

1 BILL LOCKYER, Attorney General
of the State of California
2 MARY HACKENBRACHT
Senior Assistant Attorney General
3 TERI H. ASHBY (SBN 114624)
Deputy Attorney General
4 P.O. Box 944255
Sacramento, California 94244-2550
5 Telephone: (916) 327-4254
Facsimile: (916) 327-2319

6 Attorneys for Respondent California
7 Department of Parks and Recreation
and State Park and Recreation Commission
8

9 **SUPERIOR COURT OF CALIFORNIA**

10 **COUNTY OF SACRAMENTO**

11
12 **CITIZENS FOR THE PRESERVATION OF THE**
13 **FOREST OF NISENE MARKS STATE PARK, an**
14 **unincorporated association, and SANDY HENN, a**
15 **Citizen Resident of the County of Santa Cruz,**
acting individually and on behalf of all others
similarly situated,

Petitioners,

v.

17 **CALIFORNIA DEPARTMENT OF PARKS AND**
18 **RECREATION; STATE PARK AND**
19 **RECREATION COMMISSION; and DOES 1**
20 **through 15,**

Respondents.

Case No. 03CS01366

**STATE PARKS' REPLY BRIEF
IN SUPPLEMENTAL BRIEFING
PER COURT ORDER**

Dept: 16
Judge: Judy Holzer Hersher

21
22 **INTRODUCTION**

23 At the time State Parks filed it's initial brief in this supplemental matter, State Parks
24 believed that Petitioners' agreed that the General Plan/EIR was valid except with respect to the
25 allowance of biking and further agreed that if State Parks wished to continue with a General Plan
26 for The Forest of Nisene Marks State Park, ("Nisene Marks Park") State Parks need only revise
27 the Preliminary General Plan and Final Environmental Impact Report for Nisene Marks Park to
28 delete all references to biking from the plan other than as needed to (1) reflect that biking is not

1 allowed in the deeded portions of Nisene Marks Park pursuant to the terms of the deeds and (2)
2 describe the policies, guidelines and enforcement necessary to reflect the no-biking restriction.
3 However, petitioners are now calling for a re-examination of the alternatives, complaining that
4 the biking issue is so intertwined with the use intensity levels that there is no easy way to
5 separate the biking issue. In addition, Petitioners rely on a California Environmental Quality
6 Act (“CEQA”) statute and case to argue that the alternatives must be re-examined even though
7 the Court has **not** found that the General Plan/EIR violates CEQA. The Court ruled that the
8 General Plan violated the grantors intent and asked whether the General Plan could go forward if
9 the Court ruled that the grantors’ intent was to preserve the property in as natural state as possible
10 or whether the alternatives need to be reconsidered or possibly new alternatives should be
11 considered in light of such a ruling. (See, Reporter’s Transcript.)

12 Contrary to Petitioners’ assertions, use intensity levels are related to the amount of visitor
13 use, not the manner of visitor use, and therefore, deleting the biking references does not render
14 the use intensity analysis meaningless and does not require a re-examination of the alternatives.
15 Moreover, the General Plan’s chosen alternative, with references to biking^{1/} deleted, would
16 comply not only with the Court’s order but also with the grantors’ intent and CEQA. State Parks
17 can be required to re-do the General Plan/EIR or re-examine the alternatives only if its chosen
18 alternative reveals that State Parks has abused its discretion and that is not the case.

19 **I. THE GENERAL PLAN’S CHOSEN ALTERNATIVE**
20 **COMPLIES WITH THE GRANTORS’ INTENT**

21 The grantors granted the property to the State to be preserved as a natural preserve to the
22 end that its citizens may enjoy this land in perpetuity on the conditions that (1) adequate
23 standards for public health and safety shall be maintained, (2) use of the Property shall be limited
24 to camping, nature study, hiking, and associated activities, and (3) any development of the
25 Property in connection with said activities shall be in keeping with its natural surroundings. (1
26 AR 59-60, 79-80, 105-106, 132-133.) Two of the deeds more specifically state that “the property
27

28 1. This would include all references such as “shared use trails” that are not longer
applicable given the Court’s ruling on the biking issue.

1 shall be held in its natural state, except that such trails, water drinking facilities and sanitary
2 facilities as shall be necessary for the convenience of the public, and shall be in keeping with
3 their natural surroundings, may be constructed on the property.” (1 AR 106, 132.)

4 The Court inquired as to whether the General Plan could go forward if the Court ruled
5 that the grantors’ intent was to preserve the property in as natural state as possible or whether the
6 alternatives need to be reconsidered or possibly new alternatives should be considered. (See,
7 Reporter’s Transcript.)

8 The Court exercises independent judgment on legal issues such as written instruments.
9 (*Machado v. Southern Pacific Transportation Co.* (1991) 233 Cal.App.3d 347, 352.) However,
10 once the legal issue is decided, the scope of review over an agency’s actions is limited, “. . .out of
11 deference to the agency’s authority and presumed expertise” (*Stone v. Regents of University*
12 *of California* (1999) 77 Cal.App.4th 736, 745, 92 Cal.Rptr.2d 94.) The court applies the
13 substantial evidence test to the agency’s factual findings and “the inquiry is limited to whether
14 the decision was arbitrary, capricious, or entirely lacking in evidentiary support.” (*McGill v.*
15 *Regents of University of California* (1996) 44 Cal.App.4th 1776, 1786.)

16 Once State Parks deletes references to biking to comply with the Court’s ruling, State
17 Parks will have a General Plan/EIR that still complies with the grantors’ intent without re-
18 examining the alternatives. The General Plan’s chosen alternative, Alternative B, without biking,
19 complies with the deed restrictions and the intent of the grantors. State Parks’ decision was
20 appropriate, was supported by the evidence and therefore is not therefore, subject to review.

21 **A. The State Statutory Classification of “Nature**
22 **Preserve” is Not Appropriate For The Forest of**
23 **Nisene Marks Park**

24 State Parks has already evaluated the Nisene Marks Park for classification as a nature
25 preserve as defined in Public Resources Code section 5019.71 and decided that it did not qualify
26 for *reasons unrelated to biking*. Pursuant to Section 5019.7 of the Public Resources Code, the
27 term “natural preserve” is reserved for distinct nonmarine areas of *outstanding* natural or
28 scientific significance established within the boundaries of other state park systems units.
(Emphasis added.) The purpose of a natural preserve designation is

1 to preserve rare or endangered plant and animal species and their
2 supporting ecosystems, representative examples of plant or animal
3 communities existing in California prior to the impact of
4 civilization, geological features illustrative of geological
5 processes, significant fossil occurrences or geological features of
6 cultural or economic interest, or topographic features illustrative of
7 representative or unique biogeographical patterns.

8 (Pub. Resources Code §5019.71)

9 The draft general plan included the consideration of portions of the park as a natural
10 preserve (1 AR 713) but the Chief of the Natural Resources Division pointed out that the
11 property did not have the “unique/special resources requiring this designation” and admonished
12 the drafters about using the term loosely or casually. (1 AR 764.) As a result the classification
13 was taken out of consideration as an alternative in the final General Plan. (2 AR 996-1001.)

14 Whether or not biking should be allowed in the park was not relevant to the decision.
15 State Parks determined that Nisene Marks Park was not an area that justified the statutory Natural
16 Preserve classification based on Nisene Marks Park’s resources. This decision is within State
17 Parks discretion, is supported by the evidence and does not contravene the grantors’ intent. As
18 explained in State Parks’ original opposition brief, the grantors could not have intended their
19 reference to “natural preserve” to mean the same as set forth in the Public Resources Code as the
20 section did not come into being until 1971. (2 AR 1162.) The property was granted to the state
21 in 1963 and 1965. Thus State Park’s decision to keep the State park classification rather than
22 classify Nisene Marks Park a natural preserve was within its discretion and State Parks need not
23 revisit that alternative.

24 **B. Alternative B In The General Plan Complies With The**
25 **Deed Language and The Grantors’ Intent**

26 The deeds require the property be kept in its natural state as much as possible, but allow
27 for the development of trails and facilities as shall be necessary for the convenience of the public
28 and maintenance of adequate standards for public health and safety. Thus, the grantors intended
that trails, campsites and sanitary facilities be constructed so long as they are in keeping with
their natural surroundings. A review of the map on page 1040 of the record shows that
Alternative B provides for trails, informative signs, the relocation of one trail camp, some

1 additional parking, restrooms and water in the highest use intensity area (nearest the entrance),
2 and stabilization and preservation of the Loma Prieta Mill Site. None of these plans violate
3 the deeds. Of course the references to shared use trails will be deleted to comply with the
4 Court's ruling on biking and the map should be read in that context.

5 The plan includes parking recommendations to address the parking problems (1 AR 896,
6 907 and 936) but they are planned for the convenience of the park users and do not violate the
7 deed restrictions. A small number of parking spaces (10-15) are suggested for the road in the
8 northeast corner of the Park. That road is explicitly allowed in the deeds (1 AR 132). Some
9 additional parking spaces will allow hikers to more easily access the upper portion of the park
10 without which, the upper portion could not be accessed except by the most rigorous of hikers.
11 Other additional parking is proposed in the lowest geographical area, which is the highest
12 intensity use area, for the convenience of the picnickers explicitly contemplated by the grantors.
13 The fire road running north and south through the Park is closed to vehicles except State Park
14 and emergency vehicles, and is necessary for the health and safety of the public. Thus, the
15 General Plan proposes very minimal development and what development that is proposed is
16 necessary for the convenience of the public and is in keeping with the natural surroundings. The
17 General Plan does not violate the deeds, but actually promotes the intent of the grantors.

18 **C. The Use Intensities Are Related to the Amount of**
19 **Visitor Use, Not the Manner of Visitor Use**

20 Petitioners claim that the General Plan should be rewritten because the use intensities and
21 biking are so entwined there is no way to separate the biking issue. This is incorrect. The upper
22 area of the Park proposed for low allowable use intensity, the yellow area on the Alternative B
23 Map, has far fewer trails than the area in the lower middle section of the Park which is designated
24 moderate intensity. (2 AR 1040.) The reasons for designating areas low, moderate and high are
25 set forth in the General Plan and have nothing to do with biking. (2 AR 929-934.) The higher
26 intensity area is a very small portion of the Park located near the main entrance where the
27 majority of visitor use occurs because it is close in and easy to access. When the references to
28 bikes and biking are deleted, the relevance of the use intensity designations remains. The low

1 use is designated for the area with the most sensitive plant and wildlife habitat, unique geologic
2 features and erodible soils. (2 AR 929.) The moderate allowable use area would allow for
3 additional visitor use (through trails, not biking) and the higher allowable use area allows for the
4 most visitor use. The low use intensity area is by far the largest area of the Park, the moderate
5 use area the next largest with the highest use intensity area a very small portion of the Park as a
6 whole and only a minute portion of the deeded portion of the Park. (2 AR 1040.) Reviewing the
7 Alternative B map and reading the General Plan (without reference to biking and shared use
8 trails), it is clear that the General Plan promotes park use through camping, hiking, nature study
9 and associated activities but keeps the park in as natural state as possible given the use that
10 presently occurs.^{2/} All trails could be eliminated or greatly reduced in the entire park area
11 thereby allowing for low use intensity throughout and preserving the property in its most natural
12 state, but this would severely limit or deny access to the park which does not further the grantors
13 intent. The grantors always intended for Nisene Marks Park to be enjoyed by the public. With
14 the exception of deleting biking and shared use references to comply with the Court's order, State
15 Parks need not re-do the General Plan to comply with the intent of the grant deeds.^{3/} It is within
16 State Parks discretion to decide the best manner in which to meet the grantors' wish to balance
17 visitor use with preserving the property in its natural state. The court applies the substantial
18 evidence test to the agency's factual findings and the court's inquiry is limited to whether the
19 decision was arbitrary, capricious, or entirely lacking in evidentiary support. (*McGill v. Regents*
20 *of University of California* (1996) 44 Cal.App.4th 1776, 1786.)

21 **II. THE CALIFORNIA ENVIRONMENTAL QUALITY ACT**
22 **("CEQA") DOES NOT REQUIRE STATE PARKS TO RE-**
23 **EXAMINE THE ALTERNATIVES OR CONSIDER NEW**
24 **ALTERNATIVES**

25 Petitioners rely on section 21168.9(b) and *San Joaquin Raptor/Wildlife Rescue Ctr. v.*

26 2. It cannot be seriously contested that all visitor use impacts nature in some manner.
27 The only way to eliminate all impacts would be to eliminate all use.

28 3. State Parks is not required to proceed with the General Plan at all. A general plan is
required only prior to the development of any new facilities in a park. (Pub. Resources Code
§5002.2)

1 *County of Stanislaus*, (1994) 27 Cal.App.4th 713 to claim that State Parks “must now examine
2 alternatives in light of this Court’s ruling that biking is not permitted.” (Petitioners’
3 Supplemental Brief Per Court Order, p. 3: 21-22.) However, this reliance is inappropriate and
4 reflects petitioners continued merging of the two distinct issues in this case—one, whether State
5 Parks General Plan violated the deed restrictions and the second, whether State Parks’ EIR for
6 the General Plan violated CEQA. The Court ruled that State Parks has “failed to consider and act
7 in compliance with the intent of the donors, the Marks family, that 9000 acres of the park shall be
8 preserved for use limited to camping, nature study, hiking and associated activities. Under these
9 and other terms of the various grant and gift deeds, there shall be no mountain biking within that
10 portion of the Nisene Marks State Park as provided for in the relevant grant and gift deeds.”
11 (Order Directing Issuance of Alternative Writ of Administrative Mandamus And Issuance of
12 Stay, p.2: 1-6.) The Court did not find any violations of CEQA. (See, Reporter’s Transcript.)

13 Section 21168.9(b) of the Public Resources Code applies only in cases in which a court
14 finds the decision of a public agency has been made without compliance with CEQA. (Pub.
15 Resources Code, § 21168.9 subd.(a).) Indeed, subdivision (b), upon which petitioners rely,
16 specifically states that any order pursuant to subdivision (a) shall include only those mandates
17 which are necessary to achieve compliance with CEQA. (Pub. Resources Code, § 21168.9
18 subd.(b).) The Court has not found any part of the General Plan/EIR to be out of compliance
19 with CEQA and the ruling on the biking issue does not invalidate the EIR portion of the General
20 Plan. Even petitioners’ argument that State Parks failed to provide the inventories required under
21 Public Resources Code Section 5002.2 does not offer a CEQA issue.^{4/}

22 Moreover, *San Joaquin Raptor*, *supra*, 27 Cal.App.4th 713 is inapplicable as well. In
23 that case the Court found the EIR wholly inadequate and held that the agency should be enjoined
24 from undertaking any action that could result in an adverse change to the physical environment
25 until the agency had taken action to bring its decision into compliance with CEQA. (*San Joaquin*
26 *Raptor*, *supra*, 27 Cal.App.4th at 742.) Here, there has been no showing that the EIR is

27
28 4. Public Resources Code Section 5002.2 is not applicable to this case at all as State
Parks did not re-classify Nisene Marks Park nor was State Parks required to re-classify the park.

1 inadequate or that it is out of compliance with CEQA. "Under CEQA, an EIR is presumed
2 adequate (Pub. Resources Code, § 21167.30) and the plaintiff in a CEQA action has the burden
3 of proving otherwise." (*Al Larson Boat Shop v. Board of Harbor Commissioners of the City of*
4 *Long Beach, supra*, 18 Cal.App.4th 729, 740 [internal quotations omitted]); Evid. Code, § 664.)
5 Petitioners have not met that burden by stating that because each alternative contemplated biking,
6 the alternatives must be re-considered in light of the court's ruling. Indeed, eliminating biking
7 eliminates an entire user group and therefore lessens the impacts on the environment. It certainly
8 does not result in an adverse change to the physical environment requiring an injunction against
9 the General Plan/EIR until the alternatives are reconsidered. The *San Joaquin Raptor* case simply
10 does not apply here.


11 CONCLUSION

12 If State Parks wishes to continue with the General Plan/EIR in light of the Court's ruling
13 regarding biking, it can eliminate all references to biking from the plan other than as needed to
14 (1) reflect that biking is not allowed in the deeded portions of Nisene Marks Park pursuant to the
15 terms of the deeds and (2) describe the policies, guidelines and enforcement necessary to reflect
16 the no-biking restriction and the General Plan/EIR will be in compliance with the Court's order,
17 the grantors' intent and CEQA. No additional reviews, re-considerations or changes are
18 necessary. The General Plan/EIR as amended will comply with the grantors' intent to preserve
19 the property in as natural state as possible while still allowing for camping, nature study, hiking
20 and associated activities.

21 Dated: November 1, 2004

Respectfully submitted,

22 BILL LOCKYER
23 Attorney General of the State of California

24 
25 _____
26 TERI H. ASHBY
27 Deputy Attorney General
28 Attorneys for Respondent
California Department of Parks and Recreation

DECLARATION OF SERVICE

Case Name: CITIZENS FOR THE PRESERVATION OF THE FOREST OF NISENE
MARKS STATE PARK v. DPR

Case No: Sacramento Superior Court No. 03CS01366

I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within cause; my business address is 1300 I Street, Post Office Box 944255 , Sacramento, California 94244-2550.

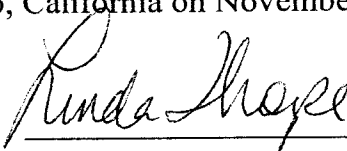
On November 1, 2004 , I served the attached

STATE PARKS' REPLY BRIEF IN SUPPLEMENTAL BRIEFING PER COURT ORDER

XX *BY MAIL*, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550, addressed as follows:

Andrea M. Kendrick Wittwer & Parkin, LLP 147 South River Street, Suite 221 Santa Cruz, CA 95060	
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I declare under penalty of perjury the foregoing is true and correct, and that this declaration was executed at Sacramento, California on November 1, 2004.



Linda Thorpe