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7 Save the Park and Build the School

8 **UNITED STATES DISTRICT COURT**  
9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

10 SAVE THE PARK AND BUILD THE  
11 SCHOOL,

12 Plaintiff,

13 v.

14 NATIONAL PARK SERVICE; DAVID L.  
BERNHARDT, in his official capacity as  
15 Secretary of the United States Department  
of the Interior; DAVID VELA, in his  
16 official capacity as Director of the National  
Park Service; LISA MANGAT, in her  
17 official capacity as Director of the  
California Department of Parks and  
18 Recreation; and CARDIFF SCHOOL  
DISTRICT,

19 Defendants.  
20

Case No. '20CV1080 L AHG

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

**JURY TRIAL DEMANDED**

21 Plaintiff SAVE THE PARK AND BUILD THE SCHOOL, a California  
22 unincorporated nonprofit association ("Plaintiff" or "Save the Park") alleges as  
23 follows:

24 **THE PARTIES**

25 1. Save the Park is a 501(c)(3) nonprofit organization dedicated to  
26 preserving the unique and treasured community asset, George Berkich Park, for the  
27 enjoyment of future generations. Save the Park is comprised of numerous citizens  
28 who live near George Berkich Park and who use the park for outdoor recreational

1 purposes.

2 2. Defendant NATIONAL PARK SERVICE (“NPS”) is a bureau of the  
3 United States Department of the Interior and is responsible for the administration of  
4 the Land and Water Conservation Fund (“LWCF”) pursuant to the responsibilities  
5 delegated to it by the Secretary of the United States Department of the Interior.

6 3. Defendant DAVID L. BERNHARDT (the “Secretary” or “Mr.  
7 Bernhardt”) is the Secretary of the United States Department of the Interior and is  
8 sued in his official capacity. As the Secretary of the United States Department of the  
9 Interior, Mr. Bernhardt is responsible for the Department’s compliance with the  
10 National Environmental Policy Act (“NEPA”), the National Historic Preservation  
11 Act (“NHPA”), and is responsible for approving any conversion of property  
12 developed with funds derived from the Land and Water Conservation Fund Act  
13 (“LWCFA”) to any other uses other than public outdoor recreation use.

14 4. Defendant DAVID VELA (“Mr. Vela”) is the Deputy Director of the  
15 National Park Service, and is sued in his official capacity as the acting Director.

16 5. Defendant LISA MANGAT (“Ms. Mangat”) is the Director of the  
17 California Department of Parks and Recreation (“State Parks”) and is sued only in  
18 her official capacity. On information and belief, as Director, Ms. Mangat serves as  
19 the State Liaison Officer (“SLO”) under the LWCFA. As the SLO, Ms. Mangat is  
20 responsible for, *inter alia*, assuring compliance with the requirements of the LWCF  
21 Manual and published regulations, inspection of project sites and stewardship of  
22 Section 6(f) parkland. *See* Land & Water Conservation Fund State Assistance  
23 Program, Federal Financial Assistance Manual, Vol. 69, at Ch. 1-3 (effective Oct. 1,  
24 2008) (the “LWCF Manual”), available at [https://www.nps.gov/ncrc/programs/  
25 lwcf/manual/lwcf.pdf](https://www.nps.gov/ncrc/programs/lwcf/manual/lwcf.pdf).

26 6. Defendant CARDIFF SCHOOL DISTRICT (the “District”) is a  
27 California school district organized and operated pursuant to California Education  
28 Code section 35000 *et seq.* The District holds title to George Berkich Park and is a

1 grantee under the Original LWCF Agreement.

2 7. Defendants NPS, the Secretary, and Mr. Vela will be referred to as the  
3 “Federal Defendants”. Since this is an action for non-monetary relief on a claim that  
4 the Federal Defendants acted or failed to act in an official capacity or under color of  
5 legal authority, the Federal Defendants have waived any claims of sovereign  
6 immunity. *See* 5 U.S.C. § 702; *The Presbyterian Church (U.S.A.) v. United States*,  
7 870 F.2d 518, 525 (9th Cir. 1989) (recognizing that the APA provides “an  
8 unqualified waiver of sovereign immunity in actions seeking nonmonetary relief  
9 against legal wrongs which governmental agencies are accountable”); *Clinton v.*  
10 *Babbitt*, 180 F.3d 1081, 1087 (9th Cir. 1999) (stating that the APA “expressly  
11 waived sovereign immunity in non-statutory review actions for nonmonetary relief  
12 brought under 28 U.S.C. § 1331”).

### 13 JURISDICTION AND VENUE

14 8. Jurisdiction over this action is proper pursuant to 28 U.S.C. § 1331,  
15 because this is a civil action arising out of the laws of the United States; 28 U.S.C.  
16 § 1361, because this is an action to compel an officer or employee of the United  
17 States or any agency thereof to perform duties owed to Plaintiff; and 28 U.S.C.  
18 § 1367, because this Court has jurisdiction over all other claims that are related to  
19 this action and form part of the same case or controversy. This action involves claims  
20 arising from the Land and Water Conservation Fund Act (54 U.S.C. § 200301 *et*  
21 *seq.*), the National Environmental Policy Act (42 U.S.C. § 4332), the National  
22 Historic Preservation Act (54 U.S.C. § 300101), and the Administrative Procedure  
23 Act (5 U.S.C. §§ 550-559, 701-706) wherein Plaintiff seeks relief other than money  
24 damages. This Court may issue a declaratory judgment and grant further relief  
25 pursuant to 5 U.S.C. §§ 702 and 706 and 28 U.S.C. §§ 2201 and 2202.

26 9. Venue is proper in the United States District Court for the Southern  
27 District of California pursuant to 28 U.S.C. § 1391 because this is the judicial district  
28 where Plaintiff resides, where a substantial part of the events or omissions giving rise

1 to the claim occurred, where the property subject to this action is situated, and  
2 because some of the defendants named herein are officers or employees of the  
3 United States.

4 **FACTUAL BACKGROUND**

5 **A. The Land and Water Conservation Fund Act**

6 10. In 1965, the United States Congress enacted the Land and Water  
7 Conservation Fund Act following a report issued in 1962 by the Outdoor Recreation  
8 Resources Review Commission, which found that the federal government must do  
9 more to increase state recreational resources. In response to these findings, President  
10 John F. Kennedy sent Congress draft legislation for the creation of a land and water  
11 conservation fund to fund the acquisition of land which has national significance, in  
12 order to preserve it for public outdoor recreation.

13 11. The LWCF Act states its purpose is “[t]o assist in preserving,  
14 developing, and assuring accessibility to all citizens of the United States of America  
15 of present and future generations ... such quantity and quality of outdoor recreation  
16 resources as may be available and are necessary and desirable for individual active  
17 participation in such recreation and to strengthen the health and vitality of the  
18 citizens of the United States.”

19 12. The LWCF Act’s Senate Report explains the purpose of the Act is also  
20 purposed to improve the “physical and spiritual health and vitality of the American  
21 people.”

22 13. Since its creation, the LWCF Act has protected America’s most treasured  
23 land, preserving scarce state and local parks, forests, and scenic land adjacent rivers,  
24 lakes and oceans for their recreational use, natural beauty, wildlife habitat and  
25 scientific value.

26 14. The LWCF Act is commonly known as an uncommon bi-partisan  
27 legislation. Indeed, in 2019, the LWCF Act was permanently reauthorized by the John  
28 D. Dingell, Jr. Conservation, Management and Recreation Act, which passed the

1 Senate with a vote of 92 to 8, and the House of Representatives with a vote of 362 to  
2 62. Recently, the Great American Outdoors Act was introduced in the Senate, which  
3 would in part, provide permanent funding for the LWCF. The bill attracted over 50  
4 cosponsors and on Tuesday, June 9, 2020, the United States Senate passed a  
5 procedural vote 80 to 17, moving the act to full consideration before the Senate.

6 15. The Office of Grants and Local Services, a California Department of  
7 Parks and Recreation agency ("OGALS"), administers annual LWCF funds  
8 distributed by the National Park Service in California.

9 16. In California, an applicant who wishes to obtain LWCF funding submits  
10 a grant application to OGALS for the funding of specific projects in accordance with  
11 the LWCF. Applications are granted based on the priorities asserted in the State  
12 Comprehensive Outdoor Recreation Plan ("SCORP").

13 17. All LWCF grant recipients are required to manage the lands they  
14 acquire or develop as a result of federal funding, and importantly, by accepting  
15 LWCF grant monies, a grant recipient is required to maintain the land for outdoor  
16 recreation use in perpetuity. *See* 54 U.S.C. § 200305(f)(3).

17 18. Once OGALS approves a grant application, the grant applicant (project  
18 sponsor) and the Department of Parks and Recreation enter into a project agreement,  
19 which prohibits the project sponsor from converting LWCF lands to non-recreational  
20 use without the consent of the United States Secretary of the Interior.

21 19. OGALS is obligated to accept responsibility for ensuring that the  
22 project sponsor adheres to the terms of the project agreement.

23 20. The LWCF Act provides that a project sponsor may not convert an  
24 LWCF-funded park to a use other than public outdoor recreation without the  
25 approval of the Secretary of the Interior, and only after certain strict prerequisites are  
26 met.

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1 **B. George Berkich Park is a LWCF Protected Park Which Must Be**  
2 **Maintained for Recreation use in Perpetuity.**

3 21. George Berkich Park is located in Cardiff-by-the-Sea, California, a  
4 community of the City of Encinitas, and is a cherished community asset situated on  
5 property owned by Cardiff School District adjacent Cardiff Elementary School. It  
6 lies in a protected coastal overlay zone and encompasses approximately 180,000  
7 square feet of land directly east of Highway 101 with unobstructed views of the  
8 ocean to the west.

9 22. The “Park was developed in 1978 to create a local neighborhood park  
10 and enhance school-related physical recreation facilities through cooperative funding  
11 of the School District, the County of San Diego and the Federal CETA program.”

12 23. When the City of Encinitas was incorporated in 1986, it had scarce  
13 parkland – only .078 acres per 1,000 persons and only one-fourth of the adopted  
14 standards set forth in the City’s general plan.

15 24. George Berkich Park was one of the community’s scarce parkland  
16 resources providing the local Cardiff and Encinitas community’s children, adults and  
17 elderly cherished space to recreate and enjoy the treasured open green spaces  
18 adjacent the Pacific Ocean. As one patron has explained, “This park has so much to  
19 offer: a ball field, soccer field, playground, and all the green grass to enjoy nature . . .  
20 This is a delightful piece of park space in Encinitas/Cardiff. The coastal community  
21 is enriched by having added this to their parks acquisition.”

22 25. By 1991, budgetary restrictions and cutbacks had diminished the  
23 community’s resources for park capital funding and George Berkich Park became  
24 even more valuable to a community in need of recreational open spaces.

25 26. Thus, in 1991, the City of Encinitas (the “City”) and the District entered  
26 into a joint facilities agreement which made their respective facilities available for  
27 public use (the “Joint Use Agreement”); and in 1992, the City and District jointly  
28 applied for LWCF grant funds for the purpose of renovating George Berkich Park.

1           27. OGALS approved the application and on June 23, 1993, the City,  
2 District and the Department of Parks and Recreation entered into a Land and Water  
3 Conservation Fund Project Agreement which obligated the parties to maintain the  
4 property consistent with the LWCF and to maintain it in public outdoor recreation  
5 use in perpetuity (the "Project Agreement"). The parties also incorporated a 6(f)(3)  
6 boundary map which delineates the boundaries of George Berkich Park which are  
7 subject to LWCF 6(f)(3) protection.

8           28. In the Project Agreement, the District expressly agreed that the benefit  
9 to be derived by the State from the District's full compliance with the terms of the  
10 Project Agreement is the preservation, protection, and the net increase in the quality  
11 of public outdoor recreation facilities and resources available to the people of the  
12 State and of the United States.

13           29. The District also agreed to keep a permanent record in its public  
14 property records and available for public inspection to the effect that the property  
15 described in the Project Agreement, and the dated project boundary map made part  
16 of the agreement, had been acquired or developed with Land and Water  
17 Conservation Fund assistance and that it cannot be converted to other than public  
18 outdoor recreation use without the written approval of the State Liaison Officer, the  
19 Director, and/or the Secretary of the Interior.

20           30. On August 19, 1994, the District and City entered into an amendment to  
21 their Joint Use Agreement in which the District expressly guaranteed to maintain  
22 George Berkich Park for general public use in perpetuity.

23           31. In 1995, the renovation of George Berkich Park was complete,  
24 consisting of *inter alia*, the installation of play courts, concrete walkways, walls,  
25 handball wall, sand play areas, new play equipment and irrigation. The City  
26 contributed \$298,400 for the renovation and the State contributed \$140,400 in  
27 LWCF grant money.

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1 **C. NPS may not Approve a Conversion of LWCF Protected Land Unless the**  
2 **Applicant Satisfies Strict Requirements.**

3 32. The LWCFA “assures that once an area has been funded with L&WCF  
4 assistance, it is continuously maintained in public recreation use unless the NPS  
5 approves substitute property of reasonably equivalent usefulness and location and of  
6 at least equal fair market value.” 36 C.F.R. § 59.3(a). Specifically, the substitute  
7 property must provide similar types of recreational resources.

8 33. Further, NPS is prohibited from even considering a conversion request  
9 until the prerequisites set forth in 36 C.F.R. § 59.3 are satisfied, including: the  
10 applicant’s evaluation of “all practical alternatives to the proposed conversion,” the  
11 “guidelines for environmental evaluation have been satisfactorily completed and  
12 considered by NPS . . . ,” including compliance with the California Environmental  
13 Quality Act (“CEQA”) and NEPA. Further, the applicant must have undertaken an  
14 evaluation of the property to be converted to determine what recreation needs are  
15 being fulfilled by the facilities which exist and the types of outdoor recreation  
16 resources and opportunities available. The applicant must also evaluate the property  
17 being proposed for substitution to determine if it will meet recreation needs which  
18 are at least like in magnitude and impact to the user community as the converted site.

19 34. Any replacement property “must constitute or be part of a viable  
20 recreation area.” 36 C.F.R. § 59.3. Further, “the proposed conversion and  
21 substitution” must be in accord with the SCORP and/or equivalent recreation plans.

22 35. Finally, any conversion application requires the sign-off by each project  
23 sponsor or party to the project agreement.

24 36. The Project Agreement allows for injunctive relief in the event of an  
25 unauthorized conversion of the parkland.

26 37. The LWCF Manual (which is incorporated into the project agreement)  
27 provides that “[i]f the NPS is alerted or otherwise becomes aware of an ongoing  
28 conversion activity that has not been approved, NPS shall request the State Liaison

1 Officer (SLO) to advise the project sponsor of the necessary prerequisites for  
2 approval of a conversion *and to discontinue the unauthorized conversion*  
3 *activities.*” LWCF Manual at Ch. 8-4 (emphasis added).

4 38. *“If the conversion activity continues, NPS shall formally notify the*  
5 *State that it must take appropriate action to preclude the project sponsor from*  
6 *proceeding further with the conversion, use and occupancy of the area pending*  
7 *NPS independent review and decision of a formal conversion proposal.” Id.*  
8 (emphasis added).

9 39. “The NPS Regional Director has the authority to disapprove conversion  
10 requests and/or to reject proposed property substitutions. This approval is a  
11 discretionary action *and should not be considered a right of the project sponsor.*”  
12 *Id.* (emphasis added).

13 40. NPS is required to conduct an independent review of the proposal using  
14 the conversion prerequisites and any other critical factors that may have arisen  
15 during proposal development. *Id.* at Ch. 8-5-Ch. 8-9.

16 **D. The District in Knowing Violation of the LWCF Usurps Substantial**  
17 **Swaths of George Berkich Park Without NPS Approval.**

18 41. Since 1978, the Cardiff and Encinitas community has enjoyed the  
19 recreational opportunities and green space that George Berkich Park has afforded  
20 adjacent Cardiff Elementary School.

21 42. On November 8, 2016, the District placed Proposition 39 Measure GG  
22 on the ballot and asked the Cardiff voters to approve \$22 million in funding for  
23 project improvements to Cardiff Elementary School and Ada Harris Elementary  
24 School.

25 43. Specifically, the District sought authorization of funds for a project  
26 described generally as “repair, upgrade, modernization and improvement of existing  
27 school buildings and facilities, and the construction of new classrooms, new  
28 restrooms and a new multipurpose room.”

1           44. The District availed itself of Proposition 39 (Cal. Const. art. 13A §  
2 1(b)(3)(A) & (B)) which allowed for passage of Measure GG by a 55% vote in lieu  
3 of the customary two-thirds vote.

4           45. On November 8, 2016, at least fifty-five percent of the voters approved  
5 Measure GG, including members of the Save the Park.

6           46. On May 31, 2017, the District hired an architect to design its project,  
7 and thereafter selected a general contractor for the purpose of constructing its design.

8           47. In September 2017, the District released to the public its concept design  
9 plans which showed alarming, substantial encroachment into George Berkich Park,  
10 including the grading and demolition of substantial swaths of the Park and the  
11 construction of non-recreational use improvements in the Park.

12           48. On September 24, 2017, and in direct violation of the LWCF, the  
13 District entered into a lease-leaseback with its general contractor surrendering  
14 possession and control of the 6(f)(3) protected Park to its general contractor.

15           49. Concerned by the District's proposed conversion of George Berkich  
16 Park, on February 6, 2018, an attorney and resident of Cardiff e-mailed the District  
17 reminding it of its obligations under its LWCF Project Agreement, including the  
18 requirement to maintain George Berkich Park for recreation use in perpetuity and the  
19 prohibition on converting the parkland without the approval of the Secretary of the  
20 Interior.

21           50. As of that date, the District had already finalized its project design and  
22 encroachment into George Berkich Park despite not having applied for, much less  
23 having received, an approval of its conversion of George Berkich Park from 6(f)(3)  
24 protected parkland to a school use.

25           51. Notably, the District had failed to record its LWCF obligations as  
26 required by its LWCF Project Agreement, and when the District was notified of its  
27 obligations by the Cardiff resident, it pled ignorance of its project agreement and its  
28 LWCF obligations.

1           52. Following the February 6, 2018 e-mail to the District concerning the  
2 LWCFAs, in March 2018, the District reached out to OGALS concerning its proposed  
3 project. The District testified under penalty of perjury that OGALS informed the  
4 District that its project would not be in compliance with the LWCFAs, but that  
5 OGALS told the District it "... did not need to redesign and [the District] could keep  
6 moving forward with [its] plans." The District also testified under penalty of perjury  
7 that OGALS informed the District that the conversion of George Berkich Park "...  
8 could be handled as a staff administrative action" despite the strict prerequisites set  
9 out in 36 C.F.R. § 59.3.

10           53. Thereafter, and without having applied to OGALS for a conversion and  
11 without the approval of NPS, in the fall of 2018, the District prepared a Draft  
12 Environmental Impact Report ("DEIR") required by the California Environmental  
13 Quality Act and released it for public comment.

14           54. The DEIR showed that the District's project had not only morphed into  
15 an entirely different and expanded project than what was approved by the voters in  
16 Measure GG, but it also included grading, demolition and the usurpation of nearly  
17 20% of George Berkich Park.

18           55. *Specifically, the DEIR revealed the District's intent to convert much*  
19 *of George Berkich Park's grassy parkland to a paved parking lot, biofiltration*  
20 *basins, a school multipurpose building and adjacent school amphitheater, thereby*  
21 *eliminating nearly 20% of the Park and its LWCF protected public recreational*  
22 *use.*

23           56. Subsequently, Plaintiff wrote to OGALS objecting to the proposed  
24 conversion of George Berkich Park explaining that the District had not satisfied the  
25 requirements set forth in the LWCFAs.

26           57. On December 3, 2018, NPS wrote to OGALS explaining that the  
27 District's project raised questions concerning the eligibility of the District's proposed  
28 substitute land for a conversion.

1           58. On December 12, 2018, the local OGALS project officer e-mailed NPS  
2 with what can only be described as advocacy on behalf of the District and in  
3 disregard of the conversion requirements.

4           59. On February 17, 2019, despite still not having even applied for  
5 conversion of the LWCFA protected parkland, the District nonetheless certified its  
6 EIR and approved its project in violation of the LWCFA and its project agreement.  
7 In so doing, the District speculated that it would receive federal approval.

8 **E. Save the Park Files Suit in San Diego Superior Court Against the District**  
9 **for Violations of CEQA and for Taxpayer Waste. The Court Orders the**  
10 **District to Stop its Conversion of the Park.**

11           60. Following the District's approval of its EIR and its project, on March 8,  
12 2019, Save the Park commenced a lawsuit against the District in San Diego Superior  
13 Court within the CEQA statute of limitation for, *inter alia*, violations of CEQA and  
14 taxpayer waste in connection with its approval of its Project (the "State Litigation").

15           61. Days later, OGALS informed the District that based on feedback from  
16 the National Park Service "it is unlikely that OGALS will recommend the boundary  
17 adjustment [and] [t]he City and the School District should continue to consider other  
18 options in moving forward with their proposal."

19           62. On April 22, 2019, the District wrote to OGALS stating that it cannot  
20 "acquire additional property for park purposes for a boundary adjustment/conversion  
21 [and] must work within the confines of its existing school site." In other words, the  
22 District explained that it could not comply with the statutory conversion  
23 requirements. The District's attorney also stated that the 6(f)(3) federally protected  
24 parkland was owned by the District and insinuated that the project agreement was  
25 invalid since the District "could not contract away" its obligations to its students.  
26 The letter ended with a public records act request demanding, *inter alia*, all  
27 documents related to any project agreements entered into by and between NPS,  
28 OGALS and any other public school district.

1           63.    Thereafter, in June 2019, the District closed George Berkich Park to the  
2 public for a period of almost two years (through Spring 2021) in order to start  
3 construction at the school site and within the 6(f)(3) boundary based on its design set  
4 forth in its DEIR. It did so despite its admission that it could not comply with the  
5 LWCFA requirements for a conversion and despite not having applied for or having  
6 received approval from NPS. The District also began to stage construction trailers  
7 on the parkland in violation of the LWCFA.

8           64.    On the heels of the District’s disclosure that it could not satisfy the  
9 LWCFA requirements, and having knowledge that the District intended to close  
10 George Berkich Park, on June 19, 2019, OGALS wrote to the District. OGALS  
11 explained that it was not familiar with the District’s project as set forth in the  
12 District’s certified Final EIR, that it needed additional information regarding how the  
13 proposed reconfiguration of the Park would provide reasonably equivalent  
14 recreational opportunities for a reasonably equivalent population, signed by both the  
15 District and the City. In other words, OGALS explained that the District and the  
16 City had not even applied for a conversion and that OGALS did not have enough  
17 information to process a conversion application. *Notwithstanding, the letter stated*  
18 *“OGALS is not requesting a stop of the construction.”* The letter went on to say  
19 that a closure of the Park beyond six-months would result in a conversion of use.

20           65.    On June 20, 2019, Save the Park e-mailed NPS explaining that the  
21 District had closed the Park for two years and was staging construction trailers on the  
22 parkland.

23           66.    On the same day, NPS responded that it had “not received any request  
24 to approve a closure of the park,” and that “complete park closures are usually  
25 considered conversions of use... *The announced closure makes it appear that the*  
26 *School District and City have decided to go ahead with their development plans*  
27 *prior to compliance with federal requirements.*” (Emphasis added).

28           67.    In deposition taken in the State Litigation, the District testified that it

1 could not reopen the Park because it had surrendered possession of the 6(f)(3)  
2 boundary to its general contractor.

3 68. Notably, the District also testified under penalty of perjury that OGALS  
4 told the District “we would like you to proceed” and that after the District presented  
5 its project to OGALS along with the construction schedule, OGALS “never  
6 instructed [the District] to stop.”

7 69. Despite knowing that the District was moving forward with construction  
8 and converting the Park to a non-recreational use in violation of the LWCF, A,  
9 OGALS and NPS did nothing to stop the District from proceeding with its unlawful  
10 conversion. Indeed, OGALS went so far as to say that it was not stopping  
11 construction. This was in blatant derogation of the agency’s respective duties. Both  
12 OGALS and NPS were required to demand discontinuance of the District’s  
13 unauthorized conversion activities and NPS was required to formally notify the State  
14 that it must take appropriate action to preclude the project sponsor from proceeding  
15 further with the conversion, use, and occupancy of the area pending NPS  
16 independent review and decision of a formal conversion proposal. *See* LWCF  
17 Manual Ch. 8-3 – Ch. 8-11. Neither OGALS nor NPS complied with their duties,  
18 essentially greenlighting the District to continue its violation of federal law.

19 70. Indeed, on July 15, 2019, following the closure of the Park, the District  
20 obtained a grading permit from the City and began to grade the site.

21 71. On July 24, 2019, Save the Park moved the San Diego Superior Court  
22 for a temporary restraining order seeking to restrain the District from moving ahead  
23 with its conversion of George Berkich Park in the absence of NPS approval, which  
24 the Court granted. The District vehemently opposed the TRO application and made  
25 clear by its opposition that it fully intended to proceed with construction in George  
26 Berkich Park but-for the Court’s temporary restraining order.

27 72. On August 20, 2019, the District notified Save the Park that in addition  
28 to its unlawful closure of George Berkich Park and staging in the Park, it also

1 intended to dump and store 1,500 square feet of soil for the purpose of construction  
2 on the grassy parkland, which would inevitably cause the grass to die.

3 73. On the same date, Save the Park's attorney wrote to OGALS explaining  
4 that the soils storage was in violation of the LWCFCA to which OGALS responded  
5 that it had no objection to the soils storage on the parkland.

6 74. On August 21, 2019, the District was quoted in a newspaper  
7 publication saying that the Park is the "school's play fields and they are 100-percent  
8 owned by the district. It's against the law for school districts to give up their land for  
9 anything else other than educational uses..." referring to the LWCFCA project  
10 agreement in which the District agreed to maintain the parkland for public outdoor  
11 recreational use in perpetuity.

12 75. On August 29, 2019, Save the Park filed its Opening Brief in support of  
13 its CEQA claim in the State Litigation, and on September 12, 2019, it filed its  
14 motion for preliminary injunction. In its CEQA Opening Brief, Plaintiff contended,  
15 *inter alia*, that the District unlawfully omitted any discussion of its project's impacts  
16 on parks and recreation in its CEQA Initial Study thereby calculatingly dispensing  
17 with the required analysis in its EIR. In its motion for preliminary injunction,  
18 Plaintiff contended that the District had wasted taxpayer funds on designing and  
19 constructing improvements in George Berkich Park without NPS approval and  
20 therefore, in violation of federal law.

21 76. On October 4, 2019, the State Court heard Save the Park's motion for  
22 preliminary injunction and took the matter under submission. Subsequently, the  
23 District scrambled to submit additional information to OGALS in an attempt to  
24 acquire approval of its conversion, including submitting an appraisal of the substitute  
25 land that it offered in exchange for the land it was taking from George Berkich Park.

26 77. On November 18, 2019, Honorable Earl H. Maas, III, Judge of the  
27 Superior Court for the State of California, granted Save the Park's CEQA Petition  
28 for Writ of Mandate in full, finding that the District's EIR violated CEQA and the

1 Court decertified the District's EIR. On the same day, the Court granted Save the  
2 Park's motion for preliminary injunction in full finding that Plaintiff was likely to  
3 prevail on the merits of its taxpayer waste claim, in part, because the District had  
4 expended the taxpayer's money on the design and construction of improvements in  
5 George Berkich Park without NPS approval and in violation of the LWCFCA.

6 78. As of November 18, 2019, the City, a co- LWCF sponsor and party to  
7 the LWCF Project Agreement had repeatedly voiced its concerns with respect to the  
8 District's project, and the District's failure to keep the City apprised of its  
9 communications with OGALS. Both the City's Director of Parks and Recreation and  
10 separately, a City councilmember had each written to OGALS pleading it to keep the  
11 City apprised of information concerning the District's conversion of the Park.

12 79. The City was rightfully concerned given that as a party to the project  
13 agreement, it was obligated to maintain George Berkich Park for recreational use in  
14 perpetuity, to not convert the parkland without NPS approval; and notably, it was  
15 required to sign off on any conversion application made to OGALS for the  
16 conversion of parkland.

17 80. As of November 25, 2019, the City had not signed off on the District's  
18 conversion application.

19 81. On that day, OGALS undertook a series of actions, each of which  
20 violated the LWCFCA.

21 a) OGALS wrote to the Department of Wildlife explaining that "State  
22 Parks urgently needs a second 'Yellow Book' review of the [District's]  
23 attached real estate appraisal. **It is part of a negotiated settlement**  
24 **Package that needs to be finalized no later than end of today, or it**  
25 **might actually fall apart.**" (Emphasis added).

26 b) OGALS then sent a letter to the City unilaterally and unlawfully  
27 removing the City as a party to the project agreement as a "matter of  
28 convenience" thereby dispensing with the need for the City's sign-off

1 on the District’s conversion application.

2 c) OGALS executed a supplemental project agreement wherein it officially  
3 terminated the City as a party to the project agreement leaving the  
4 District as the sole grantee and recommended approval of the  
5 conversion in exchange, *inter alia*, an agreement by the District not to  
6 sue OGALS or NPS.

7 d) Lastly, OGALS sent a letter to NPS recommending that NPS approves  
8 the District’s conversion request.

9 82. Following OGALS’ removal of the City as a party to the Project  
10 Agreement, and in an apparent act to eliminate any further City objections to its  
11 conversion of the parkland, on December 12, 2019, the District unilaterally  
12 terminated its Joint Use Agreement with the City of Encinitas nullifying its  
13 obligation to maintain George Berkich Park for public recreation use in perpetuity.

14 83. On December 20, 2019, the District’s Park closure exceeded six  
15 months, constituting a conversion of use requiring the “State/project sponsor to  
16 provide replacement property pursuant to Section 6(f)(3) of the LWCF Act.” LWCF  
17 Manual at Ch. 8-13.

18 84. Following OGALS’ November 25, 2019 actions, Save the Park notified  
19 NPS that any approval of the conversion was unlawful since, among other  
20 things,(1) the State Court had decertified the District’s EIR and therefore, the District  
21 was not in compliance with CEQA or NEPA; (2) the District had admitted in  
22 deposition that it had never considered any alternatives to its project which precluded  
23 NPS’s consideration of a conversion application; and (3) the District had not met the  
24 statutory eligibility requirements for its replacement property.

25 85. Thereafter, Plaintiff brought its taxpayer waste claim to trial before  
26 Hon. Earll Maas III and on the day of trial, the parties settled. On February 26, 2020  
27 the parties entered into a settlement agreement expressly conditioned on it not being  
28 confidential and which was materially based on the District’s promise not to

1 construct in George Berkich Park or otherwise convert the parkland without  
2 obtaining NPS approval.

3 86. On March 24, 2020, Plaintiff learned that the District, without NPS  
4 approval, had brazenly violated the settlement agreement by tearing out the Park’s  
5 walking track, formerly utilized by the community’s elderly population for exercise,  
6 and the baseball backstop. Notably, the District undertook this egregious act  
7 knowing that the San Diego Superior Courts were closed on account of COVID-19.  
8 As a consequence, Plaintiff was left without any practical legal option to enforce its  
9 agreement.

10 87. Despite all of the foregoing facts, on April 24, 2020, NPS approved the  
11 District’s conversion of George Berkich Park and issued associated findings of fact.

12 88. On May 22, 2020, Save the Park Build sent NPS a detailed twenty-one  
13 page letter delineating NPS’s numerous errors of law and fact set forth in its findings  
14 in support of its conversion.

## 15 **LEGAL BACKGROUND**

### 16 **A. The Land and Water Conservation Fund**

17 89. The Land and Water Conservation Fund (54 U.S.C. § 200301 *et seq.*)<sup>1</sup>  
18 was established “to assist in preserving, developing and assuring accessibility to all  
19 citizens of the United States of America of present and future generations . . . such  
20 quality and quantity of outdoor recreation resources as may be available and are  
21 necessary and desirable for individual active participation in such recreation and to  
22 strengthen the health and vitality of the citizens of the United States . . . .” Pub. Law  
23 No. 88-578.

24 90. Since the time the LWCF was first established in 1964, “more than  
25 \$4.4 billion has been made available to state and local governments to fund more  
26 than 43,000 projects throughout the nation.” Department of the Interior, *Secretary*  
27 *Bernhardt Announces \$170.6 Million to Support State Parks and Outdoor*

28 <sup>1</sup> Formerly cited as 16 U.S.C. § 4601-8.

1 *Recreation Through the Land and Water Conservation Fund*, 2019 WL 4200456  
2 (Sept. 5, 2019). LWCF funds are “used to permanently conserve outdoor recreation  
3 areas for public use and enjoyment. The funds enable state and local governments to  
4 improve parks and other recreation areas in their communities by rehabilitating and  
5 upgrading existing parks, creating brand new parks in places that have none, and  
6 developing and expanding trail systems to link communities together and create  
7 recreation opportunities.” *Id.*

8 91. The LWCF “assures that once an area has been funded with L&WCF  
9 assistance, *it is continually maintained in public recreation use* unless NPS  
10 approves substitution property of reasonably equivalent usefulness and location and  
11 of at least equal fair market value.” *See* 36 C.F.R. § 59.3(a) (emphasis added).

12 92. In addition to the regulations, the LWCF Manual “sets forth the  
13 administrative procedures and requirements for” LWCF assistance. LWCF Manual  
14 at Preface 1. Under the LWCF Manual, “[i]t is the responsibility of the State, as  
15 primary grant recipient, to comply with [the LWCF Manual] requirements and all  
16 terms and conditions of the grant agreement. *The State’s responsibility cannot be*  
17 *delegated or transferred.*” *Id.* (emphasis added). “Participation in the LWCF State  
18 Assistance Program is deemed to constitute a public trust.” *Id.*

19 93. Chapter 8 of the LWCF Manual “contains the requirements for  
20 maintaining LWCF assisted sites and facilities in public outdoor recreation use  
21 following project completion and to assure that LWCF-assisted areas remain  
22 accessible to the general public including non-residents of assisted jurisdictions.” *Id.*  
23 at 8-1.

24 94. Under Section 6(f)(3) of the LWCF (now codified at 54 U.S.C. §  
25 200305(f)(3), “[t]he Secretary shall approve a conversion [of land to any use other  
26 than public outdoor recreation use] only if the Secretary finds it to be in accordance  
27 with the then-existing comprehensive statewide outdoor recreation plan and only on  
28 such conditions as the Secretary considers necessary to ensure the substitution of

1 other recreation properties of at least equal fair market value and of reasonably  
2 equivalent usefulness and location.” 54 U.S.C. § 200305(f)(3).

3 95. Any requests to convert LWCF property to non-public outdoor  
4 recreational use must be submitted by the State Liaison Officer to the appropriate  
5 NPS Regional Director in writing. 36 C.F.R. § 59.3(b).

6 96. NPS may consider a request for a conversion only if all of the nine  
7 following prerequisites have been met:

8 (1) All practical alternatives to the proposed conversion have been  
9 evaluated.

10 (2) The fair market value of the property to be converted has been  
11 established and the property proposed for substitution is of at least equal  
12 fair market value as established by an approved appraisal . . .

13 (3) The property proposed for replacement is of reasonably equivalent  
14 usefulness and location as that being converted. Dependent upon the  
15 situation and at the discretion of the Regional Director, the replacement  
16 property need not provide identical recreation experiences or be located  
17 at the same site, provided it is in a reasonably equivalent location. . . .  
18 Equivalent usefulness and location will be determined based on the  
19 following criteria:

20 (i) Property to be converted must be evaluated in order to  
21 determine what recreation needs are being fulfilled by the  
22 facilities which exist and the types of outdoor recreation  
23 resources and opportunities available. The property being  
24 proposed for substitution must then be evaluated in a similar  
25 manner to determine if it will meet recreation needs which are  
26 at least like in magnitude and impact to the user community as  
27 the converted site. . . .

28 (ii) Replacement property need not necessarily be directly  
adjacent to or close by the converted site. . . .

(iii) The acquisition of one parcel of land may be used in  
satisfaction of several approved conversions.

(4) The property proposed for substitution meets the eligibility  
requirements for L&WCF assisted acquisition. The replacement  
property must constitute or be part of a viable recreation area. Unless  
each of the following additional conditions is met, land currently in

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public ownership, including that which is owned by another public agency, may not be used as replacement land for land acquired as part of an L&WCF project:

- (i) The land was not acquired by the sponsor or selling agency for recreation.
- (ii) The land has not been dedicated or managed for recreational purposes while in public ownership.
- (iii) No Federal assistance was provided in the original acquisition unless the assistance was provided under a program expressly authorized to match or supplement L&WCF assistance.
- (iv) Where the project sponsor acquires the land from another public agency, the selling agency must be required by law to receive payment for the land so acquired.

[ . . . ]

(5) In the case of assisted sites which are partially rather than wholly converted, the impact of the converted portion on the remainder shall be considered. If such a conversion is approved, the unconverted area must remain recreationally viable or be replaced as well.

(6) All necessary coordination with other Federal agencies has been satisfactorily accomplished . . . .

(7) The guidelines for environmental evaluation have been satisfactorily completed and considered by NPS during its review of the proposed 6(f)(3) action. . . . .

(8) State intergovernmental clearinghouse review procedures have been adhered to if the proposed conversion and substitution constitute significant changes to the original Land and Water Conservation Fund project. . . .

(9) The proposed conversion and substitution are in accord with the Statewide Comprehensive Outdoor Recreation Plan (SCORP) and/or equivalent recreation plans.

36 C.F.R. § 59.3(b) (emphasis added).

97. If NPS becomes aware of an ongoing conversion activity that has not been approved “NPS shall request the [SLO] to advise the project sponsor of the necessary prerequisites for approval of a conversion and to discontinue the unauthorized conversion activities. If the conversion activity continues, NPS shall

1 formally notify the State it must take appropriate action to preclude the project  
2 sponsor from proceeding further with the conversion, use, and occupancy of the area  
3 pending NPS independent review and decision of a formal conversion proposal.”  
4 LWCF Manual, at 8-4.

5 98. Notably, approval of a conversion request “*should not be considered a*  
6 *right of the project sponsor.*” LWCF Manual at Ch. 8-4 (emphasis added).

7 **B. The National Environmental Policy Act**

8 99. The National Environmental Policy Act (42 U.S.C. § 4321 *et seq.*)  
9 requires that “a federal agency ‘to the fullest extent possible,’ to prepare ‘a detailed  
10 statement on . . . the environmental impact’ of ‘major Federal actions significantly  
11 affecting the quality of the human environment.” *Ctr. for Biological Diversity v.*  
12 *Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008) (quoting  
13 42 U.S.C. § 4332(2)(C)(i)). The purpose of NEPA ensures that federal agencies  
14 carefully consider detailed information related to significant environmental impacts,  
15 and guaranties that relevant information is made available to the larger public  
16 audience. *Id.* NEPA serves as “our basic national charter for protection of the  
17 environment.” 40 C.F.R. § 1500.1(a).

18 100. NEPA applies to “new and continuing” federal actions, including  
19 “[a]pproval of specific projects, such as construction or management activities  
20 located in a defined geographic area. Projects include actions approved by permit or  
21 other regulatory decision as well as federally and federally assisted activities.” 40  
22 C.F.R. § 1508.18.

23 101. Categorical exclusions to NEPA, thereby relieving an agency of its  
24 obligation to perform an environmental assessment or environmental impact  
25 statement, applies to a “category of actions which do not individually or  
26 cumulatively have a significant effect on the human environment and which have  
27 been found to have no such effect in procedures adopted by a Federal agency in  
28 implementation of these [NEPA] regulations.” 40 C.F.R. § 1508.4. However, any

1 categorical exclusion “shall provide for extraordinary circumstances in which a  
2 normally excluded action may have a significant environmental effect.” *Id.*

3 102. Part 516 of the Department of Interior Department Manual (“DM”)  
4 Chapter 12, provides a categorical exclusion from NEPA for “minor boundary  
5 changes.” *See* 516 DM 12 at § 12.5(A)(3) (available at 65 F.R. 52212-01).

6 103. On or around January 3, 2017, NPS issued a Policy Update regarding  
7 NEPA review for “small conversions.” NPS’s Policy Update defines “small  
8 conversions” as “partial conversions in which no more than ten percent (10%) of the  
9 whole LWCF recreation area will be removed from having to comply with LWCF  
10 recreation area provisions.” According to NPS, the policy update “allows the use of a  
11 [NEPA] Categorical Exclusion for conversions that amount to no more than 10  
12 percent of the LWCF recreation area or five acres, whichever is less.”

13 104. Under NEPA, an agency may not rely on a categorical exclusion if  
14 extraordinary circumstances are present. *See* 40 C.F.R. § 1508.4. The Department of  
15 Interior has defined extraordinary circumstances to include, *inter alia*, actions that  
16 “[h]ave highly controversial environmental effects or involve unresolved conflicts  
17 concerning alternative uses of available resources,” “[e]stablish a precedent for  
18 future action or represent a decision in principle about future actions with potentially  
19 significant environmental effects,” or [h]ave significant impacts on properties listed,  
20 or eligible for listing, on the National Register of Historic Places as determined by  
21 the bureau.” 43 C.F.R. § 46.215.

### 22 **C. The National Historic Preservation Act of 1966**

23 105. The National Historic Preservation Act of 1966 (54 U.S.C. § 300101)<sup>2</sup>  
24 was enacted by Congress to expand and accelerate historic preservation programs  
25 and activities throughout the nation. *See* Pub. L. No. 89-665. Congress expressly  
26 recognized that “the spirit and direction of the Nation are founded upon and reflected  
27 in its historic past,” and “the historical and cultural foundations of the Nation should

28 <sup>2</sup> Formerly cited as 16 U.S.C. § 470-1.

1 be preserved as a living part of our community life and development in order to give  
2 a sense of orientation to the American people.” *Id.*

3 106. Under “Section 106” of the NHPA (54 U.S.C. § 306108)<sup>3</sup>, federal  
4 agencies “having direct or indirect jurisdiction over a proposed Federal or federally  
5 assisted undertaking in any State” “shall take into account” the effect of the  
6 undertaking on any site, building, structure or object included on, or eligible for  
7 inclusion on the National Register “prior to” approving any such undertaking.  
8 Additionally, the federal agencies “shall afford the [Advisory Council on Historic  
9 Preservation] a reasonable opportunity to comment with regard to the undertaking.”

10 107. The goal of the Section 106 process is to “identify historic properties  
11 potentially affected by [any] undertaking, assess its effects and seek ways to avoid,  
12 minimize, or mitigate any adverse effects on historic properties.” 36 C.F.R. §  
13 800.1(a). To further this goal, agencies must “ensure that the section 106 process is  
14 initiated early in the undertaking’s planning, so that a broad range of alternatives  
15 may be considered during the planning process for the undertaking.” 36 C.F.R. §  
16 800.1(c).

17 108. Under the regulations, public input is recognized as “essential to  
18 informed Federal decisionmaking in the section 106 process.” 36 C.F.R. § 800.2(d).  
19 Federal agencies must seek and consider the views of the public, must provide the  
20 public with information about any undertaking and its effects on historic properties,  
21 and seek public comment and input. *Id.*

22 109. An agency must identify the appropriate State Historic Preservation  
23 Officer (“SHPO”) and consult with them during the review process. 36 C.F.R. §  
24 800.3. The agency and SHPO must then create a plan for public notice and  
25 involvement, and must identify and invite any local governments or applicants that  
26 are entitled to be consulting parties under Section 106. *Id.*

27 110. In consultation with the SHPO, the agency must determine and

28 <sup>3</sup> Formerly cited as 16 U.S.C. § 470f.

1 document the “geographic area or areas within which an undertaking may directly or  
2 indirectly cause alterations in the character or use of historic properties” (36 C.F.R. §  
3 800.16(d)), review existing information, and seek out additional information from  
4 parties and individuals with knowledge of historic properties in the area. 36 C.F.R. §  
5 800.4. The agency “shall make a reasonable and good faith effort to carry out  
6 appropriate identification efforts, which may include background research,  
7 consultation, oral history interviews, sample field investigation, and field survey” to  
8 identify historic properties. *Id.* If a property meets any of the National Register  
9 criteria, and the SHPO agrees, the property is considered eligible for the National  
10 Register for Section 106 purposes. *Id.*

11 111. If an agency determines that an undertaking will not affect any historic  
12 properties, the agency must provide documentation of its finding to the SHPO, shall  
13 notify all consulting parties, and shall make the documentation available for public  
14 inspection prior to approving any undertaking. 36 C.F.R. § 800.4(d). The Advisory  
15 Council and SHPO are given thirty (30) days in which to object to an agency’s  
16 determination of no adverse impacts. *Id.*

17 112. Adverse effects are alterations, resulting directly or indirectly from an  
18 undertaking, to “any of the characteristics of a historic property that qualify the  
19 property for inclusion in the National Register in a manner that would diminish the  
20 integrity of the property’s location, design, setting, materials, workmanship, feeling,  
21 or association.” 36 C.F.R. § 800.5. Adverse effects may include reasonably  
22 foreseeable effects caused by the undertaking that may occur later in time, or be  
23 cumulative, including, *inter alia*, physical damage or destruction to all or part of a  
24 property, change of character of the property’s use or features within the property’s  
25 setting that contribute to its historical significance, or neglect of a property which  
26 causes its deterioration. *Id.*

27 113. If the agency determines there may be adverse effects, it must conduct a  
28 review and must consider views concerning the effects which have been provided by

1 any consulting party or by the public. *Id.* If an agency finds that there will be adverse  
 2 effects, it must work with the SHPO and other consulting parties “to develop and  
 3 evaluate alternatives or modifications to the undertaking that could avoid, minimize,  
 4 or mitigate adverse effects on historic properties.” 36 C.F.R. § 800.6.

5 114. An agency may expedite its review and consultation under sections  
 6 800.3 through 800.6 only “as long as the consulting parties and the public have an  
 7 adequate opportunity to express their views as provided in § 800.2(d).” 36 C.F.R. §  
 8 800.3(g).

9 115. The LWCF Manual expressly states that the “Section 106 process must  
 10 be applied to the Section 6(f)(3) protected area to be converted as well as the  
 11 acquisition and development of the replacement parkland.” LWCF Manual at Ch. 4-  
 12 12.

### VIOLATIONS OF THE LWCF AND APA

#### A. The District Did Not Meet the Statutory Eligibility Requirements. Therefore, it was an Error of Law and Abuse of Discretion to Approve the District’s Conversion.

17 116. 36 C.F.R. § 59.3(a) provides that once an area has been funded with  
 18 LWCF assistance, it must be continually maintained in public recreation use unless  
 19 NPS approves substitution property of reasonably equivalent usefulness and location  
 20 and of at least equal fair market value. The substitute (or replacement) property must  
 21 constitute or be part of a viable recreation area. 36 C.F.R. § 59.3(b). Land that is  
 22 currently in public ownership... may not be used as replacement land unless certain  
 23 specific requirements are met. *Id.* Put simply, the District was required to provide an  
 24 equal amount of recreational land to replace the land it intends to usurp from the  
 25 Park.

26 117. George Berkich Park is 173,173 square feet. The District’s project  
 27 intends to seize 23,700 square feet of grassy parkland and walking path for the  
 28 school’s concrete improvements, including a multipurpose building, an existing

1 science and lab building encroachment, a school pickup and drop off and school  
2 paved parking. It also includes the elimination of grassy parkland to accommodate  
3 two biofiltration basins required as a consequence of the new school improvements  
4 and resulting impervious surface. The biofiltration basins total 9,220 square feet.  
5 Thus, the project eliminates nearly 20% of George Berkich Park’s public recreational  
6 use.

7 118. Thus, the District was required to provide the same square footage in  
8 replacement land of reasonably equivalent recreational use.

9 119. In approving the District’s conversion, NPS found that (1) the District’s  
10 contribution of its school site’s new paved parking lot was of reasonably equivalent  
11 recreational usefulness as the grassy parkland it will replace; (2) that the District’s  
12 stormwater biofiltration basins constitute a “recreational use” such that there was no  
13 conversion of the grassy parkland that will be eliminated in favor of the basins; and  
14 (3) that hardcourts, which were already available for public use vis-à-vis the Joint  
15 Use Agreement, could be used to substitute property taken by the District.

16 120. Preliminarily, NPS erroneously failed to account for a 7,850 square feet  
17 reduction in grassy parkland that the District usurped from the Park for its newly  
18 expanded paved parking lot. In any event NPS erroneously deemed the paved  
19 parking lot a reasonably equivalent recreational use to the former grassy parkland,  
20 contending that it will provide additional parking for access to the Park. Not only  
21 does the new paved parking lot not provide direct access to the Park, which the Park  
22 currently enjoys, it is patently not a recreational use. At most it is a “support facility”  
23 which the LWCF Manual identifies as a different and separate use than a recreational  
24 use. *Compare* LWCF Manual at Ch. 3-13 (§ 5(a), Support facilities) *with* Ch. 3-10 –  
25 Ch. 3-13 (§ 4, Eligible recreation facilities). Basic common sense belies the  
26 conclusion that a paved parking lot serves a reasonably equivalent recreational use as  
27 grassy parkland where children can play and families can picnic on warm sunny  
28 days.

1           21. The District’s PD/ESF describes its biofiltration basins as “designed to  
2 be outdoor recreation play areas.” However, the District’s EIR hydrology analysis  
3 explains that the biofiltration basins are purposed to collect and filter run-off water  
4 prior to release into the municipal stormwater system. As the EIR points out, the  
5 types of pollutants the basins are intended to collect include oil, fertilizers,  
6 pesticides, trash soil and animal waste. As such, the biofiltration basins are  
7 unsuitable for public recreation use and cannot reasonably be found to constitute an  
8 equivalent recreational use as the grassy parkland the basins will replace.

9           122. The Amended Master Joint Use Agreement dated August 11, 1994  
10 expressly provides that the “District guarantees that the recreational facilities  
11 referred to as George Berkich Park consisting of turf playfields, hard courts,  
12 basketball, handball and playground areas will be made available for general public  
13 use after school hours and on weekends in perpetuity.” As such, the hardcourts were  
14 already available for public recreation use and therefore, under the express  
15 provisions of 36 C.F.R. § 59.3(b)(ii), could not constitute replacement land.

16           123. The District could never have met the required square foot in-kind  
17 exchange of land for its conversion of the parkland without NPS deeming the  
18 biofiltration basins and school paved parking lot Park “recreational uses” equivalent  
19 to grassy parkland, and counting the hardcourts as an in-kind exchange despite the  
20 clear proscription set forth in the LWCFA. It is evident that the NPS’s findings were  
21 factually and legally erroneous and constituted an abuse of discretion.

22 **B. It was an Error of Law for NPS to Consider the District’s Conversion**  
23 **Application, Much Less Approve It, Since the District Admitted it Never**  
24 **Considered Alternatives to its Project as Required by 36 C.F.R. § 59.3(a).**

25           124. 36 C.F.R. § 59.3 lays out the prerequisites for conversion approval and  
26 makes clear that until the prerequisites are satisfied, NPS may not ever consider a  
27 conversion request. The very first prerequisite that must be met is that the applicant  
28 evaluated “all practical alternatives to the proposed conversion.” 36 C.F.R.

1 § 59.3(b)(1).

2 125. On January 9, 2020, Save the Park sent NPS deposition transcripts of  
 3 the sworn testimony of Randall Lee Peterson, the District’s agent and Person Most  
 4 Qualified with respect to the District’s conversion application and Eric Naslund, the  
 5 Person Most Qualified for Studio E Architects, which designed the District’s  
 6 encroachments into George Berkich Park.

7 126. Mr. Peterson and Mr. Naslund each testified that the District **never**  
 8 considered any alternatives to its current design. Notably the depositions were taken  
 9 December 16, 2019 and December 13, 2019 respectively, following the District’s  
 10 application for conversion and OGALS’ issuance of an amended project agreement  
 11 approving the conversion.

<b>Excerpts from the Deposition of Randall Peterson, Person Most Qualified for the District Taken on December 16, 2019.</b>	
<b>Testimony</b>	<b>Pg./Line</b>
14 Q. So we talked about this long process. This drawn out 15 process of trying to get a conversion that started really 16 with Ms. Musick’s e-mail to the District notifying them 17 of their obligations under the L&WCFA Agreement. 18 Since that – since you received that e-mail back in 19 February 2018 through today, has the District ever 20 considered an alternative to the site plan we see at 25 21 relative to the improvements that have been designed 22 into the 6(f)(3) boundary?  23 A. No.	pp. 195:23- 196:20
24 Q. Why not, if you know?  25 A. It was never presented to the District that we needed 26 to redesign...  27 A. The question was asked of OGALS if we needed to 28 redesign and they said no.	pp. 108-20- 109:9
A. And they stated that we did not need to redesign or go back in the process.	pp. 108-20- 109:9

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<p>Q. Even though they also said the work to be performed would not be in compliance with the agreement?</p> <p>A. That's correct...</p>	
<p>Q. Did you or anyone on the – on behalf of the District, if you know, contact Studio E to come up with any contingency design plan which would exclude these improvements that were designed into the 6(f)(3) boundary from the boundary?</p> <p>A. No.</p>	<p>p. 157:8-13</p>

<p><b>Excerpts from the Deposition of Erik Naslund, Person Most Qualified for Studio E Architects December 13, 2019</b></p>	
<p><b>Testimony</b></p>	<p><b>Pg./Line</b></p>
<p>Q. Was Studio E ever asked to make any changes to the design to which we generally see here on the site plan? Was it asked to make any design changes as a consequence of (the) issues with OGALS that we've been talking about?</p> <p>A. We were not asked to make any changes to take things out of the existing boundary. The effort was made to make an in-kind trade.</p>	<p>p. 38:17-24</p>
<p>Q. As we sit here today, has anybody at Cardiff asked Studio E to develop some contingency plans should the court, for example, say it cannot build into George Berkich Park.</p> <p>A. No, not yet.</p>	<p>p. 39:9-13</p>
<p>Q. Did at any time, a part of the design process that Studio E engaged in on this project, at any time did anybody from Cardiff School District contact Studio E to tell it, we need to not design improvements either into George Berkich Park, or west of the 6(f)(3) boundary?</p> <p>A. You know, I'm not thinking that anybody said that, no, that I recall.</p>	<p>pp. 34:21-35:2</p>

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<p>Q. Did Studio E ever consider any other alternative parking designs that would have not included parking within George Berkich Park or west of the boundary line, as we've been calling it?</p> <p>A. I don't believe so. Some of that was driven by the number of cars that needed to be placed in there.</p>	<p>p. 55:7-12</p>
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127. The factual background reveals why the District never considered an alternative to its present design.

128. On May 31, 2017, the District hired Studio E Architects to design its project based on an educational program prepared by Randal Peterson.

129. On September 14, 2017, the District entered into a lease-leaseback with its general contractor surrendering possession and control of the 6(f)(3) boundary to its general contractor.

130. On February 6, 2018, and following the District's breach of its LWCFA obligation to record the project agreement, a resident of Cardiff notified the District of its LWCFA obligations. The District testified that this was the first time it became aware of its obligations under the LWCFA.

131. As of February 6, 2018, the District had already cemented its current site design which encroaches into the 6(f)(3) boundary.

132. On February 7, 2019, the District approved its project, including the current site design, authorizing the encroachments into George Berkich Park, and certified its EIR which shows that the District never considered an alternative to encroaching into the 6(f)(3) Boundary.

133. On June 5, 2019, the District's general contractor submitted its Guaranteed Maximum Price based on the current site plan and thereafter, the District proceeded to convert the parkland until the State Court issued a temporary restraining order which became a preliminary injunction.

134. In or about November 2019, the District finalized its application for a

1 conversion to OGALS.

2 135. On December 16, 2019, the District’s agent, Randal Peterson, admitted  
3 the District had never considered any alternative to its present site design which  
4 usurps parkland for its non-recreational improvements, including school paved  
5 parking and biofiltration basins.

6 136. Further, each of the District’s site designs from August 2017 through  
7 the present date show encroachment into the 6(f)(3) boundary. None include an  
8 alternative to conversion of the parkland.

9 137. Despite the foregoing testimony, NPS checked off the statutory  
10 “alternative requirement” as a precondition of approval without having any factual or  
11 legal basis to do so.

12 **C. NPS Was Not Entitled to Approve the District’s Conversion Application**  
13 **Without the City’s Sign-Off.**

14 138. On November 25, 2019, OGALS unilaterally removed the City as a  
15 party to the LWCFA project agreement for “convenience” after the City had not  
16 signed off on the District’s conversion application, and after the City had expressed  
17 concerns with respect to the District’s project. In so doing, it cited Section J(5) of  
18 the Project Agreement.

19 139. Days later, the District unilaterally terminated the Joint Use Agreement  
20 in which it had promised to maintain George Berkich Park for public recreation use  
21 in perpetuity.

22 140. A plain reading of section J(5) of the Project Agreement reveals that it  
23 provides absolutely no authority to unilaterally remove a party to the agreement for  
24 convenience or otherwise. Basic contract principles do not permit the unilateral  
25 removal of a party to an agreement.

26 141. In its findings in support of its approval of the conversion, NPS  
27 sidestepped any discussion of OGALS’ removal of the City under Section J(5) of the  
28 agreement and instead, ratified OGALS’ removal of the City. In doing so, it found

1 that the District, and not the City, could better carry out the objectives of the  
2 LWCF project agreement. NPS made this finding despite its knowledge of the  
3 following facts:

- 4 a) The District's breach of the project agreement which required it to  
5 record the LWCF Project Agreement obligations;
- 6 b) The District's 2002 unauthorized conversion of the Park when it  
7 usurped parkland for its Building M and Mozart Avenue drop-off;
- 8 c) The District's planned closure of the park for two years in violation of  
9 the LWCF project agreement and its closure of the Park for over 6 months which is an  
10 unauthorized conversion;
- 11 d) The District's demolition and construction in the Park without NPS  
12 approval and its refusal to stop absent a temporary restraining order and  
13 preliminary injunction issued by the State Court, which the District  
14 vehemently opposed;
- 15 e) The District's continued construction in contempt of the State Court's  
16 ruling on Plaintiff's CEQA claim which culminated in the Court  
17 explaining to the District that it would be in contempt should it continue  
18 with construction;
- 19 f) The District's refusal to record the LWCF Project Agreement as is  
20 required by the Agreement;
- 21 g) The District's termination of the Joint Use Agreement with the City  
22 nullifying its obligations to maintain the 6(f)(3) boundary and other  
23 parts of the school site (e.g. the hardcourts) for public recreational use in  
24 perpetuity;
- 25 h) The District's continued construction in the Park without NPS approval  
26 in direct and material violation of the settlement agreement between  
27 Plaintiff and the District.

28 142. In contrast to the foregoing conduct, the City conditioned the issuance

1 of a Coastal Development Permit for encroachment into George Berkich Park on  
2 NPS approval. When juxtaposing the respective agency’s treatment of the 6(f)(3)  
3 boundary, it is patently evident that the City, not the District, was the better agency  
4 to carry out the objectives of the LWCFA. At minimum, it was simply unnecessary  
5 to remove the City as a party to the agreement merely because it had not signed off  
6 on the District’s conversion application, which was its right given its objections to  
7 the District’s usurpation of George Berkich Park.

8 **D. The District Has Not Satisfied State and Federal Environmental Review**  
9 **Requirements. As Such, NPS was Not Entitled to Review the District’s**  
10 **Conversion Application, Much Less Approve it.**

11 143. 36 C.F.R. § 59.3(b) provides that NPS may only consider a conversion  
12 request if, *inter alia*, “[t]he guidelines for environmental evaluation have been  
13 satisfactorily completed and considered by NPS...”

14 144. Despite the fact that the State Court decertified the District’s EIR based  
15 on the District’s violations of CEQA that the District never cured, NPS found that  
16 the District complied with CEQA since the lawsuit was ultimately dismissed. This  
17 finding is a blatant and egregious error of law.

18 145. NPS also found that the District was entitled to exempt itself from  
19 NEPA. However, since the EIR is in violation of CEQA, NPS is not entitled to  
20 conclude that it “considered the environmental consequences of its actions and  
21 decided to apply a categorical exclusion to the facts.” *See State of California v.*  
22 *Norton*, 311 F.3d 1162, 1176 (9th Cir. 2000). Given the controversial nature of the  
23 project and the invalid EIR, the record shows that the exceptions to the categorical  
24 exclusion listed in DO-12 Handbook § 3.5 may exist, prohibiting NPS’s reliance on a  
25 categorical exclusion. *See id.* at 177 (“the fact that the exceptions [to categorical  
26 exclusions] may apply is all that is required to prohibit use of the categorical  
27 exclusion”).

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1 **E. The District Failed to Prepare a Required Resource Impact Analysis.**

2 146. As a prerequisite to a conversion, the “[p]roperty to be converted must  
3 be evaluated in order to determine what recreation needs are being fulfilled by the  
4 facilities which exist and the types of outdoor recreation resources and opportunities  
5 available. The property being proposed for substitution must then be evaluated in a  
6 manner to determine if it will meet recreation needs which are at least like in  
7 magnitude and impact to the user community as the converted site.” 36 C.F.R. §  
8 59.3(b)(3)(ii).

9 147. The walking/jogging track around George Berkich Park was a key  
10 element of the original renovation and grant of LWCFAs funds. Since its installation,  
11 the track has been used daily by the community and students.

12 148. NPS failed to consider the recreation needs that are being fulfilled by  
13 the existing park, such as the usefulness of the walking/jogging track—which has  
14 been completely removed by the District’s conversion proposal. The bio-filtration  
15 basins and parking lot that are replacing the grassy parkland are not “at least like in  
16 magnitude and impact to the user community,” and as such NPS has failed to fulfil  
17 its obligation to prepare a resource impact analysis.

18 **F. NPS Failed to Consider the Project’s Consistency with the Statewide**  
19 **Comprehensive Outdoor Recreation Plan**

20 149. Prior to approving a conversion application, NPS must ensure that  
21 “[t]he proposed conversion and substitution are in accord with the” SCORP. 36  
22 C.F.R. § 59.3(b)(9). NPS’ conversion evaluation fails to evaluate the goals and  
23 policies set forth in the SCORP, and instead summarily concludes that the  
24 conversion “is intended to provide greater recreational utility based on current uses  
25 of the park.”

26 **G. The Park Has Been Closed for Over Six Months, Resulting in an**  
27 **Unauthorized Conversion**

28 150. Without any prior warning to OGALS or NPS, on or around June 20,

1 2019 the District closed George Berkich Park for a period that was set to last almost  
2 two years.

3 151. The District has used the area within the 6(f)(3) boundary for  
4 construction staging, and has used the parkland to store its construction trailers, soils,  
5 and other equipment.

6 152. To date, George Berkich Park remains closed to the public constituting  
7 an unlawful conversion under the LWCF Act.

8 153. The LWCF Manual states that “[a]ll requests for temporary uses for  
9 purposes that do not conform to the public outdoor recreation requirement must be  
10 submitted and reviewed by the State.” LWCF Manual at Ch. 8-13. “*Continued use*  
11 *beyond six-months will not be considered temporary*, but will result in a conversion  
12 of use and will require the State *project sponsor to provide replacement property*  
13 pursuant to the LWCF Act.” *Id.* (emphasis added).

14 154. In order to obtain NPS’ permission to temporarily close a park to the  
15 public, the State must submit a formal proposal to NPS for any temporary non-  
16 conforming use, and “[a]n acknowledgement by the SLO a full conversion will result  
17 if the temporary use has not ceased after the maximum six-month period allotted.”  
18 *Id.* at Ch. 8-14.

19 155. When evaluating a temporary conversion request, NPS must consider,  
20 *inter alia*, the following criteria: “[t]he size of the parkland affected by any  
21 temporary non-recreation use shall not result in a significant impact on public  
22 outdoor recreation use [and] [n]o practical alternatives to the proposed temporary use  
23 exist.” *Id.*

24 156. Neither the District nor the State submitted an application for a  
25 temporary non-conforming use to NPS.

26 157. George Berkich Park has remained completely closed for over six  
27 months and is now considered a “conversion” under the LWCF Act for which the  
28 District must provide replacement property.

1 **H. The Appraisal Submitted with the District’s Application Failed to**  
2 **Analyze the Changes Made to the District’s Conversion Application**

3 158. The October 19, 2019 Appraisal Analysis for Conversion Application  
4 submitted by the District fails to establish that the fair market value of the property to  
5 be converted is of at least equal fair market value as established by an approved  
6 appraisal.

7 159. The Appraisal, which was effective as of October 1, 2019, was based on  
8 the District’s original proposed conversion proposal set forth in its EIR. The final  
9 conversion map approved by NPS differs from the conversion proposal analyzed in  
10 the appraisal submitted by the District and accordingly, NPS approved the  
11 conversion application without having received a complete and accurate appraisal.

12 **I. OGALS’ Approval of the District’s Conversion Was Tainted by Conflict**  
13 **of Interest**

14 160. Not only did OGALS depart from the LWCFCA by allowing the District  
15 to proceed with its conversion of George Berkich Park at a time when OGALS  
16 admitted it did not even understand the project relative to the District’s EIR and at a  
17 time when the District had not even applied for a conversion, much less had the  
18 approval of NPS, OGALS conditioned its approval on a covenant not to sue. Thus,  
19 OGALS’ approval was not only in derogation of the LWCFCA, it was also tainted by  
20 its own self-interest, and therefore could not constitute an objective, legally  
21 compliant approval.

22 **FIRST CAUSE OF ACTION**

23 **(Violation of the Land and Water Conservation Fund Act)**

24 ***(Against the Federal Defendants and State Parks)***

25 161. Plaintiff incorporates by reference each and every allegation contained  
26 in each paragraph above and below as though the same was set forth in full herein.

27 162. Defendants have an obligation to maintain property developed with  
28 LWCFCA assistance for public outdoor recreational use in perpetuity. The LWCFCA

1 provides for a conversion of LWCFA protected property only upon such conditions  
2 as the Secretary “deems necessary to assure the substitution of other recreation  
3 properties of at least equal fair market value and of reasonably equivalent usefulness  
4 and location.” 54 U.S.C. § 200305(f)(3).

5 163. George Berkich Park is land which is protected under the LWCFA, and  
6 must therefore remain available for public outdoor recreational use in perpetuity.

7 164. Under 36 C.F.R. § 59.3, any changes to the outdoor public recreational  
8 uses of George Berkich Park require NPS approval and the substitution of  
9 replacement land in accordance with the requirements set forth by the LWCFA. In  
10 order to consider a conversion, NPS must establish that the nine requirements set  
11 forth in 36 C.F.R. § 59.3 have been met.

12 165. On or around November 25, 2019, State Parks entered into a  
13 Supplemental Project Agreement with the District and recommended to NPS that the  
14 6(f)(3) boundary be modified, despite the fact the District failed to meet the  
15 prerequisites for a conversion application.

16 166. Thereafter, on or around April 23, 2020, NPS violated the LWCFA by  
17 approving the District’s conversion application without following the requirements  
18 of 36 C.F.R. § 59.3.

19 167. Defendants’ approval of the District’s 6(f)(3) conversion application  
20 constitutes a conversion of George Berkich Park in violation of the LWCFA and was  
21 a decision that is “arbitrary, capricious, an abuse of discretion, or otherwise not in  
22 accordance with law,” “in excess of statutory jurisdiction, authority, or limitations, or  
23 short of statutory right,” and “without observance of procedure required by law”  
24 within the meaning of the APA. 5 U.S.C. § 706(2)(A), (C)-(D).

25 168. Plaintiff has no adequate remedy at law with respect to this conversion  
26 of the Park.

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**SECOND CAUSE OF ACTION**

**(Violation of the Land and Water Conservation Fund Act)**

***(Against the Federal Defendants and State Parks)***

169. Plaintiff incorporates by reference each and every allegation contained in each paragraph above and below as though the same was set forth in full herein.

170. The Federal Defendants have an absolute, nondiscretionary statutory duty to review conversions of property acquired with assistance under the Land and Water Conservation Fund Act to determine whether a conversion has occurred and to approve a conversion “only if [the Secretary] finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan and only on such conditions as the Secretary considers necessary to ensure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location.” 16 U.S.C. § 200305(f)(3).

171. Defendants also have an absolute, nondiscretionary duty to ensure that land developed with LWCFA funds remains available for public outdoor recreational use in perpetuity.

172. Defendants owe these nondiscretionary duties to Plaintiff.

173. In violation of the provisions of the LWCFA, the District has built a parking lot and classroom building within the 6(f)(3) boundary; leased the Park to McCarthy Building Companies, Inc.; has closed the Park for a period of over six (6) months, thereby constituting an unlawful conversion under the LWCF Manual; and continues to engage in construction activities within the 6(f)(3) boundary.

174. In dereliction of a clear statutory directive, Defendants have failed to take any action to remedy the District’s unlawful conversion of the 6(f)(3) boundary, thereby depriving Plaintiff’s rights under the Land and Water Conservation Fund Act.

175. Plaintiff has no other adequate remedies at law or in equity to seek redress for Defendants’ failure to fulfill nondiscretionary statutory duties.

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**THIRD CAUSE OF ACTION**

**(Violation of the National Environmental Policy Act)**

***(Against all Defendants)***

176. Plaintiff incorporates by reference each and every allegation contained in each paragraph above and below as though the same was set forth in full herein.

177. NEPA is required whenever there is a major federal action, which includes the Federal Defendants’ consideration and approval of the District’s conversion application. *See* 36 C.F.R. § 59.3(b)(7) (a prerequisite for considering conversion requests is that “[t]he guidelines for environmental evaluation have been satisfactorily completed and considered by NPS during its review of the proposed 6(f)(3) action”).

178. The Federal Defendants and State Parks engaged in the joint review of the District’s conversion application. State Parks certified that a site inspection was conducted and to the best of its knowledge, the District’s PD/ESF was accurate based on available resource data. On the basis of the environmental impact information, State Parks recommended that under NEPA, the proposal should qualify for a categorical exclusion (A.2 Minor Boundary Change) because “[t]he new 6(f)(3) boundary would be outside of building footprints on the project site (see Figure 4-6, Proposed 9(f)(3) [sic] Boundary, of the DEIR) and would result in an increase in 25,846 square feet of area within the boundary.”

179. The District’s Modernization and Reconstruction Project cannot proceed without the prior approval of NPS and/or the Secretary, since the District is required to obtain a 6(f)(3) boundary conversion prior to constructing any of the proposed buildings within the 6(f)(3) boundary.

180. Both the District and State Parks received federal LWCF funding for the development of George Berkich Park.

181. Defendants erroneously concluded that the District’s conversion application was categorically excluded from NEPA because it constituted a “small

1 conversion.”

2 182. On information and belief, the District’s conversion proposal will result  
3 in the conversion of 32,920 SF of the parkland to non-public outdoor recreational  
4 space, resulting in a conversion of nineteen percent (19%) of the protected LWCFA  
5 property; accordingly, the conversion proposal is not categorically exempt from  
6 NEPA review under the small conversion exclusion.

7 183. Additionally, to the extent the conversion proposal is less than 10% and  
8 qualifies for the small conversion exemption, the conversion will “[h]ave highly  
9 controversial environmental effects or involve unresolved conflicts concerning  
10 alternative uses of available resources,” “[e]stablish a precedent for future action or  
11 represent a decision in principle about future actions with potentially significant  
12 environmental effects,” and [h]ave significant impacts on properties listed, or  
13 eligible for listing, on the National Register of Historic Places as determined by the  
14 bureau,” and the Defendants may not rely on any categorical exclusion whatsoever.  
15 43 C.F.R. § 46.215.

16 184. Accordingly, Defendants’ violations of NEPA were “arbitrary,  
17 capricious, an abuse of discretion, or otherwise not in accordance with law,” “in  
18 excess of statutory jurisdiction, authority, or limitations, or short of statutory right,”  
19 and “without observance of procedure required by law” within the meaning of the  
20 APA. 5 U.S.C. § 706(2)(A), (C)-(D).

21 **FOURTH CAUSE OF ACTION**

22 **(Violation of the National Historic Preservation Act of 1966)**

23 ***(Against the Federal Defendants and State Parks)***

24 185. Plaintiff incorporates by reference each and every allegation contained  
25 in each paragraph above and below as though the same was set forth in full herein.

26 186. The National Historic Preservation Act of 1966 and the regulations  
27 thereunder require a federal agency with jurisdiction over a proposed undertaking to  
28 determine, prior to approving the undertaking, whether the undertaking will have an

1 adverse effect on any site, building, structure or object included on, or eligible for  
2 inclusion on the National Register prior to approving such undertaking.

3 187. The Federal Defendants' approval of the 6(f)(3) conversion application  
4 is an undertaking within the meaning of NHPA Section 106 (*see* 36 C.F.R. §  
5 800.16(y)), as recognized by NPS in its statement that "[b]ecause [the conversion  
6 proposal] involves a federal approval, it does qualify (per 36 CFR §800.16(y)) as an  
7 undertaking for the purposes of NHPA §106."

8 188. The Cardiff School site is comprised of two separate legal parcels. The  
9 first parcel, APN 260-340-01-00 comprises the majority of the Cardiff School site  
10 and contains the existing school buildings and George Berkich Park (as defined by  
11 the 6(f)(3) boundary). The second, smaller parcel, APN 260-340-02-00, was  
12 acquired by the District in or around 2001—long after the 1993 grant establishing the  
13 existing 6(f)(3) boundary.

14 189. The second parcel contains a small structure known as the "Little Brick  
15 Building," a telephone "repeater hut" believed to have been built circa 1938. The  
16 Little Brick Building is believed to have been used by the Pacific Bell Telephone  
17 Company to energize telephone signals between the 1930s and 1960s. The remaining  
18 portion of the second parcel is used as a garden for the K-3 students.

19 190. On information and belief, the Little Brick Building is eligible for  
20 listing in the National Register. The Historic Resources Assessment Report, included  
21 as Appendix 5.4-2 to the District's EIR, states that the number of remaining  
22 telephone repeater huts "appears to be very small" and the Little Brick Building is "a  
23 rare example of an early twentieth-century telephone system repeater hut designed in  
24 Colonial Revival style architecture." The report states that the Little Brick Building  
25 meets the National Register Criterion. The report concludes that "[t]he 'Little Brick  
26 Building' has been found to meet the criteria to be determined historic resources, and  
27 the building has retained high levels of integrity to convey its original appearance.  
28 The building has retained the levels of integrity of location, materials, setting,

1 design, workmanship, and feeling”

2 191. Defendants failed to comply with the Section 106 review procedures  
3 required under the NHPA by, *inter alia*, failing to seek and consider the views of the  
4 public, failing to provide the public with information about its undertaking and its  
5 effects on the Little Brick Building, and by failing to adequately assess the impact of  
6 the conversion proposal on the Little Brick Building.

7 192. State Parks issued the amended project agreement and recommended  
8 the District’s conversion application to NPS prior to beginning the Section 106  
9 review process, and the Federal Defendants issued conditional approval of the  
10 District’s conversion application prior to having begun, let alone completed, the  
11 required Section 106 analysis.

12 193. Defendants’ violations of the NHPA were “arbitrary, capricious, an  
13 abuse of discretion, or otherwise not in accordance with law,” “in excess of statutory  
14 jurisdiction, authority, or limitations, or short of statutory right,” and “without  
15 observance of procedure required by law” within the meaning of the APA. 5 U.S.C.  
16 § 706(2)(A), (C)-(D).

17 **FIFTH CAUSE OF ACTION**  
18 **(Violation of the Public Trust Doctrine)**  
19 ***(Against the District and State Parks)***

20 194. Plaintiff incorporates by reference each and every allegation contained  
21 in each paragraph above and below as though the same was set forth in full herein.

22 195. George Berkich Park is property held by a public entity for the benefit  
23 of the general public under the LWCF and Defendants are required to hold open  
24 George Berkich park for public outdoor recreational use in perpetuity.

25 196. As trustees, Defendants have a duty to refrain from substantial  
26 impairment of the essential natural resources protected under the Public Trust  
27 Doctrine and are not permitted to deviate or attempt to divert the use of George  
28 Berkich Park from its dedicated purposes.

1 197. Defendants have failed to safeguard the interests of Plaintiff as the  
2 present and future beneficiaries of the public trust and have taken actions that  
3 adversely affect the public’s right of access to and use and enjoyment of the land on  
4 which George Berkich Park is located.

5 198. Accordingly, Defendants have violated the Public Trust Doctrine  
6 Plaintiffs are entitled to a declaration that Defendants are required to maintain and  
7 preserve George Berkich Park for public outdoor recreational use in perpetuity and  
8 have failed to do so.

9 **SIXTH CAUSE OF ACTION**

10 **(Injunctive Relief)**

11 ***(Against the District)***

12 199. Plaintiff incorporates by reference each and every allegation contained  
13 in each paragraph above and below as though the same was set forth in full herein.

14 200. The District has engaged in impermissible construction activities within  
15 the 6(f)(3) boundary of the Park without approval from NPS and despite an order  
16 from the San Diego Superior Court determining that it failed to comply with the  
17 California Environmental Quality Act and vacating the approvals for the Project.

18 201. The District’s construction plans called for the reconstruction of the  
19 Cardiff School in two phases: the District would first rebuild the classroom buildings  
20 outside of the existing 6(f)(3) boundary, and would then build the multipurpose  
21 building and other improvements that encroached into the Park and that required a  
22 conversion of the existing 6(f)(3) boundary.

23 202. On information and belief, upon NPS’s approval of the District’s 6(f)(3)  
24 conversion application, the District has taken its construction plans out of order in an  
25 effort to construct as much of the multipurpose room and other improvements within  
26 the Park on account of an anticipated legal challenge to NPS’s approval.

27 203. Plaintiff has no other adequate remedies at law or in equity to seek  
28 redress for the District’s continual violations of the LWCFCA and disregard for the

1 6(f)(3) boundary, and seeks permanent injunctive relief restraining the District from  
2 constructing any permanent improvements within the 6(f)(3) boundary of the Park  
3 without the properly-granted or fully reasoned consent of NPS, and from denying the  
4 public access to the Park for public outdoor recreational use.

5 **SEVENTH CAUSE OF ACTION**

6 **(Declaratory Relief)**

7 ***(Against All Defendants)***

8 204. Plaintiff incorporates by reference each and every allegation contained  
9 in each paragraph above and below as though the same was set forth in full herein.

10 205. An actual and substantial controversy has arisen among the parties  
11 regarding the 6(f)(3) grant boundary of George Berkich Park and the District’s  
12 conversion application.

13 206. Plaintiff desires a judicial determination of the respective rights and  
14 obligations of the parties, and in particular, seeks a judicial determination declaring  
15 that the District is not entitled to a conversion of the 6(f)(3) boundary as currently  
16 proposed, and may not build any improvements within the existing 6(f)(3) boundary.

17 207. Such a declaration is necessary at this time so that the parties may  
18 ascertain their rights and obligations, and it is appropriate because it will obviate the  
19 need for future legal action between the parties regarding the same subject matter.

20 **JURY TRIAL DEMANDED**

21 Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands  
22 a trial by jury on all issues so triable.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Save the Park and Build the School prays for the following  
25 relief:

- 26 1. An order declaring that NPS and the Secretary have acted in a  
27 manner that was arbitrary, capricious, an abuse of discretion, not  
28 in accordance with the law, and in violation of the LWCFCA;

- 1           2.     An order declaring that NPS and the Secretary have acted in a  
2                 manner that was arbitrary, capricious, an abuse of discretion, not  
3                 in accordance with the law, and in violation of NEPA;
- 4           3.     An order declaring that NPS and the Secretary have acted in a  
5                 manner that was arbitrary, capricious, an abuse of discretion, not  
6                 in accordance with the law, and in violation of the NHPA;
- 7           4.     An order declaring that the District and State Parks have violated  
8                 the Public Trust Doctrine;
- 9           5.     An order vacating the Federal Defendants' April 24, 2020  
10                Amendment to the Project Agreement approving the District's  
11                6(f)(3) conversion application;
- 12           6.     An order vacating the Federal Defendants' April 24, 2020  
13                Amendment to the Project Agreement removing the City of  
14                Encinitas as a project sponsor;
- 15           7.     An order vacating the Federal Defendants' determination that the  
16                District's 6(f)(3) conversion application is categorically excluded  
17                from NEPA;
- 18           8.     A permanent injunction prohibiting NPS from considering a  
19                6(f)(3) boundary conversion unless and until the District has met  
20                all of the prerequisites set forth in 36 C.F.R. § 59.3(b);
- 21           9.     A permanent injunction prohibiting the District from converting  
22                the Park to any use other than public outdoor recreational use;
- 23           10.    A permanent injunction prohibiting the District from constructing  
24                any permanent improvements in the 6(f)(3) boundary without the  
25                approval of NPS;
- 26           11.    An injunction requiring the District to restore the Park to the state  
27                it existed prior to the Cardiff School Modernization and  
28                Reconstruction Project and requiring that the Park be

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- immediately reopened for public outdoor recreational use;
- 12. For costs of suit incurred herein;
- 13. For attorneys' fees, including expert fees; and,
- 14. For such other and further relief as the Court deems just and proper.

DATED: June 12, 2020

PROCOPIO, CORY, HARGREAVES  
& SAVITCH LLP

By: /s/Justin M. Fontaine  
Rebecca L. Reed  
Justin M. Fontaine  
Attorneys for Plaintiff  
Save the Park and Build the School