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**Private Grazing on Tolowa Dunes State Park Lands
in Violation of State Law**

Dear Director Coleman, Supt. Gardner, and Supt. Bomke:

We write to express the serious concerns of our client, the Environmental Protection Information Center ("EPIC"), about the degradation of environmentally significant wetlands and other wildlife habitat in Tolowa Dunes State Park caused by illegal permitting of private cattle grazing on these public lands. The Department of Parks and Recreation ("the Department") currently permits a private dairy farm, Alexandre Dairy, to graze its cattle on 230 acres of public land along the Yontocket and Tolowa Sloughs ("State Park Land"), adversely impacting those acres and surrounding habitat. The permitted grazing also impacts Tolowa Indian cultural, religious, and burial sites in the Park. By issuing and extending this permit without following lawful procedures, the Department has violated and continues to violate California law. The Department's permitting violates the California Public Resources Code provisions governing State Park System management, the California Coastal Act, and the California Environmental Quality Act. To comply with its legal duties and respect the purpose of the State Park, the Department must cease to permit this harmful private use of the State Park Land in question.

I. BACKGROUND

Tolowa Dunes State Park is an ecological treasure and an integral part of the rare wetland ecosystem. It is a “key link” in the remaining chain of wetlands spanning the West coast of the Americas.¹ The Smith River Plain, the area containing the 230 acres of concern, is a lowland plain with sand dunes, wetlands, and grasslands that provide shelter to over 250 species of birds and 58 mammals,² including endangered species such as the Oregon silverspot butterfly and Western snowy plover.³ The wetlands in particular “create crucial wildlife habitat and greatly increase biological diversity.”⁴ In a recent evaluation of the Park’s ecological significance, including the grazed acreage, Dr. Chad Roberts found that “[t]his area is unique in California, with unmatched geomorphological, hydrological, ecological, botanical, and conservation significance.”⁵ Dr. Roberts, an ecologist and wetland scientist, recommended that because of the outstanding natural significance of these wetlands, the Department should designate this part of the Park as a Natural Preserve area.⁶ Under relevant state law, a Natural Preserve must be managed to “allow natural dynamics of ecological interaction to continue without interference.”⁷

EPIC is a community-based, non-profit organization in Northern California devoted to protecting and restoring watersheds, coastal estuaries, and native species in this region.⁸ EPIC members use this area of Tolowa Dunes for walking, birding, botanizing, and nature study, as well as for learning about Tolowa Indian culture and history. They have protested the Department’s permitting of this State Park Land for years, because the grazing directly impacts their use and enjoyment. Since 2005, members have documented the observable harms from the grazing, including damage to wetlands adjacent to the pasture and the despoiling of the public trail.⁹

Grazing on this land is directly contrary to the Park’s management objective “to preserve the natural, cultural, aesthetic, and recreational resources of the dune and

¹ Cal. Dept. of Parks & Recreation and Cal. Dept. of Fish & Game, Lake Earl Project Interim Plan for Land Use and Mgmt. of State Lands 4 (Apr. 1982).

² *Id.*

³ Cal. State Parks Natural Res. Div., Natural Parks Report 17 (Oct. 2005).

⁴ Natural Res. Agency, Cal. State Parks, Tolowa Dunes SP Res. Summary & Reclassification Draft 19 (Aug. 25, 2010).

⁵ Letter from Dr. Chad Roberts, Roberts Environmental and Conservation Planning, LLC, to Peter M. Douglas, California Coastal Commission 1 (March 17, 2010).

⁶ *Id.* at 13-14.

⁷ Cal. Pub. Res. Code § 5019.71 (West 2011).

⁸ Environmental Protection Information Center, “About Us,” <http://www.wildcalifornia.org/about-us/> (last visited Feb. 8, 2011).

⁹ *See, e.g.*, E-mail from Wendell Wood, EPIC, to Marilyn Murphy and Valerie Gizinski (July 8, 2005).

wetland habitats, and to preserve the cultural and historic resources in the vicinity of lakes Earl and Tolowa, and make them available to the people, forever, for their education and enjoyment.”¹⁰ The illegally permitted grazing has degraded not only the 230 acres, but also the adjacent wetland habitats, adversely affecting this uncommon ecological and cultural resource. The cattle have decimated the pasture’s grasses, leaving bare dirt exposed, and have trampled wetlands near the pasture.¹¹ The grazing has also adversely impacted the surrounding wetland, riparian, and pond habitats, which are important sources of biodiversity.¹² Once a habitat for short-eared owls and native riparian vegetation such as rare orchids, this area has been reduced to a vista of patchy grass and mud.¹³ The pollution on these 230 acres contrasts starkly with the “near-absence of human sounds and litter to be experienced [generally] in the Park.”¹⁴

The Dairy’s animals also negatively impact access to land that is sacred to its native people, the Tolowa Dee-ni’, and of federally recognized historical significance. This part of the State Park lies within the Yontocket Historic District, a site that is recognized on the National Register of Historic Places for its prehistoric, historic, and religious significance dating back to before the Common Era.¹⁵ The Yontocket Historic District encompasses a village center that the Tolowa hold to be the center of their spiritual world.¹⁶ It is also the site of a horrific and historically significant massacre of over 400 Tolowa men, women, and children at the Yontocket ceremonial site,¹⁷ one of the largest attacks against native peoples in American history. The area also holds ancestral and contemporary burial sites.¹⁸ The State’s permitting of cattle grazing in this area impedes the access route to these cultural resources; members of the Tribe or the public who wish to visit these cultural resources on foot or bicycle must navigate a trail

¹⁰ Tolowa Dunes SP Res. Summary & Reclassification Draft, *supra*, at 4.

¹¹ Letter from Wendell Wood, EPIC, to Jeff Bomke, Acting Park Superintendent, Redwood State Parks, and Steve Horwitz, Dist. Superintendent, Cal. State Parks, 2 (Jan. 29, 2008).

¹² Letter from Scott Greacen, Public Lands Coordinator, EPIC, to Bruce Lynn 2 (May 31, 2007).

¹³ E-mail from Wendell Wood, EPIC, to Steve Horwitz, Dist. Superintendent, Cal. State Parks (Feb. 29, 2008).

¹⁴ Tolowa Dunes SP Res. Summary & Reclassification Draft, *supra*, at 24.

¹⁵ National Park Service, National Register of Historic Places, 73000400, “Yontocket Historic District” (Dec. 18, 1973), available at <http://nrhp.focus.nps.gov/natregsearchresult.do?fullresult=true&recordid=0> (last visited Mar. 7, 2011).

¹⁶ *See, e.g.*, Tolowa Dunes SP Res. Summary & Reclassification Draft, *supra*, at 13-16; Cal. State Parks, Tolowa Dunes State Park “Dead Lake Trail,” http://www.parks.ca.gov/default.asp?page_id=25203 (last visited Mar. 11, 2011).

¹⁷ *Id.* at 10.

¹⁸ *See, e.g.*, Nick Grube, “Tolowa Cemetery Raided,” *The Daily Triplicate*, Apr. 21, 2010, <http://www.triplicate.com/20100417108758/News/Local-News/Tolowa-cemetery-raided>.

rutted and fouled by the cattle.¹⁹ Cattle often escape from the pasture fences, and have been found despoiling not only the trail but also trampling and defecating on the Yontocket village site and the area with contemporary graves.

The history of the Department's "permitting" of this State Park Land for grazing by the Alexandre Dairy for over a decade reveals a deplorable disregard for even basic contract norms, not to mention State Park purposes and environmental concerns. Since first allowing the Dairy to graze its cattle on these 230 acres in 1996, the Department has repeatedly failed to enforce monthly rental requirements and contractual obligations.²⁰ In 1996, for example, after issuing a permit with a provision requiring the Dairy to comply with the California Environmental Quality Act ("CEQA"),²¹ the Department allowed the Dairy to significantly alter the land – removing berms, landplaning the natural contours of the ground, disking, and fencing – without initiating any CEQA process.²² Then in 1997, when a Park Ranger finally attempted to comply with the permit's provision and impose some environmental process on the Dairy's management of these public lands, the Dairy ignored his suggestions and again aggressively worked the land to prepare it for grazing.²³

Under the current permitting scheme, the Department allows the Dairy to graze cattle on these 230 acres by impliedly extending a Temporary Use Permit that was first issued in 2006, even though its stated purpose is no longer valid.²⁴ (The Department amended the Permit in 2007 to allow month-to-month implied extensions.²⁵) The stated purpose of the 2006 Permit – and, by incorporation, the amended version and all subsequent implied extensions – was "to provide a high quality habitat for Aleutian Canada [Cackling] Geese."²⁶ The geese were once listed as an endangered species that

¹⁹ Wood Letter (Jan. 29, 2008) at 2.

²⁰ *See, e.g.*, D.E. Scott, Grazing Lease Compliance, Project Review & CEQA Evaluation 1 (July 2, 1997) (referencing an August 1996 agreement between the Department and the Dairy); Letter from Marilyn Murphy, Sector Superintendent, Dept. of Parks & Recreation, to Blake Alexandre, Alexandre Dairy (June 28, 2005) (notifying the Dairy that no rent was paid from 1996 to 2001); E-mail from Jennifer C. Comilang, Staff Counsel, Cal. State Parks, to Wendell Wood, EPIC (Oct. 4, 2010) (confirming that the Dairy failed to pay rent from 2005 to 2010); Memorandum from Bruce Lynn, State Park Superintendent, Dept. of Parks & Recreation, to Wendell Wood, EPIC (Sept. 15, 2007) (conceding that the Department could find no monitoring reports for 2006 or 2007, which a provision of the 2006 permit required the Dairy to submit).

²¹ Memorandum from Dan Scott, Park Ranger, Dept. of Parks & Recreation, to Richard Sermon 1 (Sept. 29, 1997).

²² *Id.* at 5.

²³ *Id.*

²⁴ *See* Comilang E-mail (Oct. 4, 2010); Dept. of Parks & Recreation, Temporary Use Permit – Amendment #1 ¶ 21 (Jul. 24, 2007).

²⁵ Temporary Use Permit – Amendment #1 at 1.

²⁶ *Id.*

grazed the Tolowa Dunes area lands during their annual migration.²⁷ Today, however, the geese are no longer listed – in fact, the goose population is now so healthy that the bird is hunted in Del Norte County – and the birds now primarily graze in a neighboring county.²⁸ The purpose of the Permit is therefore no longer valid. The Department, in fact, has acknowledged that the “extenuating circumstances” that may once have legitimized the Permit now “have changed.”²⁹

Additionally, both parties have repeatedly violated substantive provisions of the Permit. Most glaringly, the Dairy has failed to pay rent for years – and the Department has failed to enforce payment.³⁰

II. VIOLATIONS

The Department’s permitting violates three separate California statutory regimes: the statutes governing State Park System management (collectively “State Park Statutes”); the California Coastal Act; and the California Environmental Quality Act (“CEQA”). To end this history of harming environmentally significant State Park land, the Department should immediately cease to permit the Dairy’s grazing. Unless the Department cures its violations by terminating all future extensions of the Temporary Use Permit, EPIC is prepared to file litigation in state court compelling the Department to perform its legal duties.

A. California State Park Statutes

The Department has a duty to manage State Parks to “restore, protect, and maintain . . . native environmental complexes,” Cal. Pub. Res. Code § 5019.53, for “public enjoyment and education,” *id.* Accordingly, although the legislature has allowed for the agricultural use of State Park lands under certain circumstances, the Department disregards its affirmative obligation when, as here, it permits private grazing on State Park land without meeting the legal conditions. *Id.* § 5069.1. The Department may only lease State Park land for agricultural purposes if that land was already used for agricultural purposes within the two years before the State acquired the land for the State Park system. *Id.* Even then, the Department may only lease the land if the Department director makes written findings that the agricultural use “would be compatible with the ultimate use of the [State Park] real property as a unit . . . and with the sound management and conservation of resources within the unit.” *Id.*

²⁷ Letter from Scott Greacen, Public Lands Coordinator, EPIC, to Ruth Coleman, Director, Cal. Dept. of Parks & Recreation, 4 (Aug. 31, 2010).

²⁸ *Id.*

²⁹ Letter from Bruce Lynn, State Park Superintendent, Dept. of Parks & Recreation, to Alexandre Dairy (Jan. 23, 2007).

³⁰ See Dept. of Parks & Recreation, Temporary Use Permit between Alexandre Dairy and Tolowa Dunes State Park 1 (Aug. 1, 2006); Comilang E-mail (Oct. 4, 2010).

The Department violates its legal duty by continuing to extend Alexandre Dairy's permit to graze on Tolowa Dunes State Park land without ever having made written findings that this intensive use of the 230 acres is compatible with the conservation of the Park's resources. Further, the degradation of wetlands – a key resource of this coastal State Park – is incompatible with the Park's greater purpose of preserving the “natural, cultural, aesthetic, and recreational resources of the dune and wetland habitats.” Draft Res. Summary & Reclassification at 4.

To legally permit the agricultural use of State Park lands, the Department must fulfill other procedural requirements. First, any lease of land for agricultural use must be approved by the Department of General Services. Cal. Pub. Res. Code § 5069.3 (“Every lease . . . shall be subject to approval by the Department of General Services.”). The Department of Parks and Recreation must also collect fair market value rent payments, deposit those payments, and include a specific tax provision in the leasing document. *Id.* § 5069.3 (requiring that fair market rents be deposited and that “[e]very lease shall require the lessee to pay the taxes on the lessee’s interest in the real property which become due, owing, or unpaid on the interest created by the lessee”); *see also* § 5010.

The Department has failed to satisfy these requirements in granting and extending the Permit to Alexandre Dairy. It has never documented any approval by the Department of General Services; it has repeatedly failed to collect and deposit rent payments; and it failed to include the required tax provision in the Permit. *See* Temporary Use Permit at 1 (“This permit is entered into . . . by and between the State of California, acting by and through the Department of Parks and Recreation, North Coast Redwood District . . . and Alexandre Dairy”); Comilang E-mail (Oct. 4, 2010).

B. California Coastal Act

The California Coastal Act imposes an affirmative duty on state agencies to protect the State's coastal zone from environmentally harmful land usage. Cal. Pub. Res. Code § 30001.5 (mandating that the State “[p]rotect, maintain, and, where feasible, enhance and restore” the coastal zone). The legislature has recognized that the coastal zone is a “distinct and valuable natural resource” and “a delicately balanced ecosystem.” *Id.* § 30001. To protect this resource, the Act mandates that any “person . . . wishing to perform or undertake any development in the coastal zone,” *id.* § 30600, including within 100 feet of “any wetland, estuary, [or] stream,” *id.* § 30601, must obtain a permit from the California Coastal Commission. Under the Act, a state agency is a “person.” *Id.* § 30111. The Act defines “development” broadly to include any “change in the density or intensity of use of land” and the “grading, removing, . . . or extraction of any materials.” *Id.* § 30106.

Courts interpret the Act robustly to protect the delicate ecosystem of the coastal zone. *Stanson v. San Diego Coast Regional Com.*, 161 Cal. Rptr. 392, 398 (Cal. Ct. App. 4 Dist. 1980) (finding that a broad interpretation of “development” is “consistent with the legislative policy of the Act”). For example, setting off fireworks above an estuary

without obtaining a development permit from the Coastal Commission was held to violate the Act. *Gualala Festivals Comm. v. Cal. Coastal Comm'n*, 106 Cal. Rptr. 3d 908, 913 (Cal. Ct. App. 1 Dist. 2010).

The Department has violated the Act by allowing the Dairy to intensively graze the 230 acres, which include and are surrounded by wetlands, without obtaining a coastal development permit from the Coastal Commission. Grazing is development in two respects: (1) it changes the intensity of use of the land, and (2) grading and disking physically alters the land. First, the animals' intense grazing and trampling of the land and their discharges have degraded the 230 acres and even impacted the surrounding habitats and cultural areas. Second, the Dairy extensively graded and worked the land, destroying its natural contours. *See* Scott Memorandum (Sept. 29, 1997) at 5. Without a permit from the Coastal Commission, the Department's Permit and the Dairy's grazing are illegal.

C. California Environmental Quality Act

A government entity must comply with the California Environmental Quality Act's prescribed process before any discretionary approval of a project. Cal. Pub. Res. Code §§ 21002.1, 21080 (unless the project is statutorily exempt); *see also Friends of Sierra Madre v. City of Sierra Madre*, 25 Cal. 4th 165, 184-85 (2001) (providing an overview of the CEQA process). A project is "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment," Cal. Pub. Res. Code § 21065, and which "involves the issuance to a person of a lease, *permit*, . . . or other entitlement for use by one or more public agencies," *id.* (emphasis added). For any project the government considers, unless it rejects or disapproves the project, *id.* § 21080(b)(5), the government must either adopt a "negative declaration" finding that the project "would not have a significant effect on the environment," § 21080(c), or it must prepare an environmental impact report ("EIR") if there is "substantial evidence" that the project "may have a significant effect on the environment," § 21080(d).

In considering, granting, and extending the Alexandre Dairy Permit, the Department has manifestly failed to comply with the CEQA process. It never adopted a negative declaration for the project. It never prepared an EIR. In fact, the only time the Department even pretended to comply with CEQA, it simply filled out a check-the-box "CEQA" form – still failing to issue either a declaration or an EIR. *See* D.E. Scott, *Grazing Lease Compliance, Project Review & CEQA Evaluation 1* (July 2, 1997). Because the Department has blatantly violated CEQA, the Permit is invalid.

III. CONCLUSION

To fulfill its legal duties and honor the purpose of the Tolowa Dunes State Park as a haven of coastal wetlands, the Department must immediately revoke the permit for cattle grazing by the Alexandre Dairy on 230 acres of State Park land and order the Dairy

to remove all cattle and other property from the public land. Unless the Department accordingly terminates all future extensions of the Temporary Use Permit within 60 days of receipt of this letter, EPIC is prepared to file litigation in state court compelling the Department to perform its legal duties. If we are forced to file litigation, we will also seek recovery of attorneys' fees for this public interest effort, pursuant to applicable legal provisions, including section 1021.5 of the California Code of Civil Procedure.

If you have any questions about this letter or wish to discuss this matter further, please do not hesitate to contact us.

Sincerely yours,



Holley Horrell, Student Practitioner
Deborah A. Sivas, Clinic Director

HH:lfj

cc: California Resources Secretary John Laird
California Assemblymember Wesley Chesbro
California Senator Christine Kehoe
California Senator Lois Wolk
California Senator Noreen Evans
Congressman Mike Thompson
Peter Douglas, California Coastal Commission
Smith River Rancheria
Chair Caryl Hart, California State Park and Recreation Commission