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Via Email

Oregon Parks and Recreation Commission
Lisa Sumption, Director
725 Summer St. NE, Suite C
Salem, OR 97301

Re: Bandon State Natural Area and Bandon Biota Breach of Contract and Destruction of Public Property

Dear Members of the Commission and Director Sumption,

In May and June of 2014, Bandon Biota, through their agent Bandon Well and Pump, entered, without notice to the Oregon Department of Parks and Recreation (Parks Department) and Commission, Bandon State Natural Area, which resulted in significant destruction of public property and sensitive parklands. Bandon State Natural Area, including the 280 acres proposed for exchange to Bandon Biota, is currently within public ownership and managed by the Parks Department. Bandon Biota has no current ownership interest in Bandon State Natural Area.¹

Specifically, Bandon Biota entered Bandon State Natural Area with heavy equipment, and cut three loop roads – one large and two smaller – through the forested parkland, clearing trees, and destroying high-value, sensitive wildlife habitat (see attached survey map showing road locations (Exhibit A), and attached map from the OPRD 2013 Vegetation Assessment of the exchange parcel in BSNA (Exhibit B)). Adding insult to injury, Bandon Biota then sank two geological bore holes into Bandon State Natural Area. One bore hole is 234 feet deep and the

¹ While Bandon Biota may have initially intended to close the exchange agreement in June 2015, Bandon Biota requested that the deadline be extended to December 31, 2016. Section 7 of the Exchange Agreement unequivocally provides that “[p]ossession of the real property exchanged under this Agreement will pass to the other party upon Closing.” As such, Bandon Biota has no current ownership interest in the Bandon State Natural Area, and the destruction that occurred on this valued state park was, therefore, destruction of public property.

other is 169 feet deep.² According to records from the Oregon Water Resources Department, the bore holes were placed on land owned by Michael Keiser/Bandon Dunes, a clear misrepresentation by Bandon Well and Pump, which filed the required reports on the bore holes. Again, the bore holes, illegal roads, and timber cutting occurred on publicly owned land and a valued state park. Not until a Parks Department Ranger discovered the destruction in August 2015 did the Parks Department or Commission even become aware of the destruction, which indicates a disturbing lack of transparency on the part of Bandon Biota.³

In communications between the Parks Department and Bandon Biota, Bandon Biota alleges that the bulldozed road, cut trees, bore holes, and other destruction occurred pursuant to Section 7 of the Exchange Agreement between the Parks Department and Bandon Biota. Section 7 provides, in full:

7. Possession. Possession of the real property exchanged under this Agreement will pass to the other party [i.e., Bandon Biota] upon Closing. Notwithstanding, pursuant to this Agreement, Biota, at its expense, may conduct non-intrusive testings on the Bandon Parcel in connection with its project, including without limitation golf course layout, environmental testings, soil suitability testings, water well testings, and wildlife habitat testings, necessary for land use and other regulatory permitting as required by the county, state, and federal governments. Biota shall indemnify, defend and hold OPRD harmless from and against any and all losses from Biota's inspections and testings, unless and to the extent OPRD's gross negligence or intentional acts contributed to the losses, claims, damages, or liabilities.

Specifically, Bandon Biota alleged that its actions were necessary to “gaining county, state, and federal approval for the project.” To the contrary, these actions were unnecessary and likely create an impediment to gaining county, state, and federal approval for the project” because it represents a breach of the section 7 of the agreement between Bandon Biota and the Commission, as well as a breach of the public’s trust. Bandon Biota has not demonstrated how its actions were “necessary for land use and other regulatory permitting as required by the county, state, and federal governments.” In other words, Bandon Biota has not pointed to a

² A third hole, an irrigation well, was also dug, but appears to be located just outside Bandon State Natural Area.

³ This lack of transparency is further underscored from notes prepared by the Parks Department from a meeting with Bandon Biota and Parks Department. The following questions and concerns were posed to the Parks Department by representatives of Bandon Biota: “Has issue with the way information is being made public. Are notes from this meeting info going to be public?” To the Parks Department’s credit, its representatives appropriately responded with the following: “We’re public officials. This isn’t privileged information. The entire exchange has to be done transparently, which means we respond to document requests and post a full record of each step on the department website. These notes will go there, too.”

single criterion under county, state, or federal law that its heavy-handed actions were done to satisfy.

Bandon Biota also alleges that “[t]he words ‘non-intrusive testings’ were not meant to mean Bandon Biota could not do the testings set forth in the same sentence, but to remind State Parks and Bandon Biota that the testing should occur in a reasonable fashion without undue disturbance of the terrain.” Even if it were assumed that Bandon Biota’s reading were correct, which it is not, Bandon Biota has not demonstrated that its testings were done in a “reasonable fashion.” As indicated by the attached letter from Mr. Gordon Lyford, a registered agricultural engineer and certified water rights examiner, the actions taken by Bandon Biota were not only unnecessary but were far in excess of what was needed to acquire the information that was ultimately obtained. *See Exhibit C.*

In other words, Bandon Biota’s actions were unreasonable. It has also been argued that the phrase “without limitation” nullifies the “non-intrusive” language. There is simply no support for such a reading, and, even if there were, an equally plausible interpretation would be that the “non-intrusive” language negates the “without limitation” phrase. Moreover, the “without limitation” phrase clearly modifies the latter part of the sentence related to the various subjects of testing e.g., “golf course layout, environmental testings, soil suitability testings, water well testings, and wildlife habitat testings.” More importantly, the phrase “without limitation” is still subject to the requirement that the testing must be done pursuant to some local, state, or federal requirement. As noted below, Bandon Biota has admitted that it was not done for such purposes.

Finally, and in obvious contradiction to the statements made in its communications with the Commission, legal counsel for Bandon Biota stated in an Oregonian article dated August 11, 2015 (attached, Exhibit D) that the destructive actions were not done pursuant to some unidentified governmental requirement; rather, the destructive activities were “to make sure the project is going to work for us.” Exhibit D. In other words, legal counsel for Bandon Biota concedes that it destroyed public property “to make sure the project is going to work for us,” not a governmental approval. Without question, legal counsel for Bandon Biota admits that the Exchange Agreement was breached. When one party repudiates or commits a substantial breach of contract, the other party is justified in rescinding the contract and demanding restitution. *Bollenback v. Continental Casualty Co.*, 243 Or 498, 506, 414 P2d 802 (1996); *Mohr v. Lear*, 239 Or 41, 48-49, 395 P2d 117 (1964). While the party seeking rescission bears the burden of proving the substantiality of the breach, *Pickard v. Ore. Senior Citizens, Inc.*, 238 Or 359, 363, 395 P2d 168 (1964), the destruction that occurred and Bandon Biota’s admission would easily satisfy this burden.

ORCA is disappointed that the Commission thus far remains committed to the Exchange Agreement when Bandon Biota has breached its obligations under the Exchange Agreement and breached the public’s trust through unnecessary destruction of a state park. ORCA also

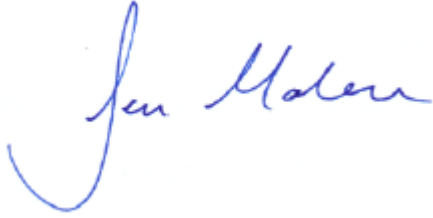
questions the Commission's statement that the "proposal remains strong" given what has occurred. It has not escaped ORCA's attention that the Commission and the Parks Department hold "a public trust to protect Oregon's park system," OAR 736-100-0020, and the mission of the Parks Department "is to provide and protect outstanding natural, scenic, cultural, historic and recreational sites for the enjoyment and education of present and future generations," OAR 736-100-0000. ORCA does not believe that the Commission can continue with this exchange and credibly uphold its trust and mission in light of what has occurred. Furthermore, it remains to be seen whether the destructive actions have compromised or harmed legally protected species, and if such species were indeed harmed, it would be unconscionable for the Commission to continue with the exchange. Given that the destruction took place in the areas of the exchange parcel with high level of habitat values, it is certainly possible and perhaps likely that legally protected species were harmed. The forthcoming natural and cultural resources reports will detail the destruction's effects on these park values.

Given that Bandon Biota's destructive actions were admittedly done for its own purposes and not pursuant to any permitted use under section 7 of the Exchange Agreement, Bandon Biota destroyed public property at a state park, plain and simple. "Violations that disturb or damage park resources are Class A violations," 736-010-0022(2), and "[e]ach occurrence of a violation of a state park rule shall be considered a separate offense," 736-010-0022(5). Furthermore "[v]iolations of state park rules are punishable, upon conviction, by a fine as provided in ORS chapter 153" 736-010-0022(6). For the Commission to retain its credibility to hold and protect state parks and their resources in trust for the public, the Commission must acknowledge and impose the necessary fines against Bandon Biota pursuant to ORS chapter 153.

In conclusion, Bandon Biota has not demonstrated that their actions were necessary to satisfy any legal requirement (whether that be a county, state, or federal requirement), has not demonstrated that their actions were reasonable in terms of accepted practices, took actions that were in the highest degree intrusive, not to mention cavalierly irresponsible, and has admitted that their actions were done for purposes unrelated to Section 7 or any other provision of the Exchange Agreement. Bandon Biota has clearly violated the terms of the Exchange Agreement, and lost the trust of the people of the State of Oregon.

In light of these actions, ORCA respectfully requests that the Commission deem Bandon Biota's actions a breach of its obligations under the Exchange Agreement, and discharge both the Commission and Bandon Biota of any further performances or obligations pursuant to the Exchange Agreement. Furthermore, ORCA encourages the Commission to pursue damages against Bandon Biota arising from the breach and destruction of public property, and require full restoration of the damage they created, including but not limited to removal of the 234 ft. bore hole, which to the best of ORCA's knowledge, still remains onsite. The 169-ft bore hole was capped, sealed and abandoned by Bandon Biota in late August 2015, according to WRD records.

Sincerely,



Sean T. Malone
Counsel for ORCA

cc:

client
Gov. Kate Brown, c/o Natural Resources Policy office
BLM District office

Enclosures:

Exhibit A, Parks Department Survey re Bandon Biota Actions
Exhibit B, Bandon State Natural Area Resource Values
Exhibit C, Letter from Gordon Lyford
Exhibit D, Oregonian Article, "Golf developer causes stir with unpermitted construction on state park land," August 11, 2015