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6 IN THE UNITED STATES DISTRICT COURT  
7  
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
9

10 UNITED STATES OF AMERICA,

11 Plaintiff,

No. C 14-01781 WHA

12 v.

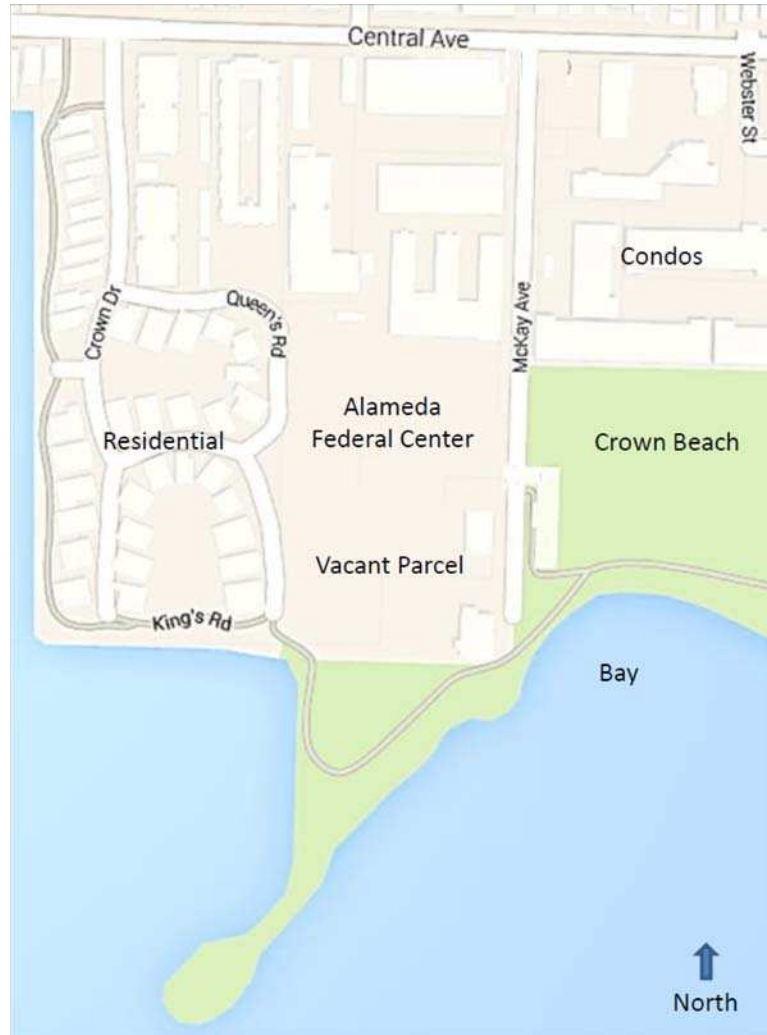
13 1.41 ACRES OF LAND, more or less, situated in  
14 the City of Alameda, Alameda County, State of  
15 California, and THE STATE OF CALIFORNIA,  
16 acting by and through its Department of Parks and  
Recreation, and the EAST BAY REGIONAL  
PARK DISTRICT,

17 Defendants.  
18 \_\_\_\_\_/

**ORDER RE MOTION TO  
STRIKE AFFIRMATIVE  
DEFENSES**

19 **STATEMENT**

20 In this condemnation action, the United States, acting on behalf of the General Services  
21 Administration, seeks to condemn a portion of McKay Avenue in Alameda County. The map  
22 below shows McKay Avenue, which extends from Central Avenue to Crown Memorial State  
23 Beach. East of McKay Avenue is the Alameda Federal Center and a vacant parcel of federal  
24 land. West of McKay Avenue are condominiums and Crown Beach.  
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**MAP OF CONDEMNED AND SURROUNDING AREA**

As a practical matter, this dispute is one of preserving public open-space values versus maximizing the proceeds of the sale of the vacant federal parcel through private development. The United States had sought to sell the vacant federal parcel for private development, and defendants seek to preserve the open-space near Crown Beach. At issue are certain access rights that the United States seeks to possess.

In 1961, the United States granted McKay Avenue to the State of California, reserving access and utility easements across McKay Avenue for “as long as may be required to serve Government-owned property.”

In 2011, the United States began publicly auctioning the vacant parcel. A private developer submitted the winning bid with a sale price of \$3.075 million. Defendant East Bay

1 Regional Park District (“East Bay”) offered \$1.5 million. The City of Alameda then re-zoned  
2 the property for open-use only.

3 In April 2014, the United States commenced this condemnation action, filed a declaration  
4 of taking, and deposited ten dollars with the Clerk of the Court (Dkt. Nos. 1, 5, 11, 13).  
5 Defendants California Department of Parks and Recreation (“State Parks”) and East Bay filed  
6 answers.

7 The United States then filed the instant motion to strike affirmative defenses. Fact  
8 discovery will close in May 2015 and trial will begin October 2015. This order follows full  
9 briefing and oral argument.

### 10 ANALYSIS

11 The United States seeks to strike defendants’ affirmative defenses, leaving only the issue  
12 of just compensation. This is a pleading motion without the benefit of discovery. The United  
13 States seeks an order holding as a matter of law that the taking is for a congressionally-  
14 authorized public purpose, namely, whether the taking is authorized by statute and whether it  
15 qualifies as a “public use” under the Fifth Amendment. *United States v. 14.02 Acres of Land*,  
16 547 F.3d 943, 949–50 (9th Cir. 2008). For the reasons stated herein, the United States’ motion  
17 to strike defendants’ affirmative defenses is **DENIED**.

#### 18 1. STATUTORY AUTHORITY.

19 It is undisputed that the United States’ complaint and declaration of taking failed to cite  
20 a disposal-of-property statute such as 40 U.S.C. 543, 545. The declaration and complaint only  
21 cite 40 U.S.C. 581(c), which prescribes the GSA’s general authority (including condemnation),  
22 40 U.S.C. 3114, which sets the requirements for a declaration of taking, and an appropriations  
23 act. On the record presented, it would appear that at least some of the condemned land is to be  
24 taken solely for the benefit of the vacant lot, given that the United States already has an easement  
25 to service the vacant lot for so long as it is owned by the United States. Therefore, the  
26 affirmative defense will not be stricken, though it will need to be proven up at summary  
27 judgment and/or trial.  
28

1           The United States responds that it did not need to cite a disposal statute because it  
2 sought to condemn the land for the “continuing operations” of the Alameda Federal Center.  
3 This argument is belied by the easement it already retains and the circumstances around the now  
4 defunct sale to the private developer. The only real reason the United States seeks to obtain title  
5 to McKay Avenue in fee simple is to secure easements for a prospective private development  
6 of the vacant federal parcel. This falls into the category of disposal of surplus lands and the  
7 government should have cited such authority in its declaration and complaint.

8           The United States’ reliance on *United States v. 1.33 Acres*, 9 F.3d 70, 71 (9th Cir. 1993)  
9 is misplaced. There, unlike here, the United States relied upon a disposal statute and the GSA’s  
10 general condemnation power. The disposal statute cited was found to be broad enough to  
11 authorize the condemnation. Here, no disposal statute was cited in the declaration of taking.

## 12           **2. PUBLIC USE.**

13           On the other hand, this order sides with the United States on the next issue of “public  
14 use.” Defendants contend that there is no “public use” for the proposed taking and that the  
15 proffered “public purposes” are pre-textual. *Kelo v. City of New London, Connecticut*, 545 U.S.  
16 469, 477–78 (2005). Specifically, defendants allege that the United States condemned the land  
17 in order to secure rights to the McKay Avenue utility and access easements so as to effect a more  
18 profitable sale of the vacant parcel.

19           In *1.33 Acres*, our court of appeals upheld a condemnation action undertaken to secure  
20 an easement necessary to dispose of federal property. 9 F.3d at 72–74. As discussed *supra*, that  
21 decision relied primarily on a disposal statute. Furthermore, in *Southern Pacific Land Co. v.*  
22 *United States*, 367 F.2d 161, 163 (9th Cir. 1966), the United States condemned mineral rights  
23 underlying a parcel taken for the construction of a military facility in order to increase the value  
24 of the condemned land in the event of its future sale. The court stated that “[a]dvantageous  
25 liquidation of a Government’s investment is a legitimate consideration in determining the estate  
26 to be taken.” *Ibid.* Taken together, these decisions support the proposition that the United States  
27 may condemn property pursuant to a disposal statute in order to secure access by the buyer to the  
28

1 disposed property and in doing so may also consider the condemnation's effect on the value  
2 of the disposal property.

3 The problem is that the United States neglected to cite the disposal statute and thus  
4 this dictum so far does it no good. As the record actually stands, the United States relies solely  
5 on condemnation to support "continuing operations of the federal building." In light of the  
6 easement already owned by the United States for exactly that purpose, the supposed rationale for  
7 condemnation would appear to be a sham – or so it is alleged – and at this stage, that defensive  
8 allegation will not be stricken.

9 **3. COASTAL ZONE MANAGEMENT ACT.**

10 State Parks' ninth affirmative defense invoked the Coastal Zone Management Act,  
11 16 U.S.C. 1452. The United States moved to strike this defense and State Parks stated that it  
12 "does not contest the motion to strike its defense based on the Coastal Zone Management Act"  
13 (Opp. 13). Accordingly, the motion to strike State Parks' ninth affirmative defense is **GRANTED**.

14 **CONCLUSION**

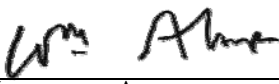
15 For the reasons stated herein, State Parks' ninth affirmative defense is hereby **STRICKEN**.  
16 The United States' motion to strike defendants' other affirmative defenses is hereby **DENIED**.  
17 The requests for judicial notice, to the extent not relied upon herein, are **DENIED AS MOOT**.

18 Whether or not an amendment to the declaration can be made is a procedural issue not  
19 decided by this order.

20 As stated at oral argument, these issues should be set forth in a motion for summary  
21 judgment. Accordingly, the United States shall file a motion for summary judgment by  
22 **FEBRUARY 16, 2015**, to be noticed on a 35-day track. This, of course, does not preclude  
23 defendants from moving for summary judgment at some earlier point.

24  
25 **IT IS SO ORDERED.**

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27 Dated: November 10, 2014.

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WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE