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CITIZENS FOR THE PRESERVATION OF THE FOREST
6 OF NISENE MARKS STATE PARK

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO**

CITIZENS FOR THE PRESERVATION OF
THE FOREST OF NISENE MARKS STATE
PARK, an unincorporated association, and
SANDY HENN, a Citizen Resident of the
County of Santa Cruz, acting individually and
on behalf of all others similarly situated

No. 03CS01366

SECOND AMENDED PETITION FOR
WRIT OF MANDAMUS AND
COMPLAINT FOR DECLARATORY
RELIEF

Petitioners,

vs.

CALIFORNIA DEPARTMENT OF PARKS
AND RECREATION; STATE PARK AND
RECREATION COMMISSION;
and DOES 1 THROUGH 15,

Respondents,

_____)

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I

INTRODUCTION

1. The California Department of Parks and Recreation (hereinafter "State Parks") developed a General Plan for the management of The Forest of Nisene Marks State Park (hereinafter "Nisene Marks State Park"), which is located in Aptos, California. State Parks prepared a Preliminary General Plan/Draft Environmental Impact Report for The Forest of Nisene Marks State Park, dated March 2003. The Draft Environmental Impact Report was prepared to identify the environmental impacts which may occur with the implementation of the Preliminary General Plan.

2. Petitioner Citizens for the Preservation of The Forest of Nisene Marks State Park (hereinafter "Petitioner Citizens"), submitted comments to State Parks on the Preliminary General Plan and the Draft Environmental Impact Report. Petitioner Sandy Henn (hereinafter "Petitioner Henn") is a taxpayer in the County of Santa Cruz and resides in close proximity to Nisene Marks State Park. (Petitioner Citizens and Petitioner Henn, collectively "Petitioners.") Petitioners are concerned with the protection of the environmental integrity of Nisene Marks State Park, the erosion and resource damage caused by the current pattern of use of Nisene Marks State Park, the poor maintenance and illegal cutting of new trails, and the impacts from mountain biking in the Park. Petitioners are concerned that the General Plan for The Forest of Nisene Marks State Park, which will serve as the guide for managing the use and development of Nisene Marks State Park well into the future, fails to adequately protect the environmental integrity of the Park. In addition Petitioners are concerned that State Parks, as the holder of Nisene Marks State Park in trust for the use and enjoyment of the public, will allow the use of Nisene Marks State Park for purposes inconsistent with the express terms of the Grant and Gift Deeds of the Grantor and Donors, which provide that Nisene Marks State Park be used as a natural preserve.

II

PROCEDURAL HISTORY

3. Petitioners hereby incorporate by reference paragraphs 1 through 2 herein as if fully set forth herein.

1 4. Nisene Marks State Park, located in the County of Santa Cruz, is operated by
2 California State Department of Parks and Recreation. The Park contains approximately 10,000
3 acres of wilderness, rising from sea level to mountains of more than 2,600 feet. A total of more
4 than 9,000 acres was conveyed to the State of California by the children of Nisene Marks in four
5 separate conveyances, all of which were to be included within a state park to be known as The
6 Forest of Nisene Marks State Park. The Marks family transferred Arden Forest, a parcel of
7 approximately 750 acres, in 1963. The Marks family used the Nature Conservancy as an
8 intermediary to deed this parcel to the State. In 1963, the Marks family conveyed by Gift Deed,
9 Aptos Forest, a parcel of approximately 4,800 acres. In 1963, the Timothy Hopkins parcels,
10 constituting approximately 1,700 acres, were conveyed to the State from the Marks family by
11 Gift Deed. The Hinckley Basin parcel, consisting of approximately 2,500 acres was conveyed by
12 the Marks family in 1965 by Gift Deed. The terms of the Grant and Gift Deeds specifically
13 provided, among other restrictions, that the Park be preserved for all time as a natural preserve.
14 Subsequently, 1,000 additional acres of property have been added through gifts from various
15 donors to form what now comprises The Forest of Nisene Marks State Park. As part of the state
16 park system, State Parks must prepare a General Plan setting forth the guidelines for the future
17 management of Nisene Marks State Park. In March 2003, following a series of public workshops
18 in 2001 and 2002, State Parks submitted for public review a Preliminary General Plan/Draft
19 Environmental Impact Report for the future management of The Forest of Nisene Marks State
20 Park.

21 5. The mandated 45-day public review and comment period on the Preliminary General
22 Plan/Draft Environmental Impact Report began on March 27, 2003 and ended on May 12, 2003.
23 Petitioner Citizens submitted comments to State Parks during this comment period.

24 6. On August 22, 2003 the Preliminary General Plan and Final Environmental Impact
25 Report was presented to the State Park and Recreation Commission (hereinafter "Park
26 Commission") at a public hearing. At this meeting the Park Commission considered the
27 Department's recommendation regarding approval of the General Plan and Environmental
28 Impact Report (hereinafter "EIR"). Petitioners objected to the Preliminary General Plan and the

1 Final EIR. Despite Petitioner Citizens' objections, the Park Commission approved the
2 Preliminary General Plan and Final EIR as submitted.

3 7. Petitioners challenge the approval of the Preliminary General Plan and Final EIR on
4 the grounds that the Preliminary General Plan and Final EIR violate the California
5 Environmental Quality Act ("CEQA"—Public Resources Code Section 21000, *et seq.*) because
6 State Parks failed to respond to all comments received during the public review
7 period—including those of Petitioner Citizens, as required under Public Resources Code Section
8 21091(d)(2)(A). Additionally, State Parks violated CEQA by deferring an analysis of the
9 impacts associated with the use and development of the trail system into the future until it
10 devises the detailed trail plan for Nisene Marks State Park. State Parks violated the law
11 governing the State Park System by its failure to include in the General Plan for The Forest of
12 Nisene Marks State Park, all the elements required under Public Resources Code Section 5002.2.

13 8. In addition, Petitioner Henn as a taxpayer and resident of the County of Santa
14 Cruz, brings this Taxpayer Suit challenging the Preliminary General Plan and Final EIR on the
15 grounds that Respondents have failed to comply with the conditions set forth in the Grant and
16 Gift Deeds conveying the Property to the State, an ultra vires act, beyond the power of State
17 Parks.

18 III 19 PARTIES

20 9. Petitioners hereby incorporate by reference paragraphs 1 through 8 herein as if fully
21 set forth herein.

22 10. Petitioner Citizens is an unincorporated association consisting of individuals
23 dedicated to the protection of the environment in the County of Santa Cruz by participating in
24 local environmental and land use policy and decision making. Its members are residents of the
25 County of Santa Cruz who visit and hike in Nisene Marks State Park regularly. Petitioner
26 Citizens' interest in the preservation of the ecological integrity of Nisene Marks State Park will
27 be adversely affected by the lack of adequate environmental review under CEQA, poor
28 maintenance of trails, illegal cutting of trails, and erosion and resource damage caused by the
current and future pattern of use by mountain bikers. Petitioner Citizens, through its members

1 and representatives, has participated at public hearings before State Parks and has submitted
2 comments to the Park Commission.

3 11. Petitioner Henn is a resident and taxpayer in the County of Santa Cruz.
4 Petitioner Henn lives in Aptos, California and in close proximity to Nisene Marks State Park and
5 visits and hikes in Nisene Marks State Park regularly. Petitioner Henn, therefore, has a
6 significant interest in the preservation of the ecological integrity of Nisene Marks State Park
7 which will be adversely affected by State Parks in the performance of acts which violate the
8 terms of the Grant and Gift Deeds and by the erosion and resource damage caused by the current
9 and future pattern of use by mountain bikers.

10 12. Respondent California Department of Parks and Recreation, by and through the
11 State Park and Recreation Commission, has approved the General Plan/EIR for Nisene Marks
12 State Park.

13 13. Petitioners are informed and believe that at all times herein alleged, Respondents
14 and each of them were the agents and employees of each of the remaining Respondents and while
15 doing the things herein alleged, were acting within the course and scope of such agency and
16 employment.

17 14. The true names and capacities, whether individual, corporate or otherwise, of Does
18 1 through 15, are unknown to Petitioners who therefore sue said Respondents or Real Parties in
19 Interest by such fictitious names and will seek leave to amend this Petition for Writ of
20 Mandamus and Complaint for Declaratory Relief when they have been ascertained.

21 **IV**
22 **STANDING**

23 15. Petitioners hereby incorporate by reference paragraphs 1 through 14 herein as if
24 fully set forth herein.

25 16. Approval of the Preliminary General Plan/Draft Environmental Impact Report for
26 The Forest of Nisene Marks State Park will adversely affect the interests of Petitioner Citizens
27 and its members and Petitioner Henn. Petitioner Citizens is an unincorporated association
28 organized and dedicated to preserving the environment of the County of Santa Cruz and Nisene
Marks State Park as set forth herein. Petitioners are concerned about maintaining the

1 environmental, visual, aesthetic, and historic integrity of Nisene Marks State Park and the lands
2 held by State Parks in trust for its citizens for public use. Approval of the terms of the General
3 Plan will adversely affect these interests of Petitioner Citizens and its members and Petitioner
4 Henn. Members or representatives of Petitioner Citizens, on behalf thereof, and Petitioner Henn
5 have submitted comments on and objections to the lack of CEQA compliance, the inadequacy of
6 the General Plan pursuant to Public Resources Code Section 5002.2, and the contravention of the
7 intent of the Grantor and Donors of Nisene Marks State Park and have submitted comments at
8 public hearings before the Park Commission. Accordingly, Petitioner Citizens is an "aggrieved
9 person" within the meaning of Public Resources Code Section 21177. The claims asserted and
10 relief requested are broad-based, so that participation in the litigation by the members is not
11 required.

11 17. Petitioner Henn is a resident of the County of Santa Cruz and has paid real
12 property taxes in the County for at least each of the last five years. Petitioner Henn is concerned
13 that the lands held by State Parks in trust for its citizens be used pursuant to the terms of the
14 original Grant and Gift Deeds to maintain the park as a natural preserve. Petitioner Henn is a
15 "taxpayer" within the meaning of the term under the common law of the State of California.

16 18. Jurisdiction of this court is invoked pursuant to California Code of Civil Procedure
17 Sections 1085, 1094.5; 1060; California Public Resources Code Sections 21167; State CEQA
18 Guidelines Section 15112; Government Code Section 54960; the Constitution of the State of
19 California; the Constitution of the United States; and applicable law.

20
21 **V**

22 **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

23 19. Petitioners hereby incorporate by reference paragraphs 1 through 18 herein as if
24 fully set forth herein.

25 20. Petitioners and others, by and through their representatives and members, have
26 performed all conditions precedent to the filing of this petition by raising each and every issue
27 known to them before the California Department of Parks and Recreation and the State Park and
28 Recreation Commission, in compliance with Public Resources Code Sections 21177; and Code
of Civil Procedure Sections 1085 and 1094.5.

1 deferred. Accordingly, State Parks has abused its discretion.

2 25. The General Plan designates trail areas and use intensities including mountain bike
3 use within Nisene Marks State Park. The EIR has failed to address the impacts and user conflicts
4 associated with the use of these mountain bikes. Accordingly State Parks has abused its
5 discretion.

6 **[Mitigations in the EIR are Inadequate]**

7 26. Public Resources Code Section 21100 mandates that an EIR must propose mitigation
8 measures which are designed to minimize the project's significant impacts by substantially
9 reducing or avoiding those significant impacts. State Parks has failed to articulate true
10 mitigations for the illegal use of mountain bikes. As stated in the EIR, State Parks recognized
11 the potential disruption caused by mountain biking, by admitting that "realizing that staff and
12 funding may limit the amount of trail patrol for optimum enforcement, the Department supports
13 all efforts to minimize user conflicts . . ." Those efforts, which rely on volunteers and education,
14 are not analyzed as to their potential effectiveness nor as to the specific methods for
15 implementing a volunteer trail patrol system. Accordingly, State Parks has abused its discretion.

16
17 **VI**

18 **[SECOND CAUSE OF ACTION]**
19 **Violation of Public Resources Code**

20 27. Petitioners hereby incorporate by reference paragraphs 1 through 26 herein as if fully
21 set forth herein.

22 28. Under Public Resources Code Section 5002.2, a General Plan "shall consist of
23 elements that will evaluate and define the proposed land uses, facilities, concessions, operation of
24 the unit, any environmental impacts, and the management, and operation of the unit." State
25 Parks regulations provide that "[t]he General Plan shall consist of a resource element, a land use
26 element, a facilities element, and an operation element." 14 C.C.R. Section 4332. The General
27 Plan that is before the Commission does not include a land use element, facilities element, or an

1 operations element nor does it define the proposed facilities, concessions, or operation of Nisene
2 Marks State Park. Failure to comply with Public Resources Code Section 5002.2 and 14 C.C.R.
3 Section 4332 was a failure to proceed in a manner required by law. Therefore, State Parks
4 abused its discretion.

5 VII

6 [THIRD CAUSE OF ACTION] 7 Declaratory Relief

8 29. Petitioners hereby incorporate by reference paragraphs 1 through 28 herein as if fully
9 set forth herein.

10 30. Petitioner Henn brings this taxpayers' suit as a Citizen Resident of the County of
11 Santa Cruz, acting individually and on behalf of all others similarly situated.

12 31. The Forest of Nisene Marks State Park was conveyed by the Marks family to the
13 State of California in four separate conveyances in 1963 and 1965. The Grant and Gift Deeds all
14 stated that the family intended for the property to be "**preserved for all time as a natural**
15 **preserve**, notwithstanding any future change of use of any surrounding properties and
16 notwithstanding that increased population and other causes may bring about such changed use in
17 future years." (Emphasis added). The Grant and Gift Deeds also contained **several conditions**,
18 three of which are that "there shall be **no horseback riding**;" the **use of the Property shall be**
19 **limited to camping, nature study, hiking, and associated activities**; and any development of the
20 **property in connection with the allowed activities shall be in keeping with the natural**
21 **surroundings**. Despite these conditions imposed on the use of Nisene Marks State Park, the
22 General Plan includes multiple use trails and bicycles on those lands donated by the Marks
23 Family and does not limit use to camping, nature study, and hiking. Moreover, State Parks has
24 failed to designate significant portions of the Park as a "natural preserve." Under State Park
25 policy, no mountain biking is permitted in natural preserves except on paved roads, of which
26 Nisene Marks State Park has none.

27 32. Public Resources Code Section 5005 states that the California Parks System may

1 accept in the name of the state any gift or grant of title to any interest in real property to be used
2 in connection with the park system. **When the state accepts this conveyance of real property**
3 **from the private donor to the state for park purposes, the property is received by the state and**
4 **held in trust for the people of the state to use for park purposes. See 15 Ops.Atty.Gen. 184.**
5 Under California common law, a “taxpayer may sue in a representative capacity in cases
6 involving fraud, collusion, ultra vires, or failure of a governmental body to perform a duty
7 specifically enjoined.” *City of Hermosa Beach v. Superior Court* (1964) 231 Cal.App.2d 295,
8 300 (citing *Silver v. City of Los Angeles* 57 Cal.2d 39). According to *City of Hermosa Beach*, a
9 **governmental body (the City in that circumstance) “is duty bound not to divert the use of the**
10 **property from its dedicated purposes, and any attempt to do so would be an ultra vires act within**
11 **the rule of the Silver case.” Id. When individuals dedicate property for public use, the**
12 **restrictive covenants are strictly construed** (*Ritzman v. City of Los Angeles* (1940) 38 Cal.App.2d
13 470, 474) **and “guarded zealously”** (*Kelly v. Town of Hayward* (1923) 192 Cal. 242). State
14 Parks’ expansion of uses and authorization of mountain bikes in the Forest of Nisene Marks State
15 Park is an ultra vires act, a failure to proceed in a manner required by law. Therefore, State Parks
16 abused its discretion.

17 33. Petitioners seek a determination pursuant to C.C.P. 1060 that the portion of
18 Nisene Marks State Park donated by the Marks family shall be preserved as a natural preserve
19 and that the use of the Property shall be limited to camping, nature study, hiking, and associated
20 activities and that there shall be no mountain biking within that portion of Nisene Marks State
21 Park, as contemplated by the Grantor and Donors. Moreover, that State Parks’ failure to
22 designate Nisene Marks State Park as a “natural preserve” is also contrary to the intent of the
23 Grantor and Donors.

1 **VIII**

2 **ATTORNEY'S FEES**

3 34. Petitioners hereby incorporate by reference paragraphs 1 through 33 herein as if fully
4 set forth herein.

5 35. In pursuing this action, Petitioners will confer a substantial benefit on the People of
6 the State of California and therefore are entitled to recover from Respondents reasonable
7 attorney's fees and costs pursuant to §1021.5 of the Code of Civil Procedure, and other
8 provisions of law.

9 36. Furthermore, State Parks has abused its discretion in approving the General
10 Plan/Final EIR and has acted arbitrarily and capriciously under Government Code §800.

11 **IX**

12 **CLAIMS FOR RELIEF**

13 37. Petitioners hereby incorporate by reference paragraphs 1 through 36 herein as if fully
14 set forth herein.

15 38. An actual controversy has arisen concerning Respondents' failure to comply with
16 Public Resources Code Section 21000 *et seq.*, as set forth above.

17 39. As a result of the above alleged violations of CEQA, the law governing California
18 State Parks, and the law controlling development of property held in Public Trust, Respondents
19 have failed to conduct adequate environmental review as required by law, have failed to respond
20 to public comments on the EIR, have failed to prepare an adequate General Plan, and have failed
21 to comply with its duties as the holder of the Property in trust for the citizens of California
22 pursuant to the terms of the conditions in the Grant and Gift Deeds.

23 40. At all times mentioned herein, the Respondents have been able to respond to
24 comments received on the EIR and have had the authority to provide adequate environmental
25 review of the proposals in the General Plan. Notwithstanding such ability, State Parks has failed
26 and continues to fail to perform its duty to require and perform sufficient environmental review,
27 to respond to all comments submitted on the EIR, and to prepare a more thorough General Plan.

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WHEREFORE, Petitioners pray for judgment as follows:

1. For Alternative and Peremptory Writs of Mandate ordering Respondent State Parks to set aside the Park Commission August 22, 2003 approval of the Preliminary General Plan/Final EIR and to follow California regulations and statutes in complying with CEQA and conducting environmental review, state law mandating that a more extensive General Plan be prepared, and its duties as the holder of Nisene Marks State Park in trust for the public.

2. For an order staying the agency from engaging in any activity pursuant to the adoption of the Preliminary General Plan/Final EIR until the environmental review complies with California regulations and statutes, including but not limited to the requirements of CEQA, the law governing California State Parks, and the law controlling the development of property held in Public Trust.;

3. For declaratory relief that the portion of Nisene Marks State Park donated by the Marks family shall be preserved as a natural preserve and that the use of the Property shall be limited to camping, nature study, hiking, and associated activities and that there shall be no mountain biking within that portion of Nisene Marks State Park as provided for in the Grant and Gift Deeds.

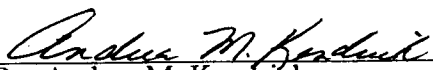
4. For reasonable attorney's fees under California Code of Civil Procedure section 1021.5, Government Code Section 800, and any other provisions of law;

5. For costs of suit;

6. For such other and further relief as the court deems proper.

Respectfully submitted,
WITTWER & PARKIN, LLP

Dated: *March 4, 2004*


By: Andrea M. Kendrick
Attorney for Petitioners
CITIZENS FOR THE
PRESERVATION OF THE
FOREST OF NISENE MARKS
STATE PARK and SANDY HENN

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Paralegal
Jana Rinaldi

September 17, 2003

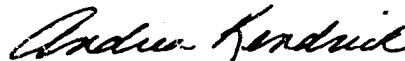
California Department of Parks and Recreation
1416 Ninth Street
Sacramento, CA 95814

**RE: NOTICE OF INTENTION TO COMMENCE LITIGATION
RE: APPROVAL OF GENERAL PLAN AND EIR FOR THE FOREST OF
NISENE MARKS STATE PARK**

To the California Department of Parks and Recreation:

PLEASE TAKE NOTICE that pursuant to the requirements of Public Resources Code section 21167.5, this letter will serve as notice of the commencement of litigation against the California Department of Parks and Recreation, and the State Park and Recreation Commission by "Citizens for the Preservation of the Forest of Nisene Marks State Park." The litigation is commenced, among other reasons, for violations of the California Environmental Quality Act, California Public Resources Code concerning development of General Plans for State Parks, and violation of the public trust by approval of a plan in violation of the conditions of the Grant Deed from the Marks family to the State of California.

Very truly yours,



Andrea Kendrick

EXHIBIT A

1 **PROOF OF SERVICE BY MAIL**

2 I certify and declare as follows:

3 I am over the age of 18, and not a party to this action. My business address is Wittwer &
4 Parkin, LLP, 147 South River Street, Suite 221, Santa Cruz, CA 95060, which is located in Santa
5 Cruz County where the mailing described below took place.

6 I am familiar with the business practice at my place of business for the collection and
7 processing of correspondence for mailing with the United States Postal Service. Correspondence
8 so collected and processed is deposited with the United States Postal Service that same day in the
9 ordinary course of business.

10 On March 4, 2004, the following document(s):

- 11 **1. SECOND AMENDED PETITION FOR WRIT OF MANDAMUS AND**
12 **COMPLAINT FOR DECLARATORY RELIEF**

13 was placed for deposit in the United States Postal Service in a sealed envelope, with postage fully
14 paid to:

15 California Department of Parks
16 and Recreation
17 1416 Ninth Street
18 Sacramento, CA 95814

Teri Ashby
Attorney General of the State of California
1300 I Street
Sacramento, CA 95814

19 I certify and declare under penalty of perjury that the forgoing is true and correct.
20

21 Dated: March 4, 2004

22 
23 Jana Rinaldi
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