

# Staff Report 51

## APPLICANT:

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Jesse A. Berber and Elizabeth A. Berber, as Trustees or any Successor Trustee of the Jesse A. Berber and Elizabeth A. Berber Family Trust dated July 6, 2001

## PROPOSED ACTION:

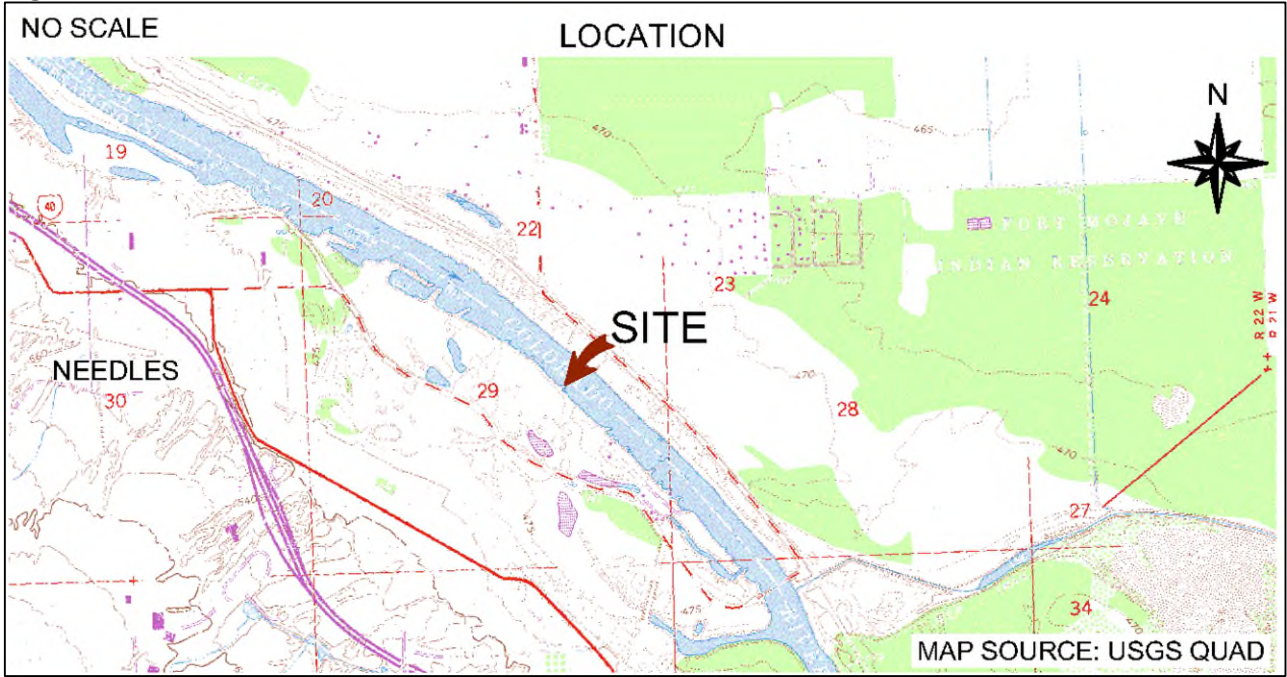
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Issuance of a General Lease – Recreational and Protective Structure Use.

## AREA, LAND TYPE, AND LOCATION:

Sovereign land located in the Colorado River, adjacent to 1138 Beach Drive, Needles, San Bernardino County (as shown in Figure 1).

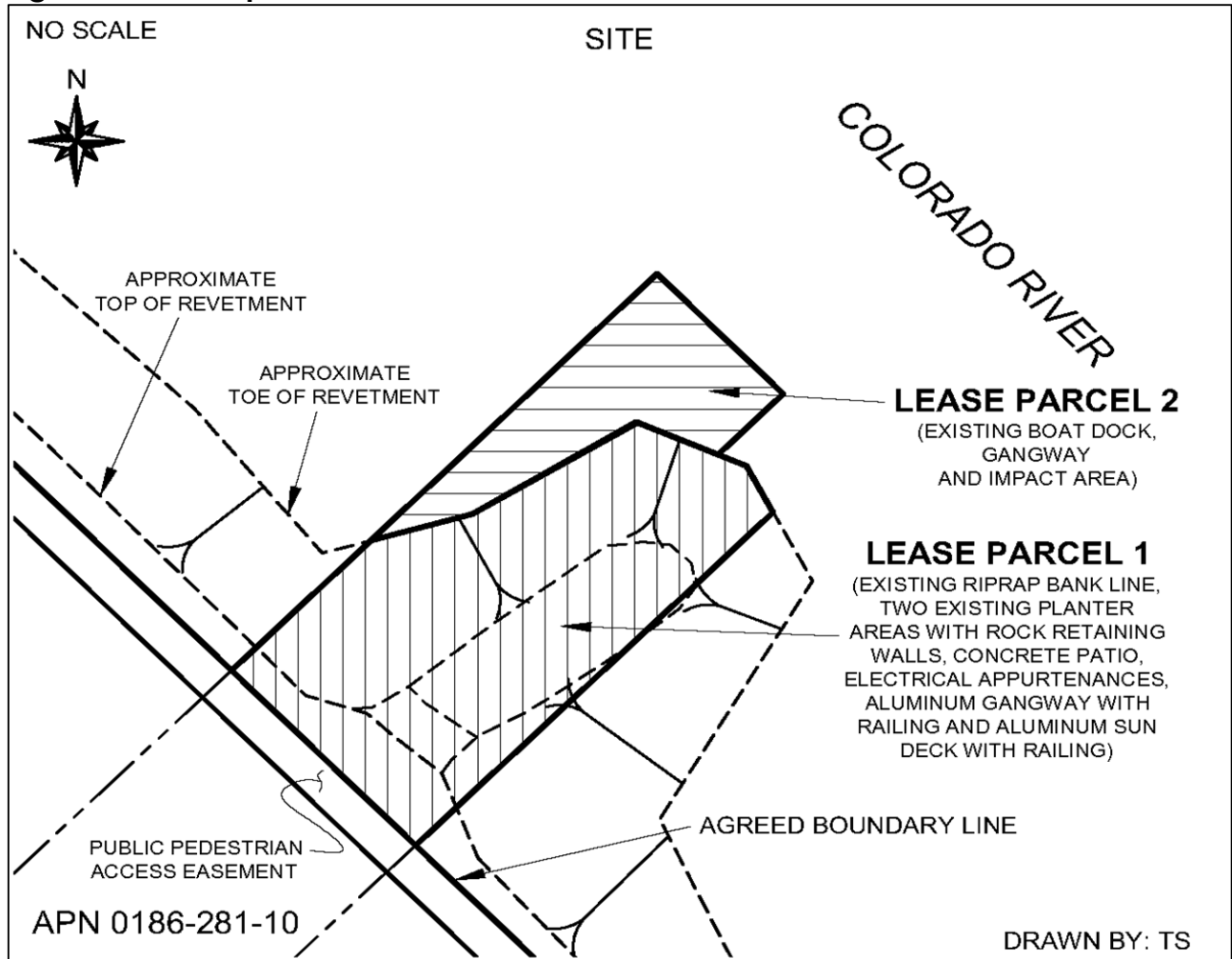
**Figure 1. Location**



**AUTHORIZED USE:**

Use of an existing boat dock, gangway, two planter areas with rock retaining walls and electrical appurtenances, two concrete stairways with rock walls, concrete patio area, sundeck, and riprap bankline (as shown in Figure 2).

**Figure 2. Site Map**



NOTE: This depiction of the lease premises is based on unverified information provided by the Applicant or other parties and is not a waiver or limitation of any State interest in the subject or any other property.

**TERM:**

10 years, beginning April 23, 2024.

**CONSIDERATION:**

\$1,341 per year, with an annual Consumer Price Index adjustment.

**SPECIFIC LEASE PROVISIONS:**

- Liability insurance in an amount no less than \$1,000,000 per occurrence.
- Lessee acknowledges that the Public Pedestrian Access Easement located on portions of Lessee's fee owned upland property shall remain open to the public and that no structures or improvements shall be erected, nor any personal property placed, that would obstruct or prevent public access in and along the Easement.
- Lessee acknowledges that they shall not place signs or advocate in any other manner to prevent or discourage public use of the Public Pedestrian Access Easement.
- Lessee shall post signage on, or directly adjacent to, the gate at the top of bankline clearly indicating that the public may pass through the gate to access the river.
- Lessee shall not lock the gate at the top of the bankline, or in any other way prevent or advocate against public use of the gate to access the river.
- Lessee assumes responsibility for the maintenance of the riprap bankline within the Lease Premises.
- Lessee and the public shall have equal rights to access the stairs on the lease premises and Lessee shall not exclude the public from use of the stairs, install any structures to prevent public use of the stairs, nor post signage or advocate in any manner against public use of the stairs.

**BACKGROUND:**

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On December 12, 1990 ([Item 08, December 12, 1990](#)), the Commission authorized a Boundary Line Agreement and Compromise Settlement (AD 134) which confirmed the State's fee ownership of sovereign land located in the Colorado River at this location. Pursuant to Public Resources Code section 6501.1, projects in this location, including new development or maintenance of existing facilities, extending waterward of the ordinary high-water mark (OHWM), as fixed by AD 134, require a lease from the Commission. The Applicant's upland property is located along the Colorado River adjacent to the fixed OHWM.

Pursuant to AD 134, the State of California was granted a Public Pedestrian Access Easement (Easement) running parallel to the fixed OHWM. The Easement is

intended to provide public access to and along the bank of the Colorado River. The Easement affects lots 1 through 40 of the Rio Buena Vista residential subdivision, one of which is the Applicant's property. The Easement provides access to the Colorado River and can be accessed by the public from the northern or southern end of the subdivision, or from the Colorado River.

The U.S. Department of the Interior, Bureau of Reclamation (Reclamation) conducted a review by boat of the riprap bankline on March 27, 2002, and conducted a site visit on April 10, 2002. These inspections revealed that the bankline was cleared of vegetation and that the federally constructed riprap and jetties were undisturbed and in good condition.

By letter dated April 23, 2002, Reclamation declared that it would not place additional riprap on the bankline because of interference from the upland residential development. Reclamation stated that the upland homeowners would be responsible for maintaining protection of their own bankline in the future, subject to the homeowner's seeking approval and permitting of their riprap or bankline construction work from the U.S. Army Corps of Engineers.

## **STAFF ANALYSIS AND RECOMMENDATION:**

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### **AUTHORITY:**

Public Resources Code sections 6005, 6216, 6301, 6321, 6321.2, 6501.1, 6503, 6503.5, and 6505.5; California Code of Regulations, title 2, sections 2000 and 2003.

### **PUBLIC TRUST AND STATE'S BEST INTERESTS:**

On April 23, 2014, the Commission authorized issuance of a General Lease - Recreational and Protective Structure Use to Jesse A. Berber and Elizabeth A. Berber, as Trustees or any Successor Trustee of the Jesse A. Berber and Elizabeth A. Berber Family Trust dated July 6, 2001 for the use and maintenance of two existing planter areas with rock retaining walls and electrical appurtenances, two concrete stairways with rock walls, concrete patio area, and riprap bankline ([Item 58, April 23, 2014](#)). On April 23, 2015, the Commission authorized an amendment of lease to allow for the construction of an aluminum gangway with railing and boat dock ([Item 75, April 23, 2015](#)). On October 16, 2015, the Commission authorized an amendment of lease to allow for the construction, use, and maintenance of an aluminum sundeck with railing ([Item 41, October 16, 2015](#)). This lease expired on April 22, 2024.

The Applicant is now applying for a General Lease – Recreational and Protective Structure Use for use of the existing boat dock, gangway, two planter areas with rock retaining walls and electrical appurtenances, two concrete stairways with rock walls, concrete patio area, sundeck, and riprap bankline in the Colorado River, adjacent to 1138 Beach Drive, Needles, San Bernardino County.

The Applicant owns the uplands adjoining the lease premises and the subject facilities are located directly waterward of the upland property. The boat dock and gangway on the lease premises occupy a relatively small area and facilitate recreational boating. Recreational boating is water-dependent and is generally consistent with the common law Public Trust Doctrine. The California Legislature has identified private recreational boating facilities as an authorized use of Public Trust lands (Pub. Resources Code, § 6503.5).

The existing stairways on the lease premises serve to provide safe access to the river for both the Lessee and the public. As such, these improvements provide a benefit to the public and do not negatively impact Public Trust uses in this location. To ensure that the stairway remains available for public use, the proposed lease includes provisions protecting the public's right to access these improvements.

There is a gate present at this location at the top of the bankline that may deter the public from accessing the river. The Applicant requested authorization to keep the gate to prevent young children from accessing the stairs without adult supervision. The proposed lease includes a provision requiring the Applicant to post signage near the gate indicating that the public may pass through to access the river. Additionally, the Applicant cannot lock the gate at the top of the bankline nor prevent public access to the river. Staff recommends that with these provisions, the gate may remain in place to allow for public safety.

The riprap bankline on the lease premises is maintained by the Applicant and serves to stabilize the bank and support the integrity of both the river and the upland property. Loss or degradation of this structure could result in property damage and adverse impacts to Public Trust resources in the lease area and the surrounding waterway. As such, this improvement provides a benefit to both the public and the upland owner and does not negatively impact Public Trust uses in this location.

The two planter areas with rock retaining walls and electrical appurtenances, concrete patio area, and sundeck on the lease premises serve as an extension of the upland property and are not Public Trust uses. However, the Commission has issued leases on a limited basis for existing facilities that are not generally consistent

with the Public Trust when such facilities do not significantly interfere with Public Trust needs and values. The existing sundeck on the lease premises meets these qualifications as it has existed for many years, does not significantly interfere with Public Trust needs and values at this location, and because public access to the river is preserved by the Easement detailed above. Additionally, to further ensure that the uses and improvements authorized by the proposed lease do not impair public access, the lease includes provisions protecting access to Public Trust resources within the lease area.

The proposed Lease does not alienate the State's fee simple interest or permanently impair public rights. The lease is limited to a 10-year term, does not grant the lessee exclusive rights to the lease premises, and reserves an easement to the public for Public Trust-consistent uses. Upon lease termination, the lessee may be required to remove all improvements from State land and restore the lease premises to their original condition.

The proposed lease requires the lessee to insure the lease premises and indemnify the State for any liability incurred as a result of the lessee's activities thereon. The lease also requires the payment of annual rent to compensate the people of the State for the occupation of the public land involved.

### **CLIMATE CHANGE:**

The lease area in the Colorado River is not tidally influenced and, therefore, would not be subject to sea level rise. The water level near the existing improvement is regulated primarily by water released upstream from the Davis Dam. As stated in [Safeguarding California Plan: 2018 Update](#) (California Natural Resources Agency 2018), climate change is projected to increase the frequency and severity of natural disasters related to flooding, fire, extreme heat, drought, and storms.

Droughts could dramatically reduce river flow and water levels, leading to loss of public access and navigability. Climate change will further influence riverine areas by changing erosion and sedimentation rates; likewise, runoff from more frequent and severe storm events will likely increase scour and lead to a more rapid decrease in bank stability.

The combination of these projected conditions could increase the likelihood of damage to structures within the lease premises from floods or droughts during the term of the lease. The floating boat dock and adjustable gangway are not likely to be damaged by storm-created flooding due to their floating nature. However, the planter areas with rock retaining walls, concrete patio area, sundeck, and riprap

bankline will not be able to shift in response to changing water levels and may need relocation or reinforcement in the future to withstand higher levels of flood exposure or drought. During a severe drought, the boat dock may not be able to function due to low water levels in the river and could be damaged.

Regular maintenance, as referenced in the lease, may reduce the likelihood of severe structural degradation or dislodgement. Pursuant to the proposed lease, the Applicant acknowledges that the lease premises and adjacent upland are in an area that may be subject to the effects of climate change.

**CONCLUSION:**

For all the reasons above, staff believe approval of this lease will not substantially interfere with Public Trust needs at this location, at this time, and for the term of the lease; and is in the best interests of the State.

**OTHER PERTINENT INFORMATION:**

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1. Approval or denial of the application is a discretionary action by the Commission. Each time the Commission approves or rejects a use of sovereign land, it exercises legislatively delegated authority and responsibility as trustee of the State's Public Trust lands as authorized by law. If the Commission denies the application, the Applicant may be required to remove the improvements and restore the lease premises to their original condition. The lessee has no right to a new lease or to renewal of any previous lease.
2. This action is consistent with the "Leading Climate Activism" and "Meeting Evolving Public Trust Needs" Strategic Focus Areas of the Commission's 2021-2025 Strategic Plan.
3. Staff recommends that the Commission find that this activity is exempt from the requirements of the California Environmental Quality Act (CEQA) as a categorically exempt project. The project is exempt under Class 1, Existing Facilities; California Code of Regulations, title 2, section 2905, subdivision (a)(2).

Authority: Public Resources Code section 21084 and California Code of Regulations, title 14, section 15061 and California Code of Regulations, title 2, section 2905.

## **RECOMMENDED ACTION:**

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It is recommended that the Commission:

### **CEQA FINDING:**

Find that the activity is exempt from the requirements of CEQA pursuant to California Code of Regulations, title 14, section 15061 as a categorically exempt project, Class 1, Existing Facilities; California Code of Regulations, title 2, section 2905, subdivision (a)(2).

### **PUBLIC TRUST AND STATE'S BEST INTERESTS:**

1. Find that the existing and, for a limited period, use of the existing boat dock and gangway are consistent with the common law Public Trust Doctrine.
2. Find that the existing and, for a limited period, continuing use of the existing riprap bankline, two planter areas with rock retaining walls and electrical appurtenances, two concrete stairways with rock walls, concrete patio area, and sundeck do not substantially interfere with the trust.
3. Find that issuing the proposed lease is in the best interests of the State.

### **AUTHORIZATION:**

Authorize issuance of a General Lease – Recreational and Protective Structure Use to the Applicant beginning April 23, 2024, for a term of 10 years, for the use of an existing boat dock, gangway, two planter areas with rock retaining walls and electrical appurtenances, two concrete stairways with rock walls, concrete patio area, sundeck, and riprap bankline; annual rent in the amount of \$1,341, with an annual Consumer Price Index adjustment; and liability insurance in amount no less than \$1,000,000 per occurrence.