore, any allegations that repair and maintenance activity occurred within 20 feet of streams and/or in environmentally sensitive habitat area are entirely untrue. There are no streams on this parcel in the vicinity of existing roads or trails. No pads have been graded.

Commission's Response:

The work completed on parcel 4464-019-010 includes construction of two pads, removal of both surface and subsurface chaparral plant material (not simply "trimming"), and construction of roads that required excavation of roadcuts up to ten feet in height. This development is not exempt from CDP requirements per § 30610 of the Coastal Act. Pursuant to section 30600 (a) of the Coastal Act, any person wishing to perform or undertake development in the Coastal Zone must obtain a Coastal Development Permit, in addition to any other permit required by law.

"Development" is defined by Section 30106 of the Coastal Act as:

> *"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of the use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvest of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations....*

Thus, the above-mentioned unpermitted grading and demolition of structures constitutes development under the Coastal Act.

As noted in the sections above, the roads and pads on parcel 4464-019-010 do not predate the Coastal Act, and were constructed without coastal development permits; therefore the vegetation removal and excavation of rocks repair and maintenance of "existing" roads and is not exempt from coastal permit requirements.

Moreover, even if the Respondents were to claim a Vested Right to the roads under §30608, no such Vested Rights determination has been applied for or granted. The Respondents have not obtained a vested right before the Commission pursuant to Section 30608 of the Coastal Act. Only the Commission can approve and grant a claim of vested rights.

As noted above, staff does not allege that streambed alteration has occurred on APN 4464-019-010. However, staff does note that the excessive grading and exposure of bare soil on steep slopes is causing erosion on the parcel, which will result in potentially significant adverse impacts to stream habitat in the area.

Finally, whether or not the unpermitted development was performed using only hand tools is irrelevant. The work was completed over a long period of time with work crews of several individuals. In addition, the laborers utilized a Polaris® work vehicle to transport equipment, haul soil, and drive into and knock down vegetation. A mechanical chipper was used to break down cut vegetation, and chain saws were used to cut chaparral vegetation and oak trees.

Kay's Defense:

There Is No Ongoing Biological Damage.

There is no evidence of damage to biological resources resulting from the activities conducted by Kay on the parcel. To date, even though the Commission asserts it as its basis for issuing the Notices, the Commission has presented no evidence or report of any kind that Kay's brush clearance, repair, maintenance, or use of the roads has been detrimental to biological resources. On the other hand, Kay has presented evidence to the Commission from Biologist Steven G. Nelson that Kay's activities have not caused any marked damage to resources and, in fact, have been beneficial to the parcel and wildlife.

Commission's Response:

Biological damage has clearly occurred on the APN 4464-019-010 due to destruction of ESHA. Additionally, on May 8, August 15, and November 10, 2003, staff observed active erosion on the parcel resulting from destabilization of slopes from removal of vegetation and excavation and sidecasting of soil and rock for road construction on steep slopes. The subject properties are located at the headwaters of several drainages, including three blue line streams and at least one designated significant watershed area. Excavation and sidecasting of unconsolidated soil leads to increased sedimentation rates in adjacent streams, causing adverse impacts to fish and other aquatic wildlife, and therefore constitutes resource damage.

On the above dates, staff observed soil and rock material piled against the trunks and stems of oak trees and native chaparral species, damaging native vegetation on APN 4464-019-010.

Some chaparral plant species, including species found on this parcel, rely on underground woody structures such as woody taproots to sprout following removal of surface vegetation due to

events such as fire. Staff confirmed that subsurface plant material had been removed at various locations on the parcels, including root material. Removal of the root material of these plants will result in their failure to regenerate.

Finally, the fact that the unpermitted grading was performed using primarily hand tools does not mean a CDP was not required, since no exemption applies (see discussion above).

Kay's Defense:

There is no Basis to Issue a §30811 Restoration Order.

Section 30811 authorizes the Commission to order restoration of a site it finds three things. One, that the development has occurred without a CDP; two, that the development is inconsistent with what is allowed under the Coastal Act; and, three, that the development is causing continuing resource damage. Based on the foregoing description of the activities that took place on the parcel, nothing occurred on the remaining portion of this parcel that qualifies as development. Therefore, there has been no violation of the Coastal Act and the Commission has no basis upon which to issue a restoration order with respect to this property. In addition, the required finding that resource damage has occurred cannot be made. (See Biologist's Report and Addendum attached).

Commission's Response:

The unpermitted development meets the criteria required for the Commission to issue a Restoration Order pursuant to Section 30811. As explained in the preceding sections of this report, the roads and pads do not predate the Coastal Act; the development is inconsistent with the Coastal Act; and the development is causing continuing resource damage.

Kay's Defense:

Kay Should Not be Held Civilly Liable Under §30820. First, Kay solicited advice regarding what lawful activities he could undertake on the parcel without a CDP. After reviewing such advice, Kay was careful to operate within the limitations of the activities not requiring a CDP. Second, Kay ceased all repair and maintenance work immediately upon notice from the Commission and receipt of the Commission's May 8, 2003 Notice, and has not conducted any activities on the property since that date. (See Schmitz's May 12, May 13, and May 15 letters and Declaration of James A. Kay, Jr., attached hereto as Exhibits G, H, I, and N) Kay even abided by the Commission request that he cease using the roads, despite the Commission's lack of a legal basis for such request. Third, the Commission has presented no biological reports documenting the basis for its allegations and of evidence of ongoing biological damage to resources. (See Biologist's Report and Addendum, attached hereto as Exhibit D).

Commission's Response:

Kay did not solicit advice from Coastal Commission staff regarding what lawful development activities he could undertake without a CDP. The fact that Kay sought, and allegedly received erroneous guidance from an unidentified source does not absolve Kay of responsibility for Coastal Act violations. Kay has performed and maintained unpermitted development on adjacent property in violation of the Coastal Act, and Kay has been repeatedly advised by Commission Enforcement staff regarding requirements for coastal development permits within the Coastal Zone since 1997. In addition, in the recent past, from May 2003 until the present, Kay and his representatives have been repeatedly informed of the Coastal Act requirements as they pertain to these parcels (See Exhibits 9 through 13). Despite this, Kay has continued to conduct and maintain unpermitted development at the site.

Contrary to assurances from Kay and his representatives, staff found evidence that Kay did not abide by the terms of Executive Director Cease and Desist Order ED-03-CD-146. On August 15, 2003, staff from both the Commission and the California State Regional Water Quality Control Board located fresh tire tracts matching the tire tread of the Polaris® work vehicle on parcel 4464-019-008, adjacent to parcel 4464-019-010.

The above-referenced document by John Dixon, PhD., entitled "*Designation of ESHA in the Santa Monica Mountains*" (Exhibit 6) confirms that native chaparral habitat in the Santa Monica Mountains is ESHA. Deep-rooted chaparral vegetation provides protection from soil erosion, especially on steep slopes in the Santa Monica Mountains, holding soil intact and preventing movement of soil on steep slopes. Chaparral vegetation also protects the soil surface from direct impact from by interception of precipitation by foliage, and slowing surface runoff, and providing greater infiltration of moisture.[6]

Dr. Dixon's memorandum has been cited and included with numerous documents approved by the Commission, including staff reports for Commission items of clients of Kay's representative Schmitz, and has been readily available to the public.

Finally, as noted in relevant sections above, the properties are located within the Coastal Zone, and ongoing damage is occurring to resources that are afforded protections under the policies of Chapter 3 of the Coastal Act, including but not limited to water quality, environmentally sensitive wildlife habitat, and the visual quality of coastal areas.

Violators' Defenses and Commission's Response

PARCEL 4464-019-900, Owned by the United States Government

Parcel 4464-019-900 is public park property owned by the Federal Government as part of Santa Monica Mountains National Recreation Area, and is included in the Commission Cease and Desist Order, but is not included in the Restoration Order. On October 24, 2003, the Executive Director issued EDCDO No. ED-03-CD-147, and included parcel 4464-019-900, to halt further

[6] Memorandum from John Dixon to Ventura Commission staff entitled "Designation of ESHA in the Santa Monica Mountains," dated March 25, 2003, attached hereto as Exhibit 6.

damage to Park property; however it is the opinion of the Executive Director that restoration of the site should be completed under the direction of the National Park Service. Staff recommends issuance of the Cease and Desist Order to the Respondents to prevent any further unpermitted development by the Respondents on Park property.

The unpermitted development on APN 4464-019-900 was conducted and directed by James A. Kay, Jr. It appears that the unpermitted development on the public property was conducted for the benefit of Mr. Kay and the corporate entities controlled by Kay, which are identified as the owners of the properties adjacent to Park property.

The violations on this property include removal of native chaparral vegetation and material damage to oak trees to clear a restored road that existed on park property. Federal Authorities will coordinate with the CCC and Respondents to resolve the damage to Park property caused by Kay. For the portion of Park property within the Coastal Zone, staff is only proposing a Commission Cease and Desist Order at this time, and is not proposing that the Commission issue a Restoration Order. Restoration of the damage park resources within the Coastal Zone may require a coastal development permit.

During the 1950s, a section of dirt road, approximately 450 linear feet long, existed on what is now National Park Service land (APN 4464-019-900), which was purchased in 1982. By 1991, the roadbed on Park property was completely revegetated and overgrown to the extent that it was no longer discernable or functional as a road.[7] Without permission of the National Park Service or the Coastal Commission, Kay's work crews entered onto NPS property under the supervision of Don Schmitz and cleared native chaparral and cut several oak tree branches to reopen the former road. In addition, Kay has placed unpermitted metal and wood posts, and a chain across the road and constructed a new road across parcel 4464-019-008 to access parcel 4464-019-010.

Kay's Defense:

In the Statement of Defense dated November 12, 2003, the Respondents do not offer specific defenses to the allegations against James A. Kay, Jr. for unpermitted development performed on parcel 4464-019-900. Responses are only submitted on behalf of Deer Valley Ranch, LLC, Panorama Ranch, LLC, and Communications Relay Corporation. The Respondents do cite the general assertions in the Statement of Defense submitted on July 17, 2003.

In the Statement of Defense dated November 12, 2003, Gaines indicates that Deer Valley Ranch, LLC, Panorama Ranch, LLC, and Communications Relay Corporation, object to the evidence presented to Commission staff by National Park Service Rangers, **"On the grounds that they are heresy – unsubstantiated reports, offered to prove the truth of the matter asserted. [In addition, the credibility of such 'reports' allegedly received**

[7] During a meeting with Commission staff on July 28, 2003, NPS Ranger Bonnie Clarfield stated that the vegetation on the 1950s era roadbed on NPS parcel 4464-019-900 was so thick that she had to bushwhack to crawl through the area.

by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]"

To our clients' knowledge, the NPS has not closed APN 4464-019-900 to the public or imposed public use limits pursuant to Section 1.5 of Title 36 of the Code of Federal Regulations, nor has it posted signs illustrating that to walk on APN 4464-019-900 is prohibited pursuant to Section 1.10 of Title 36 of the Code of Federal Regulations. In addition, Section 2.31 of Title 36 of the Code of Federal Regulations defines trespassing as "...entering or remaining in or upon property or real property not open to the public, except with the express invitation or consent of the person having lawful control of the property or real property." Based on the understanding that the NPS property was open to the public (and presumably still is), our clients and their agents believe that it is lawful to utilize the roads located in APN 4464-019-900.

Commission's Response:

In the Statement of Defense, the Respondents do not address the illegal clearing of the road on NPS property. The fact that the property is public parkland and is by definition open to the public, does not grant Kay the right to perform unpermitted development on Park property in violation of the Coastal Act. Kay has damaged park resources and illegally cleared a restored road on public property. Halting Kay's actions to conduct further unpermitted development and to use the illegal road is an appropriate response by both the Coastal Commission and National Park Service. Continued use of the road by Kay will further compact soils and crush vegetation on the site.

Although the road at issue across NPS property existed in 1953, aerial photographs indicate that the subject road was substantially revegetated by the late 1970s, and was completed revegetated and restored to thick chaparral vegetation by 1991. Laborers employed by Kay, and allegedly under the supervision of Schmitz, entered onto the Park property and cleared native chaparral and cut several oak tree branches to create a new road. The Respondents have not demonstrated a legal right to create a new road at this location. The Commission has not determined that the Respondents have a vested right to a road in this location, nor has Kay submitted a claim of Vested Rights, pursuant to the Commission's regulations, seeking such a determination.

Nevertheless, aerial photographs provide no evidence of a ranching operation or other significant development on the property predating the Coastal Act. A 1953 aerial photograph submitted by Kay shows only two sections of existing road on parcel 4464-019-008. At the northwest corner of the property, there was an access road, which still exists today, but is not the subject of these Orders. The 1953 photograph also shows a graded road approximately 1,000 feet long, of which approximately 600 feet was located on parcel 4464-019-008. Aerial photographs indicate the road was completely revegetated prior to recent road construction. Thus, new development was conducted without a permit to create a road on parcel 4464-019-008.

Based on aerial photographs of the site, 450 linear feet of roadway existed was located on what is now National Park Service land (APN 4464-019-900), which was purchased in 1982. This section of road was illegally cleared and reopened by Kay's work crews, and is addressed in detail in subsequent sections below.

Violators' Defenses and Commission's Response

PARCEL 4464-022-001, COMMUNICATIONS RELAY CORPORATION

Kay's Defense:

There is no evidence of damage to biological resources resulting from the activities conducted by Kay on the parcel [APN 4464-022-001 and 4464-022-010]. To date, even though the Commission asserts it as its basis for issuing the Notices, the Commission has presented no evidence or report of any kind that Kay's brush clearance, repair, maintenance, or use of the roads has been detrimental to biological resources. On the other hand, Kay has presented evidence to the Commission from biologist Steve G. Nelson that Kay's activities have not caused any marked damage to resources and, in fact, have been beneficial to the parcel and wildlife.

> **"The Vegetation in the areas in question consists of mixed chaparral, and not coastal sage scrub. The dominant plant species throughout the area consist of robust shrub species that grow to more than six feet in height and form extremely dense stands (chamise, canothus, manzanita, and toyon). Mixed chaparral is not considered by any authoritative agency as either coastal sage scrub or sensitive vegetation."**

Commission's Response:

Kay does not provide evidence that the development conducted by Kay is "beneficial to wildlife." In fact, in a June 11, 2003 letter, Biologist, Steve G. Nelson states: "Interestingly, and not to be misunderstood to mean that roads through habitat areas are necessarily beneficial to wildlife, it is plausible to expect the roads are used by larger mammals to facilitate their movement through the area in light of the surrounding dense chaparral." Staff does not dispute the fact that large mammals such as deer will in fact utilize trails and roads, however this is not evidence that construction of roads and clearance of vegetation are beneficial to wildlife, nor does it address negative impacts of road construction and vegetation clearance on wildlife, water quality, and visual resources or provide a defense to violations of the Coastal Act. In fact, Schmitz has indicated that Kay is interested in utilizing the roads to a commercial "big game hunting range."

Mr. Nelson asserts that Chaparral of the Santa Monica Mountains is not considered "sensitive vegetation." The Commission has found that the vegetative community of site meets the definition of ESHA under the Coastal Act. Section 30107.5 of the Coastal Act defines environmentally sensitive areas as "Any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments."

On July 22, 2003, Dr. John Dixon, Coastal Commission biologist, conducted a site visit to the area, and confirmed that the site is substantially classified as ESHA (chaparral habitat). The value of chaparral habitat is well documented by the Coastal Commission. In a memorandum dated March 25, 2003, entitled, "*Designation of ESHA in the Santa Monica Mountains*" Dr. Dixon confirms, "because of its important roles in the functioning of the Santa Monica Mountains Mediterranean ecosystem, and its extreme vulnerability to development, chaparral within the Santa Monica Mountains meets the definition of ESHA under the Coastal Act."[8]

In adopting the local Coastal Program ("LCP") for the City of Malibu on September 13, 2002, the Commission recognized the importance of chaparral ESHA as an integral part of the Santa Monica Mountains ecosystem. The LUP specifically identifies several acres of the subject properties as ESHA, including oak woodlands and significant watersheds. In addition, three blue line streams identified by the U.S. Geological Survey are identified on the parcels.

Other entities have also recognized the importance of this ecosystem. The subject properties are surrounded by, and are contiguous with, significantly undeveloped areas of the Santa Monica Mountains region, including large tracts of National Park Service lands. The *Los Angeles County Significant Ecological Area Update Study 2000*, prepared for the Los Angeles County Department of Regional Planning, includes the subject properties in a proposed Significant Ecological Area ("SEA"), which includes approximately 99,430 acres of land in the Santa Monica Mountains.

The Los Angeles County General Plan identifies SEAs as "ecologically important fragile land and water areas that are valuable as plant or animal communities and often important to the preservation of threatened or endangered species. Each SEA includes areas that contain examples of plants and animals that cumulatively represent biological diversity. Preservation of this biological diversity is the main objective of the SEA designation and connecting important natural habitats plays an important role in maintaining biotic communities."[9]

The Santa Monica Mountains North Area Plan component of the Los Angeles County General Plan further states that "Coastal sage scrub, chaparral, and rock outcrops tend to support similar species, with such reptiles as western fence lizards, western whiptails, western rattlesnakes, and

[8] Memorandum from John Dixon to Ventura Commission staff entitled "Designation of ESHA in the Santa Monica Mountains," dated March 25, 2003. See attached exhibit 6.

[9] Los Angeles County General Plan.

gopher snakes; birds such as towhees, sparrows, California thrashers, bushtits, and wrentits; and mammals such as bats, woodrats, mule deer, and bobcats."[10]

Violators' Defenses and Commission's Response

PARCEL 4464-022-010, Owned by PANORAMA RANCH, LLC

Kay's Defense:

No Pads have been graded.

Commission's Response:

During the site visit on May 8, 2003, staff observed a small, flat graded pad covered with 2-4 inches of freshly chipped vegetation located on Panorama Ranch, LLC Parcel 4464-022-010. Staff asked Kay what the purpose of the graded pad was. Both Kay and Schmitz insisted the graded area was "natural," and that no grading had occurred. On August 4, 2003, staff met with Schmitz and again observed the graded pad site. Staff measured the graded area, which is approximately 350 square feet, with approximately six inches to one foot of cut soil on the south side, and one to three feet of fill on the northern side. The graded fill pad is located at the end of a section cleared of chaparral approximately 10 to 20 feet wide and 150 feet long, which culminates at a blue line stream adjacent to the border of National Park Service property to the east.

During the meeting on August 4, 2003, Schmitz admitted that the grading was the "beginning of a new road." However, Schmitz protested the description of the graded area as a "pad," claiming that this would distort the Commissioner's view of the development. Staff advised Schmitz that while the graded pad could in fact appear to be the beginning of a new road, it is nonetheless an unpermitted graded pad. Schmitz requested that staff issue an amendment to the EDCDO and NOI, retracting allegations of a graded pad. Staff subsequently advised Schmitz that no such retraction would be issued since the description was accurate.

In addition, Kay cleared a second area on this parcel, approximately 6,000 square feet in size, approximately 250 feet south of graded fill pad noted above, and within 100 feet of National Park Service property boundary. During the meeting on November 10, 2003, staff asked Schmitz what the purpose of the cleared area was; Schmitz replied that it was cleared because it was "just there," and Schmitz asserted that it had always been there. Staff asked Schmitz how the laborers knew where to locate the site given the density of the brush at the site. Schmitz replied, "They just knew."

Kay's Defense:

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[10] The Santa Monica Mountains North Area Plan was prepared by the Los Angeles County Department of Regional Planning, and was adopted by the Los Angeles County Board of Supervisors, October 24, 2000.

Kay should be exonerated from any responsibility for all of the alleged violations regarding the Panorama Ranch Property No. 2 for the following reasons. Specifically, the work performed on the subject parcel consisted of the following:

1) **Clearance and trimming of mixed chaparral from existing roadways.**

2) **Clearance and removal of fallen rocks and boulders from existing roadbeds.**

The cleared and repaired area on this parcel is .68 acres of the 44.58 acre parcel, or about 1.51% of the entire property. About 2, 950 linear feet or existing roadway was cleared.

The Roads and Trails Pre-Date The Coastal Act.

The roads and trails located on this parcel pre-date the Coastal Act (See Declaration of James A. Kay, Jr., the Biologists Report and Addendum, map, and Whittier College 1953 aerial photo, attached hereto as Exhibits N, D, C, and B.) As such, Kay has a vested right per § 30608 to use, repair, and maintain the existing roadway and does not require a CDP to continue to do so.

No Development or Coastal Act Violations Have Occurred on the Property.

The Work performed on the property does not constitute development as defined by § 30106.

Exemptions to §30106 are contained in §30610. Specifically, §30610(d) provides exemptions from the CDP requirement.

Here, the work performed on the subject property does not constitute development as defined by § 30106 and is exempt from CDP requirements per § 30610. Courts have held for example, that development under § 30106 may include activities such as: a change in density or intensity of use of land (Stanson v. San Diego Coast Regional Commission) (App. 4 Dist. 1980) 101 Cal.App.3d 38.) a division of land (Ojavan Investors, Inc. v. California Coastal Commission. (App. 2 Dist. 1997) 54 Cal.App.4th 373), and lot line adjustments (La Fe, Inc. v. Los Angeles County (App. 2 Dist. 1999) 73 Cal.App.4th 231). All of these cases can be easily distinguished from this situation. The brush clearing, repair, and maintenance has not resulted in a change in the density of the use of land, nor has it resulted in an addition to, or enlargement or expansion of the existing roadways or trails. The work undertaken was all preformed by hand tools (picks and shovels).

In addition, the work performed on the subject property does not constitute repair and maintenance activities that require a permit under § 13252 of Title 14 of the California Administrative Code.

Furthermore, any allegations that repair and maintenance activity occurred within 20 feet of streams and/or in environmentally sensitive habitat area are entirely untrue. There are no streams on this parcel in the vicinity of existing roads or trails. No pads have been graded, no culverts have been constructed, and no railroad ties have been placed on this Property.

Commission's Response:

As noted in the sections above, the Commission has not determined that the roads and pads on parcel 4464-022-010 predate the Coastal Act, nor have the Respondents submitted a claim of Vested Rights, pursuant to the Commission's regulations, seeking such a determination. The road construction is not "repair and maintenance." Staff has confirmed that unpermitted development requiring a coastal development permit (as set forth in Coastal Act §30106) has occurred within 20 feet of a designated blue-line stream, and in environmentally sensitive habitat. Specifically, major vegetation was cleared from approximately 3,120 linear feet of roadway, resulting in approximately 31,000 square feet of vegetation clearance.

In addition, a cleared swath of vegetation extends into a designated blue line stream of the parcel near the eastern boundary of the property. On November 10, 2003, Kay's representative Schmitz stated that this vegetation clearance was a "mistake," but asserts that it is not a violation of the Coastal Act.

Kay's Defense:

There Is No Ongoing Biological Damage.

There is no evidence of damage to biological resources resulting from the activities conducted by Kay on the parcel. To date, even though the Commission asserts it as its basis for issuing the Notices, the Commission has presented no evidence or report of any kind that Kay's brush clearance, repair, maintenance, or use of the roads has been detrimental to biological resources. On the other hand, Kay has presented evidence to the Commission from Biologist Steven G. Nelson that Kay's activities have not caused any marked damage to resources and, in fact, have been beneficial to the parcel and wildlife.

Commission's Response:

Biological damage has occurred on the APN 4464-022-010 due to destruction of ESHA. Additionally, On May 8, August 15, and November 10, 2003, staff observed active erosion on the parcel resulting from destabilization of slopes from removal of vegetation and excavation and sidecasting of soil and rock for road construction on steep slopes. The subject properties are located at the headwaters of several drainages, including three blue line streams and at least one designated significant watershed area. Excavation and sidecasting of unconsolidated soil leads to increased sedimentation rates in adjacent streams, causing adverse impacts to fish and other aquatic wildlife.

Staff observed soil and rock material piled against the trunks and stems of oak trees and native chaparral species, damaging native vegetation on APN 4464-022-010.

Some chaparral plant species, including species found on this parcel, rely on underground woody structures such as woody taproots to sprout following removal of surface vegetation due to events such as fire. Staff confirmed that subsurface plant material had been removed at various locations on the parcels, including root material. Removal of the root material of these plants will result in their failure to regenerate.

Finally, the fact that the unpermitted grading was performed using primarily hand tools is not

Kay's Defense:

There is no Basis to Issue a §30811 Restoration Order.

Section 30811 authorizes the Commission to order restoration of a site it finds three things. One, that the development has occurred without a CDP; two, that the development is inconsistent with what is allowed under the Coastal Act; and, three, that the development is causing continuing resource damage. Based on the foregoing description of the activities that took place on the parcel, nothing occurred on the remaining portion of this parcel that qualifies as development. Therefore, there has been no violation of the Coastal Act and the Commission has no basis upon which to issue a restoration order with respect to this property. In addition, the required finding that resource damage has occurred cannot be made. {See Biologist's Report and Addendum}.

Commission's Response:

The unpermitted development meets the criteria required for the Commission to issue a Restoration Order pursuant to Section 30811. As in the preceding sections of this report, the roads and pads do not predate the Coastal Act; the development is inconsistent with the Coastal Act; and the development is causing continuing resource damage.

Kay's Defense:

Kay Should Not be Held Civilly Liable Under §30820. First, Kay solicited advice regarding what lawful activities he could undertake on the parcel without a CDP. After reviewing such advice, Kay was careful to operate within the limitations of the activities not requiring a CDP. Second, Kay ceased all repair and maintenance work immediately upon notice from the Commission and receipt of the Commission's May 8, 2003 Notice, and has not conducted any activities on the property since that date. (See Schmitz's May 12, May 13, and May 15 letters and Declaration of James A. Kay, Jr., attached hereto as Exhibits G, H, I, and N.) Kay even abided by the Commission request that he cease using the roads, despite the Commission's lack of a legal basis for such request. Third, the Commission has presented no biological reports documenting the basis for its allegations and of evidence of

ongoing biological damage to resources. (See Biologist's Report and Addendum, attached hereto as Exhibit D).

Commission's Response:

Kay did not solicit advice from Coastal Commission staff regarding what lawful development activities he could undertake without a CDP. The fact that Kay sought, and allegedly received erroneous guidance from an unidentified source does not absolve Kay of responsibility for Coastal Act violations. Kay has performed and maintained unpermitted development on adjacent property in violation of the Coastal Act, and Commission Enforcement staff has repeatedly advised Kay regarding requirements for coastal development permits within the Coastal Zone since 1997. In addition, in the recent past, from May 2003 until the present, Kay and his representatives have been repeatedly informed of the Coastal Act requirements as they pertain to these parcels (See Exhibits 9 through 13). Despite this, Kay has continued to conduct and maintain unpermitted development at the site.

As noted above, contrary to the Respondents assertion that the site is not ESHA, Commission Biologist Dr. John Dixon confirms that native chaparral habitat in the Santa Monica Mountains is meets the definition of ESHA under the Coastal Act.

Finally, as noted in relevant sections above, the properties are located within the Coastal Zone, and ongoing damage is occurring to resources that are afforded protections under the policies of Chapter 3 of the Coastal Act, including but not limited to water quality, environmentally sensitive wildlife habitat, and the visual quality of coastal areas.

Staff recommends that the Commission issue the following Cease and Desist and Restoration Orders:

CEASE AND DESIST AND RESTORATION ORDERS

CEASE AND DESIST ORDER CCC-03-CD-015

Pursuant to its authority under Public Resource Code §30810, the California Coastal Commission hereby finds that unpermitted development has occurred on the site in violation of the Coastal Act, and hereby orders and authorizes James A. Kay, Jr., his agents, contractors and employees, Deer Valley Ranch, LLC, Panorama Ranch, LLC, Communications Relay Corporation, and any person(s) acting in concert with any of the foregoing (hereinafter referred to as "Respondents") to cease and desist from: 1) removal of major vegetation, including but not limited to removal of native chaparral, riparian habitat, and damage to native oak trees; grading and clearing of new roads and pads; streambed alteration, including but not limited to grading, filling, and manipulation of channel substrate, installation of metal culverts and creosote-treated railroad ties, and construction of an Arizona crossing in a blue line stream; and construction of unpermitted structures including but not limited to metal gates, metal and wood gate posts with chain barriers set with concrete bases, and from conducting any other unpermitted development at the site which would require a CDP, and 2) maintaining on said property any of the above referenced unpermitted development or as otherwise referenced in Section IV.A of this report.

Within 45 days of the issuance of this order, and as necessary thereafter, Commission staff will conduct a site visit to confirm compliance with the terms and conditions of the Order.

RESTORATION ORDER CCC-03-RO-009

Pursuant to its authority under Public Resource Code §30811, the California Coastal Commission finds that the development is 1) unpermitted, 2) inconsistent with the Coastal Act, and 3) causing continuing resource damage, and hereby orders and authorizes James A. Kay, Jr., his agents, contractors and employees, Deer Valley Ranch, LLC, Panorama Ranch, LLC, Communications Relay Corporation, and any person(s) acting in concert with any of the foregoing (hereinafter, "Respondents") to restore the subject properties to the extent provided below to the condition it was in prior to the undertaking of the development activity that is the subject of this order. Accordingly, the persons subject to this order shall fully comply with the following conditions:

A. Within 14 days of issuance of this Restoration Order, Respondents shall submit for the review and approval of the Executive Director of the Commission a Restoration, Revegetation and Monitoring Plan. The Executive Director may extend this time for good cause.

   The Restoration, Revegetation and Monitoring Plan (hereinafter referred to as the "Restoration Plan") shall be prepared by a qualified restoration ecologist and a qualified geologic engineer, as described in section (d), below and shall include the following:

   a) Goals and Performance Standards. Section A of the Restoration Plan shall present the following goals of the Restoration and Revegetation Project.

1. Restoration of the property to the condition that existed prior to the unpermitted development through restorative grading of the topography in the areas impacted by the unpermitted development. Restorative grading plans should include sections showing original and finished grades, and quantitative breakdown of grading amounts (cut/fill), drawn to scale with contours that clearly illustrate the original topography of the subject site prior to any grading disturbance. The location for any excavated material to be removed from the site as a result of the restoration of the impacted areas shall be identified. If the dumpsite is located in the Coastal Zone and is not an existing sanitary landfill, a coastal development permit shall be required.

2. Revegetation of all graded areas and areas impacted by the removal of major vegetation so that disturbed areas have a similar plant density, total cover and species composition as that typical of undisturbed chaparral vegetation in the surrounding area within 5 years from the initiation of revegetation activities.

3. Eradication of non-native vegetation within the areas subject to revegetation and those areas that are identified as being subject to disturbance as a result of the restoration and revegetation activities.

4. Minimization of the amount of artificial inputs such as watering or fertilizers that shall be used to support the revegetation of the impacted areas. The Restoration and Revegetation Project will not be successful until the revegetated areas meet the performance standards for at least three years without maintenance or remedial activities other than nonnative species removal.

5. Stabilization of soils so that soil is not transported off the subject property or into the chaparral or riparian ESHA and so that slumping, gullying, or other surficial instability does not occur.

6. Section A of the Restoration Plan shall also include specific ecological and erosion control performance standards that relate logically to the restoration and revegetation goals. Where there is sufficient information to provide a strong scientific rationale, the performance standards shall be absolute (*e.g.*, specified average height within a specified time for a plant species).

7. Where absolute performance standards cannot reasonably be formulated, clear relative performance standards will be specified. Relative standards are those that require a comparison of the restoration site with reference sites. The performance standards for the plant density, total cover and species composition shall be relative. In the case of relative performance standards, the rationale for the selection of reference sites, the comparison procedure, and the basis for judging differences to be significant will be specified.

Reference sites shall be located on adjacent areas vegetated with chaparral undisturbed by development or vegetation removal, within 2000 feet of the subject property with similar slope, aspect and soil moisture. If the comparison between the revegetation area and the reference sites requires a statistical test, the test will be described, including the desired magnitude of difference to be detected, the desired statistical power of the test, and the alpha level at which the test will be conducted. The design of the sampling program shall relate logically to the performance standards and chosen methods of comparison. The sampling program shall be described in sufficient detail to enable an independent scientist to duplicate it. Frequency of monitoring and sampling shall be specified for each parameter to be monitored. Sample sizes shall be specified and their rationale explained. Using the desired statistical power and an estimate of the appropriate sampling variability, the necessary sample size will be estimated for various alpha levels, including 0.05 and 0.10.

b) Restoration and Revegetation Methodology. Section B of the Restoration Plan shall describe the methods to be used to stabilize the soils and revegetate the impacted areas. Section B shall be prepared in accordance with the following directions:

1. The plan shall be designed to minimize the size of the area and the intensity of the impacts from disturbances caused by the restoration of the impacted areas. Other than those areas subject to revegetation activities, the areas of the site and surrounding areas currently vegetated with chaparral shall not be disturbed by activities related to this restoration project. Prior to initiation of any activities resulting in physical alteration of the subject property, the disturbance boundary shall be physically delineated in the field using temporary measures such as stakes or colored tape.

2. Specify that the restoration of the site shall be performed using hand tools wherever possible, unless it has been demonstrated to the satisfaction of the Executive Director that heavy equipment will not contribute significantly to impacts to resources protected by the Coastal Act, including, but not limited to geological instability, minimization of landform alteration, erosion and impacts to native vegetation and the stream.

3. The qualified geologic engineer and restoration ecologist shall specify the methods to be used after restoration to stabilize the soil and make it capable of supporting native vegetation. Such methods shall not include the placement of retaining walls or other permanent structures, grout, geogrid or similar materials. Any soil stabilizers identified for erosion control shall be compatible with native plant recruitment and establishment. The plan shall

specify the erosion control measures that shall be installed on the project site prior to or concurrent with the initial grading operations and maintained until the impacted areas have been revegetated to minimize erosion and transport of sediment outside of the disturbed areas. The soil treatments shall include the use of mycorrhizal inoculations of the soil, unless it can be demonstrated to the satisfaction of the Executive Director that such treatment will not likely increase the survival of the plants to be used for revegetation.

4. Describe the methods for revegetation of the site. All plantings shall be the same species, or sub-species, if relevant, as those documented as being located in the reference sites. The planting density shall be at least 10% greater than that documented in the reference sites, in order to account for plant mortality. All plantings shall be performed using native plants that were propagated from plants as close as possible to the subject property, in order to preserve the genetic integrity of the flora in and adjacent to the revegetation area.

5. Describe the methods for detection and eradication of nonnative plant species on the site. Herbicides shall only be used if physical and biological control methods are documented in peer-reviewed literature as not being effective at controlling the specific nonnative species that become established in the revegetation area. If herbicides are to be used in the revegetation area, specify the precautions that shall be taken to protect native plants and workers, consistent with all applicable laws and regulations.

6. Specify the measures that will be taken to identify and avoid impacts to sensitive species. Sensitive species are defined as: (a) species which are listed by state or federal agencies as threatened or endangered or which are designated as candidates for such listing; (b) California species of special concern; (c) fully protected or "special animal" species in California; and (d) plants considered rare, endangered, or of limited distribution by the California Native Plant Society.

c) Monitoring and Maintenance. Section C of the Restoration Plan shall describe the monitoring and maintenance methodology and shall include the following provisions:

1. The Respondents shall submit, on an annual basis for a period of five years (no later than December 31st each year) a written report, for the review and approval of the Executive Director, prepared by a qualified restoration ecologist and qualified geologic engineer, evaluating compliance with the performance standards. The annual reports shall include further recommendations and

requirements for additional restoration activities in order for the project to meet the goals and performance standards specified in the Restoration Plan. These reports shall also include photographs taken from pre-designated locations (annotated to a copy of the site plans) indicating the progress of recovery at the site.

2. During the monitoring period, all artificial inputs shall be removed except for the purposes of providing mid-course corrections or maintenance to ensure the long-term survival of the restoration of the project site. If any such inputs are required beyond the first two years, then the monitoring program shall be extended by an amount of time equal to that time during which inputs were required after the first two years, so that the success and sustainability of the restoration of the project site are ensured.

3. At the end of the five-year period, a final detailed report shall be submitted for the review and approval of the Executive Director. If this report indicates that the restoration project has in part, or in whole, been unsuccessful, based on the approved performance standards, the applicant shall be required to submit a revised or supplemental plan to compensate for those portions of the original program that were not successful. The Executive Director will determine if the revised or supplemental restoration plan must be processed as a CDP, a new Restoration Order, or modification of Restoration Order CCC-03-RO-009.

d) Appendix A shall include a description of the education, training and experience of the qualified geologic engineer and restoration ecologist who shall prepare the Restoration Plan. A qualified restoration ecologist for this project shall be an ecologist, arborist, biologist or botanist who has experience successfully completing restoration or revegetation of chaparral habitats. If this qualified restoration ecologist does not have experience in creating the soil conditions necessary for successful revegetation of chaparral vegetation, a qualified soil scientist shall be consulted to assist in the development of the conditions related to soils in the Revegetation and Monitoring Plan. A qualified geologic engineer for this project shall be a geologic engineer who has experience evaluating and designing soil stabilization projects in the Santa Monica Mountains area.

e) Submit interim erosion control plans for the review and approval of the Executive Director. The Interim Erosion Control Plan shall be prepared by a qualified restoration ecologist and shall include the following:

1. The Interim Erosion Control Plan shall demonstrate that:

   a. The following temporary erosion control measures shall be used: hay bales, wattles, silt fences.

b. Erosion on the site shall be controlled to avoid adverse impacts on adjacent properties and resources.

2. The Interim Erosion Control Plan shall include, at a minimum, the following components:

   a. A narrative report describing all temporary runoff and erosion control measures to be used and any permanent erosion control measures to be installed for permanent erosion control.
   b. A detailed site plan showing the location of all temporary erosion control measures.
   c. A schedule for installation and removal of temporary erosion control measures, in coordination with the long term restoration, revegetation and monitoring plan discussed below.

B. Within 30 days of the approval by the Executive Director of the documents submitted under paragraph A, or within such additional time as the Executive Director may grant for good cause, Respondents shall complete the following actions, in compliance with the plans approved under paragraph A:

1. Restore the topography consistent with the Restoration, Revegetation and Monitoring Plan required by Part A of this order and as approved by the Executive Director.

2. Submit to the Executive Director a report documenting the restoration of the topography. This report shall include photographs that show the restored site. This report shall include a topographic plan that is prepared by a licensed surveyor, shows two-foot contours, and represents the topographic contours after removal of the development and grading to achieve restoration of the topography to the maximum extent possible, as described in paragraph A.

C. Within 15 days of the approval by the Executive Director of the documents submitted under paragraph B2 above, or within such additional time as the Executive Director may grant for good cause, revegetate the disturbed areas with native plants, following the specifications of the Restoration Plan approved by the Executive Director, pursuant to paragraph A above.

D. In accordance with the schedule set forth in the Restoration Plan, approved by the Executive Director pursuant to paragraph B above, submit to the Executive Director monitoring reports.

E. After approval of the monitoring reports by the Executive Director, implement within such timeframe as the Executive Director may specify all measures specified by the Executive Director to ensure the health and stability of the restored areas, as required by the Restoration Plan.

F. For the duration of the restoration project, including the monitoring period, all persons subject to this order shall allow the Executive Director of the Commission, and/or his/her designees to inspect the subject property to assess compliance with the Restoration Order, subject to twenty-four hours advance notice.

Persons Subject to the Orders

James A. Kay, Jr., his agents, contractors and employees, Deer Valley Ranch, LLC, Panorama Ranch, LLC, Communications Relay Corporation, and any person(s) acting in concert with any of the foregoing

Identification of the Property

The property that is subject to these orders is located north of Castro Motorway and east of Latigo Canyon Road in Los Angeles County and is described as follows:

Cease and Desist Order:

- APN 4464-019-010 (80-acres) owned by Deer Valley Ranch, LLC
- APN 4464-019-008 (40-acres) owned by Panorama Ranch, LLC.
- APN 4464-022-001 (25 acres) owned by Communications Relay Corporation
- APN 4464-022-010 (44.5 acres) owned by Panorama Ranch, LLC
- APN 4464-019-900 (which includes approximately 11 acres in the Coastal Zone) owned by National Park Service

Restoration Order:

- APN 4464-019-010 (80-acres) owned by Deer Valley Ranch, LLC
- APN 4464-019-008 (40-acres) owned by Panorama Ranch, LLC.
- APN 4464-022-001 (25 acres) owned by Communications Relay Corporation
- APN 4464-022-010 (44.5 acres) owned by Panorama Ranch, LLC

Description of Unpermitted Development

Unpermitted removal of major vegetation and disturbance of Environmentally Sensitive Habitat, including but not limited to removal of native chaparral and damage to native oak trees; grading and clearing of new roads and pads; unpermitted streambed alteration, including but not limited to grading, filling, and manipulation of channel substrate, installation of metal culverts and creosote-treated railroad ties, and construction of an Arizona crossing in a blue line stream; and construction of unpermitted structures including but not limited to metal gates, metal and wood gate posts with chain barriers set with concrete bases.

Effective Date and Terms of the Orders

The effective date of these orders is December 12, 2003. The orders shall remain in effect permanently unless and until modified or rescinded by the Commission.

Findings

These orders are issued on the basis of the findings adopted by the Commission on December 12, 2003, as set forth in the attached document entitled "**RECOMMENDED FINDINGS FOR RESTORATION ORDER CCC-03-RO-009 and CEASE AND DESIST ORDER CCC-03-CD-015**".

Compliance Obligation

Strict compliance with the orders by all parties subject thereto is required. Failure to comply strictly with any term or condition of the orders, including any deadline contained in the orders, will constitute a violation of the orders and may result in the imposition of civil penalties of up to SIX THOUSAND DOLLARS ($6,000) per day for each day in which such compliance failure persists, in addition to any other penalties authorized under Section 30820. The Executive Director may extend deadlines for good cause.

Deadlines

Deadlines may be extended by the Executive Director for good cause. Any extension request must be made in writing to the Executive Director and received by Commission staff at least 10 days prior to expiration of the subject deadline.

Appeal

Pursuant to PRC § 300803(b), any person or entity against whom this order is issued may file a petition with the Superior Court for a stay of this order.

Executed in San Francisco on December 12, 2003, on behalf of the California Coastal Commission.

_____

Peter Douglas, Executive Director

Exhibits

1. Location Map
2. Assessor's Parcel Locations Map
3. Master Site Plan (Reduced copy of map submitted with July 17, 2003 SOD)
4. Aerial photos indicating unpermitted road and pad development
5. Photographic documentation of onsite violations
6. Memorandum from Commission Biologist, John Dixon, PhD., March 25, 2003
7. Statement of Defense, dated July 17, 2003
8. Statement of Defense, dated November 12, 2003
9. Notice of Intent to Commence Restoration Order Proceedings, June 27, 2003
10. Notice of Intent to Commence Restoration Order Proceedings, July 1, 2003
11. Notice of Intent to Commence Cease and Desist Order Proceedings, October 23, 2003
12. ED Cease and Desist Order ED-03-CD-146, July 2, 2003
13. ED Cease and Desist Order ED-03-CD-147, October 24, 2003

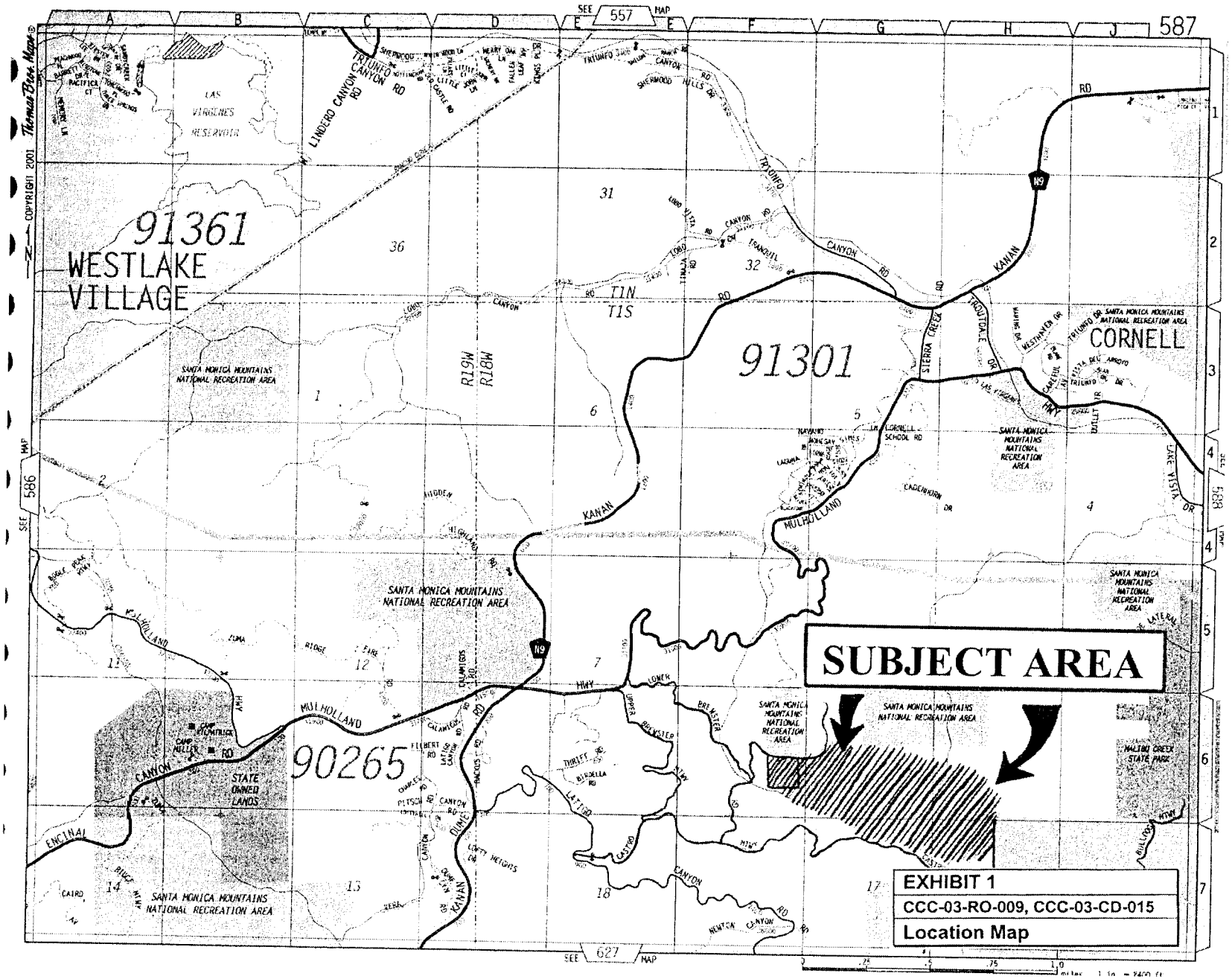


EXHIBIT 1
CCC-03-RO-009, CCC-03-CD-015
Location Map

F12

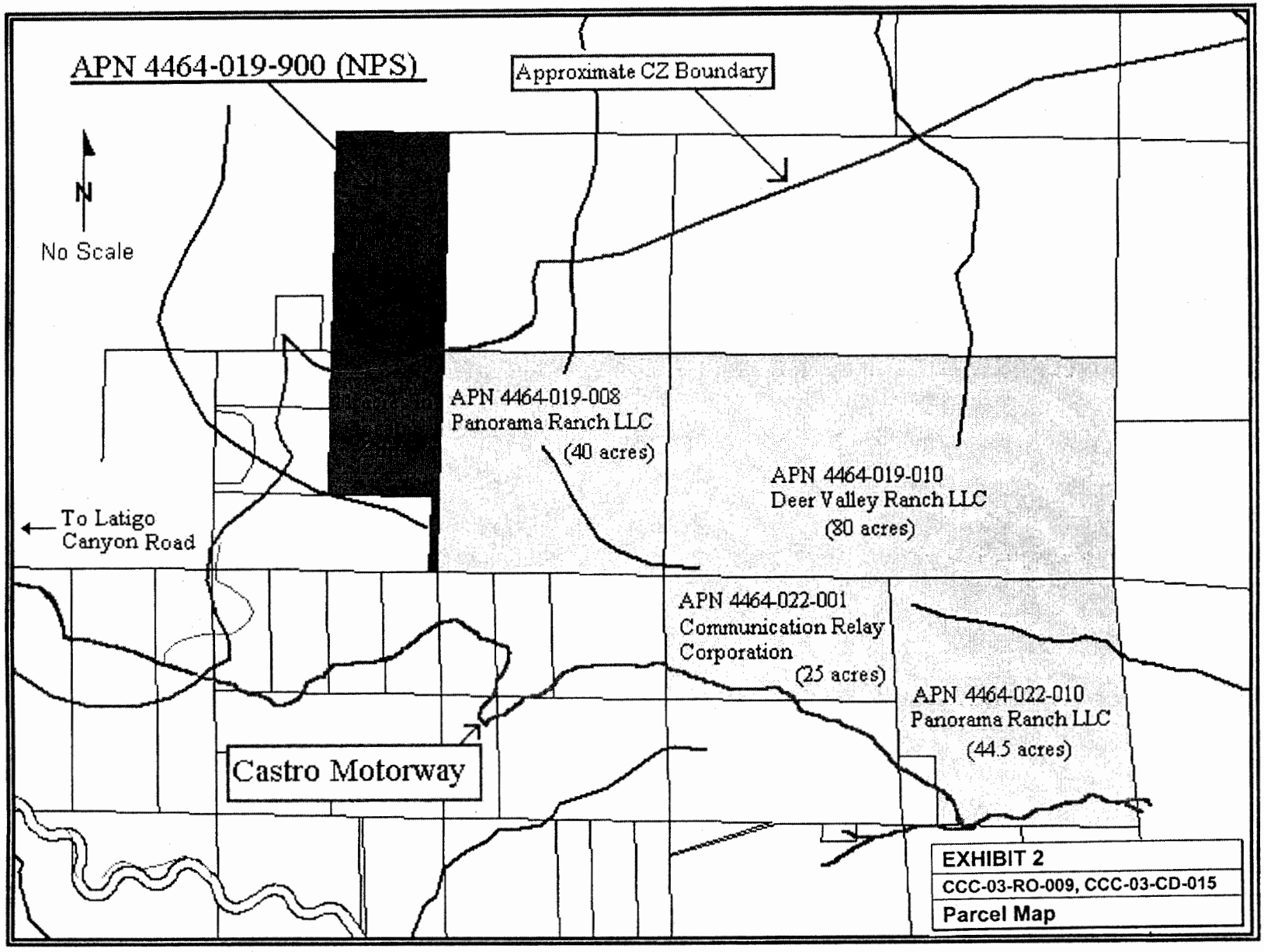


EXHIBIT 2
CCC-03-RO-009, CCC-03-CD-015
Parcel Map

F12

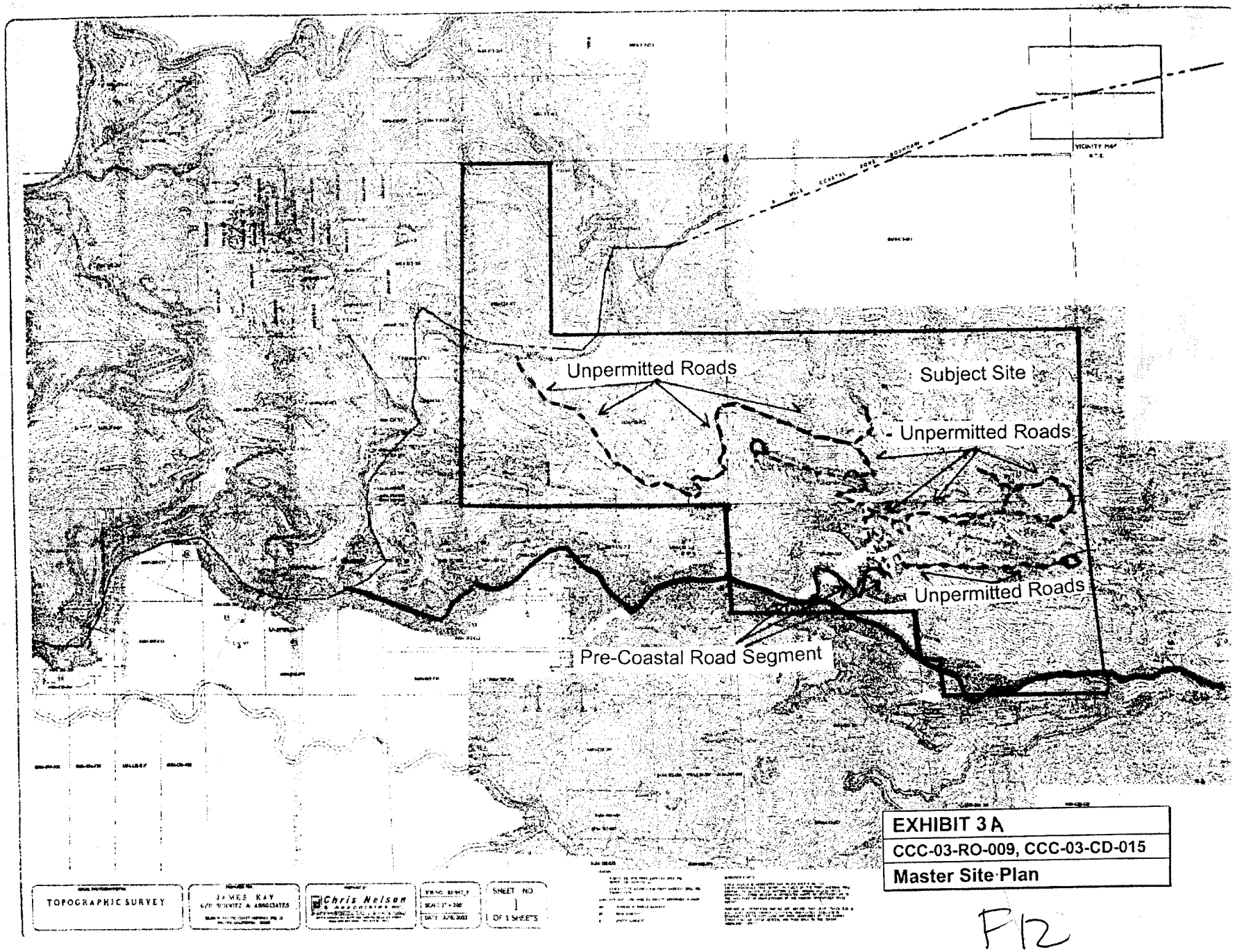


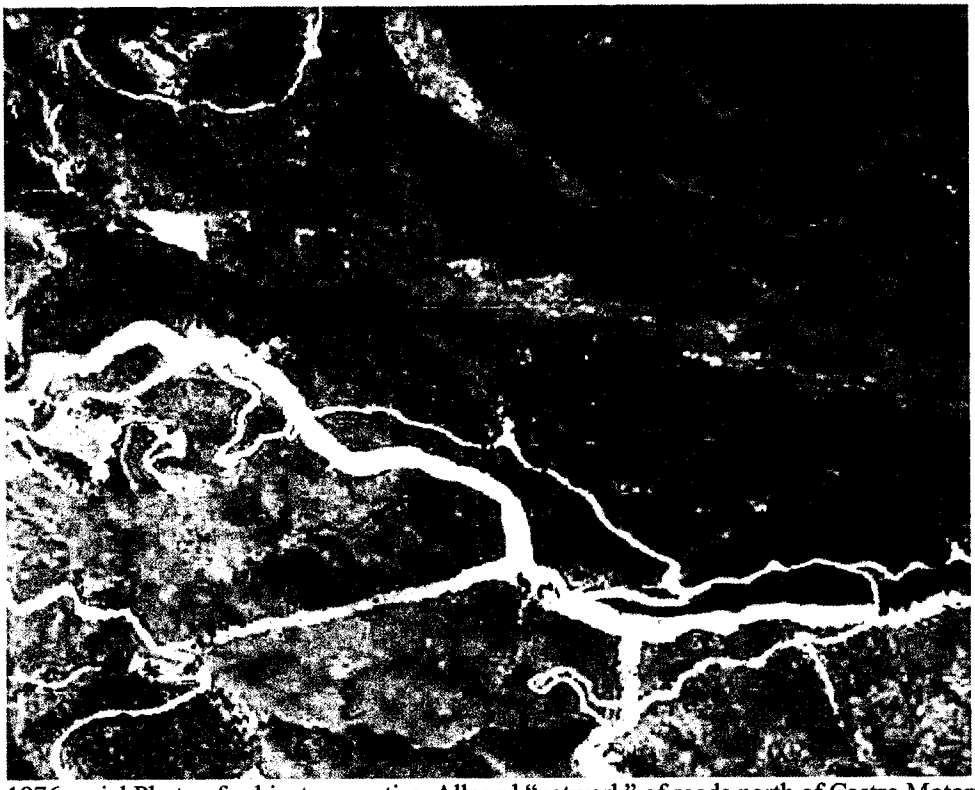
EXHIBIT 3 A

CCC-03-RO-009, CCC-03-CD-015

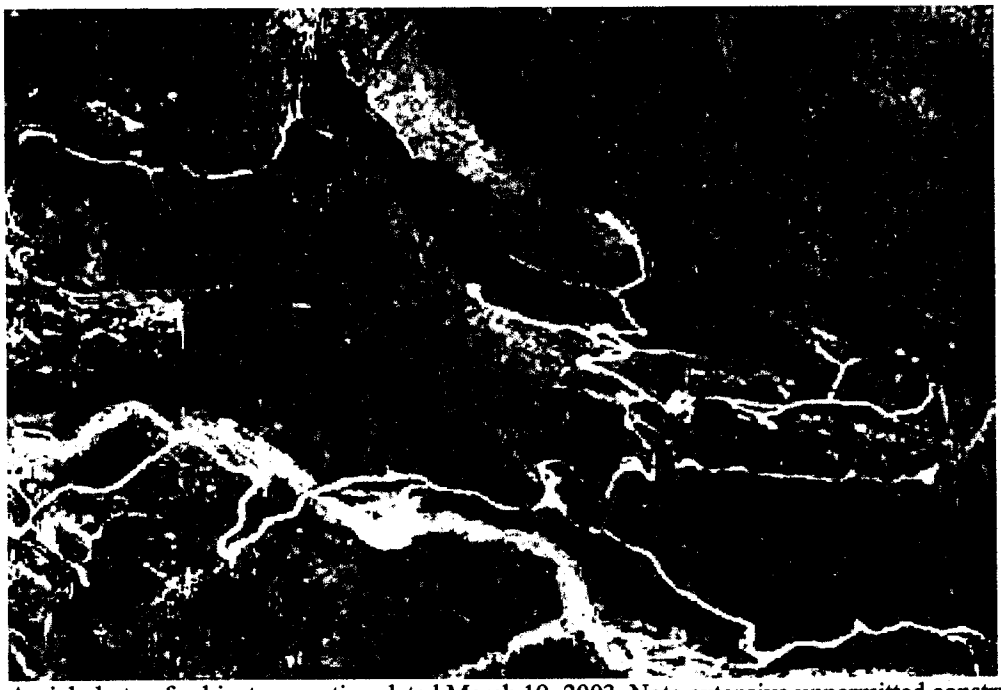
Master Site Plan

F12

EXHIBIT No. 4, AERIAL PHOTOS, CCC-03-RO-009, CCC-03-CD-015



1976 aerial Photo of subject properties. Alleged "network" of roads north of Castro Motorway is not present.



Aerial photo of subject properties, dated March 19, 2003. Note extensive unpermitted construction of roads and pads at the right (East) side of the photo. The unpermitted development shown above is located on parcels 4464-019-010, 4464-022-001, and 4464-022-010. Additional unpermitted development was conducted on parcels 4464-019-008 and 4464-019-900 after March 19, 2003.

EXHIBIT 4 F12

AERIAL PHOTOS SHOWING LEGALLY EXISTING ROADS

May 8, 2003: Unpermitted Culvert with Creosote treated railroad ties

May 8, 2003: b Unpermitted vegetation clearance

EXHIBIT 5
CCC-03-RO-009, CCC-03-CD-015
Photographs of Site

STATE OF CALIFORNIA – THE RESOURCES AGENCY GRAY DAVIS, GOVERNOR

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400

MEMORANDUM

Exhibit 6 F12

MEMO FROM CCC Biologist J. Dixon March 25, 2003

FROM: John Dixon, Ph.D.
Ecologist / Wetland Coordinator

TO: Ventura Staff

SUBJECT: Designation of ESHA in the Santa Monica Mountains

DATE: March 25, 2003

In the context of the Malibu LCP, the Commission found that the Mediterranean Ecosystem in the Santa Mountains is rare, and especially valuable because of its relatively pristine character, physical complexity, and resultant biological diversity. Therefore, areas of undeveloped native habitat in the Santa Monica Mountains that are large and relatively unfragmented may meet the definition of ESHA by virtue of their valuable roles in that ecosystem, regardless of their relative rarity throughout the state. This is the only place in the coastal zone where the Commission has recognized chaparral as meeting the definition of ESHA. The scientific background presented herein for ESHA analysis in the Santa Monica Mountains is adapted from the Revised Findings for the Malibu LCP that the Commission adopted on February 6, 2003.

For habitats in the Santa Monica Mountains, particularly coastal sage scrub and chaparral, there are three site-specific tests to determine whether an area is ESHA because of its especially valuable role in the ecosystem. First, is the habitat properly identified, for example as coastal sage scrub or chaparral? The requisite information for this test generally should be provided by a site-specific biological assessment. Second, is the habitat largely undeveloped and otherwise relatively pristine? Third, is the habitat part of a large, contiguous block of relatively pristine native vegetation? This should be documented with an aerial photograph from our mapping unit (with the site delineated) and should be attached as an exhibit to the staff report. For those habitats that are absolutely rare or that support individual rare species, it is not necessary to find that they are relatively pristine, and are neither isolated nor fragmented.

Designation of Environmentally Sensitive Habitat in the Santa Monica Mountains

The Coastal Act provides a definition of "environmentally sensitive area" as: "Any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments" (Section 30107.5).

There are three important elements to the definition of ESHA. First, a geographic area can be designated ESHA either because of the presence of individual species of plants or animals or because of the presence of a particular habitat. Second, in order for an area to be designated as ESHA, the species or habitat must be either rare or it must be especially valuable. Finally, the area must be easily disturbed or degraded by human activities.

The first test of ESHA is whether a habitat or species is rare. Rarity can take several forms, each of which is important. Within the Santa Monica Mountains, rare species and habitats often fall within one of two common categories. Many rare species or habitats are globally rare, but locally abundant. They have suffered severe historical declines in overall abundance and currently are reduced to a small fraction of their original range, but where present may occur in relatively large numbers or cover large local areas. This is probably the most common form of rarity for both species and habitats in California and is characteristic of coastal sage scrub, for example. Some other habitats are geographically widespread, but occur everywhere in low abundance. California's native perennial grasslands fall within this category.

A second test for ESHA is whether a habitat or species is especially valuable. Areas may be valuable because of their "special nature," such as being an unusually pristine example of a habitat type, containing an unusual mix of species, supporting species at the edge of their range, or containing species with extreme variation. For example, reproducing populations of valley oaks are not only increasingly rare, but their southernmost occurrence is in the Santa Monica Mountains. Generally, however, habitats or species are considered valuable because of their special "role in the ecosystem." For example, many areas within the Santa Monica Mountains may meet this test because they provide habitat for endangered species, protect water quality, provide essential corridors linking one sensitive habitat to another, or provide critical ecological linkages such as the provision of pollinators or crucial trophic connections. Of course, all species play a role in their ecosystem that is arguably "special." However, the Coastal Act requires that this role be "especially valuable." This test is met for relatively pristine areas that are integral parts of the Santa Monica Mountains Mediterranean ecosystem because of the demonstrably rare and extraordinarily special nature of that ecosystem as detailed below.

Finally, ESHAs are those areas that could be easily disturbed or degraded by human activities and developments. Within the Santa Monica Mountains, as in most areas of southern California affected by urbanization, all natural habitats are in grave danger of direct loss or significant degradation as a result of many factors related to anthropogenic changes.

Ecosystem Context of the Habitats of the Santa Monica Mountains

The Santa Monica Mountains comprise the largest, most pristine, and ecologically complex example of a Mediterranean ecosystem in coastal southern California.

California's coastal sage scrub, chaparral, oak woodlands, and associated riparian areas have analogues in just a few areas of the world with similar climate. Mediterranean ecosystems with their wet winters and warm dry summers are only found in five localities (the Mediterranean coast, California, Chile, South Africa, and south and southwest Australia). Throughout the world, this ecosystem with its specially adapted vegetation and wildlife has suffered severe loss and degradation from human development. Worldwide, only 18 percent of the Mediterranean community type remains undisturbed[1]. However, within the Santa Monica Mountains, this ecosystem is remarkably intact despite the fact that it is closely surrounded by some 17 million people. For example, the 150,000 acres of the Santa Monica Mountains National Recreation Area, which encompasses most of the Santa Monica Mountains, was estimated to be 90 percent free of development in 2000[2]. Therefore, this relatively pristine area is both large and mostly unfragmented, which fulfills a fundamental tenet of conservation biology[3]. The need for large contiguous areas of natural habitat in order to maintain critical ecological processes has been emphasized by many conservation biologists[4].

In addition to being a large single expanse of land, the Santa Monica Mountains ecosystem is still connected, albeit somewhat tenuously, to adjacent, more inland ecosystems[5]. Connectivity among habitats within an ecosystem and connectivity among ecosystems is very important for the preservation of species and ecosystem integrity. In a recent statewide report, the California Resources Agency[6] identified wildlife corridors and habitat connectivity as the top conservation priority. In a letter to governor Gray Davis, sixty leading environmental scientists have endorsed the

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[1] National Park Service. 2000. Draft general management plan & environmental impact statement. Santa Monica Mountains National Recreation Area – California.

[2] Ibid.

[3] Harris, L. D. 1988. Edge effects and conservation of biotic diversity. Conserv. Biol. 330-332. Soule, M. E, D. T. Bolger, A. C. Alberts, J. Wright, M. Sorice and S. Hill. 1988. Reconstructed dynamics of rapid extinctions of chaparral-requiring birds in urban habitat islands. Conserv. Biol. 2: 75-92. Yahner, R. H. 1988. Changes in wildlife communities near edges. Conserv. Biol. 2:333-339. Murphy, D. D. 1989. Conservation and confusion: Wrong species, wrong scale, wrong conclusions. Conservation Biol. 3:82-84.

[4] Crooks, K. 2000. Mammalian carnivores as target species for conservation in Southern California. p. 105-112 *in*: Keeley, J. E., M. Baer-Keeley and C. J. Fotheringham (eds), 2nd Interface Between Ecology and Land Development in California, U.S. Geological Survey Open-File Report 00-62. Sauvajot, R. M., E. C. York, T. K. Fuller, H. Sharon Kim, D. A. Kamradt and R. K. Wayne. 2000. Distribution and status of carnivores in the Santa Monica Mountains, California: Preliminary results from radio telemetry and remote camera surveys. p 113-123 *in*: Keeley, J. E., M. Baer-Keeley and C. J. Fotheringham (eds), 2nd Interface Between Ecology and Land Development in California, U.S. Geological Survey Open-File Report 00-62. Beier, P. and R. F. Noss. 1998. Do habitat corridors provide connectivity? Conserv. Biol. 12:1241-1252. Beier, P. 1996. Metapopulation models, tenacious tracking and cougar conservation. *In*: Metapopulations and Wildlife Conservation, ed. D. R. McCullough. Island Press, Covelo, California, 429p.

[5] The SMM area is linked to larger natural inland areas to the north through two narrow corridors: 1) the Conejo Grade connection at the west end of the Mountains and 2) the Simi Hills connection in the central region of the SMM (from Malibu Creek State Park to the Santa Susanna Mountains).

[6] California Resources Agency. 2001. Missing Linkages: Restoring Connectivity to the California Landscape. California Wilderness Coalition, Calif. Dept of Parks & Recreation, USGS, San Diego Zoo and The Nature Conservancy. Available at: http://www.calwild.org/pubs/reports/linkages/index.htm

conclusions of that report[7]. The chief of natural resources at the California Department of Parks and Recreation has identified the Santa Monica Mountains as an area where maintaining connectivity is particularly important[8].

The species most directly affected by large scale connectivity are those that require large areas or a variety of habitats, e.g., gray fox, cougar, bobcat, badger, steelhead trout, and mule deer[9]. Large terrestrial predators are particularly good indicators of habitat connectivity and of the general health of the ecosystem[10]. Recent studies show that the mountain lion, or cougar, is the most sensitive indicator species of habitat fragmentation, followed by the spotted skunk and the bobcat[11]. Sightings of cougars in both inland and coastal areas of the Santa Monica Mountains[12] demonstrate their continued presence. Like the "canary in the mineshaft," an indicator species like this is good evidence that habitat connectivity and large scale ecological function remains in the Santa Monica Mountains ecosystem.

The habitat integrity and connectivity that is still evident within the Santa Monica Mountains is extremely important to maintain, because both theory and experiments over 75 years in ecology confirm that large spatially connected habitats tend to be more stable and have less frequent extinctions than habitats without extended spatial structure[13]. Beyond simply destabilizing the ecosystem, fragmentation and disturbance

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[7] Letters received and included in the September 2002 staff report for the Malibu LCP.

[8] Schoch, D. 2001. Survey lists 300 pathways as vital to state wildlife. Los Angeles Times. August 7, 2001.

[9] Martin, G. 2001. Linking habitat areas called vital for survival of state's wildlife Scientists map main migration corridors. San Francisco Chronicle, August 7, 2001.

[10] Noss, R. F., H. B. Quigley, M. G. Hornocker, T. Merrill and P. C. Paquet. 1996. Conservation biology and carnivore conservation in the Rocky Mountains. Conerv. Biol. 10: 949-963. Noss, R. F. 1995. Maintaining ecological integrity in representative reserve networks. World Wildlife Fund Canada.

[11] Sauvajot, R. M., E. C. York, T. K. Fuller, H. Sharon Kim, D. A. Kamradt and R. K. Wayne. 2000. Distribution and status of carnivores in the Santa Monica Mountains, California: Preliminary results from radio telemetry and remote camera surveys. p 113-123 in: Keeley, J. E., M. Baer-Keeley and C. J. Fotheringham (eds), 2nd Interface Between Ecology and Land Development in California, U.S. Geological Survey Open-File Report 00-62. Beier, P. 1996. Metapopulation models, tenacious tracking and cougar conservation. In: Metapopulations and Wildlife Conservation, ed. D. R. McCullough. Island Press, Covelo, California, 429p.

[12] Recent sightings of mountain lions include: Temescal Canyon (pers. com., Peter Brown, Facilities Manager, Calvary Church), Topanga Canyon (pers. com., Marti Witter, NPS), Encinal and Trancas Canyons (pers. com., Pat Healy), Stump Ranch Research Center (pers. com., Dr. Robert Wayne, Dept. of Biology, UCLA). In May of 2002, the NPS *photographed* a mountain lion at a trip camera on the Back Bone Trail near Castro Crest – Seth Riley, Eric York and Dr. Ray Sauvajot, National Park Service, SMMNRA.

[13] Gause, G. F. 1934. The struggle for existence. Balitmore, William and Wilkins 163 p. (also reprinted by Hafner, N.Y. 1964). Gause, G. F., N. P. Smaragdova and A. A. Witt. 1936. Further studies of interaction between predators and their prey. J. Anim. Ecol. 5:1-18. Huffaker, C. B. 1958. Experimental studies on predation: dispersion factors and predator-prey oscillations. Hilgardia 27:343-383. Luckinbill, L. S. 1973. Coexistence in laboratory populations of *Paramecium aurelia* and its predator *Didinium nasutum*. Ecology 54:1320-1327. Allen, J. C., C. C. Brewster and D. H. Slone. 2001. Spatially explicit ecological models: A spatial convolution approach. Chaos, Solitons and Fractals. 12:333-347.

can even cause unexpected and irreversible changes to new and completely different kinds of ecosystems (habitat conversion)[14].

As a result of the pristine nature of large areas of the Santa Monica Mountains and the existence of large, unfragmented and interconnected blocks of habitat, this ecosystem continues to support an extremely diverse flora and fauna. The observed diversity is probably a function of the diversity of physical habitats. The Santa Monica Mountains have the greatest geological diversity of all major mountain ranges within the transverse range province. According to the National Park Service, the Santa Monica Mountains contain 40 separate watersheds and over 170 major streams with 49 coastal outlets[15]. These streams are somewhat unique along the California coast because of their topographic setting. As a "transverse" range, the Santa Monica Mountains are oriented in an east-west direction. As a result, the south-facing riparian habitats have more variable sun exposure than the east-west riparian corridors of other sections of the coast. This creates a more diverse moisture environment and contributes to the higher biodiversity of the region. The many different physical habitats of the Santa Monica Mountains support at least 17 native vegetation types[16] including the following habitats considered sensitive by the California Department of Fish and Game: native perennial grassland, coastal sage scrub, red-shank chaparral, valley oak woodland, walnut woodland, southern willow scrub, southern cottonwood-willow riparian forest, sycamore-alder woodland, oak riparian forest, coastal salt marsh, and freshwater marsh. Over 400 species of birds, 35 species of reptiles and amphibians, and more than 40 species of mammals have been documented in this diverse ecosystem. More than 80 sensitive species of plants and animals (listed, proposed for listing, or species of concern) are known to occur or have the potential to occur within the Santa Monica Mountains Mediterranean ecosystem.

The Santa Monica Mountains are also important in a larger regional context. Several recent studies have concluded that the area of southern California that includes the Santa Monica Mountains is among the most sensitive in the world in terms of the number of rare endemic species, endangered species and habitat loss. These studies have designated the area to be a local hot-spot of endangerment in need of special protection[17].

Therefore, the Commission finds that the Santa Monica Mountains ecosystem is itself rare and especially valuable because of its special nature as the largest, most pristine,

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[14] Scheffer, M., S. Carpenter, J. A. Foley, C. Folke and B. Walker. 2001. Catastrophic shifts in ecosystems. Nature 413:591-596.

[15] NPS. 2000. op.cit.

[16] From the NPS report (2000 op. cit.) that is based on the older Holland system of subjective classification. The data-driven system of Sawyer and Keeler-Wolf results in a much larger number of distinct "alliances" or vegetation types.

[17] Myers, N. 1990. The biodiversity challenge: Expanded hot-spots analysis. Environmentalist 10:243-256. Myers, N., R. A. Mittermeier, C. G. Mittermeier, G. A. B. da Fonseca and J. A. Kent. 2000. Biodiversity hot-spots for conservation priorities. Nature 403:853-858. Dobson, A. P., J. P. Rodriguez, W. M. Roberts and D. S. Wilcove. 1997. Geographic distribution of endangered species in the United States. Science 275:550-553.

physically complex, and biologically diverse example of a Mediterranean ecosystem in coastal southern California. The Commission further finds that because of the rare and special nature of the Santa Monica Mountains ecosystem, the ecosystem roles of substantially intact areas of the constituent plant communities discussed below are "especially valuable" under the Coastal Act.

Major Habitats within the Santa Monica Mountains

The most recent vegetation map that is available for the Santa Monica Mountains is the map that was produced for the National Park Service in the mid-1990s using 1993 satellite imagery supplemented with color and color infrared aerial imagery from 1984, 1988, and 1994 and field review[18]. The minimum mapping unit was 5 acres. For that map, the vegetation was mapped in very broad categories, generally following a vegetation classification scheme developed by Holland[19]. Because of the mapping methods used the degree of plant community complexity in the landscape is not represented. For example, the various types of "ceanothus chaparral" that have been documented were lumped under one vegetation type referred to as "northern mixed chaparral." Dr. Todd Keeler-Wolf of the California Department of Fish and Game is currently conducting a more detailed, quantitative vegetation survey of the Santa Monica Mountains.

The National Park Service map can be used to characterize broadly the types of plant communities present. The main generic plant communities present in the Santa Monica Mountains[20] are: coastal sage scrub, chaparral, riparian woodland, coast live oak woodland, and grasslands.

Riparian Woodland

Some 49 streams connect inland areas with the coast, and there are many smaller drainages as well, many of which are "blue line." Riparian woodlands occur along both perennial and intermittent streams in nutrient-rich soils. Partly because of its multi-layered vegetation, the riparian community contains the greatest overall biodiversity of all the plant communities in the area[21]. At least four types of riparian communities are discernable in the Santa Monica Mountains: walnut riparian areas, mulefat-dominated riparian areas, willow riparian areas and sycamore riparian woodlands. Of these, the

[18] Franklin, J. 1997. Forest Service Southern California Mapping Project, Santa Monica Mountains National Recreation Area, Task 11 Description and Results, Final Report. June 13, 1997, Dept. of Geography, San Diego State University, USFS Contract No. 53-91S8-3-TM45.
[19] Holland R. F. 1986. Preliminary Descriptions of the Terrestrial Natural Communities of California. State of California, The Resources Agency, Dept. of Fish and Game, Natural Heritage Division, Sacramento, CA. 95814.
[20] National Park Service. 2000. Draft: General Management Plan & Environmental Impact Statement, Santa Monica Mountains National Recreation Area, US Dept. of Interior, National Park Service, December 2000. (Fig. 11 in this document.)
[21] Ibid.

sycamore riparian woodland is the most diverse riparian community in the area. In these habitats, the dominant plant species include arroyo willow, California black walnut, sycamore, coast live oak, Mexican elderberry, California bay laurel, and mule fat. Wildlife species that have been observed in this community include least Bell's vireo (a State and federally listed species), American goldfinches, black phoebes, warbling vireos, bank swallows (State listed threatened species), song sparrows, belted kingfishers, raccoons, and California and Pacific tree frogs.

Riparian communities are the most species-rich to be found in the Santa Monica Mountains. Because of their multi-layered vegetation, available water supply, vegetative cover and adjacency to shrubland habitats, they are attractive to many native wildlife species, and provide essential functions in their lifecycles[22]. During the long dry summers in this Mediterranean climate, these communities are an essential refuge and oasis for much of the areas' wildlife.

Riparian habitats and their associated streams form important connecting links in the Santa Monica Mountains. These habitats connect all of the biological communities from the highest elevation chaparral to the sea with a unidirectional flowing water system, one function of which is to carry nutrients through the ecosystem to the benefit of many different species along the way.

The streams themselves provide refuge for sensitive species including: the coast range newt, the Pacific pond turtle, and the steelhead trout. The coast range newt and the Pacific pond turtle are California Species of Special Concern and are proposed for federal listing[23], and the steelhead trout is federally endangered. The health of the streams is dependent on the ecological functions provided by the associated riparian woodlands. These functions include the provision of large woody debris for habitat, shading that controls water temperature, and input of leaves that provide the foundation of the stream-based trophic structure.

The importance of the connectivity between riparian areas and adjacent habitats is illustrated by the Pacific pond turtle and the coast range newt, both of which are sensitive and both of which require this connectivity for their survival. The life history of the Pacific pond turtle demonstrates the importance of riparian areas and their associated watersheds for this species. These turtles require the stream habitat during the wet season. However, recent radio tracking work[24] has found that although the Pacific pond turtle spends the wet season in streams, it also requires upland habitat for refuge during the dry season. Thus, in coastal southern California, the Pacific pond turtle requires both streams and intact adjacent upland habitats such as coastal sage

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[22] Walter, Hartmut. Bird use of Mediterranean habitats in the Santa Monica Mountains, Coastal Commission Workshop on the Significance of Native Habitats in the Santa Monica Mountains. CCC Hearing, June 13, 2002, Queen Mary Hotel.

[23] USFWS. 1989. Endangered and threatened wildlife and plants; animal notice of review. Fed. Reg. 54:554-579. USFWS. 1993. Endangered and threatened wildlife and plants; notice of 1-year petition finding on the western pond turtle. Fed. Reg. 58:42717-42718.

[24] Rathbun, G.B., N.J. Scott and T.G. Murphy. 2002. Terrestrial habitat use by Pacific pond turtle in a Mediterranean climate. Southwestern Naturalist. (*in Press*).

scrub, woodlands or chaparral as part of their normal life cycle. The turtles spend about four months of the year in upland refuge sites located an average distance of 50 m (but up to 280 m) from the edge of the creek bed. Similarly, nesting sites where the females lay eggs are also located in upland habitats an average of 30 m (but up to 170 m) from the creek. Occasionally, these turtles move up to 2 miles across upland habitat[25]. Like many species, the pond turtle requires both stream habitats and the upland habitats of the watershed to complete its normal annual cycle of behavior. Similarly, the coast range newt has been observed to travel hundreds of meters into upland habitat and spend about ten months of the year far from the riparian streambed[26]. They return to the stream to breed in the wet season, and they are therefore another species that requires both riparian habitat and adjacent uplands for their survival.

Riparian habitats in California have suffered serious losses and such habitats in southern California are currently very rare and seriously threatened. In 1989, Faber estimated that 95-97% of riparian habitat in southern California was already lost[27]. Writing at the same time as Faber, Bowler asserted that, *"[t]here is no question that riparian habitat in southern California is endangered."*[28] In the intervening 13 years, there have been continuing losses of the small amount of riparian woodlands that remain. Today these habitats are, along with native grasslands and wetlands, among the most threatened in California.

In addition to direct habitat loss, streams and riparian areas have been degraded by the effects of development. For example, the coast range newt, a California Species of Special Concern has suffered a variety of impacts from human-related disturbances[29]. Human-caused increased fire frequency has resulted in increased sedimentation rates, which exacerbates the cannibalistic predation of adult newts on the larval stages.[30] In addition impacts from non-native species of crayfish and mosquito fish have also been documented. When these non-native predators are introduced, native prey organisms are exposed to new mortality pressures for which they are not adapted. Coast range newts that breed in the Santa Monica Mountain streams do not appear to have adaptations that permit co-occurrence with introduced mosquito fish and crayfish[31]. These introduced predators have eliminated the newts from streams where they previously occurred by both direct predation and suppression of breeding.

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[25] Testimony by R. Dagit, Resource Conservation District of the Santa Monica Mountains at the CCC Habitat Workshop on June 13, 2002.

[26] Dr, Lee Kats, Pepperdine University, personal communication to Dr J. Allen, CCC.

[27] Faber, P.A., E, Keller, A. Sands and B.M. Massey. 1989. The ecology of riparian habitats of the southern California coastal region: a community profile. U.S. Fish and Wildlife Service Biological Report 85(7.27) 152pp.

[28] Bowler, P.A. 1989. Riparian woodland: An endangered habitat in southern California. Pp 80-97 *in* Schoenherr, A.A. (ed.) Endangered plant communities of southern California. Botanists Special Publication No. 3.

[29] Gamradt, S.C., L.B. Kats and C.B. Anzalone. 1997. Aggression by non-native crayfish deters breeding in California newts. Conservation Biology 11(3):793-796.

[30] Kerby, L.J., and L.B. Kats. 1998. Modified interactions between salamander life stages caused by wildfire-induced sedimentation. Ecology 79(2):740-745.

[31] Gamradt, S.C. and L.B. Kats. 1996. Effect of introduced crayfish and mosquitofish on California newts. Conservation Biology 10(4):1155-1162.

Therefore, because of the essential role that riparian plant communities play in maintaining the biodiversity of the Santa Monica Mountains, because of the historical losses and current rarity of these habitats in southern California, and because of their extreme sensitivity to disturbance, the native riparian habitats in the Santa Monica Mountains meet the definition of ESHA under the Coastal Act.

Coastal Sage Scrub and Chaparral

Coastal sage scrub and chaparral are often lumped together as "shrublands" because of their roughly similar appearance and occurrence in similar and often adjacent physical habitats. In earlier literature, these vegetation associations were often called soft chaparral and hard chaparral, respectively. "Soft" and "hard" refers to differences in their foliage associated with different adaptations to summer drought. Coastal sage scrub is dominated by soft-leaved, generally low-growing aromatic shrubs that die back and drop their leaves in response to drought. Chaparral is dominated by taller, deeper-rooted evergreen shrubs with hard, waxy leaves that minimize water loss during drought.

The two vegetation types are often found interspersed with each other. Under some circumstances, coastal sage scrub may even be successional to chaparral, meaning that after disturbance, a site may first be covered by coastal sage scrub, which is then replaced with chaparral over long periods of time.[32] The existing mosaic of coastal sage scrub and chaparral is the result of a dynamic process that is a function of fire history, recent climatic conditions, soil differences, slope, aspect and moisture regime, and the two habitats should not be thought of as completely separate and unrelated entities but as different phases of the same process[33]. The spatial pattern of these vegetation stands at any given time thus depends on both local site conditions and on history (e.g., fire), and is influenced by both natural and human factors.

In lower elevation areas with high fire frequency, chaparral and coastal sage scrub may be in a state of flux, leading one researcher to describe the mix as a "coastal sage-chaparral subclimax."[34] Several other researchers have noted the replacement of chaparral by coastal sage scrub, or coastal sage scrub by chaparral depending on fire history.[35] In transitional and other settings, the mosaic of chaparral and coastal sage

[32] Cooper, W.S. 1922. The broad-sclerophyll vegetation of California. Carnegie Institution of Washington Publication 319. 124 pp.
[33] Longcore, T and C. Rich. 2002. Protection of environmentally sensitive habitat areas in proposed local coastal plan for the Santa Monica Mountains. The Urban Wildlands Group, Inc., P.O. Box 24020 Los Angeles, CA 90024. (See attached comment document in Appendix).
[34] Hanes, T.L. 1965. Ecological studies on two closely related chaparral shrubs in southern California. Ecological Monographs 41:27-52.
[35] Gray, K.L. 1983. Competition for light and dynamic boundary between chaparral and coastal sage scrub. Madrono 30(1):43-49. Zedler, P.H., C.R. Gautier and G.S. McMaster. 1983. Vegetation change in response to extreme events: The effect of a short interval between fires in California chaparral and coastal sage scrub. Ecology 64(4): 809-818.

scrub enriches the seasonal plant resource base and provides additional habitat variability and seasonality for the many species that inhabit the area.

Relationships Among Coastal Sage Scrub, Chaparral and Riparian Communities

Although the constituent communities of the Santa Monica Mountains Mediterranean ecosystem can be defined and distinguished based on species composition, growth habits, and the physical habitats they characteristically occupy, they are not independent entities ecologically. Many species of plants, such as black sage, and laurel sumac, occur in more than one plant community and many animals rely on the predictable mix of communities found in undisturbed Mediterranean ecosystems to sustain them through the seasons and during different portions of their life histories.

Strong evidence for the interconnectedness between chaparral, coastal scrub and other habitats is provided by "opportunistic foragers" (animals that follow the growth and flowering cycles across these habitats). Coastal scrub and chaparral flowering and growth cycles differ in a complimentary and sequential way that many animals have evolved to exploit. Whereas coastal sage scrub is shallow-rooted and responds quickly to seasonal rains, chaparral plants are typically deep-rooted having most of their flowering and growth later in the rainy season after the deeper soil layers have been saturated[36]. New growth of chaparral evergreen shrubs takes place about four months later than coastal sage scrub plants and it continues later into the summer[37]. For example, in coastal sage scrub, California sagebrush flowers and grows from August to February and coyote bush flowers from August to November[38]. In contrast, chamise chaparral and bigpod ceanothus flower from April to June, buck brush ceanothus flowers from February to April, and hoaryleaf ceanothus flowers from March to April.

Many groups of animals exploit these seasonal differences in growth and blooming period. The opportunistic foraging insect community (e.g., honeybees, butterflies and moths) tends to follow these cycles of flowering and new growth, moving from coastal sage scrub in the early rainy season to chaparral in the spring[39]. The insects in turn are followed by insectivorous birds such as the blue-gray gnatcatcher[40], bushtit, cactus wren, Bewick's wren and California towhee. At night bats take over the role of daytime insectivores. At least 12 species of bats (all of which are considered sensitive) occur in

[36] DeSimone, S. 2000. California's coastal sage scrub. Fremontia 23(4):3-8. Mooney, H.A. 1988. Southern coastal scrub. Chap. 13 *in* Barbour, M.G. and J. Majors; Eds. 1988. Terrestrial vegetation of California, 2nd Edition. Calif. Native Plant Soc. Spec. Publ. #9.
[37] Schoenherr, A. A. 1992. A natural history of California. University of California Press, Berkeley. 772p.
[38] Dale, N. 2000. Flowering plants of the Santa Monica Mountains. California Native Plant Society, 1722 J Street, Suite 17, Sacramento, CA 95814.
[39] Ballmer, G. R. 1995. What's bugging coastal sage scrub. Fremontia 23(4):17-26.
[40] Root, R. B. 1967. The niche exploitation pattern of the blue-gray gnatcatcher. Ecol. Monog.37:317-350.

the Santa Monica Mountains[41]. Five species of hummingbirds also follow the flowering cycle[42].

Many species of 'opportunistic foragers', which utilize several different community types, perform important ecological roles during their seasonal movements. The scrub jay is a good example of such a species. The scrub jay is an omnivore and forages in coastal sage scrub, chaparral, and oak woodlands for insects, berries and notably acorns. Its foraging behavior includes the habit of burying acorns, usually at sites away from the parent tree canopy. Buried acorns have a much better chance of successful germination (about two-fold) than exposed acorns because they are protected from desiccation and predators. One scrub jay will bury approximately 5000 acorns in a year. The scrub jay therefore performs the function of greatly increasing recruitment and regeneration of oak woodland, a valuable and sensitive habitat type[43].

Like the scrub jay, most of the species of birds that inhabit the Mediterranean ecosystem in the Santa Monica Mountains require more than one community type in order to flourish. Many species include several community types in their daily activities. Other species tend to move from one community to another seasonally. The importance of maintaining the integrity of the multi-community ecosystem is clear in the following observations of Dr. Hartmut Walter of the University of California at Los Angeles:

> "Bird diversity is directly related to the habitat mosaic and topographic diversity of the Santa Monicas. Most bird species in this bio-landscape require more than one habitat for survival and reproduction." "A significant proportion of the avifauna breeds in the wooded canyons of the Santa Monicas. Most of the canyon breeders forage every day in the brush- and grass-covered slopes, ridges and mesas. They would not breed in the canyons in the absence of the surrounding shrublands. Hawks, owls, falcons, orioles, flycatchers, woodpeckers, warblers, hummingbirds, etc. belong to this group. Conversely, some of the characteristic chaparral birds such as thrashers, quails, and wrentits need the canyons for access to shelter, protection from fire, and water. The regular and massive movement of birds between riparian corridors and adjacent shrublands has been demonstrated by qualitative and quantitative observations by several UCLA students[44]."

Thus, the Mediterranean ecosystem of the Santa Monica Mountains is a mosaic of vegetation types linked together ecologically. The high biodiversity of the area results

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[41] Letter from Dr. Marti Witter, NPS, dated Sept. 13, 2001, in letters received and included in the September 2002 staff report for the Malibu LCP.

[42] National Park Service. 1993. A checklist of the birds of the Santa Monica Mountains National Recreation Area. Southwest Parks and Monuments Assoc., 221 N. Court, Tucson, AZ. 85701

[43] Borchert, M. I., F. W. Davis, J. Michaelsen and L. D. Oyler. 1989. Interactions of factors affecting seedling recruitment of blue oak (*Quercus douglasii*) in California. Ecology 70:389-404. Bossema, I. 1979. Jays and oaks: An eco-ethological study of a symbiosis. Behavior 70:1-118. Schoenherr, A. A. 1992. A natural history of California. University of California Press, Berkeley. 772p.

[44] Walter, Hartmut. Bird use of Mediterranean habitats in the Santa Monica Mountains, Coastal Commission Workshop on the Significance of Native Habitats in the Santa Monica Mountains. CCC Hearing, June 13, 2002, Queen Mary Hotel.

from both the diversity and the interconnected nature of this mosaic. Most raptor species, for example, require large areas and will often require different habitats for perching, nesting and foraging. Fourteen species of raptors (13 of which are considered sensitive) are reported from the Santa Monica Mountains. These species utilize a variety of habitats including rock outcrops, oak woodlands, riparian areas, grasslands, chaparral, coastal sage scrub, estuaries and freshwater lakes[45].

When the community mosaic is disrupted and fragmented by development, many chaparral-associated native bird species are impacted. In a study of landscape-level fragmentation in the Santa Monica Mountains, Stralberg[46] found that the ash-throated flycatcher, Bewick's wren, wrentit, blue-gray gnatcatcher, California thrasher, orange-crowned warbler, rufous-crowned sparrow, spotted towhee, and California towhee all decreased in numbers as a result of urbanization. Soule[47] observed similar effects of fragmentation on chaparral and coastal sage scrub birds in the San Diego area.

In summary, all of the vegetation types in this ecosystem are strongly linked by animal movement and foraging. Whereas classification and mapping of vegetation types may suggest a snapshot view of the system, the seasonal movements and foraging of animals across these habitats illustrates the dynamic nature and vital connections that are crucial to the survival of this ecosystem.

Coastal Sage Scrub

"Coastal sage scrub" is a generic vegetation type that is inclusive of several subtypes[48]. In the Santa Monica Mountains, coastal sage scrub is mostly of the type termed "Venturan Coastal Sage Scrub." In general, coastal sage scrub is comprised of dominant species that are semi-woody and low-growing, with shallow, dense roots that enable them to respond quickly to rainfall. Under the moist conditions of winter and spring, they grow quickly, flower, and produce light, wind-dispersed seeds, making them good colonizers following disturbance. These species cope with summer drought by dying back, dropping their leaves or producing a smaller summer leaf in order to reduce water loss. Stands of coastal sage scrub are much more open than chaparral and contain a greater admixture of herbaceous species. Coastal sage scrub is generally restricted to drier sites, such as low foothills, south-facing slopes, and shallow soils at higher elevations.

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[45] National Park Service. 1993. A checklist of the birds of the Santa Monica Mountains National Recreation Area. Southwest Parks and Monuments Assoc., 221 N. Court, Tucson, AZ. 85701. *and* Letter from Dr. Marti Witter, NPS, Dated Sept. 13, 2001, in letters received and included in the September 2002 staff report for the Malibu LCP.

[46] Stralberg, D. 2000. Landscape-level urbanization effects on chaparral birds: A Santa Monica Mountains case study. p 125-136 *in*: Keeley, J. E., M. Baer-Keeley and C. J. Fotheringham (eds), 2nd Interface Between Ecology and Land Development in California, U.S. Geological Survey Open-File Report 00-62.

[47] Soule, M. E, D. T. Bolger, A. C. Alberts, J. Wright, M. Sorice and S. Hill. 1988. Reconstructed dynamics of rapid extinctions of chaparral-requiring birds in urban habitat islands. Conserv. Biol. 2: 75-92.

[48] Kirkpatrick, J.B. and C.F. Hutchinson. 1977. The community composition of Californian coastal sage scrub. Vegetatio 35:21-33; Holland, 1986. op.cit.; Sawyer and Keeler-Wolf, 1995, op.cit.

The species composition and structure of individual stands of coastal sage scrub depend on moisture conditions that derive from slope, aspect, elevation and soil type. Drier sites are dominated by more drought-resistant species (e.g., California sagebrush, coast buckwheat, and *Opuntia* cactus). Where more moisture is available (e.g., north-facing slopes), larger evergreen species such as toyon, laurel sumac, lemonade berry, and sugar bush are common. As a result, there is more cover for wildlife, and movement of large animals from chaparral into coastal sage scrub is facilitated in these areas. Characteristic wildlife in this community includes Anna's hummingbirds, rufous-sided towhees, California quail, greater roadrunners, Bewick's wrens, coyotes, and coast horned lizards[49], but most of these species move between coastal sage scrub and chaparral during their daily activities or on a seasonal basis.

Of the many important ecosystem roles performed by the coastal sage scrub community, five are particularly important in the Santa Monica Mountains. Coastal sage scrub provides critical linkages between riparian corridors, provides essential habitat for species that require several habitat types during the course of their life histories, provides essential habitat for local endemics, supports rare species that are in danger of extinction, and reduces erosion, thereby protecting the water quality of coastal streams.

Riparian woodlands are primary contributors to the high biodiversity of the Santa Monica Mountains. The ecological integrity of those riparian habitats not only requires wildlife dispersal along the streams, but also depends on the ability of animals to move from one riparian area to another. Such movement requires that the riparian corridors be connected by suitable habitat. In the Santa Monica Mountains, coastal sage scrub and chaparral provide that function. Significant development in coastal sage scrub would reduce the riparian corridors to linear islands of habitat with severe edge effects[50], reduced diversity, and lower productivity.

Most wildlife species and many species of plants utilize several types of habitat. Many species of animals endemic to Mediterranean habitats move among several plant communities during their daily activities and many are reliant on different communities either seasonally or during different stages of the their life cycle. Without an intact mosaic of coastal sage scrub, chaparral, and riparian community types, many species will not thrive. Specific examples of the importance of interconnected communities, or habitats, were provided in the discussion above. This is an essential ecosystem role of coastal sage scrub.

A characteristic of the coastal sage scrub vegetation type is a high degree of endemism. This is consonant with Westman's observation that 44 percent of the species he sampled in coastal sage scrub occurred at only one of his 67 sites, which were

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[49] National Park Service. 2000. Draft: General Management Plan & Environmental Impact Statement, Santa Monica Mountains National Recreation Area, US Dept. of Interior, National Park Service, December 2000.

[50] Environmental impacts are particularly severe at the interface between development and natural habitats. The greater the amount of this "edge" relative to the area of natural habitat, the worse the impact.

distributed from the San Francisco Bay area to Mexico[51]. Species with restricted distributions are by nature more susceptible to loss or degradation of their habitat. Westman said of this unique and local aspect of coastal sage scrub species in California:

> "While there are about 50 widespread sage scrub species, more than half of the 375 species encountered in the present study of the sage scrub flora are rare in occurrence within the habitat range. In view of the reduction of the area of coastal sage scrub in California to 10-15% of its former extent and the limited extent of preserves, measures to conserve the diversity of the flora are needed."[52]

Coastal sage scrub in southern California provides habitat for about 100 rare species[53], many of which are also endemic to limited geographic regions[54]. In the Santa Monica Mountains, rare animals that inhabit coastal sage scrub[55] include the Santa Monica shieldback katydid, silvery legless lizard, coastal cactus wren, Bell's sparrow, San Diego desert woodrat, southern California rufous-crowned sparrow, coastal western whiptail, and San Diego horned lizard. Some of these species are also found in chaparral[56]. Rare plants found in coastal sage scrub in the Santa Monica Mountains include Santa Susana tarplant, Coulter's saltbush, Blockman's dudleya, Braunton's milkvetch, Parry's spineflower, and Plummer's mariposa lily[57]. A total of 32 sensitive species of reptiles, birds and mammals have been identified in this community by the National Park Service.[58]

One of the most important ecological functions of coastal sage scrub in the Santa Monica Mountains is to protect water quality in coastal streams by reducing erosion in the watershed. Although shallow rooted, the shrubs that define coastal sage scrub have dense root masses that hold the surface soils much more effectively than the exotic annual grasses and forbs that tend to dominate in disturbed areas. The native shrubs of this community are resistant not only to drought, as discussed above, but well adapted to fire. Most of the semi-woody shrubs have some ability to crown sprout after

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[51] Westman, W.E. 1981. Diversity relations and succession in Californian coastal sage scrub. Ecology 62:170-184.
[52] Ibid.
[53] Atwood, J. L. 1993. California gnatcatchers and coastal sage scrub: The biological basis for endangered species listing. pp.149-166 *In*: Interface Between Ecology and Land Development in California. Ed. J. E. Keeley, So. Calif. Acad. of Sci., Los Angeles. California Department of Fish and Game (CDFG). 1993. The Southern California Coastal Sage Scrub (CSS) Natural Communities Conservation Plan (NCCP). CDFG and Calif. Resources Agency, 1416 9th St., Sacramento, CA 95814.
[54] Westman, W.E. 1981. op. cit.
[55] Biological Resources Assessment of the Proposed Santa Monica Mountains Significant Ecological Area. Nov. 2000. Los Angeles Co., Dept. of Regional Planning, 320 West Temple St., Rm. 1383, Los Angeles, CA 90012.
[56] O'Leary J.F., S.A. DeSimone, D.D. Murphy, P.F. Brussard, M.S. Gilpin, and R.F. Noss. 1994. Bibliographies on coastal sage scrub and related malacophyllous shrublands of other Mediterranean-type climates. *California Wildlife Conservation Bulletin* 10:1–51.
[57] Biological Resources Assessment of the Proposed Santa Monica Mountains Significant Ecological Area. Nov. 2000. Los Angeles Co., Dept. of Regional Planning, 320 West Temple St., Rm. 1383, Los Angeles, CA 90012.
[58] NPS, 2000, op cit.

fire. Several CSS species (e.g., *Eriogonum cinereum*) in the Santa Monica Mountains and adjacent areas resprout vigorously and other species growing near the coast demonstrate this characteristic more strongly than do individuals of the same species growing at inland sites in Riverside County.[59] These shrub species also tend to recolonize rapidly from seed following fire. As a result they provide persistent cover that reduces erosion.

In addition to performing extremely important roles in the Mediterranean ecosystem, the coastal sage scrub community type has been drastically reduced in area by habitat loss to development. In the early 1980's it was estimated that 85 to 90 percent of the original extent of coastal sage scrub in California had already been destroyed.[60] Losses since that time have been significant and particularly severe in the coastal zone.

Therefore, because of its increasing rarity, its important role in the functioning of the Santa Monica Mountains Mediterranean ecosystem, and its extreme vulnerability to development, coastal sage scrub within the Santa Monica Mountains meets the definition of ESHA under the Coastal Act.

Chaparral

Another shrub community in the Santa Monica Mountain Mediterranean ecosystem is chaparral. Like "coastal sage scrub," this is a generic category of vegetation. Chaparral species have deep roots (10s of ft) and hard waxy leaves, adaptations to drought that increase water supply and decrease water loss at the leaf surface. Some chaparral species cope more effectively with drought conditions than do desert plants[61]. Chaparral plants vary from about one to four meters tall and form dense, intertwining stands with nearly 100 percent ground cover. As a result, there are few herbaceous species present in mature stands. Chaparral is well adapted to fire. Many species regenerate mainly by crown sprouting; others rely on seeds which are stimulated to germinate by the heat and ash from fires. Over 100 evergreen shrubs may be found in chaparral[62]. On average, chaparral is found in wetter habitats than coastal sage scrub, being more common at higher elevations and on north facing slopes.

The broad category "northern mixed chaparral" is the major type of chaparral shown in the National Park Service map of the Santa Monica Mountains. However, northern mixed chaparral can be variously dominated by chamise, scrub oak or one of several species of manzanita or by ceanothus. In addition, it commonly contains woody vines and large shrubs such as mountain mahogany, toyon, hollyleaf redberry, and sugarbush[63]. The rare red shank chaparral plant community also occurs in the Santa Monica Mountains. Although included within the category "northern mixed chaparral" in

[59] Dr. John O'Leary, SDSU, personal communication to Dr. John Dixon, CCC, July 2, 2002
[60] Westman, W.E. 1981. op. cit.
[61] Dr. Stephen Davis, Pepperdine University. Presentation at the CCC workshop on the significance of native habitats in the Santa Monica Mountains. June 13, 2002.
[62] Keely, J.E. and S.C. Keeley. Chaparral. Pages 166-207 in M.G. Barbour and W.D. Billings, eds. North American Terrestrial Vegetation. New York, Cambridge University Press.
[63] Ibid.

the vegetation map, several types of ceanothus chaparral are reported in the Santa Monica Mountains. Ceanothus chaparral occurs on stable slopes and ridges, and may be dominated by bigpod ceanothus, buck brush ceanothus, hoaryleaf ceanothus, or greenbark ceanothus. In addition to ceanothus, other species that are usually present in varying amounts are chamise, black sage, holly-leaf redberry, sugarbush, and coast golden bush[64].

Several sensitive plant species that occur in the chaparral of the Santa Monica Mountains area are: Santa Susana tarplant, Lyon's pentachaeta, marcescent dudleya, Santa Monica Mountains dudleya, Braunton's milk vetch and salt spring checkerbloom[65]. Several occurring or potentially occurring sensitive animal species in chaparral from the area are: Santa Monica shieldback katydid, western spadefoot toad, silvery legless lizard, San Bernardino ring-neck snake, San Diego mountain kingsnake, coast patch-nosed snake, sharp-shinned hawk, southern California rufous-crowned sparrow, Bell's sparrow, yellow warbler, pallid bat, long-legged myotis bat, western mastiff bat, and San Diego desert woodrat.[66]

Coastal sage scrub and chaparral are the predominant generic community types of the Santa Monica Mountains and provide the living matrix within which rarer habitats like riparian woodlands exist. These two shrub communities share many important ecosystem roles. Like coastal sage scrub, chaparral within the Santa Monica Mountains provides critical linkages among riparian corridors, provides essential habitat for species that require several habitat types during the course of their life histories, provides essential habitat for sensitive species, and stabilizes steep slopes and reduces erosion, thereby protecting the water quality of coastal streams.

Many species of animals in Mediterranean habitats characteristically move among several plant communities during their daily activities, and many are reliant on different communities either seasonally or during different stages of their life cycle. The importance of an intact mosaic of coastal sage scrub, chaparral, and riparian community types is perhaps most critical for birds. However, the same principles apply to other taxonomic groups. For example, whereas coastal sage scrub supports a higher diversity of native ant species than chaparral, chaparral habitat is necessary for the coast horned lizard, an ant specialist[67]. Additional examples of the importance of an interconnected communities, or habitats, were provided in the discussion of coastal sage scrub above. This is an extremely important ecosystem role of chaparral in the Santa Monica Mountains.

Chaparral is also remarkably adapted to control erosion, especially on steep slopes. The root systems of chaparral plants are very deep, extending far below the surface and

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[64] Ibid.
[65] Biological Resources Assessment of the Proposed Santa Monica Mountains Significant Ecological Area. Nov. 2000. Los Angeles Co., Dept. of Regional Planning, 320 West Temple St., Rm. 1383, Los Angeles, CA 90012.
[66] Ibid.
[67] A.V. Suarez. Ants and lizards in coastal sage scrub and chaparral. A presentation at the CCC workshop on the significance of native habitats in the Santa Monica Mountains. June 13, 2002.

penetrating the bedrock below[68], so chaparral literally holds the hillsides together and prevents slippage.[69] In addition, the direct soil erosion from precipitation is also greatly reduced by 1) water interception on the leaves and above ground foliage and plant structures, and 2) slowing the runoff of water across the soil surface and providing greater soil infiltration. Chaparral plants are extremely resistant to drought, which enables them to persist on steep slopes even during long periods of adverse conditions. Many other species die under such conditions, leaving the slopes unprotected when rains return. Since chaparral plants recover rapidly from fire, they quickly re-exert their ground stabilizing influence following burns. The effectiveness of chaparral for erosion control after fire increases rapidly with time[70]. Thus, the erosion from a 2-inch rain-day event drops from 5 yd^3/acre of soil one year after a fire to 1 yd^3/acre after 4 years.[71] The following table illustrates the strong protective effect of chaparral in preventing erosion.

Soil erosion as a function of 24-hour precipitation and chaparral age.

Years Since Fire	Erosion (yd^3/acre) at Maximum 24-hr Precipitation of:		
	2 inches	5 inches	11 inches
1	5	20	180
4	1	12	140
17	0	1	28
50+	0	0	3

Therefore, because of its important roles in the functioning of the Santa Monica Mountains Mediterranean ecosystem, and its extreme vulnerability to development, chaparral within the Santa Monica Mountains meets the definition of ESHA under the Coastal Act.

Oak Woodland and Savanna

Coast live oak woodland occurs mostly on north slopes, shaded ravines and canyon bottoms. Besides the coast live oak, this plant community includes hollyleaf cherry, California bay laurel, coffeeberry, and poison oak. Coast live oak woodland is more

[68] Helmers, H., J.S. Horton, G. Juhren and J. O'Keefe. 1955. Root systems of some chaparral plants in southern California. Ecology 36(4):667-678. Kummerow, J. and W. Jow. 1977. Root systems of chaparral shrubs. Oecologia 29:163-177.
[69] Radtke, K. 1983. *Living more safely in the chaparral-urban interface*. General Technical Report PSW-67. U.S. Department of Agriculture, Forest Service, Pacific Southwest Research Station, Berkeley, California. 51 pp.
[70] Kittredge, J. 1973. Forest influences — the effects of woody vegetation on climate, water, and soil. Dover Publications, New York. 394 pp. Longcore, T and C. Rich. 2002. Protection of environmentally sensitive habitat areas in proposed local coastal plan for the Santa Monica Mountains. (Table 1). The Urban Wildlands Group, Inc., P.O. Box 24020 Los Angeles, CA 90024. Vicars, M. (ed.) 1999. FireSmart: protecting your community from wildfire. Partners in Protection, Edmonton, Alberta.
[71] Ibid.

tolerant of salt-laden fog than other oaks and is generally found nearer the coast[72]. Coast live oak also occurs as a riparian corridor species within the Santa Monica Mountains.

Valley oaks are endemic to California and reach their southern most extent in the Santa Monica Mountains. Valley oaks were once widely distributed throughout California's perennial grasslands in central and coastal valleys. Individuals of this species may survive 400-600 years. Over the past 150 years, valley oak savanna habitat has been drastically reduced and altered due to agricultural and residential development. The understory is now dominated by annual grasses and recruitment of seedlings is generally poor. This is a very threatened habitat.

The important ecosystem functions of oak woodlands and savanna are widely recognized[73]. These habitats support a high diversity of birds[74], and provide refuge for many species of sensitive bats[75]. Typical wildlife in this habitat includes acorn woodpeckers, scrub jays, plain titmice, northern flickers, cooper's hawks, western screech owls, mule deer, gray foxes, ground squirrels, jackrabbits and several species of sensitive bats.

Therefore, because of their important ecosystem functions and vulnerability to development, oak woodlands and savanna within the Santa Monica Mountains met the definition of ESHA under the Coastal Act.

Grasslands

Grasslands consist of low herbaceous vegetation that is dominated by grass species but may also harbor native or non-native forbs.

California Perennial Grassland

Native grassland within the Santa Monica Mountains consists of perennial native needlegrasses: purple needlegrass, (Nassella pulchra), foothills needlegrass, (Nassella lepida) and nodding needlegrass (Nassella cernua). These grasses may occur in the same general area but they do not typically mix, tending to segregate based on slope

[72] NPS 2000. op. cit.
[73] Block, W.M., M.L. Morrison, and J. Verner. 1990. Wildlife and oak-woodland interdependency. *Fremontia* 18(3):72–76. Pavlik, B.M., P.C. Muick, S. Johnson, and M. Popper. 1991. *Oaks of California*. Cachuma Press and California Oak Foundation, Los Olivos, California. 184 pp.
[74] Cody, M.L. 1977. Birds. Pp. 223–231 *in* Thrower, N.J.W., and D.E. Bradbury (eds.). *Chile-California Mediterranean scrub atlas*. US/IBP Synthesis Series 2. Dowden, Hutchinson & Ross, Stroudsburg, Pennsylvania. National Park Service. 1993. A checklist of the birds of the Santa Monica Mountains National Recreation Area. Southwest Parks and Monuments Assoc., 221 N. Court, Tucson, AZ. 85701
[75] Miner, K.L., and D.C. Stokes. 2000. Status, conservation issues, and research needs for bats in the south coast bioregion. Paper presented at *Planning for biodiversity: bringing research and management together*, February 29, California State University, Pomona, California.

and substrate factors[76]. Mixed with these native needlegrasses are many non-native annual species that are characteristic of California annual grassland[77]. Native perennial grasslands are now exceedingly rare[78]. In California, native grasslands once covered nearly 20 percent of the land area, but today are reduced to less than 0.1 percent[79]. The California Natural Diversity Database (CNDDB) lists purple needlegrass habitat as a community needing priority monitoring and restoration. The CNDDB considers grasslands with 10 percent or more cover by purple needlegrass to be significant, and recommends that these be protected as remnants of original California prairie. Patches of this sensitive habitat occur throughout the Santa Monica Mountains where they are intermingled with coastal sage scrub, chaparral and oak woodlands.

Many of the raptors that inhabit the Santa Monica Mountains make use of grasslands for foraging because they provide essential habitat for small mammals and other prey. Grasslands adjacent to woodlands are particularly attractive to these birds of prey since they simultaneously offer perching and foraging habitat. Particularly noteworthy in this regard are the white-tailed kite, northern harrier, sharp-shinned hawk, Cooper's hawk, red-shouldered hawk, red-tailed hawk, golden eagle, American kestrel, merlin, and prairie falcon[80].

Therefore, because of their extreme rarity, important ecosystem functions, and vulnerability to development, California native perennial grasslands within the Santa Monica Mountains meet the definition of ESHA under the Coastal Act.

California Annual Grassland

The term "California annual grassland" has been proposed to recognize the fact that non-native annual grasses should now be considered naturalized and a permanent feature of the California landscape and should be acknowledged as providing important ecological functions. These habitats support large populations of small mammals and provide essential foraging habitat for many species of birds of prey. California annual grassland generally consists of dominant invasive annual grasses that are primarily of Mediterranean origin. The dominant species in this community include common wild oats (Avena fatua), slender oat (Avena barbata), red brome (Bromus madritensis ssp. Rubens), ripgut brome, (Bromus diandrus), and herbs such as black mustard (Brassica nigra), wild radish (Raphanus sativus) and sweet fennel (Foeniculum vulgare). Annual grasslands are located in patches throughout the Santa Monica Mountains in previously disturbed areas, cattle pastures, valley bottoms and along roadsides. While many of

[76] Sawyer, J. O. and T. Keeler-Wolf. 1995. A manual of California vegetation. California Native Plant Society, 1722 J St., Suite 17, Sacramento, CA 95814.
[77] Biological Resources Assessment of the Proposed Santa Monica Mountains Significant Ecological Area. Nov. 2000. Los Angeles Co., Dept. of Regional Planning, 320 West Temple St., Rm. 1383, Los Angeles, CA 90012.
[78] Noss, R.F., E.T. LaRoe III and J.M. Scott. 1995. Endangered ecosystems of the United States: a preliminary assessment of loss and degradation. Biological Report 28. National Biological Service, U.S. Dept. of Interior.
[79] NPS 2000. op. cit.
[80] NPS 2000. op. cit.

these patches are dominated by invasive non-native species, it would be premature to say that they are never sensitive or do not harbor valuable annual native species. A large number of native forbs also may be present in these habitats[81], and many native wildflowers occur primarily in annual grasslands. In addition, annual grasslands are primary foraging areas for many sensitive raptor species in the area.

Inspection of California annual grasslands should be done prior to any impacts to determine if any rare native species are present or if any rare wildlife rely on the habitat and to determine if the site meets the Coastal Act ESHA criteria.

Effects of Human Activities and Development on Habitats within the Santa Monica Mountains

The natural habitats of the Santa Monica Mountains are highly threatened by current development pressure, fragmentation and impacts from the surrounding megalopolis. The developed portions of the Santa Monica Mountains represents the extension of this urbanization into natural areas. About 54% of the undeveloped Santa Monica Mountains are in private ownership[82], and computer simulation studies of the development patterns over the next 25 years predict a serious increase in habitat fragmentation[83]. Development and associated human activities have many well-documented deleterious effects on natural communities. These environmental impacts may be both direct and indirect and include the effects of increased fire frequency, of fire clearance, of introduction of exotic species, and of night lighting.

Increased Fire Frequency

Since 1925, all the major fires in the Santa Monica Mountains have been caused by human activities[84]. Increased fire frequency alters plant communities by creating conditions that select for some species over others. Strong resprouting plant species such as laurel sumac, are favored while non-sprouters like bigpod ceanothus, are at a disadvantage. Frequent fire recurrence before the non-sprouters can develop and reestablish a seed bank is detrimental, so that with each fire their chances for propagation are further reduced. Resprouters can be sending up new shoots quickly, and so they are favored in an increased fire frequency regime. Also favored are weedy and invasive species. Dr. Steven Davis in his abstract for a Coastal Commission

[81] Holstein, G. 2001. Pre-agricultural grassland in Central California. Madrono 48(4):253-264. Stromberg, M.R., P. Kephart and V. Yadon. 2001. Composition, invasibility and diversity of coastal California grasslands. Madrono 48(4):236-252.
[82] National Park Service. 2000. Draft: General Management Plan & Environmental Impact Statement, Santa Monica Mountains National Recreation Area, US Dept. of Interior, National Park Service, December 2000.
[83] Swenson, J. J., and J. Franklin. 2000. The effects of future urban development on habitat fragmentation in the Santa Monica Mountains. Landscape Ecol. 15:713-730.
[84] NPS, 2000, op. cit.

Workshop stated[85] "*We have evidence that recent increases in fire frequency has eliminated drought-hardy non-sprouters from chaparral communities near Malibu, facilitating the invasion of exotic grasses and forbs that further exacerbate fire frequency.*" Thus, simply increasing fire frequency from about once every 22 years (the historical frequency) to about once every 12 years (the current frequency) can completely change the vegetation community. This has cascading effects throughout the ecosystem.

Fuel Clearance

The removal of vegetation for fire protection in the Santa Monica Mountains is required by law in "Very High Fire Hazard Severity Zones"[86]. Fuel removal is reinforced by insurance carriers[87]. Generally, the Santa Monica Mountains are considered to be a high fire hazard severity zone. In such high fire hazard areas, homeowners must often resort to the California FAIR Plan to obtain insurance. Because of the high risk, all homes in "brush areas" are assessed an insurance surcharge if they have less than the recommended 200-foot fuel modification zone[88] around the home. The combination of insurance incentives and regulation assures that the 200-foot clearance zone will be applied universally[89]. While it is not required that all of this zone be cleared of vegetation, the common practice is simply to disk this zone, essentially removing or highly modifying all native vegetation. For a new structure not adjacent to existing structures, this results in the removal or modification of a minimum of three acres of vegetation[90]. While the directly impacted area is large, the effects of fuel modification extend beyond the 200-foot clearance area.

Effects of Fuel Clearance on Bird Communities

The impacts of fuel clearance on bird communities was studied by Stralberg who identified three ecological categories of birds in the Santa Monica Mountains: 1) local and long distance migrators (ash-throated flycatcher, Pacific-slope flycatcher, phainopepla, black-headed grosbeak), 2) chaparral-associated species (Bewick's wren, wrentit, blue-gray gnatcatcher, California thrasher, orange-crowned warbler, rufous-crowned sparrow, spotted towhee, California towhee) and 3) urban-associated species

[85] Davis, Steven. Effects of fire and other factors on patterns of chaparral in the Santa Monica Mountains, Coastal Commission Workshop on the Significance of Native Habitats in the Santa Monica Mountains. CCC Hearing, June 13, 2002, Queen Mary Hotel.
[86] 1996 Los Angeles County Fire Code Section 1117.2.1
[87] Longcore, T and C. Rich. 2002. Protection of environmentally sensitive habitat areas in proposed local coastal plan for the Santa Monica Mountains. The Urban Wildlands Group, Inc., P.O. Box 24020 Los Angeles, CA 90024. Vicars, M. (ed.) 1999. FireSmart: protecting your community from wildfire. Partners in Protection, Edmonton, Alberta.
[88] Fuel Modification Plan Guidelines. Co. of Los Angeles Fire Department, Fuel Modification Unit, Prevention Bureau, Forestry Division, Brush Clearance Section, January 1998.
[89] Longcore, T and C. Rich. 2002. Protection of environmentally sensitive habitat areas in proposed local coastal plan for the Santa Monica Mountains. The Urban Wildlands Group, Inc., P.O. Box 24020 Los Angeles, CA 90024.
[90] Ibid.

(mourning dove, American crow, Western scrub-jay, Northern mockingbird)[91]. It was found in this study that the number of migrators and chaparral-associated species decreased due to habitat fragmentation while the abundance of urban-associated species increased. The impact of fuel clearance is to greatly increase this edge-effect of fragmentation by expanding the amount of cleared area and "edge" many-fold. Similar results of decreases in fragmentation-sensitive bird species are reported from the work of Bolger et al. in southern California chaparral[92].

Effects of Fuel Clearance on Arthropod Communities

Fuel clearance and habitat modification may also disrupt native arthropod communities, and this can have surprising effects far beyond the cleared area on species seemingly unrelated to the direct impacts. A particularly interesting and well-documented example with ants and lizards illustrates this point. When non-native landscaping with intensive irrigation is introduced, the area becomes favorable for the invasive and non-native Argentine ant. This ant forms "super colonies" that can forage more than 650 feet out into the surrounding native chaparral or coastal sage scrub around the landscaped area[93]. The Argentine ant competes with native harvester ants and carpenter ants displacing them from the habitat[94]. These native ants are the primary food resource for the native coast horned lizard, a California "Species of Special Concern." As a result of Argentine ant invasion, the coast horned lizard and its native ant food resources are diminished in areas near landscaped and irrigated developments[95]. In addition to specific effects on the coast horned lizard, there are other Mediterranean habitat ecosystem processes that are impacted by Argentine ant invasion through impacts on long-evolved native ant-plant mutualisms[96]. The composition of the whole arthropod community changes and biodiversity decreases when habitats are subjected to fuel modification. In coastal sage scrub disturbed by fuel modification, fewer arthropod

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[91] Stralberg, D. 2000. Landscape-level urbanization effects on chaparral birds: a Santa Monica Mountains case study. Pp. 125–136 *in* Keeley, J.E., M. Baer-Keeley, and C.J. Fotheringham (eds.). *2nd interface between ecology and land development in California*. U.S. Geological Survey, Sacramento, California.

[92] Bolger, D. T., T. A. Scott and J. T. Rotenberry. 1997. Breeding bird abundance in an urbanizing landscape in coastal Southern California. Conserv. Biol. 11:406-421.

[93] Suarez, A.V., D.T. Bolger and T.J. Case. 1998. Effects of fragmentation and invasion on native ant communities in coastal southern California. Ecology 79(6):2041-2056.

[94] Holway, D.A. 1995. The distribution of the Argentine ant (*Linepithema humile*) in central California: a twenty-year record of invasion. Conservation Biology 9:1634-1637. Human, K.G. and D.M. Gordon. 1996. Exploitation and interference competition between the invasive Argentine ant, (*Linepithema humile*), and native ant species. Oecologia 105:405-412.

[95] Fisher, R.N., A.V. Suarez and T.J. Case. 2002. Spatial patterns in the abundance of the coastal horned lizard. Conservation Biology 16(1):205-215. Suarez, A.V. J.Q. Richmond and T.J. Case. 2000. Prey selection in horned lizards following the invasion of Argentine ants in southern California. Ecological Applications 10(3):711-725.

[96] Suarez, A.V., D.T. Bolger and T.J. Case. 1998. Effects of fragmentation and invasion on native ant communities in coastal southern California. Ecology 79(6):2041-2056. Bond, W. and P. Slingsby. Collapse of an Ant-Plant Mutualism: The Argentine Ant (*Iridomyrmex humilis*) and Myrmecochorous Proteaceae. Ecology 65(4):1031-1037.

predator species are seen and more exotic arthropod species are present than in undisturbed habitats[97].

Studies in the Mediterranean vegetation of South Africa (equivalent to California shrubland with similar plant species) have shown how the invasive Argentine ant can disrupt the whole ecosystem.[98] In South Africa the Argentine ant displaces native ants as they do in California. Because the native ants are no longer present to collect and bury seeds, the seeds of the native plants are exposed to predation, and consumed by seed eating insects, birds and mammals. When this habitat burns after Argentine ant invasion the large-seeded plants that were protected by the native ants all but disappear. So the invasion of a non-native ant species drives out native ants, and this can cause a dramatic change in the species composition of the plant community by disrupting long-established seed dispersal mutualisms. In California, some insect eggs are adapted to being buried by native ants in a manner similar to plant seeds[99].

Artificial Night Lighting

One of the more recently recognized human impacts on ecosystem function is that of artificial night lighting as it effects the behavior and function of many different types of organisms[100]. For literally billions of years the only nighttime sources of light were the moon and stars, and living things have adapted to this previously immutable standard and often depend upon it for their survival. A review of lighting impacts suggests that whereas some species are unaffected by artificial night lighting, many others are severely impacted. Overall, most impacts are negative ones or ones whose outcome is unknown. Research to date has found negative impacts to plants, aquatic and terrestrial invertebrates, amphibians, fish, birds and mammals, and a detailed literature review can be found in the report by Longcore and Rich[101].

Summary

In a past action, the Coastal Commission found[102] that the Santa Monica Mountains Mediterranean Ecosystem, which includes the undeveloped native habitats of the Santa Monica Mountains, is rare and especially valuable because of its relatively pristine

[97] Longcore, T.R. 1999. Terrestrial arthropods as indicators of restoration success in coastal sage scrub. Ph.D. Dissertation, University of California, Los Angeles.
[98] Christian, C. 2001. Consequences of a biological invasion reveal the importance of mutualism for plant communities. Nature 413:635-639.
[99] Hughes, L. and M. Westoby. 1992. Capitula on stick insect eggs and elaiosomes on seeds: convergent adaptations for burial by ants. Functional Ecology 6:642-648.
[100] . Longcore, T and C. Rich. 2002. Protection of environmentally sensitive habitat areas in proposed local coastal plan for the Santa Monica Mountains. The Urban Wildlands Group, Inc., P.O. Box 24020 Los Angeles, CA 90024.
[101] Ibid, and Ecological Consequences of Artificial Night Lighting, Conference, February 23-24, 2002, UCLA Los Angeles, California.
[102] Revised Findings for the City of Malibu Local Coastal Program (as adopted on September 13, 2002) adopted on February 6, 2003.

character, physical complexity, and resultant biological diversity. The undeveloped native habitats within the Santa Monica Mountains that are discussed above are ESHA because of their valuable roles in that ecosystem, including providing a critical mosaic of habitats required by many species of birds, mammals and other groups of wildlife, providing the opportunity for unrestricted wildlife movement among habitats, supporting populations of rare species, and preventing the erosion of steep slopes and thereby protecting riparian corridors, streams and, ultimately, shallow marine waters.

The importance the native habitats in the Santa Monica Mountains was emphasized nearly 20 years ago by the California Department of Fish and Game[103]. Commenting on a Draft Land Use Plan for the City of Malibu, the Regional Manager wrote that, "It is essential that large areas of land be reclassified to reflect their true status as ESHAs. One of the major needs of the Malibu LUP is that it should provide protection for entire drainages and not just stream bottoms." These conclusions were supported by the following observations:

> "It is a fact that many of the wildlife species of the Santa Monica Mountains, such as mountain lion, deer, and raccoon, have established access routes through the mountains. They often travel to and from riparian zones and development such as high density residential may adversely affect a wildlife corridor.
>
> Most animal species that exist in riparian areas will, as part of their life histories, also be found in other habitat types, including chapparal (sic) or grassland. For example, hawks nest and roost in riparian areas, but are dependent on large open areas for foraging. For the survival of many species, particularly those high on the food chain, survival will depend upon the presence of such areas. Such areas in the Santa Monica Mountains include grassland and coastal sage scrub communities, which have been documented in the SEA studies as supporting a wide diversity of plant and animal life."

This analysis by the Department of Fish and Game is consonant with the findings of the Commission in the case of the Malibu LCP, and with the conclusion that large contiguous areas of relatively pristine native habitat in the Santa Monica Mountains meet the definition of ESHA under the Coastal Act.

[103] Letter from F. A. Worthley, Jr. (CDFG) to N. Lucast (CCC) re Land Use Plan for Malibu dated March 22, 1983.

FRED GAINES
SHERMAN L. STACEY
LISA A. WEINBERG*
REBECCA A. THOMPSON
NANCI SESSIONS-STACEY
KIMBERLY A. RIBLE
* a professional corporation

LAW OFFICES OF
GAINES & STACEY LLP
16633 VENTURA BOULEVARD, SUITE 1150
ENCINO, CA 91436-1865

TELEPHONE (818) 593-6355
(310) 394-1163
FACSIMILE (818) 593-6356
INTERNET: WWW.GAINESLAW.COM

July 17, 2003

VIA HAND DELIVERY

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CALIFORNIA
COASTAL COMMISSION
SOUTH CENTRAL COAST DISTRICT

California Coastal Commission
c/o Mr. Tom Sinclair
Enforcement Officer
South Central Coast District
89 S. California Street, Suite 200
Ventura, CA 93001

Exhibit 7 F12
STATEMENT OF DEFENSE
July 17, 2003

Re: Statement of Defense - Violation File No. V-4-03-018 (Kay)
Tentative Commission Hearing Date: August 6-8, 2003

Dear Honorable Commissioners:

This law office represents James A. Kay, Jr. ("Kay"), an officer of entities which own property in unincorporated Malibu, with regard to the above-referenced matter. The purpose of this correspondence is to set forth our client's position and response to the California Coastal Commission's (the "Commission") Notices of Intent to Commence Restoration Order Proceedings, dated June 27, 2003 and July 1, 2003 (the "June 27th Notice" and the "July 1st Notice", collectively "Notices"), which have been tentatively scheduled for hearing at the Commission's August 6-8, 2003 meeting. On behalf of our client, we oppose the issuance of a Restoration Order on the properties owned by the Kay entities and submit this letter to the Commission as a supplement to the enclosed Statement of Defense.

Kay opposes the issuance of a Restoration Order for several reasons. First, Kay owns only five out of the six parcels cited by the Commission. Kay does not own, nor has he or anyone acting on his behalf entered, the property identified by assessor parcel number ("APN") 4464-019-001. Second, Kay has not performed any work (not even minimal brush clearance) on the property identified by APN 4464-022-014. Third, §30610(d) provides Kay with an exemption for the work performed on the remaining parcels (with the exception of certain work performed on APN 4464-019-008 and APN 4464-019-010) because the activities conducted by Kay consisted of minor brush clearance and repair and maintenance work on pre-existing roads and trails. Fourth, Kay halted work on the subject properties immediately upon receipt of the Commission's May 8, 2003 Notice Prior to Issuance of Executive Director Cease and Desist Order (the "May 8th Notice"). Fifth, Kay intends to apply for Coastal Development Permits ("CDPs") at this time.

Kay has fully abided by the directives contained in the May 8th Notice. Kay has even cooperated with the Commission's demand that Kay refrain from using the roads located on the cited properties, notwithstanding the fact that the Commission has no legal basis to prevent the use of such preexisting private roads and trails. To date, the Commission has not presented any evidence of biological damage to the properties cited in the Notices. Conversely, a biologist's report prepared for Kay demonstrates that there is no evidence of biological damage on any of the cited properties. Furthermore, Kay's properties are entirely undeveloped vacant parcels. No building of any type has occurred. Today, however, Kay is prohibited from even accessing his own properties, either by foot or vehicle. For the reasons contained in this correspondence and the accompanying Statement of Defense, no Restoration Order should be issued and Kay must be allowed access to his properties.

I.

BACKGROUND.

A. The Telecommunication Towers and Caretaker's Residence.

The properties which are the subject of the Notices are located in the Santa Monica Mountains in unincorporated Malibu, generally between Castro Peak Motorway and Mulholland Highway. Although the Notices cite alleged violations on six parcels in the vicinity, only five are owned by entities in which our client has any interest. Kay's interest in the properties began in 1998, when SOCAL Communications, an entity in which Kay was an officer, acquired a security interest in property which houses telecommunications towers and antenna facilities. The telecommunications equipment provides emergency services to public and private entities. SOCAL acquired title to the property in early 1999. (See Declaration of James A. Kay, Jr., attached hereto as Exhibit N.)

Subsequently, SOCAL Communications' interest in the parcel was transferred to LT-WR, LLC, of which Kay is also an officer (the "LT-WR Property"). The LT-WR Property was the first property acquired in the vicinity by any entity in which Kay has an ownership interest. (See Declaration of James A. Kay, Jr., attached hereto as Exhibit N.) While the LT-WR Property is not a property cited in the Notices, it is relevant to the Commission's action because the circumstances demonstrate Kay's ongoing good faith efforts.

Since acquiring the LT-WR Property, LT-WR has sought to legalize numerous preexisting violations. LT-WR has undertaken extensive efforts with the County of Los Angeles (the "County") and the Commission to bring the LT-WR Property into compliance with County requirements and Coastal Act regulations. In fact, prior litigation against the Commission resulted in a June 2002 settlement agreement with respect to relocating one of the communications towers and legalizing an existing caretaker's residence. (See attached Declaration of James A. Kay, Jr. and Settlement Agreement, attached hereto as Exhibits N and A.)

After the settlement with the Coastal Commission, the County would not process Kay's application for a conditional use permit ("CUP") for the caretaker's residence, even though the Settlement Agreement resolved issues with which the County had initial concerns. Kay instituted a lawsuit against the County, requesting the County to process the CUP application for the caretaker's residence. This lawsuit resulted in a settlement with the County and the County agreed to process the CUP application. (See Declaration of James A. Kay, Jr., attached hereto as Exhibit N.)

The CUP for the caretaker's residence was unanimously approved by the County Regional Planning Commission on April 2, 2003. A condition of the CUP is a County requirement that Kay prove legal access to the LT-WR Property. Kay asserts that he has legal access by prescription and, in April 2003, filed suit in Los Angeles Superior Court for prescriptive easement rights against individuals and entities owning property along Castro Peak Motorway. This lawsuit has resulted in many Latigo Canyon/Castro Peak Motorway vicinity property owners being angry with and adversarial to Kay and, in retaliation, several of the property owners along Castro Peak Motorway began to install gate posts and gates without the benefit of a CDP. [1] (See Declaration of James A. Kay, Jr., attached hereto as Exhibit N.)

B. The Kay Properties Which Are The Subject Of The Commission's Notices.

Subsequent to LT-WR's purchase of the LT-WR Property, other entities in which Kay has an ownership interest have acquired additional properties located in the vicinity of Castro Peak Motorway. (See Declaration of James A. Kay, Jr., attached hereto as Exhibit N.) The following list shows the ownership information and the years of purchase for the properties cited in the Notices.[2]

Property	Owner	Year of Purchase
APN 4464-019-008	Panorama Ranch, LLC 4535 W. Sahara Ave. 100A-816 Las Vegas, NV 89102	2002
APN 4464-019-010	Deer Valley Ranch, LLC 4535 W. Sahara Ave. 100A-816	2002

[1] These gate posts were pointed out to Commission staff during the May 8, 2003 site visit and photographs of the gate posts were provided to staff at that time. To date, the Commission has yet to commence an enforcement action against these property owners.

[2] Please note that neither James A. Kay, Jr., nor any entity with which he is affiliated, has an ownership interest in APN 4464-019-001, know, or are related in any way to Mark Galley as alleged in the June 27th Notice.

	Las Vegas, NV 89102	
APN 4464-022-001	Communications Relay Corp. 15525 Cabrito Rd. Van Nuys, CA 91406	2001
APN 4464-022-010	Panorama Ranch, LLC 4535 W. Sahara Ave. 100A-816 Las Vegas, NV 89102	2002
APN 4464-022-014	Park Lands Ranch, LLC 4535 W. Sahara Ave. 100A-816 Las Vegas, NV 89102	2002

The above five parcels are referred to collectively herein as the "Properties."

Together, the Properties consist of about 200 acres. Although none of the Properties are developed, some have long-existing trails, fire, and agricultural roads. In fact, these roads have existed since before the enaction of the Coastal Act. (See Whittier College 1953 aerial photo, map, and Biologist's Report and Addendum, attached hereto as Exhibits B, C, and D.) In addition, property assessment reports, prepared by consultants for the previous record owner of the Properties, state that the Properties had "existing dirt road access." (See Property Assessment Reports and Aerial Photos, attached hereto as Exhibit E.)

C. Summary of Events.

At or around the time Panorama Ranch, LLC, Deer Valley Ranch, LLC, Communications Relay Corporation, and Park Lands Ranch, LLC purchased their respective parcels, Kay contacted Don Schmitz of Schmitz & Associates, a former Coastal Commission staff member, so that Schmitz could advise Kay of Kay's property rights both inside and outside the coastal zone. Schmitz & Associates is a well-regarded planning firm and Schmitz and his staff are known for their specific knowledge and experience with respect to projects located within the coastal zone ("Schmitz"). Kay specifically solicited advice from Schmitz with regard to Coastal Act regulations and what work could be performed on the Properties, if any, without a Coastal Development Permit ("CDP"). (See Declaration of James A. Kay, Jr., attached hereto as Exhibit N.)

Based on the fact that the roadway and trails were already in existence, and the photographic evidence of their clear location, Kay was advised that he could clear brush and loose rock, utilizing hand tools (picks and shovels), in order to repair and maintain existing roadways and trails. Kay was advised that these activities did not constitute development pursuant to §30106 and §30610 of the Coastal Act and, therefore, did not require a CDP. (See Declaration of James A. Kay, Jr., attached hereto as Exhibit N.)

In early 2003, Kay began undertaking work on the Properties to pick up loose rock and sidecast material and clear brush alongside existing roadways and trails. All the work was performed with hand tools. Kay enlisted employees to undertake the work on some of his Properties pursuant to these specific directions. Kay monitored these employees to ensure that Coastal Act guidelines and other regulations were being specifically adhered to. (See Declaration of James A. Kay, Jr., attached hereto as Exhibit N.)

On May 2, 2003, Schmitz met with the Commission to discuss "reports" the Commission had received of alleged unpermitted activities on some of the Properties. Schmitz told the Commission that while it was true that laborers were removing brush and clearing debris from existing roadways, that no grading or illegal activities were occurring. Commission staff requested a site visit and Schmitz and Kay readily agreed to meet with staff the following week when Kay would be in town. (Kay is not a California resident.) (See Declaration of James A. Kay, Jr., attached hereto as Exhibit N.)

On May 8, 2003, Kay, along with representatives of Schmitz and Gaines & Stacey, conducted a site visit to the Properties with Commission staff. (See Declaration of James A. Kay, Jr., attached hereto as Exhibit N.) On the same date, Kay received from the Commission the May 8 th Notice alleging "unpermitted removal of native coastal sage scrub vegetation" and "construction of new roads." (See the May 8th Notice, attached hereto as Exhibit F.) The May 8th Notice demanded that Kay respond by telephone no later than the end of Friday, May 9, 2003 and in writing to the Commission no later than 5:00 p.m. on May 12, 2003. Schmitz responded with May 12, May 13, May 15, and June 23, 2003 correspondence to the Commission, addressing the items specified and asserting that Kay would comply with the May 8, 2003 Commission Notice.

Specifically, on May 9, 2003, Schmitz called the Commission and confirmed that all work had stopped on the Properties. On May 12, 2003, Schmitz submitted its response to the May 8th Notice to the Commission before the 5:00 p.m. deadline. Schmitz responded affirmatively to each of the Commission's demands, however, Schmitz requested that the Commission clarify its demand "that no use of the unpermitted roads will occur unless and until such time as such use were to be legally authorized by the Commission." (See Schmitz May 12, 2003 correspondence, attached hereto as Exhibit G.) On May 13, 2003, Schmitz spoke with Commission staff and sent the Commission a confirming letter that stated, unequivocally, that all work on and use of the subject roads had ceased. (See Schmitz May 13, 2003 correspondence, attached hereto as Exhibit H.)

On May 15, 2003, Schmitz sent the Commission another letter, challenging the Commission's May 8th Notice, but also reiterating that Kay was in full compliance with the May 8th Notice. (See Schmitz May 15, 2003 correspondence, attached hereto as Exhibit I.) The May 15th letter again requested that the Commission provide to Kay written clarification regarding the Commission's requested non-use of the roads. On June 23, 2003, Schmitz sent yet another letter to the Commission because Schmitz still had not received any response to its inquiry regarding clarification of the Commission's demand to cease use of the roads. (See Schmitz June 23, 2003 correspondence, attached hereto as Exhibit J.) In that letter, Schmitz demanded that the Commission respond no later than 5:00 p.m. on Monday, June 30, 2003 or else Kay would resume brush clearing activities because they are exempt from the Coastal Act. Neither in Schmitz's June 23d letter, nor by any representations or actions prior to that letter, did Schmitz or Kay state that Kay had deviated from the terms of the May 8 th Notice. The Commission responded to Schmitz's June 23, 2003 letter on June 27 and July 1, 2003, not by clarifying the Commission's demand to cease use of the roads, but by issuing the Notices which are the subject of this correspondence and the attached Statement of Defense. (See Notices, attached hereto as Exhibits K and L.) In fact, Kay continues to honor the agreement with the Commission that Kay would cease to work on or use the subject Properties and roads, as stated in Schmitz's May 12th and May 15th letters. (See Declaration of James A. Kay, Jr., attached hereto as Exhibit N.)

II.

THERE IS NO DAMAGE TO BIOLOGICAL RESOURCES.

A. The Commission Has No Evidence of Biological Damage.

There is no evidence of damage to biological resources resulting from the activities conducted by Kay on the Properties. To date, even though the Commission asserts it as its basis for issuing the Notices, it has presented no evidence or report of any kind that Kay's brush clearance, repair, maintenance, or use of the roads has been detrimental to biological resources. On the other hand, Kay has presented evidence to the Commission from Biologist Steven G. Nelson that Kay's activities have not caused any marked damage to resources and, in fact, have been beneficial to the Properties and wildlife. (See Resume of Steven G. Nelson, Biologist's Report and Addendum, attached hereto as Exhibit D.)

The vegetation in the areas in question consists of mixed chaparral, and not coastal sage scrub. The dominant plant species throughout the area consist of robust shrub species that grow to more than six feet in height and form extremely dense stands (chamise, canothus, manzanita, and toyon). Mixed chaparral is not considered by any authoritative agency as either coastal sage scrub or sensitive vegetation. (See Biologist's Report and Addendum, attached hereto as Exhibit D.)
As detailed more fully in the attached Statement of Defense, the vast majority of the work performed on the Properties consisted of brush clearance, repair, and maintenance to existing roads.

Specifically, Kay removed brush and repaired existing roadways with hand tools on APN 4464-019-010, APN 4464-022-001, APN 4464-022-010, and APN 4464-019-008. On APN 4464-019-010, the cleared and repaired area is approximately 1.03 acres of the 80 acre parcel, or about 1.3%. On APN 4464-022-001, the cleared and repaired area is approximately .09 acres of the 25 acre parcel, or about .36%. On APN 4464-022-010, the cleared and repaired area is .68 acres of the 44.58 acre parcel, or about 1.51%. On APN 4464-019-008, the cleared and repaired area is .48 acres of the 40 acre parcel, or about 1.2%. (See Agricultural Roads Repair and Maintenance Plans, attached hereto as Exhibit M.) Out of a total of almost 110 acres, only 2.28 acres was touched.

B. APN 4464-019-008 and A Portion of APN 4464-019-010 Must Be Distinguished From the Other Kay Properties.

As discussed in detail in the attached Statement of Defense, APN 4464-019-008 and the westerly portion of APN 4464-019-010 must be distinguished by the Commission from the remainder of the cited properties. Kay acknowledges that some of the activities on portions of these parcels went beyond brush clearance and repair, and Kay is now applying for a CDP for APN 4464-019-008 and APN 4464-019-010. (See Agricultural Roads Repair and Maintenance Plans, attached hereto as Exhibits M.) All of the work on APN 4464-019-008 and APN 4464-019-010 was still performed with hand tools, however, Kay's employees made some significant cuts into existing roadbeds that exceeded exempt routine repair and maintenance. While the activities conducted on these parcels went beyond typical brush clearance, repair, and maintenance, they still constitute development that is consistent with the Coastal Act.

On the other hand, the remaining portion of APN 4464-019-010, APN 4464-022-001, and APN 4464-022-010, must be differentiated in that the brush clearance and repair of existing roads was minimal and in no way necessitated a CDP.[3] Therefore, it is essential that the Commission review and treat the work performed on APN 4464-019-008 and on the westerly portion of APN 4464-019-010 (which is specified more fully in the accompanying Statement of Defense) differently from the activities performed on the remaining portion of APN 4464-019-010 and the other two parcels.

[3] Even so, Kay is now applying for CDPs for these parcels as well.

III.

LEGAL ARGUMENTS.

A. No Development or Coastal Act Violations Have Occurred on the Properties.

The work performed on the Properties (with the exception of certain work performed on APN 4464-019-008 and APN 4464-019-010) does not constitute development as defined by California Public Resources §30106. Section 30106 is defined as:

> ""Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal or any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity or use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511).
>
> As used in this section, "structure" includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line."

Exemptions to §30106 are contained in §30610. Specifically, §30610(d) provides exemptions from the CDP requirement:

> "(d) Repair or maintenance activities that do not result in an addition to, or enlargement or expansion of, the object of those repair or maintenance activities; provided, however, that if the commission determines that certain extraordinary methods of repair and maintenance involve a risk of substantial adverse environmental impact, it shall, by regulation, require that a permit be obtained pursuant to this chapter."

Here, the work performed on the subject Properties (with the exception of certain work performed on APN 4464-019-008 and APN 4464-019-010) does not constitute development as defined by §30106 and is exempt from the CDP requirement per §30610. Courts have held, for example, that development under §30106 may include activities such as: a change in density or intensity of use of land (Stanson v. San Diego Coast Regional Commission (App. 4 Dist. 1980) 101 Cal.App.3d 38.), a division of land (Ojavan Investors, Inc. v. California Coastal Com. (App. 2 Dist. 1997) 54 Cal.App.4th 373), and lot line adjustments (La Fe, Inc. v. Los Angeles County (App. 2 Dist. 1999) 73 Cal.App.4th 231). All of these cases can be easily distinguished from this situation. The brush clearing, repair, and maintenance has not resulted in a change in the density or intensity of the use of land, nor has it resulted in an addition to, or enlargement or expansion of the existing roadways or trails. Again, the work undertaken was all performed by hand tools (picks and shovels).

In addition, the work performed on the Properties (with the exception of certain work performed on APN 4464-019-008 and APN 4464-019-010) does not constitute repair and maintenance activities that require a permit under §13252 of Title 14 of the California Administrative Code.

B. There Is No Legal Basis to Issue a §30811 Restoration Order.

There is no legal basis to issue a §30811 restoration order. Section 30811 authorizes the Commission to order restoration of a site if it finds three things. One, that the development has occurred without a CDP; two, that the development is inconsistent with what is allowed under the Coastal Act; and, three, that the development is causing continuing resource damage. The primary prerequisite is that some development has occurred as defined in the Coastal Act. Based on the foregoing description of the activities that took place on the Kay Properties and the attached Statement of Defense, nothing occurred that qualifies as development (with the exception of certain work performed on APN 4464-019-008 and APN 4464-019-010). Therefore, there has been no violation of the Coastal Act and the Commission has no basis upon which to issue a Restoration Order with respect to the Properties. In addition, the required third finding cannot be made, as no resource damage has occurred. (See Biologist's Report and Addendum, attached hereto as Exhibit D.)

C. There Is No Legal Basis to Hold Kay Civilly Liable Under §30820.

There is no legal basis to hold Kay civilly liable under §30820. First, Kay solicited advice regarding what lawful activities he could undertake on the Properties without a CDP. After receiving such advice, Kay was careful to operate within the limitations of the activities that do not require a CDP. (See Declaration of James A. Kay, Jr., attached hereto as Exhibit N.) Second, Kay ceased all repair and maintenance work immediately upon notice from the Commission and receipt of the May 8th Notice, and has not conducted any activities on the Properties since that date. (See Schmitz's May 12, May 13, May 15 letters and Declaration of James A. Kay, attached hereto as Exhibits G, H, I, and

N.) Kay even abided by the Commission's request that he cease using the roads, despite the Commission's lack of a legal basis for such request. Third, the Commission has presented no biological reports documenting the basis for its allegations and no evidence of ongoing biological damage. On the other hand, Kay has presented a biologist's report documenting the Commission's lack of a legal basis for alleging that there are violations or existing or ongoing damages to resources. (See Biologist's Report and Addendum, attached hereto as Exhibit D.)

D. Kay Has a Vested Right Per §30608 to Use and Maintain the Pre-Coastal Act Roads.

The roads and trails located on the Properties pre-date the Coastal Act. (See Declaration of James A. Kay, Jr., Biologist's Report and Addendum, map, and Whittier College 1953 aerial photo, attached hereto as Exhibits N, D, C, and B.) As such, Kay has a vested right per §30608 to use, repair, and maintain the existing roadways and does not require a CDP to continue to do so.

E. The Commission's Actions Constitute a Taking.

The Coastal Commission's actions constitute an unlawful taking of Kay's Properties under Article I, Section 19 of the California Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, which expressly forbid the Commission from acting in any manner which results in a taking or damaging of private property without payment of just compensation. The Commission's actions in denying Kay's use of the Properties amounts to a taking of private property without compensation and the Commission has unduly interfered with Kay's reasonable use (let alone, any use) of the Properties.

F. The Commission's Actions Violate Kay's Civil Rights.

The Commission's actions violate Kay's civil rights under 42 USC §1983. By its acts in denying Kay any use of the Properties (even to walk on the Properties is prohibited by the Commission's Notices), the Commission knowingly and intentionally has singled out and deprived Kay of his rights under the United States Constitution and laws, including, but not limited to, 42 USC §1983, and acted in conscious disregard to Kay's clearly established rights. The Commission's actions, on their face and as applied to the Properties, constitute a violation of Kay's rights to procedural and substantive due process and equal rights under the United States Constitution.

As a result of the Commission's actions, Kay is left with Properties with no viable economic use and without any available recourse or redress. To date, the Commission has not responded to Schmitz's May 15th correspondence that requested an explanation of the Commission's demand that Kay not "use" the roads on his Properties or a description of which roads it meant. In essence, the Commission has prevented Kay from using his Properties at all (or touching, for that matter), without any showing of biological damage or other potential just cause.

G. The Commission's Actions Are Part of a Pattern and Practice of Pre-Condemnation Activity.

The Coastal Commission's actions constitute pre-condemnation activity with regard to the Kay Properties. Kay believes that the Commission wishes to prevent him from going on or doing anything on his Properties because it either wants to preserve the Properties as undeveloped open space or open the Properties up for public access. Furthermore, Kay believes that the National Park Service ("NPS") also has a desire to preserve or acquire the Properties or open them up for public use and access. For example, the NPS has notified the County that it wishes to acquire a recreation easement across one of Kay's parcels. (See May 29, 2003 Letter from NPS, attached hereto as Exhibit O.) In addition, Kay understands that the NPS recently engaged in lengthy negotiations in an attempt to purchase some or all of the Properties from a prior owner. The Commission's Notices may, in fact, be part of a strategy on the part of either the Commission, the NPS, or other entities unknown to Kay, to eventually allow public access to the Properties, preserve the Properties, or acquire the Properties.

In addition, the Notices state that the Commission has received telephone reports of activities allegedly taking place on the Properties. Although the Notices do not identify who telephoned the Commission, Kay has reason to believe that these reports came from NPS officials and/or angry property owners along Castro Peak Motorway. As such, Kay believes that at the very least, the Commission, the NPS, and/or other unknown entities are engaging in a pattern and practice of illegal pre-condemnation activity.

IV.

CONTACT INFORMATION.

Please note that any further correspondence from the Commission with regard to the Properties should be directed to the official legal addresses for each of the listed entities as listed in this letter. Furthermore, future Commission communications should also be sent to the following representatives of the above-referenced entities:

1) Fred Gaines, Esq.
Gaines & Stacey LLP
16633 Ventura Blvd., Suite 1150
Encino, CA 91436
Tel: (818) 593-6355
Fax: (818) 593-6356
E-Mail: fgaines@gaineslaw.com

2) Donald Schmitz
Schmitz & Associates Inc.
29350 West Pacific Coast Hwy., Unit 11
Malibu, CA 90265
Tel: (310) 589-0773
Fax: (310) 589-0353
E-Mail: dons@schmitzandassociates.net

V.

CONCLUSION.

For the reasons stated in this correspondence and in the attached Statement of Defense, Kay hereby opposes the issuance of a Restoration Order. At all times, Kay was operating within the parameters of Coastal Act regulations. Based on the Coastal Act itself and decades of Commission precedent, none of the activities performed by Kay or his employees (with the exception of certain work performed on APN 4464-019-008 and APN 4464-019-010) require a CDP from the Commission and none of the activities on any of the Properties are violative of §30811. Furthermore, Kay ceased all activities on the Properties, including all "use" of the roads, immediately upon receipt of the Commission's May 8th Notice. Finally, the Commission has no legal justification, including evidence of biological damage, to either issue a Restoration Order or to prevent Kay from using the Properties and/or undertaking brush clearance, repair, and maintenance activities.

Therefore, on behalf of Kay, we respectfully request that you deny staff's recommendation for a Restoration Order. In addition, we request that you confirm that Kay may proceed to use his properties as allowed by law.

Thank you for your immediate attention to this matter. As always, please do not hesitate to contact me at any time with any questions or comments you may have.

Sincerely,

GAINES & STACEY LLP

By

FRED GAINES

Enclosures (Statement of Defense; Exhibits)

STATEMENT OF DEFENSE

Violation File No. V-4-03-018 (Kay)
Tentative Commission Hearing Date: August 6-8, 2003

This law office represents James A. Kay, Jr. ("Kay"), an officer of entities which own property in unincorporated Malibu, with regard to this matter. The purpose of this Statement of Defense and the accompanying correspondence is to set forth our client's position and response to the California Coastal Commission's (the "Commission") Notices of Intent to Commence Restoration Order Proceedings, dated June 27, 2003 and July 1, 2003 (the "June 27th Notice" and the "July 1st Notice", collectively "Notices"), which have been tentatively scheduled for hearing at the Commission's August 6-8, 2003 meeting. On behalf of our client, we oppose the issuance of a Restoration Order on the properties owned by the Kay entities and submit this letter to the Commission as a supplement to the enclosed Statement of Defense.

Because the Notices deal with several different properties, the following information addresses each property separately with regard to the required Statement of Defense responses.

A. APN 4464-019-001.

The parcel identified by APN 4464-019-001, allegedly owned by Mark Galley (the "Galley Property"), is cited in the June 27th Notice. Neither Kay, nor any entity affiliated with Kay, knows Mark Galley or has any ownership interest in the Galley Property.

1. Facts or allegations contained in the cease and desist order or the notice of intent that you admit (with specific reference to the paragraph number in the order):

Kay admits none of the facts or allegations regarding the Galley Property contained in the June 27th Notice.

2. Facts or allegations contained in the cease and desist order or notice of intent that you deny (with specific reference to paragraph number in the order):

Kay denies all of the facts or allegations regarding the Galley Property contained in the June 27th Notice.

3. Facts or allegations contained in the cease and desist order or notice of intent of which you have no personal knowledge (with specific reference to paragraph number in the order):

Kay has no personal knowledge of any facts or allegations regarding the Galley Property contained

in the June 27th Notice.

4. **Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to the possible violation (be as specific as you can; if you have or know of any document(s), photograph(s), map(s), letter(s), or other evidence that you believe is/are relevant, please identify it/them by name, date, type, and any other identifying information and provide the original(s) or (a) copy(ies) if you can:**

Kay should be exonerated from any responsibility for the alleged violations regarding the Galley Property because: 1) Kay has no knowledge of Mark Galley; 2) neither Kay, nor any entity with which he is affiliated, has any ownership interest in the Galley Property; 3) neither Kay, nor anyone acting on his behalf, has entered or performed work (minimal brush clearing or otherwise) on the Galley Property; and 4) the Commission has no evidence that Kay has entered or performed work on the Galley Property. In fact, the Commission did not even enter or view this parcel during the May 8, 2003 site visit. (See Declaration of James A. Kay, Jr., attached hereto as Exhibit N.)

Based on the foregoing, the Commission has no authority under §30811 to issue a Restoration Order and no authority under §30820 to impose civil liability on Kay.

5. **Any other information, statement, etc. that you want to offer or make:**

Because Kay has never entered or performed work of any kind on the Galley Property and is, therefore, not in violation of the Coastal Act, Kay hereby requests that the Commission remove the Galley Property from the June 27th Notice.

B. <u>APN 4464-022-014.</u>

The parcel identified by APN 4464-022-014, owned by Park Lands Ranch LLC (the "Park Lands Ranch Property"), is cited in the July 1st Notice.

1. **Facts or allegations contained in the cease and desist order or the notice of intent that you admit (with specific reference to the paragraph number in the order):**

Kay admits none of the facts or allegations regarding the Park Lands Ranch Property contained in the July 1st Notice, other than the fact that APN 4464-022-014 is owned by Park Lands Ranch, LLC.

2. **Facts or allegations contained in the cease and desist order or notice of intent that you deny (with specific reference to paragraph number in the order):**

Kay denies all of the facts or allegations regarding the Park Lands Ranch Property contained in the

July 1st Notice, other than the fact that APN 4464-022-014 is owned by Park Lands Ranch, LLC.

3. Facts or allegations contained in the cease and desist order or notice of intent of which you have no personal knowledge (with specific reference to paragraph number in the order):

Kay has no personal knowledge of any facts or allegations regarding the Park Lands Ranch Property contained in the July 1st Notice, other than the fact that APN 4464-022-014 is owned by Park Lands Ranch, LLC.

4. Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to the possible violation (be as specific as you can; if you have or know of any document(s), photograph(s), map(s), letter(s), or other evidence that you believe is/are relevant, please identify it/them by name, date, type, and any other identifying information and provide the original(s) or (a) copy(ies) if you can:

Kay should be exonerated from any responsibility for the alleged violations regarding the Park Lands Ranch Property because: 1) neither Kay, nor anyone acting on his behalf, has performed any work, including repair, maintenance, and/or brush clearance (with hand tools or otherwise) on the Park Lands Ranch Property (in fact, Kay's activities on this parcel have been strictly limited to driving along Castro Peak Motorway) and 2) the Commission has no evidence that Kay has performed work on the Park Lands Ranch Property (in fact, the Commission did not even enter or view this parcel during the May 8, 2003 site visit). (See the Declaration of James A. Kay, Jr., attached hereto as Exhibit N.)

Kay does not know with certainty and, on that basis, denies that this parcel is within the coastal zone and within the Commission's jurisdiction. Kay has requested that the Commission provide a map depicting the coastal zone boundaries in the vicinity of the Properties.

Based on the foregoing, the Commission has no authority under §30811 to issue a Restoration Order and no authority under §30820 to impose civil liability on Kay.

5. Any other information, statement, etc. that you want to offer or make:

Because Kay has never performed work of any kind on the Park Lands Ranch Property and is, therefore, not in violation of the Coastal Act, Kay hereby requests that the Commission remove the Park Lands Ranch Property from the July 1st Notice.

C. APN 4464-019-010.

The parcel identified by APN 4464-019-010, owned by Deer Valley Ranch, LLC (the "Deer Valley Ranch Property"), is cited in the June 27th Notice.

1. Facts or allegations contained in the cease and desist order or the notice of intent that you admit (with specific reference to the paragraph number in the order):

Kay admits the following facts or allegations regarding the Deer Valley Ranch Property contained in the June 27th Notice:

1) That portion of paragraph 1 on page 3, which states: "...[A]ctivity occurred for approximately four months, between the middle of January 2003 through May 8, 2003" (p. 1, para. 3);

2) All alleged facts contained in paragraph 2 of page 3, beginning with the words "On the following day..." (p. 3, para. 2);

3) That portion of paragraph 3 on page 3, which states: "Commission staff conducted a site visit on Thursday, May 8, 2003" (p. 3, para. 4);

4) That portion of paragraph 4 on page 3, which states: "On the morning of May 8, 2003, Commission staff met with you and Mr. Schmitz to conduct a site investigation of the property." (p. 3, para. 4);

5) That portion of paragraph 1 on page 4, which states: "At approximately 2:00 p.m. on May 8, 2003, Commission staff issued a NOI for an Executive Director Cease and Desist Order to stop all unpermitted development of roads on the subject properties, as well as unpermitted development that may have encroached onto adjacent public lands." (p. 4, para. 1);

6) All alleged facts contained in paragraph 3, page 4, beginning with the words "You provided..." (p. 4, para. 3);

7) All alleged facts, except the last sentence, contained in paragraph 4, page 4, beginning with "On Monday, May 12, 2003..." and ending with the words "use of the roads" (p. 4, para. 4);

8) All alleged facts contained in paragraph 5, page 4, including all alleged facts contained in footnote 1 (p. 4, para. 5 and footnote 1);

9) All alleged facts contained in paragraph 1, page 5 (p. 5, para. 1);

10) That portion of paragraph 3 on page 5, which states: "You claim you are conducting repair and maintenance on roads that existed prior to the Coastal Act. You argue that you have a vested right to maintain the roads and the repair and maintenance is exempt from the coastal development permit requirements." (p. 5, para. 3).

2. Facts or allegations contained in the cease and desist order or notice of intent that you deny (with specific reference to paragraph number in the order):

Kay denies all other facts or allegations regarding the Deer Valley Ranch Property contained in the June 27th Notice, including, but not limited to:

1) All alleged facts contained in paragraph 2, page 1 (p. 1, para. 2);

2) All alleged facts contained in paragraph 3, page 1/paragraph 1, page 2, beginning with the words "As the Commission has previously indicated..." (p. 1, para. 3/p. 2, para. 1);

3) All alleged facts in paragraph 2, page 3, beginning with the words "[T]he record clearly shows that unpermitted development performed by you..." (p. 3, para.2);

4) That portion of paragraph 4 on page 3, which states: "During the period between May 2, 2003 and May 8, 2003, work crews continued construction activities on the property despite the request by Commission staff that work on the roads cease." (p. 3, para. 4);

5) That portion of paragraph 4 on page 4, which states: "Thus, the requirement for a satisfactory response was not met by the specified deadline" (p. 4, para. 4);

6) That portion of paragraph 2 on page 5, which states: "...[T]he parcels are located in the coastal zone and therefore they are within the Coastal Commission's jurisdiction." (p. 5, para. 2);

7) That portion of paragraph 3 on page 5, which states: "These arguments are unsupported. You have not obtained a determination by the Coastal Commission that there are vested rights for any roads on the parcels. You have also not provided any evidence indicating that roads were present prior to the effective date of the Coastal Act. Therefore, the activities do not constitute repair and maintenance to lawfully constructed facilities or structures." (p. 5, para. 3);

8) All alleged facts contained in paragraph 4, page 5 (p. 5, para. 4);

9) All alleged facts contained in paragraph 5, page 5 (p. 5, para. 5);

10) All alleged facts contained in paragraph 2, page 6 (p. 6, para. 2);

11) All alleged facts contained in paragraph 3, page 6 (p. 6, para. 3);

12) All alleged facts contained in paragraph 4, page 6 (p. 6, para. 4);

13) All alleged facts contained in paragraph 5, page 6 (p. 6, para. 5).

3. Facts or allegations contained in the cease and desist order or notice of intent of which you have no personal knowledge (with specific reference to paragraph number in the order):

Kay has no personal knowledge of and, on that basis, denies the following facts or allegations regarding the Deer Valley Ranch Property contained in the June 27th Notice:

1) That portion of paragraph 3 on page 3, which states: "Commission staff first witnessed unpermitted grading and vegetation removal on the subject properties on Thursday, May 1, 2003. From a distance of several hundred feet away, Commission staff observed a crew of laborers clearing vegetation, and excavating a new road in the hillside, using hand tools" (p. 3, para. 3);

2) That portion of paragraph 4 on page 3, which states: "During the site investigation, Commission staff confirmed that unpermitted development had in fact occurred, and was continuing to occur on the subject properties" (p. 3, para. 4);

3) All alleged facts contained in paragraph 1, page 6 (p. 6, para. 1).

4. Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to the possible violation (be as specific as you can; if you have or know of any document(s), photograph(s), map(s), letter(s), or other evidence that you believe is/are relevant, please identify it/them by name, date, type, and any other identifying information and provide the original(s) or (a) copy(ies) if you can:

Kay should be exonerated from any responsibility for the following alleged violations regarding the Deer Valley Ranch Property:

1) Allegations of grading "at least one fill pad."

<u>Kay Response:</u>

Neither Kay nor anyone acting on his behalf has at any time graded one or more "fill pads"

on this parcel. (See Declaration of James A. Kay, Jr., attached hereto as Exhibit N.)

2) Allegations of "extensive vegetation clearance, including removal of surface and subsurface plant materials in native chaparral and riparian vegetation areas."

Kay Response:

The vegetation in the areas in question consists of mixed chaparral, and not coastal sage scrub. The dominant plant species throughout the area consist of robust shrub species that grow to more than six feet in height and form extremely dense stands (chamise, canothus, manzanita, and toyon). Mixed chaparral is not considered by any authoritative agency as either coastal sage scrub or sensitive vegetation. (See Biologist's Report and Addendum, attached hereto as Exhibit D.)

The majority of the work performed on the roads and trails was maintenance related and consisted of clearing and trimming the mixed chaparral and moving fallen boulders and rocks from the roadbeds. In fact, no more than 1.03 acres of brush was cleared from the Deer Valley Ranch Property, or 1.3% of the entire parcel. About 900 linear feet of existing roadway was cleared. (See Biologist's Report and Addendum and Agricultural Roads Repair and Maintenance Plans, attached hereto as Exhibits D and M.)

It is important to distinguish the work done on the westerly portion of this parcel from the rest of the work performed on the remainder of the Deer Valley Ranch Property and on the other parcels. On the Commission's May 8, 2003 site visit, staff was, in fact, concerned with the westerly portion of this parcel to the extent that Kay's activities went beyond repair and maintenance work. The area on which the work exceeded repair and maintenance activity is very small - about 900 linear feet of roadbed work. (The entire existing roadway on this parcel consists of 4,500 linear feet.) Kay acknowledges, as should the Commission, that these 900 linear feet should be viewed differently. Any other activity on this parcel was entirely limited to brush clearance, repair, and maintenance work.

3) Allegations of "streambed alteration, including grading, filling, removal of in-channel riparian vegetation, placement of new culverts and railroad ties, and manipulation of boulders and cobbles within stream channels."

Kay Response:

Neither Kay nor anyone acting on his behalf has at any time performed work on this parcel that resulted in streambed alteration, grading, filling, or removal of in-channel riparian vegetation. Furthermore, neither Kay nor anyone acting on his behalf has at any time placed new culverts or railroad ties or manipulate boulders and cobbles within stream channels. (See Declaration of James A. Kay, Jr., attached hereto as Exhibit N.)

4) Allegations of "destabilization of slopes, alteration of drainages."

Kay Response:

Neither Kay nor anyone acting on his behalf has at any time performed work on this parcel that resulted in destabilization of slopes or alteration of drainages. (See Declaration of James A. Kay, Jr., attached hereto as Exhibit N.)

Kay should be exonerated from any responsibility for work performed on the remaining portions of the Deer Valley Ranch Property for the following reasons. Specifically, the exempt work performed on the subject parcel consisted of the following:

1) Clearance and trimming of mixed chaparral from existing roadways;

2) Clearance and removal of fallen rocks and boulders from existing roadbeds.

1) The Roads and Trails Pre-Date the Coastal Act.

The roads and trails located on this parcel pre-date the Coastal Act. (See Declaration of James A. Kay, Jr., the Biologist's Report and Addendum, map, and Whittier College 1953 aerial photo, attached hereto as Exhibits N, D, C, and B.) As such, Kay has a vested right per §30608 to use, repair, and maintain the existing roadways and does not require a CDP to continue to do so.

2) No Development (Except for the Westerly Portion of the Property) or Coastal Act Violations Have Occurred on the Property.

The work performed on the property, except for the work performed on the westerly portion of this parcel, does not constitute development as defined by §30106. Section 30106 is defined as:

> ""Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal or any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 (commencing

with Section 4511).

As used in this section, "structure" includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line."

Exemptions to §30106 are contained in §30610. Specifically, §30610(d) provides exemptions from the CDP requirement:

> "(d) Repair or maintenance activities that do not result in an addition to, or enlargement or expansion of, the object of those repair or maintenance activities; provided, however, that if the commission determines that certain extraordinary methods of repair and maintenance involve a risk of substantial adverse environmental impact, it shall, by regulation, require that a permit be obtained pursuant to this chapter."

Here, the work performed on the subject property (except for the work performed on the westerly portion of the parcel) does not constitute development as defined by §30106 and is exempt from the CDP requirement per §30610. Courts have held, for example, that development under §30106 may include activities such as: a change in density or intensity of use of land (Stanson v. San Diego Coast Regional Commission (App. 4 Dist. 1980) 101 Cal.App.3d 38.), a division of land (Ojavan Investors, Inc. v. California Coastal Com. (App. 2 Dist. 1997) 54 Cal.App.4th 373), and lot line adjustments (La Fe, Inc. v. Los Angeles County (App. 2 Dist. 1999) 73 Cal.App.4th 231). All of these cases can be easily distinguished from this situation. The brush clearing, repair, and maintenance has not resulted in a change in the density or intensity of the use of land, nor has it resulted in an addition to, or enlargement or expansion of the existing roadways or trails. The work undertaken was all performed by hand tools (picks and shovels).

In addition, the work performed on the subject property (except for the work performed on the westerly portion of the parcel) does not constitute repair and maintenance activities that require a permit under §13252 of Title 14 of the California Administrative Code.

Furthermore, any allegations that repair and maintenance activity occurred within 20 feet of streams and/or in an environmentally sensitive habitat area are entirely untrue. There are no streams on this parcel in the vicinity of existing roads or trails. No pads have been graded. (See Biologist's Report and Addendum and Whittier College 1953 aerial photo, attached hereto as Exhibits D and B.)

3) There Is No Ongoing Biological Damage.

There is no evidence of damage to biological resources resulting from the activities conducted by Kay on the parcel. To date, even though the Commission asserts it as its basis for issuing the Notices, the Commission has presented no evidence or report of any kind that Kay's brush clearance, repair, maintenance, or use of the roads has been detrimental to biological resources. On the other

hand, Kay has presented evidence to the Commission from Biologist Steven G. Nelson that Kay's activities have not caused any marked damage to resources and, in fact, have been beneficial to the parcel and wildlife. (See Biologist's Report and Addendum, attached hereto as Exhibit D.)

The vegetation in the areas in question consists of mixed chaparral, and not coastal sage scrub. The dominant plant species throughout the area consist of robust shrub species that grow to more than six feet in height and form extremely dense stands (chamise, canothus, manzanita, and toyon). Mixed chaparral is not considered by any authoritative agency as either coastal sage scrub or sensitive vegetation. (See Biologist's Report and Addendum, attached hereto as Exhibit D.)

4) <u>There Is No Basis to Issue a §30811 Restoration Order.</u>

Section 30811 authorizes the Commission to order restoration of a site if it finds three things. One, that the development has occurred without a CDP; two, that the development is inconsistent with what is allowed under the Coastal Act; and, three, that the development is causing continuing resource damage. Based on the foregoing description of the activities that took place on the parcel, nothing occurred on the remaining portion of this parcel that qualifies as development. Therefore, there has been no violation of the Coastal Act and the Commission has no basis upon which to issue a restoration order with respect to this property. In addition, the required finding that resource damage has occurred cannot be made. (See Biologist's Report and Addendum, attached hereto as Exhibit D.)

5) <u>Kay Should Not be Held Civilly Liable Under §30820.</u>

First, Kay solicited advice regarding what lawful activities he could undertake on the parcel without a CDP. After receiving such advice, Kay was careful to operate within the limitations of the activities not requiring a CDP. Second, Kay ceased all repair and maintenance work immediately upon notice from the Commission and receipt of the Commission's May 8, 2003 Notice, and has not conducted any activities on the property since that date. (See Schmitz's May 12, May 13, and May 15 letters and Declaration of James A. Kay, Jr., attached hereto as Exhibits G, H, I, and N.) Kay even abided by the Commission's request that he cease using the roads, despite the Commission's lack of a legal basis for such request. Third, the Commission has presented no biological reports documenting the basis for its allegations and no evidence of ongoing biological damage. On the other hand, Kay has presented a biologist's report documenting the Commission's lack of a legal basis for alleging that there are violations or existing or ongoing damages to resources. (See Biologist's Report and Addendum, attached hereto as Exhibit D.)

Kay does not know with certainty and, on that basis, denies that this parcel is within the coastal zone and within the Commission's jurisdiction. Kay has requested that the Commission provide a map depicting the coastal zone boundaries in the vicinity of the Properties.

Based on the foregoing, the Commission has no authority under §30811 to issue a Restoration Order and no authority under §30820 to impose civil liability on Kay.

5. Any other information, statement, etc. that you want to offer or make:

The westerly portion of the Deer Valley Ranch Property should be distinguished from the other cited parcels and the remainder of the Deer Valley Ranch Property in that Kay acknowledges that the brush clearance, repair, and maintenance activities went beyond what he had anticipated and requested of his employees. On that basis, Kay has also prepared and will be submitting a CDP application for grading on this property.

Notwithstanding, Kay firmly denies that the brush clearance, repair, and maintenance activities on the remainder of this parcel were in violation of the Coastal Act and, on that basis, hereby requests the Commission to differentiate between the work performed on the westerly portion of the property and the activities performed on the remainder of the parcel. Notwithstanding, in the spirit of cooperation, Kay has prepared and will be submitting a CDP application for grading on this property.

D. <u>APN 4464-022-001.</u>

The parcel identified by APN 4464-022-001, owned by Communications Relay Corporation (the "Communications Relay Property"), is cited in the July 1st Notice.

1. Facts or allegations contained in the cease and desist order or the notice of intent that you admit (with specific reference to the paragraph number in the order):

Kay admits the following facts or allegations regarding the Communications Relay Property contained in the July 1st Notice:

1) That portion of paragraph 3 on page 1, which states: "...[A]ctivity occurred for approximately four months, between the middle of January 2003 through May 8, 2003" (p. 1, para. 3);

2) All alleged facts contained in paragraph 2 of page 3, beginning with the words "On the following day..." (p. 3, para. 2);

3) That portion of paragraph 3 on page 3, which states: "Commission staff met with you and Mr. Schmitz to conduct a site investigation on several properties" (p. 3, para. 3);

4) That portion of paragraph 3 on page 3, which states: "At approximately 2:00 p.m. on May 8, 2003, Commission staff issued a NOI for an Executive Director Cease and Desist Order to stop all unpermitted development of roads on the subject properties, as well as unpermitted development that may have encroached onto adjacent public lands." (p. 3, para. 3);

5) All alleged facts contained in paragraph 2, page 4, beginning with the words "You provided..." (p. 4, para. 2);

6) All alleged facts, except the last sentence, contained in paragraph 3, page 4, beginning with "On Monday, May 12, 2003..." and ending with the words "use of the roads" (p. 4, para. 3);

7) All alleged facts contained in paragraph 4, page 4, including all alleged facts contained in footnote 1 (p. 4, para. 4 and footnote 1);

8) All alleged facts contained in paragraph 1, page 5 (p. 5, para. 1);

9) That portion of paragraph 3 on page 5, which states: "You claim you are conducting repair and maintenance on roads that existed prior to the Coastal Act. You argue that you have a vested right to maintain the roads and the repair and maintenance is exempt from the coastal development permit requirements." (p. 5, para. 3).

2. Facts or allegations contained in the cease and desist order or notice of intent that you deny (with specific reference to paragraph number in the order):

Kay denies all other facts or allegations regarding the Communications Relay Property contained in the July 1st Notice, including, but not limited to:

1) All alleged facts contained in paragraph 2, page 1 (p. 1, para. 2);

2) All alleged facts contained in paragraph 3, page 1/paragraph 1, page 2, beginning with the words "As the Commission has previously indicated..." (p. 1, para. 3/p. 2, para. 1);

3) All alleged facts in paragraph 2, page 3, beginning with the words "[T]he record clearly shows that unpermitted development performed by you..." (p. 3, para.2);

4) That portion of paragraph 3 on page 3, which states: "...[I]ncluding the above referenced properties, which you maintained were owned by you" (p. 3, para. 3);

5) That portion of paragraph 3 on page 3, which states: "During the period between May 2, 2003 and May 8, 2003, work crews continued construction activities on the property despite the request by Commission staff that work on the roads cease." (p. 3, para. 3);

6) That portion of paragraph 3 on page 4, which states: "Thus, the requirement for a satisfactory response was not met by the specified deadline" (p. 4, para. 3);

7) That portion of paragraph 2 on page 5, which states: "...[T]he parcels are located in the coastal zone and therefore they are within the Coastal Commission's jurisdiction." (p. 5,

para. 2);

8) That portion of paragraph 3 on page 5, which states: "These arguments are unsupported. You have not obtained a determination by the Coastal Commission that there are vested rights for any roads on the parcels. You have also not provided any evidence indicating that roads were present prior to the effective date of the Coastal Act. Therefore, the activities do not constitute repair and maintenance to lawfully constructed facilities or structures." (p. 5, para. 3);

9) All alleged facts contained in paragraph 4, page 5 (p. 5, para. 4);

10) All alleged facts contained in paragraph 5, page 5 (p. 5, para. 5);

11) All alleged facts contained in paragraph numbered 2, page 6 (p. 6, para. #2);

12) All alleged facts contained in paragraph numbered 3, page 6 (p. 6, para. #3);

13) All alleged facts contained in paragraph numbered 4, page 6 (p. 6, para. #4);

14) All alleged facts contained in paragraph numbered 5, page 6 (p. 6, para. #5).

3. Facts or allegations contained in the cease and desist order or notice of intent of which you have no personal knowledge (with specific reference to paragraph number in the order):

Kay has no personal knowledge of and, on that basis, denies the following facts or allegations regarding the Communications Relay Property contained in the July 1st Notice:

1) That portion of paragraph 2 on page 3, which states: "Commission staff first witnessed unpermitted grading and vegetation removal on the subject properties on Thursday, May 1, 2003. From a distance of several hundred feet away, Commission staff observed a crew of laborers clearing vegetation, and excavating a new road in the hillside, using hand tools" (p. 3, para. 2);

2) That portion of paragraph 4 on page 3, which states: "During the site investigation, Commission staff confirmed that unpermitted development had in fact occurred, and was continuing to occur on the subject properties" (p. 3, para. 4);

3) All alleged facts contained in paragraph numbered 1, page 5 (p. 1, para. #1).

4. **Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to the possible violation (be as specific as you can; if you have or know of any document(s), photograph(s), map(s), letter(s), or other evidence that you believe is/are relevant, please identify it/them by name, date, type, and any other identifying information and provide the original(s) or (a) copy(ies) if you can:**

Kay should be exonerated from any responsibility for all of the alleged violations regarding the Communications Relay Property for the following reasons. Specifically, the work performed on the subject parcel consisted of the following:

1) Clearance and trimming of mixed chaparral from existing roadways;

2) Clearance and removal of fallen rocks and boulders from existing roadbeds;

c) Placement of railroad ties;

d) Repair of a culvert.

The cleared and repaired area on this parcel is .09 acres of the 25 acre parcel, or about .36% of the entire property. About 2,600 linear feet of existing roadway was cleared, of which 400 linear feet was improved only by the removal of brush. (See Agricultural Roads Repair and Maintenance Plans, attached hereto as Exhibit M.)

1) <u>The Roads and Trails Pre-Date the Coastal Act.</u>

The roads and trails located on this parcel pre-date the Coastal Act. (See Declaration of James A. Kay, Jr., the Biologist's Report and Addendum, map, and Whittier College 1953 aerial photo, attached hereto as Exhibits N, D, C, and B.) As such, Kay has a vested right per §30608 to use, repair, and maintain the existing roadways and does not require a CDP to continue to do so.

2) <u>No Development or Coastal Act Violations Have Occurred on the Property.</u>

The work performed on the property does not constitute development as defined by §30106. Section 30106 is defined as:

> ""Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal or any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with <u>Section 66410 of the Government Code</u>), and any other division of land, including lot splits, except where the land division is brought about in

connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511).

As used in this section, "structure" includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line."

Exemptions to §30106 are contained in §30610. Specifically, §30610(d) provides exemptions from the CDP requirement:

"(d) Repair or maintenance activities that do not result in an addition to, or enlargement or expansion of, the object of those repair or maintenance activities; provided, however, that if the commission determines that certain extraordinary methods of repair and maintenance involve a risk of substantial adverse environmental impact, it shall, by regulation, require that a permit be obtained pursuant to this chapter."

Here, the work performed on the subject property does not constitute development as defined by §30106 and is exempt from the CDP requirement per §30610. Courts have held, for example, that development under §30106 may include activities such as: a change in density or intensity of use of land (Stanson v. San Diego Coast Regional Commission (App. 4 Dist. 1980) 101 Cal.App.3d 38.), a division of land (Ojavan Investors, Inc. v. California Coastal Com. (App. 2 Dist. 1997) 54 Cal.App.4th 373), and lot line adjustments (La Fe, Inc. v. Los Angeles County (App. 2 Dist. 1999) 73 Cal.App.4th 231). All of these cases can be easily distinguished from this situation. The brush clearing, repair, and maintenance has not resulted in a change in the density or intensity of the use of land, nor has it resulted in an addition to, or enlargement or expansion of the existing roadways or trails. The work undertaken was all performed by hand tools (picks and shovels).

In addition, the work performed on the subject property does not constitute repair and maintenance activities that require a permit under §13252 of Title 14 of the California Administrative Code.

Furthermore, any allegations that repair and maintenance activity occurred within 20 feet of streams and/or in an environmentally sensitive habitat area are entirely untrue. There are no streams on this parcel in the vicinity of existing roads or trails. No pads have been graded. (See Biologist's Report and Addendum and Whittier College 1953 aerial photo, attached hereto as Exhibits D and B.)

3) There Is No Ongoing Biological Damage.

There is no evidence of damage to biological resources resulting from the activities conducted by Kay on the parcel. To date, even though the Commission asserts it as its basis for issuing the Notices, the Commission has presented no evidence or report of any kind that Kay's brush clearance, repair, maintenance, or use of the roads has been detrimental to biological resources. On the other hand, Kay has presented evidence to the Commission from Biologist Steven G. Nelson that Kay's activities have not caused any marked damage to resources and, in fact, have been beneficial to the parcel and wildlife. (See Biologist's Report and Addendum, attached hereto as Exhibit D.)

The vegetation in the areas in question consists of mixed chaparral, and not coastal sage scrub. The dominant plant species throughout the area consist of robust shrub species that grow to more than six feet in height and form extremely dense stands (chamise, canothus, manzanita, and toyon). Mixed chaparral is not considered by any authoritative agency as either coastal sage scrub or sensitive vegetation. (See Biologist's Report and Addendum, attached hereto as Exhibit D.)

4) There Is No Basis to Issue a §30811 Restoration Order.

Section 30811 authorizes the Commission to order restoration of a site if it finds three things. One, that the development has occurred without a CDP; two, that the development is inconsistent with what is allowed under the Coastal Act; and, three, that the development is causing continuing resource damage. The primary prerequisite is that some development has occurred as defined in the Coastal Act. Based on the foregoing description of the activities that took place on the parcel, nothing occurred on this parcel that qualifies as development. Therefore, there has been no violation of the Coastal Act and the Commission has no basis upon which to issue a restoration order with respect to this property. In addition, the required finding that resource damage has occurred cannot be made. (See Biologist's Report and Addendum, attached hereto as Exhibit D.)

5) Kay Should Not be Held Civilly Liable Under §30820.

First, Kay solicited advice regarding what lawful activities he could undertake on the parcel without a CDP. After receiving such advice, Kay was careful to operate within the limitations of the activities not requiring a CDP. Second, Kay ceased all repair and maintenance work immediately upon notice from the Commission and receipt of the Commission's May 8, 2003 Notice, and has not conducted any activities on the property since that date. (See Schmitz's May 12, May 13, and May 15 letters and Declaration of James A. Kay, Jr., attached hereto as Exhibits G, H, I, and N.) Kay even abided by the Commission's request that he cease using the roads, despite the Commission's lack of a legal basis for such request. Third, the Commission has presented no biological reports documenting the basis for its allegations and no evidence of ongoing biological damage. On the other hand, Kay has presented a biologist's report documenting the Commission's lack of a legal basis for alleging that there are violations or existing or ongoing damages to resources. (See Biologist's Report and Addendum, attached hereto as Exhibit D.)

Kay does not know with certainty and, on that basis, denies that this parcel is within the coastal zone and within the Commission's jurisdiction. Kay has requested that the Commission provide a map depicting the coastal zone boundaries in the vicinity of the Properties.

Finally, the County inspected this parcel on May 13, 2003. The County determined that no grading had occurred on the subject property and did not issue a Notice of Violation.

5. Any other information, statement, etc. that you want to offer or make:

Kay firmly denies that the brush clearance, repair, maintenance, placement of railroad ties, and repair of a culvert on this parcel were in violation of the Coastal Act and, on that basis, hereby requests the Commission to remove the Communications Relay Property from the July 1st Notice. Notwithstanding, in the spirit of cooperation, Kay has prepared and will be submitting a CDP application for grading on this property.

E. APN 4464-022-010.

The parcel identified by APN 4464-022-010, owned by Panorama Ranch, LLC (the "Panorama Ranch Property No. 2"), is cited in the June 27th Notice.

1. Facts or allegations contained in the cease and desist order or the notice of intent that you admit (with specific reference to the paragraph number in the order):

Kay admits the following facts or allegations regarding the Panorama Ranch Property No. 2 contained in the June 27th Notice:

1) That portion of paragraph 3 on page 1, which states: "...[A]ctivity occurred for approximately four months, between the middle of January 2003 through May 8, 2003" (p. 1, para. 3);

2) All alleged facts contained in paragraph 2 of page 3, beginning with the words "On the following day..." (p. 3, para. 2);

3) That portion of paragraph 4 on page 3, which states: "Commission staff conducted a site visit on Thursday, May 8, 2003" (p. 3, para. 4);

4) That portion of paragraph 4 on page 3, which states: "On the morning of May 8, 2003, Commission staff met with you and Mr. Schmitz to conduct a site investigation of the property." (p. 3, para. 4);

5) That portion of paragraph 1 on page 4, which states: "At approximately 2:00 p.m. on May

8, 2003, Commission staff issued a NOI for an Executive Director Cease and Desist Order to stop all unpermitted development of roads on the subject properties, as well as unpermitted development that may have encroached onto adjacent public lands." (p. 4, para. 1);

6) All alleged facts contained in paragraph 3, page 4, beginning with the words "You provided..." (p. 4, para. 3);

7) All alleged facts, except the last sentence, contained in paragraph 4, page 4, beginning with "On Monday, May 12, 2003..." and ending with the words "use of the roads" (p. 4, para. 4);

8) All alleged facts contained in paragraph 5, page 4, including all alleged facts contained in footnote 1 (p. 4, para. 5 and footnote 1);

9) All alleged facts contained in paragraph 1, page 5 (p. 5, para. 1);

10) That portion of paragraph 3 on page 5, which states: "You claim you are conducting repair and maintenance on roads that existed prior to the Coastal Act. You argue that you have a vested right to maintain the roads and the repair and maintenance is exempt from the coastal development permit requirements." (p. 5, para. 3).

2. Facts or allegations contained in the cease and desist order or notice of intent that you deny (with specific reference to paragraph number in the order):

Kay denies all other facts or allegations regarding the Panorama Ranch Property No. 2 contained in the June 27th Notice, including, but not limited to:

1) All alleged facts contained in paragraph 2, page 1 (para. 2, page 1);

2) All alleged facts contained in paragraph 3, page 1/paragraph 1, page 2, beginning with the words "As the Commission has previously indicated..." (p. 1, para. 3/p. 2, para. 1);

3) All alleged facts in paragraph 2, page 3, beginning with the words "[T]he record clearly shows that unpermitted development performed by you..." (p. 3, para.2);

4) That portion of paragraph 4 on page 3, which states: "During the period between May 2, 2003 and May 8, 2003, work crews continued construction activities on the property despite the request by Commission staff that work on the roads cease." (p. 3, para. 4);

5) That portion of paragraph 4 on page 4, which states: "Thus, the requirement for a satisfactory response was not met by the specified deadline" (p. 4, para. 4);

6) That portion of paragraph 2 on page 5, which states: "...[T]he parcels are located in the coastal zone and therefore they are within the Coastal Commission's jurisdiction." (p. 5, para. 2);

7) That portion of paragraph 3 on page 5, which states: "These arguments are unsupported. You have not obtained a determination by the Coastal Commission that there are vested rights for any roads on the parcels. You have also not provided any evidence indicating that roads were present prior to the effective date of the Coastal Act. Therefore, the activities do not constitute repair and maintenance to lawfully constructed facilities or structures." (p. 5, para. 3);

8) All alleged facts contained in paragraph 4, page 5 (p. 5, para. 4);

9) All alleged facts contained in paragraph 5, page 5 (p. 5, para. 5);

10) All alleged facts contained in paragraph 2, page 6 (p. 6, para. 2);

11) All alleged facts contained in paragraph 3, page 6 (p. 6, para. 3);

12) All alleged facts contained in paragraph 4, page 6 (p. 6, para. 4);

13) All alleged facts contained in paragraph 5, page 6 (p. 6, para. 5).

3. Facts or allegations contained in the cease and desist order or notice of intent of which you have no personal knowledge (with specific reference to paragraph number in the order):

Kay has no personal knowledge of and, on that basis, denies the following facts or allegations regarding the Panorama Ranch Property No. 2 contained in the June 27th Notice:

1) That portion of paragraph 3 on page 3, which states: "Commission staff first witnessed unpermitted grading and vegetation removal on the subject properties on Thursday, May 1, 2003. From a distance of several hundred feet away, Commission staff observed a crew of laborers clearing vegetation, and excavating a new road in the hillside, using hand tools" (p. 3, para. 3);

2) That portion of paragraph 4 on page 3, which states: "During the site investigation, Commission staff confirmed that unpermitted development had in fact occurred, and was continuing to occur on the subject properties" (p. 3, para. 4);

3) All alleged facts contained in paragraph 1, page 6 (p. 6, para. 1).

4. **Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to the possible violation (be as specific as you can; if you have or know of any document(s), photograph(s), map(s), letter(s), or other evidence that you believe is/are relevant, please identify it/them by name, date, type, and any other identifying information and provide the original(s) or (a) copy(ies) if you can:**

Kay should be exonerated from any responsibility for all of the alleged violations regarding the Panorama Ranch Property No. 2 for the following reasons. Specifically, the work performed on the subject parcel consisted of the following:

1) Clearance and trimming of mixed chaparral from existing roadways;

2) Clearance and removal of fallen rocks and boulders from existing roadbeds.

The cleared and repaired area on this parcel is .68 acres of the 44.58 acre parcel, or about 1.51% of the entire property. About 2,950 linear feet of existing roadway was cleared. (See Agricultural Roads Repair and Maintenance Plans, attached hereto as Exhibit M.)

1) <u>The Roads and Trails Pre-Date the Coastal Act.</u>

The roads and trails located on this parcel pre-date the Coastal Act. (See Declaration of James A. Kay, Jr., the Biologist's Report and Addendum, map, and Whittier College 1953 aerial photo, attached hereto as Exhibits N, D, C, and B.) As such, Kay has a vested right per §30608 to use, repair, and maintain the existing roadways and does not require a CDP to continue to do so.

2) <u>No Development or Coastal Act Violations Have Occurred on the Property.</u>

The work performed on the property does not constitute development as defined by §30106. Section 30106 is defined as:

> "'Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal or any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with <u>Section 66410 of the Government Code</u>), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber

operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511).

As used in this section, "structure" includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line."

Exemptions to §30106 are contained in §30610. Specifically, §30610(d) provides exemptions from the CDP requirement:

"(d) Repair or maintenance activities that do not result in an addition to, or enlargement or expansion of, the object of those repair or maintenance activities; provided, however, that if the commission determines that certain extraordinary methods of repair and maintenance involve a risk of substantial adverse environmental impact, it shall, by regulation, require that a permit be obtained pursuant to this chapter."

Here, the work performed on the subject property does not constitute development as defined by §30106 and is exempt from the CDP requirement per §30610. Courts have held, for example, that development under §30106 may include activities such as: a change in density or intensity of use of land (Stanson v. San Diego Coast Regional Commission (App. 4 Dist. 1980) 101 Cal.App.3d 38.), a division of land (Ojavan Investors, Inc. v. California Coastal Com. (App. 2 Dist. 1997) 54 Cal.App.4th 373), and lot line adjustments (La Fe, Inc. v. Los Angeles County (App. 2 Dist. 1999) 73 Cal.App.4th 231). All of these cases can be easily distinguished from this situation. The brush clearing, repair, and maintenance has not resulted in a change in the density or intensity of the use of land, nor has it resulted in an addition to, or enlargement or expansion of the existing roadways or trails. The work undertaken was all performed by hand tools (picks and shovels).

In addition, the work performed on the subject property does not constitute repair and maintenance activities that require a permit under §13252 of Title 14 of the California Administrative Code.

Furthermore, any allegations that repair and maintenance activity occurred within 20 feet of streams and/or in an environmentally sensitive habitat area are entirely untrue. There are no streams on this parcel in the vicinity of existing roads or trails. No pads have been graded, no culverts have been constructed, and no railroad ties have been placed on this Property. (See Biologist's Report and Addendum and Whittier College 1953 aerial photo, attached hereto as Exhibits D and B.)

3) There Is No Ongoing Biological Damage.

There is no evidence of damage to biological resources resulting from the activities conducted by Kay on the parcel. To date, even though the Commission asserts it as its basis for issuing the Notices, the Commission has presented no evidence or report of any kind that Kay's brush clearance,

repair, maintenance, or use of the roads has been detrimental to biological resources. On the other hand, Kay has presented evidence to the Commission from Biologist Steven G. Nelson that Kay's activities have not caused any marked damage to resources and, in fact, have been beneficial to the parcel and wildlife. (See Biologist's Report and Addendum, attached hereto as Exhibit D.)

The vegetation in the areas in question consists of mixed chaparral, and not coastal sage scrub. The dominant plant species throughout the area consist of robust shrub species that grow to more than six feet in height and form extremely dense stands (chamise, canothus, manzanita, and toyon). Mixed chaparral is not considered by any authoritative agency as either coastal sage scrub or sensitive vegetation. (See Biologist's Report and Addendum, attached hereto as Exhibit D.)

4) <u>There Is No Basis to Issue a §30811 Restoration Order.</u>

Section 30811 authorizes the Commission to order restoration of a site if it finds three things. One, that the development has occurred without a CDP; two, that the development is inconsistent with what is allowed under the Coastal Act; and, three, that the development is causing continuing resource damage. The primary prerequisite is that some development has occurred as defined in the Coastal Act. Based on the foregoing description of the activities that took place on the parcel, nothing occurred on this parcel that qualifies as development. Therefore, there has been no violation of the Coastal Act and the Commission has no basis upon which to issue a restoration order with respect to this property. In addition, the required finding that resource damage has occurred cannot be made. (See Biologist's Report and Addendum, attached hereto as Exhibit D.)

5) <u>Kay Should Not be Held Civilly Liable Under §30820.</u>

First, Kay solicited advice regarding what lawful activities he could undertake on the parcel without a CDP. After receiving such advice, Kay was careful to operate within the limitations of the activities not requiring a CDP. Second, Kay ceased all repair and maintenance work immediately upon notice from the Commission and receipt of the Commission's May 8, 2003 Notice, and has not conducted any activities on the property since that date. (See Schmitz's May 12, May 13, and May 15 letters and Declaration of James A. Kay, Jr., attached hereto as Exhibits G, H, I, and N.) Kay even abided by the Commission's request that he cease using the roads, despite the Commission's lack of a legal basis for such request. Third, the Commission has presented no biological reports documenting the basis for its allegations and no evidence of ongoing biological damage. On the other hand, Kay has presented a biologist's report documenting the Commission's lack of a legal basis for alleging that there are violations or existing or ongoing damages to resources. (See Biologist's Report and Addendum, attached hereto as Exhibit D.)

Kay does not know with certainty and, on that basis, denies that this parcel is within the coastal zone and within the Commission's jurisdiction. Kay has requested that the Commission provide a map depicting the coastal zone boundaries in the vicinity of the Properties.

Finally, the County inspected this parcel on May 13, 2003. The County determined that no grading had occurred on the subject property and did not issue a Notice of Violation.

5. Any other information, statement, etc. that you want to offer or make:

Kay firmly denies that the brush clearance, repair, and maintenance activities on this parcel were in violation of the Coastal Act and, on that basis, hereby requests the Commission to remove the Panorama Ranch Property No. 2 from the June 27th Notice. Notwithstanding, in the spirit of cooperation, Kay has prepared and will be submitting a CDP application for grading on this property.

F. APN 4464-019-008.

The parcel identified by APN 4464-019-008, owned by Panorama Ranch, LLC (the "Panorama Ranch Property No. 1"), is cited in the June 27th Notice.

1. Facts or allegations contained in the cease and desist order or the notice of intent that you admit (with specific reference to the paragraph number in the order):

Kay admits the following facts or allegations regarding the Panorama Ranch Property No. 1 contained in the June 27th Notice:

1) That portion of paragraph 3 on page 1, which states: "...[A]ctivity occurred for approximately four months, between the middle of January 2003 through May 8, 2003" (p. 1, para. 3);

2) All alleged facts contained in paragraph 2, page 3, beginning with the words "On the following day..." (p. 3, para. 2);

3) That portion of paragraph 4 on page 3, which states: "Commission staff conducted a site visit on Thursday, May 8, 2003" (p. 3, para. 4);

4) That portion of paragraph 4 on page 3, which states: "On the morning of May 8, 2003, Commission staff met with you and Mr. Schmitz to conduct a site investigation of the property." (p. 3, para. 4);

5) That portion of paragraph 1 on page 4, which states: "At approximately 2:00 p.m. on May 8, 2003, Commission staff issued a NOI for an Executive Director Cease and Desist Order to stop all unpermitted development of roads on the subject properties, as well as unpermitted development that may have encroached onto adjacent public lands." (p. 4, para. 1);

6) All alleged facts contained in paragraph 3, page 4, beginning with the words "You provided..." (p. 4, para. 3);

7) All alleged facts, except the last sentence, contained in paragraph 4, page 4, beginning with "On Monday, May 12, 2003..." and ending with the words "use of the roads" (p. 4, para. 4);

8) All alleged facts contained in paragraph 5, page 4, including all alleged facts contained in footnote 1 (p. 4, para. 5 and footnote 1);

9) All alleged facts contained in paragraph 1, page 5 (p. 5, para. 1);

10) That portion of paragraph 3 on page 5, which states: "You claim you are conducting repair and maintenance on roads that existed prior to the Coastal Act. You argue that you have a vested right to maintain the roads and the repair and maintenance is exempt from the coastal development permit requirements." (p. 5, para. 3).

2. Facts or allegations contained in the cease and desist order or notice of intent that you deny (with specific reference to paragraph number in the order):

Kay denies all other facts or allegations regarding the Panorama Ranch Property No. 1 contained in the June 27th Notice, including, but not limited to:

1) All alleged facts contained in paragraph 2, page 1 (p. 1, para. 2);

2) All alleged facts contained in paragraph 3, page 1/paragraph 1, page 2, beginning with the words "As the Commission has previously indicated..." (p. 1, para. 3/p. 2, para. 1);

3) All alleged facts in paragraph 2, page 3, beginning with the words "[T]he record clearly shows that unpermitted development performed by you..." (p. 3, para.2);

4) That portion of paragraph 4 on page 3, which states: "During the period between May 2, 2003 and May 8, 2003, work crews continued construction activities on the property despite the request by Commission staff that work on the roads cease." (p. 3, para. 4);

5) That portion of paragraph 4 on page 4, which states: "Thus, the requirement for a satisfactory response was not met by the specified deadline" (p. 4, para. 4);

6) That portion of paragraph 2 on page 5, which states: "...[T]he parcels are located in the coastal zone and therefore they are within the Coastal Commission's jurisdiction." (p. 5, para. 2);

7) That portion of paragraph 3 on page 5, which states: "These arguments are unsupported.

You have not obtained a determination by the Coastal Commission that there are vested rights for any roads on the parcels. You have also not provided any evidence indicating that roads were present prior to the effective date of the Coastal Act. Therefore, the activities do not constitute repair and maintenance to lawfully constructed facilities or structures." (p. 5, para. 3);

8) All alleged facts contained in paragraph 4, page 5 (p. 5, para. 4);

9) All alleged facts contained in paragraph 5, page 5 (p. 5, para. 5);

10) All alleged facts contained in paragraph 2, page 6 (p. 6, para. 2);

11) All alleged facts contained in paragraph 3, page 6 (p. 6, para. 3);

12) All alleged facts contained in paragraph 4, page 6 (p. 6, para. 4);

13) All alleged facts contained in paragraph 5, page 6 (p. 6, para. 5).

3. Facts or allegations contained in the cease and desist order or notice of intent of which you have no personal knowledge (with specific reference to paragraph number in the order):

Kay has no personal knowledge of and, on that basis, denies the following facts or allegations regarding the Panorama Ranch Property No. 1 contained in the June 27th Notice:

1) That portion of paragraph 3 on page 3, which states: "Commission staff first witnessed unpermitted grading and vegetation removal on the subject properties on Thursday, May 1, 2003. From a distance of several hundred feet away, Commission staff observed a crew of laborers clearing vegetation, and excavating a new road in the hillside, using hand tools" (p. 3, para. 3);

2) That portion of paragraph 4 on page 3, which states: "During the site investigation, Commission staff confirmed that unpermitted development had in fact occurred, and was continuing to occur on the subject properties" (p. 3, para. 4);

3) All alleged facts contained in paragraph 1, page 6 (p. 6, para. 1).

4. **Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to the possible violation (be as specific as you can; if you have or know of any document(s), photograph(s), map(s), letter(s), or other evidence that you believe is/are relevant, please identify it/them by name, date, type, and any other identifying information and provide the original(s) or (a) copy(ies) if you can:**

Kay should be exonerated from any responsibility for the following alleged violations regarding the Panorama Ranch Property No. 1:

1) Allegations of grading "at least one fill pad."

Kay Response:

Neither Kay nor anyone acting on his behalf has at any time graded one or more "fill pads" on this parcel. (See Declaration of James A. Kay, Jr., attached hereto as Exhibit N.)

2) Allegations of "extensive vegetation clearance, including removal of surface and subsurface plant materials in native chaparral and riparian vegetation areas."

Kay Response:

The vegetation in the areas in question consists of mixed chaparral, and not coastal sage scrub. The dominant plant species throughout the area consist of robust shrub species that grow to more than six feet in height and form extremely dense stands (chamise, canothus, manzanita, and toyon). Mixed chaparral is not considered by any authoritative agency as either coastal sage scrub or sensitive vegetation. (See Biologist's Report and Addendum, attached hereto as Exhibit D.)

The majority of the work performed on the roads and trails was maintenance related and consisted of clearing and trimming the mixed chaparral and moving fallen boulders and rocks from the roadbeds. In fact, no more than .48 acres of brush was cleared from the Panorama Ranch Property No. 1, or 1.2% of the entire parcel. About 900 linear feet of existing roadway was cleared. (See Biologist's Report and Addendum and Agricultural Roads Repair and Maintenance Plans, attached hereto as Exhibits D and M.)

It is important to distinguish this parcel from the rest. On the Commission's May 8, 2003 site visit, staff was, in fact, concerned with only one portion of this parcel to the extent that Kay's activities had gone beyond repair and maintenance work (even though it was still all performed with hand tools). The area on which the work exceeded repair and maintenance activity is very small - about 900 linear feet of roadbed work. (The entire existing roadway on this parcel consists of 2,100 linear feet.) Kay acknowledges, as should the Commission, that these 900 linear feet should be viewed differently. Any other activity on this parcel, if

any, was entirely limited to brush clearance, repair, and maintenance work.

3) Allegations of "streambed alteration, including grading, filling, removal of in-channel riparian vegetation, placement of new culverts and railroad ties, and manipulation of boulders and cobbles within stream channels."

Kay Response:

Neither Kay nor anyone acting on his behalf has at any time performed work on this parcel that resulted in streambed alteration, including grading or filling. Furthermore, neither Kay nor anyone acting on his behalf has at any time placed new culverts or railroad ties. (See Declaration of James A. Kay, Jr., attached hereto as Exhibit N.)

4) Allegations of "destabilization of slopes, alteration of drainages."

Kay Response:

Neither Kay nor anyone acting on his behalf has at any time performed work on this parcel that resulted in destabilization of slopes. (See Declaration of James A. Kay, Jr., attached hereto as Exhibit N.)

Furthermore, Kay immediately ceased work on the property at the time he received the May 8, 2003 Notice from the Commission and has not conducted any activities on the parcel since that date.

Kay does not know with certainty and, on that basis, denies that this parcel is within the coastal zone and within the Commission's jurisdiction. Kay has requested that the Commission provide a map depicting the coastal zone boundaries in the vicinity of the Properties.

Based on the foregoing, the Commission has no authority under §30811 to issue a Restoration Order and no authority under §30820 to impose civil liability on Kay.

5. Any other information, statement, etc. that you want to offer or make:

This parcel should be distinguished from the other cited parcels in that Kay acknowledges that the brush clearance, repair, and maintenance activities on a small portion of the Panorama Ranch Property No. 1 went beyond what he had anticipated and requested of his employees. On that basis, Kay has also prepared and will be submitting a CDP application for grading on this property.

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

1. PARTIES:

The parties to this Settlement Agreement and Mutual Release ("Agreement") are: LT-WR, LLC, the successor-in-interest to Petitioner/Plaintiff SOCAL Communications ("SOCAL") and Respondent/Defendant California Coastal Commission ("Commission").

2. RECITALS

This Agreement is made with reference to the following facts:

2.1 SOCAL owns a 23-acre parcel on top of Castro Peak, located at 1953 Latigo Canyon Road, Malibu in Los Angeles County.

2.2 On April 12, 2001, the Commission approved a coastal development permit ("permit") that authorized SOCAL to relocate a 120 foot communications tower encroaching on National Park Service land and approved the previous construction of another 150 foot communications tower.

2.3 The Commission imposed conditions on the permit including special condition no. 3 regarding landscaping requirements and special condition no. 4 regarding a future development deed restriction.

2.4 SOCAL filed its First Amended Petition For Writ of Mandate ("Petition") against the Commission challenging special condition no. 3 and special condition no. 4.

2.5 SOCAL Communications, a California limited liability company, dissolved on January 31, 2002. The SOCAL property was transferred to LT-WR, a Nevada limited liability company, which is SOCAL's successor-in-interest. By entering into this agreement LT-WR, LLC acknowledges it is the successor-in-interest to SOCAL.

2.6 The parties have reached a settlement of all the disputes and claims encompassed by the lawsuit.

3. SETTLEMENT TERMS:

3.1 Within thirty (30) days of the execution of this Agreement, SOCAL shall file a complete coastal development permit application for the trailer in which John R. Burroughs, the caretaker, resides.

3.2 In the event SOCAL files a complete coastal development permit application for the residential trailer, the Commission shall waive local approvals.

3.3 Within thirty (30) days of the execution of this Agreement, SOCAL shall file a complete Los Angeles County Building and Safety ("B&S") permit application for the tower relocation.

3.4 Within ninety (90) days of approval of a B&S permit, a coastal development permit amendment and a Regional Planning permit, whichever is later, SOCAL shall relocate the 120 foot communications tower so that it is located completely within SOCAL's property and does not encroach onto National Park Service land.

3.5 SOCAL shall notify the Commission's counsel, Deputy Attorney General Rosana Miramontes, within two (2) days of the date when all local permit(s) are approved.

3.6 The Commission shall accept and process an application to amend Coastal Development Permit No. 4-00-222 as set forth below, and the Commission staff shall recommend approval of such amendments: Special Condition no. 3 shall be amended to read as follows:

Landscaping Condition. In accepting this coastal development permit, the applicant acknowledges and agrees that: No installation of landscaping or clearance of vegetation on the subject parcel is authorized beyond the 200 foot area from the communications towers and associated structures authorized by Coastal Development Permit No. 4-00-222, except for such thinning or clearance of vegetation that may be required within the 200 foot distance from these structures by the Los Angeles County Fire Department. Invasive, non-native plants shall not be installed on site within the area authorized for construction by this coastal development permit. Landscaping or clearance of vegetation beyond the 200 foot area noted above, except as specifically provided for herein, shall require a new coastal development permit from the Commission or successor agency.

3.7 Special Condition no. 4 shall be amended to read as follows:

Future Use and Development of Site. (A) This permit is only for the development described in Coastal Development Permit No. 4-00-222, and does not include the use or placement of a residential trailer or other structures on site; and (B) Pursuant to this permit, the two communications towers, including tower components, shall not be relocated or extended above their currently approved heights of 120 feet and 150 feet, respectively: The towers' footprint foundations shall not be expanded, altered, or modified. Accordingly, any future relocation or extension of the permitted communications towers, or any expansion, alteration, or modification of the towers' footprint foundations shall require an amendment to Coastal Development Permit No. 4-00-222 from the Commission or shall require an additional coastal development permit from the Commission or from the applicable certified local government. Notwithstanding this limitation, however, the applicant shall have the right to modify the location and number of radio antennas, antenna mounts, and dishes affixed to each of the towers without further notice to or approval from the Commission.

3.8 Within ten (10) days of the execution of this Agreement, SOCAL shall file all appropriate documents with the Los Angeles Superior Court to effectuate dismissals with prejudice of the lawsuit. As soon as is practicable, SOCAL shall forward to the Commission, care of Deputy Chief Counsel Amy Roach, evidence of these dismissals.

3.9 For and in consideration of the above terms, the parties agree as follows:

3.10 SOCAL and its successors-in-interest, transferees and assignees fully and forever release the Commission, its officers, employees, governing members, agents and attorneys from any and all liability, claims, demands, damages, punitive damages, disputes, suits, claims for relief and causes of action, whether known or unknown, foreseen or unforeseen, which directly or indirectly relate to any claims, facts or circumstances arising out of or alleged in the lawsuit or any amended versions thereof.

3.11 The Commission for itself and its officers, governing members, employees and agents, fully and forever release SOCAL and its successors-in-interest, transferees, assignees, agents and/or attorneys from any and all liability, claims, demands, damages, punitive damages, disputes, suits, claims for relief and causes of action, whether known or unknown, foreseen or unforeseen, which directly or indirectly relate to any claims, facts or circumstances arising out of or alleged in the lawsuit or any amended versions thereof. However, the foregoing shall not apply to any Coastal Act violations and the Commission shall be entitled to pursue legal action and seek whatever remedies it has under the Coastal Act to address any violations on the property.

4. ENFORCEMENT OF SETTLEMENT AGREEMENT:

The Commission and SOCAL stipulate, covenant and agree that the Agreement shall be enforceable by any Judge of the Superior Court of the County of Los Angeles as if the Agreement is a judgment enforceable pursuant to California Code of Civil Procedure section 128(4) and 664.6.

5. WAIVER OF THE BENEFITS OF CIVIL CODE SECTION 1542:

All of the parties having been fully apprized of the nature and effect of the provisions of Section 1542 of the California Civil Code, waive all rights which they may have against the other, both known and unknown, that might otherwise exist by virtue of the provisions of Section 1542 which provides as follows:

> "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE

DEBTOR."

6. REPRESENTATIONS:

All parties to this Agreement represent and warrant that they have been afforded adequate opportunity to and have in fact reviewed the contents of this Agreement with counsel of their own choosing and accept the terms and conditions hereof.

7. REMEDIES FOR BREACH OF AGREEMENT:

Should any party to this Agreement violate any term or condition herein, the non-breaching party shall retain all rights and remedies available under the law including, but not limited to, the Coastal Act and remedies arising under contract law. The breaching party shall retain the right to raise all applicable defenses in response to any claim brought by the non-breaching party.

8. SEVERABILITY:

The invalidity or the unenforceability of one or more clauses or portions of this Agreement shall not detract from the validity or enforceability of the remaining clauses or portions of the Agreement which shall survive in all respects as if the invalid or unenforceable portions were not a part thereof.

9. INTERPRETATION:

All parties acknowledge and agree that this Agreement shall be interpreted, construed, governed and enforced under and pursuant to the laws of the State of California, which apply in all respects.

10. MERGER AND INTEGRATION:

This Agreement constitutes the entire agreement of the parties pertaining to the dispute which gave rise to the filing of the lawsuit and it supercedes all prior or contemporaneous understandings, representations, warranties and agreements made by the parties hereto or their representatives pertaining to the subject matter hereof. This Agreement is entire in and of itself and may not be modified or amended except by an instrument in writing signed by all the parties.

11. EXECUTION IN COUNTERPART:

The parties hereto, in order to more expeditiously implement the compromise and settlement terms set forth herein, agree that the Agreement may be executed in two or more counterparts as if all parties signed one document and each executed counterpart shall be regarded as if it is an original document. The original executed counterparts shall be kept in the

custody of the Commission. Execution may be via facsimile copy.

12. WARRANTY OF NON-ASSIGNMENT:

The parties warrant that they have not assigned or transferred, or will they in the future attempt to assign or transfer, any claim for relief or cause of action released herein.

13. BINDING ON SUCCESSORS-IN-INTEREST:

This Agreement is binding upon the parties, and their successors-in-interest, transferees and assignees.

14. ATTORNEY'S FEES:

In any action or proceeding arising out of this Agreement, or to enforce the terms of this Agreement, the prevailing party shall be entitled to recover reasonable attorney's fees and costs incurred in the action or proceeding. Should any action or proceeding be brought which is barred by the terms of this Agreement, the prevailing party shall be entitled to recover reasonable attorney's fees and costs incurred in the action or proceeding.

15. NON-ADMISSION OF LIABILITY

No part of this Agreement shall be construed or otherwise deemed an admission of any liability whatsoever on the part of any of the parties to the Agreement.

IN WITNESS WHEREFORE the parties have caused this Agreement to be executed.

Approved as to form:

Date: 6/5/02

ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

Rosana Miramontes
Deputy Attorney General
Attorneys for the California Coastal Commission

Date: 6-12-02

GAINES & STACEY LLP

Fred Gaines, Esq.
Attorneys for SOCAL Communications

The Parties:

Date: 6/18/02

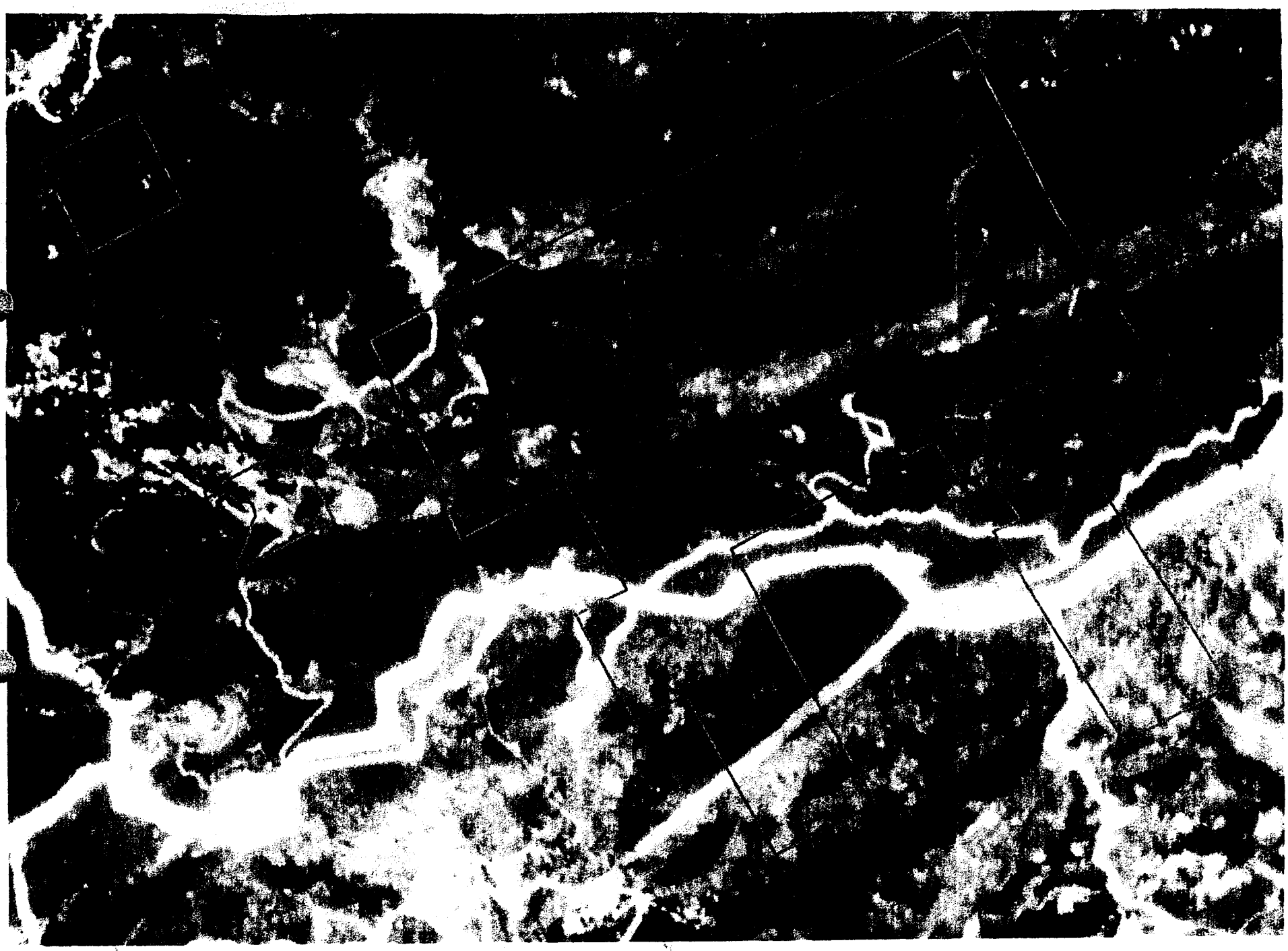
CALIFORNIA COASTAL COMMISSION

Peter M. Douglas
Executive Director

Date: 6/11/02

LT-WR, LLC

James A. Kay, Jr.
Title: Managing Partner



STEVEN G. NELSON, Consulting Biologist

QUALIFICATIONS

Steve Nelson is a biologist with expertise in the areas of wildlife biology, botany and freshwater ecology. He has been a professional consultant for more than 28 years. During that time, he has been responsible for a wide variety of biological studies, ranging from technical wildlife and vegetation assessments to regionwide biodiversity planning. His broad education and professional experience in biology and business administration have given him a unique insight into resource identification, evaluation, planning and management.

EDUCATION

1990-1993 M. Business Administration, California State Polytechnic University, Pomona, California.
1973-1975 M.A. Biology, University of California, Riverside, California.
1969-1973 B.S. Biology, University of California, Riverside, California.

EMPLOYMENT

1996-Now Director of Biological Services, PCR Services Corporation, Irvine, CA
Directs a 15-member biological consulting group within a comprehensive environmental planning firm. Provides oversight to a wide range of practices, including sensitive species surveys, CEQA/NEPA assessments, wetlands/regulatory permitting, habitat restoration and regionwide conservation planning.

1994-1996 Director of Resources Management, Michael Brandman Associates, Irvine, CA
Directed a 13-member biological consulting group within a comprehensive environmental planning firm. Provided oversight to a range of services, including sensitive species surveys, CEQA/NEPA assessments, wetlands/regulatory permitting and habitat restoration planning.

1983-1994 Independent Contractor, Diamond Bar, CA
Managed and was responsible for numerous biological assessments and focused sensitive species surveys for projects located throughout southern California.

1979-1982 Principal, EDAW, Inc., Newport Beach, CA
Served as Project Manager for a broad range of resource management assignments throughout the western United States. Actively participated as the project biologist.

1977-1979 Project Manager, PBR, Inc., Newport Beach, CA
Responsible for CEQA biological assessments in support of firmwide environmental planning and documentation activities.

1974-1977 Principal, England & Nelson, Environmental Consultants, Riverside, CA
Served as a partner in the operation of a small biological consulting firm and as co-researcher for a wide variety of biological studies.

SELECTED EXPERIENCE

Various Biological Assessments/Santa Monica Mountains, Los Angeles County - Project Biologist for over 20 project sites within California Coastal Commission, County of Los Angeles and/or City of Malibu jurisdictions. Key issues addressed included ESHA and County SEA designations. 1994-present.

Aera Energy/Puente Hills, Los Angeles County - Senior biologist for 3,000-acre planned development project. Resolution of issues related to County SEA program, sensitive walnut woodland communities, federally-threatened California gnatcatcher, and jurisdictional waters and wetlands required. 1996-present.

Lytle Creek Planned Development, San Bernardino County - Senior Biologist for 3,000-acre planned development program, involving sensitive and listed species of plants and animals, sensitive alluvial scrub communities, regulated waters, and related state and federal permitting processes. 1993-present.

Centex Homes/Emery Ranch Planned Development, Orange County - Senior Biologist for 137-acre residential development in abandoned oil field. Key issues are conservation, habitat restoration planning and construction monitoring for the California gnatcatcher. 2000-present.

Los Angeles County Significant Ecological Area 2000 Update Study, Los Angeles County - Co-Principal Investigator for countywide update to 1976 SEA Study. Required updating data bases for SEAs and expansion of program in accordance with current conservation planning tenets. 1999-2000.

Foothill Transportation Corridor/South, Orange County - Senior Biological Manager for technical biological studies and the preparation of Natural Environment Study for 10,000-acre project area. Oversaw 29 biologists investigating 84 sensitive species of plants and animals and jurisdictional wetlands. 1994-1996.

Tramanto Estates Development, City of Rancho Palos Verdes, Los Angeles County - Senior Biologist for construction of a 43-lot residential tract adjacent to occupied California gnatcatcher habitat. Required developing conservation measures with USFWS and construction monitoring. 1995.

Newport Beach Circulation Improvements/Open Space Dedication EIR, Newport Beach, Orange County - Project Biologist for multi-property project. Issues included potential impacts to coastal wetlands, California gnatcatcher and sensitive coastal scrub habitats. 1989.

Las Virgenes MWD Areawide Facilities EIS/EIR, Los Angeles and Ventura Counties - Project Biologist for regional water and wastewater facilities plan including Malibu, Topanga and Triunfo communities. Key issues researched and field studied included natural open space values. 1979-1982.

1976 Significant Ecological Area Study, Los Angeles County - Co-authored study of SEAs countywide as part of the 1983 County General Plan Update Program. 1975-1976.

RELATED ACTIVITIES

City of Diamond Bar Planning Commissioner. 1999-present.
City of Diamond Bar SEA Technical Advisory Committee. 1992-1994.

June 11, 2003

Ms. Donna Shen
Schmitz & Associates, Inc.
29350 West Pacific Coast Highway, Unit 12
Malibu, CA 90265

Re: California Coastal Commission Violation No. V-4-03-018 - Biological Assessment

Dear Ms. Shen:

The purpose of this letter is to document the findings of my site investigation regarding the above-referenced violation. I have reviewed the California Coastal Commission (Commission) *Notice Prior to Issuance of Executive Director Cease and Desist for Violation No. V-4-03-018*. It is my understanding that the Commission issued the violation due to what it perceived as being the "unpermitted removal of native coastal sage scrub vegetation, grading and construction of new roads". On June 11, 2003 I conducted a site inspection to assess the damage actually done to biological resources and to determine whether or not any such damage would continue with future use of the roads in question. Based on my field observations, experience, and analysis, I do not believe the Commission is correct in its claim for the following reasons.

1. The vegetation through which the roads in question pass is mixed chaparral, and not coastal sage scrub. This is the case for all of the roads I inspected within APNs 4464-019-008, 4464-019-010, 4464-022-001 and 4464-022-010. As is characteristic of chaparral, the dominant plant species throughout the area consist of robust shrub species that grow to six feet and higher in height and form dense, nearly impenetrable stands. Dominant plants along all portions of the roads included chamise (*Adenostoma fasciculatum*), ceanothus (*Ceanothus sp.*), manzanita (*Arctostaphylos sp.*) and toyon (*Heteromeles arbutifolia*). In comparison, species typically dominating coastal sage scrub, including lower-growing, "softer" shrubs, were largely absent. This distinction is important to note because mixed chaparral is not considered to be sensitive by any authoritative organization I am aware of (e.g., California Department of Fish and Game, U.S. Fish and Wildlife Service). Nor is mixed chaparral considered to be limited in distribution in the region. Therefore, the biological basis of the violation - that is, removal of a sensitive vegetation type - is incorrect.

2. The Commission's use of the term "removal" is an overstatement as it applies to all but a small portion of the roads in question. Based on my field observations, the majority of the work completed was strictly maintenance-related involving the trimming of overgrown shrubs and removal of fallen rocks and boulders from the road bed itself. This was evidenced by the absence of recent cuts and fills along the majority of the roads' length. More importantly, there was no evidence anywhere along the roads that entire shrubs had been removed from the road edges as part of the work.

3. Notwithstanding my observations that some vegetation was actually removed along limited portions of the road edge, such removals are insignificant considering the extensive stands of mixed chaparral in the vicinity and the Santa Monica Mountains overall. For example, I estimated less than 400 square feet (0.009 acre) of new cut and fill at one "hairpin" turn along one of the roads in the south-central portion of APN 4464-019-010; and, it was my observation that this was one of the more obvious areas at issue. Similarly, obvious encroachments of maintenance activities outside the original construction footprint many years ago were also observed elsewhere within APNs 4464-019-008 and 4464-019-010. However, they could be measured in terms of one to a few feet outside of the existing road itself. Again, I do not consider this to be significant.

4. In terms of damage to biological resources, I took a broad view in my approach to the assessment. I considered the actual loss of vegetation in terms of its extent and sensitivity, the potential impacts on wildlife using the vegetation as habitat, potential erosion and downstream siltation, and edge effects (e.g., the establishment of invasive plant species). The very limited extent to which vegetation was actually removed and the lack of sensitivity associated with the vegetation effected has been discussed above.

Regarding the effect of the road maintenance work on wildlife, I do not expect there to be any significant adverse impacts. The roads are simply too minor of a potential interruption and too little of an agent for habitat fragmentation to be of concern. Interestingly, and not to be misunderstood to mean that roads through habitat areas are necessarily beneficial to wildlife, it is plausible to expect the roads are used by larger mammals to facilitate their movement through the area in light of the surrounding dense chaparral. Concerning potential erosion and siltation hazards, I noted the general absence of any evidence that this was a problem. I believe this is due to the cutting, chipping and spreading on-site methods used to clear the roads. The chipped and spread material covered both the road and its margins. I speculate that this use of chipped material, whether intentional or not, has effectively controlled erosion from occurring at the work areas. In contrast, the off-site unimproved roads leading to the roads in question were all observed to have erosional features across or along the road beds and at their margins. The same was observed to be true for the introduction of non-native, invasive plant species. Along all of the off site road margins, there was an abundance of non-native, "weedy" species. Yet, along the roads in question where chipped material had been spread and acted like a natural mulch, almost no invasive plants were observed. In other words, I believe any damage that might have been feared to occur, has not, due to the manner in which the maintenance was carried out.

5. As a final observation on the matter, I do not expect that the continued use of the roads for light vehicular travel, hiking, biking and riding to be a concern. The roads all appear to have been originally graded many years ago and a stable roadbed looks to be in place. The recent maintenance, including the use of chipped material as a soil surface stabilizer, would indicate future use is not a problem.

I understand both the County of Los Angeles and the Commission have at least hinted that mitigation may be required. However, I find no reasonable cause or impact threshold criteria upon which to base mitigation and I do not believe compensatory measures are warranted. There has been no marked damage to biological resources; and, I do not expect any to be associated with continued use of the roads.

Having stated my conclusion above, I do have two recommendations to consider. First, I recommend the maintenance work be completed. Within APN 4464-019-008 maintenance work on the roads appeared to be incomplete. In particular, cut material had not yet been chipped and spread over the work areas. I strongly recommend this work be completed in order to minimize the potential for erosion and the establishment of invasive plants. Second, within this same parcel, a road crosses a small but distinct drainage feature which I believe is indicated as a blue-line stream on USGS topography. The road crossing (minor as it is) should be stabilized so surface runoff crossing the road will not result in erosion. Here, because of the volume and velocity of runoff expected, the spreading of chipped material is likely to be inadequate. Rather, I recommend rocks from the surrounding area be used as a road bed in the form of an "Arizona-crossing". These preventative measures will ensure there will be no future damage along this portions of the road.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Steven G. Nelson

Steven G. Nelson
Consulting Biologist
24230 Delta Drive
Diamond Bar, CA
Tel/Fax (909) 861-8502

July 14, 2003

Ms. Donna Shen
Schmitz & Associates
29350 West Pacific Coast Highway, Unit 12
Malibu, California 90265

Re: Response to Notice of Intent to Commence Restoration Order Proceeding, Coastal Act Violation File No. V-4-03-018 (Kay)

Dear Ms. Shen:

I have reviewed the June 27, 2003 Notice of Intent (NOI) sent to Mr. James Kay from the California Coastal Commission (Commission) and I am puzzled by the Commission's stated position regarding biological resource damage. I am further puzzled by the absence of any reference to my letter report, dated June 11, 2003, wherein I summarized my findings based on a site inspection of the issues at hand. After 30 years in the biological consulting profession (please refer to my cv, attached), I find it difficult to believe the Commission would not consider, let alone address, what I observed and concluded. I can only think of three reasons for this: 1) the Commission either does not agree with my conclusions or ignored them altogether; 2) the Commission did not receive my letter and consider it before they sent the June 27, 2003 NOI; and 3) the Commission has yet to have their own biologist inspect the site and generate their own account of what has and is taking place on site.

If the Commission disagreed with my conclusions, I assume they would have stated this and specifically described why. I sincerely hope and doubt they ignored them altogether; that would be very unprofessional not to mention unfair to Mr. Kay. Also, it is my understanding that the Commission did receive a copy of my June 11, 2003 letter report prior to their June 27, 2003 NOI. That leaves the lack of an inspection by a qualified Commission biologist and the generation of findings comparable to my June 27, 2003 letter as the most plausible reason for their not specifically responding to my conclusions and recommendations. Needless to say, I strongly recommend the Commission receive a full and accurate report before they act to enforce restoration proceedings. It would seem to be the only fair, reasonable and professional thing to do.

To reiterate my findings, based on extensive experience in the field, I do not believe the Commission is correct in their claims for the following reasons, all of which are based on a site inspection:

1. The vegetation effected by the road maintenance activities is mixed chaparral, a widespread and common plant community, and not sensitive coastal sage scrub as claimed by the Commission.

2. With the exception of small, localized pockets the results of maintenance activities I observed reflected trimming, and not removal as claimed by the Commission.

3. The areas of actual removal could be measured in terms of square feet, which I do not believe is significant, and is not widespread as implied by the Commission's actions.

4. Due to the manner in which the road maintenance was completed (i.e., cutting, chipping and spreading), damage from erosion, siltation, edge effects and establishment of non-native plant species was avoided.

5. Clearly, the roads I observed were established long before the maintenance as evidenced by the relative absence of recently created cut and fill slopes.

Further, I stand by my original recommendations that the maintenance be completed so all cut material can

be chipped and spread, and the single road crossing of a blue-line stream can be stabilized through the installation of an "Arizona-crossing".

For future reference, I would be happy to meet with a Commission biologist in the field at the site to discuss my observations and findings.

Sincerely,

Steven G. Nelson

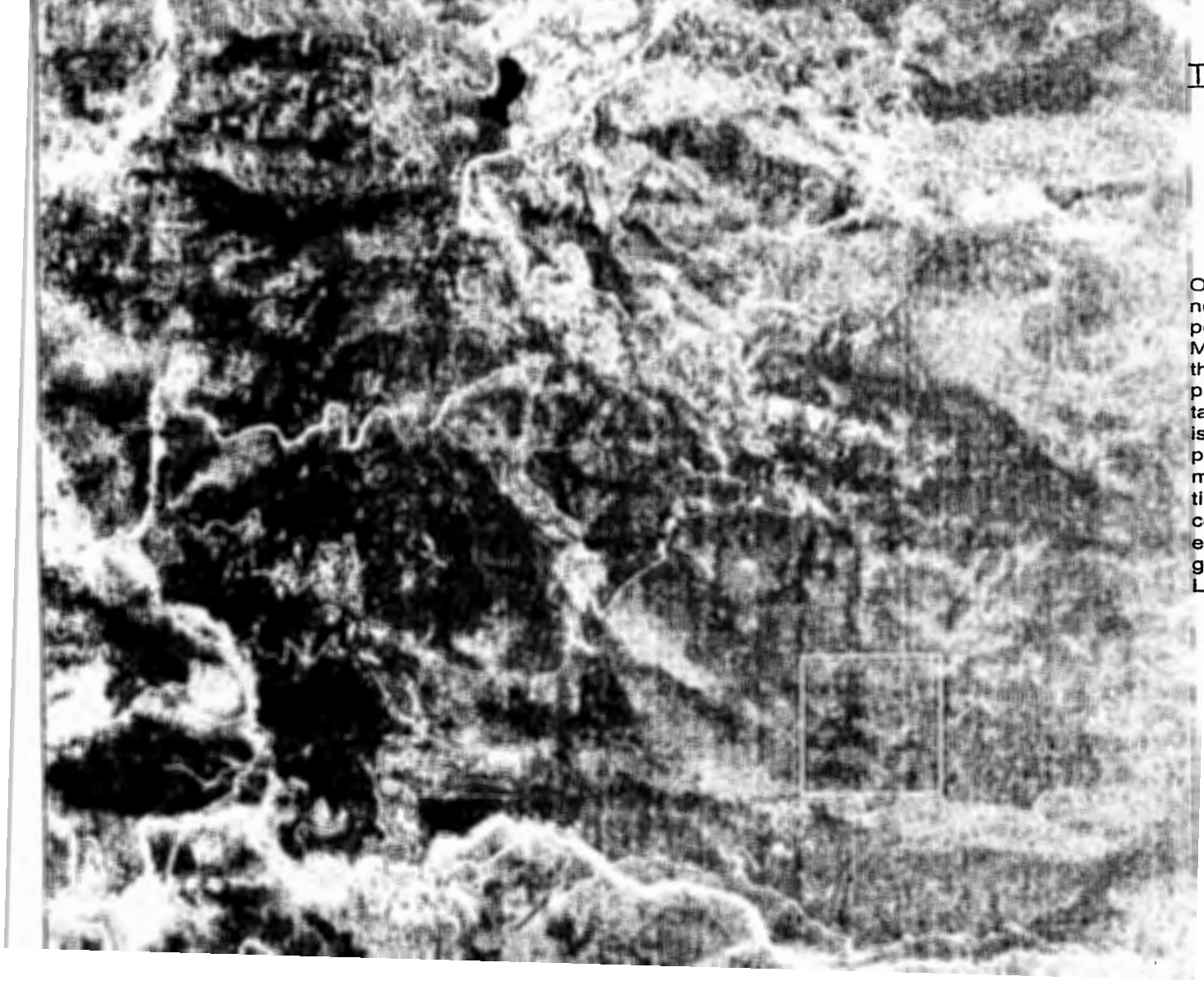
Steven G. Nelson
Consulting Biologist
24230 Delta Drive
Diamond Bar, CA 91765
Tel/Fax (909) 396-8478

attachment

MALIBU CALIFORNIA

PANORAMA RANCH

Property Assessment
and
Potential Use
4464-019-010-2
40.00 ± AC



THE SETTING:

Owning your own private ranch, nestled between the imposing peaks of the surrounding Santa Monica Mountains, represents the ultimate real estate accomplishment. The tranquil mountain setting of Panorama Ranch is private yet accessible. The property is romantic with grassy meadows, exposed rock formations and natural vegetation consisting of chaparral, large evergreen shrubs, low growing grasses and graceful California Live Oaks.

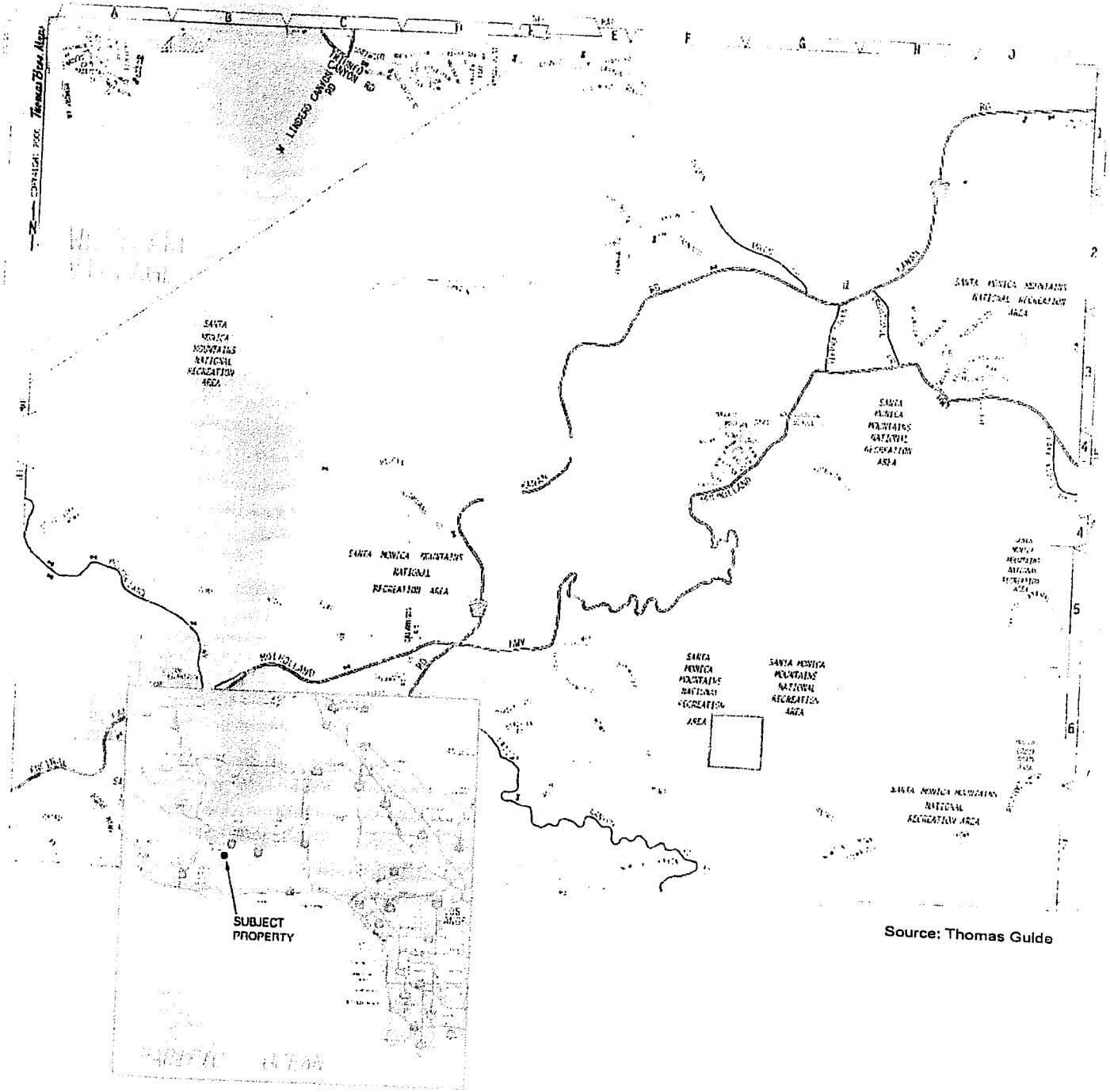
EXHIBIT A:
Easement Deeds

Access road towards property.

Access road towards property.

DEER VALLEY RANCH

Property Assessment
and
Potential Use
4464-019-008
40.00± AC (Existing Parcel)
26.00± AC (After Lot Line Adjustment)



Source: Thomas Guide

VICINITY INFORMATION:

With 40 acres of land (26 acres after Lot Line Adjustment with parcel 4464-019-005) Deer Valley Ranch sits nestled between Federal Recreation Area lands and Mulholland Highway. The property has an existing dirt road access from Mulholland Highway that provides the property with a direct link, via Kanan Road, to Highway 101 located approximately 4 miles to the North.

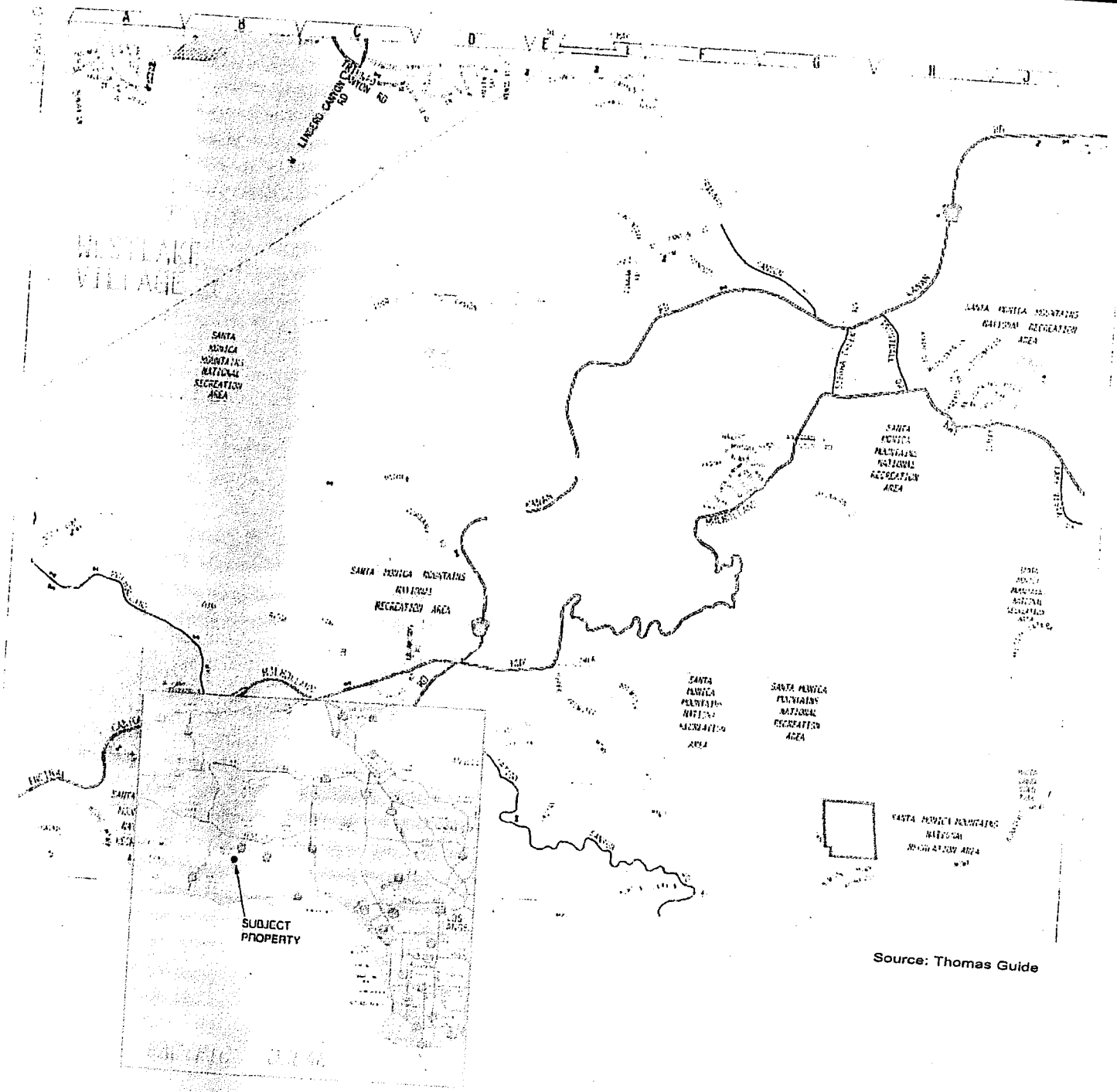
None of the adjacent properties to Deer Valley Ranch are developed. To the east and southeast the property is proximal to Malibu Creek State Park and the Federally owned lands of Castro Crest within the Santa Monica Mountains National Recreation Area.

The property is situated close to the population and commercial mass of Los Angeles County, yet remains pristine and offers a wilderness experience.

MEADOWLANDS RANCH

Property Assessment
and
Potential Use
4464-022-010
44.58 ± AC

MALIBU CALIFORNIA



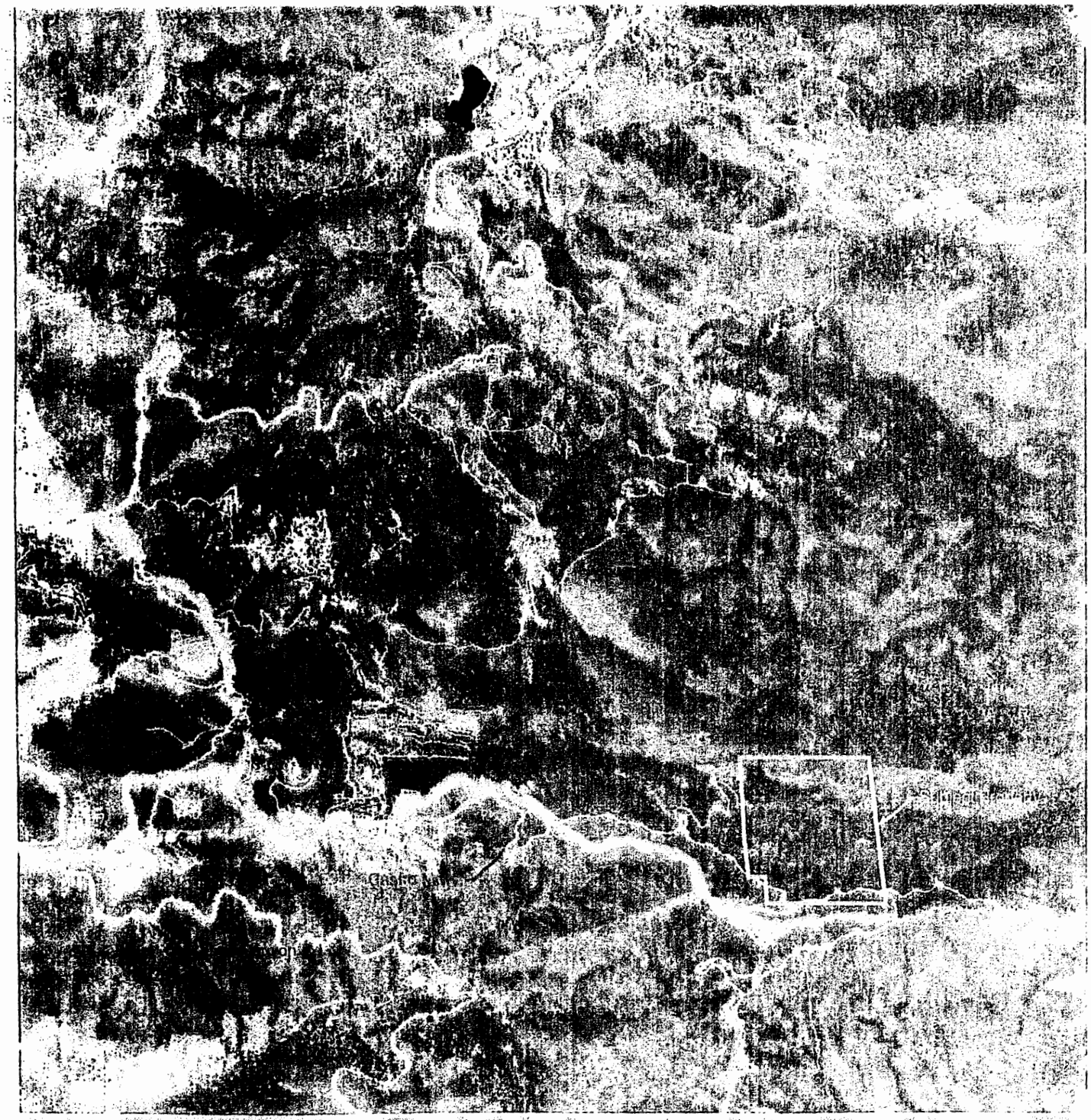
Source: Thomas Guide

VICINITY INFORMATION:

With 44 acres of land Meadowlands Ranch sits nestled between Federal Recreation Area lands and Mulholland Highway. The property has an existing dirt road access that provides the property with a direct link, via Kanan Road, to Highway 101 located approximately 4 miles to the North.

None of the adjacent properties to Meadowlands Ranch are developed. To the east and southeast the property is proximal to Malibu Creek State Park and the Federally owned lands of Castro Crest within the Santa Monica Mountains National Recreation Area.

The property is situated close to the population and commercial mass of Los Angeles County, yet remains pristine and offers a wilderness experience.



THE SETTING:

Owning your own private ranch, nestled between the imposing peaks of the surrounding Santa Monica Mountains, represents the ultimate real estate accomplishment. The tranquil mountain setting of Meadowlands Ranch is private yet accessible. The 44 acre ranch is currently accessed by Castro Motorway. The property is romantic with grassy meadows, exposed rock formations and natural vegetation consisting of chaparral, large evergreen shrubs, low growing grasses and graceful California Live Oaks.

MEADOWLANDS RANCH

MALIBU CALIFORNIA

STATE OF CALIFORNIA—THE RESOURCES AGENCY

GRAY DAVIS, GOVERNOR

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400

HAND DELIVERED

May 8, 2003

Mr. James A. Kay Jr.
LT-WR, LLC
1953 Latigo Canyon Road
Malibu, CA 90265

Subject:	**Notice Prior to Issuance of Executive Director Cease and Desist Order for Violation No. V-4-03-018**
Location:	Santa Monica Mountains, unincorporated area of Los Angeles County, Between Castro Motorway and Mulholland Highway.
Violation Description:	Unpermitted removal of native coastal sage scrub vegetation, grading and construction of new roads.

Dear Mr. Kaye:

The purpose of this letter is to notify you of my intent, as the Executive Director of the California Coastal Commission ("Commission"), to issue an Executive Director Cease and Desist Order to you pursuant to Section 30809 of the Coastal Act to direct you, LT-WR, LLC, and all involved parties, to cease and desist from carrying out any unpermitted activities, which require a Coastal Development Permit ("CDP") under the Coastal Act, including any development consisting of construction activities and/or the use of the new roads, until this matter is resolved to the Executive Director's satisfaction. California Public Resources Code section 30809 specifically states:

> *(a) If the executive director determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) may require a permit from the commission without securing a permit or (2) may be inconsistent with any permit previously issued by the commission, the executive director may issue an order directing that person or governmental agency to cease and desist.*

Under this provision of the Coastal Act, the Executive Director may, after providing notice to the affected parties, issue the Executive Director Cease and Desist Order unless a "satisfactory" response is received. A "satisfactory" response is defined in the Commission's regulations to be one made in the manner and within the timeframe specified in the notice, and which either

provides information sufficient to demonstrate to the Executive Director's satisfaction that either (1) the requirements of Section 30809 of the Coastal Act are not met, or that you are not responsible for the activity, or (2) provides all information requested, results in immediate and complete cessation of all work on the project, and includes an agreement (followed by actions which fully carry out the agreement) to comply in the manner and within the timeframe specified in the notice with any request to undertake measures to prevent irreparable injury to the area. (See CCR § 13180).

The unpermitted development is located between Castro Motorway and Mulholland Highway in the unincorporated Santa Monica Mountains of Los Angeles County. The unpermitted development has occurred on all or some of the following properties ("subject properties") identified by Los Angeles County Assessor Parcel Number ("APN") :

- Los Angeles County APN 4464-019-007
- Los Angeles County APN 4464-019-008
- Los Angeles County APN 4464-019-010
- Los Angeles County APN 4464-019-900
- Los Angeles County APN 4464-019-901
- Los Angeles County APN 4464-022-001
- Los Angeles County APN 4464-022-010
- Los Angeles County APN 4464-022-013
- Los Angeles County APN 4464-022-014
- Los Angeles County APN 4464-022-045
- Los Angeles County APN 4464-022-902
- Los Angeles County APN 4464-022-903

Section 30809(a) of the California Coastal Act (Division 20 of the Public Resource Code) states the following:

> *If the executive director determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) may require a permit from the commission without securing a permit or (2) may be inconsistent with any permit previously issued by the commission, the executive director may issue an order directing that person or governmental agency to cease and desist...*

Development under the Coastal Act is defined in Section 30106 to include:

> *the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the*

intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511).

The unpermitted construction of roads and removal of native vegetation on the property constitutes development that requires a coastal development permit ("CDP"). The Executive Director Cease and Desist Order will direct you to cease and desist from undertaking any construction activities without a coastal development permit or permit amendment, using the roads without a coastal development permit or permit amendment, or performing or maintaining any development that is inconsistent with the Permit or with the Coastal Act.

Executive Director Cease and Desist Order Process

Section 30809(b) of the Coastal Act states the following:

> *The cease and desist order shall be issued only if the person or agency has failed to respond in a satisfactory manner to an oral notice given in person or by telephone, followed by a written confirmation, or a written notice given by certified mail or hand delivered to the landowner or the person performing the activity.*

Section 13180(a) of Title 14 of the California Code of Regulations defines the term "satisfactory manner" with regard to Section 30809(b) of the Coastal Act as being, in part, "a response which is made in the manner and within the timeframe specified in the notice." **To prevent the issuance of the Executive Director Cease and Desist Order, you must confirm the following by telephone by close of business on Friday, May 9, 2003, and must also submit an appropriate response by facsimile, followed by hard copy sent via U.S. Mail Service, no later than 5:00 p.m., Monday, May 12, 2003, including a letter of agreement, which unequivocally states:**

1. that no further unpermitted development, including construction activity will occur until Commission staff has stated in writing that construction activities may resume; and
2. that no use of the unpermitted roads will occur unless and until such time as such use were to be legally authorized by the Commission.

The Executive Director Cease and Desist Order may be subject to such terms and conditions as the Executive Director may determine are necessary to avoid irreparable injury to any area within the jurisdiction of the Commission, pending action by the Commission under Section 30810 (which grants the Commission the authority to issue Cease and Desist Orders). The Executive Director Cease and Desist Order shall be effective upon its issuance. An Executive Director Cease and Desist Order issued pursuant to Section 30809 of the Coastal Act shall become null and void 90 days after issuance and may be followed up by a Cease and Desist

Order or Restoration Order issued by the Commission pursuant to Section 30810 of the Coastal Act, which will have a longer effective period. Violations of Executive Director Cease and Desist Orders may give rise to penalties under Section 30821.6 of the Coastal Act (up to $6,000 per day) and Section 30822, in addition to other fines and remedies available under the Coastal Act.

If you have any questions regarding this letter or the enforcement case, please call Tom Sinclair at (805) 585-1800 or send correspondence to the attention of Mr. Sinclair at 89 South California Street, Suite 200; Ventura, CA 93001.

Sincerely,

for S. Hudson

Peter Douglas
Executive Director

cc: Don Schmitz
Tom Sinclair, Enforcement Officer, CCC
Charles Damm, Chief Deputy Director, CCC
Gary Timm, District Manager, CCC
Lisa Haage, Chief of Enforcement, CCC
Steven Hudson, Enforcement Supervisor, CCC
Sandy Goldberg, Staff Counsel, CCC

SCHMITZ & ASSOCIATES INC

May 12, 2003

Via Facsimile and Certified Mail

Steve Hudson
Enforcement Supervisor
South Central Coast Area Office
89 South California Street, Suite 200
Ventura, CA 93001

RE: Violation No. 4-03-018

Dear Mr. Hudson:

This letter serves as our response to the *Notice Prior to Issuance of Executive Director Cease and Desist Order* ("Notice") hand delivered to the property owner and his attorney on May 8, 2003, following a site visit to the parcels in question. In the upcoming weeks, pursuant to your request, we intend to provide you with a topographic map which delineates the location of the roads inspected on May 8th, along with documentation that the alleged unpermitted construction of said roads was in fact repair and maintenance of *existing roads*.

With respect to the subject parcels, we wish to advise you that of the 12 parcels listed in the Notice, only five belong to the property owner and his LLCs (APNs 4464-019-008, 4464-019-010, 4464-022-001, 4464-022-010, and 4464-022-014). The remaining 7 listed parcels either belong to the National Park Service or to other landowners; in addition, the property owner and his LLCs are and have always been very clear as to the boundaries of their properties and thus refute any allegations that they have conducted any development activity on these parcels belonging to NPS and other owners.

As we advised you upon receipt of the Notice on May 8th, and in a follow-up message placed by Schmitz & Associates in your voice mailbox on May 9, 2003, all repair and maintenance work to the inspected roads located in the subject parcels has ceased and will not resume until this matter has been resolved. However, we object to any enforcement action—including the prohibition of the use of these existing roads for which simple repair and maintenance activity has been conducted—against the five subject parcels until we have had a reasonable opportunity to demonstrate to you that the roads were existing roads. In addition, because the Notice merely refers to "unpermitted roads," which could refer to the network of existing roads and trails throughout these parcels, including those on which no brush clearance or maintenance activity has taken

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place, we respectfully request that Coastal enforcement staff clearly define which roads or trails they are requesting the property owner not use.

In response to the allegation that construction activity has occurred on these roads, we intend to demonstrate that for parcels 4464-019-010, 4464-022-001, -010, and –014, any activity constituted mere repair and maintenance work which is exempt (pursuant to §30610(b) and (d) of the Coastal Act) from Coastal Development Permit requirements. As we communicated to you during the May 8th site visit, we will be filing an application for a Coastal Development Permit for the grading activity on any portions of the subject road in the parcel identified as APN 4464-019-008 and within the Coastal Zone. Because the Coastal Zone boundary appears to cut through the northwest corner of this parcel, we will be seeking a boundary determination for this parcel to establish the Coastal Commission's jurisdiction with respect to the roads in question.

Please do not hesitate to contact us should you have any questions. We are hopeful that you will find this response satisfactory to the demands stated in the Notice. Thank you for your consideration of this matter and we look forward to working with you in resolving these issues.

Sincerely,
SCHMITZ & ASSOCIATES, INC.

Donna Shen

Donna Shen
Senior Planner

XC: James Kay
Fred Gaines, Esq.
Rebecca Thompson, Esq.
Jack Ainsworth, Supervisor of Planning and Regulation, CCC
Tom Sinclair, Enforcement Officer, CCC

May 13, 2003

Via Facsimile and Certified Mail

Steve Hudson
Enforcement Supervisor
South Central Coast Area Office
89 South California Street, Suite 200
Ventura, CA 93001

RE: Violation No. 4-03-018 (Supplement to 5-12-03 letter from Schmitz & Associates, Inc.)

Dear Mr. Hudson:

Pursuant to our telephone conversation earlier this afternoon, we are submitting this correspondence on behalf of the property owners of the parcels subject to the above-referenced violation. Upon conclusion of our conversation, I spoke with Mr. James Kay who confirmed what I had already conveyed to you: pursuant to Mr. Kay's orders, all use of and work on the inspected roads has ceased (pending resolution of this matter) since May 8, 2003, the date of your inspection and hand delivery of the *Notice Prior to Issuance of Executive Director Cease and Desist Order* ("Notice").

Although we intend to present you with documentation of the property owners' vested right in maintaining the existing roads, the property owners have taken the Notice seriously. Having reviewed the Coastal Act for themselves, they understand the ramifications of non-compliance with the Notice. Therefore, we wish to reiterate that all use of and work on the inspected roads has ceased and will not resume until this matter has been resolved. As you have advised me that we must convince you of this statement, we will be providing you with declarations from Mr. Kay and his field supervisor verifying these assertions under the penalty of perjury.

As you indicated that you have received reports of continued use of and work on the subject roads since May 8, 2003, we request that any such claims be supported by verifiable documentation. Furthermore, we wish to remind you that we cannot control the use of these roads by persons not in the property owners' employ.

We wish to also advise you that Los Angeles County Building & Safety Inspector Kevin Petrowksi conducted an unexpected site visit this afternoon to view the same roads that you viewed last Thursday, as well as an additional 2 parcels (APN 4464-018-013 and

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–014) located off of Mulholland Highway (which are outside of the Coastal Zone but over which you expressed concerns). Mr. Petrowski gave us a "clean bill of health" for all of the roads, except the one located on APN 4464-019-008 (which is the road for which we intend to apply for an after-the-fact Coastal Development Permit). You may contact Mr. Petrowski at (818) 880-4150 at your convenience.

Section 30809(b) of the Coastal Act provides that a cease and desist order will be issued *only if* the property owner or his agency has failed to respond in a satisfactory manner to a Notice. Section 13180(a) of Title 14 of the California Code of Regulations defines the term "satisfactory manner" with regard to Section 30809(b) as being, in part, "a response which is made in the manner and within the timeframe specified in the notice." As we have "unequivocally state[d]" that all work on and use of the subject roads has ceased pursuant to the terms of the Notice, we are in full compliance with the requirement of Section 30809(b).

Please feel free to contact us should you have any additional questions or comments. Thank you for your thoughtful consideration of this matter.

Sincerely,
SCHMITZ & ASSOCIATES, INC.

Donna Shen

Donna Shen
Senior Planner

XC: James Kay
Fred Gaines, Esq.
Rebecca Thompson, Esq.
Jack Ainsworth, Supervisor of Planning and Regulation, CCC
Tom Sinclair, Enforcement Officer, CCC

RECEIVED
SOUTH CENTRAL COAST DISTRICT

May 15, 2003

Steve Hudson
Enforcement Supervisor
South Central Coast Area Office
89 South Central Street, Suite 200
Ventura, Ca 93001

Re: Violation No. 4-03-018

Dear Mr. Hudson,

The following correspondence is prepared on behalf of and at the request of Schmitz & Associates, Inc. [hereinafter "Schmitz"] to address a "Notice Prior to Issuance of Executive Director Cease and Desist Order for Violation No. V-4-03-018" dated May 8, 2003, and issued, by hand-delivery, [hereinafter "Notice"] to their client, Mr. James Kay Jr., a Partner in the Limited Liability Corporations (LLCs) of record ownership of the subject parcels [hereinafter "Kay"].

The executive director of the California Coastal Commission has provided written notice of the intent to issue a cease and desist order pursuant to Section 30809 of Public Resources Code (hereinafter "Coastal Act"). The Notice alleges that there has been unpermitted removal of native coastal sage scrub vegetation, grading and construction of new roads "on all or some of the following properties"[1]:

APN 4464-019-007
APN 4464-019-008
APN 4464-019-010
APN 4464-019-900
APN 4464-019-901
APN 4464-022-001
APN 4464-022-010
APN 4464-022-013
APN 4464-022-014
APN 4464-022-045
APN 4464-022-902
APN 4464-022-903

[1] The properties highlighted in bold are the only properties in which Mr. Kay, or LLC's of which he is a member, have ownership interest.

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The Notice directs Kay to "cease and desist from carrying out any unpermitted activities, which require a Coastal Development Permit under the Coastal Act, including any development consisting of construction activities and/or the use of new roads."

I. Basis for Issuance of a Cease and Desist Order is Deficient

Section 30809(a) of the Coastal Act provides that the director may issue a cease and desist order "if the executive director **determines** that [a person] has undertaken, or is threatening to undertake, any activity that (1) may require a permit from the commission without securing a permit." (Emphasis added). The Notice alleges that there has been unpermitted removal of native coastal sage scrub vegetation, grading and construction of new roads **on all or some** of 12 properties located in Los Angeles County[2].

The basis for concluding and arriving at a determination that unpermitted development has been threatened or undertaken on each of the 12 named properties is uncertain and thus, open to question on the following grounds:

(1) It is uncertain on how a **determination** can be made by the executive director with respect to each and every one of the 12 listed properties given the statement in the Notice that "unpermitted development has occurred "on all or some" of the 12 listed properties. The plain meaning of the statement is that it is not known by the executive director whether or not the alleged unpermitted development has occurred on each and every one of the 12 named properties. Clearly, if it is only "some", it is not all. To proceed with a cease and desist order directed at all twelve properties without a separate determination that unpermitted development has been threatened or undertaken as to each and every property exceeds the authority of the executive director pursuant to Section 30809(a). Cease and desist orders are a powerful enforcement tool and cannot be issued based upon tentative and indeterminate statements.

(2) Further undermining the credibility of the determination- seven of the twelve named properties in the Notice are not owned by Mr. Kay, or LLC's of which he is a member. The following properties are owned either by the National Park Service, or other individuals or organizations.

APN 4464-019-007
APN 4464-019-900
APN 4464-019-901
APN 4464-022-013
APN 4464-022-045
APN 4464-022-902
APN 4464-022-903

(3) The property identified as APN 4464-019-008 is traversed by the Coastal Zone Boundary. It has yet to be established which portion of the property, as well as which if any of the alleged roads, is subject to Coastal Commission jurisdiction.

[2] The complete list as derived from the Notice is provided in the introduction herewith.

Coastal Enforcement Supervisor Steve Hudson has represented to Schmitz and Associates, Inc. that they will have to review the boundary vis-à-vis the listed parcels.

The Court of Appeal recently held in Sierra Club v. California Coastal Commission,[3] that the Commission cannot consider impacts outside of the Coastal Zone, even if the project straddles the Coastal Zone Boundary.

Thus, until such time as a boundary determination is made, and a description of the unpermitted activity and its location on the subject property, a determination cannot be made as to whether there has been unpermitted development in violation of the Coastal Act on this property. Should a determination be made that activity occurred on this parcel within the Coastal Zone, Kay will apply for an after-the-fact permit to address any activity that required a coastal development permit.

(4) All repair and maintenance work to the inspected roads shown to Commission staff during the site visit of May 8, 2003 with Jack Ainsworth, Supervisor of Planning and Regulation, Steve Hudson, Enforcement Supervisor, and Tom Sinclair, Enforcement Officer, with the exception of the road within parcel 4464-019-008 is exempt from the coastal development permit requirements pursuant to Section 30610 of the Coastal Act and Section 13252 of the California Code of Regulations.

It was stated in the correspondence dated May 12, 2003 from Schmitz to the Commission, in response to the Notice, that Mr. Kay intends to provide a topographic map which delineates the location of the roads inspected on May 8, 2003, along with documentation that the roads were existing, pre-coastal, and do not constitute development of new roads.

It is not only pre-mature, but hasty and unwarranted for the executive director to proceed with the cease and desist order at this time given the uncertainty and deficiencies in the Notice with respect to the named properties, and questions concerning whether or not the alleged activity is subject to a coastal development permit or exempt. Mr. Kay wishes to resolve these issues and will provide the executive director with the information required to make a fully informed determination as to whether the alleged activities require a permit from the Commission. A determination cannot justifiably be made at this time that unpermitted development in violation of the Coastal Act has occurred on the listed properties as provided for in the Notice.

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[3] Court of Appeal of California, First District Division Five, A100194 (Cal.App.4th 2003), Modified May 9, 2003.

II. Prerequisites to Issuance of a Cease and Desist Order Have Not Been Satisfied.

A. Notice

Section 30809(b) of the Coastal Act and Section 13181(a) of the CCR provide the statutory noticing requirements prior to issuance of a cease and desist order. The notice of intent to issue a cease and desist order shall include, at a minimum, names of those undertaking or threatening to undertake unpermitted activity, identification of the affected property, and a description of the unpermitted activity undertaken or threatened that may require a permit from the commission, "together with an explanation of the basis of the executive director's belief that the specified activity meets the criteria of section 30810(a)." CCR, Title 14, Div. 5.5, Ch. 5, Subch. 8, §13181(a).

The Notice describes the following as development that requires a coastal development permit: "construction of roads and removal of native vegetation on the property." The Notice provides Kay should cease and desist from construction activities with respect to the alleged new roads, as well as use of said roads.

There are additional statements within the Notice referring generally to "construction activities" and "any unpermitted activities." In addition, there are general statements that Kay is to cease and desist from carrying out unpermitted activities. A description of these referenced activities is not provided. Given that Section 30809(b) of the Coastal Act and Section 13181(a) of the CCR specifically provide that the activity being addressed by the proposed cease and desist order must be described, it is our understanding that the only activity being addressed by the Notice is that specifically related to the alleged construction of roads and removal of native vegetation on the property, since these are the only activities described in the Notice. Given the enforcement nature of the Cease and Desist order and its repercussions, the activity from which an alleged violator must cease and desist should be clearly and specifically provided.

Of further note, the Notice also provides that Kay should cease and desist in the use of the roads. Use of the roads does not constitute an activity that requires a permit from the commission and thus is not subject to the cease and desist order pursuant to Section 30809(a) of the Coastal Act. Further, there has been historical and ongoing vehicular, pedestrian and equestrian use of the existing roads, constructed prior to Commission jurisdiction. Written clarification by the Commission staff is required as to what constitutes use, i.e. vehicular traffic, walking, horseback riding, how the particular uses of the road meets the criteria of Section 30809(a) of the Coastal Act, and what if any uses are subject to the Notice.

B. Response

Section 30809(b) of the Coastal Act provides that "the cease and desist shall be issued only if the person . . . has failed to respond in a satisfactory manner to . . . a written notice." (Emphasis added) 'Satisfactory Manner' "characterize[s] a response to a notice provided in accordance with the requirements of section 30809(b) of the Coastal Act. CCR, Title 14, Div. 5.5, Ch. 5, Subch. 8, §13180(a). 'Satisfactory Manner' means a response which is made in the manner and within the timeframe specified in the Notice and meets either of the following conditions, provided herewith in relevant part:

(1) Sufficient information is provided to demonstrate to the satisfaction of the executive direction that the activity specified in the notice does not meet the criteria of section 30809(a) of the Coastal Act;

(2) Provides all information concerning the activity requested by the notice, resultant in immediate and complete cessation of all work specified in the notice and includes an agreement by the recipients of the notice, followed by actions which fully carry out such agreement, to comply in the manner and within the timeframe specified in the notice.
CCR, Title 14, Div. 5.5, Ch. 5, Subch. 8, §13180(a) (1) and (2).

The Notice issued to Kay on May 8, 2003 states "to prevent the issuance of the Executive Director Cease and Desist Order, you must confirm the following...

1. That no further unpermitted development, including construction activity will occur until the Commission staff has stated in writing that construction activities may resume; and
2. That no use of the unpermitted roads will occur unless and until such time as such use were to be legally authorized by the Commission."

Kay has complied with the demand made by the executive director pursuant to the Notice, although the activity prohibited is not defined, the location of the activity is not accurately provided or delineated, and the demand exceeds the scope of the authority vested in the executive director by 30809(a) of the Coastal Act - the roads are existing, pre-coastal, a coastal development permit is not required for repair and maintenance, use is not defined, and the use of the roads does not constitute development.

All activities have ceased, including repair and maintenance work and use of the road. If there is any reported activity of use and activity, Kay has requested the documentation verifying any such reports, as he has ceased all activities. A clarification should be provided as to the use and degree of use, and activities so that Kay can address the concerns of the Commission

To date, Kay has taken the following steps to confirm the above statements:

- Upon receiving the Notice on May 8, 2003, Kay advised Mr. Steve Hudson, Mr. Jack Ainsworth and Mr. Tom Sinclair that he would direct his field crew to cease any work on the inspected roads.
- On May 9, 2003, Schmitz left a voice mail message for Mr. Hudson, once again affirming on behalf of Kay that all work on the inspected roads had been suspended.
- On May 12 and 13, 2003, Schmitz submitted via facsimile correspondence to Mr. Hudson, advising him once again that all work on the inspected roads had been suspended. In addition, all use of the roads had ceased with the exception of an inspection conducted with and at the request of Los Angeles County Building Inspectors on May 13, 2003. (Copies via Certified Mail to follow.)
- On May 14, 2003, Schmitz submitted via facsimile to Mr. Hudson declarations from Mr. Kay and his foreman Dale Jaureguy attesting under penalty of perjury that all work on the roads had ceased since May 8, 2003, and that with the exception of the May 13, 2003 LA County Building & Safety Inspection, all use of the roads also had been suspended.

As we have "unequivocally state[d]" that all work on and use of the subject roads has ceased pursuant to the terms of the Notice, the response was made in the manner and within the timeframes demanded, and Kay is in full compliance with the requirements of Section 30809(b) of the Coastal Act. Thus, Kay has responded in a satisfactory manner pursuant California Code of Regulations Section 13180(a)(2) and a cease and desist order should not be issued. Furthermore, the documentation to demonstrate that any activity constituted mere repair and maintenance works, which is exempt from coastal development permit requirements, is actively being compiled.

Sincerely,

Stephanie Dreckmann, Esq.

XC: James Kay
Fred Gaines, Esq.
Rebecca Thompson, Esq.
Jack Ainsworth, Supervisor of Planning and Regulation, CCC
Tom Sinclair, Enforcement Officer, CCC

SCHMITZ & ASSOCIATES INC

June 23, 2003

Via Hand Delivery and Facsimile

Steve Hudson
Enforcement Supervisor
South Central Coast District Office
California Coastal Commission
89 South California Street, Suite 200
Ventura, CA 93001

RE: Violation No. 4-03-018

Dear Mr. Hudson:

This correspondence is prepared on behalf of and at the request of Schmitz & Associates, Inc. [hereinafter "Schmitz"] to address the above-referenced violation, and as a follow-up to a May 15, 2003 letter addressed to you (enclosed), in which clarification was requested, and concerns and objections were raised with the *Notice Prior to Issuance of Executive Director Cease and Desist Order* [hereinafter "Notice"].[1] In spite of Schmitz's repeated requests (via telephone messages and letters) for clarification of prohibited actions outlined in the Notice and the May 15, 2003 letter, Schmitz has not received any form of communication from Coastal staff on this matter since the issuance of the Notice.

The LLC's of record ownership endeavor to provide information to the executive director so that an informed determination can be made as to: (1) whether the alleged activities constitute development under the Coastal Act; and/or (2) whether the alleged activities are subject to a coastal development permit or exempt from permitting requirements. To that end, the LLC's of record ownership have retained the services of Steve G. Nelson, Consulting Biologist, to provide a biological assessment in response to the "Notice Prior To Issuance of Executive Director Cease and Desist Order for Violation No. V-4003-018".

[1] As you recall, this pre-prepared Notice was issued by hand delivery to their client, Mr. James Kay, Jr., a Partner in the Limited Liability Corporations (LLCs) of record ownership of the subject parcels, promptly upon the conclusion of a site visit conducted with Coastal staff on May 8, 2003

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I. Pursuant to the biologist's findings and recommendations, there has been no resource damage to warrant the Notice or Violation citation.

According to the Notice's description of the alleged violation, there was "unpermitted removal of native coastal scrub vegetation, grading and construction of new roads." In our May 15 correspondence, we, among other things, challenged the basis for concluding and arriving at a determination that unpermitted development has been threatened or undertaken.

On June 11, 2003, Mr. Nelson conducted a site visit and prepared a corresponding report. He did not observe any significant damage to biological resources. Mr. Nelson concluded that the perception and assertion by the California Coastal Commission that there has been "unpermitted removal of native coastal sage scrub vegetation, grading and construction of new roads" is incorrect. In summary, he notes as follows:

- The biological basis of the violation/Notice—i.e. removal of a sensitive vegetation type—is incorrect;
- The repair and maintenance activity of the roads in question have <u>not</u> damaged biological or wildlife resources; on the contrary, Mr. Nelson concludes that the vegetation through which the roads pass is non-sensitive, mixed chaparral, and the "roads through habitat areas are necessarily beneficial to wildlife;"
- The chipping and spreading of chipped brush is beneficial to the resources as this activity effectively controls erosion and deters the growth of invasive plants; and
- As the roads all appear to have been originally graded many years ago and a stable roadbed is in place, the continued use of the roads for light vehicular travel, hiking, biking and riding are not expected to create any damage to biological resources.

II. Pursuant to the biologist's findings and recommendations, property owners intend to resume use, and repair and maintenance activities of the subject roads.

The LLCs of record ownership of the subject parcels have complied with the terms of the Notice to date notwithstanding their written objections to the basis of said Notice. One of these objections related to the prohibition against any "use of the unpermitted roads until such time as such use were to be legally authorized by the Commission" (page 3 of the Notice). To date there has been no response to the requested clarifications or objections raised by the LLCs of record ownership with respect to the breadth, and jurisdiction of the California Coastal Commission. As the subject parcels are covered in dense vegetation, the roads provide the only means of access to the subject parcels. Thus, to prohibit use of the roads is to prohibit the LLCs from feasible and reasonable access to their properties.

Furthermore, the alleged repair and maintenance work of existing roads[2] is exempt from coastal development permit requirements pursuant to section 30610 of the Coastal Act and section 13252 of the California Code of Regulation, and the use of the existing roads does not constitute "development" pursuant to section 30610 of the Coastal Act.

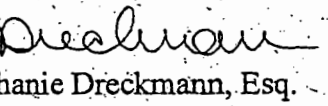
III. Conclusion

The LLCs of record ownership have fully complied with and responded to the Notice in order to address the issues raised in the Notice pursuant to various correspondences, including the May 15, 2003 correspondence. In furtherance of its effort to cooperate and comply with the Notice, the LLCs of record ownership hired the services of a biologist to conduct a site visit and prepare a report. The biologist's report supports the contention and objections raised in the May 15, 2003 correspondence that Notice is deficient, vague and overbroad.

The Notice lists properties outside of the California Coastal Commission's jurisdiction, and asserts alleged unpermitted activity that is either inaccurate, exempt, or outside of the jurisdiction of the California Coastal Commission. The LLCs of record ownership requested further clarification as to the properties and activities subject to the Notice in the correspondence dated May 15, 2003. To date, no response has been forthcoming.

We hereby demand a response in writing to our May 15, 2003 correspondence by Monday, June 30, 2003 at 5 p.m.. Should a response not be forthcoming we will assume that the foregoing and enclosed addresses the Notice and the executive director's concerns, and that no further action on the part of the California Coastal Commission is forthcoming. Additionally, should the LLCs of record ownership or its designated agents not be informed otherwise, the LLCs will initiate limited vegetation removal as required for repair and maintenance of the existing roads, as these activities do not constitute construction activities requiring legal authorization by the California Coastal Commission. Please provide any response or objections in writing as soon as possible so that the LLCs of record ownership can evaluate their legal position and options.

Sincerely,



Stephanie Dreckmann, Esq.

Xc: James Kay
Fred Gaines, Esq.
Rebecca Thompson, Esq.
Jack Ainsworth, Supervisor of Planning and Regulation, CCC
Tom Sinclair, Enforcement Officer, CCC

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[2] The parcel identified as APN 4464-019-008 is the exception; as we have previously advised Coastal staff, we are presently compiling our application for a Los Angeles County grading permit and a Coastal Development Permit.

SCHMITZ ASSOCIATES INC.

RECEIVED
MAY 15 2003
CALIFORNIA
COASTAL COMMISSION
SOUTH CENTRAL COAST DISTRICT

May 15, 2003

Steve Hudson
Enforcement Supervisor
South Central Coast Area Office
89 South Central Street, Suite 200
Ventura, Ca 93001

Re: Violation No. 4-03-018

Dear Mr. Hudson,

The following correspondence is prepared on behalf of and at the request of Schmitz & Associates, Inc. [hereinafter "Schmitz"] to address a "Notice Prior to Issuance of Executive Director Cease and Desist Order for Violation No. V-4-03-018" dated May 8, 2003, and issued, by hand-delivery, [hereinafter "Notice"] to their client, Mr. James Kay Jr., a Partner in the Limited Liability Corporations (LLCs) of record ownership of the subject parcels [hereinafter "Kay"].

The executive director of the California Coastal Commission has provided written notice of the intent to issue a cease and desist order pursuant to Section 30809 of Public Resources Code (hereinafter "Coastal Act"). The Notice alleges that there has been unpermitted removal of native coastal sage scrub vegetation, grading and construction of new roads "on all or some of the following properties"[1]:

APN 4464-019-007
APN 4464-019-008
APN 4464-019-010
APN 4464-019-900
APN 4464-019-901
APN 4464-022-001
APN 4464-022-010
APN 4464-022-013
APN 4464-022-014
APN 4464-022-045
APN 4464-022-902
APN 4464-022-903

[1] The properties highlighted in bold are the only properties in which Mr. Kay, or LLC's of which he is a member, have ownership interest.

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The Notice directs Kay to "cease and desist from carrying out any unpermitted activities, which require a Coastal Development Permit under the Coastal Act, including any development consisting of construction activities and/or the use of new roads."

I. Basis for Issuance of a Cease and Desist Order is Deficient

Section 30809(a) of the Coastal Act provides that the director may issue a cease and desist order "if the executive director **determines** that [a person] has undertaken, or is threatening to undertake, any activity that (1) may require a permit from the commission without securing a permit." (Emphasis added). The Notice alleges that there has been unpermitted removal of native coastal sage scrub vegetation, grading and construction of new roads **on all or some** of 12 properties located in Los Angeles County[2].

The basis for concluding and arriving at a determination that unpermitted development has been threatened or undertaken on each of the 12 named properties is uncertain and thus, open to question on the following grounds:

(1) It is uncertain on how a **determination** can be made by the executive director with respect to each and every one of the 12 listed properties given the statement in the Notice that "unpermitted development has occurred "on all or some" of the 12 listed properties. The plain meaning of the statement is that it is not known by the executive director whether or not the alleged unpermitted development has occurred on each and every one of the 12 named properties. Clearly, if it is only "some", it is not all. To proceed with a cease and desist order directed at all twelve properties without a separate determination that unpermitted development has been threatened or undertaken as to each and every property exceeds the authority of the executive director pursuant to Section 30809(a). Cease and desist orders are a powerful enforcement tool and cannot be issued based upon tentative and indeterminate statements.

(2) Further undermining the credibility of the determination- seven of the twelve named properties in the Notice are not owned by Mr. Kay, or LLC's of which he is a member. The following properties are owned either by the National Park Service, or other individuals or organizations.

APN 4464-019-007
APN 4464-019-900
APN 4464-019-901
APN 4464-022-013
APN 4464-022-045
APN 4464-022-902
APN 4464-022-903

(3) The property identified as APN 4464-019-008 is traversed by the Coastal Zone Boundary. It has yet to be established which portion of the property, as well as which if any of the alleged roads, is subject to Coastal Commission jurisdiction.

[2] The complete list as derived from the Notice is provided in the introduction herewith.

Coastal Enforcement Supervisor Steve Hudson has represented to Schmitz and Associates, Inc. that they will have to review the boundary vis-à-vis the listed parcels.

The Court of Appeal recently held in Sierra Club v. California Coastal Commission,[3] that the Commission cannot consider impacts outside of the Coastal Zone, even if the project straddles the Coastal Zone Boundary.

Thus, until such time as a boundary determination is made, and a description of the unpermitted activity and its location on the subject property, a determination cannot be made as to whether there has been unpermitted development in violation of the Coastal Act on this property. Should a determination be made that activity occurred on this parcel within the Coastal Zone, Kay will apply for an after-the-fact permit to address any activity that required a coastal development permit.

(4) All repair and maintenance work to the inspected roads shown to Commission staff during the site visit of May 8, 2003 with Jack Ainsworth, Supervisor of Planning and Regulation, Steve Hudson, Enforcement Supervisor, and Tom Sinclair, Enforcement Officer, with the exception of the road within parcel 4464-019-008 is exempt from the coastal development permit requirements pursuant to Section 30610 of the Coastal Act and Section 13252 of the California Code of Regulations.

It was stated in the correspondence dated May 12, 2003 from Schmitz to the Commission, in response to the Notice, that Mr. Kay intends to provide a topographic map which delineates the location of the roads inspected on May 8, 2003, along with documentation that the roads were existing, pre-coastal, and do not constitute development of new roads.

It is not only pre-mature, but hasty and unwarranted for the executive director to proceed with the cease and desist order at this time given the uncertainty and deficiencies in the Notice with respect to the named properties, and questions concerning whether or not the alleged activity is subject to a coastal development permit or exempt. Mr. Kay wishes to resolve these issues and will provide the executive director with the information required to make a fully informed determination as to whether the alleged activities require a permit from the Commission. A determination cannot justifiably be made at this time that unpermitted development in violation of the Coastal Act has occurred on the listed properties as provided for in the Notice.

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[3] Court of Appeal of California, First District Division Five, A100194 (Cal.App.4th 2003), Modified May 9, 2003.

II. Prerequisites to Issuance of a Cease and Desist Order Have Not Been Satisfied.

A. Notice

Section 30809(b) of the Coastal Act and Section 13181(a) of the CCR provide the statutory noticing requirements prior to issuance of a cease and desist order. The notice of intent to issue a cease and desist order shall include, at a minimum, names of those undertaking or threatening to undertake unpermitted activity, identification of the affected property, and a description of the unpermitted activity undertaken or threatened that may require a permit from the commission, "together with an explanation of the basis of the executive director's belief that the specified activity meets the criteria of section 30810(a)." CCR, Title 14, Div. 5.5, Ch. 5, Subch. 8, §13181(a).

The Notice describes the following as development that requires a coastal development permit: "construction of roads and removal of native vegetation on the property." The Notice provides Kay should cease and desist from construction activities with respect to the alleged new roads, as well as use of said roads.

There are additional statements within the Notice referring generally to "construction activities" and "any unpermitted activities." In addition, there are general statements that Kay is to cease and desist from carrying out unpermitted activities. A description of these referenced activities is not provided. Given that Section 30809(b) of the Coastal Act and Section 13181(a) of the CCR specifically provide that the activity being addressed by the proposed cease and desist order must be described, it is our understanding that the only activity being addressed by the Notice is that specifically related to the alleged construction of roads and removal of native vegetation on the property, since these are the only activities described in the Notice. Given the enforcement nature of the Cease and Desist order and its repercussions, the activity from which an alleged violator must cease and desist should be clearly and specifically provided.

Of further note, the Notice also provides that Kay should cease and desist in the use of the roads. Use of the roads does not constitute an activity that requires a permit from the commission and thus is not subject to the cease and desist order pursuant to Section 30809(a) of the Coastal Act. Further, there has been historical and ongoing vehicular, pedestrian and equestrian use of the existing roads, constructed prior to Commission jurisdiction. Written clarification by the Commission staff is required as to what constitutes use, i.e. vehicular traffic, walking, horseback riding, how the particular uses of the road meets the criteria of Section 30809(a) of the Coastal Act, and what if any uses are subject to the Notice.

B. Response

Section 30809(b) of the Coastal Act provides that "the cease and desist shall be issued only if the person . . . has failed to respond in a satisfactory manner to . . . a written notice." (Emphasis added) 'Satisfactory Manner' "characterize[s] a response to a notice provided in accordance with the requirements of section 30809(b) of the Coastal Act. CCR, Title 14, Div. 5.5, Ch. 5, Subch. 8, §13180(a). 'Satisfactory Manner' means a response which is made in the manner and within the timeframe specified in the Notice and meets either of the following conditions, provided herewith in relevant part:

(1) Sufficient information is provided to demonstrate to the satisfaction of the executive direction that the activity specified in the notice does not meet the criteria of section 30809(a) of the Coastal Act;

(2) Provides all information concerning the activity requested by the notice, resultant in immediate and complete cessation of all work specified in the notice and includes an agreement by the recipients of the notice, followed by actions which fully carry out such agreement, to comply in the manner and within the timeframe specified in the notice.
CCR, Title 14, Div. 5.5, Ch. 5, Subch. 8, §13180(a) (1) and (2).

The Notice issued to Kay on May 8, 2003 states "to prevent the issuance of the Executive Director Cease and Desist Order, you must confirm the following...

1. That no further unpermitted development, including construction activity will occur until the Commission staff has stated in writing that construction activities may resume; and
2. That no use of the unpermitted roads will occur unless and until such time as such use were to be legally authorized by the Commission."

Kay has complied with the demand made by the executive director pursuant to the Notice, although the activity prohibited is not defined, the location of the activity is not accurately provided or delineated, and the demand exceeds the scope of the authority vested in the executive director by 30809(a) of the Coastal Act - the roads are existing, pre-coastal, a coastal development permit is not required for repair and maintenance, use is not defined, and the use of the roads does not constitute development.

All activities have ceased, including repair and maintenance work and use of the road. If there is any reported activity of use and activity, Kay has requested the documentation verifying any such reports, as he has ceased all activities. A clarification should be provided as to the use and degree of use, and activities so that Kay can address the concerns of the Commission

To date, Kay has taken the following steps to confirm the above statements:

- Upon receiving the Notice on May 8, 2003, Kay advised Mr. Steve Hudson, Mr. Jack Ainsworth and Mr. Tom Sinclair that he would direct his field crew to cease any work on the inspected roads.
- On May 9, 2003, Schmitz left a voice mail message for Mr. Hudson, once again affirming on behalf of Kay that all work on the inspected roads had been suspended.
- On May 12 and 13, 2003, Schmitz submitted via facsimile correspondence to Mr. Hudson, advising him once again that all work on the inspected roads had been suspended. In addition, all use of the roads had ceased with the exception of an inspection conducted with and at the request of Los Angeles County Building Inspectors on May 13, 2003. (Copies via Certified Mail to follow.)
- On May 14, 2003, Schmitz submitted via facsimile to Mr. Hudson declarations from Mr. Kay and his foreman Dale Jaureguy attesting under penalty of perjury that all work on the roads had ceased since May 8, 2003, and that with the exception of the May 13, 2003 LA County Building & Safety Inspection, all use of the roads also had been suspended.

As we have "unequivocally state[d]" that all work on and use of the subject roads has ceased pursuant to the terms of the Notice, the response was made in the manner and within the timeframes demanded, and Kay is in full compliance with the requirements of Section 30809(b) of the Coastal Act. Thus, Kay has responded in a satisfactory manner pursuant California Code of Regulations Section 13180(a)(2) and a cease and desist order should not be issued. Furthermore, the documentation to demonstrate that any activity constituted mere repair and maintenance works, which is exempt from coastal development permit requirements, is actively being compiled.

Sincerely,

Stephanie Dreckmann, Esq.

XC: James Kay
Fred Gaines, Esq.
Rebecca Thompson, Esq.
Jack Ainsworth, Supervisor of Planning and Regulation, CCC
Tom Sinclair, Enforcement Officer, CCC

June 11, 2003

Ms. Donna Shen
Schmitz & Associates, Inc.
29350 West Pacific Coast Highway, Unit 12
Malibu, CA 90265

Re: California Coastal Commission Violation No. V-4-03-018 - Biological Assessment

Dear Ms. Shen:

The purpose of this letter is to document the findings of my site investigation regarding the above-referenced violation. I have reviewed the California Coastal Commission (Commission) *Notice Prior to Issuance of Executive Director Cease and Desist for Violation No. V-4-03-018*. It is my understanding that the Commission issued the violation due to what it perceived as being the "unpermitted removal of native coastal sage scrub vegetation, grading and construction of new roads". On June 11, 2003 I conducted a site inspection to assess the damage actually done to biological resources and to determine whether or not any such damage would continue with future use of the roads in question. Based on my field observations, experience, and analysis, I do not believe the Commission is correct in its claim for the following reasons.

1. The vegetation through which the roads in question pass is mixed chaparral, and not coastal sage scrub. This is the case for all of the roads I inspected within APNs 4464-019-008, 4464-019-010, 4464-022-001 and 4464-022-010. As is characteristic of chaparral, the dominant plant species throughout the area consist of robust shrub species that grow to six feet and higher in height and form dense, nearly impenetrable stands. Dominant plants along all portions of the roads included chamise (*Adenostoma fasciculatum*), ceanothus (*Ceanothus sp.*), manzanita (*Arctostaphylos sp.*) and toyon (*Heteromeles arbutifolia*). In comparison, species typically dominating coastal sage scrub, including lower-growing, "softer" shrubs, were largely absent. This distinction is important to note because mixed chaparral is not considered to be sensitive by any authoritative organization I am aware of (e.g., California Department of Fish and Game, U.S. Fish and Wildlife Service). Nor is mixed chaparral considered to be limited in distribution in the region. Therefore, the biological basis of the violation - that is, removal of a sensitive vegetation type - is incorrect.

2. The Commission's use of the term "removal" is an overstatement as it applies to all but a small portion of the roads in question. Based on my field observations, the majority of the work completed was strictly maintenance-related involving the trimming of overgrown shrubs and removal of fallen rocks and boulders from the road bed itself. This was evidenced by the absence of recent cuts and fills along the majority of the roads' length. More importantly, there was no evidence anywhere along the roads that entire shrubs had been removed from the road edges as part of the work.

3. Notwithstanding my observations that some vegetation was actually removed along limited portions of the road edge, such removals are insignificant considering the extensive stands of mixed chaparral in the vicinity and the Santa Monica Mountains overall. For example, I estimated less than 400 square feet (0.009 acre) of new cut and fill at one "hairpin" turn along one of the roads in the south-central portion of APN 4464-019-010; and, it was my observation that this was one of the more obvious areas at issue. Similarly, obvious encroachments of maintenance activities outside the original construction footprint many years ago were also observed elsewhere within APNs 4464-019-008 and 4464-019-010. However, they could be measured in terms of one to a few feet outside of the existing road itself. Again, I do not consider this to be significant.

4. In terms of damage to biological resources, I took a broad view in my approach to the assessment. I considered the actual loss of vegetation in terms of its extent and sensitivity, the potential impacts on wildlife using the vegetation as habitat, potential erosion and downstream siltation, and edge effects (e.g., the establishment of invasive plant species). The very limited extent to which vegetation was actually removed and the lack of sensitivity associated with the vegetation effected has been discussed above.

Regarding the effect of the road maintenance work on wildlife, I do not expect there to be any significant adverse impacts. The roads are simply too minor of a potential interruption and too little of an agent for habitat fragmentation to be of concern. Interestingly, and not to be misunderstood to mean that roads through habitat areas are necessarily beneficial to wildlife, it is plausible to expect the roads are used by larger mammals to facilitate their movement through the area in light of the surrounding dense chaparral. Concerning potential erosion and siltation hazards, I noted the general absence of any evidence that this was a problem. I believe this is due to the cutting, chipping and spreading on-site methods used to clear the roads. The chipped and spread material covered both the road and its margins. I speculate that this use of chipped material, whether intentional or not, has effectively controlled erosion from occurring at the work areas. In contrast, the off-site unimproved roads leading to the roads in question were all observed to have erosional features across or along the road beds and at their margins. The same was observed to be true for the introduction of non-native, invasive plant species. Along all of the off site road margins, there was an abundance of non-native, "weedy" species. Yet, along the roads in question where chipped material had been spread and acted like a natural mulch, almost no invasive plants were observed. In other words, I believe any damage that might have been feared to occur, has not, due to the manner in which the maintenance was carried out.

5. As a final observation on the matter, I do not expect that the continued use of the roads for light vehicular travel, hiking, biking and riding to be a concern. The roads all appear to have been originally graded many years ago and a stable roadbed looks to be in place. The recent maintenance, including the use of chipped material as a soil surface stabilizer, would indicate future use is not a problem.

I understand both the County of Los Angeles and the Commission have at least hinted that mitigation may be required. However, I find no reasonable cause or impact threshold criteria upon which to base mitigation and I do not believe compensatory measures are warranted. There has been no marked damage to biological resources; and, I do not expect any to be associated with continued use of the roads.

Having stated my conclusion above, I do have two recommendations to consider. First, I recommend the maintenance work be completed. Within APN 4464-019-008 maintenance work on the roads appeared to be incomplete. In particular, cut material had not yet been chipped and spread over the work areas. I strongly recommend this work be completed in order to minimize the potential for erosion and the establishment of invasive plants. Second, within this same parcel, a road crosses a small but distinct drainage feature which I believe is indicated as a blue-line stream on USGS topography. The road crossing (minor as it is) should be stabilized so surface runoff crossing the road will not result in erosion. Here, because of the volume and velocity of runoff expected, the spreading of chipped material is likely to be inadequate. Rather, I recommend rocks from the surrounding area be used as a road bed in the form of an "Arizona-crossing". These preventative measures will ensure there will be no future damage along this portions of the road.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Steven G. Nelson

Steven G. Nelson
Consulting Biologist
24230 Delta Drive
Diamond Bar, CA
Tel/Fax (909) 861-8502

STATE OF CALIFORNIA – THE RESOURCES AGENCY GRAY DAVIS, Governor

CALIFORNIA COASTAL COMMISSION
45 FREMONT STREET, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200

VIA REGULAR AND CERTIFIED MAIL AND FACSIMILE

June 27, 2003

Mr. James A. Kay Jr.
LT-WR, LLC
P.O. Box 7890
Malibu, CA 90265

AS REPRESENTATIVE OF: **Mark Galley, APN 4464-019-001.**
Panorama Ranch LLC, APN 4464-019-008
Deer Valley LLC, APN 4464-019-010
Panorama Ranch LLC, APN 4464-022-010

SUBJECT: Notice of Intent to Commence Restoration Order Proceeding, Coastal Act Violation File No. V-4-03-018 (Kay) – Unpermitted grading of new roads and at least one graded pad; extensive clearance of native chaparral and riparian vegetation; streambed alteration, including placement of new culverts and railroad ties in drainage courses.

Dear Mr. Kay:

This letter is to notify you, James A. Kay, Jr., and your agents, partners, employees and any other person acting in concert with you, that pursuant to Section 30811 of the California Public Resources Code, ("PRC"), I intend to commence proceedings to issue a Restoration Order to address unpermitted development, which you are responsible for performing on the following properties (APNs 4464-019-001, 4464-019-008, 4464-019-010, 4464-022-010), located in the coastal zone northeast of Latigo Canyon Road, between Castro Motorway and Mulholland Highway, in unincorporated Los Angeles County.

Commission staff has determined that you have undertaken development (as that term is defined in Section 30106 of the California Coastal Act) without a Coastal Development Permit, in violation of Section 30600 of the California Coastal Act. The unpermitted development on the above referenced property consists of 1) Grading of roads and at least one fill pad, with extensive cut and fill grading on previously undisturbed hillsides, including unengineered roads on oversteepened slopes, 2) extensive vegetation clearance, including removal of surface and subsurface plant materials in native chaparral and riparian vegetation areas, 3) streambed alteration, including grading, filling, removal of in-channel riparian vegetation, placement of new culverts and railroad ties, and manipulation of boulders and cobbles within stream channels.

We are informed by you and your employees, and believe that the activity occurred for approximately four months, between the middle of January 2003, through May 8, 2003. As the

Commission has previously indicated to you in the Notice of Intent ("NOI") to issue an Executive Director Cease and Desist Order dated May 8, 2003, significant vegetation removal and grading of roads requires a Coastal Development Permit. Your failure to obtain a Coastal Development Permit, or a determination from the Coastal Commission that a Coastal Development Permit is not required, prior to road construction, fill pad construction, , fill pad construction, vegetation clearance, and streambed alteration constitutes violations of the Coastal Act. If issued by the Commission, the Restoration Order will order you to restore the site to its pre-development condition.

Restoration Order Proceedings

Section 30811 of the Coastal Act authorizes the Commission to order restoration of a site in the following terms:

> *In addition to any other authority to order restoration, the commission...may, after a public hearing, order restoration of a site if it finds that the development has occurred without a coastal development permit from the commission... the development is inconsistent with this division, and the development is causing continuing resource damage.*

Subsequent paragraphs of this letter 1) describe the unpermitted development that is the subject of this restoration order proceeding, and 2) set forth the basis for the determination that the specified activity meets the criteria of Section 30811 of the Coastal Act.

The procedures for the issuance of restoration orders are described in Sections 13190 through 13197 of the Commission's regulations. Section 13196(e) of the Commission's regulations states the following:

> *Any term or condition that the commission may impose which requires removal of any development or material shall be for the purpose of restoring the property affected by the violation to the condition it was in before the violation occurred.*

Accordingly, any restoration order that the Commission may issue will have as its purpose the restoration of the subject property to the conditions that existed prior to the occurrence of the unpermitted development described below.

Penalties

Coastal Act Section 30820 (a) provides that any person who violates any provision of the Coastal Act may be subject to a penalty of up to $30,000. In addition to such penalty, Section 30820 (b) states that a person who intentionally and knowingly undertakes development that is in violation of the Coastal Act may be civilly liable in an amount which shall not be less that $1,000 and not more than $15,000 per day for each day in which the violation persists. In addition, Section 30821.6 provides that a violation of either type of cease and desist order or of a restoration order can result in the imposition of civil fines of up to $6,000 for each day in which the violation

persists. Finally, Section 30822 allows the Commission to maintain a legal action for exemplary damages, the size of which is left to the discretion of the court. In exercising its discretion, the court shall consider the amount of liability necessary to deter further violations.

Based upon the record of communications between you, Coastal Commission staff, and the California State Attorney General's office, which date back to 1998 regarding Coastal Act violations and permit requirements on your at 1953 Castro Motorway, Commission staff believes that the record clearly shows that unpermitted development preformed by you on properties located in the coastal zone, which are the subject of this Notice of Intent, has been carried out after you were informed that such development could not legally proceed without being authorized in a Coastal Development Permit. As such, the recent unpermitted grading, vegetation removal, alteration of drainages, and construction of culverts constitutes a knowing and intentional violation of the Coastal Act. The Commission reserves the right to seek penalties for these violations in a separate proceeding pursuant to Section 30820 (b) and Section 30822 of the Coastal Act.

History of the Violation Investigation

Commission staff first witnessed unpermitted grading and vegetation removal on the subject properties on Thursday, May 1, 2003. From a distance of several hundred feet away, Commission staff observed a crew of laborers clearing vegetation, and excavating a new road in the hillside, using hand tools. On the following day, Friday, May 2, 3003, Commission staff and met with your representative, Mr. Donald W. Schmitz in the Commission's Ventura office. Mr. Schmitz assured Commission staff that in fact no grading was occurring, that all work was "simple maintenance" of existing "pre-coastal" roads. Mr. Schmitz asserted that the work was therefore exempt (pursuant to Section 30610 of the Coastal Act). Commission staff requested permission from Mr. Schmitz to meet at the property and enter the site that same afternoon or as soon as feasible to conduct a site visit and investigate the alleged violations. Commission staff also requested that Mr. Schmitz direct the workers to stop all work immediately, until such time that Commission staff could review the work and advise you regarding the need for permits. Mr. Schmitz indicated that he would arrange for the site visit and would notify the laborers to stop the work.

Commission staff conducted a site visit on Thursday, May 8, 2003. During the period between May 2, 2003 and May 8, 2003, work crews continued construction activities on the property despite the request by Commission staff that work on the roads cease. On the morning of May 8, 2003, Commission staff met with you and Mr. Schmitz to conduct a site investigation of the property. During the site investigation, Commission staff confirmed that unpermitted development had in fact occurred, and was continuing to occur on the subject properties. The unpermitted development includes, but is not necessarily limited to 1) Grading of new roads and at least one fill pad, with extensive cut and fill grading on previously undisturbed hillsides, including unengineered roads on oversteepened slopes, 2) extensive vegetation clearance, including removal of surface and subsurface plant materials in native chaparral communities and riparian corridors, 3) streambed alteration, including grading, filling, removal of riparian

vegetation, and manipulation of boulders and cobbles within stream channels, and 4) construction of new culverts. At approximately 2:00 p.m. on May 8, 2003, Commission staff issued a NOI for an Executive Director Cease and Desist Order to stop all unpermitted development of roads on the subject properties, as well as unpermitted development that may have encroached onto adjacent public lands.

Response to Executive Director Cease and Desist Order NOI

To prevent issuance of the Executive Director Cease and Desist Order, you were required to respond to the NOI in a satisfactory manner. Section 30809 (b) states in part:

> *...if the person or agency has failed to respond in a satisfactory manner to an oral notice given in person or by telephone, followed by a written confirmation, or a written notice given by certified mail or hand delivered to the landowner or the person performing the activity. The notice shall include the following:*

You provided verbal assurance to Commission staff that you would stop work upon receipt of the NOI. The NOI also directed you to submit a written response assuring Commission staff by 5:00 p.m., Monday, May 12, 2003, that work on the roads had ceased, and confirmation that 1), no further unpermitted development, including construction activity will occur until Commission staff has stated in writing that construction activities may resume, and that 2) no use of the unpermitted roads will occur unless and until such time as such use were to be legally authorized by the Commission.

On Monday, May 12, 2003, Commission staff received a letter from your representative, Schmitz & Associates, stating that all work had ceased and would not resume until the matter was resolved, however the letter did not provide assurances that use of the unpermitted new roads would cease, and in fact, the letter objected to the restriction of use of the roads. Thus, the requirement for a satisfactory response was not met by the specified deadline.

Following telephone discussions with Commission staff on May 12-13, 2003, Schmitz & Associates submitted a letter to the Commission on May 13, 2003, on your behalf, stating that you have agreed to cease use of the roads. Therefore, the Executive Director did not issue the Cease and Desist Order. [1]

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[1] On May 15, 2003, Schmitz & Associates submitted a letter asserting that the NOI was deficient, and challenged the Commission's right to preclude use of the roads, stating that "*Use of the roads does not constitute an activity that requires a permit from the commission and thus is not subject to the cease and desist order...*". At the time of issuance of the NOI, and again on May 12-13, 2003, Commission staff explained to you and your representatives that any use of the new roads, including but not limited to, pedestrian, equestrian, and specifically vehicular use, which will result in compaction of the soil, further destruction of vegetation, alteration of stream channels under these conditions, constitutes unpermitted development under the Coastal Act, and was prohibited by the Coastal Act, a stated in the NOI. Schmitz & Associates further stated in writing on May 15, 2003, that all "use of the subject roads has ceased . . .

On June 23, 2003, staff received a letter from Schmitz & Associates alleging that "...there has been no resource damage to warrant the Notice or Violation citation." The June 23, 2003 letter further asserts that use of the roads, as well as repair and maintenance of the roads is exempt from coastal development permit requirements, and that "The Notice lists properties outside of the California Coastal Commission 's jurisdiction..." Finally, the June 23, 2003 letter demands "a response in writing" to the May 15, 2003 by Monday, June 30, 2003 at 500 p.m., and advises staff that work on the roads will resume unless staff responds to allegations that the NOI is "deficient, vague, and overbroad."

Basis for Determination that the Specified Activity Meets the Criteria of Section 30811 of the Coastal Act

Contrary to your assertions (including those of your agent and counsel), the parcels are located in the coastal zone and therefore they are within the Coastal Commission's jurisdiction.

You claim you are conducting repair and maintenance on roads that existed prior to the Coastal Act. You argue that you have a vested right to maintain the roads and the repair and maintenance is exempt from the coastal development permit requirements. These arguments are unsupported. You have not obtained a determination by the Coastal Commission that there are vested rights for any roads on the parcels. You have also not provided any evidence indicating that roads were present prior to the effective date of the Coastal Act. Therefore, the activities do not constitute repair and maintenance to lawfully constructed facilities or structures.

Furthermore, even if any lawfully constructed roads existed on the parcels prior to the effective date of the Coastal Act, they were abandoned by prior owners and were allowed to become revegetated by natural processes, so they became impassable as roads. Any potential vested rights to such roads were abandoned. Furthermore, if there were any pre-existing roads, your unpermitted development increased the size, width and/or length of such roads and there can be no vested right to do so without a coastal permit. In addition, your constructed new culverts at streams and constructed a new fill pad and this constitutes new development for which there can be no vested right.

Moreover, even if there were lawfully constructed roads on the parcels, the activity would not be exempt from the coastal permit requirements because it occurs within 20 feet of streams and in environmentally sensitive habitat and involves placement of rip-rap, rocks, or solid materials as well as use of mechanized equipment (including but not limited to mechanized saws and chipper machine).

I have determined that it is appropriate for a restoration order proceeding to be commenced to address the unpermitted development, based on the following:

." Therefore Schmitz & Associates asserted: "Kay has responded in a satisfactory manner pursuant to California Code of Regulations Section 13180(a)(2) and a cease and desist order should not be issued."

1) On May 1, 2003, Commission staff observed grading, vegetation clearance, and streambed alteration on the subject properties. Staff confirmed that no Coastal Development Permits had been issued for the work being conducted.

2) On May 8, 2003, Commission staff met with you and your representatives to inspect the unpermitted development. At that time Commission staff confirmed that unpermitted grading, vegetation clearance, streambed alteration and construction of culverts had occurred in the Coastal Zone, and was continuing to occur, and had been completed by you, and/or individuals employed by you at your direction.

3) The unpermitted development is inconsistent with the policies of the Coastal Act, and has caused resource damage as defined by Section 13190 of the Commission's regulations. Because of the vegetation removal, destabilization of slopes, alteration of drainages, and the absence of any erosion control measures on the site during the rainy season, adverse impacts to water quality and other Coastal resources have occurred as a result of the violations.

4) The removal of native vegetation and alteration of natural drainages has continuing adverse impacts on wildlife and water quality. Since this unpermitted development continues to exist at the subject properties, the damage to resources protected by the Coastal Act is continuing. The unpermitted development on the subject properties has caused adverse resource impacts which violate the Coastal Resources Planning and Management Policies of chapter 3 of the Coastal Act, including:

   a) Section 30253 Geologic stability, protection against erosion,
   b) Section 30230 Marine resources
   c) Section 30231 Biological productivity; water quality,
   d) Section 30240 environmentally sensitive habitat areas (ESHA), and
   e) Section 30250 Location; existing developed area, and

   Such impacts meet the definition of damage provided in Section 13190(b): "any degradation or other reduction in quality, abundance, or other quantitative or qualitative characteristic of the resource as compared to the condition the resource was in before it was disturbed by unpermitted development."

5) Proceedings for issuance of a restoration order are being commenced against you as the current owner of the subject properties and the person responsible for conducting the unpermitted development.

For the reasons stated above, I have decided to commence a restoration order proceeding before the Commission in order to promptly restore the subject property to the condition it was in before the unpermitted development occurred.

Steps in the Restoration Order Process

Pursuant to Coastal Act Section 30811, the Commission has the authority to order restoration of a site if the Commission, after a public hearing, determines that "development has occurred without a coastal development permit...and the development is causing continuing resource damage." An order issued pursuant to Section 30811 will require that you restore the site to its pre-violation condition within a specified period of time.

Please be advised that if the Commission issues a Restoration Order, Section 30821.6(a) of the Coastal Act authorizes the Commission to seek monetary daily penalties of up to $6,000 per day for any intentional or negligent violation of the order for each day in which the violation persists.

At this time, the Commission is tentatively planning to hold a hearing on the issuance of a Restoration Order on this matter at the Commission meeting that is scheduled for the week of August 6-8, 2002 in Huntington Beach, California.

In accordance with the California Code of Regulations, Title 14, Section 13191(a), you have the opportunity to respond to the Commission staff's allegations as set forth in this notice by completing the enclosed Statement of Defense form. **This office must receive the completed Statement of Defense form no later than July 17, 2003.** Should you have questions regarding the Statement of Defense form, please contact Tom Sinclair at (805) 585-1800.

Sincerely,

Peter Douglas
Executive Director

Encl.: Statement of Defense form

Cc: Amy Roach, Deputy Chief Counsel
Lisa Haage, Chief of Enforcement
John Bowers, Staff Counsel
Sandy Goldberg, Staff Counsel
Tom Sinclair, Enforcement Officer, South Central District Officer
Steve Hudson, Enforcement Supervisor, Southern Districts
John Ainsworth, Permit Supervisor, South Central District Office
Melanie Hale, Permit Supervisor, South Central District Office
Donald W. Schmitz

STATE OF CALIFORNIA -- THE RESOURCES AGENCY

GRAY DAVIS, GOVERNOR

CALIFORNIA COASTAL COMMISSION
45 FREMONT STREET, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200

VIA REGULAR AND CERTIFIED MAIL AND FACSIMILE

July 1, 2003

Mr. James A. Kay Jr.
Communications Relay Corporation
Park Lands Ranch LLC
P.O. Box 7835
Van Nuys, CA 91409-7835

SUBJECT: Notice of Intent to Commence Restoration Order Proceeding, Coastal Act Violation File No. V-4-03-018 (Kay) – Unpermitted grading of new roads and and/or pads; clearance of native chaparral and riparian vegetation; and/or streambed alteration, including placement of new culverts and railroad ties in drainage courses.

Dear Mr. Kay:

This letter is to notify you, James A. Kay, Jr., and your agents, partners, employees and any other person acting in concert with you, that pursuant to Section 30811 of the California Public Resources Code, ("PRC"), I intend to commence proceedings to issue a Restoration Order to address unpermitted development, which you are responsible for performing on the following properties (APN: 4464-022-001, Communications Relay Corporation, and APN: 4464-022-014, Park Lands Ranch LLC), located in the coastal zone northeast of Latigo Canyon Road, between Castro Motorway and Mulholland Highway, in unincorporated Los Angeles County.

Commission staff has determined that you have undertaken development (as that term is defined in Section 30106 of the California Coastal Act) without a Coastal Development Permit, in violation of Section 30600 of the California Coastal Act. The unpermitted development on the above referenced property consists of 1) grading of roads and and/or pads, with extensive cut and fill grading on previously undisturbed hillsides, including unengineered roads on oversteepened slopes, 2) extensive vegetation clearance, including removal of surface and subsurface plant materials in native chaparral and riparian vegetation areas, 3) and/or streambed alteration, including grading, filling, removal of in-channel riparian vegetation, placement of new culverts and railroad ties, and manipulation of boulders and cobbles within stream channels.

We are informed by you and your employees, and believe that the activity occurred for approximately four months, between the middle of January 2003, through May 8, 2003. As the Commission has previously indicated to you in the Notice of Intent ("NOI") to issue an Executive Director Cease and Desist Order dated May 8, 2003, significant vegetation removal and grading of roads requires a Coastal Development Permit. Your failure to obtain a Coastal Development Permit, or a determination from the Coastal Commission that a Coastal Development Permit is not required, prior to road construction, fill pad construction, vegetation clearance, and/or streambed alteration constitutes violations of the Coastal Act. If issued by the

Commission, the Restoration Order will order you to restore the site to its pre-development condition.

Restoration Order Proceedings

Section 30811 of the Coastal Act authorizes the Commission to order restoration of a site in the following terms:

> *In addition to any other authority to order restoration, the commission...may, after a public hearing, order restoration of a site if it finds that the development has occurred without a coastal development permit from the commission... the development is inconsistent with this division, and the development is causing continuing resource damage.*

Subsequent paragraphs of this letter 1) describe the unpermitted development that is the subject of this restoration order proceeding, and 2) set forth the basis for the determination that the specified activity meets the criteria of Section 30811 of the Coastal Act.

The procedures for the issuance of restoration orders are described in Sections 13190 through 13197 of the Commission's regulations. Section 13196(e) of the Commission's regulations states the following:

> *Any term or condition that the commission may impose which requires removal of any development or material shall be for the purpose of restoring the property affected by the violation to the condition it was in before the violation occurred.*

Accordingly, any restoration order that the Commission may issue will have as its purpose the restoration of the subject property to the conditions that existed prior to the occurrence of the unpermitted development described below.

Penalties

Coastal Act Section 30820 (a) provides that any person who violates any provision of the Coastal Act may be subject to a penalty of up to $30,000. In addition to such penalty, Section 30820 (b) states that a person who intentionally and knowingly undertakes development that is in violation of the Coastal Act may be civilly liable in an amount which shall not be less that $1,000 and not more than $15,000 per day for each day in which the violation persists. In addition, Section 30821.6 provides that a violation of either type of cease and desist order or of a restoration order can result in the imposition of civil fines of up to $6,000 for each day in which the violation persists. Finally, Section 30822 allows the Commission to maintain a legal action for exemplary damages, the size of which is left to the discretion of the court. In exercising its discretion, the court shall consider the amount of liability necessary to deter further violations.

Based upon the record of communications between you, Coastal Commission staff, and the California State Attorney General's office, which date back to 1998 regarding Coastal Act

violations and permit requirements on your at 1953 Castro Motorway. Commission staff believes that the record clearly shows that unpermitted development preformed by you on properties located in the coastal zone, which are the subject of this Notice of Intent, has been carried out after you were informed that such development could not legally proceed without being authorized in a Coastal Development Permit. As such, the recent unpermitted grading, vegetation removal, alteration of drainages, and construction of culverts constitutes a knowing and intentional violation of the Coastal Act. The Commission reserves the right to seek penalties for these violations in a separate proceeding pursuant to Section 30820 (b) and Section 30822 of the Coastal Act.

History of the Violation Investigation

Commission staff first witnessed unpermitted grading and vegetation removal on the subject properties on Thursday, May 1, 2003. From a distance of several hundred feet away, Commission staff observed a crew of laborers clearing vegetation, and excavating a new road in the hillside, using hand tools. On the following day, Friday, May 2, 3003, Commission staff and met with your representative, Mr. Donald W. Schmitz in the Commission's Ventura office. Mr. Schmitz assured Commission staff that in fact no grading was occurring, that all work was "simple maintenance" of existing "pre-coastal" roads. Mr. Schmitz asserted that the work was therefore exempt (pursuant to Section 30610 of the Coastal Act). Commission staff requested permission from Mr. Schmitz to meet at the property and enter the site that same afternoon or as soon as feasible to conduct a site visit and investigate the alleged violations. Commission staff also requested that Mr. Schmitz direct the workers to stop all work immediately, until such time that Commission staff could review the work and advise you regarding the need for permits. Mr. Schmitz indicated that he would arrange for the site visit and would notify the laborers to stop the work.

Commission staff met with you and Mr. Schmitz to conduct a site investigation on several properties, including the above referenced properties, which you maintained were owned by you, on Thursday, May 8, 2003. During the period between May 2, 2003 and May 8, 2003, work crews continued construction activities on the property despite the request by Commission staff that work on the roads cease. During the site investigation on May 8, 2003, Commission staff confirmed that unpermitted development had in fact occurred, and was continuing to occur on the subject properties. The unpermitted development includes, but is not necessarily limited to 1) Grading of new roads and at least one fill pad, with extensive cut and fill grading on previously undisturbed hillsides, including unengineered roads on oversteepened slopes, 2) extensive vegetation clearance, including removal of surface and subsurface plant materials in native chaparral communities and riparian corridors, 3) and/or streambed alteration, including grading, filling, removal of riparian vegetation, and manipulation of boulders and cobbles within stream channels, and 4) construction of new culverts. At approximately 2:00 p.m. on May 8, 2003, Commission staff issued a NOI for an Executive Director Cease and Desist Order to stop all unpermitted development of roads on the subject properties, as well as unpermitted development that may have encroached onto adjacent public lands.

Response to Executive Director Cease and Desist Order NOI

To prevent issuance of the Executive Director Cease and Desist Order, you were required to respond to the NOI in a satisfactory manner. Section 30809 (b) states in part:

> *...if the person or agency has failed to respond in a satisfactory manner to an oral notice given in person or by telephone, followed by a written confirmation, or a written notice given by certified mail or hand delivered to the landowner or the person performing the activity. The notice shall include the following:*

You provided verbal assurance to Commission staff that you would stop work upon receipt of the NOI. The NOI also directed you to submit a written response assuring Commission staff by 5:00 p.m., Monday, May 12, 2003, that work on the roads had ceased, and confirmation that 1), no further unpermitted development, including construction activity will occur until Commission staff has stated in writing that construction activities may resume, and that 2) no use of the unpermitted roads will occur unless and until such time as such use were to be legally authorized by the Commission.

On Monday, May 12, 2003, Commission staff received a letter from your representative, Schmitz & Associates, stating that all work had ceased and would not resume until the matter was resolved, however the letter did not provide assurances that use of the unpermitted new roads would cease, and in fact, the letter objected to the restriction of use of the roads. Thus, the requirement for a satisfactory response was not met by the specified deadline.

Following telephone discussions with Commission staff on May 12-13, 2003, Schmitz & Associates submitted a letter to the Commission on May 13, 2003, on your behalf, stating that you have agreed to cease use of the roads. Therefore, the Executive Director did not issue the Cease and Desist Order. [1]

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[1] On May 15, 2003, Schmitz & Associates submitted a letter asserting that the NOI was deficient, and challenged the Commission's right to preclude use of the roads, stating that "*Use of the roads does not constitute an activity that requires a permit from the commission and thus is not subject to the cease and desist order...*". At the time of issuance of the NOI, and again on May 12-13, 2003, Commission staff explained to you and your representatives that any use of the new roads, including but not limited to, pedestrian, equestrian, and specifically vehicular use, which will result in compaction of the soil, further destruction of vegetation, alteration of stream channels under these conditions, constitutes unpermitted development under the Coastal Act, and was prohibited by the Coastal Act, a stated in the NOI. Schmitz & Associates further stated in writing on May 15, 2003, that all "use of the subject roads has ceased . . . ." Therefore Schmitz & Associates asserted: "Kay has responded in a satisfactory manner pursuant to California Code of Regulations Section 13180(a)(2) and a cease and desist order should not be issued."

On June 23, 2003, staff received a letter from Schmitz & Associates alleging that "...there has been no resource damage to warrant the Notice or Violation citation." The June 23, 2003 letter further asserts that use of the roads, as well as repair and maintenance of the roads is exempt from coastal development permit requirements, and that "The Notice lists properties outside of the California Coastal Commission 's jurisdiction..." Finally, the June 23, 2003 letter demands "a response in writing" to the May 15, 2003 by Monday, June 30, 2003 at 500 p.m., and advises staff that work on the roads will resume unless staff responds to allegations that the NOI is "deficient, vague, and overbroad."

Basis for Determination that the Specified Activity Meets the Criteria of Section 30811 of the Coastal Act

Contrary to your assertions (including those of your agent and counsel), the parcels are located in the coastal zone and therefore they are within the Coastal Commission's jurisdiction.

You claim you are conducting repair and maintenance on roads that existed prior to the Coastal Act. You argue that you have a vested right to maintain the roads and the repair and maintenance is exempt from the coastal development permit requirements. These arguments are unsupported. You have not obtained a determination by the Coastal Commission that there are vested rights for any roads on the parcels. You have also not provided any evidence indicating that roads were present prior to the effective date of the Coastal Act. Therefore, the activities do not constitute repair and maintenance to lawfully constructed facilities or structures.

Furthermore, even if any lawfully constructed roads existed on the parcels prior to the effective date of the Coastal Act, they were abandoned by prior owners and were allowed to become revegetated by natural processes, so they became impassable as roads. Any potential vested rights to such roads were abandoned. Furthermore, if there were any pre-existing roads, your unpermitted development increased the size, width and/or length of such roads and there can be no vested right to do so without a coastal permit. In addition, you constructed new culverts in streams and constructed at least one new fill pad and this constitutes new development for which there can be no vested right.

Moreover, even if there were lawfully constructed roads on the parcels, the activity would not be exempt from the coastal permit requirements because it occurs within 20 feet of streams and in environmentally sensitive habitat and involves placement of rip-rap, rocks, or solid materials as well as use of mechanized equipment (including but not limited to mechanized saws and chipper machine).

I have determined that it is appropriate for a restoration order proceeding to be commenced to address the unpermitted development, based on the following:

1) On May 1, 2003, Commission staff observed grading, vegetation clearance, and streambed alteration on the subject properties. Staff confirmed that no Coastal Development Permits had been issued for the work being conducted.

2) On May 8, 2003, Commission staff met with you and your representatives to inspect the unpermitted development. At that time Commission staff confirmed that unpermitted grading, vegetation clearance, streambed alteration and construction of culverts had occurred in the Coastal Zone, and was continuing to occur, and had been completed by you, and/or individuals employed by you at your direction.

3) The unpermitted development is inconsistent with the policies of the Coastal Act, and has caused resource damage as defined by Section 13190 of the Commission's regulations. Because of the vegetation removal, destabilization of slopes, alteration of drainages, and the absence of any erosion control measures on the site during the rainy season, adverse impacts to water quality and other Coastal resources have occurred as a result of the violations.

4) The removal of native vegetation and alteration of natural drainages has continuing adverse impacts on wildlife and water quality. Since this unpermitted development continues to exist at the subject properties, the damage to resources protected by the Coastal Act is continuing. The unpermitted development on the subject properties has caused adverse resource impacts which violate the Coastal Resources Planning and Management Policies of chapter 3 of the Coastal Act, including:

   a) Section 30253 Geologic stability, protection against erosion,
   b) Section 30230 Marine resources
   c) Section 30231 Biological productivity; water quality,
   d) Section 30240 environmentally sensitive habitat areas (ESHA), and
   e) Section 30250 Location; existing developed area, and

   Such impacts meet the definition of damage provided in Section 13190(b): "any degradation or other reduction in quality, abundance, or other quantitative or qualitative characteristic of the resource as compared to the condition the resource was in before it was disturbed by unpermitted development."

5) Proceedings for issuance of a restoration order are being commenced against you as the current owner of the subject properties and the person responsible for conducting the unpermitted development.

For the reasons stated above, I have decided to commence a restoration order proceeding before the Commission in order to promptly restore the subject property to the condition it was in before the unpermitted development occurred.

Steps in the Restoration Order Process

Pursuant to Coastal Act Section 30811, the Commission has the authority to order restoration of a site if the Commission, after a public hearing, determines that "development has occurred

without a coastal development permit...and the development is causing continuing resource damage." An order issued pursuant to Section 30811 will require that you restore the site to its pre-violation condition within a specified period of time.

Please be advised that if the Commission issues a Restoration Order, Section 30821.6(a) of the Coastal Act authorizes the Commission to seek monetary daily penalties of up to $6,000 per day for any intentional or negligent violation of the order for each day in which the violation persists.

At this time, the Commission is tentatively planning to hold a hearing on the issuance of a Restoration Order on this matter at the Commission meeting that is scheduled for the week of August 6-8, 2002 in Huntington Beach, California.

In accordance with the California Code of Regulations, Title 14, Section 13191(a), you have the opportunity to respond to the Commission staff's allegations as set forth in this notice by completing the enclosed Statement of Defense form. **This office must receive the completed Statement of Defense form no later than July 21, 2003.** Should you have questions regarding the Statement of Defense form, please contact Tom Sinclair at (805) 585-1800.

Sincerely,

Lisa Haage for

Peter Douglas
Executive Director

Encl.: Statement of Defense form

Cc: Amy Roach, Deputy Chief Counsel
Lisa Haage, Chief of Enforcement
John Bowers, Staff Counsel
Sandy Goldberg, Staff Counsel
Tom Sinclair, Enforcement Officer, South Central District Officer
Steve Hudson, Enforcement Supervisor, Southern Districts
John Ainsworth, Permit Supervisor, South Central District Office
Melanie Hale, Permit Supervisor, South Central District Office
Donald W. Schmitz

EXHIBIT N

DECLARATION OF JAMES A. KAY, JR.

I, James A. Kay, Jr. declare:

1) I am an officer of Park Lands Ranch, LLC, Deer Valley Ranch, LLC, Panorama Ranch, LLC, and Communications Relay Corporation (the "Kay entities"). I have personal knowledge of the facts stated in this Declaration, and if called upon, could and would testify competently to these facts.

2) The Kay entities own property in unincorporated Malibu which are the subject of the California Coastal Commission's (the "Commission") June 27, 2003 and July 1, 2003 Notices of Intent to Commence Restoration Order Proceedings (the "Notices"). The properties are located in the Santa Monica Mountains, generally between Castro Peak Motorway and Mulholland Highway.

3) Although the Notices cite alleged violations on six parcels in the vicinity, only five are owned by Kay entities (the "Properties").

4) My interest in the properties began in 1998, when SOCAL Communications, an entity in which I was an officer, acquired a security interest in property which houses telecommunications towers and antenna facilities. The telecommunications equipment provides emergency services to public and private entities. SOCAL acquired title to the property in early 1999. Subsequently, SOCAL Communications' interest in the parcel was transferred to LT-WR, LLC, of which I am also an officer (the "LT-WR Property"). The LT-WR Property was the first property acquired in the vicinity by any entity in which I has an ownership interest. The LT-WR Property is not a property cited in the Notices.

5) Since acquiring the LT-WR Property, LT-WR has sought to legalize numerous preexisting violations. LT-WR has undertaken extensive efforts with the County of Los Angeles (the "County") and the Commission to bring the LT-WR Property into compliance with County requirements and Coastal Act regulations. In fact, prior litigation against the Commission resulted in a June 2002 settlement agreement with respect to relocating one of the communications towers and legalizing an existing caretaker's residence.

6) After the settlement with the Coastal Commission, the County would not process the application for a conditional use permit ("CUP") for the caretaker's residence, even though the Settlement Agreement resolved issues with which the County had initial concerns. A lawsuit was instituted against the County, requesting the County to process the CUP application for the caretaker's residence. This lawsuit resulted in a settlement with the County and the County agreed to process the CUP application.

7) The CUP for the caretaker's residence was unanimously approved by the County Regional Planning Commission on April 2, 2003. A condition of the CUP is a County requirement that I prove legal access to the LT-WR Property. I believe that I have legal access by prescription and, in April 2003, I filed suit in Los Angeles Superior Court for prescriptive easement rights against individuals and entities owning property along Castro Peak Motorway. This lawsuit has resulted in many Latigo Canyon/Castro Peak Motorway vicinity property owners being angry with and

adversarial to me. I am informed and believe that several of the property owners along Castro Peak Motorway began to install gate posts and gates without the benefit of a CDP.

8) At or around the time the Kay entities purchased their respective parcels, I contacted Don Schmitz of Schmitz & Associates, a former Coastal Commission staff member, so that Schmitz could advise me of my property rights both inside and outside the coastal zone. Schmitz & Associates is a well-regarded planning firm and Schmitz and his staff are known for their specific knowledge and experience with respect to projects located within the coastal zone ("Schmitz"). I specifically solicited advice from Schmitz with regard to Coastal Act regulations and what work could be performed on the Properties, if any, without a Coastal Development Permit ("CDP").

9) I was advised that I could clear brush and loose rock, utilizing hand tools (picks and shovels), in order to repair and maintain existing roadways and trails. I was advised that these activities did not constitute development pursuant to §30106 and §30610 of the Coastal Act and, therefore, did not require a CDP. I also understood that the roads and trails located on the Properties pre-dated the Coastal Act.

10) In early 2003, I began undertaking work on the Properties to pick up loose rock and sidecast material and clear brush alongside existing roadways and trails. All the work was performed with hand tools. I enlisted employees to undertake the work on some of the Properties pursuant to these specific directions. I monitored these employees to ensure that Coastal Act guidelines and other regulations were being specifically adhered to. I was careful to operate within the limitations of the activities that do not require a CDP.

11) In early May 2003, Commission staff requested a site visit of the Properties and Schmitz and I readily agreed to meet with staff the following week when I would be in town. I am not a California resident and May 8, 2003 was the earliest possible date on which I could attend a site visit of the Properties. On May 8, 2003, I, along with representatives of Schmitz and Gaines & Stacey, conducted a site visit to the Properties with Commission staff.

12) On May 8, 2003, I received from the Commission a Notice Prior to Issuance of Executive Director Cease and Desist Order (the "May 8th Notice"). I ceased all repair and maintenance work immediately upon notice from the Commission and receipt of the May 8th Notice, and have not conducted any activities on the Properties since that date. I have even abided by the Commission's request that I cease using the roads. To date, I continue to honor my agreement with the Commission that I would cease to work on or use the subject Properties and roads.

13) Neither I nor any entity with which I am affiliated owns, nor have I or anyone acting on my behalf entered, the property identified by assessor parcel number ("APN") 4464-019-001 (i.e the Galley property).

14) Neither I, nor anyone acting on my behalf, has performed any work, including repair, maintenance, and/or brush clearance (with hand tools or otherwise) on APN 4464-022-014 (the "Park Lands Ranch Property"). My activities on this parcel have been strictly limited to driving along Castro Peak Motorway. In fact, the Commission did not even enter or view this parcel during the

May 8, 2003 site visit.

15) I acknowledge that some of the activities on small portions of APN 4464-019-008 (the "Panorama Ranch Property No. 1") and APN 4464-019-010 (the "Deer Valley Ranch Property") went beyond brush clearance and repair, and I am now applying for Coastal Development Permits ("CDP") for these parcels. Neither I, nor my employees performed the following work on these parcels: grading of fills pads, streambed alteration, including grading or filling, alteration of drainages, or destablization of slopes. Furthermore, neither I nor anyone acting on my behalf has at any time placed new culverts or railroad ties on these parcels.

16) On APN 4464-022-001 (the "Communications Relay Property") and APN 4464-022-010 (the "Panorama Ranch Property No. 2"), the activities were limited to routine brush clearance, and repair and maintenance of existing roadways and trails. On the Communications Relay Property, my employees repaired a culvert and placed railroad ties. While I firmly deny that the work performed on the these parcels went beyond exempted brush clearance, repair, and maintenance, I am submitting, under protest, CDPs for these parcels as well. Neither I, nor my employees performed the following work on these parcels: grading of fills pads, streambed alteration, including grading or filling, alteration of drainages, or destablization of slopes, removal of riparian vegetation, manipulation of boulders and cobbles within stream channels, and streambed alteration.

17) The Notices state that the Commission has received telephone reports of activities allegedly taking place on the Properties. Although the Notices do not identify who telephoned the Commission, I believe that these reports may have come from National Park Service officials and/or angry property owners along Castro Peak Motorway.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Las Vegas, Nevada.

Dated: July 17, 2003

JAMES A. KAY, JR.

EXHIBIT C

United States Department of the Interior

NATIONAL PARK SERVICE
Santa Monica Mountains National Recreation Area
401 West Hillcrest Drive
Thousand Oaks, California 91360-4207

In reply refer to:
L76 (SAMO)

RECEIVED
JUN 02 2002
By

May 29, 2003

Los Angeles Planning Commission
County of Los Angeles, Department of Regional Planning
320 West Temple Street
Los Angeles, CA 90012

Dear Commissioners:

The National Park Service wishes to notify the County of the desirability of securing a public recreational easement on the Newton Motorway for a portion crossing Assessor Parcel Number 4464-022-042, 1953 Latigo Canyon Road. Furthermore, the National Park Service is willing to accept the easement and assume all liability associated with managing the easement.

The segment of interest along Newton Motorway is part of a six-mile, historically popular loop off the regionally significant Backbone Trail. The entire trail loop, except for the 850-foot segment and another 250-foot stretch across land under the same private ownership, is publicly owned by either the National Park Service or California State Parks. Attached is a map with the trail defined and the segment on this parcel highlighted.

Newton Motorway has been used by the public for more than 20 years for recreational hiking, biking, and horseback riding. The trail use has not interfered with the property's private use. Approximately one year ago, the segment of interest was gated and posted as "No Trespassing" on both the east and west property boundaries. The posting has caused public confusion about access along this highly popular trail route. The NPS wishes to officialize the public right-of-way over this stretch of the six-mile loop by obtaining a recreational easement.

We thank the County for considering the need for a public easement over Newton Motorway. If you have questions, please call Jessica Zakrie, Outdoor Recreation Planner, at (805) 370-2332.

Sincerely,

Woody Smeck

Woody Smeck
Superintendent

cc: Laura Shell, Los Angeles County Supervisor Zev Yaroslavsky, Third District
Karen Simmonds, Los Angeles County Department of Regional Planning

Don Schmitz, Schmitz & Associates
Joe Edmiston, Executive Director, Santa Monica Mountains Conservancy
Ron Schaffer, Superintendent, Angeles District, State Department of Parks and Recreation
Becca Barkin, Executive Officer, Resource Conservation District of the Santa Monica Mountains

FRED GAINES
SHERMAN L. STACEY
LISA A. WEINBERG*
REBECCA A. THOMPSON
NANCI SESSIONS-STACEY
KIMBERLY A. RIBLE
* a professional corporation

LAW OFFICES OF
GAINES & STACEY LLP
16633 VENTURA BOULEVARD, SUITE 1150
ENCINO, CA 91436-1865

TELEPHONE (818) 593-6355
(310) 394-1163
FACSIMILE (818) 593-6356
INTERNET: WWW.GAINESLAW.COM

EXHIBIT 7
CCC-03-RO-009, CCC-03-CD-015
SOD, Nov 12, 2003

November 12, 2003

ORIGINAL VIA U.S. MAIL

RECEIVED
NOV 14 2003
CALIFORNIA
COASTAL COMMISSION
SOUTH CENTRAL COAST DISTRICT

VIA FACSIMILE (805) 641-1732

Mr. Tom Sinclair
California Coastal Commission
South Central Coast District
89 S. California Street, Suite 200
Ventura, CA 93001

Re: Statements of Defense - Violation File No. V-4-03-018
Notice of Intent to Commence Cease and Desist Order Proceedings

Dear Mr. Sinclair:

Enclosed please find the following Statements of Defense in response to the California Coastal Commission's October 23, 2003 Notice of Intent to Commence Cease and Desist Order Proceedings:

1) Statement of Defense, submitted by Panorama Ranch, LLC (re: APN 4464-019-008);
2) Statement of Defense, submitted by Panorama Ranch, LLC (re: APN 4464-022-010);
3) Statement of Defense, submitted by Deer Valley Ranch, LLC (re: APN 4464-019-010);
4) Statement of Defense, submitted by Communications Relay Corporation (re: APN 4464-022-001); and
5) Statement of Defense, submitted by Panorama Ranch, Deer Valley Ranch, and Communications Relay (re: APN 4464-019-900, owned by US Government).

As always, please do not hesitate to contact Fred Gaines or me at any time with any questions or comments you may have.

Sincerely,

GAINES & STACEY LLP

Kimberly A. Rible

By KIMBERLY A. RIBLE

Enclosures

Exhibit 8 F12
STATEMENT OF
DEFENSE
Nov. 12, 2003

STATEMENT OF DEFENSE
NOTICE OF INTENT TO COMMENCE CEASE AND DESIST ORDER PROCEEDINGS

Violation File No. V-4-03-018
Tentative Commission Hearing Date: December 8-10, 2003

This law office represents Panorama Ranch, LLC, a Nevada limited liability company ("Panorama Ranch"), with regard to this matter. Panorama Ranch owns real property in unincorporated Malibu, identified by assessor parcel number ("APN") 4464-019-008 (the "Panorama Ranch Property No. 1"). The purpose of this Statement of Defense is to set forth our client's position and response to the California Coastal Commission's (the "Commission") Notice of Intent to Commence Cease and Desist Order Proceedings, dated October 23, 2003 (the "October 23rd Notice"), which has been tentatively scheduled for hearing at the Commission's December 8-10, 2003 meeting.

On behalf of our client, we oppose the issuance of a Cease and Desist Order.

APN 4464-019-008

The parcel identified by APN 4464-019-008, owned by Panorama Ranch, LLC, is cited in the October 23rd Notice.

1. **Facts or allegations contained in the cease and desist order or the notice of intent that you admit (with specific reference to the paragraph number in the order):**

Panorama Ranch incorporates by reference its prior Statement of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

Panorama Ranch admits the following facts or allegations regarding the Panorama Ranch Property No. 1 contained in the October 23rd Notice:

1) The same alleged facts which are admitted in the July 17th Statement of Defense;

2) That portion of paragraph 6, page 4, which states: "On August 4, 2003, Commission staff arranged a meeting with Schmitz to view the subject properties and advise Schmitz as to the specific locations of certain unpermitted development" (p. 4, para. 6);

3) That portion of paragraph 7, page 4, which states: "On August 15, 2003, Commission staff again met with Schmitz to view the subject properties" (p. 4, para. 7);

4) All alleged facts contained in paragraph 8, page 4, beginning with the words "On August 26, 2003..." (p. 4, para. 8);

5) That portion of paragraph 3, page 5, which states: "On October 7, 2003, Commission staff spoke with Schmitz. Schmitz stated that Kay had abided by the terms of the EDCDO despite the expiration of the EDCDO and Schmitz denied that any work or use of the roads had occurred. Schmitz confirmed that Kay had recently purchased a bulldozer..." (p. 5, para. 3).

2. Facts or allegations contained in the cease and desist order or notice of intent that you deny (with specific reference to paragraph number in the order):

Panorama Ranch incorporates by reference its prior Statement of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

Panorama Ranch denies all other facts or allegations regarding the Panorama Ranch Property No. 1 contained in the October 23rd Notice, including, but not limited to:

1) The same alleged facts which are denied in the July 17th Statement of Defense;

2) That portion of paragraph 6, page 4, which states: "Kay subsequently refused to allow Commission staff on the properties without his personal supervision, with the exception of viewing a graded pad on parcel 4464-0022-010" (p. 4, para. 6);

3) That portion of paragraph 7, page 4, which states: "Commission staff viewed portions of subject properties and found evidence that use of the roads had continued in violation of the EDCDO" (p. 4, para. 7);

4) That portion of paragraph 1, page 5, which states: "During the afternoons, work crews were seen leaving the area and trucks loaded with vegetation were seen leaving the site" (P. 5, para. 1);

Objection: *Panorama Ranch objects to the statement that "work crews were seen leaving the area and trucks loaded with vegetation were seen leaving the site" on the grounds that it is hearsay - unsubstantiated reports, made by unnamed persons or entities, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]*

5) That portion of paragraph 3, page 5, which states: "...but stated that Schmitz was the only one with keys to the vehicle" (p. 5, para. 3);

6) All alleged facts contained in paragraph 4, page 5 (p. 5, para. 4);

Objection: *Panorama Ranch objects to the statements that "NPS Rangers observed a work crew clearing and chipping vegetation from parcel 4464-019-008" and "NPS Rangers observed at least three laborers on site using a Polaris® work vehicle, and mechanical chipper" on the grounds that they are hearsay - unsubstantiated reports, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]*

7) All alleged facts contained in paragraph 5, page 5 (p. 5, para. 5);

Objection: *Panorama Ranch objects to the statements that "NPS Rangers observed a work crew of at least nine (9) laborers clearing and chipping vegetation from parcel 4464-019-008," "[l]aborers were again working on site with a Polaris® work vehicle, and mechanical chipper," and "NPS Rangers also located 2 new wooden posts set in concrete at the property boundary with NPS Parcel 4464-019-900" on the grounds that they are hearsay - unsubstantiated reports, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]*

8) All alleged facts contained in paragraph 6, page 5 (p. 5, para. 6).

Objection: *Panorama Ranch objects to the statement that "staff received additional reports that work crews were conducting additional roadwork on the subject properties, using a Backhoe Tractor, mechanical wood chipper, and Polaris® vehicle" on the grounds that it is hearsay - unsubstantiated reports, made by unnamed persons or entities, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]*

3. Facts or allegations contained in the cease and desist order or notice of intent of which you have no personal knowledge (with specific reference to paragraph number in the order):

Panorama Ranch incorporates by reference its prior Statement of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

Panorama Ranch has no personal knowledge of and, on that basis, denies the following facts or allegations regarding the Panorama Ranch Property No. 1 contained in the October 23rd Notice:

1) The same alleged facts of which Panorama Ranch has no personal knowledge contained in the July 17th Statement of Defense;

2) That portion of paragraph 9, page 4/ paragraph 1, page 5, which states: "During September 29, 2003, and September 30, 2003, staff received reports of work crews, including known employees of Kay, driving up to the Castro Peak area toward the subject properties and transporting heavy equipment, including a bulldozer and large trucks." (p. 4, para. 9/p. 5, para. 1);

   Objection: *Panorama Ranch objects to the statement that "staff received reports of work crews, including known employees of Kay, driving up to the Castro Peak area toward the subject properties and transporting heavy equipment, including a bulldozer and large trucks" on the grounds that it is hearsay - unsubstantiated reports, made by unnamed persons or entities, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]*

3) All alleged facts contained in paragraph 2, page 5 (p. 5, para. 2).

4. Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to the possible violation (be as specific as you can; if you have or know of any document(s), photograph(s), map(s), letter(s), or other evidence that you believe is/are relevant, please identify it/them by name, date, type, and any other identifying information and provide the original(s) or (a) copy(ies) if you can:

Panorama Ranch incorporates by reference its prior Statement of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

A) <u>The Activities Undertaken by Panorama Ranch Since September 30, 2003 Do Not Warrant Commission Enforcement Action.</u>

Panorama Ranch should be exonerated from any responsibility for the alleged violations contained in the October 23rd Notice. Panorama Ranch fully complied with the July 2, 2003 Executive Director Cease and Desist Order ("July 2nd CDO"), which expired on September 30, 2003. Since September 30, 2003, the <u>only</u> activities conducted on the Panorama Ranch Property No. 1 consisted of chipping existing already cleared brush which remained from prior brush clearing and vehicular travel on existing roads. Such activities are not in violation of the Coastal Act.

5. Any other information, statement, etc. that you want to offer or make:

Panorama Ranch incorporates by reference its prior Statement of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

A) Panorama Ranch Objects to the Issuance of the October 23rd Notice and October 24, 2003 Executive Director Cease and Desist Order ("October 24th CDO").

Panorama Ranch objects to the issuance of the October 23rd Notice and October 24th CDO. As the Commission is aware, Panorama Ranch was the subject of a July 2nd CDO which expired on September 30, 2003. Panorama Ranch fully complied with the July 2nd CDO (as well as the Notices of Intent issued as early as May 2003) and has done nothing sine September 30, 2003 to justify the renewal of Commission enforcement action. Notwithstanding, the Commission unjustifiably issued the October 23rd Notice.

The Commission hastily issued the October 24th CDO, again without justification and without allowing Panorama Ranch an opportunity to respond to the allegations in writing. Panorama Ranch has been the subject of Commission enforcement action since May of 2003. Since that time, up through the expiration of the July 2nd CDO, Panorama Ranch has refrained from so much as touching its property. Since July, more than four months ago, the Commission has failed to provide Panorama Ranch with any sort of hearing (either a restoration order hearing, a coastal development permit application hearing, and/or a hearing with regard to the matters contained in the CDOs). No hearing, coupled with an absence of proper factual or legal findings, render the October 24th CDO a clear violation of Panorama Ranch's due process rights.

B) Panorama Ranch's Coastal Development Permit Application Must be Heard at the Commission's December 2003 Meeting.

A coastal development permit application for all the alleged "violations" was submitted to the Commission on July 17, 2003. To date, however, no hearing has been set for the Commission to hear Panorama Ranch's application. In fact, Public Resources Code §30621 provides that "[a] hearing on any coastal development permit application or an appeal shall be set no later than 49 days after the date on which the application or appeal is filed with the commission." Given that it has been 118 days since submitting its application, Panorama Ranch requests that its application be heard at the Commission's December 2003 meeting (either prior to or concurrently with the pending Restoration Orders and October 23rd Notice).

C) Panorama Ranch is Entitled to its Own Hearing.

Panorama Ranch, once again, renews its request that it be afforded a hearing that is separate from hearings relating to other properties which are owned by different entities. To date, the Commission has grouped various properties together and has not specified with any degree of certainty which

allegations relate to which property or which owner. [Three out of five parcels targeted by the Commission are owned by entirely different entities (*i.e.* Park Lands Ranch, LLC owns APN 4464-022-014, Communications Relay Corporation owns APN 4464-022-001, and Deer Valley Ranch, LLC owns APN 4464-019-010). The remaining two parcels, APN 4464-019-008 and APN APN 4464-022-010, are owned by Panorama Ranch, LLC.]

As outlined in a July 17, 2003 letter to the Commission, the July 17th Statements of Defense, and a July 28, 2003 letter to Peter Douglas, each of the owners related to the Commission's enforcement proceedings deserves a separate hearing. Section 17003 of the California Corporations Code provides that:

> "...a limited liability company organized under this title shall have all of the powers of a natural person in carrying out its business activities, including, without limitation, the power to:
>
> (a) Transact its business, carry on its operations, qualify to do business, and have and exercise the powers granted by this title in any state, territory, district, possession, or dependency of the United States, and in any foreign country.
>
> (b) Sue, be sued, complain and defend any action, arbitration, or proceeding, whether judicial, administrative, or otherwise, in its own name..."

Furthermore, the acts of a corporation or LLC are deemed independent of the acts of its members. Abrahim & Sons Enterprises, et al. v. Equilon Enterprises, et al., (9th Cir. 2002) 292 F.3d 958, 962. As such, the actions of Panorama Ranch are independent of any action of its officers and deserves to defend itself in its own name.

Not only does the ownership of three out of the five parcels differ, but there is an entirely separate and distinct set of facts that relate to each property. The difference in the facts are made evident in the five separate Statements of Defense submitted to the Commission on July 17, 2003. In particular, the Statements of Defense set forth an important distinction between the work undertaken on APN 4464-019-008 (owned by Panorama Ranch, LLC) and the westerly portion of APN 4464-019-010 (owned by Deer Valley Ranch, LLC).

Evidence that is not applicable to a specific owner or a specific property should not be admitted or heard by the Commission because it is not relevant to the other owners or other properties. Data, reports, or evidence relating to a different owner or different property, other than the one at issue, is not material to, nor can it prove or disprove, any disputed fact that is of consequence to another owner or another property. (Deering's Ev. Code §210.) Should the Commission hold only one hearing for all five parcels or for all four owners, the probative value of certain evidence presented to the Commission will be substantially outweighed by the probability that it would unduly prejudice each of the other owners or confuse the issues as they relate to each parcel or each owner. (Deering's Ev. Code § 352.) With a single hearing, each of the owners could be severely prejudiced by the

evidence presented that relates to other parcels or other owners. All of these factors could affect the fairness of the proceeding and, ultimately, Panorama Ranch's due process rights. (U.S.C.A. Const. Amend. 14.)

STATEMENT OF DEFENSE
NOTICE OF INTENT TO COMMENCE CEASE AND DESIST ORDER PROCEEDINGS

Violation File No. V-4-03-018
Tentative Commission Hearing Date: December 8-10, 2003

This law office represents Panorama Ranch, LLC, a Nevada limited liability company ("Panorama Ranch"), with regard to this matter. Panorama Ranch owns real property in unincorporated Malibu, identified by assessor parcel number ("APN") 4464-022-010 (the "Panorama Ranch Property No. 2"). The purpose of this Statement of Defense is to set forth our client's position and response to the California Coastal Commission's (the "Commission") Notice of Intent to Commence Cease and Desist Order Proceedings, dated October 23, 2003 (the "October 23rd Notice"), which has been tentatively scheduled for hearing at the Commission's December 8-10, 2003 meeting.

On behalf of our client, we oppose the issuance of a Cease and Desist Order.

APN 4464-022-010

The parcel identified by APN 4464-022-010, owned by Panorama Ranch, LLC, is cited in the October 23rd Notice.

1. **Facts or allegations contained in the cease and desist order or the notice of intent that you admit (with specific reference to the paragraph number in the order):**

Panorama Ranch incorporates by reference its prior Statement of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

Panorama Ranch admits the following facts or allegations regarding the Panorama Ranch Property No. 2 contained in the October 23rd Notice:

1) The same alleged facts which are admitted in the July 17th Statement of Defense;

2) That portion of paragraph 6, page 4, which states: "On August 4, 2003, Commission staff arranged a meeting with Schmitz to view the subject properties and advise Schmitz as to the specific locations of certain unpermitted development" (p. 4, para. 6);

3) That portion of paragraph 7, page 4, which states: "On August 15, 2003, Commission staff again met with Schmitz to view the subject properties" (p. 4, para. 7);

4) All alleged facts contained in paragraph 8, page 4, beginning with the words "On August 26, 2003..." (p. 4, para. 8);

5) That portion of paragraph 3, page 5, which states: "On October 7, 2003, Commission staff spoke with Schmitz. Schmitz stated that Kay had abided by the terms of the EDCDO despite the expiration of the EDCDO and Schmitz denied that any work or use of the roads had occurred. Schmitz confirmed that Kay had recently purchased a bulldozer..." (p. 5, para. 3).

2. Facts or allegations contained in the cease and desist order or notice of intent that you deny (with specific reference to paragraph number in the order):

Panorama Ranch incorporates by reference its prior Statement of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

Panorama Ranch denies all other facts or allegations regarding the Panorama Ranch Property No. 2 contained in the October 23rd Notice, including, but not limited to:

1) The same alleged facts which are denied in the July 17th Statement of Defense;

2) That portion of paragraph 6, page 4, which states: "Kay subsequently refused to allow Commission staff on the properties without his personal supervision, with the exception of viewing a graded pad on parcel 4464-0022-010" (p. 4, para. 6);

3) That portion of paragraph 7, page 4, which states: "Commission staff viewed portions of subject properties and found evidence that use of the roads had continued in violation of the EDCDO" (p. 4, para. 7);

4) That portion of paragraph 1, page 5, which states: "During the afternoons, work crews were seen leaving the area and trucks loaded with vegetation were seen leaving the site" (P. 5, para. 1);

Objection: *Panorama Ranch objects to the statement that "work crews were seen leaving the area and trucks loaded with vegetation were seen leaving the site" on the grounds that it is hearsay - unsubstantiated reports, made by unnamed persons or entities, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]*

5) That portion of paragraph 3, page 5, which states: "...but stated that Schmitz was the only one with keys to the vehicle" (p. 5, para. 3);

6) All alleged facts contained in paragraph 4, page 5 (p. 5, para. 4);

Objection: *Panorama Ranch objects to the statements that "NPS Rangers observed a work crew clearing and chipping vegetation from parcel 4464-019-008" and "NPS Rangers observed at least three laborers on site using a Polaris® work vehicle, and mechanical chipper" on the grounds that they are hearsay - unsubstantiated reports, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]*

7) All alleged facts contained in paragraph 5, page 5 (p. 5, para. 5);

Objection: *Panorama Ranch objects to the statements that "NPS Rangers observed a work crew of at least nine (9) laborers clearing and chipping vegetation from parcel 4464-019-008," "[l]aborers were again working on site with a Polaris® work vehicle, and mechanical chipper," and "NPS Rangers also located 2 new wooden posts set in concrete at the property boundary with NPS Parcel 4464-019-900" on the grounds that they are hearsay - unsubstantiated reports, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]*

8) All alleged facts contained in paragraph 6, page 5 (p. 5, para. 6).

Objection: *Panorama Ranch objects to the statement that "staff received additional reports that work crews were conducting additional roadwork on the subject properties, using a Backhoe Tractor, mechanical wood chipper, and Polaris® vehicle" on the grounds that it is hearsay - unsubstantiated reports, made by unnamed persons or entities, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]*

3. Facts or allegations contained in the cease and desist order or notice of intent of which you have no personal knowledge (with specific reference to paragraph number in the order):

Panorama Ranch incorporates by reference its prior Statement of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

Panorama Ranch has no personal knowledge of and, on that basis, denies the following facts or allegations regarding the Panorama Ranch Property No. 2 contained in the October 23rd Notice:

1) The same alleged facts of which Panorama Ranch has no personal knowledge contained in the July 17th Statement of Defense;

2) That portion of paragraph 9, page 4/ paragraph 1, page 5, which states: "During September 29, 2003, and September 30, 2003, staff received reports of work crews, including known employees of Kay, driving up to the Castro Peak area toward the subject properties and transporting heavy equipment, including a bulldozer and large trucks." (p. 4, para. 9/p. 5, para. 1);

Objection: Panorama Ranch objects to the statement that "staff received reports of work crews, including known employees of Kay, driving up to the Castro Peak area toward the subject properties and transporting heavy equipment, including a bulldozer and large trucks" on the grounds that it is hearsay - unsubstantiated reports, made by unnamed persons or entities, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]

3) All alleged facts contained in paragraph 2, page 5 (p. 5, para. 2).

4. Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to the possible violation (be as specific as you can; if you have or know of any document(s), photograph(s), map(s), letter(s), or other evidence that you believe is/are relevant, please identify it/them by name, date, type, and any other identifying information and provide the original(s) or (a) copy(ies) if you can:

Panorama Ranch incorporates by reference its prior Statement of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

A) The Activities Undertaken by Panorama Ranch Since September 30, 2003 Do Not Warrant Commission Enforcement Action.

Panorama Ranch should be exonerated from any responsibility for the alleged violations contained in the October 23rd Notice. Panorama Ranch fully complied with the July 2, 2003 Executive Director Cease and Desist Order ("July 2nd CDO"), which expired on September 30, 2003. Since September 30, 2003, the only activities conducted on the Panorama Ranch Property No. 2 consisted of vehicular travel on existing roads and routine repair and maintenance of gates and "No Trespassing" signs which are part of the pending coastal development permit application for this property. Such activities are not in violation of the Coastal Act.

5. Any other information, statement, etc. that you want to offer or make:

Panorama Ranch incorporates by reference its prior Statement of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

A) Panorama Ranch Objects to the Issuance of the October 23rd Notice and October 24, 2003 Executive Director Cease and Desist Order ("October 24th CDO").

Panorama Ranch objects to the issuance of the October 23rd Notice and October 24th CDO. As the Commission is aware, Panorama Ranch was the subject of a July 2nd CDO which expired on September 30, 2003. Panorama Ranch fully complied with the July 2nd CDO (as well as the Notices of Intent issued as early as May 2003) and has done nothing sine September 30, 2003 to justify the renewal of Commission enforcement action. Notwithstanding, the Commission unjustifiably issued the October 23rd Notice.

The Commission hastily issued the October 24th CDO, again without justification and without allowing Panorama Ranch an opportunity to respond to the allegations in writing. Panorama Ranch has been the subject of Commission enforcement action since May of 2003. Since that time, up through the expiration of the July 2nd CDO, Panorama Ranch has refrained from so much as touching its property. Since July, more than four months ago, the Commission has failed to provide Panorama Ranch with any sort of hearing (either a restoration order hearing, a coastal development permit application hearing, and/or a hearing with regard to the matters contained in the CDOs). No hearing, coupled with an absence of proper factual or legal findings, render the October 24th CDO a clear violation of Panorama Ranch's due process rights.

B) Panorama Ranch's Coastal Development Permit Application Must be Heard at the Commission's December 2003 Meeting.

A coastal development permit application for all the alleged "violations" was submitted to the Commission on July 17, 2003. To date, however, no hearing has been set for the Commission to hear Panorama Ranch's application. In fact, Public Resources Code §30621 provides that "[a] hearing on any coastal development permit application or an appeal shall be set no later than 49 days after the date on which the application or appeal is filed with the commission." Given that it has been 118 days since submitting its application, Panorama Ranch requests that its application be heard at the Commission's December 2003 meeting (either prior to or concurrently with the pending Restoration Orders and October 23rd Notice).

C) Panorama Ranch is Entitled to its Own Hearing.

Panorama Ranch, once again, renews its request that it be afforded a hearing that is separate from hearings relating to other properties which are owned by different entities. To date, the Commission

has grouped various properties together and has not specified with any degree of certainty which allegations relate to which property or which owner. [Three out of five parcels targeted by the Commission are owned by entirely different entities (*i.e.* Park Lands Ranch, LLC owns APN 4464-022-014, Communications Relay Corporation owns APN 4464-022-001, and Deer Valley Ranch, LLC owns APN 4464-019-010). The remaining two parcels, APN 4464-019-008 and APN APN 4464-022-010, are owned by Panorama Ranch, LLC.]

As outlined in a July 17, 2003 letter to the Commission, the July 17th Statements of Defense, and a July 28, 2003 letter to Peter Douglas, each of the owners related to the Commission's enforcement proceedings deserves a separate hearing. Section 17003 of the California Corporations Code provides that:

> "...a limited liability company organized under this title shall have all of the powers of a natural person in carrying out its business activities, including, without limitation, the power to:
>
> (a) Transact its business, carry on its operations, qualify to do business, and have and exercise the powers granted by this title in any state, territory, district, possession, or dependency of the United States, and in any foreign country.
>
> (b) Sue, be sued, complain and defend any action, arbitration, or proceeding, whether judicial, administrative, or otherwise, in its own name..."

Furthermore, the acts of a corporation or LLC are deemed independent of the acts of its members. Abrahim & Sons Enterprises, et al. v. Equilon Enterprises, et al., (9th Cir. 2002) 292 F.3d 958, 962. As such, the actions of Panorama Ranch are independent of any action of its officers and deserves to defend itself in its own name.

Not only does the ownership of three out of the five parcels differ, but there is an entirely separate and distinct set of facts that relate to each property. The difference in the facts are made evident in the five separate Statements of Defense submitted to the Commission on July 17, 2003. In particular, the Statements of Defense set forth an important distinction between the work undertaken on APN 4464-019-008 (owned by Panorama Ranch, LLC) and the westerly portion of APN 4464-019-010 (owned by Deer Valley Ranch, LLC).

Evidence that is not applicable to a specific owner or a specific property should not be admitted or heard by the Commission because it is not relevant to the other owners or other properties. Data, reports, or evidence relating to a different owner or different property, other than the one at issue, is not material to, nor can it prove or disprove, any disputed fact that is of consequence to another owner or another property. (Deering's Ev. Code §210.) Should the Commission hold only one hearing for all five parcels or for all four owners, the probative value of certain evidence presented to the Commission will be substantially outweighed by the probability that it would unduly prejudice each of the other owners or confuse the issues as they relate to each parcel or each owner. (Deering's

Ev. Code § 352.) With a single hearing, each of the owners could be severely prejudiced by the evidence presented that relates to other parcels or other owners. All of these factors could affect the fairness of the proceeding and, ultimately, Panorama Ranch's due process rights. (U.S.C.A. Const. Amend. 14.)

STATEMENT OF DEFENSE
NOTICE OF INTENT TO COMMENCE CEASE AND DESIST ORDER PROCEEDINGS

Violation File No. V-4-03-018
Tentative Commission Hearing Date: December 8-10, 2003

This law office represents Deer Valley Ranch, LLC, a Nevada limited liability company ("Deer Valley Ranch"), with regard to this matter. Deer Valley Ranch owns real property in unincorporated Malibu, identified by assessor parcel number ("APN") 4464-019-010 (the "Deer Valley Ranch Property"). The purpose of this Statement of Defense is to set forth our client's position and response to the California Coastal Commission's (the "Commission") Notice of Intent to Commence Cease and Desist Order Proceedings, dated October 23, 2003 (the "October 23rd Notice"), which has been tentatively scheduled for hearing at the Commission's December 8-10, 2003 meeting.

On behalf of our client, we oppose the issuance of a Cease and Desist Order.

APN 4464-019-010

The parcel identified by APN 4464-019-010, owned by Deer Valley Ranch, is cited in the October 23rd Notice.

1. **Facts or allegations contained in the cease and desist order or the notice of intent that you admit (with specific reference to the paragraph number in the order):**

Deer Valley Ranch incorporates by reference its prior Statement of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

Deer Valley Ranch admits the following facts or allegations regarding the Deer Valley Ranch Property contained in the October 23rd Notice:

1) The same alleged facts which are admitted in the July 17th Statement of Defense;

2) That portion of paragraph 6, page 4, which states: "On August 4, 2003, Commission staff arranged a meeting with Schmitz to view the subject properties and advise Schmitz as to the specific locations of certain unpermitted development" (p. 4, para. 6);

3) That portion of paragraph 7, page 4, which states: "On August 15, 2003, Commission staff again met with Schmitz to view the subject properties" (p. 4, para. 7);

4) All alleged facts contained in paragraph 8, page 4, beginning with the words "On August 26, 2003..." (p. 4, para. 8);

5) That portion of paragraph 3, page 5, which states: "On October 7, 2003, Commission staff spoke with Schmitz. Schmitz stated that Kay had abided by the terms of the EDCDO despite the expiration of the EDCDO and Schmitz denied that any work or use of the roads had occurred. Schmitz confirmed that Kay had recently purchased a bulldozer..." (p. 5, para. 3).

2. Facts or allegations contained in the cease and desist order or notice of intent that you deny (with specific reference to paragraph number in the order):

Deer Valley Ranch incorporates by reference its prior Statement of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

Deer Valley Ranch denies all other facts or allegations regarding the Deer Valley Ranch Property contained in the October 23rd Notice, including, but not limited to:

1) The same alleged facts which are denied in the July 17th Statement of Defense;

2) That portion of paragraph 6, page 4, which states: "Kay subsequently refused to allow Commission staff on the properties without his personal supervision, with the exception of viewing a graded pad on parcel 4464-0022-010" (p. 4, para. 6);

3) That portion of paragraph 7, page 4, which states: "Commission staff viewed portions of subject properties and found evidence that use of the roads had continued in violation of the EDCDO" (p. 4, para. 7);

4) That portion of paragraph 1, page 5, which states: "During the afternoons, work crews were seen leaving the area and trucks loaded with vegetation were seen leaving the site" (P. 5, para. 1);

__Objection__: Deer Valley Ranch objects to the statement that "work crews were seen leaving the area and trucks loaded with vegetation were seen leaving the site" on the grounds that it is hearsay - unsubstantiated reports, made by unnamed persons or entities, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]

5) That portion of paragraph 3, page 5, which states: "...but stated that Schmitz was the only one with keys to the vehicle" (p. 5, para. 3);

6) All alleged facts contained in paragraph 4, page 5 (p. 5, para. 4);

Objection: *Deer Valley Ranch objects to the statements that "NPS Rangers observed a work crew clearing and chipping vegetation from parcel 4464-019-008" and "NPS Rangers observed at least three laborers on site using a Polaris® work vehicle, and mechanical chipper" on the grounds that they are hearsay - unsubstantiated reports, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]*

7) All alleged facts contained in paragraph 5, page 5 (p. 5, para. 5);

Objection: *Deer Valley Ranch objects to the statements that "NPS Rangers observed a work crew of at least nine (9) laborers clearing and chipping vegetation from parcel 4464-019-008," "[l]aborers were again working on site with a Polaris® work vehicle, and mechanical chipper," and "NPS Rangers also located 2 new wooden posts set in concrete at the property boundary with NPS Parcel 4464-019-900" on the grounds that they are hearsay - unsubstantiated reports, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]*

8) All alleged facts contained in paragraph 6, page 5 (p. 5, para. 6).

Objection: *Deer Valley Ranch objects to the statement that "staff received additional reports that work crews were conducting additional roadwork on the subject properties, using a Backhoe Tractor, mechanical wood chipper, and Polaris® vehicle" on the grounds that it is hearsay - unsubstantiated reports, made by unnamed persons or entities, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]*

3. Facts or allegations contained in the cease and desist order or notice of intent of which you have no personal knowledge (with specific reference to paragraph number in the order):

Deer Valley Ranch incorporates by reference its prior Statement of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

Deer Valley Ranch has no personal knowledge of and, on that basis, denies the following facts or allegations regarding the Deer Valley Ranch Property contained in the October 23rd Notice:

1) The same alleged facts of which Deer Valley Ranch has no personal knowledge contained in the July 17th Statement of Defense;

2) That portion of paragraph 9, page 4/ paragraph 1, page 5, which states: "During September 29, 2003, and September 30, 2003, staff received reports of work crews, including known employees of Kay, driving up to the Castro Peak area toward the subject properties and transporting heavy equipment, including a bulldozer and large trucks." (p. 4, para. 9/p. 5, para. 1);

Objection: *Deer Valley Ranch objects to the statement that "staff received reports of work crews, including known employees of Kay, driving up to the Castro Peak area toward the subject properties and transporting heavy equipment, including a bulldozer and large trucks" on the grounds that it is hearsay - unsubstantiated reports, made by unnamed persons or entities, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]*

3) All alleged facts contained in paragraph 2, page 5 (p. 5, para. 2).

4. **Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to the possible violation (be as specific as you can; if you have or know of any document(s), photograph(s), map(s), letter(s), or other evidence that you believe is/are relevant, please identify it/them by name, date, type, and any other identifying information and provide the original(s) or (a) copy(ies) if you can:**

Deer Valley Ranch incorporates by reference its prior Statement of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

A) <u>The Activities Undertaken by Deer Valley Ranch Since September 30, 2003 Do Not Warrant Commission Enforcement Action.</u>

Deer Valley Ranch should be exonerated from any responsibility for the alleged violations contained in the October 23rd Notice. Deer Valley Ranch fully complied with the July 2, 2003 Executive Director Cease and Desist Order ("July 2nd CDO"), which expired on September 30, 2003. Since September 30, 2003, the <u>only</u> activities conducted on the Deer Valley Ranch Property consisted of vehicular travel on existing roads. Such activities are not in violation of the Coastal Act.

5. Any other information, statement, etc. that you want to offer or make:

Deer Valley Ranch incorporates by reference its prior Statement of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

A) Deer Valley Ranch Objects to the Issuance of the October 23rd Notice and October 24, 2003 Executive Director Cease and Desist Order ("October 24th CDO").

Deer Valley Ranch objects to the issuance of the October 23rd Notice and October 24th CDO. As the Commission is aware, Deer Valley Ranch was the subject of a July 2nd CDO which expired on September 30, 2003. Deer Valley Ranch fully complied with the July 2nd CDO (as well as the Notices of Intent issued as early as May 2003) and has done nothing sine September 30, 2003 to justify the renewal of Commission enforcement action. Notwithstanding, the Commission unjustifiably issued the October 23rd Notice.

The Commission hastily issued the October 24th CDO, again without justification and without allowing Deer Valley Ranch an opportunity to respond to the allegations in writing. Deer Valley Ranch has been the subject of Commission enforcement action since May of 2003. Since that time, up through the expiration of the July 2nd CDO, Deer Valley Ranch has refrained from so much as touching its property. Since July, more than four months ago, the Commission has failed to provide Deer Valley Ranch with any sort of hearing (either a restoration order hearing, a coastal development permit application hearing, and/or a hearing with regard to the matters contained in the CDOs). No hearing, coupled with an absence of proper factual or legal findings, render the October 24th CDO a clear violation of Deer Valley Ranch's due process rights.

B) Deer Valley Ranch's Coastal Development Permit Application Must be Heard at the Commission's December 2003 Meeting.

A coastal development permit application for all the alleged "violations" was submitted to the Commission on July 17, 2003. To date, however, no hearing has been set for the Commission to hear Deer Valley Ranch's application. In fact, Public Resources Code §30621 provides that "[a] hearing on any coastal development permit application or an appeal shall be set no later than 49 days after the date on which the application or appeal is filed with the commission." Given that it has been 118 days since submitting its application, Deer Valley Ranch requests that its application be heard at the Commission's December 2003 meeting (either prior to or concurrently with the pending Restoration Orders and October 23rd Notice).

C) Deer Valley Ranch is Entitled to its Own Hearing.

Deer Valley Ranch, once again, renews its request that it be afforded a hearing that is separate from hearings relating to other properties which are owned by different entities. To date, the Commission has grouped various properties together and has not specified with any degree of certainty which

allegations relate to which property or which owner. [Three out of five parcels targeted by the Commission are owned by entirely different entities (*i.e.* Park Lands Ranch, LLC owns APN 4464-022-014, Communications Relay Corporation owns APN 4464-022-001, and Deer Valley Ranch, LLC owns APN 4464-019-010). The remaining two parcels, APN 4464-019-008 and APN APN 4464-022-010, are owned by Panorama Ranch, LLC.]

As outlined in a July 17, 2003 letter to the Commission, the July 17th Statements of Defense, and a July 28, 2003 letter to Peter Douglas, each of the owners related to the Commission's enforcement proceedings deserves a separate hearing. Section 17003 of the California Corporations Code provides that:

> "...a limited liability company organized under this title shall have all of the powers of a natural person in carrying out its business activities, including, without limitation, the power to:
>
> (a) Transact its business, carry on its operations, qualify to do business, and have and exercise the powers granted by this title in any state, territory, district, possession, or dependency of the United States, and in any foreign country.
>
> (b) Sue, be sued, complain and defend any action, arbitration, or proceeding, whether judicial, administrative, or otherwise, in its own name..."

Furthermore, the acts of a corporation or LLC are deemed independent of the acts of its members. Abrahim & Sons Enterprises, et al. v. Equilon Enterprises, et al., (9th Cir. 2002) 292 F.3d 958, 962. As such, the actions of Deer Valley Ranch are independent of any action of its officers and deserves to defend itself in its own name.

Not only does the ownership of three out of the five parcels differ, but there is an entirely separate and distinct set of facts that relate to each property. The difference in the facts are made evident in the five separate Statements of Defense submitted to the Commission on July 17, 2003. In particular, the Statements of Defense set forth an important distinction between the work undertaken on APN 4464-019-008 (owned by Panorama Ranch, LLC) and the westerly portion of APN 4464-019-010 (owned by Deer Valley Ranch, LLC).

Evidence that is not applicable to a specific owner or a specific property should not be admitted or heard by the Commission because it is not relevant to the other owners or other properties. Data, reports, or evidence relating to a different owner or different property, other than the one at issue, is not material to, nor can it prove or disprove, any disputed fact that is of consequence to another owner or another property. (Deering's Ev. Code §210.) Should the Commission hold only one hearing for all five parcels or for all four owners, the probative value of certain evidence presented to the Commission will be substantially outweighed by the probability that it would unduly prejudice each of the other owners or confuse the issues as they relate to each parcel or each owner. (Deering's Ev. Code § 352.) With a single hearing, each of the owners could be severely prejudiced by the

evidence presented that relates to other parcels or other owners. All of these factors could affect the fairness of the proceeding and, ultimately, Deer Valley Ranch's due process rights. (U.S.C.A. Const. Amend. 14.)

STATEMENT OF DEFENSE
NOTICE OF INTENT TO COMMENCE CEASE AND DESIST ORDER PROCEEDINGS

Violation File No. V-4-03-018
Tentative Commission Hearing Date: December 8-10, 2003

This law office represents Communications Relay Corporation, a California corporation ("Communications Relay"), with regard to this matter. Communications Relay owns real property in unincorporated Malibu, identified by assessor parcel number ("APN") 4464-022-001 (the "Communications Relay Property"). The purpose of this Statement of Defense is to set forth our client's position and response to the California Coastal Commission's (the "Commission") Notice of Intent to Commence Cease and Desist Order Proceedings, dated October 23, 2003 (the "October 23rd Notice"), which has been tentatively scheduled for hearing at the Commission's December 8-10, 2003 meeting.

On behalf of our client, we oppose the issuance of a Cease and Desist Order.

APN 4464-022-001

The parcel identified by APN 4464-022-001, owned by Communications Relay, is cited in the October 23rd Notice.

1. Facts or allegations contained in the cease and desist order or the notice of intent that you admit (with specific reference to the paragraph number in the order):

Communications Relay incorporates by reference its prior Statement of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

Communications Relay admits the following facts or allegations regarding the Communications Relay Property contained in the October 23rd Notice:

1) The same alleged facts which are admitted in the July 17th Statement of Defense;

2) That portion of paragraph 6, page 4, which states: "On August 4, 2003, Commission staff arranged a meeting with Schmitz to view the subject properties and advise Schmitz as to the specific locations of certain unpermitted development" (p. 4, para. 6);

3) That portion of paragraph 7, page 4, which states: "On August 15, 2003, Commission staff again met with Schmitz to view the subject properties" (p. 4, para. 7);

4) All alleged facts contained in paragraph 8, page 4, beginning with the words "On August 26, 2003..." (p. 4, para. 8);

5) That portion of paragraph 3, page 5, which states: "On October 7, 2003, Commission staff spoke with Schmitz. Schmitz stated that Kay had abided by the terms of the EDCDO despite the expiration of the EDCDO and Schmitz denied that any work or use of the roads had occurred. Schmitz confirmed that Kay had recently purchased a bulldozer..." (p. 5, para. 3).

2. Facts or allegations contained in the cease and desist order or notice of intent that you deny (with specific reference to paragraph number in the order):

Communications Relay incorporates by reference its prior Statement of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

Communications Relay denies all other facts or allegations regarding the Communications Relay Property contained in the October 23rd Notice, including, but not limited to:

1) The same alleged facts which are denied in the July 17th Statement of Defense;

2) That portion of paragraph 6, page 4, which states: "Kay subsequently refused to allow Commission staff on the properties without his personal supervision, with the exception of viewing a graded pad on parcel 4464-0022-010" (p. 4, para. 6);

3) That portion of paragraph 7, page 4, which states: "Commission staff viewed portions of subject properties and found evidence that use of the roads had continued in violation of the EDCDO" (p. 4, para. 7);

4) That portion of paragraph 1, page 5, which states: "During the afternoons, work crews were seen leaving the area and trucks loaded with vegetation were seen leaving the site" (P. 5, para. 1);

__Objection__: Communications Relay objects to the statement that "work crews were seen leaving the area and trucks loaded with vegetation were seen leaving the site" on the grounds that it is hearsay - unsubstantiated reports, made by unnamed persons or entities, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]

5) That portion of paragraph 3, page 5, which states: "...but stated that Schmitz was the only one with keys to the vehicle" (p. 5, para. 3);

6) All alleged facts contained in paragraph 4, page 5 (p. 5, para. 4);

Objection: *Communications Relay objects to the statements that "NPS Rangers observed a work crew clearing and chipping vegetation from parcel 4464-019-008" and "NPS Rangers observed at least three laborers on site using a Polaris® work vehicle, and mechanical chipper" on the grounds that they are hearsay - unsubstantiated reports, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]*

7) All alleged facts contained in paragraph 5, page 5 (p. 5, para. 5);

Objection: *Communications Relay objects to the statements that "NPS Rangers observed a work crew of at least nine (9) laborers clearing and chipping vegetation from parcel 4464-019-008," "[l]aborers were again working on site with a Polaris® work vehicle, and mechanical chipper," and "NPS Rangers also located 2 new wooden posts set in concrete at the property boundary with NPS Parcel 4464-019-900" on the grounds that they are hearsay - unsubstantiated reports, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]*

8) All alleged facts contained in paragraph 6, page 5 (p. 5, para. 6).

Objection: *Communications Relay objects to the statement that "staff received additional reports that work crews were conducting additional roadwork on the subject properties, using a Backhoe Tractor, mechanical wood chipper, and Polaris® vehicle" on the grounds that it is hearsay - unsubstantiated reports, made by unnamed persons or entities, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]*

3. Facts or allegations contained in the cease and desist order or notice of intent of which you have no personal knowledge (with specific reference to paragraph number in the order):

Communications Relay incorporates by reference its prior Statement of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

Communications Relay has no personal knowledge of and, on that basis, denies the following facts or allegations regarding the Communications Relay Property contained in the October 23rd Notice:

1) The same alleged facts of which Communications Relay has no personal knowledge contained in the July 17th Statement of Defense;

2) That portion of paragraph 9, page 4/ paragraph 1, page 5, which states: "During September 29, 2003, and September 30, 2003, staff received reports of work crews, including known employees of Kay, driving up to the Castro Peak area toward the subject properties and transporting heavy equipment, including a bulldozer and large trucks." (p. 4, para. 9/p. 5, para. 1);

__Objection__: Communications Relay objects to the statement that "staff received reports of work crews, including known employees of Kay, driving up to the Castro Peak area toward the subject properties and transporting heavy equipment, including a bulldozer and large trucks" on the grounds that it is hearsay - unsubstantiated reports, made by unnamed persons or entities, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]

3) All alleged facts contained in paragraph 2, page 5 (p. 5, para. 2).

4. Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to the possible violation (be as specific as you can; if you have or know of any document(s), photograph(s), map(s), letter(s), or other evidence that you believe is/are relevant, please identify it/them by name, date, type, and any other identifying information and provide the original(s) or (a) copy(ies) if you can:

Communications Relay incorporates by reference its prior Statement of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

A) <u>The Activities Undertaken by Communications Relay Since September 30, 2003 Do Not Warrant Commission Enforcement Action.</u>

Communications Relay should be exonerated from any responsibility for the alleged violations contained in the October 23rd Notice. Communications Relay fully complied with the July 2, 2003 Executive Director Cease and Desist Order ("July 2nd CDO"), which expired on September 30, 2003. Since September 30, 2003, the <u>only</u> activities conducted on the Communications Relay Property consisted of vehicular travel on existing roads (970 feet of which the Commission admits pre-date the Coastal Act). Such activities are not in violation of the Coastal Act.

5. Any other information, statement, etc. that you want to offer or make:

Communications Relay incorporates by reference its prior Statement of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

A) Communications Relay Objects to the Issuance of the October 23rd Notice and October 24, 2003 Executive Director Cease and Desist Order ("October 24th CDO").

Communications Relay objects to the issuance of the October 23rd Notice and October 24th CDO. As the Commission is aware, Communications Relay was the subject of a July 2nd CDO which expired on September 30, 2003. Communications Relay fully complied with the July 2nd CDO (as well as the Notices of Intent issued as early as May 2003) and has done nothing sine September 30, 2003 to justify the renewal of Commission enforcement action. Notwithstanding, the Commission unjustifiably issued the October 23rd Notice.

The Commission hastily issued the October 24th CDO, again without justification and without allowing Communications Relay an opportunity to respond to the allegations in writing. Communications Relay has been the subject of Commission enforcement action since May of 2003. Since that time, up through the expiration of the July 2nd CDO, Communications Relay has refrained from so much as touching its property. Since July, more than four months ago, the Commission has failed to provide Communications Relay with any sort of hearing (either a restoration order hearing, a coastal development permit application hearing, and/or a hearing with regard to the matters contained in the CDOs). No hearing, coupled with an absence of proper factual or legal findings, render the October 24th CDO a clear violation of Communications Relay's due process rights.

B) Communications Relay's Coastal Development Permit Application Must be Heard at the Commission's December 2003 Meeting.

A coastal development permit application for all the alleged "violations" was submitted to the Commission on July 17, 2003. To date, however, no hearing has been set for the Commission to hear Communications Relay's application. In fact, Public Resources Code §30621 provides that "[a] hearing on any coastal development permit application or an appeal shall be set no later than 49 days after the date on which the application or appeal is filed with the commission." Given that it has been 118 days since submitting its application, Communications Relay requests that its application be heard at the Commission's December 2003 meeting (either prior to or concurrently with the pending Restoration Orders and October 23rd Notice).

C) Communications Relay is Entitled to its Own Hearing.

Communications Relay, once again, renews its request that it be afforded a hearing that is separate from hearings relating to other properties which are owned by different entities. To date, the Commission has grouped various properties together and has not specified with any degree of

certainty which allegations relate to which property or which owner. [Three out of five parcels targeted by the Commission are owned by entirely different entities (*i.e.* Park Lands Ranch, LLC owns APN 4464-022-014, Communications Relay Corporation owns APN 4464-022-001, and Deer Valley Ranch, LLC owns APN 4464-019-010). The remaining two parcels, APN 4464-019-008 and APN APN 4464-022-010, are owned by Panorama Ranch, LLC.]

As outlined in a July 17, 2003 letter to the Commission, the July 17th Statements of Defense, and a July 28, 2003 letter to Peter Douglas, each of the owners related to the Commission's enforcement proceedings deserves a separate hearing. Section 17003 of the California Corporations Code provides that:

> "...a limited liability company organized under this title shall have all of the powers of a natural person in carrying out its business activities, including, without limitation, the power to:
>
> (a) Transact its business, carry on its operations, qualify to do business, and have and exercise the powers granted by this title in any state, territory, district, possession, or dependency of the United States, and in any foreign country.
>
> (b) Sue, be sued, complain and defend any action, arbitration, or proceeding, whether judicial, administrative, or otherwise, in its own name..."

Furthermore, the acts of a corporation or LLC are deemed independent of the acts of its members. Abrahim & Sons Enterprises, et al. v. Equilon Enterprises, et al., (9th Cir. 2002) 292 F.3d 958, 962. As such, the actions of Communications Relay are independent of any action of its officers and deserves to defend itself in its own name.

Not only does the ownership of three out of the five parcels differ, but there is an entirely separate and distinct set of facts that relate to each property. The difference in the facts are made evident in the five separate Statements of Defense submitted to the Commission on July 17, 2003. In particular, the Statements of Defense set forth an important distinction between the work undertaken on APN 4464-019-008 (owned by Panorama Ranch, LLC) and the westerly portion of APN 4464-019-010 (owned by Deer Valley Ranch, LLC).

Evidence that is not applicable to a specific owner or a specific property should not be admitted or heard by the Commission because it is not relevant to the other owners or other properties. Data, reports, or evidence relating to a different owner or different property, other than the one at issue, is not material to, nor can it prove or disprove, any disputed fact that is of consequence to another owner or another property. (Deering's Ev. Code §210.) Should the Commission hold only one hearing for all five parcels or for all four owners, the probative value of certain evidence presented to the Commission will be substantially outweighed by the probability that it would unduly prejudice each of the other owners or confuse the issues as they relate to each parcel or each owner. (Deering's Ev. Code § 352.) With a single hearing, each of the owners could be severely prejudiced by the

evidence presented that relates to other parcels or other owners. All of these factors could affect the fairness of the proceeding and, ultimately, Communications Relay's due process rights. (U.S.C.A. Const. Amend. 14.)

STATEMENT OF DEFENSE
NOTICE OF INTENT TO COMMENCE CEASE AND DESIST ORDER PROCEEDINGS

Violation File No. V-4-03-018
Tentative Commission Hearing Date: December 8-10, 2003

This law office represents Deer Valley Ranch, LLC ("Deer Valley Ranch"), Panorama Ranch, LLC ("Panorama Ranch"), and Communications Relay Corporation ("Communications Relay") with regard to this matter. Deer Valley Ranch, Panorama Ranch, and Communications Relay own real property in unincorporated Malibu. The purpose of this Statement of Defense is to set forth our clients' position and response to the California Coastal Commission's (the "Commission") Notice of Intent to Commence Cease and Desist Order Proceedings, dated October 23, 2003 (the "October 23rd Notice"), which has been tentatively scheduled for hearing at the Commission's December 8-10, 2003 meeting.

On behalf of our clients, we oppose the issuance of a Cease and Desist Order.

APN 4464-019-900
(owned by United States Government, National Park Service)

The parcel identified by APN 4464-019-900, owned by the National Park Service (the "NPS Property"), is cited in the October 23rd Notice.

1. **Facts or allegations contained in the cease and desist order or the notice of intent that you admit (with specific reference to the paragraph number in the order):**

Deer Valley Ranch, Panorama Ranch, and Communications Relay incorporate by reference their prior Statements of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

Deer Valley Ranch, Panorama Ranch, and Communications Relay admit the following facts or allegations regarding the NPS Property contained in the October 23rd Notice:

1) The same alleged facts which are admitted in the July 17th Statements of Defense;

2) That portion of paragraph 6, page 4, which states: "On August 4, 2003, Commission staff arranged a meeting with Schmitz to view the subject properties and advise Schmitz as to the specific locations of certain unpermitted development" (p. 4, para. 6);

3) That portion of paragraph 7, page 4, which states: "On August 15, 2003, Commission staff again met with Schmitz to view the subject properties" (p. 4, para. 7);

4) All alleged facts contained in paragraph 8, page 4, beginning with the words "On August 26,

2003..." (p. 4, para. 8);

5) That portion of paragraph 3, page 5, which states: "On October 7, 2003, Commission staff spoke with Schmitz. Schmitz stated that Kay had abided by the terms of the EDCDO despite the expiration of the EDCDO and Schmitz denied that any work or use of the roads had occurred. Schmitz confirmed that Kay had recently purchased a bulldozer..." (p. 5, para. 3).

2. Facts or allegations contained in the cease and desist order or notice of intent that you deny (with specific reference to paragraph number in the order):

Deer Valley Ranch, Panorama Ranch, and Communications Relay incorporate by reference their prior Statements of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

Deer Valley Ranch, Panorama Ranch, and Communications Relay deny all other facts or allegations regarding the NPS Property contained in the October 23rd Notice, including, but not limited to:

1) The same alleged facts which are denied in the July 17th Statement of Defense;

2) That portion of paragraph 6, page 4, which states: "Kay subsequently refused to allow Commission staff on the properties without his personal supervision, with the exception of viewing a graded pad on parcel 4464-0022-010" (p. 4, para. 6);

3) That portion of paragraph 7, page 4, which states: "Commission staff viewed portions of subject properties and found evidence that use of the roads had continued in violation of the EDCDO" (p. 4, para. 7);

4) That portion of paragraph 1, page 5, which states: "During the afternoons, work crews were seen leaving the area and trucks loaded with vegetation were seen leaving the site" (P. 5, para. 1);

Objection: *Deer Valley Ranch, Panorama Ranch, and Communications Relay object to the statement that "work crews were seen leaving the area and trucks loaded with vegetation were seen leaving the site" on the grounds that it is hearsay - unsubstantiated reports, made by unnamed persons or entities, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]*

5) That portion of paragraph 3, page 5, which states: "...but stated that Schmitz was the only one with keys to the vehicle" (p. 5, para. 3);

6) All alleged facts contained in paragraph 4, page 5 (p. 5, para. 4);

__Objection__: Deer Valley Ranch, Panorama Ranch, and Communications Relay object to the statements that "NPS Rangers observed a work crew clearing and chipping vegetation from parcel 4464-019-008" and "NPS Rangers observed at least three laborers on site using a Polaris® work vehicle, and mechanical chipper" on the grounds that they are hearsay - unsubstantiated reports, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]

7) All alleged facts contained in paragraph 5, page 5 (p. 5, para. 5);

__Objection__: Deer Valley Ranch, Panorama Ranch, and Communications Relay object to the statements that "NPS Rangers observed a work crew of at least nine (9) laborers clearing and chipping vegetation from parcel 4464-019-008." "[l]aborers were again working on site with a Polaris® work vehicle, and mechanical chipper," and "NPS Rangers also located 2 new wooden posts set in concrete at the property boundary with NPS Parcel 4464-019-900" on the grounds that they are hearsay - unsubstantiated reports, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]

8) All alleged facts contained in paragraph 6, page 5 (p. 5, para. 6).

3. Facts or allegations contained in the cease and desist order or notice of intent of which you have no personal knowledge (with specific reference to paragraph number in the order):

Deer Valley Ranch, Panorama Ranch, and Communications Relay incorporate by reference their prior Statements of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

Deer Valley Ranch, Panorama Ranch, and Communications Relay have no personal knowledge of and, on that basis, deny the following facts or allegations regarding the NPS Property contained in the October 23rd Notice:

1) The same alleged facts of which Deer Valley Ranch, Panorama Ranch, and Communications Relay have no personal knowledge contained in the July 17th Statement of Defense;

2) That portion of paragraph 9, page 4/ paragraph 1, page 5, which states: "During September

29, 2003, and September 30, 2003, staff received reports of work crews, including known employees of Kay, driving up to the Castro Peak area toward the subject properties and transporting heavy equipment, including a bulldozer and large trucks." (p. 4, para. 9/p. 5, para. 1);

Objection: Deer Valley Ranch, Panorama Ranch, and Communications Relay object to the statement that "staff received reports of work crews, including known employees of Kay, driving up to the Castro Peak area toward the subject properties and transporting heavy equipment, including a bulldozer and large trucks" on the grounds that it is hearsay - unsubstantiated reports, made by unnamed persons or entities, offered to prove the truth of the matter asserted. [In addition, the credibility of such "reports" allegedly received by the Commission is suspect, given strained relations between the property owner and NPS and NPS's prior unsuccessful negotiations to acquire the property from the owner's predecessor in interest.]

3) All alleged facts contained in paragraph 2, page 5 (p. 5, para. 2).

4. Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to the possible violation (be as specific as you can; if you have or know of any document(s), photograph(s), map(s), letter(s), or other evidence that you believe is/are relevant, please identify it/them by name, date, type, and any other identifying information and provide the original(s) or (a) copy(ies) if you can:

Deer Valley Ranch, Panorama Ranch, and Communications Relay incorporate by reference their prior Statements of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

A) The Activities Undertaken by Deer Valley Ranch, Panorama Ranch, and Communications Relay Since September 30, 2003 Do Not Warrant Commission Enforcement Action.

Deer Valley Ranch, Panorama Ranch, and Communications Relay should be exonerated from any responsibility for the alleged violations contained in the October 23rd Notice. Deer Valley Ranch, Panorama Ranch, and Communications Relay fully complied with the July 2, 2003 Executive Director Cease and Desist Order ("July 2nd CDO"), which expired on September 30, 2003. Since September 30, 2003, the only activities conducted on the NPS Property consisted of vehicular travel on existing roads. Such activities are not in violation of the Coastal Act.

To our clients' knowledge, the NPS has not closed APN 4464-019-900 to the public or imposed public use limits pursuant to Section 1.5 of Title 36 of the Code of Federal Regulations, nor has it posted signs illustrating that to walk on APN 4464-019-900 is prohibited pursuant to Section 1.10 of Title 36 of the Code of Federal Regulations. In addition, Section 2.31 of Title 36 of the Code of

Federal Regulations defines trespassing as "...entering or remaining in or upon property or real property ***not open to the public,*** except with the express invitation or consent of the person having lawful control of the property or real property."[1] Based on the understanding that the NPS property was open to the public (and presumably still is), our clients and their agents believe that it is lawful to utilize the roads located on APN 4464-019-900.

Also note that August and October 2003 letters were sent to Superintendent Smeck regarding use the roads located on APN 4464-019-900. In October 2003, we specifically requested that NPS advise our clients if the roads on APN 4464-019-900 were closed to the public. (We are enclosing a copy of the October 2003 letter with this Statement of Defense.) To date, the NPS has not responded to that letter.

5. Any other information, statement, etc. that you want to offer or make:

Deer Valley Ranch, Panorama Ranch, and Communications Relay incorporate by reference their prior Statements of Defense and accompanying correspondence and exhibits, submitted to the Commission on July 17, 2003 (or the "July 17th Statement of Defense").

A) Deer Valley Ranch, Panorama Ranch, and Communications Relay Object to the Issuance of the October 23rd Notice and October 24, 2003 Executive Director Cease and Desist Order ("October 24th CDO").

Deer Valley Ranch, Panorama Ranch, and Communications Relay object to the issuance of the October 23rd Notice and October 24th CDO. As the Commission is aware, the parties were the subjects of a July 2nd CDO which expired on September 30, 2003. Deer Valley Ranch, Panorama Ranch, and Communications Relay fully complied with the July 2nd CDO (as well as the Notices of Intent issued as early as May 2003) and have done nothing sine September 30, 2003 to justify the renewal of Commission enforcement action. Notwithstanding, the Commission unjustifiably issued the October 23rd Notice.

The Commission hastily issued the October 24th CDO, again without justification and without allowing the parties an opportunity to respond to the allegations in writing. Deer Valley Ranch, Panorama Ranch, and Communications Relay have been the subject of Commission enforcement action since May of 2003. Since that time, up through the expiration of the July 2nd CDO, the parities have refrained from so much as touching their respective properties. Since July, more than four months ago, the Commission has failed to provide the parties with any sort of hearing (either a restoration order hearing, a coastal development permit application hearing, and/or a hearing with regard to the matters contained in the CDOs). No hearing, coupled with an absence of proper factual or legal findings, render the October 24th CDO a clear violation of Deer Valley Ranch,

[1] We requested NPS to please inform us at once if there are existing regulations or posted signs of which our clients may be unaware that state that APN 4464-019-900 is closed to the public.

Panorama Ranch, and Communications Relay's due process rights.

B) Deer Valley Ranch, Panorama Ranch, and Communications Relay's Coastal Development Permit Applications Must be Heard at the Commission's December 2003 Meeting.

Coastal development permit applications for all the alleged "violations" were submitted to the Commission by the respective property owners on July 17, 2003. To date, however, no hearing has been set for the Commission to hear the applications. In fact, Public Resources Code §30621 provides that "[a] hearing on any coastal development permit application or an appeal shall be set no later than 49 days after the date on which the application or appeal is filed with the commission." Given that it has been 118 days since submitting their applications. Deer Valley Ranch, Panorama Ranch, and Communications Relay request that their applications be heard at the Commission's December 2003 meeting (either prior to or concurrently with the pending Restoration Orders and October 23rd Notice).

C) Deer Valley Ranch, Panorama Ranch, and Communications Relay are Entitled to their Own Hearings.

Deer Valley Ranch, Panorama Ranch, and Communications Relay, once again, renew their requests that they be afforded hearings that are separate from hearings relating to other properties which are owned by different entities. To date, the Commission has grouped various properties together and has not specified with any degree of certainty which allegations relate to which property or which owner. [Three out of five parcels targeted by the Commission are owned by entirely different entities (*i.e.* Park Lands Ranch, LLC owns APN 4464-022-014, Communications Relay Corporation owns APN 4464-022-001, and Deer Valley Ranch, LLC owns APN 4464-019-010). The remaining two parcels, APN 4464-019-008 and APN APN 4464-022-010, are owned by Panorama Ranch, LLC.]

As outlined in a July 17, 2003 letter to the Commission, the July 17th Statements of Defense, and a July 28, 2003 letter to Peter Douglas, each of the owners related to the Commission's enforcement proceedings deserves a separate hearing. Section 17003 of the California Corporations Code provides that:

> "...a limited liability company organized under this title shall have all of the powers of a natural person in carrying out its business activities, including, without limitation, the power to:
>
> (a) Transact its business, carry on its operations, qualify to do business, and have and exercise the powers granted by this title in any state, territory, district, possession, or dependency of the United States, and in any foreign country.
>
> (b) Sue, be sued, complain and defend any action, arbitration, or proceeding, whether judicial, administrative, or otherwise, in its own name..."

Furthermore, the acts of a corporation or LLC are deemed independent of the acts of its members. Abrahim & Sons Enterprises, et al. v. Equilon Enterprises, et al., (9th Cir. 2002) 292 F.3d 958, 962. As such, the actions of the respective parties are independent of any action of their officers and deserve to defend themselves in their own name.

Not only does the ownership of three out of the five parcels differ, but there is an entirely separate and distinct set of facts that relate to each property. The difference in the facts are made evident in the five separate Statements of Defense submitted to the Commission on July 17, 2003. In particular, the Statements of Defense set forth an important distinction between the work undertaken on APN 4464-019-008 (owned by Panorama Ranch, LLC) and the westerly portion of APN 4464-019-010 (owned by Deer Valley Ranch, LLC).

Evidence that is not applicable to a specific owner or a specific property should not be admitted or heard by the Commission because it is not relevant to the other owners or other properties. Data, reports, or evidence relating to a different owner or different property, other than the one at issue, is not material to, nor can it prove or disprove, any disputed fact that is of consequence to another owner or another property. (Deering's Ev. Code §210.) Should the Commission hold only one hearing for all five parcels or for all four owners, the probative value of certain evidence presented to the Commission will be substantially outweighed by the probability that it would unduly prejudice each of the other owners or confuse the issues as they relate to each parcel or each owner. (Deering's Ev. Code § 352.) With a single hearing, each of the owners could be severely prejudiced by the evidence presented that relates to other parcels or other owners. All of these factors could affect the fairness of the proceeding and, ultimately, Deer Valley Ranch, Panorama Ranch, and Communications Relay's due process rights. (U.S.C.A. Const. Amend. 14.)

Enclosure

FRED GAINES
SHERMAN L. STACEY
LISA A. WEINBERG*
REBECCA A. THOMPSON
NANCI SESSIONS-STACEY
KIMBERLY A. RIBLE
* a professional corporation

LAW OFFICES OF
GAINES & STACEY LLP
16633 VENTURA BOULEVARD, SUITE 1150
ENCINO, CA 91436-1865

TELEPHONE (818) 593-6355
(310) 394-1163
FACSIMILE (818) 593-6356
INTERNET: WWW.GAINESLAW.COM

October 13, 2003

Woody Smeck, Superintendent
National Park Service
Santa Monica Mountains National Recreation Area
401 West Hillcrest Drive
Thousand Oaks, CA 91360

Dear Mr. Smeck:

As you are aware, this office represents various limited liability companies which own property in the Castro Peak area of unincorporated Malibu, in the vicinity of APN 4464-019-900 (National Park Service ["NPS"] Tract 124-24). Our clients recently noticed that NPS boundary markers have been posted on both sides of the entrances of the existing roads traversing said NPS parcel. As our clients have *not* noticed any "No Trespassing" signs with/near these boundary markers, they are assuming that these subject roads are open to the public for travel in motor vehicles. We are writing to verify with you that this is, in fact, accurate. If this is an inaccurate assumption, and NPS does not wish for the public to use said roads, please advise us of the same and post this parcel with signs advising that "No Trespassing" is allowed.

Thank you for your assistance and attention to this matter. As always, please do not hesitate to contact me at any time with any questions or comments you may have.

Sincerely,

GAINES & STACEY LLP

By FRED GAINES

... OFFICE OF EMERGENCY SERVICES

Hazardous Materials Spill Report

DATE: 11/25/2003 TIME: 1642	RECEIVED BY: OES - Bob Mcrae OSPR -	CONTROL#: OES - 03-6107 NRC - 706345

1.a. PERSON NOTIFYING GOVERNOR'S OES:

1. NAME:	2. AGENCY:	3. PHONE#:	4. Ext:	5. PAG/CELL:
XXX	NRC	800-424-8802		

1.b. PERSON REPORTING SPILL (If different from above):

1. NAME:	2. AGENCY:	3. PHONE#:	4. Ext:	5. PAG/CELL:
Patrick Neal	Pearson Marine Fuels	619-222-7048		

2. SUBSTANCE TYPE:

2. a. SUBSTANCE:	b.QTY:>=<	*Amount*	*Measure*	c. TYPE:	d. OTHER:
1. Diesel	=	UNK	Unknown	PETROLEUM	
2.	=				
3.	=				

e. DESCRIPTION: Caller stated that they were pumping out material from a vessel and there was an accidental release of materials into the water. Booms applied, clean-up crew on-site, clean up underway.

f. CONTAINED:	g. WATER INVOLVED:	h. WATERWAY:	i. DRINKING WATER IMPACTED
Yes	Yes	San Diego Harbor	No

3. a. INCIDENT LOCATION: 2435 Shelter Island Drive

b. CITY:	c. COUNTY:	d. ZIP:
San Diego	San Diego County	

4. INCIDENT DESCRIPTION:

a. DATE: 11/25/2003 **b. TIME** *(Military)*: 1545 **c. SITE:** Waterways

d. INJURIES#	e. FATALS #:	f. EVACS #:	g. CLEANUP BY:
0	0	0	Unknown

Same as #1 "PERSON NOTIFYING OES"

5. SUSPECTED RESPONSIBLE PARTY:

a. NAME:	b. AGENCY:	c. PHONE#:	d. EXT.:
Patrick Neal	Pearson Marine Fuels	619-222-7084	

e. MAIL ADDRESS:	f. CITY:	g. STATE:	h. ZIP:
2435 Shelter Island Drive	San Diego	CA	

6. NOTIFICATION INFORMATION:

a. ON SCENE:	b. OTHER ON SCENE:	c. OTHER NOTIFIED:
		NRC

d. ADMIN. AGENCY: San Diego County Health Services Dept. **e. SEC. AGENCY:**

f. NOTIFICATION LIST: DOG Unit: RWQCB Unit: 9

☐ AA/CUPA	☐ DFG-OSPR	☐ EMSA	☐ OES PLANS UNIT	☐ RWQCB	☐ USFWS
☐ AIR RESOURCES BD	☐ DHS-D O.	☐ FEMA	☐ OES REG	☐ SFM	☐ USDOI
☐ CALTRANS	☐ DOG	☐ FOOD & AG	☐ OSHA	☐ US EPA	☐ OTHER
☐ CDF	☐ DTSC	☐ LANDS	☐ PARKS & REC	☐ USMMS	
☐ COASTAL COM	☐ EB PARKS	☐ OES HAZMATUNIT	☐ PUC	☐ USCG	

STATE OF CALIFORNIA -- THE RESOURCES AGENCY

GRAY DAVIS, Governor

CALIFORNIA COASTAL COMMISSION
45 FREMONT STREET, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200

VIA REGULAR AND CERTIFIED MAIL AND FACSIMILE

Exhibit 9 F12
NOI to Commence Restoration Order Proceedings June 27, 2003

June 27, 2003

Mr. James A. Kay Jr.
LT-WR, LLC
P.O. Box 7890
Malibu, CA 90265

AS REPRESENTATIVE OF: **Mark Galley, APN 4464-019-001.**
Panorama Ranch LLC, APN 4464-019-008
Deer Valley LLC, APN 4464-019-010
Panorama Ranch LLC, APN 4464-022-010

SUBJECT: Notice of Intent to Commence Restoration Order Proceeding, Coastal Act Violation File No. V-4-03-018 (Kay) – Unpermitted grading of new roads and at least one graded pad; extensive clearance of native chaparral and riparian vegetation; streambed alteration, including placement of new culverts and railroad ties in drainage courses.

Dear Mr. Kay:

This letter is to notify you, James A. Kay, Jr., and your agents, partners, employees and any other person acting in concert with you, that pursuant to Section 30811 of the California Public Resources Code, ("PRC"), I intend to commence proceedings to issue a Restoration Order to address unpermitted development, which you are responsible for performing on the following properties (APNs 4464-019-001, 4464-019-008, 4464-019-010, 4464-022-010), located in the coastal zone northeast of Latigo Canyon Road, between Castro Motorway and Mulholland Highway, in unincorporated Los Angeles County.

Commission staff has determined that you have undertaken development (as that term is defined in Section 30106 of the California Coastal Act) without a Coastal Development Permit, in violation of Section 30600 of the California Coastal Act. The unpermitted development on the above referenced property consists of 1) Grading of roads and at least one fill pad, with extensive cut and fill grading on previously undisturbed hillsides, including unengineered roads on oversteepened slopes, 2) extensive vegetation clearance, including removal of surface and subsurface plant materials in native chaparral and riparian vegetation areas, 3) streambed alteration, including grading, filling, removal of in-channel riparian vegetation, placement of new culverts and railroad ties, and manipulation of boulders and cobbles within stream channels.

We are informed by you and your employees, and believe that the activity occurred for approximately four months, between the middle of January 2003, through May 8, 2003. As the

Commission has previously indicated to you in the Notice of Intent ("NOI") to issue an Executive Director Cease and Desist Order dated May 8, 2003, significant vegetation removal and grading of roads requires a Coastal Development Permit. Your failure to obtain a Coastal Development Permit, or a determination from the Coastal Commission that a Coastal Development Permit is not required, prior to road construction, fill pad construction, , fill pad construction, vegetation clearance, and streambed alteration constitutes violations of the Coastal Act. If issued by the Commission, the Restoration Order will order you to restore the site to its pre-development condition.

Restoration Order Proceedings

Section 30811 of the Coastal Act authorizes the Commission to order restoration of a site in the following terms:

> *In addition to any other authority to order restoration, the commission...may, after a public hearing, order restoration of a site if it finds that the development has occurred without a coastal development permit from the commission... the development is inconsistent with this division, and the development is causing continuing resource damage.*

Subsequent paragraphs of this letter 1) describe the unpermitted development that is the subject of this restoration order proceeding, and 2) set forth the basis for the determination that the specified activity meets the criteria of Section 30811 of the Coastal Act.

The procedures for the issuance of restoration orders are described in Sections 13190 through 13197 of the Commission's regulations. Section 13196(e) of the Commission's regulations states the following:

> *Any term or condition that the commission may impose which requires removal of any development or material shall be for the purpose of restoring the property affected by the violation to the condition it was in before the violation occurred.*

Accordingly, any restoration order that the Commission may issue will have as its purpose the restoration of the subject property to the conditions that existed prior to the occurrence of the unpermitted development described below.

Penalties

Coastal Act Section 30820 (a) provides that any person who violates any provision of the Coastal Act may be subject to a penalty of up to $30,000. In addition to such penalty, Section 30820 (b) states that a person who intentionally and knowingly undertakes development that is in violation of the Coastal Act may be civilly liable in an amount which shall not be less that $1,000 and not more than $15,000 per day for each day in which the violation persists. In addition, Section 30821.6 provides that a violation of either type of cease and desist order or of a restoration order can result in the imposition of civil fines of up to $6,000 for each day in which the violation

persists. Finally, Section 30822 allows the Commission to maintain a legal action for exemplary damages, the size of which is left to the discretion of the court. In exercising its discretion, the court shall consider the amount of liability necessary to deter further violations.

Based upon the record of communications between you, Coastal Commission staff, and the California State Attorney General's office, which date back to 1998 regarding Coastal Act violations and permit requirements on your at 1953 Castro Motorway, Commission staff believes that the record clearly shows that unpermitted development preformed by you on properties located in the coastal zone, which are the subject of this Notice of Intent, has been carried out after you were informed that such development could not legally proceed without being authorized in a Coastal Development Permit. As such, the recent unpermitted grading, vegetation removal, alteration of drainages, and construction of culverts constitutes a knowing and intentional violation of the Coastal Act. The Commission reserves the right to seek penalties for these violations in a separate proceeding pursuant to Section 30820 (b) and Section 30822 of the Coastal Act.

History of the Violation Investigation

Commission staff first witnessed unpermitted grading and vegetation removal on the subject properties on Thursday, May 1, 2003. From a distance of several hundred feet away, Commission staff observed a crew of laborers clearing vegetation, and excavating a new road in the hillside, using hand tools. On the following day, Friday, May 2, 3003, Commission staff and met with your representative, Mr. Donald W. Schmitz in the Commission's Ventura office. Mr. Schmitz assured Commission staff that in fact no grading was occurring, that all work was "simple maintenance" of existing "pre-coastal" roads. Mr. Schmitz asserted that the work was therefore exempt (pursuant to Section 30610 of the Coastal Act). Commission staff requested permission from Mr. Schmitz to meet at the property and enter the site that same afternoon or as soon as feasible to conduct a site visit and investigate the alleged violations. Commission staff also requested that Mr. Schmitz direct the workers to stop all work immediately, until such time that Commission staff could review the work and advise you regarding the need for permits. Mr. Schmitz indicated that he would arrange for the site visit and would notify the laborers to stop the work.

Commission staff conducted a site visit on Thursday, May 8, 2003. During the period between May 2, 2003 and May 8, 2003, work crews continued construction activities on the property despite the request by Commission staff that work on the roads cease. On the morning of May 8, 2003, Commission staff met with you and Mr. Schmitz to conduct a site investigation of the property. During the site investigation, Commission staff confirmed that unpermitted development had in fact occurred, and was continuing to occur on the subject properties. The unpermitted development includes, but is not necessarily limited to 1) Grading of new roads and at least one fill pad, with extensive cut and fill grading on previously undisturbed hillsides, including unengineered roads on oversteepened slopes, 2) extensive vegetation clearance, including removal of surface and subsurface plant materials in native chaparral communities and riparian corridors, 3) streambed alteration, including grading, filling, removal of riparian

vegetation, and manipulation of boulders and cobbles within stream channels, and 4) construction of new culverts. At approximately 2:00 p.m. on May 8, 2003, Commission staff issued a NOI for an Executive Director Cease and Desist Order to stop all unpermitted development of roads on the subject properties, as well as unpermitted development that may have encroached onto adjacent public lands.

Response to Executive Director Cease and Desist Order NOI

To prevent issuance of the Executive Director Cease and Desist Order, you were required to respond to the NOI in a satisfactory manner. Section 30809 (b) states in part:

> *...if the person or agency has failed to respond in a satisfactory manner to an oral notice given in person or by telephone, followed by a written confirmation, or a written notice given by certified mail or hand delivered to the landowner or the person performing the activity. The notice shall include the following:*

You provided verbal assurance to Commission staff that you would stop work upon receipt of the NOI. The NOI also directed you to submit a written response assuring Commission staff by 5:00 p.m., Monday, May 12, 2003, that work on the roads had ceased, and confirmation that 1), no further unpermitted development, including construction activity will occur until Commission staff has stated in writing that construction activities may resume, and that 2) no use of the unpermitted roads will occur unless and until such time as such use were to be legally authorized by the Commission.

On Monday, May 12, 2003, Commission staff received a letter from your representative, Schmitz & Associates, stating that all work had ceased and would not resume until the matter was resolved, however the letter did not provide assurances that use of the unpermitted new roads would cease, and in fact, the letter objected to the restriction of use of the roads. Thus, the requirement for a satisfactory response was not met by the specified deadline.

Following telephone discussions with Commission staff on May 12-13, 2003, Schmitz & Associates submitted a letter to the Commission on May 13, 2003, on your behalf, stating that you have agreed to cease use of the roads. Therefore, the Executive Director did not issue the Cease and Desist Order. [1]

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[1] On May 15, 2003, Schmitz & Associates submitted a letter asserting that the NOI was deficient, and challenged the Commission's right to preclude use of the roads, stating that "*Use of the roads does not constitute an activity that requires a permit from the commission and thus is not subject to the cease and desist order...*". At the time of issuance of the NOI, and again on May 12-13, 2003, Commission staff explained to you and your representatives that any use of the new roads, including but not limited to, pedestrian, equestrian, and specifically vehicular use, which will result in compaction of the soil, further destruction of vegetation, alteration of stream channels under these conditions, constitutes unpermitted development under the Coastal Act, and was prohibited by the Coastal Act, a stated in the NOI. Schmitz & Associates further stated in writing on May 15, 2003, that all "use of the subject roads has ceased . . .

On June 23, 2003, staff received a letter from Schmitz & Associates alleging that "...there has been no resource damage to warrant the Notice or Violation citation." The June 23, 2003 letter further asserts that use of the roads, as well as repair and maintenance of the roads is exempt from coastal development permit requirements, and that "The Notice lists properties outside of the California Coastal Commission 's jurisdiction..." Finally, the June 23, 2003 letter demands "a response in writing" to the May 15, 2003 by Monday, June 30, 2003 at 500 p.m., and advises staff that work on the roads will resume unless staff responds to allegations that the NOI is "deficient, vague, and overbroad."

Basis for Determination that the Specified Activity Meets the Criteria of Section 30811 of the Coastal Act

Contrary to your assertions (including those of your agent and counsel), the parcels are located in the coastal zone and therefore they are within the Coastal Commission's jurisdiction.

You claim you are conducting repair and maintenance on roads that existed prior to the Coastal Act. You argue that you have a vested right to maintain the roads and the repair and maintenance is exempt from the coastal development permit requirements. These arguments are unsupported. You have not obtained a determination by the Coastal Commission that there are vested rights for any roads on the parcels. You have also not provided any evidence indicating that roads were present prior to the effective date of the Coastal Act. Therefore, the activities do not constitute repair and maintenance to lawfully constructed facilities or structures.

Furthermore, even if any lawfully constructed roads existed on the parcels prior to the effective date of the Coastal Act, they were abandoned by prior owners and were allowed to become revegetated by natural processes, so they became impassable as roads. Any potential vested rights to such roads were abandoned. Furthermore, if there were any pre-existing roads, your unpermitted development increased the size, width and/or length of such roads and there can be no vested right to do so without a coastal permit. In addition, your constructed new culverts at streams and constructed a new fill pad and this constitutes new development for which there can be no vested right.

Moreover, even if there were lawfully constructed roads on the parcels, the activity would not be exempt from the coastal permit requirements because it occurs within 20 feet of streams and in environmentally sensitive habitat and involves placement of rip-rap, rocks, or solid materials as well as use of mechanized equipment (including but not limited to mechanized saws and chipper machine).

I have determined that it is appropriate for a restoration order proceeding to be commenced to address the unpermitted development, based on the following:

." Therefore Schmitz & Associates asserted: "Kay has responded in a satisfactory manner pursuant to California Code of Regulations Section 13180(a)(2) and a cease and desist order should not be issued."

1) On May 1, 2003, Commission staff observed grading, vegetation clearance, and streambed alteration on the subject properties. Staff confirmed that no Coastal Development Permits had been issued for the work being conducted.

2) On May 8, 2003, Commission staff met with you and your representatives to inspect the unpermitted development. At that time Commission staff confirmed that unpermitted grading, vegetation clearance, streambed alteration and construction of culverts had occurred in the Coastal Zone, and was continuing to occur, and had been completed by you, and/or individuals employed by you at your direction.

3) The unpermitted development is inconsistent with the policies of the Coastal Act, and has caused resource damage as defined by Section 13190 of the Commission's regulations. Because of the vegetation removal, destabilization of slopes, alteration of drainages, and the absence of any erosion control measures on the site during the rainy season, adverse impacts to water quality and other Coastal resources have occurred as a result of the violations.

4) The removal of native vegetation and alteration of natural drainages has continuing adverse impacts on wildlife and water quality. Since this unpermitted development continues to exist at the subject properties, the damage to resources protected by the Coastal Act is continuing. The unpermitted development on the subject properties has caused adverse resource impacts which violate the Coastal Resources Planning and Management Policies of chapter 3 of the Coastal Act, including:

   a) Section 30253 Geologic stability, protection against erosion,
   b) Section 30230 Marine resources
   c) Section 30231 Biological productivity; water quality,
   d) Section 30240 environmentally sensitive habitat areas (ESHA), and
   e) Section 30250 Location; existing developed area, and

   Such impacts meet the definition of damage provided in Section 13190(b): "any degradation or other reduction in quality, abundance, or other quantitative or qualitative characteristic of the resource as compared to the condition the resource was in before it was disturbed by unpermitted development."

5) Proceedings for issuance of a restoration order are being commenced against you as the current owner of the subject properties and the person responsible for conducting the unpermitted development.

For the reasons stated above, I have decided to commence a restoration order proceeding before the Commission in order to promptly restore the subject property to the condition it was in before the unpermitted development occurred.

Steps in the Restoration Order Process

Pursuant to Coastal Act Section 30811, the Commission has the authority to order restoration of a site if the Commission, after a public hearing, determines that "development has occurred without a coastal development permit...and the development is causing continuing resource damage." An order issued pursuant to Section 30811 will require that you restore the site to its pre-violation condition within a specified period of time.

Please be advised that if the Commission issues a Restoration Order, Section 30821.6(a) of the Coastal Act authorizes the Commission to seek monetary daily penalties of up to $6,000 per day for any intentional or negligent violation of the order for each day in which the violation persists.

At this time, the Commission is tentatively planning to hold a hearing on the issuance of a Restoration Order on this matter at the Commission meeting that is scheduled for the week of August 6-8, 2002 in Huntington Beach, California.

In accordance with the California Code of Regulations, Title 14, Section 13191(a), you have the opportunity to respond to the Commission staff's allegations as set forth in this notice by completing the enclosed Statement of Defense form. **This office must receive the completed Statement of Defense form no later than July 17, 2003.** Should you have questions regarding the Statement of Defense form, please contact Tom Sinclair at (805) 585-1800.

Sincerely,

Peter Douglas
Executive Director

Encl.: Statement of Defense form

Cc: Amy Roach, Deputy Chief Counsel
Lisa Haage, Chief of Enforcement
John Bowers, Staff Counsel
Sandy Goldberg, Staff Counsel
Tom Sinclair, Enforcement Officer, South Central District Officer
Steve Hudson, Enforcement Supervisor, Southern Districts
John Ainsworth, Permit Supervisor, South Central District Office
Melanie Hale, Permit Supervisor, South Central District Office
Donald W. Schmitz

STATE OF CALIFORNIA – THE RESOURCES AGENCY GRAY DAVIS, *GOVERNOR*

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400

STATEMENT OF DEFENSE FORM

DEPENDING ON THE OUTCOME OF FURTHER DISCUSSIONS THAT OCCUR WITH THE COMMISSION ENFORCEMENT STAFF AFTER YOU HAVE COMPLETED AND RETURNED THIS FORM, (FURTHER) ADMINISTRATIVE OR LEGAL ENFORCEMENT PROCEEDINGS MAY NEVERTHELESS BE INITIATED AGAINST YOU. IF THAT OCCURS, ANY STATEMENTS THAT YOU MAKE ON THIS FORM WILL BECOME PART OF THE ENFORCEMENT RECORD AND MAY BE USED AGAINST YOU.

YOU MAY WISH TO CONSULT WITH OR RETAIN AN ATTORNEY BEFORE COMPLETING THIS FORM OR OTHERWISE CONTACT THE COMMISSION ENFORCEMENT STAFF.

This form is accompanied by either a cease and desist order issued by the Executive Director or a notice of intent to initiate cease and desist order proceedings before the Coastal Commission. This document indicates that you are or may be responsible for, or in some way involved in, either a violation of the Coastal Act or a permit issued by the Commission. This form asks you to provide details about the (possible) violation, the responsible parties, the time and place the violation (may have) occurred, and other pertinent information about the (possible) violation.

This form also provides you the opportunity to respond to the (alleged) facts contained in the document, to raise any affirmative defenses that you believe apply, and to inform the staff of all facts that you believe may exonerate you of any legal responsibility for the (possible) violation or may mitigate your responsibility. You must also enclose with the completed statement of defense form copies of all written documents, such as letters, photographs, maps, drawings, etc. and written declarations under penalty of perjury that you want the commission to consider as part of this enforcement hearing.

You must complete the form (please use additional pages if necessary) and return it no later than to the Commission's enforcement staff at the following address:

Tom Sinclair
Enforcement Officer
California Coastal Commission
South Central Coast District
89 S. California Street, Suite 200
Ventura, California 93001

If you have any questions, please contact Tom Sinclair, at (805) 585-1800.

1. **Facts or allegations contained in the cease and desist order or the notice of intent that you admit (with specific reference to the paragraph number in the order):**

_____

_____

_____

_____

_____

_____

2. **Facts or allegations contained in the cease and desist order or notice of intent that you deny (with specific reference to paragraph number in the order):**

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

3. **Facts or allegations contained in the cease and desist order or notice of intent of which you have no personal knowledge (with specific reference to paragraph number in the order):**

_____

_____

_____

_____

4. **Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to the possible violation (be as specific as you can; if you have or know of any document(s), photograph(s), map(s), letter(s), or other evidence that you believe is/are relevant, please identify it/them by name, date, type, and any other identifying information and provide the original(s) or (a) copy(ies) if you can:**

5. **Any other information, statement, etc. that you want to offer or make:**

6. **Documents, exhibits, declarations under penalty of perjury or other materials that you have attached to this form to support your answers or that you want to be made part of the administrative record for this enforcement proceeding (Please list in chronological order by date, author, and title, and enclose a copy with this completed form):**

_____

_____

_____

_____

6. **Documents, exhibits, declarations under penalty of perjury or other materials that you have attached to this form to support your answers or that you want to be made part of the administrative record for this enforcement proceeding (Please list in chronological order by date, author, and title, and enclose a copy with this completed form):**

_____

_____

_____

_____

STATE OF CALIFORNIA -- THE RESOURCES AGENCY

GRAY DAVIS, *Governor*

CALIFORNIA COASTAL COMMISSION
45 FREMONT STREET, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200

VIA REGULAR AND CERTIFIED MAIL AND FACSIMILE

July 1, 2003

Exhibit 10 F12
NOI to Commence Restoration order Proceedings July 1, 2003

Mr. James A. Kay Jr.
Communications Relay Corporation
Park Lands Ranch LLC
P.O. Box 7835
Van Nuys, CA 91409-7835

SUBJECT: Notice of Intent to Commence Restoration Order Proceeding, Coastal Act Violation File No. V-4-03-018 (Kay) – Unpermitted grading of new roads and and/or pads; clearance of native chaparral and riparian vegetation; and/or streambed alteration, including placement of new culverts and railroad ties in drainage courses.

Dear Mr. Kay:

This letter is to notify you, James A. Kay, Jr., and your agents, partners, employees and any other person acting in concert with you, that pursuant to Section 30811 of the California Public Resources Code, ("PRC"), I intend to commence proceedings to issue a Restoration Order to address unpermitted development, which you are responsible for performing on the following properties (APN: 4464-022-001, Communications Relay Corporation, and APN: 4464-022-014, Park Lands Ranch LLC), located in the coastal zone northeast of Latigo Canyon Road, between Castro Motorway and Mulholland Highway, in unincorporated Los Angeles County.

Commission staff has determined that you have undertaken development (as that term is defined in Section 30106 of the California Coastal Act) without a Coastal Development Permit, in violation of Section 30600 of the California Coastal Act. The unpermitted development on the above referenced property consists of 1) grading of roads and and/or pads, with extensive cut and fill grading on previously undisturbed hillsides, including unengineered roads on oversteepened slopes, 2) extensive vegetation clearance, including removal of surface and subsurface plant materials in native chaparral and riparian vegetation areas, 3) and/or streambed alteration, including grading, filling, removal of in-channel riparian vegetation, placement of new culverts and railroad ties, and manipulation of boulders and cobbles within stream channels.

We are informed by you and your employees, and believe that the activity occurred for approximately four months, between the middle of January 2003, through May 8, 2003. As the Commission has previously indicated to you in the Notice of Intent ("NOI") to issue an Executive Director Cease and Desist Order dated May 8, 2003, significant vegetation removal and grading of roads requires a Coastal Development Permit. Your failure to obtain a Coastal Development Permit, or a determination from the Coastal Commission that a Coastal Development Permit is not required, prior to road construction, fill pad construction, vegetation clearance, and/or streambed alteration constitutes violations of the Coastal Act. If issued by the

Commission, the Restoration Order will order you to restore the site to its pre-development condition.

Restoration Order Proceedings

Section 30811 of the Coastal Act authorizes the Commission to order restoration of a site in the following terms:

> *In addition to any other authority to order restoration, the commission...may, after a public hearing, order restoration of a site if it finds that the development has occurred without a coastal development permit from the commission... the development is inconsistent with this division, and the development is causing continuing resource damage.*

Subsequent paragraphs of this letter 1) describe the unpermitted development that is the subject of this restoration order proceeding, and 2) set forth the basis for the determination that the specified activity meets the criteria of Section 30811 of the Coastal Act.

The procedures for the issuance of restoration orders are described in Sections 13190 through 13197 of the Commission's regulations. Section 13196(e) of the Commission's regulations states the following:

> *Any term or condition that the commission may impose which requires removal of any development or material shall be for the purpose of restoring the property affected by the violation to the condition it was in before the violation occurred.*

Accordingly, any restoration order that the Commission may issue will have as its purpose the restoration of the subject property to the conditions that existed prior to the occurrence of the unpermitted development described below.

Penalties

Coastal Act Section 30820 (a) provides that any person who violates any provision of the Coastal Act may be subject to a penalty of up to $30,000. In addition to such penalty, Section 30820 (b) states that a person who intentionally and knowingly undertakes development that is in violation of the Coastal Act may be civilly liable in an amount which shall not be less that $1,000 and not more than $15,000 per day for each day in which the violation persists. In addition, Section 30821.6 provides that a violation of either type of cease and desist order or of a restoration order can result in the imposition of civil fines of up to $6,000 for each day in which the violation persists. Finally, Section 30822 allows the Commission to maintain a legal action for exemplary damages, the size of which is left to the discretion of the court. In exercising its discretion, the court shall consider the amount of liability necessary to deter further violations.

Based upon the record of communications between you, Coastal Commission staff, and the California State Attorney General's office, which date back to 1998 regarding Coastal Act

violations and permit requirements on your at 1953 Castro Motorway, Commission staff believes that the record clearly shows that unpermitted development preformed by you on properties located in the coastal zone, which are the subject of this Notice of Intent, has been carried out after you were informed that such development could not legally proceed without being authorized in a Coastal Development Permit. As such, the recent unpermitted grading, vegetation removal, alteration of drainages, and construction of culverts constitutes a knowing and intentional violation of the Coastal Act. The Commission reserves the right to seek penalties for these violations in a separate proceeding pursuant to Section 30820 (b) and Section 30822 of the Coastal Act.

History of the Violation Investigation

Commission staff first witnessed unpermitted grading and vegetation removal on the subject properties on Thursday, May 1, 2003. From a distance of several hundred feet away, Commission staff observed a crew of laborers clearing vegetation, and excavating a new road in the hillside, using hand tools. On the following day, Friday, May 2, 3003, Commission staff and met with your representative, Mr. Donald W. Schmitz in the Commission's Ventura office. Mr. Schmitz assured Commission staff that in fact no grading was occurring, that all work was "simple maintenance" of existing "pre-coastal" roads. Mr. Schmitz asserted that the work was therefore exempt (pursuant to Section 30610 of the Coastal Act). Commission staff requested permission from Mr. Schmitz to meet at the property and enter the site that same afternoon or as soon as feasible to conduct a site visit and investigate the alleged violations. Commission staff also requested that Mr. Schmitz direct the workers to stop all work immediately, until such time that Commission staff could review the work and advise you regarding the need for permits. Mr. Schmitz indicated that he would arrange for the site visit and would notify the laborers to stop the work.

Commission staff met with you and Mr. Schmitz to conduct a site investigation on several properties, including the above referenced properties, which you maintained were owned by you, on Thursday, May 8, 2003. During the period between May 2, 2003 and May 8, 2003, work crews continued construction activities on the property despite the request by Commission staff that work on the roads cease. During the site investigation on May 8, 2003, Commission staff confirmed that unpermitted development had in fact occurred, and was continuing to occur on the subject properties. The unpermitted development includes, but is not necessarily limited to 1) Grading of new roads and at least one fill pad, with extensive cut and fill grading on previously undisturbed hillsides, including unengineered roads on oversteepened slopes, 2) extensive vegetation clearance, including removal of surface and subsurface plant materials in native chaparral communities and riparian corridors, 3) and/or streambed alteration, including grading, filling, removal of riparian vegetation, and manipulation of boulders and cobbles within stream channels, and 4) construction of new culverts. At approximately 2:00 p.m. on May 8, 2003, Commission staff issued a NOI for an Executive Director Cease and Desist Order to stop all unpermitted development of roads on the subject properties, as well as unpermitted development that may have encroached onto adjacent public lands.

Response to Executive Director Cease and Desist Order NOI

To prevent issuance of the Executive Director Cease and Desist Order, you were required to respond to the NOI in a satisfactory manner. Section 30809 (b) states in part:

> *...if the person or agency has failed to respond in a satisfactory manner to an oral notice given in person or by telephone, followed by a written confirmation, or a written notice given by certified mail or hand delivered to the landowner or the person performing the activity. The notice shall include the following:*

You provided verbal assurance to Commission staff that you would stop work upon receipt of the NOI. The NOI also directed you to submit a written response assuring Commission staff by 5:00 p.m., Monday, May 12, 2003, that work on the roads had ceased, and confirmation that 1), no further unpermitted development, including construction activity will occur until Commission staff has stated in writing that construction activities may resume, and that 2) no use of the unpermitted roads will occur unless and until such time as such use were to be legally authorized by the Commission.

On Monday, May 12, 2003, Commission staff received a letter from your representative, Schmitz & Associates, stating that all work had ceased and would not resume until the matter was resolved, however the letter did not provide assurances that use of the unpermitted new roads would cease, and in fact, the letter objected to the restriction of use of the roads. Thus, the requirement for a satisfactory response was not met by the specified deadline.

Following telephone discussions with Commission staff on May 12-13, 2003, Schmitz & Associates submitted a letter to the Commission on May 13, 2003, on your behalf, stating that you have agreed to cease use of the roads. Therefore, the Executive Director did not issue the Cease and Desist Order. [1]

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[1] On May 15, 2003, Schmitz & Associates submitted a letter asserting that the NOI was deficient, and challenged the Commission's right to preclude use of the roads, stating that "*Use of the roads does not constitute an activity that requires a permit from the commission and thus is not subject to the cease and desist order...*". At the time of issuance of the NOI, and again on May 12-13, 2003, Commission staff explained to you and your representatives that any use of the new roads, including but not limited to, pedestrian, equestrian, and specifically vehicular use, which will result in compaction of the soil, further destruction of vegetation, alteration of stream channels under these conditions, constitutes unpermitted development under the Coastal Act, and was prohibited by the Coastal Act, a stated in the NOI. Schmitz & Associates further stated in writing on May 15, 2003, that all "use of the subject roads has ceased . . . ." Therefore Schmitz & Associates asserted: "Kay has responded in a satisfactory manner pursuant to California Code of Regulations Section 13180(a)(2) and a cease and desist order should not be issued."

On June 23, 2003, staff received a letter from Schmitz & Associates alleging that "...there has been no resource damage to warrant the Notice or Violation citation." The June 23, 2003 letter further asserts that use of the roads, as well as repair and maintenance of the roads is exempt from coastal development permit requirements, and that "The Notice lists properties outside of the California Coastal Commission 's jurisdiction..." Finally, the June 23, 2003 letter demands "a response in writing" to the May 15, 2003 by Monday, June 30, 2003 at 500 p.m., and advises staff that work on the roads will resume unless staff responds to allegations that the NOI is "deficient, vague, and overbroad."

Basis for Determination that the Specified Activity Meets the Criteria of Section 30811 of the Coastal Act

Contrary to your assertions (including those of your agent and counsel), the parcels are located in the coastal zone and therefore they are within the Coastal Commission's jurisdiction.

You claim you are conducting repair and maintenance on roads that existed prior to the Coastal Act. You argue that you have a vested right to maintain the roads and the repair and maintenance is exempt from the coastal development permit requirements. These arguments are unsupported. You have not obtained a determination by the Coastal Commission that there are vested rights for any roads on the parcels. You have also not provided any evidence indicating that roads were present prior to the effective date of the Coastal Act. Therefore, the activities do not constitute repair and maintenance to lawfully constructed facilities or structures.

Furthermore, even if any lawfully constructed roads existed on the parcels prior to the effective date of the Coastal Act, they were abandoned by prior owners and were allowed to become revegetated by natural processes, so they became impassable as roads. Any potential vested rights to such roads were abandoned. Furthermore, if there were any pre-existing roads, your unpermitted development increased the size, width and/or length of such roads and there can be no vested right to do so without a coastal permit. In addition, you constructed new culverts in streams and constructed at least one new fill pad and this constitutes new development for which there can be no vested right.

Moreover, even if there were lawfully constructed roads on the parcels, the activity would not be exempt from the coastal permit requirements because it occurs within 20 feet of streams and in environmentally sensitive habitat and involves placement of rip-rap, rocks, or solid materials as well as use of mechanized equipment (including but not limited to mechanized saws and chipper machine).

I have determined that it is appropriate for a restoration order proceeding to be commenced to address the unpermitted development, based on the following:

1) On May 1, 2003, Commission staff observed grading, vegetation clearance, and streambed alteration on the subject properties. Staff confirmed that no Coastal Development Permits had been issued for the work being conducted.

2) On May 8, 2003, Commission staff met with you and your representatives to inspect the unpermitted development. At that time Commission staff confirmed that unpermitted grading, vegetation clearance, streambed alteration and construction of culverts had occurred in the Coastal Zone, and was continuing to occur, and had been completed by you, and/or individuals employed by you at your direction.

3) The unpermitted development is inconsistent with the policies of the Coastal Act, and has caused resource damage as defined by Section 13190 of the Commission's regulations. Because of the vegetation removal, destabilization of slopes, alteration of drainages, and the absence of any erosion control measures on the site during the rainy season, adverse impacts to water quality and other Coastal resources have occurred as a result of the violations.

4) The removal of native vegetation and alteration of natural drainages has continuing adverse impacts on wildlife and water quality. Since this unpermitted development continues to exist at the subject properties, the damage to resources protected by the Coastal Act is continuing. The unpermitted development on the subject properties has caused adverse resource impacts which violate the Coastal Resources Planning and Management Policies of chapter 3 of the Coastal Act, including:

   a) Section 30253 Geologic stability, protection against erosion,
   b) Section 30230 Marine resources
   c) Section 30231 Biological productivity; water quality,
   d) Section 30240 environmentally sensitive habitat areas (ESHA), and
   e) Section 30250 Location; existing developed area, and

   Such impacts meet the definition of damage provided in Section 13190(b): "any degradation or other reduction in quality, abundance, or other quantitative or qualitative characteristic of the resource as compared to the condition the resource was in before it was disturbed by unpermitted development."

5) Proceedings for issuance of a restoration order are being commenced against you as the current owner of the subject properties and the person responsible for conducting the unpermitted development.

For the reasons stated above, I have decided to commence a restoration order proceeding before the Commission in order to promptly restore the subject property to the condition it was in before the unpermitted development occurred.

Steps in the Restoration Order Process

Pursuant to Coastal Act Section 30811, the Commission has the authority to order restoration of a site if the Commission, after a public hearing, determines that "development has occurred

without a coastal development permit...and the development is causing continuing resource damage." An order issued pursuant to Section 30811 will require that you restore the site to its pre-violation condition within a specified period of time.

Please be advised that if the Commission issues a Restoration Order, Section 30821.6(a) of the Coastal Act authorizes the Commission to seek monetary daily penalties of up to $6,000 per day for any intentional or negligent violation of the order for each day in which the violation persists.

At this time, the Commission is tentatively planning to hold a hearing on the issuance of a Restoration Order on this matter at the Commission meeting that is scheduled for the week of August 6-8, 2002 in Huntington Beach, California.

In accordance with the California Code of Regulations, Title 14, Section 13191(a), you have the opportunity to respond to the Commission staff's allegations as set forth in this notice by completing the enclosed Statement of Defense form. **This office must receive the completed Statement of Defense form no later than July 21, 2003.** Should you have questions regarding the Statement of Defense form, please contact Tom Sinclair at (805) 585-1800.

Sincerely,

Lisa Haage for

Peter Douglas
Executive Director

Encl.: Statement of Defense form

Cc: Amy Roach, Deputy Chief Counsel
Lisa Haage, Chief of Enforcement
John Bowers, Staff Counsel
Sandy Goldberg, Staff Counsel
Tom Sinclair, Enforcement Officer, South Central District Officer
Steve Hudson, Enforcement Supervisor, Southern Districts
John Ainsworth, Permit Supervisor, South Central District Office
Melanie Hale, Permit Supervisor, South Central District Office
Donald W. Schmitz

STATE OF CALIFORNIA – THE RESOURCES AGENCY

GRAY DAVIS, GOVERNOR

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400

STATEMENT OF DEFENSE FORM

DEPENDING ON THE OUTCOME OF FURTHER DISCUSSIONS THAT OCCUR WITH THE COMMISSION ENFORCEMENT STAFF AFTER YOU HAVE COMPLETED AND RETURNED THIS FORM, (FURTHER) ADMINISTRATIVE OR LEGAL ENFORCEMENT PROCEEDINGS MAY NEVERTHELESS BE INITIATED AGAINST YOU. IF THAT OCCURS, ANY STATEMENTS THAT YOU MAKE ON THIS FORM WILL BECOME PART OF THE ENFORCEMENT RECORD AND MAY BE USED AGAINST YOU.

YOU MAY WISH TO CONSULT WITH OR RETAIN AN ATTORNEY BEFORE COMPLETING THIS FORM OR OTHERWISE CONTACT THE COMMISSION ENFORCEMENT STAFF.

This form is accompanied by either a cease and desist order issued by the Executive Director or a notice of intent to initiate cease and desist order proceedings before the Coastal Commission. This document indicates that you are or may be responsible for, or in some way involved in, either a violation of the Coastal Act or a permit issued by the Commission. This form asks you to provide details about the (possible) violation, the responsible parties, the time and place the violation (may have) occurred, and other pertinent information about the (possible) violation.

This form also provides you the opportunity to respond to the (alleged) facts contained in the document, to raise any affirmative defenses that you believe apply, and to inform the staff of all facts that you believe may exonerate you of any legal responsibility for the (possible) violation or may mitigate your responsibility. You must also enclose with the completed statement of defense form copies of all written documents, such as letters, photographs, maps, drawings, etc. and written declarations under penalty of perjury that you want the commission to consider as part of this enforcement hearing.

You must complete the form (please use additional pages if necessary) and return it no later than **JULY 21, 2003** to the Commission's enforcement staff at the following address:

Tom Sinclair
Enforcement Officer
California Coastal Commission
South Central Coast District
89 S. California Street, Suite 200
Ventura, California 93001

If you have any questions, please contact Tom Sinclair, at (805) 585-1800.

1. **Facts or allegations contained in the cease and desist order or the notice of intent that you admit (with specific reference to the paragraph number in the order):**

_____

_____

_____

_____

_____

_____

2. **Facts or allegations contained in the cease and desist order or notice of intent that you deny (with specific reference to paragraph number in the order):**

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

3. **Facts or allegations contained in the cease and desist order or notice of intent of which you have no personal knowledge (with specific reference to paragraph number in the order):**

_____

_____

_____

_____

4. **Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to the possible violation (be as specific as you can; if you have or know of any document(s), photograph(s), map(s), letter(s), or other evidence that you believe is/are relevant, please identify it/them by name, date, type, and any other identifying information and provide the original(s) or (a) copy(ies) if you can:**

5. **Any other information, statement, etc. that you want to offer or make:**

6. **Documents, exhibits, declarations under penalty of perjury or other materials that you have attached to this form to support your answers or that you want to be made part of the administrative record for this enforcement proceeding (Please list in chronological order by date, author, and title, and enclose a copy with this completed form):**

_____

_____

_____

_____

HP LASERJET 3150
PRINTER/FAX/COPIER/SCANNER

SEND CONFIRMATION REPORT FOR
COASTAL COMM
4159045235
JUL-1-03 4:21PM

JOB	START TIME	USAGE	PHONE NUMBER/ADDRESS	TYPE	PAGES	MODE	STATUS
407	7/ 1 4:02PM	19'15"	310 589 0353	SEND.....	12/12	EC 24	COMPLETED.....

TOTAL 19'15" PAGES SENT: 12 PAGES PRINTED: 0

California Coastal Commission
45 Fremont, Suite 2000
San Francisco, CA 94105-2219
Voice and TDD (415) 904-5200 • CALNET 539-5200

[redacted]

Date: [redacted] 7.1.03. Time: [redacted]

Number of Pages including this cover sheet: 12

To: Don Schmitz

From: Lisa Haage / Tom Sinclair

Company: Schmitz & Assoc

Unit: Enforcement - SF / Ventura

Address:

Telephone Number: (415) 904-5220 805 585 1800

FAX Number: 310.589.0353

Direct FAX = (415) 904-5400 CALNET = 539-5400

Remarks: ☑ Urgent ☐ For your review ☑ Reply ASAP ☐ Please comment ☐ Other

Notice of Intent to Commence
Restoration Order
V-4-03-18 (Kay)

CCC World Wide Web Location
http://ceres.ca.gov/coastalcomm/index.html

California Coastal Commission

45 Fremont, Suite 2000
San Francisco, CA 94105-2219
Voice and TDD (415) 904-5200 • CALNET 539-5200

[redacted]

Date: [redacted] 7.1.03.	Time: [redacted]	Number of Pages including this cover sheet: 12
To: Don Schmitz		From: Lisa Haage / Tom Sinclair
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Address:		Telephone Number: (415) 904-5220 805 585 1800
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Remarks: ☑ Urgent ☐ For your review ☑ Reply ASAP ☐ Please comment ☐ Other

Notice of Intent to Commence
Restoration Order
V-4-03-18 (Kay)

HP LASERJET 3150
PRINTER/FAX/COPIER/SCANNER

SEND CONFIRMATION REPORT FOR
COASTAL COMM
4159045235
JUL-1-03 4:01PM

JOB	START TIME	USAGE	PHONE NUMBER/ADDRESS	TYPE	PAGES	MODE	STATUS
406	7/ 1 3:57PM	4'00"	918187827101	SEND	12/12	EC144	COMPLETED

TOTAL 4'00" PAGES SENT: 12 PAGES PRINTED: 0

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45 Fremont, Suite 2000
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[redacted]

Date: [redacted] 7.1.03 Time: [redacted]

Number of Pages including this cover sheet: 12

To: James Kay JR.

From: Lisa Haage / Tom Sinclair

Company:

Unit: Enforcement SF/Ventura

Address:

Telephone Number: (415) 904-5220 805-585-1800

FAX Number: 818 782 7101

Direct FAX = (415) 904-5400 CALNET = 539-5400

Remarks: ☒ Urgent ☐ For your review ☒ Reply ASAP ☐ Please comment ☐ Other

NOTICE of Intent to COMMENCE
Restoration order
V-4-03-18 (Kay)

CCC World Wide Web Location
http://ceres.ca.gov/coastalcomm/index.html

California Coastal Commission

45 Fremont, Suite 2000
San Francisco, CA 94105-2219
Voice and TDD (415) 904-5200 • CALNET 539-5200

[redacted]

Date: [redacted] 7.1.03	Time: [redacted]
Number of Pages including this cover sheet: 12	
To: James Kay JR.	From: Lisa Haage / Tom Sinclair
Company:	Unit: Enforcement: SF/Ventura
Address:	Telephone Number: (415) 904-5220 805-585-1800
FAX Number: 818 782 7101	Direct FAX = (415) 904-5400 CALNET = 539-5400

Remarks: ☒ Urgent ☐ For your review ☒ Reply ASAP ☐ Please comment ☐ Other

Notice of Intent to Commence
Restoration order
V-4-03-18 (Kay)

STATE OF CALIFORNIA—THE RESOURCES AGENCY GRAY DAVIS, *GOVERNOR*

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400

VIA CERTIFIED MAIL (Article No. 7002 0460 0003 8376 4464)
REGULAR MAIL, AND FACSIMILE

October 23, 2003

Mr. James A. Kay Jr.
P.O. Box 7835
Van Nuys, CA 91409-7835

Panorama Ranch LLC
C/O Mr. James A. Kay Jr.
P.O. Box 7835
Van Nuys, CA 91409-7835

Deer Valley Ranch LLC
C/O Mr. James A. Kay Jr.
P.O. Box 7835
Van Nuys, CA 91409-7835

Communications Relay Corporation
C/O Mr. James A. Kay Jr.
P.O. Box 7835
Van Nuys, CA 91409-7835

Exhibit 11 F12
NOI to Commence
Cease and Desist
Order Proceedings
Oct. 23, 2003

Subject: **NOTICE OF INTENT TO COMMENCE CEASE AND DESIST ORDER PROCEEDINGS**

NOTICE OF INTENT TO ISSUE EXECUTIVE DIRECTOR CEASE & DESIST ORDER FOR VIOLATION NO. V-4-03-018

Location: APN 4464-019-008, owned by Panorama Ranch LLC
APN 4464-019-010, owned by Deer Valley Ranch LLC
APN 4464-019-900, owned by United States Government (National Park Service)
APN 4464-022-001, owned by Communications Relay Corporation
APN 4464-022-010, owned by Panorama Ranch LLC
Located in the Santa Monica Mountains portion of unincorporated area of Los Angeles County.

Violation Description: Unpermitted development, including but not limited to the following: Removal of significant vegetation and disturbance of Environmentally Sensitive Habitat, including but not limited to removal of native chaparral and damage to native oak trees;

grading and clearing of new roads and pads; unpermitted streambed alteration, including but not limited to grading, filling, and manipulation of channel substrate, installation of metal culverts and creosote-treated railroad ties, and construction of an Arizona crossing in a blue line stream; and construction of unpermitted structures including but not limited to metal gates, metal and wood gate posts with chain barriers set with concrete bases.

Dear Mr. Kay:

This letter notifies Panorama Ranch, LLC; Deer Valley Ranch, LLC; Communications Relay Corporation, Inc., and you as officer, president, manager, member and/or person in control of the foregoing entities and as the person responsible for undertaking the development described herein, of my intent, as the Executive Director of the California Coastal Commission ("Commission"), to commence proceedings for issuance of a Cease and Desist Order to you, and to Panorama Ranch, LLC, Deer Valley Ranch, LLC and Communications Relay Corporation, Inc, for violations of the Coastal Act, which have occurred on the properties listed above.

Specifically, this letter is to provide you, Panorama Ranch, LLC, Deer Valley Ranch, LLC and Communications Relay Corporation, Inc. with formal notice under sections 30809 and 30810 of the Coastal Act, that I intend to both: (1) issue an Executive Director Cease and Desist Order to require that you and the foregoing entities cease and desist from undertaking, allowing and/or maintaining unpermitted development on the parcels listed above, and (2) recommend to the Coastal Commission that they issue a Commission Cease and Desist Order addressing unpermitted development on the parcels listed above.

Commission staff has determined that you, Panorama Ranch, LLC, Deer Valley Ranch LLC and Communications Relay Corporation, Inc. (hereafter jointly referred to as "Kay" or "you") have undertaken, allowed, and/or maintained development (as that term is defined in Section 30106 of the California Coastal Act) without a coastal development permit, which is in violation of Section 30600 of the California Coastal Act. This development consists of unpermitted development, including but not limited to the following: Removal of significant vegetation and disturbance of Environmentally Sensitive Habitat (ESHA), including but not limited to removal of native chaparral and material damage to native oak trees; grading and clearing of new roads and pads; unpermitted streambed alteration, including but not limited to grading, filling, and manipulation of channel substrate, installation of metal culverts and creosote-treated railroad ties, and construction of an Arizona crossing in a blue line stream; and construction of unpermitted structures including but not limited to metal gates, metal and wood gate posts with chain barriers set with concrete bases.

The persons or entities subject to the Executive Director and Commission Cease and Desist Orders, which may be issued pursuant to this notice of intent letter are James A. Kay, Jr., Communications Relay Corporation, Deer Valley Ranch LLC, Panorama Ranch LLC, as owners of the subject property, any agent or supervisor of work crews carrying out unpermitted development, as well as all other agents, contractors, employees of James A. Kay, Jr.,

Communications Relay Corporation, Deer Valley Ranch LLC, Panorama Ranch LLC, and any persons acting in concert with any of the foregoing.

History of the Violation Investigation

Commission staff first learned of the recent violations on the property in mid April 2003. Staff received reports that a large crew of laborers was grading new roads under the direction of Mr. James A. Kay, Jr. ("Kay"). The work was allegedly being performed on Kay's property as well as on National Park Service land. Staff contacted Kay's representative, Donald W. Schmitz, III, of Schmitz and Associates ("Schmitz"), by telephone and Schmitz assured staff that the work on the property was only minor brush clearance for the purpose of locating property boundaries and for maintenance on existing roads, and was being carried out at the request of Kay, and under the direct supervision of Schmitz. Staff received subsequent reports of additional unpermitted development being undertaken by Kay.

Staff conducted a site visit to the area on May 1, 2003, which confirmed that significant vegetation removal and grading of roads was occurring on parcel 4464-019-008. On May 2, 2003, staff met with Schmitz at the Coastal Commission office in Ventura. Schmitz asserted that no grading had occurred on the site and stated that all roads on the property predated the Coastal Act. Staff requested that Schmitz 1) allow staff on the property for the purpose of reviewing the alleged violations, and 2) arrange for all grading and vegetation removal to cease immediately until staff had the opportunity to evaluate the situation. Schmitz indicated that he understood the staff direction and agreed to notify the workers to stop unpermitted construction of the roads on the subject properties.

On May 8, staff met at the subject properties with Mr. James A. Kay, Jr., and representatives from Schmitz and the law firm of Gaines and Stacey ("Gaines"). Staff inspected the site and confirmed that unpermitted development had occurred on parcels 4464-019-008, 4464-019-010, 4464-022-001, and 4464-022-010, including construction of several thousand of linear feet of unpermitted roads through either grading and/or removal of native vegetation, installation of metal culverts and creosote-treated railroad ties in a drainage, and construction of an Arizona crossing in a blue line stream. The construction of the roads continued through May 8; 2003, despite the request from staff on May 2, 2003, that work on the roads cease immediately. Staff advised Kay that he was in violation of the Coastal Act and, upon completion of the inspection issued Kay a Notice of Intent ("NOI") to issue an Executive Director Cease & Desist Order, directing Kay to cease all unpermitted development on the subject properties, as well as eight (8) other parcels, including adjacent National Park Service parcels, on which unpermitted development had allegedly occurred under the direction of Kay. The NOI also directed Kay to cease use of the unpermitted new roads since this could contribute to harm to vegetation and increased soil erosion.

Pursuant to the requirements of the NOI, Schmitz gave verbal assurance to staff on May 9, 2003, that unpermitted work on the site had stopped. However, Kay and Schmitz failed to provide required written assurance by the deadline of 5:00 p.m. on May 12, 2003, that <u>use</u> of the unpermitted roads had also ceased. On May 12, 2003, Commission staff received reports that Kay was continuing to drive vehicles on the roads in violation of the NOI. On May 12, 2003,

Schmitz submitted a letter claiming that work on the roads had stopped, and that they intended to provide staff with a map delineating the location of roads, although Schmitz objected to the prohibition on use of the roads.

On May 13, 2003, staff advised Schmitz that they were in violation of the NOI for failing to give written assurance that use of the roads had ceased. After discussions with staff, Schmitz subsequently submitted a facsimile letter agreeing to stop use of the roads.

On June 23, 2003, Schmitz advised staff in writing that the owners intended to resume work and use of the subject roads, alleging that the roadwork and vegetation removal is beneficial to wildlife and is exempt from Coastal review.

On June 27, 2003, I issued a Notice of Intent to Commence Restoration Order proceeding, for restoration of the unpermitted grading, streambed alteration, and vegetation removal. The Notice included parcels 4464-019-008, 4464-019-010, and 4464-022-010. On July 1, 2003, Commission staff issued a follow-up Notice of Intent to Commence Restoration Proceeding to Kay, to correct a typographical error and include APNs 4464-022-001 and 4464-022-014. (APN 4464-022-014, which is owned by Parkland Ranch, is the subject of an ongoing investigation regarding alleged unpermitted development, which is not covered under this proposed Restoration Order report).

As a result of 1) correspondence from Schmitz stating that the property owner intended to recommence unpermitted development on the property, and 2) the failure of Kay to submit promised maps and supporting documentation that he claimed would exonerate him from responsibility for alleged violations of the Coastal Act, Executive Director Cease & Desist Order No. ED-03-CD-146 was issued to Kay on July 2, 2003, directing Kay to stop all unpermitted development on the subject properties. As of July, 2, 2003, neither Kay or his representatives had submitted any maps or other documentation to support their claim that the roads were legally existing prior to the Coastal Act or that the property was outside the Coastal Zone, nor had they demonstrated an intent to comply with the NOI or to cooperate with Commission staff in resolving the alleged violations.

On August 4, 2003, Commission staff arranged a meeting with Schmitz to view the subject properties and advise Schmitz as to the specific locations of certain unpermitted development. Kay subsequently refused to allow Commission staff on the properties without his personal supervision, with the exception of viewing a graded pad on parcel 4464-022-010.

On August 15, 2003, Commission staff again met with Schmitz to view the subject properties. Commission staff viewed portions of subject properties and found evidence that use of the roads had continued in violation of the EDCDO.

On August 26, 2003, staff sent correspondence to Gaines clarifying the location of an approximately 970 foot long section of roadway located on parcel 4464-022-001, which is not in violation of the Coastal Act.

During September 29, 2003, and September 30, 2003, staff received reports of work crews, including known employees of Kay, driving up to the Castro Peak area toward the subject

properties and transporting heavy equipment, including a bulldozer and large trucks. During the afternoons, work crews were seen leaving the area and trucks loaded with vegetation were seen leaving the site.

On October 1, 2003, Commission staff conducted a site visit to adjacent NPS property. At approximately 11:45 a.m. staff observed a six-wheel Polaris® work vehicle traveling at a high rate of speed on the unpermitted roads across parcels 4464-022-001 and 4464-022-010.

On October 7, 2003, Commission staff spoke with Schmitz. Schmitz stated that Kay had abided by the terms of the EDCDO despite the expiration of the EDCDO and Schmitz denied that any work or use of the roads had occurred. Schmitz confirmed that Kay had recently purchased a bulldozer, but stated that Schmitz was the only one with keys to the vehicle.

On October 16, 2003, at 2:10 p.m., NPS Rangers observed a work crew clearing and chipping vegetation from parcel 4464-019-008. NPS Rangers observed at least three laborers on site using a Polaris® work vehicle, and mechanical chipper.

On October 20, 2003, NPS Rangers observed a work crew of at least nine (9) laborers clearing and chipping vegetation from parcel 4464-019-008. Laborers were again working on site with a Polaris® work vehicle, and mechanical chipper. NPS Rangers also located 2 new wooden posts set in concrete at the property boundary with NPS Parcel 4464-019-900.

On October 23, 2003, staff received additional reports that work crews were conducting additional roadwork on the subject properties, using a Backhoe Tractor, mechanical wood chipper, and Polaris® vehicle.

COMMISSION CEASE AND DESIST ORDER

Commission Cease and Desist Order Process

The Commission's Authority to issue Cease and Desist Orders is set forth in Section 30810(a) of the Coastal Act, which states the following:

> *If the commission, after public hearing, determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing the permit or (2) is inconsistent with any permit previously issued by the commission, the commission may issue an order directing that person or governmental agency to cease and desist.*

Under Section 30810, the Cease and Desist Order may be subject to such terms and conditions as the Commission may determine are necessary to ensure compliance with the Coastal Act. Such terms and conditions may include, among other requirements, implementation of temporary and/or permanent erosion control measures.

Please be advised that if the Commission issues a Cease and Desist Order, Section 30821.6(a) of the Coastal Act authorizes the Commission to seek monetary daily penalties for any intentional or negligent violation of the order for each day in which the violation persists. The penalty for intentionally or negligently violating a Cease and Desist Order can be as much as $6,000 per day for as long as the violation persists.

At this time, the Commission is tentatively planning to hold a hearing on the issuance of a Cease and Desist Order in this matter at the Commission meeting that is scheduled for the week of December 10-12, 2003, in San Francisco, California.

In accordance with the California Code of Regulations, Title 14, Section 13181(a), you have the opportunity to respond to the staff's allegations as set forth in this notice by completing the enclosed Statement of Defense form. **The completed Statement of Defense form must be received by Tom Sinclair at the South Central Coast District office at 89 South California Street, Suite 200, Ventura, California, 93001, no later than Wednesday, November 12, 2003.** Should you have questions concerning the filing of the Statement of Defense form, you may contact Tom Sinclair at (805) 585-1800.

EXECUTIVE DIRECTOR CEASE AND DESIST ORDER

Section 30809(a) of the Coastal Act provides that:

> *If the executive director determines that any person...has undertaken or is threatening to undertake, any activity that...may require a permit from the commission without securing a permit...the executive director may issue an order directing that person to cease and desist.*

Executive Director Cease and Desist Order Process

Section 30809(b) of the Coastal Act provides that an Executive Director Cease and Desist Order may be issued if:

> *...the person... has failed to respond in a satisfactory manner to an oral notice given in person or by telephone, followed by a written confirmation, or a written notice given by certified mail or hand delivered to the landowner or the person performing the activity.*

Section 13180(a) of Title 14 of the California Code of Regulations defines the term "satisfactory manner" with regard to Section 30809(b) of the Coastal Act as being, in part, "a response which is made in the manner and within the timeframe specified in the notice." **To prevent the issuance of the Executive Director Cease and Desist Order, you must confirm by telephone no later than 1:00 p.m., Friday, October 24, 2003, that all unpermitted development, including but not limited to the unpermitted development described above has ceased and will not resume without authorization from the Commission, and you must also submit an**

appropriate response by facsimile to (805) 641-1732, followed by hard copy sent via U.S. Mail Service to Tom Sinclair at the South Central Coast District office at 89 South California Street, Suite 200, Ventura, California, 93001, no later than 12:00 pm (noon), Monday, October 27, 2003, including a letter of agreement, which unequivocally states:

1. That no further unpermitted development, including but not limited to construction of roads, pads, gates, streambed alteration, or removal of native vegetation will occur unless and until a permit for such activities has been issued by the California Coastal Commission and any necessary work plans have been approved; and
2. That no further use of the unpermitted roads on parcels 4464-019-008, 4464-019-101, 4464-022-001, 4464-022-010 and 4464-019-900 will occur unless and until such time as such use were to be legally authorized by the Commission.
3. A COMPLETE Coastal Development Permit Application will be submitted to the California Coastal Commission on or before November 5, 2003, proposing restoration of all unpermitted development on the subject properties, including but not limited to restoration of unpermitted roads, graded and cleared pads, streambed alterations including, damage to oak trees, as applicable, or areas where native vegetation was removed, on parcels 4464-019-008, 4464-019-101, 4464-022-001, and 4464-022-010.
4. A comprehensive interim erosion control plan to stabilize and control erosion from exposed cut and fill slopes on parcels 4464-019-008, 4464-019-101, 4464-022-001, and 4464-022-010 will be submitted to the California Coastal Commission on or before November 5, 2003 and after notification of approval by Commission staff, the plan shall be fully implemented within 10 days.
5. All unpermitted gates, gateposts, and chain barriers, will be removed from the subject properties no later than 5:00 p.m., Thursday, October 30, 2003, and that removal of these unpermitted objects shall be completed by hand tools, without the use of motorized vehicles or other heavy mechanical machinery.

The Executive Director Cease and Desist Order may be subject to such terms and conditions as the Executive Director may determine are necessary to avoid irreparable injury to any area within the jurisdiction of the Commission, pending action by the Commission under Section 30810 (which grants the Commission the authority to issue Cease and Desist Orders): The Executive Director Cease and Desist Order shall be effective upon its issuance. An Executive Director Cease and Desist Order issued pursuant to Section 30809 of the Coastal Act shall become null and void 90 days after issuance and may be followed up by a Cease and Desist Order or Restoration Order issued by the Commission pursuant to Section 30810 of the Coastal Act, which will have a longer effective period. Violations of Executive Director Cease and Desist Orders may give rise to penalties under Section 30821.6 of the Coastal Act (up to $6,000 per day) and Section 30822, in addition to other fines and remedies available under the Coastal Act.

Please note that any unpermitted development on parcels 4464-019-008, 4464-019-010, 4464-019-900, 4464-022-001 and/or 4464-022-010, including but not limited to any grading, construction, removal of native vegetation, or stream alteration, that is undertaken either before or after issuance of the proposed Cease and Desist Orders by the Executive Director and/or the Coastal Commission will constitute violation(s) of the Coastal Act, subject to penalties and

exemplary damages under Public Resources Code sections 30820 and 30822. Should you have any questions regarding this letter, please call Tom Sinclair at (805) 585-1800.

Sincerely,

PETER DOUGLAS
Executive Director

cc: Amy Roach, Deputy Chief Counsel
Lisa Haage, Chief of Enforcement
John Bowers, Staff Counsel
Sandy Goldberg, Staff Counsel
Tom Sinclair, Enforcement Officer, South Central District Officer
Steve Hudson, Enforcement Supervisor, Southern Districts
Woody Smeck, Superintendent, Santa Monica Mountains National Recreation Area
Fred Gaines, Gaines & Stacey, LLP
Donald W. Schmitz, III, Schmitz and Associates
Daniel Olivas, Deputy Attorney General

Enclosure: Statement of Defense Form for Commission Cease and Desist Order

STATE OF CALIFORNIA—THE RESOURCES AGENCY GRAY DAVIS, GOVERNOR

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400

VIA REGULAR AND CERTIFIED MA

Exhibit 12 F12
ED Cease and Desist
ORDER
ED-03-CD-146
JULY 2, 2003

July 2, 2003

Mr. James A. Kay Jr.
P.O. Box 7835
Van Nuys, CA 91409-7835

As Representative Of: Panorama Ranch LLC, APN 4464-019-008
Deer Valley Ranch LLC, APN 4464-019-010
Communications Relay Corporation, APN 4464-022-001
Panorama Ranch LLC, APN 4464-022-010
Park Lands Ranch, APN 4464-022-014

Subject: **Executive Cease and Desist Order No. ED-03-CD-146**

Date Issued: July 2, 2003

Expiration Date: October 1, 2003

Violation File No: V-4-03-018 (Kay)

Property Location: Los Angeles County Assessor's Parcels ("APN") 4464-019-008, 4464-019-010, 4464-022-001, 4464-022-010, 4464-022-014 located in the Coastal Zone of the Santa Monica Mountains, unincorporated area of Los Angeles County, Between Castro Motorway and Mulholland Highway

Alleged Coastal Act Violation: Unpermitted construction and grading of roads and at least one graded pad; extensive clearance of native chaparral and riparian vegetation; streambed alteration, including placement of new culverts and railroad ties in drainage courses.

I. ORDER

Pursuant to my authority under California Public Resources Code (PRC) Section 30809, I hereby order you, your employees, agents and contractors, and any other persons acting in concert with you to cease and desist from violating the Coastal Act by undertaking development without a coastal development permit ("CDP"), including the grading and construction of roads and pads; increasing the size, width or length of roads; clearance of major vegetation, including but not limited to removal and destruction of native chaparral vegetation; alteration of one or more stream channels and removal of riparian vegetation, placement of new culverts, railroad ties or solid

materials in drainage courses, and use of the unpermitted roads, on the properties identified below.

II. IDENTIFICATION OF THE PROPERTY

The properties that are the subject of this cease and desist order include several vacant parcels in the Santa Monica Mountains area of Unincorporated Los Angeles County, owned by you or one or more of the entities named above, or upon which you performed the development described below. The parcels include, but may not be limited to the following parcels:

Los Angeles County APN 4464-019-008
Los Angeles County APN 4464-019-010
Los Angeles County APN 4464-022-001
Los Angeles County APN 4464-022-010
Los Angeles County APN 4464-022-014

III. DESCRIPTION OF DEVELOPMENT

The development that is the subject of this order consists of the unpermitted construction and grading of roads and at least one graded pad; use of unpermitted roads; clearance of native chaparral and riparian vegetation; streambed alteration; and placement of new culverts, railroad ties, or other solid materials in drainage courses.

IV. FINDINGS

A. In April 2003, Commission staff received reports that unpermitted development was occurring on property allegedly owned by Mr. James A. Kay, Jr. near Castro Peak Motorway. Staff has reviewed the coastal development permit files and determined that there is no permit for any of the development identified as unpermitted in this Order.

B. On Tuesday, April 22, 2003, Commission staff ("staff") spoke with Mr. Donald W. Schmitz II, of Schmitz & Associates, regarding reports of alleged unpermitted construction of roads and vegetation clearance on properties allegedly owned by Mr. James A. Kay, Jr., near Castro Peak Motorway in the Santa Monica Mountains of unincorporated Los Angeles County. Mr. Schmitz confirmed that there were "laborers" on Mr. Kay's properties, but maintained that they were conducting "hand labor only" under the direction of Mr. Schmitz, and that he had given "explicit instructions" to the laborers as to the work being performed, and that the laborers were "only clearing some brush to mark property boundaries." He also stated that they "brought in a chipper to do some maintenance clearing of existing roads," and were "side casting" the chippings along these existing roads. Mr. Schmitz stated that he had spoken with Ms. Melanie Beck of the National Park Service and Mr. Kevin

Petrowsky on April 17th 2003, and advised them that no unpermitted development was occurring on Mr. Kay's properties, nor was any of the work encroaching onto Park Service property.

C. On Thursday, May 1, 2003, staff received additional telephone reports of unpermitted vegetation removal and construction and grading of roads being conducted by Mr. Kay and or his work crew on the subject properties. During the afternoon of May 1, 2003, staff observed vegetation removal and construction of roads below and to the north of Castro Motorway. A work crew of several laborers was conducting the development with the assistance of a Polaris Workmobile™ and a wood chipper towed by a large pick-up truck. Staff took several photographs of portions of the unpermitted construction from a distance of several hundred feet.

D. On Friday, May 2, 2003, staff met with Mr. Schmitz to discuss the alleged violations on Mr. Kay's properties, as well as the possibility that the roads and vegetation clearance had encroached onto adjacent National Park Service properties. On May 2, 2003, Mr. Schmitz maintained that no grading had occurred on any of the sites, and that only minor vegetation clearance and road maintenance was being performed on existing "pre-coastal" roads, and that additional minor clearing of vegetation had occurred for the purpose of locating property boundaries. Staff requested permission from Mr. Schmitz to visit the property that same afternoon, or that Mr. Schmitz arrange for a Commission staff site inspection of the properties as soon as feasible. Staff also requested that Mr. Schmitz direct his client and laborers to halt the vegetation removal and grading of roads immediately so that the development did not continue through the weekend, and until staff could conduct a site visit to the assess the activities and advise Mr. Kay regarding the necessity for permits. Mr. Schmitz acknowledged to staff that he understood staff's direction and he indicated that he would convey the message to his client as soon as feasible.

E. On Thursday, May 8, 2003 (the earliest possible date Mr. Kay and Mr. Schmitz agreed to allow staff to enter the property), Commission staff conducted a site investigation in the presence of Mr. Kay, Mr. Schmitz, Ms. Rebecca Thompson, Mr. Dale Jauregny, and Ms. Donna Chen. During the site inspection on May 8, 2003, staff discovered development consisting of grading and construction of several thousand linear feet of roads, including road cuts exceeding six (6) feet in height, a fill pad, several acres of clearance of native chaparral vegetation, including several acres for the new roads, recent installation of culverts, and grading and filling of at least one streambed. None of this development is authorized by a coastal development permit.

Mr. Schmitz stated that portions of the vegetation clearance, including large swaths of clearance up to twenty feet in width and several hundred feet long, had been conducted solely for purposes of locating property boundaries. Mr. Schmitz also stated that some smaller cleared pathways of six to ten feet in width were cleared for

the convenience of the laborers working on the property, as they were carrying heavy equipment and materials.

Mr. Schmitz and Mr. Kay denied that grading had occurred on any of the subject properties. However, new road cuts and fill slopes were clearly evident where new roads had been constructed. When questioned regarding the lack of evidence of prior existence of a road that crosses an intermittent stream channel, Mr. Schmitz admitted that there might have existed "a goat trail or something."

Mr. Kay and Mr. Schmitz stated that there had been a large ranching operation on the property during the 1950's, and that the alleged "pre-existing" roads were part of the ranching operation. Staff asked Mr. Kay and Mr. Schmitz if they had documentation or photographic evidence of the alleged ranching operation and roads; Mr. Kay and Mr. Schmitz both indicated that there was no such evidence, and that the prior owners of the property are not around to verify their assertion. Mr. Schmitz and Mr. Kay stated that numerous pieces of ranching equipment had been found on the properties, and as such, provided proof of the existence of the alleged ranch. However Mr. Schmitz and Mr. Kay could not produce the equipment as it had allegedly been hauled away from the property, nor could they provide documentation of the existence of the equipment.

E. During the meeting on May 8, 2003, staff hand delivered a Notice of Intent to Issue an Executive Director Cease and Desist Order (NOI) to Mr. Kay in accordance with the provisions of Coastal Act Section 30809(b). The NOI specifically required cessation of all unpermitted work at the site. It stated that the Executive Director intended to issue a CDO against you unless you responded to this letter in a satisfactory manner as referenced by Section 30809(b) of the California Coastal Act. The NOI specifically stated:

> *"Such a satisfactory response must include an assurance that no further development will be undertaken at the site unless specifically authorized by a permit granted by the Commission."*

The NOI specifically stated that:

> *To prevent the issuance of the Executive Director Cease and Desist Order, you must confirm the following by telephone by close of business on Friday, May 9, 2003, and must also submit an appropriate response by facsimile, followed by hard copy sent via U.S. Mail Service, no later than 5:00 p.m., Monday, May 12, 2003, including a letter of agreement, which unequivocally states:*

1. *that no further unpermitted development, including construction activity will occur until Commission staff has stated in writing that construction activities may resume; and*

2. *that no use of the unpermitted roads will occur unless and until such time as such use were to be legally authorized by the Commission.*

Commission staff requested assurances from Mr. Kay and Mr. Schmitz that the NOI would be complied with immediately; Mr. Schmitz replied that they agreed to stop all work on the roads, and that they would advise the work supervisor and laborers to cease construction and comply with the NOI immediately. However, Mr. Kay, Mr. Schmitz, and Ms. Thompson also asserted that most of the twelve properties referenced in the NOI were entirely out of the Coastal Zone, and were therefore not within the jurisdiction of the Coastal Commission. Mr. Kay and Mr. Schmitz also stated that they did not own all of the parcels referenced in the NOI. Staff advised Mr. Kay and Mr. Schmitz that staff were aware of the fact that Mr. Kay did not own all of the above referenced properties, and that Mr. Kay was simply being put on notice that further unpermitted grading and vegetation clearance conducted by Mr. Kay, whether on property owned by Mr. Kay or by others, was to cease immediately. Unpermitted development in the Coastal Zone is prohibited by the Coastal Act, regardless of property ownership.

F. On Friday, May 9, 2003, staff received a telephone message from Schmitz assuring staff that work had stopped on the site.

G. On Monday, May 12, 2003, staff received telephone reports that work crews under the direction of Mr. Kay continued use of the roads in violation of the requirements of the NOI.

H. On May 12, 2003, staff received a facsimile letter from Schmitz & Associates, stating that work on the "inspected roads" on the subject parcels 4464-019-008 and 010, and 4464-022-001, 010, and 014 had ceased, and that they intended to provide staff with a topographic map, which delineates the roads on the property. However, Schmitz & Associates objected to prohibition of the use of the roads, and requested that staff "clearly define which roads or trails they are requesting the property owner not use." The letter from Schmitz and Associates also asserted that they have not conducted any work on the other seven properties listed in the NOI.

I. The failure of Mr. Kay to cease or agree to cease use of the new roads, or to provide staff with adequate assurances by the May 12, 2003 deadline, that use of the new roads would be discontinued, constituted failure to comply with the NOI. However, as noted below, based on representations made by the respondent's agent, in an attempt to avoid unnecessary proceedings, I did not issue an Executive Director Cease and Desist Order at that time.

J. On Tuesday, May 13, 2003, Staff spoke with representatives from Schmitz & Associates. Staff again instructed Schmitz & Associates that the NOI required all unpermitted development to stop, as well as use of the roads, specifically use of

heavy machinery and vehicles, which would further compact the soil and damage the site. Schmitz & Associates subsequently submitted a facsimile letter to staff stating that Mr. Kay agreed to cease use of the roads pursuant to requirements of the NOI.

K. On May 14, 2003, staff received two declarations (by facsimile) by James A. Kay, Jr. and Dale Jauregny (foreman for Mr. Kay) agreeing to stop all "repair and maintenance" work and use of the roads on Parcels 4464-019-008 and 010 and 4464-022-001, 010, and 014.

L. On May 15, 2003, staff received a hand-delivered letter from Schmitz & Associates alleging that the NOI is "deficient" because the Executive Director determined that unpermitted development has occurred on "all or some" of the twelve parcels named in the NOI, and has thus failed to specify the exact location of the unpermitted development. However, during the site inspection of May 8, 2003, staff was escorted to a number of sites where unpermitted development had already occurred or where unpermitted development was ongoing, and while Mr. Kay maintained that the properties that staff visited were owned by Mr. Kay, he could not or would not verify the location of the parcel boundaries, and he could not or would not produce a map to reasonably ascertain the exact location where the participants in the site inspection were at any given time, or the location of the roads on the subject properties. The letter of May 15, 2003, further states that, "...in response to the Notice, that Mr. Kay intends to provide a topographic map which delineates the location of the roads inspected on May 8, 2003, along with documentation that the roads were existing, pre-coastal, and do not constitute development of new roads." As of July 1, 2003, 47 days after advising staff that the maps and supporting documentation would be submitted to the Commission, no such materials have been submitted to the Commission.

The letter of May 15, 2003, from Schmitz & Associates further challenges the Executive Director's determination, alleging that the NOI improperly advises Mr. Kay to cease work on properties not owned by Mr. Kay. Staff advised Mr. Kay on May 8, 2003, that regardless of whether Mr. Kay is conducting the unpermitted development on his own property or lands owned by other individuals or the National Park Service, he is responsible for his actions and will be held accountable for Coastal Act violations.

The letter of May 15, 2003, also alleges that the Executive Director cannot issue a Cease & Desist order against unpermitted development on Los Angeles County APN 4464-0190-008, because the property is "traversed" by the Coastal Zone boundary, and it "has yet to be established which portion of the property, as well as which if any of the alleged roads, is subject to Coastal Commission jurisdiction." The NOI was issued for unpermitted development that had occurred on the portions of the above referenced properties located within the Coastal Zone. As demonstrated by the preceding statement, the property owner and his representatives again indicate that they are unclear where the Coastal Zone boundary is located, and are thus unclear

as to whether any of the work they are performing is in the Coastal Zone or not. In fact, the Commission's Coastal Zone boundary maps indicate that less than ten percent of APN 4464-0190-008 is outside of the Coastal Zone. The other parcels identified in this Order are located entirely within the Coastal Zone. Moreover, Staff has received reports from Los Angeles County Public Works Department and the National Park Service that Mr. Kay has conducted unpermitted grading and vegetation removal on properties both in and out of the Coastal Zone, and that stop work orders have been issued to Mr. Kay by the County of Los Angeles to halt unpermitted grading on at least two of the subject properties. As noted above on page one of this Order, you are directed to cease all unpermitted development on any of the above referenced parcels, or portions thereof, that are located within the boundaries of the Coastal Zone.

The letter of May 15, 2003, also claims that the "repair and maintenance work" to the roads inspected by Commission staff on May 8, 2003, with the exception of the road within parcel 4464-0190-008 is exempt from coastal development permit requirements..." However, you have not submitted any evidence to substantiate your claim that any of the above referenced roads existed prior to the effective date of the Coastal Act, nor have you applied for or received a vested rights determination regarding these roads. Therefore, maintenance of such roads is not exempt. In fact, during the site inspection of May 8, 2003, staff found clear and compelling evidence that the roads and one graded pad had been recently created, and in fact, staff found workers on site actively constructing new roadways on property allegedly owned by Mr. Kay, despite staff's request on May 1, 2003 that the construction of the roads stop until staff could conduct a site visit and advise Mr. Kay regarding the necessity for permits.

The letter of May 15, 2003, further states that, "in response to the Notice, that Mr. Kay intends to provide a topographic map which delineates the location of the roads inspected on May 8, 2003, along with documentation that the roads were existing, pre-coastal, and do not constitute development of new roads." As noted above, as of July 1, 2003, no such map or documentation has been submitted to the Commission.

M. Despite the presence of a clear legal basis for issuing the EDCDO in May, we deferred doing so based on representations of your representatives that the development activities and use of all roads on the subject parcels were halted and that you would cooperate in resolving this matter administratively.

However, on June 24, 2003, we received a letter from Schmitz & Associates dated June 23, 2003, which states the current position of Schmitz & Associates and their clients and contradicts the previous representations that were made in response to the EDCDO NOI. The statements in the June 23 letter do not conform to the requirements of the EDCDO NOI, and therefore issuance of this order is necessary. This letter states:

> "Should a response not be forthcoming we will assume that the foregoing and enclosed [letter reasserting defenses addressed above and below] addresses the Notice and the executive director's concerns, and that no further action on the part of the California Coastal Commission is forthcoming... *The [Respondents] will initiate limited vegetation removal as required for repair and maintenance of the existing roads....*" (emphasis added)

This letter also reasserts a number of issues addressed above, including the issue of ownership of the parcels, and whether the parcels are within the coastal zone. As noted above, ownership is irrelevant to a finding of a violation under section 30809 of the Coastal Act, and this order is specifically tailored to address only parcels located within the Coastal Zone.

In addition, this letter raises two final issues: that the development was "repair and maintenance" of existing roads and therefore exempt from the Coastal Act permitting requirements, and that the development prohibited by the NOI, and this Order, do not constitute development under the Coastal Act. These arguments are unsupported. The respondent has not obtained a determination by the Coastal Commission that there are vested rights for any roads on the parcels. The respondent has also not provided any evidence indicating that roads were presentprior to the effective date of the Coastal Act. The Commission's files contain no evidence that any roads existed on the parcels prior to this date. In fact, the evidence suggests that the roads did not exist prior to the effective date of the Coastal Act. Therefore, the activities do not constitute repair and maintenance to lawfully constructed facilities or structures.

Furthermore, if there were any pre-existing roads, the respondent's unpermitted development increased the size, width and/or length of such roads and there can be no vested right to do so without a coastal permit. In addition, the respondent constructed new culverts at streams and constructed a new fill pad and this constitutes new development for which there can be no vested right.

N. The activities referenced herein are within the Coastal Zone and within the Commission's jurisdiction. Any development conducted therein requires a coastal development permit from the Commission. No CDP was obtained. Failure to obtain a CDP is a violation of the Coastal Act and can subject persons performing such development to remedies in Chapter 9 of the Coastal Act, including the issuance of Executive Director cease and desist orders under Section 30809 of the Coastal Act.

V. COMPLIANCE OBLIGATION

Strict compliance with this order by all parties subject thereto is required. Failure to comply strictly with any term or condition of this order may result in the imposition of civil penalties up to Six Thousand Dollars ($6,000) per day for each day in which

such compliance failure persists and other such penalties and relief as provided for in the Coastal Act. In addition, the Executive Director is authorized, after providing notice and the opportunity for a hearing as provided for in section 30812 of the Coastal Act, to record a Notice of Violation against your property.

VI. APPEAL

Pursuant to PRC section 30803(b), any person or entity against whom this order is issued may file a petition with the Superior Court seeking a stay of this order.

Should you have any questions regarding this matter, please contact Mr. Tom Sinclair, South Central Coast District Enforcement Officer, at 805-585-1800.

Executed at San Francisco, California on July 2, 2003.

Signed,

PETER M. DOUGLAS
Executive Director
California Coastal Commission

STATE OF CALIFORNIA—THE RESOURCES AGENCY GRAY DAVIS, *GOVERNOR*

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400

VIA REGULAR AND CERTIFIED MAIL

October 24, 2003

Mr. James A. Kay Jr.
P.O. Box 7835
Van Nuys, CA 91409-7835

Panorama Ranch LLC
C/O Mr. James A. Kay Jr.
P.O. Box 7835
Van Nuys, CA 91409-7835

Deer Valley Ranch LLC
C/O Mr. James A. Kay Jr.
P.O. Box 7835
Van Nuys, CA 91409-7835

Communications Relay Corporation
C/O Mr. James A. Kay Jr.
P.O. Box 7835
Van Nuys, CA 91409-7835

Exhibit 13 F12
ED Cease and Desist
ORDER ED-03-CD-147
OCT 24, 2003

Subject: **EXECUTIVE DIRECTOR CEASE & DESIST ORDER No. ED-03-CD-147**

Date Issued: October 24, 2003

Expiration Date: January 22, 2004

Violation File No: V-4-03-018 (Kay)

Property Location: APN 4464-019-008, owned by Panorama Ranch LLC
APN 4464-019-010, owned by Deer Valley Ranch LLC
APN 4464-019-900, owned by United States Government (National Park Service)
APN 4464-022-001, owned by Communications Relay Corporation
APN 4464-022-010, owned by Panorama Ranch LLC
Located in the Santa Monica Mountains portion of unincorporated area of Los Angeles County.

Violation Description: Unpermitted development, including but not limited to the following: Removal of major vegetation, including

removal of Environmentally Sensitive Habitat, including but not limited to native chaparral and native oak trees; grading and construction of new roads and pad areas; unpermitted streambed alteration, including but not limited to grading, filling, and manipulation of channel substrate, installation of metal culverts and creosote-treated railroad ties, and construction of an Arizona crossing in a blue line stream; and construction of other unpermitted structures including but not limited to metal gates and metal and wood gate posts with chain barriers set with concrete bases.

I. ORDER

Pursuant to my authority under California Public Resources Code (PRC) Section 30809, I hereby order Panorama Ranch, LLC; Deer Valley Ranch, LLC; Communications Relay Corporation, Inc., and James A. Kay, Jr. as officer, president, manager, member and/or person in control of the foregoing entities and as the person responsible for undertaking the development described herein (hereinafter "Kay' or "you"), to cease and desist from violating the Coastal Act by undertaking development without a coastal development permit ("CDP"), including the grading and construction of roads and pad areas; clearance of native vegetation, including but not limited to removal and destruction of native chaparral vegetation and damage to oak trees; alteration of one or more stream channels and removal of riparian vegetation, placement of new culverts, railroad ties or solid materials in drainage courses, use of such unpermitted roads, and construction of unpermitted structures including but not limited to metal gates and metal and wood gate posts with chain barriers set with concrete bases on the properties identified below.

II. IDENTIFICATION OF THE PROPERTY

The properties that are the subject of this cease and desist order include several previously undeveloped parcels in the Santa Monica Mountains area of Unincorporated Los Angeles County, owned by you or one or more of the entities named above, or upon which you performed unpermitted development. The parcels are the following Los Angeles County parcels:

APN 4464-019-008, owned by Panorama Ranch LLC
APN 4464-019-010, owned by Deer Valley Ranch LLC
APN 4464-019-900, owned by U.S. Government - National Park Service
APN 4464-022-001, owned by Communications Relay Corp.
APN 4464-022-010, owned by Panorama Ranch LLC

III. DESCRIPTION OF ACTIVITY

The activity that is the subject of this order consists of the unpermitted development, including but not limited to the following: Removal of major vegetation, including removal of Environmentally Sensitive Habitat, including but not limited to native chaparral and native oak trees; grading and construction of new roads; unpermitted streambed alteration, including but not limited to grading, filling, and manipulation of channel substrate, installation of metal culverts and creosote-treated railroad ties, and construction of an Arizona crossing in a blue line stream; and construction of other unpermitted structures including but not limited to metal gates, metal and wood gate posts with chain barriers set with concrete bases.

IV. FINDINGS

A. Between April 16, 2003, and May 1, 2003, Commission staff ("staff") received reports of unpermitted grading and vegetation clearance on properties allegedly owned by Mr. James A. Kay, Jr., ("Kay") and the National Park Service near Castro Motorway in the Santa Monica Mountains of unincorporated Los Angeles County. Staff spoke with Mr. Donald W. Schmitz, III, of Schmitz & Associates, ("Schmitz"), who confirmed that "laborers" were working on Kay's properties conducting "hand labor only" under the supervision of Mr. Schmitz, and Schmitz had given "explicit instructions" to the laborers as to the work being performed, and that the laborers were "only clearing some brush to mark property boundaries." He also stated that they "brought in a chipper to do some maintenance clearing of existing roads," and were "side casting" the chippings along these existing roads.

B. On Thursday, May 1, 2003, staff observed unpermitted vegetation removal and construction of new roads below and to the north of Castro Motorway on APN 4464-019-008. A work crew of several laborers was using a Polaris Workmobile™, and a mechanical wood chipper towed by a large pick-up truck.

C. On Friday, May 2, 2003, staff met with Schmitz and requested that Schmitz halt the unpermitted vegetation removal and grading of roads immediately until staff could conduct a site visit to the assess the activities and advise Kay regarding the necessity for permits.

D. On Thursday, May 8, 2003 (the earliest possible date Kay and Schmitz agreed to allow staff to enter the property), Commission staff conducted a site investigation in the presence of Kay, Schmitz, Ms. Rebecca Thompson of Gaines & Stacey, LLC ("Gaines"), Ms. Donna Chen of Schmitz & Associates, and Kay's "Foreman" Mr. Dale Jauregny. During the site inspection on May 8, 2003, staff observed unpermitted development including removal of major vegetation, including native chaparral Environmentally Sensitive Habitat; grading and clearing of new roads and pad areas; unpermitted streambed alteration, filling, and manipulation of

channel substrate, installation of metal culverts and creosote-treated railroad ties, and construction of an Arizona crossing in a blue line stream.

Schmitz stated that portions of the vegetation clearance, including large swaths of clearance up to twenty feet in width and several hundred feet long, had been conducted solely for purposes of locating property boundaries. Schmitz also stated that some smaller cleared pathways of six to ten feet in width were cleared for the convenience of the laborers working on the property, as they were carrying heavy equipment and materials.

Despite clear evidence to the contrary, Schmitz and Kay denied that grading had occurred on any of the subject properties. When questioned regarding the lack of evidence of prior existence of a road that crosses an intermittent stream channel, Schmitz admitted that there might have existed "a goat trail or something."

Kay and Schmitz stated that there had been a large ranching operation on the property during the 1950's, and that the alleged grading occurred on "pre-existing" roads that were part of the ranching operation. Staff asked Kay and Schmitz if they had documentation or photographic evidence of the alleged ranching operation and roads; Kay and Schmitz both indicated that there was no such evidence, and that the prior owners of the property are not available to verify their assertion. Schmitz and Kay stated that numerous pieces of ranching equipment had been found on the properties, and as such, provided proof of the existence of the alleged ranch. However Schmitz and Kay could not produce the equipment as it had allegedly been hauled away from the property, nor could they provide documentation of the existence of the equipment.

E. During the meeting on May 8, 2003, staff hand delivered a Notice of Intent to Issue an Executive Director Cease and Desist Order (NOI) to Kay in accordance with the provisions of Coastal Act Section 30809(b). The NOI specifically required cessation of all unpermitted develpment at the subject properties. It stated that the Executive Director intended to issue a CDO against you unless you responded to this letter in a satisfactory manner as referenced by Section 30809(b) of the California Coastal Act. The NOI specifically stated:

> *"Such a satisfactory response must include an assurance that no further development will be undertaken at the site unless specifically authorized by a permit granted by the Commission."*

The NOI specifically stated that:

> *To prevent the issuance of the Executive Director Cease and Desist Order, you must confirm the following by telephone by close of business on Friday, May 9, 2003, and must also submit an appropriate response by facsimile, followed by hard copy sent via U.S. Mail*

Service, no later than 5:00 p.m., Monday, May 12, 2003, including a letter of agreement, which unequivocally states:

1. *that no further unpermitted development, including construction activity will occur until Commission staff has stated in writing that construction activities may resume; and*

2. *that no use of the unpermitted roads will occur unless and until such time as such use were to be legally authorized by the Commission.*

Commission staff also requested assurances from Kay and Schmitz that the NOI would be complied with immediately; Schmitz replied that they agreed to stop all work on the roads, and that they would advise the work supervisor and laborers to cease construction and comply with the NOI immediately.

F. On Friday, May 9, 2003, staff received a telephone message from Schmitz assuring staff that work had stopped on the subject properties.

G. On Monday, May 12, 2003, staff received telephone reports that work crews under the direction of Kay continued use of the roads in violation of the requirements of the NOI.

H. On May 12, 2003, staff received a facsimile letter from Schmitz & Associates, stating that work on the "inspected roads" on the subject parcels 4464-019-008 and 010, and 4464-022-001, 010, and 014 had ceased, and that they intended to provide staff with a topographic map that delineates the roads on the property. However, Schmitz & Associates objected to prohibition of the use of the roads, and requested that staff "clearly define which roads or trails they are requesting the property owner not use." The letter from Schmitz and Associates also asserted that they have not conducted any work on the other seven properties listed in the NOI.

I. The failure of Kay to cease or agree to cease use of the new roads, or to provide staff with adequate assurances by the May 12, 2003 deadline, that use of the new roads would be discontinued, constituted failure to comply with the NOI. However, as noted below, based on representations made by the respondent's agent, in an attempt to avoid unnecessary proceedings, I did not issue an Executive Director Cease and Desist Order at that time.

J. On Tuesday, May 13, 2003, staff spoke with representatives from Schmitz & Associates. Staff again instructed Schmitz & Associates that, to avoid issuance of an Executive Director Cease and Desist Order, all unpermitted development must stop, as well as use of the roads, specifically use of heavy machinery and vehicles, which would further compact the soil and damage the site. Schmitz & Associates subsequently submitted a facsimile letter to staff stating that Kay agreed to cease use of the roads pursuant to the NOI.

K. On May 14, 2003, staff received two declarations (by facsimile) by James A. Kay, Jr. and Dale Jauregny (foreman for Kay) agreeing to stop all "repair and maintenance" work and use of the roads on Parcels 4464-019-008 and 010 and 4464-022-001, 010, and 014.

L. Despite the presence of a clear legal basis for issuing the EDCDO in May, we deferred doing so based on representations of your representatives that the development activities and use of all roads on the subject parcels were halted and that you would cooperate in resolving this matter administratively, and that you would provide information in support of your claim of vested rights to the road.

M. On June 24, 2003, we received a letter from Schmitz & Associates dated June 23, 2003, which contradicted the previous representations that were made in response to the EDCDO NOI, and stated that the owners of the subject properties intended to: *initiate limited vegetation removal as required for repair and maintenance of the existing roads....*"

N. On June 27, 2003, staff issued to Kay a Notice of Intent to Commence Restoration Order proceeding, for restoration of areas where the unpermitted grading, streambed alteration, and vegetation removal has occurred. The Notice included parcels 4464-019-008, 4464-019-010, and 4464-022-010. On July 1, 2003, Commission staff issued a follow-up Notice of Intent to Commence Restoration Proceeding to Kay, to correct a typographical error and include APNs 4464-022-001 and 4464-022-014.

O. As a result of 1) correspondence from Schmitz stating that the property owner intended to recommence unpermitted development on the property, and 2) the failure of Kay to submit promised maps and supporting documentation that he claimed would exonerate him from responsibility for alleged violations of the Coastal Act, Executive Director Cease & Desist Order No. ED-03-CD-146 was issued to Kay on July 2, 2003, directing Kay to stop all unpermitted development on the subject properties. As of July 2, 2003, neither Kay nor his representatives had submitted any maps or other documentation to support their claim that the roads legally existed prior to the Coastal Act or that the property was outside the Coastal Zone.

P. Staff conducted a site visit to National Park Service Parcel 4464-019-900, and located additional unpermitted development located on parcels 4464-019-900 and 4464-019-008, which was conducted at the direction of Kay and under the supervision of his agents, including unpermitted road construction resulting in removal of native Chaparral vegetation, material damage to several oak trees, and placement of metal posts and chain barriers.

Q. During on-site field meetings with Schmitz on August 4, 2003 and August 15, 2003, staff confirmed with Schmitz the location of unpermitted development on the subject properties and advised Schmitz as to the location of a 970-foot long legally

existing portion of roadway on parcel 4464-022-001, which historically provided access to parcel 4464-022-001 from Castro Motorway. Staff also found physical evidence that Kay had violated the terms of the EDCDO.

R. On August 26, 2003, staff informed Gaines in writing that only a 970-foot long access road on Parcel 4464-022-001 is considered legally existing. This portion of the roadway legally existed prior to the Coastal Act. Kay and Schmitz maintain that all roads were pre-existing roads; however, neither Kay nor Schmitz have produced evidence to support their claim. Regardless, even assuming that any other roads did exist on site prior to the Coastal Act, other than the 970 ft. long segment referenced above, the unpermitted development performed by the respondent increased the size, width and/or length of such roads without a coastal permit. In addition, the respondent constructed new culverts at streams and constructed a new fill pad and this constitutes new development for which there can be no vested right.

S. On September 29, 2003 and September 30, 2003, staff received reports of work crews driving up to the Castro Peak area toward the subject properties and transporting heavy equipment, including a bulldozer and large trucks. During the afternoons, work crews were seen leaving the area and trucks loaded with vegetation were seen leaving the site.

T. On October 1, 2003, Commission staff conducted a site visit to adjacent NPS property. At approximately 11:45 a.m. staff observed a six-wheel Polaris® work vehicle traveling at a high rate of speed on the unpermitted roads across parcels 4464-022-001 and 4464-022-010.

NEW FACTS REGARDING UNPERMITTED DEVELOPMENT THAT OCCURRED AFTER THE EDCDO EXPIRED:

U. On October 7, 2003, Commission staff spoke with Schmitz. Schmitz stated that Kay had abided by the terms of the EDCDO despite the expiration of the EDCDO and Schmitz denied that any work or use of the roads had occurred. Schmitz confirmed that Kay had recently purchased a bulldozer.

V. On October 16, 2003, at 2:10 p.m., NPS Rangers observed a work crew clearing and chipping vegetation from parcel 4464-019-008. NPS Rangers observed at least three laborers on site using a Polaris® work vehicle, and mechanical chipper on the parcel.

W. On October 20, 2003, NPS Rangers observed a work crew of at least nine (9) laborers clearing and chipping vegetation from parcel 4464-019-008. Laborers were again working on site with a Polaris® work vehicle, and mechanical chipper. NPS Rangers also located 2 new wooden posts set in concrete at the property boundary with NPS Parcel 4464-019-900.

X. On October 23, 2003, staff received additional reports that work crews were conducting additional roadwork on the subject properties, using a Backhoe Tractor, mechanical wood chipper, and Polaris® vehicle.

Y. On October 23, 2003, a Notice of Intent to Issue an Executive Director Cease and Desist Order (NOI) to Kay, Panorama Ranch LLC, Deer Valley Ranch LLC and Communication Relay Corporation, Inc., in accordance with the provisions of Coastal Act Section 30809(b). The NOI specifically required cessation of all unpermitted work at the site. It stated that the Executive Director intended to issue a CDO unless a satisfactory response was received, as referenced by Section 30809(b) of the California Coastal Act. The NOI specifically stated:

> *"Such a satisfactory response must include an assurance that no further development will be undertaken at the site unless specifically authorized by a permit granted by the Commission."*

The NOI specifically stated that:

> To prevent the issuance of the Executive Director Cease and Desist Order, you must confirm by telephone no later than 1:00 p.m., Friday, October 24, 2003, that all unpermitted development, including but not limited to the unpermitted development described above has ceased and will not resume without authorization from the Commission, and you must also submit an appropriate response by facsimile, followed by hard copy sent via U.S. Mail Service, no later than 12:00 pm (noon), Monday, October 27, 2003, including a letter of agreement, which unequivocally states:
>
> 1. That no further unpermitted development, including but not limited to construction of roads, pads, gates, streambed alteration, or removal of native vegetation will occur unless and until a permit for such activities has been issued by the California Coastal Commission and any necessary work plans have been approved; and
> 2. That no further use of the unpermitted roads on parcels 4464-019-008, 4464-019-101, 4464-022-001, 4464-022-010 and 4464-019-900 will occur unless and until such time as such use were to be legally authorized by the Commission.
> 3. A COMPLETE Coastal Development Permit Application will be submitted to the California Coastal Commission on or before November 5, 2003, proposing restoration of all unpermitted development on the subject properties, including but not limited to restoration of unpermitted roads, graded and cleared pads, streambed alterations including, damage to oak trees, as applicable, or areas where native vegetation was removed, on parcels 4464-019-008, 4464-019-101, 4464-022-001, and 4464-022-010.
> 4. A comprehensive interim erosion control plan to stabilize and control erosion from exposed cut and fill slopes on parcels 4464-019-008, 4464-019-101, 4464-022-001, and 4464-022-010 will be submitted to the California Coastal

Commission on or before November 5, 2003 and after notification of approval by Commission staff, the plan shall be fully implemented within 10 days.

5. All unpermitted gates, gateposts, and chain barriers, will be removed from the subject properties no later than 5:00 p.m., Thursday, October 30, 2003, and that removal of these unpermitted objects shall be completed by hand tools, without the use of motorized vehicles or other heavy mechanical machinery.

Z. On October 24, 2003, Kimberly Rible of Gaines & Stacey, LLC, informed staff by telephone that the subject property owners do not intend to comply with the request in the Notice of Intent to confirm that the unpermitted development described in the Notice has ceased and will not resume without authorization from the Commission. Therefore, Kay, Panorama Ranch LLC, Deer Valley Ranch LLC and Communications Relay Corporation, Inc. have not responded to the Notice of Intent in a "satisfactory manner", as required by section 30809 of the Coastal Act.

AA. The activities referenced herein are within the Coastal Zone and within the Commission's jurisdiction. Any development conducted therein requires a coastal development permit from the Commission under section 30600 of the Coastal Act. No CDP was obtained. Failure to obtain a CDP is a violation of the Coastal Act and can subject persons performing such development to remedies in Chapter 9 of the Coastal Act, including the issuance of Executive Director cease and desist orders under Section 30809 of the Coastal Act.

BB. I am issuing this EDCDO due to the persisting violations and persisting threatened violations occurring at this site, noted above. This EDCDO is issued pursuant to the authority of Section 30809 of the Coastal Act and relevant regulations, including section 13188.

V. COMPLIANCE OBLIGATION

Strict compliance with this order by all parties subject thereto is required. Failure to comply strictly with any term or condition of this order may result in the imposition of civil penalties up to Six Thousand Dollars ($6,000) per day for each day in which such compliance failure persists, exemplary damages under section 30822 of the Coastal Act and other such penalties and relief as provided for in the Coastal Act. In addition, the Executive Director is authorized, after providing notice and the opportunity for a hearing as provided for in section 30812 of the Coastal Act, to record a Notice of Violation against your property.

VI. APPEAL

Pursuant to PRC section 30803(b), any person or entity against whom this order is issued may file a petition with the Superior Court seeking a stay of this order.

Should you have any questions regarding this matter, you may contact Mr. Tom Sinclair, South Central Coast District Enforcement Officer, at 805-585-1800.

Executed at San Francisco, California on October 24, 2003.

Signed

PETER M. DOUGLAS
Executive Director
California Coastal Commission

cc: Amy Roach, Deputy Chief Counsel
Chris Pederson, Deputy Chief Counsel
Lisa Haage, Chief of Enforcement
John Bowers, Staff Counsel
Sandy Goldberg, Staff Counsel
Tom Sinclair, Enforcement Officer, South Central District Officer
Steve Hudson, Enforcement Supervisor, Southern Districts
Dan Olivas, Office of the Attorney General
Woody Smeck, Superintendent, Santa Monica Mountains NRA
Fred Gaines, Gaines & Stacey, LLP
Donald W. Schmitz, III, Schmitz and Associates