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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SLPR, LLC et al.,

Plaintiffs and Appellants,

v.

STATE LANDS COMMISSION et al.,

Defendants and Respondents.

D059913

(Super. Ct. No. GIC860766)

APPEAL from a judgment of the Superior Court of San Diego County, Timothy B. Taylor, Judge. Reversed and remanded with directions.

Plaintiffs SLPR, LLC (SLPR), Ann Goodfellow, trustee of the survivor's trust of the Goodfellow Family Trust (Goodfellow), and Jerry M. Cannon and Michael S. Morris, trustees of the Sewall Family Trust (Sewall) (together Plaintiffs) appeal a summary judgment entered in favor of defendants the San Diego Unified Port District (Port) and the State of California (the State) (together Defendants) in their action against Defendants arising out of damage to their bayside properties in the City of Coronado (City) allegedly

caused by dredging of San Diego Bay (Bay). In 1998 and 2002, the United States Navy (Navy) dredged an area of Bay within the Naval Air Station North Island Turning Basin (Turning Basin). From 2004 to 2005, the United States Army Corps of Engineers (Army) dredged the central navigation channel (Channel) of Bay. On appeal, Plaintiffs contend the trial court erred by granting Defendants' motions for summary judgment because: (1) there are triable issues of material fact that preclude summary adjudication of their causes of action against each of Defendants for quiet title, inverse condemnation, nuisance, and removal of lateral support; and (2) the Navy and Army are not necessary and indispensable parties to their action.

FACTUAL AND PROCEDURAL BACKGROUND

The State owns, in public trust, the submerged land in Bay where the Turning Basin and Channel are located. Port holds, in public trust, all right, title, and interest to those tidelands and submerged lands in Bay located, according to Plaintiffs' allegations, between the mean high tide line (MHTL) along the City shoreline and the pierhead line. Each of Plaintiffs owns real property on First Street in City along the Bay shoreline.

Quiet Title. In 1923, the Legislature granted to City, in public trust, the tidelands and submerged lands, whether filled or unfilled, between the MHTL and pierhead line from Glorietta Bay to the Spanish Bight, which includes the area adjacent to Plaintiffs' properties. In 1930, City filed an action to quiet title against J.D. and A.B. Spreckels Investment Company (Spreckels), owner of real property along City's Bay shoreline and Plaintiffs' predecessor-in-interest, and other defendants to determine the location of the MHTL boundary between private uplands and City's public tidelands. In 1931, the trial

court entered a judgment (Spreckels judgment), ostensibly determining the location of that boundary. City subsequently recorded a Miscellaneous Map No. 121 (Map 121), depicting the MHTL boundary location determined by the Spreckels judgment. In 1949, a record of survey of those individual lots now owned by Plaintiffs depicted their bayside boundaries as a black line labeled "Mean High Tide Line of [Bay] according to [Map 121]."

In 1962, the Legislature created the Port as a special district for the purpose of maintaining, operating, and developing the tidelands and submerged lands granted to Port and held in trust for the people of the State. In 1966, City, as required by the Legislature, conveyed to Port all of its right, title, and interest in and to the tidelands and submerged lands in Bay granted to it in trust by the State.

Dredging Projects. In 1998 and 2002, Navy, authorized by the United States Congress, dredged the Turning Basin to allow additional aircraft carriers to be homeported at Naval Air Station North Island (NASNI). Navy proposed, planned, and implemented those two dredging operations.

In or about 1995, Port determined dredging the Channel to permit deeper-draft ships to access its Tenth Avenue Marine Terminal (Terminal) would advance its mission to increase commerce in Bay. At the time, Port was planning a \$15 million improvement project for the Terminal. Because the United States government was planning a separate project to dredge the approach and entrance channels to Bay, Port hired an engineering firm to prepare a report on the feasibility of dredging the Channel. In August 1995, Port contacted the federal government and requested that it participate in the Channel

dredging project and pay for a majority of the project's costs. Port also lobbied Congress for appropriations for the Channel dredging project. As a result, the federal government conducted a reconnaissance study that determined the dredging project would further the federal interest in reducing shipping costs.

In November 1997, Port and Army entered into a feasibility study agreement. Port and Army authored a 1,000-page feasibility study, analyzing all aspects of the Channel dredging project, including the proposed dredging depth, its footprint, dredging methodology, options for disposal of dredged sediment, and possible environmental and other impacts. Port participated in project planning meetings and public education meetings and paid 50 percent of the feasibility phase costs. Port also paid for and supervised sediment testing and utility relocations.

In September 2004, Port entered into a project cooperation agreement (PCA) with Army for implementation of the Channel dredging project. Pursuant to the PCA, Port appointed members to, and one of the two managers who co-chaired, the project coordination team that supervised the design, engineering, plans, specifications, and other implementation issues. Also pursuant to the PCA, Port paid 35 percent of the implementation phase costs of the Channel dredging project, provided the necessary lands, easements and rights of way, and agreed to hold the federal government harmless from damages caused by the construction, operation, or maintenance of the project. During the period between March 8, 1993, and April 21, 2005, Port hosted and/or attended about 60 meetings with Army and/or other third parties to design and implement

the project. The implementation phase of the Channel dredging project began in September 2004 and ended in February 2005.

The State and Federal Lawsuits. In February 2006, SLPR filed a complaint in the San Diego County Superior Court (Case No. GIC 860766-1), alleging inverse condemnation and removal-of-lateral-support causes of action against Port. Port demurred, arguing Army was an indispensable party. After the trial court sustained Port's demurrer with leave for SLPR to amend, SLPR filed a first amended complaint adding Army as a defendant. In June 2006, Army removed the action to federal court.

In December 2007, a second amended complaint (SAC) was filed in federal court, adding Sewall, Goodfellow and others as plaintiffs. The SAC alleged nuisance, inverse condemnation, and removal-of-lateral-support causes of action against only Port and various Administrative Procedure Act causes of action against Army and/or Navy.

In March 2008, Plaintiffs filed a separate complaint in the San Diego County Superior Court (Case No. 37-2008-00079175-CU-OR-CTL), alleging a quiet title cause of action against Port and the State and alleging nuisance, inverse condemnation, and removal-of-lateral-support causes of action against the State.

In October 2009, the federal court granted Plaintiffs' motion to remand back to the state court their causes of action against Port and the State. Thereafter, the state trial court (i.e., San Diego County Superior Court) apparently consolidated Case

No. 37-2008-00079175-CU-OR-CTL with Case No. GIC 860766-1,¹ then denied Defendants' motion for judgment on the pleadings.

In September 2010, Port and the State each filed a motion for summary judgment or, in the alternative, summary adjudication. They supported their motions with memoranda of points and authorities, separate statements of undisputed material facts, lodgments of exhibits, declarations, and requests for judicial notice. Plaintiffs opposed Defendants' motions, filing memoranda of points and authorities in opposition and supporting separate statements of undisputed and disputed material facts, lodgments of exhibits, declarations, and requests for judicial notice. Port and the State each filed replies to Plaintiffs' opposition papers.

Plaintiffs filed a motion for summary adjudication of their quiet title and removal-of-lateral-support causes of action.² They supported their motion with a memorandum of points and authorities, a separate statement of undisputed material facts, a lodgment of exhibits, declarations, and a request for judicial notice. Port and the State filed memoranda and other papers opposing Plaintiffs' motion. Plaintiffs replied to those opposition papers.

¹ The record on appeal does not appear to contain a copy of the trial court's consolidation order. However, because the parties represent that the trial court consolidated the two cases and the judgment in this case reflects consolidation, we presume for purposes of this appeal that the court did consolidate them.

² Sewall, however, apparently did not join in the motion for summary adjudication of the quiet title cause of action.

In April 2011, the trial court issued an amended 31-page written order, granting Defendants' motions for summary judgment and denying Plaintiffs' motion for summary adjudication. On April 7, the court entered judgment for Defendants. Plaintiffs timely filed a notice of appeal.³

DISCUSSION

I

Summary Judgment Standard of Review

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained." (*Guz v. Bechtel*

³ On September 27, 2011, Plaintiffs filed a request for judicial notice of certain documents. They requested we take judicial notice of those federal court documents contained in volume 21 of the appellants' appendix (tabs 74-85). They also requested we take judicial notice of those documents attached to their requests for judicial notice filed in the trial court in support of their motion for summary adjudication (tabs 25 & 33), in opposition to Port's motion for summary judgment (tabs 36 & 39), and in opposition to the State's motion for summary judgment (tabs 43 & 45). We grant judicial notice of all documents for which judicial notice was requested below in the trial court except Exhibit 40 (under tab 36), which consists of an Army e-mail attaching a draft of a 2005 reconnaissance study and therefore is not an official act of Army that can be judicially noticed under Evidence Code section 452, subdivision (c). Regarding the federal court documents at tabs 74 through 85, we grant judicial notice of those documents (i.e., tabs 74-78) apparently judicially noticed below by the trial court (or at least for which judicial notice was requested below), and deny judicial notice of those documents (i.e., tabs 79-85) not before the trial court at the time it decided Defendants' motions for summary judgment. (Evid. Code, § 452, subds. (c), (d).) In reviewing a summary judgment, we examine only those documents before the trial court when it considered the motion for summary judgment. (*Seo v. All-Makes Overhead Doors* (2002) 97 Cal.App.4th 1193, 1201-1202.) Plaintiffs do not persuade us that we should nevertheless take judicial notice of those later federal court documents because they purportedly would make some of the issues in this appeal moot.

National, Inc. (2000) 24 Cal.4th 317, 334; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).

Aguilar clarified the standards that apply to summary judgment motions under Code of Civil Procedure section 437c.⁴ (*Aguilar, supra*, 25 Cal.4th at pp. 843-857.) Generally, if all the papers submitted by the parties show there is no triable issue of material fact and the "moving party is entitled to a judgment as a matter of law" (§ 437c, subd. (c)), the court must grant the motion for summary judgment. (*Aguilar*, at p. 843.)

Section 437c, subdivision (p)(2), states:

"A defendant . . . has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto."

Aguilar made the following observations:

⁴ All statutory references are to the Code of Civil Procedure unless otherwise specified.

"First, and generally, from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. . . . There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. . . .

"Second, and generally, the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question. . . .

"Third, and generally, how the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on *which* would bear *what* burden of proof at trial. . . . [I]f a defendant moves for summary judgment against . . . a plaintiff [who would bear the burden of proof by a preponderance of the evidence at trial], [the defendant] must present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not--otherwise, *he* would not be entitled to judgment *as a matter of law*, but would have to present *his* evidence to a trier of fact." (*Aguilar, supra*, 25 Cal.4th at pp. 850-851, fns. & citations omitted.)

Aguilar stated:

"To speak broadly, all of the foregoing discussion of summary judgment law in this state, like that of its federal counterpart, may be reduced to, and justified by, a single proposition: *If a party moving for summary judgment in any action . . . would prevail at trial without submission of any issue of material fact to a trier of fact for determination, then he should prevail on summary judgment.* In such a case, . . . the 'court should grant' the motion 'and avoid a . . . trial' rendered 'useless' by nonsuit or directed verdict or similar device." (*Aguilar, supra*, 25 Cal.4th at p. 855, italics added.)

"[E]ven though the court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact, it must nevertheless determine what any evidence or inference *could show or imply to a reasonable trier of fact*. . . . In so doing, it does not decide on any finding of its own, but simply decides what finding such a trier of fact could make for itself." (*Aguilar, supra*, 25 Cal.4th at p. 856.) Further, "if the court determines that all of the evidence presented by the plaintiff, and all of the inferences drawn therefrom, show and imply [the ultimate fact] *only as likely as [not] or even less likely*, it must then grant the defendants' motion for summary judgment, even apart from any evidence presented by the defendants or any inferences drawn therefrom, because a reasonable trier of fact could not find for the plaintiff. Under such circumstances, the [factual] issue is not triable—that is, it may not be submitted to a trier of fact for determination in favor of either the plaintiff or the defendants, but must be taken from the trier of fact and resolved by the court itself in the defendants' favor and against the plaintiff." (*Id.* at p. 857, fn. omitted.)

"On appeal, we exercise 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.' [Citation.] 'The appellate court must examine only papers before the trial court when it considered the motion, and not documents filed later. [Citation.] Moreover, we construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the

motion in favor of the party opposing it.' " (*Seo v. All-Makes Overhead Doors, supra*, 97 Cal.App.4th at pp. 1201-1202.)

II

Quiet Title Cause of Action

Plaintiffs contend the trial court erred by concluding there are no triable issues of material fact, and that Defendants are entitled to summary adjudication as a matter of law, on their quiet title cause of action.⁵ Plaintiffs assert the Spreckels judgment is, at a minimum, ambiguous and there are triable issues of fact regarding whether the Spreckels court intended to fix in perpetuity the bayside boundaries of Plaintiffs' properties or whether it intended only to locate the current position of the MHTL at that time and retain the ambulatory MHTL as the legal boundary of their properties.

A

In moving for summary judgment, Defendants argued below that the 1931 Spreckels judgment was unambiguous in its fixing the bayside boundary lines of Plaintiffs' properties. Defendants further argued that Map 121 was recorded to show the location of the boundary lines fixed by the Spreckels judgment and that all conveyances since 1931 involving Plaintiffs' properties have unambiguously incorporated Map 121's description of their bayside boundary lines. In support of their motions, Defendants

⁵ Based on the fact that Sewall did not join in Plaintiffs' motion for summary adjudication of their quiet title cause of action, we presume Sewall likewise does not join in Plaintiffs' challenge to the trial court's ruling that Defendants are entitled to summary adjudication of their quiet title cause of action.

submitted separate statements of undisputed material facts stating that in 1923 the Legislature granted to City all Bay tidelands and submerged lands on City's bayward side, including the tidelands adjacent to Plaintiffs' properties. As an exhibit to both separate statements, Defendants attached a copy of Chapter 49 of the Statutes of 1923, which reads in pertinent part:

"SECTION 1. There is hereby granted and conveyed to [City] all the right, title and interests of the State of California, held by said state by virtue of its sovereignty, in and to all the tide lands and submerged lands (whether filled or unfilled), within the present boundaries of said city and situated upon the Coronado side of [Bay], lying between the line of mean high tide and the pier head line in [Bay], as the same has been or may hereafter be established by the federal government, and between the prolongation of the easterly boundary line of [City] into Glorietta bay, a portion of [Bay], and the prolongation of the westerly boundary line of [City] into Spanish bight, a portion of [Bay]; to be forever held by [City] in trust for the uses and purposes and upon the express conditions following : [¶] (a) . . . [City] shall not at any time grant, convey, give or alien said lands or any part thereof to any individual, firm or corporation for any purpose whatsoever; *provided*, that [City] may grant franchises thereon for wharves and other public uses and purposes, and may lease said lands or any part thereof for a period not exceeding [25] years for purposes consistent with the trust upon which said lands are held by the State . . . and with the requirements of commerce or navigation of said harbor"

Plaintiffs did not dispute that particular assertion of fact.

Defendants' separate statements also asserted the 1931 Spreckels judgment fixed the boundary between City's public tidelands and private property. As an exhibit to their statements, they attached a copy of the Spreckels judgment, titled "JUDGMENT QUIETING TITLE," which states in pertinent part:

"The above entitled cause came on regularly for trial . . . upon the amended complaint of [City] and the respective answers thereto of

the defendants [Spreckels and other named defendants]. . . . And the Court having heard the testimony and the statements of counsel for the parties and being of opinion and finding that at all times prior to the date of this judgment the location of the mean high tide line of [Bay] on the [City] side of [Bay], was uncertain and unknown to the parties to this action, and being now sufficiently advised and informed in the premises for the purposes hereof, it is now hereby ORDERED, ADJUDGED, AND DECREED by the Court as follows:

"First: At the time of the commencement of the above entitled action [City] was, it ever since has been, and it now is the owner, as Trustee for and on behalf of [City] and the inhabitants thereof, of the following described property situated in [Bay], which is more particularly described as follows: All the tidelands and submerged lands, whether filled or unfilled, within the boundaries of [City] as the said boundaries exist at the date of this judgment, and situated upon the [City] side of [Bay], and lying between the line of mean high tide and the pierhead line in [Bay], as the said pierhead line has been or may hereafter be established by the Federal Government, and between the prolongation of the easterly boundary of [City] into Glorietta Bay (a portion of [Bay]) and the prolongation of the westerly boundary line of [City] into Spanish Bight (a portion of [Bay]).

"Second: The said mean high tide line above mentioned, and which constitutes the boundary line between the upland and the aforesaid tidelands and submerged lands constituting a part of [Bay] adjoining and bordering upon the said uplands, is located and situated at, along and upon a line described as follows, to-wit:

"Beginning at Station 0, said Station being a point on the mean high tide line of [Bay] at its intersection with the Easterly city limits line of [City], said point being marked by an 8" x 8" concrete monument marked CCXII [and then setting forth a lengthy surveyor's geodetic description of angles and distances representing about 110 lines that run from numbered "station" to numbered "station" beginning with "Station 0" and terminating at "Station 110"], . . . [¶] . . . Station No. 110 being a point on the mean high tide line of Spanish Bight a portion of [Bay], at the intersection of said mean high tide line with the Westerly Boundary of [City].

"Third: At the time of the commencement of the above entitled action [Spreckels] was, continuously since February 5, 1921, had been, and it now is the owner of and in the possession and enjoyment of an estate and interest in real property, to-wit: an estate for years in and to all and singular the lands and premises, whether tidelands or submerged lands and whether filled or unfilled, situate in Glorietta Bay in [Bay] and lying below the mean high tide line of [Bay] in the said Glorietta Bay and between [two points identified by marked concrete monuments] and containing not more than forty (40) acres of the said tidelands and/or submerged lands; that the aforesaid estate of [Spreckels] in and to the lands and premises aforesaid is based upon and exists by virtue of and is for the term and terms, period and periods, and pursuant to the covenants, conditions, and agreement of lease thereof, from the Board of Harbor Commissioners for [Bay] to [Spreckels], dated February 8, 1921; that the said lease is in words and figures as follows, to-wit: [¶] [quoting the 1921 lease between Spreckels and the Board of State Harbor Commissioners for Bay]. [¶] . . . [¶]

"Fourth: [Statement that Spreckels has rights of way in the tidelands and submerged lands in Glorietta Bay for construction, maintenance, and operation of underground pipelines and conduits to and/or from Tent City and/or the Hotel del Coronado.]"

In opposing Defendants' motion, Plaintiffs did not dispute the language of the 1931 Spreckels judgment, but asserted the parties to that action had agreed to the location of the MHTL boundary and therefore the Spreckels judgment did not adjudicate that boundary location. In March 1932, City recorded Map 121, depicting the MHTL boundary location ostensibly determined by the Spreckels judgment.

In 1947, the Legislature passed a statute "to redescribe and fix the boundaries of the tidelands and the submerged lands granted and conveyed to [City] by Chapter 49 of the Statutes of 1923 and the tidelands and submerged lands conveyed to the United States of America pursuant to Chapter 293 of the Statutes of 1931, which lands are located in [Bay]" (Stats. 1947, ch. 1563, § 1, pp. 3211-3212.) On recordation of executed

conveyances to the United States and the State of certain lands described in section 2 and 3 of that statute, the Legislature declared:

"[T]here is hereby granted and conveyed to [City], pursuant to Chapter 49 of the Statutes of 1923 and subject to the provisions thereof, all of the right, title, and interest of the State . . . held by [the] State by virtue of its sovereignty, in and to all the tidelands and submerged lands (whether filled or unfilled) situated in Spanish Bight, in [Bay], and in Glorietta Bay, and more particularly described as follows: [¶] Beginning at the intersection of the ordinary high water mark of Glorietta Bay, an arm of [Bay], with the southeasterly boundary of [City]; which intersection is marked with a concrete monument inscribed 'CCXII'; and running thence from said monument along the said ordinary high water mark of Glorietta Bay, the ordinary high water mark of [Bay], and the ordinary high water mark of Spanish Bight following the courses and distances delineated and tabulated on a map entitled 'Map Showing Location of Mean High Tide Line or Ordinary High Water Mark, Within Corporate Limits of [City],' dated October, 1931, and filed at the request of [City] on March 11, 1932, designated [Map 121], to a six inch by six inch concrete monument with brass disc inscribed 'City of Coronado--Mean High Tide Traverse Station 110' set at the intersection of the ordinary high water mark in Spanish Bight with the west boundary of [City]" (Stats. 1947, ch. 1563, § 4, pp. 3212-3213.)

In 1949, a record of survey of those individual lots now owned by Plaintiffs depicted their bayside boundaries as a black line labeled "Mean High Tide Line of [Bay] according to [Map 121]." In 1962, the Legislature established Port and required City to convey "all its right, title and interest in and to the tidelands and submerged lands . . . , including any such lands which have been granted in trust to [City] by the State in [Bay]. Thereafter the title to such lands shall reside in [Port], and [Port] shall hold such lands in trust for the uses and purposes and upon the conditions which are described in this act." (Harb. & Nav. Code App., App. 1, §§ 4, 5, 14.) In 1966, City, as required by the

Legislature, conveyed to Port all of its right, title, and interest in and to the tidelands and submerged lands in Bay granted to it in trust by the State.

Defendants' separate statement also asserts it is undisputed that Plaintiffs' deeds, as attached to their complaint, describe and fix the bayside boundaries of their properties as the "Mean High Tide Line of [Bay], as shown on [Map 121]." ⁶ In opposing Defendants' motions, Plaintiffs disputed that assertion and, instead, asserted "Plaintiffs' deeds are patently and latently ambiguous. . . . Extrinsic evidence is necessary to determine the location of Plaintiffs' bayward boundaries." ⁷

In opposing Defendants' motions for summary adjudication of the quiet title cause of action, Plaintiffs asserted as undisputed fact that "[a]lthough the *Spreckels* amended complaint was nominally entitled 'Complaint to Quiet Title,' the *Spreckels* parties agreed as to the location of the MHTL, and the court never adjudicated its location." They also asserted as undisputed fact that "[t]he *Spreckels* judgment merely recited the location of the MHTL that had been included in the amended complaint." Plaintiffs also disputed Defendants' assertion that it was undisputed Map 121 and the Legislature in 1947 fixed the tideland boundaries. Plaintiffs asserted the Map 121 line is a meander line and the MHTL remained the boundary between tidelands and adjacent private lands.

⁶ For example, SLPR's 2001 deed describes the real property conveyed by referring to a 1949 deed to City and specifically uses the following language: "thence at right angles, North 26[degrees]24'05" East, 100.40 feet to an intersection with the Mean High Tide Line of [Bay], as shown on [Map 121]."

⁷ However, Sewall admitted the Map 121 line is the boundary of her bayside boundary.

In granting Defendants' motion for summary adjudication of Plaintiffs' quiet title cause of action, the trial court acknowledged the general rule that the boundary line between public tidelands and contiguous private uplands is the MHTL. Furthermore, the court noted the MHTL is not constant, but "changes over time with the level of the sea and the erosion or build-up of the shore." However, the court concluded the Spreckels judgment departed from that general rule because artificial influences affected the shoreline and therefore it fixed the boundaries of Plaintiffs' properties at the last natural location of the MHTL. The court further concluded Map 121 was a survey of those fixed, adjudicated boundary lines and Plaintiffs' deeds unambiguously described their bayside boundary lines using that Map 121 line. It further concluded Plaintiffs were barred by collateral estoppel from challenging the Spreckels judgment.

B

"Pursuant to the California Constitution, statutes, and decisional law, the state owns all tidelands along the California coast in trust for the public. (Cal. Const., art. X, § 3; *State of Cal. ex rel. State Lands Com. v. Superior Court* (1995) 11 Cal.4th 50, 63 (*State Lands*)). Those tidelands extend from the low-water mark to the ordinary high-water mark. (Civ. Code, § 670; [citation].) Therefore, the seaward boundary of land bordering coastal tidelands is the ordinary high-water mark, also referred to as the mean high tide line. (Civ. Code, § 830; [citation].) [¶] The mean high tide line is 'the line of high water as determined by the course of the tides.' (*Borax Consolidated v. City of Los Angeles* (1935) 296 U.S. 10, 22 [80 L.Ed. 9, 17, 56 S.Ct. 23, 29].) Two variables affect the location of the mean high tide line. Those variables are (1) the height of the mean

high tide and (2) the erosion or buildup of the shore. [Citation.] [¶] . . . [¶] As the mean high tide rises or the shore erodes, the mean high tide line moves landward. As the mean high tide falls or the shore builds up, the mean high tide line moves seaward. Therefore, the mean high tide line may change over time, affecting the seaward boundary of property along the coast." (*Bollay v. Office of Administrative Law* (2011) 193 Cal.App.4th 103, 107-108.)

The California Constitution provides: "All tidelands within two miles of any incorporated city . . . and fronting on the water of any harbor, estuary, bay, or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations" (Cal. Const., art. X, § 3.) Civil Code section 670, enacted in 1872, reflects that constitutional principle, stating: "The State is the owner of all land below tide water, and below ordinary high-water mark, bordering upon tide water within the State" In 1872, the Legislature also enacted a statute adopting the general rule for defining the boundary between tidelands and uplands, providing: "Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tide water, takes to ordinary high-water mark" (Civ. Code, § 830.)

"[A]s the land along a body of water gradually builds up or erodes, the ordinary high water mark necessarily moves, and thus the mark or [MHTL], i.e., the legal boundary, also moves." (*Lechuza Villas West v. California Coastal Com.* (1997) 60 Cal.App.4th 218, 235 (*Lechuza*)). The California Supreme Court long ago rejected the proposition that the ordinary high water mark, or MHTL, is a fixed line, stating: "The

proposition [that a boundary marked by the MHTL remains fixed at the location of the MHTL as it was situated on some particular past date] is contrary to the great weight of authority. . . . The [common] law of alluvion is . . . stated by Blackstone: 'And as to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make *terra firma*, or by dereliction, as when the sea shrinks below the usual water marks; in these cases the law is held to be that if the gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimus non curat lex*; and besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss.' " (*Strand Improvement Co. v. Long Beach* (1916) 173 Cal. 765, 771.) That court later pronounced that it was "unquestioned law" that "a boundary marked by a water line is a shifting boundary, going landward with erosion and waterward with accretion." (*City of Oakland v. Buteau* (1919) 180 Cal. 83, 87; cf. Civ. Code, § 1014 [providing as to riparian lands: "Where, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank."].)

Based on the above constitutional, statutory, and case law underpinnings, there is a long-established general rule "that a line shown on a map which runs along the edge of the ocean [or other body of water] is a meander line, used to ascertain the quantity of land subject to sale and to show the sinuosities of the shore, and that the *high tide line* [or

MHTL], not the meander line, *is the true legal boundary.*" (*Lechuza, supra*, 60 Cal.App.4th at p. 240, italics added.)

However, there is an exception to that general rule in cases of artificial accretions resulting from artificial causes. The California Supreme Court stated: "As between the state and private upland owners, land along tidelands and navigable rivers that accretes by artificial means, such as local dredging and construction of wing dams and levees, remains in state ownership, and does not go to the upland owner. . . . We . . . should narrowly construe what is artificial under the California rule. Accretion is artificial if directly caused by human activities in the immediate vicinity of the accreted land. But accretion is not artificial merely because human activities far away and, in the case of hydraulic mining, long ago contributed to it." (*State Lands, supra*, 11 Cal.4th at p. 56.) That court discussed the development of California's artificial accretion rule, which had its origin in 1866. (*Id.* at p. 60.) Of particular note, the Supreme Court discussed the case of *Carpenter v. City of Santa Monica* (1944) 63 Cal.App.2d 772, in which that court described the artificial accretions rule, stating:

" [A]ccretions formed gradually and imperceptibly, but caused entirely by artificial means--that is, by the works of man, such as wharves, groins, piers, etc., and by the dumping of material into the ocean--belong to the state, or its grantee, and do not belong to the upland owner. . . . If accretions along an entire bay caused by the construction of a pier or wharf were held to belong to the upland owners as against the state, or its grantee, it would mean, in some cases, that the power of the municipality to improve its harbor would be cut off unless the accreted areas were condemned. It would mean that every time the state or its grantee determined to build a wharf or pier, or to grant a permit or franchise for such construction, it would be granting away a material portion of the tidelands along the entire bay that might later be covered by artificial accretions. Such a rule

would mean that the state or its grantee could thus grant into private ownership tidelands which it holds under an irrevocable trust. Such rule would permit the state or its grantees thus indirectly to convey away these tidelands, held in trust, when it cannot do so directly. Such a rule would be violative of fundamental concepts of public policy.' " (*State Lands, supra*, 11 Cal.4th at pp. 69-70, quoting *Carpenter v. City of Santa Monica, supra*, 63 Cal.App.2d at p. 794.)

The California Supreme Court stated "California's artificial accretion rule was premised on, and is consistent with, the public trust doctrine and the inalienability of trust lands. Our cases, and Civil Code section 1014, have allowed *natural* accretions to go to private parties. The state has no control over nature; allowing private parties to gain by natural accretion does no harm to the public trust doctrine. But to allow accretion caused by artificial means to deprive the state of trust lands would effectively alienate what may not be alienated. '[A] state, as administrator of the trust in tidelands on behalf of the public, does not have the power to abdicate its role as trustee in favor of private parties.' [Citation.] . . . We thus reaffirm the continuing validity of California's artificial accretion rule." (*State Lands, supra*, 11 Cal.4th at p. 73, fn. omitted.) However, to minimize problems of proof regarding the direct cause of accretion, the court limited the artificial accretion rule to human activities in the immediate vicinity of the accreted area, stating:

"We thus hold, consistent with our prior cases, that accretion is artificial if directly caused by human activities, such as the dredging, wing dams or levees cited in this case, that occurred in the immediate vicinity of the accreted land. Accretion is not artificial merely because human activities far away contributed to it. The dividing line between what is and is not in the immediate vicinity will have to be decided on a case-by-case basis, keeping in mind that the artificial activity must have been the *direct* cause of the accretion before it can be deemed artificial. The larger the structure or the scope of human activity such as dredging or dumping, the farther away it can be and still be a direct cause of the accretion, although it

must always be in the general location of the accreted property to come within the artificial accretion rule." (*State Lands, supra*, 11 Cal.4th at pp. 79-80.)

Within the framework of these general principles, we address whether there are any triable issues of material fact that preclude summary adjudication of Plaintiffs' quiet title cause of action.

C

Based on our independent review of the record, construing Plaintiffs' evidence liberally and Defendants' evidence strictly, we conclude, as a matter of law, that Defendants did not carry their initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact on Plaintiffs' quiet title cause of action. (*Aguilar, supra*, 25 Cal.4th at pp. 850-851; *Seo v. All-Makes Overhead Doors, supra*, 97 Cal.App.4th at pp. 1201-1202.) We conclude Defendants did not show there is no triable issue of fact regarding the meaning and effect of the Spreckels judgment. Contrary to Defendants' assertion and the trial court's implied finding, we conclude Defendants did not carry their burden to present evidence that would have *required* a reasonable trier of fact to find, by a preponderance of the evidence, the Spreckels judgment *fixed* Plaintiffs' bayside boundaries per the survey description later recorded as Map 121. Contrary to Defendants' assertion, the Spreckels judgment is *not* unambiguous on its face. Without resort to extrinsic evidence, that judgment on its face is reasonably susceptible to two meanings. First, the judgment could reasonably be construed as *fixing* the boundary between City's tidelands and contiguous private lands (owned by Spreckels at that time). Second, in contrast, the judgment could reasonably be construed as merely

locating the position of the current MHTL at that time while retaining the *MHTL* as the legal boundary between City's tidelands and contiguous private lands. We conclude, as Plaintiffs assert, the Spreckels judgment is ambiguous on its face.

Furthermore, none of the extrinsic evidence presented by Defendants in support of their motions shows there is no triable issue of fact regarding the meaning and effect of the Spreckels judgment and they are entitled, as a matter of law, to summary adjudication of the quiet title cause of action. Port did not cite any extrinsic evidence in its separate statement of undisputed facts that would aid a trier of fact in the construction of the Spreckels judgment. Rather, Port merely relied on the purported unambiguous language of that judgment as adjudicating and fixing the boundaries in question. The State, however, cited and attached a certified copy of City's 1930 complaint to quiet title in the Spreckels action. That complaint alleged City was the owner of certain tidelands and submerged lands, describing that property consistently with the Legislature's 1923 grant to it of those lands in public trust, as quoted above. That description began with the following language: "All of the Tidelands and Submerged lands, whether filled or unfilled, within the present boundaries of [City], and situated upon the [City] side of [Bay] . . . lying between *the line of mean high tide* [i.e., MHTL] and the pierhead line in said Bay as the same had been or may hereafter be established by the Federal Government and between the prolongation of the Easterly boundary line of [City] into Glorietta Bay, a portion of [Bay], and the prolongation of the Westerly boundary line of [City] into Spanish Bight, a portion of [Bay]." (Italics added.)

The complaint then further describes that boundary as follows: "The said mean high tide line herein described, and *which said mean high tide line constitutes the boundary line between the uplands and said tidelands* and submerged lands constituting a part of Bay adjoining and bordering upon said uplands, is more particularly described as follows, to-wit: [setting forth the lengthy surveyor's geodetic description of angles and distances representing about 110 lines that run from numbered 'station' to numbered 'station' beginning with 'Station 0' and terminating at 'Station 110' that the Spreckels judgment appeared to subsequently incorporate]." (Italics added.) The complaint then alleged, without further specification, that Spreckels and the other defendants claimed and asserted interests in and to those tidelands and submerged lands, which claims and assertions were adverse to City, and City alleged those defendants and their claims and assertions were without right. City's complaint therefore sought a court decree quieting City's title to said tidelands and submerged lands. Based on our independent review of that evidence, we conclude it would *not* require a reasonable trier of fact to find, by a preponderance of the evidence, that, as the State asserts, the Spreckels judgment *fixed* Plaintiffs' bayside boundaries (per the survey description later recorded as Map 121) in place of the prior MHTL boundary.

There is nothing in Defendants' separate statements of undisputed material facts that show, or even assert, there was a specific dispute in 1930 between City and Spreckels and the other defendants in the Spreckels action regarding the legal boundary between City's tidelands and the defendants' private uplands. Although the State cited Spreckels's answer to City's complaint (Exhibit K) in its separate statement, it did so in

support of its asserted undisputed fact that "Plaintiffs' common predecessor-in-interest, [Spreckels], was a party to [the Spreckels action]." The State did not cite Exhibit K for any other purpose. Even were we to review the entirety of Exhibit K in search of support for the State's argument that the Spreckels judgment fixed Plaintiffs' tidelands boundary, there is insufficient evidence, when construed favorably to Plaintiffs, to support the State's argument.

In its answer to City's complaint, Spreckels denied City's allegation that City owned the tidelands property described in its complaint and denied that the mean high tide line, or City's description thereof, constituted the boundary line between its uplands and the tidelands of Bay. Its answer alleged that "on July 21, 1930, and at all times prior to that date, the *line of mean high tide* in [Bay] on the [City] side of [Bay] was, and is now, a line described as follows, to wit: [setting forth a lengthy surveyor's geodetic description of angles and distances from unnumbered 'station' to unnumbered 'station']." (Italics added.) Spreckels requested a judgment declaring it to be the owner of all real property "situated landward from the line described in . . . this answer as the mean high tide line in [Bay]." Therefore, contrary to the State's apparent assertion, the Spreckels complaint and the answer thereto do not show the Spreckels judgment was unambiguous in fixing in perpetuity Plaintiffs' bayside boundaries at a certain location rather than retaining the ambulatory MHTL as the boundary and merely describing its location at that particular point in time.

Defendants also assert the Spreckels judgment unambiguously fixed in perpetuity Plaintiffs' bayside boundaries because prior to 1930 there had been fill and other artificial

improvements that changed the location of the MHTL, thereby allowing a judgment fixing their bayside boundaries at the last natural location of the MHTL. However, in support of their motions for summary adjudication of the quiet title cause of action, Defendants did not present any evidence showing the location, extent or nature of such purported fill or other artificial changes to the shoreline involved in the Spreckels action. Rather, they cite language from the Spreckels judgment, which stated the location of the MHTL was "*uncertain and unknown* to the parties to this action" and then declaring City's property as including "[a]ll the tidelands and submerged lands, *whether filled or unfilled*, . . . [remainder of description as quoted above]." (Italics added.) However, that language does not show there is no triable issue of fact regarding the proper construction of the Spreckels judgment. The fact that the location of the MHTL in 1931 was "uncertain and unknown" to the parties could merely reflect either their uncertainty or disagreement regarding the true location of the MHTL at that point in time.

Our review of the Spreckels judgment, as reflected on Map 121, shows it set forth a very detailed surveyor's geodetic description of the location of the MHTL along City's entire circuitous Bay shoreline. The Spreckels judgment identified about 110 angles and distances in setting forth a three-page, comprehensive description of the location of the MHTL. Therefore, the Spreckels judgment is reasonably susceptible to an interpretation that the parties may have been unsure as to the exact location of the MHTL at that point in time and sought a quiet title judgment not to fix that boundary in perpetuity, but instead possibly to resolve current disputes (e.g., regarding the 1921 lease referenced

therein) and/or to determine the current location of the MHTL boundary to allow them to plan future development or other actions.

Likewise, the Spreckels judgment's use of "filled or unfilled" in describing City's tidelands and submerged lands does not necessarily show the judgment intended to fix in perpetuity City's tidelands boundary because of artificial improvements. Rather, the Spreckels judgment is reasonably susceptible to the interpretation that the trial court, for purposes of consistency, merely intended to repeat the language used by the Legislature when in 1923 it granted the tidelands and submerged lands to City. As discussed above, the Legislature in 1923 granted, in public trust, to City "all the tide lands and submerged lands (*whether filled or unfilled*), within the present boundaries of" City and situated on City's side of Bay, "lying between the line of mean high tide and the pier head line in [Bay]." (Italics added.) There is nothing in the papers supporting Defendants' motions for summary adjudication that shows the trial court expressly found the MHTL of City's tidelands and submerged lands had been artificially changed because of artificial fill or other improvements. Accordingly, we cannot conclude the Spreckels judgment is unambiguous in fixing in perpetuity City's and Spreckels's (as Plaintiffs' predecessor-in-interest) tidelands boundary, rather than retaining the ambulatory MHTL as that boundary.

To the extent Defendants may rely on their papers submitted in support of their opposition to *Plaintiffs'* motion for summary adjudication of the quiet title cause of action, we nevertheless conclude those papers still do not show the Spreckels judgment is unambiguous as they assert. In opposition to Plaintiffs' motion, the State submitted the

declaration of Steve Lehman, one of its surveyor employees, who stated, based on his review of certain documents, "artificial changes, including dredging, filling and bulkheading, particularly in the Glorietta Bay area and the Block 173 area, had rendered the legal boundary between public tidelands and private uplands uncertain and additional artificial changes were anticipated." Lehman referred to the 1921 lease of Glorietta Bay tidelands pursuant to which Spreckels agreed to spend at least \$125,000 in making " 'substantial bulkheading and filling in from dredging operations' " on those tidelands. However, even had that bulkheading and fill caused artificial changes to the MHTL of Glorietta Bay, it is not clear from the Spreckels judgment that the trial court in that case intended to fix in perpetuity the MHTL in the Glorietta Bay area, much less in the greater Bay shoreline area outside Glorietta Bay. The judgment did not refer to or identify any particular fill or other artificial improvements that may have artificially changed the natural MHTL in the Glorietta Bay or other Bay shoreline areas.⁸ Assuming arguendo

⁸ In opposition to Plaintiffs' motion for summary adjudication, the State also lodged certain exhibits, including letters written by City's hired surveyor dated before and during the Spreckels action. Were those letters presented to a trier of fact, they would tend to support a finding that there were certain areas of City's tidelands that had been filled and City desired a judgment determining the location of its Bay shoreline boundary. In a letter dated May 3, 1930, the surveyor informed the Spreckels judge that "I have been getting into shape a list of holes which were dug by us, necessary to show where the line of mean high tide was before any artificial filling was done, together with the complete logs of each, and a map showing their location." In a letter dated May 16, 1930, to City, the surveyor stated: "We have completed the field survey of the mean high tide line along Bay. [¶] This survey is based upon the elevation of mean high tide as published by the United States Coast and Geodetic Survey for the City of San Diego and transferred therefrom by instrumental levels to [City]. Where no artificial filling has been done[,] the line was surveyed as it now exists. Where, however, it was apparent that there has been some artificial filling, excavations were made at strategic points, the line of demarkation

the court in the Spreckels case may have intended to fix those particular shoreline areas where the MHTL was artificially changed by fill or other artificial improvements (i.e., Glorietta Bay and Block 173), neither of those areas include the shoreline properties now owned by Plaintiffs. Plaintiffs' properties are located along the western portion of First Street near North Island, a substantial distance from both Glorietta Bay and Block 173. Defendants do not cite any evidence showing that prior to 1931 there was any fill or other artificial improvements to the Bay shoreline of Plaintiffs' properties that would have supported any fixing in perpetuity of their Bay boundaries at the last natural location of the MHTL.⁹ Therefore, as a general proposition, it is questionable whether the Spreckels judgment, in the absence of any such artificial fill or improvements, could have validly

[sic] between the original and the filled material was observed and recorded, and the line of mean high tide as it existed prior to the artificial filling was determined. . . ."

However, these documents do not show there is no triable issue of material fact and Defendants are entitled, as a matter of law, to summary adjudication of Plaintiffs' quiet title cause of action.

⁹ In fact, in opposing Plaintiffs' motion for summary adjudication, Port's separate statement of undisputed facts asserts: "The First Street shoreline was not directly affected by artificial influences in [Bay] until the [1940's] when areas adjacent to . . . NASNI were first dredged and the quay wall on the south end of NASNI was constructed and the Spanish Bight was filled." In support of that asserted fact, Port cited the declaration of Michael Pallamary, Plaintiffs' surveyor expert, submitted in support of Plaintiffs' motion, who stated that "[i]n 1935, 1940 and 1961, the area in front of [NASNI] was filled, including the Spanish Bight, a large area separating North Island from South Island. The dredging operations, performed between 1942 and 1946, resulted in 29 million cubic yards of sand being deposited along five miles of the Silver Strand." To the extent that declaration supported Port's assertion, the fact there apparently were not any fill or other artificial improvements in the immediate vicinity of Plaintiffs' properties tends to support Plaintiffs', not Defendants', proposed interpretation of the Spreckels judgment (i.e., that the 1931 judgment did *not* fix in perpetuity Plaintiffs' bayside boundaries based on artificial fill or other improvements that had artificially changed the natural MHTL).

fixed or otherwise altered the shoreline boundaries of Plaintiffs' properties in violation of the constitutional, statutory, and common law general rule, discussed above, that the ordinary high water mark, or ambulatory MHTL, constitutes the shoreline boundary between public tidelands and private uplands.¹⁰ (Cal. Const., art. X, § 3; Civ. Code, §§ 670, 830; *Bollay v. Office of Administrative Law*, *supra*, 193 Cal.App.4th at pp. 107-108; *Lechuza*, *supra*, 60 Cal.App.4th at pp. 235, 240; *Strand Improvement Co. v. Long Beach*, *supra*, 173 Cal. at p. 771; *City of Oakland v. Buteau*, *supra*, 180 Cal. at p. 87.)

We conclude Defendants did not carry their burdens of production and persuasion to show there is no triable issue of fact regarding the meaning and effect of the Spreckels judgment and that they are entitled to summary adjudication of Plaintiffs' quiet title cause of action. Because the meaning and effect of Map 121 and Plaintiffs' deeds (and deeds of their predecessors-in-interest) that incorporate Map 121 as showing the MHTL boundary are dependent on resolution of the disputed factual issue of the meaning and effect of the Spreckels judgment, those documents cannot, at the summary judgment phase of this action, show Defendants are entitled, as a matter of law, to summary adjudication of

¹⁰ To the extent Defendants argue the Spreckels judgment fixed in perpetuity Plaintiffs' bayside boundaries because the parties to the Spreckels action stipulated and agreed to such fixing, they do not present any evidence showing all parties so agreed and, in any event, that such agreement could validly convey tidelands constitutionally and statutorily held by City in the public trust. In particular, the State cites an exhibit submitted by Plaintiffs in support of their motion for summary adjudication, which exhibit is a stipulation between City and The Coronado Water Company dated August 17, 1931. To the extent those parties stipulated to "fix" the line of the ordinary high tide on City's Bay shoreline, it presumably did not, and could not, fix the boundaries of Plaintiffs' properties because Spreckels, and not The Coronado Water Company, was their predecessor-in-interest.

Plaintiffs' quiet title cause of action. Furthermore, until that initial factual determination is made, it is premature to address other issues that are also dependent on that determination, such as the application of res judicata, collateral estoppel, and section 2077's rules for construction of boundary descriptions in deeds. Likewise, because there is a triable issue of fact regarding the meaning and effect of the Spreckels judgment, it is premature to make any determination regarding the public's rights to use the inundated portions, if any, of Sewall's property. The trial court erred in granting summary adjudication in Defendants' favor on Plaintiffs' quiet title cause of action.

III

Inverse Condemnation Cause of Action

Plaintiffs contend the trial court erred by concluding there are no triable issues of material fact regarding their inverse condemnation cause of action and Defendants are, as a matter of law, entitled to summary adjudication on that cause of action. Plaintiffs assert there is a triable issue of fact whether Port substantially participated in the Channel dredging project and whether the State substantially participated in the Channel and/or the Turning Basin dredging projects so they may be held liable in inverse condemnation for any damages those projects caused to Plaintiffs' properties.¹¹

¹¹ Plaintiffs concede Port has no inverse condemnation liability for damages caused to their properties by Navy's dredging of the Turning Basin in 1998 and 2002.

A

The elements of an inverse condemnation cause of action that a plaintiff must prove are: (1) the plaintiff's ownership interest in real property; (2) the defendant's substantial participation in a public project; (3) a taking or damaging of the plaintiff's real property; and (4) causation of damages by the public project. (2 Condemnation Practice in California (Cont.Ed.Bar 3d ed. 2011) § 13.3, p. 814.) "Article I, section 19 of the California Constitution permits private property to be 'taken or damaged for public use only when just compensation . . . has first been paid to, or into court for, the owner.' When there is incidental damage to private property caused by governmental action, but the governmental entity has not reimbursed the owner, a suit in 'inverse condemnation' may be brought to recover monetary damages for any 'special injury,' i.e., one not shared in common by the general public." (*Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 362.) Except in cases involving flood control projects, a general rule of strict liability applies in inverse condemnation cases imposing liability on a public entity for any physical injury to real property proximately or substantially caused by a public improvement or project, regardless of whether that injury was foreseeable or whether the entity's conduct was unreasonable (i.e., negligent).¹² (*Locklin v. City of Lafayette, supra*, 7 Cal.4th at pp. 362, 367; *Souza v. Silver Development Co.* (1985) 164 Cal.App.3d 165, 170; *Holtz v. Superior Court* (1970) 3 Cal.3d 296, 302-303 (*Holtz*).)

¹² Accordingly, we reject Port's assertion that the existence of a legal duty is an element of an inverse condemnation cause of action.

"To state a cause of action for inverse condemnation, the plaintiff must allege the defendant *substantially participated in the planning, approval, construction, or operation of a public project* or improvement which proximately caused injury to plaintiff's property." (*Wildensten v. East Bay Regional Park Dist.* (1991) 231 Cal.App.3d 976, 979-980, italics added.) "So long as the plaintiffs can show substantial participation, it is immaterial 'which sovereign holds title or has the responsibility for operation of the project.'" (*Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722, 761 (*Arreola*)). "In cases where there is no dispute concerning the public character of an improvement, substantial participation does not necessarily mean actively participating in the project . . . , but may include the situation where the public entity has deliberately chosen to do nothing." (*Id.* at p. 762.) In those cases in which the public entity has not actively participated in a public project, inverse condemnation liability may exist if the entity had the ability or power to control or direct the aspect of the public project that allegedly caused the injury to the plaintiff's property. (*Ibid.*; *Frustuck v. City of Fairfax* (1963) 212 Cal.App.2d 345, 362.)

The public project "need not be the sole cause of the injury; a public entity may be liable [in inverse condemnation] even if its project was only one of several 'substantial' concurring causes of the damage." (*Souza v. Silver Development Co., supra*, 164 Cal.App.3d at p. 171; see also *Ullery v. County of Contra Costa* (1988) 202 Cal.App.3d 562, 572.) Likewise, the public entity need not be the only substantial participant in a public project for inverse condemnation liability. (*Akins v. State of California* (1998) 61 Cal.App.4th 1, 48, fn. 41 (*Akins*) [recognizing the possibility of joint liability in inverse

condemnation if two public entities participate jointly in a public project]; cf. *Stoney Creek Orchards v. State of California* (1970) 12 Cal.App.3d 903, 907; *Clement v. State Reclamation Board* (1950) 35 Cal.2d 628, 645 [rejecting state defendants' contention that participation in the project by the federal government relieved them from inverse condemnation liability].)

B

Port's motion. In moving for summary adjudication of Plaintiffs' inverse condemnation cause of action, Port submitted a memorandum of points and authorities, a separate statement of undisputed material facts, a lodgment of exhibits, declarations, and a request for judicial notice. Port argued it could not be held liable in inverse condemnation for the Channel dredging project because it did not own or control the Channel, and Army exclusively controlled the Channel dredging project. Port also argued Plaintiffs did not suffer a compensable injury because incidental wave damage caused by navigation improvements is not compensable. Plaintiffs opposed Port's motion and disputed its legal theories of inverse condemnation and its assertions of undisputed facts.

Port's separate statement of undisputed material facts asserted that the State, and not Port, owns the Channel. It further asserted the Channel dredging work was exclusively within the control of, and implemented by, Army. Port also asserted it entered into the PCA with Army "to provide its [Port's] required share of the costs and obligations for the Channel dredging project" and the PCA's terms were required by federal statute for navigation improvement projects. Port also asserted that neither it nor

Army invaded Plaintiffs' properties and that Plaintiffs asserted the Channel dredging project caused erosion of their shoreline due to increased wave energy and the increased off-shore gradient.

In opposition to Port's motion, Plaintiffs' separate statement of undisputed and disputed material facts disputed Port's assertion that Army exclusively controlled and implemented the Channel dredging work and maintained responsibility and authority over all aspects of the dredging project. Plaintiffs asserted "Port substantially participated in planning, designing and implementing the [Channel] dredging project." They also disputed Port's assertion that it entered into the PCA pursuant to a federal statute requiring it to pay its share of the costs and obligations for the Channel dredging project. They asserted "Port had a choice about whether to enter into the PCA and whether to agree to undertake the responsibilities set forth therein." Plaintiffs also disputed Port's assertion that neither it nor Army actually invaded any portion of their properties, asserting instead that Port undermined their right to lateral support.

Plaintiffs also asserted their own undisputed facts and described those Port actions that allegedly constituted its substantial participation in the Channel dredging project. For brevity, we paraphrase those assertions. Port knew dredging the Channel would permit deeper birth ships to access the Terminal (in the midst of a \$15 million improvement project) and advance its goal of increasing commerce in Bay. In 1995, Port paid an engineering firm \$1.2 million to complete a feasibility study for dredging Bay. That feasibility study considered possible dredging locations, depths and methods, characteristics of dredged sediment, dredged sediment disposal options and costs, and the

project's economic impact. The federal government was already planning a \$175 million project to dredge the approach and entrance channels to Bay. On completion of the feasibility study, Port approached the federal government and requested that it determine whether there was a federal interest in proceeding with the Channel dredging project. The federal government found such a federal interest in the project. Anticipating the federal government would pay the majority of the costs of the Channel dredging project, Port lobbied the federal government to participate in the project.

During the subsequent feasibility phase of the Channel dredging project, Port co-managed the project with Army and had a role in designing all critical aspects of the project. During that phase, Port also planned and executed the main tasks required for the project's implementation, including utility relocations and sediment testing. Furthermore, during the feasibility phase, Port contributed 50 percent of the services and funds required to complete that phase. During the feasibility phase, Port was invited to participate in all three management levels (i.e., the project review boards, the executive committee, and the study management team). Port was entitled to attend project review board meetings, appoint a representative and technical advisor to the executive committee, and appoint representatives to the study management team. Port also had the right to review and approve all tasks undertaken by the federal government. The project management plan provided that the Port would have the opportunity to provide input and shape the scope of the Channel dredging project. If Port's recommendations were not incorporated into the plan for the project, it could have vetoed the entire project by not agreeing to pay for and/or perform services in connection with the project.

During the implementation phase, Port served on the project coordination team and co-managed the project with Army, contributed 35 percent of the costs associated with that phase and provided a staging area at the Terminal for the Channel dredging. Between March 8, 1993, and April 21, 2005, Port hosted and/or attended at least 60 meetings with Army and/or other entities to plan and execute the Channel dredging project. Between 1993 and 2004, Port's governing board passed 16 resolutions authorizing Port to proceed with various aspects of the Channel dredging project. The Channel was dredged by a third-party contractor, Manson Construction Company, from October 25, 2004, through February 19, 2005. During the feasibility and implementation phases, Port knew the bayfront properties along First Street were suffering from moderate-to-severe erosion and that Army had found such erosion was caused by the steep offshore gradient, sediment sinks, and vessel wakes. Pursuant to the PCA, Port agreed to acquire the necessary lands, easements, and rights of way and to hold harmless the federal government. The PCA further provided the federal government would have no ongoing responsibility for the operation and maintenance of the Channel after the dredging project was completed.

In reply, Port disputed some, but not most, of the facts asserted by Plaintiffs. Port stated it was "[u]ndisputed that some of the planning for the [Channel] dredging project occurred at the feasibility stage. However, the Army . . . controlled the design of the federal project." Port asserted its "role was limited by [Army's] control over the project and final decision-making authority over planning, design and implementation." Port further asserted it "did not have the authority to require [Army] to implement erosion

protection measures as part of the [Channel] dredging project." Port also asserted Plaintiffs' properties have not eroded since the Channel dredging project and have, in fact, accreted.

Analysis of Port's motion. Although we doubt Port met its initial burden of producing evidence showing there are no triable issues of material fact and it is entitled to summary adjudication of Plaintiffs' inverse condemnation cause of action, we need not make that determination because, assuming the burden of production shifted to Plaintiffs, Plaintiffs presented ample evidence that would support a finding in their favor by a reasonable trier of fact (i.e., there is a triable issue of material fact). (§ 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at pp. 850-851, 855.)

In Port's motion for summary adjudication of the inverse condemnation cause of action, Port asserted there is no triable issue of fact whether it "substantially participated" in the Channel dredging project under inverse condemnation principles. As discussed above, a public entity may be liable in inverse condemnation if it "*substantially participated in the planning, approval, construction, or operation of a public project or improvement which proximately caused injury to plaintiff's property.*"¹³ (*Wildensten v.*

¹³ We reject Port's assertion that it cannot be held liable in inverse condemnation unless it had the power to make or require changes in the project. To the extent cases use that language (e.g., *Paterno v. State of California* (2003) 113 Cal.App.4th 998, 1030), they generally apply that standard in circumstances in which the public entity has not taken any affirmative action with respect to a public project. That is not what Plaintiffs' evidence shows Port did in this case. Accordingly, we reject Port's attempt to apply the wrong standard for determination of its liability in inverse condemnation. In any event, we note Plaintiffs provided ample evidence to support a finding by a reasonable trier of fact that Port did, in effect, have the power to make or require changes in the Channel

East Bay Regional Park Dist., *supra*, 231 Cal.App.3d at pp. 979-980, italics added.) If such substantial participation by the defendant public entity is shown, it is irrelevant whether another public entity (e.g., Army or the State) also substantially participated in, held title to, or had responsibility for the project.¹⁴ (*Arreola*, *supra*, 99 Cal.App.4th at p. 761; *Akins*, *supra*, 61 Cal.App.4th at p. 48, fn. 41; cf. *Stoney Creek Orchards v. State of California*, *supra*, 12 Cal.App.3d at p. 907; *Clement v. State Reclamation Board*, *supra*, 35 Cal.2d at p. 645.)

Although Port asserts Army had exclusive control of the Channel dredging and therefore it could not have substantially participated in the Channel dredging project, Plaintiffs' evidence submitted in opposition to Port's motion would support a finding by a reasonable trier of fact that Port did, in fact, substantially participate in the planning, approval, construction, or operation of the Channel dredging project. Plaintiffs submitted ample evidence that Port substantially participated in the *planning* of the Channel dredging project. Construing the evidence and all reasonable inferences therefrom favorably to Plaintiffs, a reasonable trier of fact could conclude, based on Plaintiffs' evidence, that Port was one of the driving forces, if not the primary driving force, in actively lobbying for federal government funding for, and other participation in, the

dredging project (e.g., by refusing to enter into the PCA and fulfill its obligations thereunder unless its requested changes to the project were accepted by Army).

¹⁴ Accordingly, we reject Port's unsupported argument that it cannot be liable in inverse condemnation because it did not own the Channel's submerged lands where the dredging was performed.

Channel dredging project. Port also commissioned and paid for the initial feasibility study for the project. After obtaining the federal government's initial involvement, Port contributed 50 percent of the expenses and services for the subsequent feasibility (and planning) phase. Port co-managed the project with Army and was actively involved in designing and planning the project, including utility relocations and sediment testing. Port participated in all three management levels (i.e., the project review boards, the executive committee, and the study management team). Based on that evidence, it could reasonably be found that Port substantially participated in the planning of the Channel dredging project. The fact that the evidence showed Army also substantially participated in the planning of the project, or even was the primary planner with the "final" decision-making authority, does not establish the Port could not, or did not, substantially participate in planning the project. (*Arreola, supra*, 99 Cal.App.4th at p. 761; *Akins, supra*, 61 Cal.App.4th at p. 48, fn. 41.)

Likewise, there is also ample evidence to support a finding that Port substantially participated in the *approval* of the Channel dredging project. A reasonable trier of fact could reasonably find that had Port not entered into the PCA with Army and fulfilled its obligations thereunder, the project would not have proceeded. Although federal law (e.g., 33 U.S.C. §§ 540, 2211) apparently requires a "non-federal" sponsor (e.g., Port) to enter into and fulfill obligations under a PCA for Army to undertake a dredging project, that requirement supports, rather than detracts from, Plaintiffs' assertion that Port substantially participated in the approval of the project. Port does not cite any federal or other statute that *required* it to enter into a PCA or other agreement for the Channel

dredging project. Rather, the PCA was a statutory prerequisite for Army's participation in the project. Accordingly, had Port, or another non-federal sponsor, refused to enter into the PCA, Army presumably could not, and would not, have proceeded with the Channel dredging project. Therefore, by entering into the PCA and taking other actions that allowed the implementation of the dredging phase of the project (e.g., passing 16 resolutions regarding the Channel dredging project), Port in effect approved the Channel dredging project.

Finally, there is also ample evidence to support a finding that Port substantially participated in the *construction* of the Channel dredging project (i.e., the dredging). Port served on the project coordination team and co-managed the project with Army. Port contributed 35 percent of the costs associated with the implementation phase and provided a staging area at the Terminal for the Channel dredging. Pursuant to the PCA, Port agreed to acquire the necessary lands, easements, and rights of way and to hold harmless the federal government.¹⁵ (Cf. *Holzenthal v. Sewerage & Water Bd. of New Orleans* (La.App. 2007) 950 So.2d 55, 66-69 [inverse condemnation case involving similar PCA].) Therefore, a trier of fact could reasonably find Port substantially participated in the construction of the project. We conclude there is a triable issue of fact whether Port *substantially participated* in the Channel dredging project.

¹⁵ *Air Liquide America v. U.S. Army Corps of Eng'rs.* (5th Cir. 2004) 359 F.3d 358, cited by Port, is factually inapposite to this case and does not persuade us to reach a contrary conclusion.

Also in its motion for summary adjudication of the inverse condemnation cause of action, Port asserted there is no triable issue of fact whether, and Plaintiffs could not prove, the Channel dredging project was a substantial cause of damage to Plaintiffs' properties. Port argued Plaintiffs did not suffer any injury compensable under inverse condemnation law. Port argued the federal government's navigational servitude precluded Plaintiffs' inverse condemnation claim. Also, Port argued erosion caused by boat wake, as Plaintiffs alleged, is not compensable under inverse condemnation law. In support of its argument, Port's separate statement of undisputed material facts asserted Plaintiffs did not allege that Port or Army actually invaded their properties. Port also asserted Plaintiffs alleged one of the two primary factors causing erosion was wave energy created by boat and ship traffic, and the other factor was the steep, offshore gradient and deepwater sinks that affected the transport of sediments. In opposing Port's motion, Plaintiffs' separate statement of undisputed and disputed material facts disputed that neither Port nor Army actually invaded their properties, asserting they are entitled to lateral support. Although Plaintiffs did not dispute Port's assertions regarding the two factors they alleged caused erosion to their properties, they rephrased their allegations, asserting "Plaintiffs' erosion is caused by wave wash, the steep offshore gradient and sediment sinks in [Bay]." In reply, Port asserted Plaintiffs' property has not eroded since the Channel dredging project and has, instead, accreted.

We conclude Port did not carry its burden of production to show there is no triable issue regarding whether, and Plaintiffs cannot prove, the Channel dredging project was a substantial cause of damage to Plaintiffs' properties. In moving for summary

adjudication, Port did not appear to argue Plaintiffs could not prove their properties were damaged, but instead argued their theories regarding the cause(s) of that damage (i.e., wave energy from boat and ship traffic and the steep, offshore gradient) are not compensable in inverse condemnation as a matter of law.¹⁶ However, our review of the cases cited by Port in support of that argument shows those cases are inapposite to this case and/or do not support its argument. We conclude the navigational servitude empowering Army (together with Port) to dredge the Channel does not immunize those governmental entities from liability from all damage to upland property regardless of the physical cause. Furthermore, we conclude there are triable issues of fact regarding the true nature of the cause(s) of the alleged damage to Plaintiffs' properties.

Both the State and the federal government have interests in navigable waters located within the State's boundaries. The State holds all navigable waters and the lands beneath them in public trust for the people. (*Colberg, Inc. v. State of California ex rel. Dept. Pub. Wks.* (1967) 67 Cal.2d 408, 416.) The State's power to control, regulate, and utilize navigable waters is absolute, except as limited by the federal government's paramount power over navigable waters pursuant to the Commerce Clause of the United States Constitution. (*Colberg*, at pp. 416, 419.) Just compensation must be paid when

¹⁶ Port first raised its assertion that Plaintiffs did not suffer any actual damage since 2005 (i.e., after the Channel was dredged) in its reply to Plaintiffs' separate statement, asserting their properties had accreted, and not eroded, since that time. Because that factual assertion was made late, we disregard it for purposes of this discussion. In any event, our review of Port's cited evidence in support of that assertion shows there is, at most, a triable issue regarding the existence of erosion or accretion since 2005. Port's evidence does not irrefutably prove Plaintiffs' properties accreted since 2005.

the limits of the government's "navigation[al] servitude" (*id.* at p. 419) are exceeded, i.e., "when permanent physical encroachment upon or invasion of land riparian [or littoral] to the navigable waterway but above the ordinary high-water mark results." (*Id.* at p. 420.) The federal government's navigational servitude is a "dominant servitude" that extends to the navigable waters and bed below the ordinary high-water mark. (*Owen v. U.S.* (Fed.Cir. 1988) 851 F.2d 1404, 1408.) Damage to property located within the bed of navigable waters does not constitute a taking under the United States Constitution if such damage is caused by the proper exercise of the navigational servitude. (*Id.* at pp. 1408-1409.) "[T]he navigational servitude does not provide a blanket exception to the Takings Clause of the Fifth Amendment where improvements to navigation made by the government result in erosion to land located above *or* outside the bed of the stream [or other navigable waters] as delineated by the high-water mark at the time of the construction." (*Id.* at p. 1412.) Furthermore, "it is not the location of the *cause* of the damage that is relevant, but the location and permanence of the *effect* of the government action causing the damage that is the proper focus of the taking analysis." (*Ibid.*) Accordingly, *Owens* reversed judgment on the pleadings for the United States where the plaintiff alleged a compensable "taking" based on government dredging that increased the velocity of a river, causing erosion to the plaintiff's uplands (or "fast lands"). (*Id.* at pp. 1405-1406, 1417-1418.)

In this case, Plaintiffs allege the Channel dredging project caused their properties (i.e., uplands or fast lands) to erode. Based on the above case law, the navigational servitude cannot apply to immunize the federal or other governmental entity from

liability in inverse condemnation for damage caused to Plaintiffs' properties. The cases cited by Port are inapposite and/or do not persuade us to conclude otherwise.

Nevertheless, Port cites other case law that it asserts precludes its liability in inverse condemnation regardless of the geographic limits of the navigational servitude. Port cites *Miramar Co. v. City of Santa Barbara* (1943) 23 Cal.2d 170, in which the City of Santa Barbara constructed a breakwater three miles west of the plaintiff's beach hotel property. (*Id.* at p. 171.) The breakwater had the effect of changing the ocean currents, taking away sand but never depositing any replacement sand at the plaintiff's beach. (*Ibid.*) Seven years later, the plaintiff filed an action against the city for the taking or damaging of its private property for a public purpose. (*Id.* at pp. 171-172.) The trial court concluded the complaint did not allege sufficient facts to constitute a cause of action. (*Id.* at p. 172.) In a plurality opinion, *Miramar* noted littoral land owners do not have any claim against the State (or its grantees in public trust) to the uninterrupted flow of sand carried to his or her land by the ocean currents in their natural state. (*Id.* at p. 173.) "The erosion that changed the face of plaintiff's land was a gradual process in which the continuous ebb and flow of clear water over a period of years denuded plaintiff's land of the sand that had been deposited there in years past by the ebb and flow of sandy water." (*Id.* at p. 176.) *Miramar* concluded: "The withdrawal of the sandy accretions, constituting the damage to plaintiff's land, was an incidental consequence of the state's use of the public domain for a public interest [i.e., right to improve navigation] that was at all times superior to private littoral rights. There has therefore been no taking or damaging of private property for public use within the meaning of article I, section 14,

of the California Constitution." (*Ibid.*) However, the concurring opinion that provided the necessary fourth vote for affirmance was based on the plaintiff's failure to timely file a claim against the city. (*Id.* at p. 180 (conc.opn. of Shenk, J.)) Accordingly, to the extent Port relies on the language or reasoning of the plurality opinion in *Miramar*, that opinion does not provide any binding precedent for Port's arguments in this case. In *Colberg*, the California Supreme Court recognized the limited effect of *Miramar*, stating:

"[T]his court in the *Miramar* case, though divided as to the proper result under the facts there at issue, reached fundamental agreement on the extent to which the state, through the proper exercise of its trust power to deal with navigable waters, may impair without compensation rights appurtenant to property riparian or littoral to such waters. The servitude with which such property is burdened *precludes compensation for impairment or curtailment of all rights not damaged by permanent physical invasion of or encroachment upon fast lands*; when the exercise of the power [i.e., navigation servitude] does cause such physical invasion or encroachment, the servitude is inapplicable and rights damaged as a result are compensable in accordance with article I, section 14, of the state Constitution." (*Colberg, Inc. v. State of California ex rel. Dept. Pub. Wks.*, *supra*, 67 Cal.2d at p. 425, italics added.)

Therefore, pursuant to *Miramar* and *Colberg*, a plaintiff may state a valid inverse condemnation cause of action to the extent it alleges physical encroachment or damage to its uplands, or fast lands, substantially caused by a public project. In this case, Plaintiffs sufficiently alleged that physical damage.¹⁷ Plaintiffs alleged the Channel dredging project was a substantial cause of physical damage to their properties (uplands or fast

¹⁷ We further conclude that because *Miramar* is factually inapposite to this case, it does not support Port's argument that Plaintiffs cannot prove their inverse condemnation cause of action. Plaintiffs in this case do not allege the Channel dredging project deprived them of a littoral right to sandy accretions.

lands). They asserted the Channel dredging project caused erosion of their properties as a result of increased wave energy created by boat and ship traffic *and* the steep, offshore gradient and deepwater sinks created by the dredging that adversely affected the transport of sediments and deprived them of lateral support. To the extent the Channel dredging project was a substantial cause of subsidence or other taking away of lateral support for and damage to Plaintiffs' properties (e.g., through removal of supporting sediment), Plaintiffs have asserted a sufficient cause of action for inverse condemnation. Contrary to Port's assertion, that damage, if sufficiently proven at trial, *is* compensable in inverse condemnation. Therefore, at least one of Plaintiffs' two theories of causation supports a valid cause of action in inverse condemnation. We need not decide, at this stage of the case, whether Plaintiffs' second theory of causation (i.e., increased wave energy or wakes from boat or ship traffic) may also support a valid cause of action.¹⁸

Because Port has not carried its burdens of production and persuasion to show there are no triable issues of material fact and it is entitled to summary adjudication as a matter of law on Plaintiffs' inverse condemnation cause of action, the trial court erred by granting Port's motion for summary adjudication on that cause of action. (*Aguilar, supra*, 25 Cal.4th at pp. 850-851, 855.) We conclude Port has not carried its burden to show that

¹⁸ There does not appear to be any definitive California case law on this question. (Cf. *Kingsport Horizontal Property Regime v. United States* (2000) 46 Fed.Cl. 691 [erosion from increased boat "wave-wash" from dredging and expansion of South Carolina man-made waterway].)

one or more elements of the inverse condemnation cause of action cannot be established or that there is a complete defense to that cause of action. (§ 437c, subd. (p)(2).)

C

The State's motion. In moving for summary adjudication of Plaintiffs' inverse condemnation cause of action, the State submitted a memorandum of points and authorities, a separate statement of undisputed material facts, a lodgment of exhibits, declarations, and a request for judicial notice. The State argued there is no triable issue of fact whether it substantially participated in the Turning Basin and/or Channel dredging projects, and the undisputed facts show it did not substantially participate in those projects. It argued that it merely owned the submerged lands dredged by Navy and Army and had no power to control or require changes to those dredging projects because the federal government had a dominant navigational servitude. In support of its motion, the State's separate statement of undisputed material facts asserted that Plaintiffs did not allege the State proposed, planned, or implemented the dredging operations in the Turning Basin and Channel. The State further asserted it "did not hold any public hearings, did not consider, and did not approve or deny a lease, lease amendment, permit, or any other approval for the dredging operations in the Turning Basin in 1998 and 2002" and in the "Channel in 2004-2005." Finally, the State asserted it "did not plan, fund, supervise, or otherwise participate in any substantial way in the dredging operations in the Turning Basin in 1998 and 2002" and in the "Channel in 2004-2005."

In opposing the State's motion for summary adjudication, Plaintiffs disputed all of the State's asserted facts discussed above. In their separate statement of undisputed and

disputed material facts, Plaintiffs asserted "[t]he federal government sought and obtained consistency determinations for each dredging project. The State had the power to enjoin the dredging if it did not meet the State's requirements." Plaintiffs asserted it was undisputed that:

"The State 'substantially participated' in the 1998 and 2002 dredging projects because it had the power to halt the projects if they did not conform to the State's requirements. The State concurred in the Consistency Determinations for the 1998 and 2002 Turning Basin dredging projects. When the State subsequently disapproved of the Navy's decision to dispose of dredge spoils at an ocean disposal site, rather than use such spoils for beach replenishment, the State obtained a preliminary injunction halting the dredging project. The Navy was only allowed to move forward with the dredging project when it reached an agreement with the State that involved spending \$9.6 million on erosion-mitigation measures."

Regarding the Channel dredging project, Plaintiffs similarly asserted it was undisputed that:

"The State 'substantially participated' in the 2004 dredging project because it had the power to halt the project if they did not conform to the State's requirements. When [Army] and Port originally planned to dispose of dredge spoils at the same ocean disposal site the Navy had used (the most cost-effective, but the least erosion-friendly, alternative), the State refused to approve of the project. When [Army] and Port modified the project so that the dredge spoils would be disposed of nearshore off of Imperial Beach, the State approved of the project."

In their memorandum opposing the State's motion, Plaintiffs argued: "Based upon the State's ultimate decision-making authority on the issue of dredge spoil disposal, there is no reason to conclude that the State could not have exercised similar decision-making authority, if it chose to do so, on the issue of whether erosion mitigation measures should

be implemented in the respective dredging projects. Hence, there is [a triable] issue of material fact as to whether the State 'substantially participated' in the dredging projects."

In reply, the State argued:

"The 'State' for purposes of the consistency determinations was the California Coastal Commission, not [the] State Lands [Commission]. '[T]he California Coastal Commission . . . is the state agency responsible for review of federal agency projects for consistency with the federally approved California Coastal Management Program' [Citation.] Because Plaintiffs have not named the [California] Coastal Commission and have not stated a cause of action under the California Coastal Act [citation] or the Coastal Zone Management Act [citation], the issue of whether the [California] Coastal Commission could have taken some further action with respect to the dredging projects is not before this Court and is irrelevant to whether [the] State Lands [Commission] 'substantially participated' in the dredging projects. [The] State Lands [Commission] notes that Plaintiffs cite nothing in the state or federal coastal act that would require the federal agencies to provide or the [California] Coastal Commission to require erosion control measures to protect private property."

Analysis of the State's motion. Although we doubt the State met its initial burden of producing evidence showing there are no triable issues of material fact and it is entitled to summary adjudication of Plaintiffs' inverse condemnation cause of action, we need not make that determination because, assuming the burden of production shifted to Plaintiffs, Plaintiffs presented evidence that would support a finding in their favor by a reasonable trier of fact (i.e., there is a triable issue of material fact). (§ 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at pp. 850-851, 855.) Plaintiffs presented evidence showing there is a triable issue of fact whether the State "substantially participated" in the Turning Basin and/or Channel dredging projects. All three dredging projects were indisputably

performed on submerged land owned by the State.¹⁹ The State admitted it had advance notice of all three projects. Plaintiffs argued below and now argue on appeal that the State's failure to take action to require erosion mitigation measures to protect City's bayside shoreline (including along their properties) constituted substantial participation in those projects because the State had the power to control or require those changes to the projects. Plaintiffs cite the action taken by the State, through the California Coastal Commission, to intervene and obtain an injunction stopping Navy's dredging until Navy agreed to dispose of the dredged materials along Imperial Beach instead of far away in the Pacific Ocean. Accordingly, Plaintiffs assert the State, through the California Coastal Commission, could have taken similar action and prevented the Turning Basin and Channel dredging projects from proceeding until shoreline erosion mitigation measures were included in those projects. Plaintiffs argue that because the State had that power to control or require changes to the projects, the State substantially participated in them. (*Arreola, supra*, 99 Cal.App.4th at pp. 761-765.)

Based on Plaintiffs' evidence, we conclude a reasonable trier of fact could find the State: (1) actively participated in the projects when it concurred with the federal government's consistency determinations; (2) actively participated in the projects when it demanded and obtained changes to the projects (i.e., by requiring the dredged materials to be deposited along Imperial Beach); and (3) had the power to require changes to the

¹⁹ The State correctly asserts that mere ownership of land on which a public project is completed is generally insufficient, by itself, for inverse condemnation liability. (Cf. *Galli v. State of California* (1979) 98 Cal.App.3d 662.)

projects but failed to do so (i.e., failed to require erosion mitigation measures). Regarding the latter possible finding, a reasonable trier of fact could conclude that because the State, through the California Coastal Commission, could have withheld its concurrence with, or objected to, the federal government's consistency determinations and filed an action to enjoin those projects, the State had the power to require changes to the project (e.g., require inclusion of erosion mitigation measures in the projects). (See, e.g., 16 U.S.C. § 1456(c)(1)(A) & (C); 15 C.F.R. §§ 930.34(a)(1), 930.39(c), 930.41(a); Pub. Res. Code, §§ 30233 ["[t]he . . . dredging of open coastal waters . . . shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects"], 30235 [permitting revetments and seawalls when required to protect existing structures from erosion].) Therefore, there is a triable issue of fact whether the State *substantially participated* in the Turning Basin and Channel dredging projects.²⁰

Although the State asserts it cannot be held liable for inverse condemnation because it is not a party to this action, the record does not support its assertion. Plaintiffs' complaint filed on March 5, 2008, named the State as a defendant (along with Port),

²⁰ The State also argues the federal government's dominant navigational servitude somehow immunizes the State or otherwise protects it from inverse condemnation liability in this case. Based on our discussion above regarding the federal government's dominant navigational servitude and conclusion that it does not protect Port from such liability, we likewise conclude it does not protect the State from inverse condemnation liability.

alleging the State "retains an interest and/or authority in the tidelands of [Bay]"

There is nothing in the record showing any amendment to that complaint was filed that either removed the State as a defendant in this action or otherwise changed the name of the State or its representative nature or capacity as a defendant. On the contrary, throughout the pendency of this action, the State has remained a named defendant in Plaintiffs' action.

Although the State cites a stipulation between it and Plaintiffs that it argues supports a contrary conclusion, we cannot conclude, as a matter of law, that the stipulation had the effect of removing the State as a defendant from this action. On May 2, 2008, the parties filed a document titled, "Stipulation for 15-Day Extension for Defendants to Respond to Complaint." That stipulation stated:

"1. *Defendant State of California is acting by and through the State Lands Commission (State Lands). The parties agree the Complaint need not be amended to so provide and agree that the Complaint names State Lands as the agency, department, commission or board of the State involved in this matter.*

"2. State Lands and the Port shall have one 15-day extension beyond the 30-day time period prescribed for their responses after service of the initial complaint. . . ." (Italics added.)

That stipulation supports our conclusion that Plaintiffs' complaint was never formally amended to remove the State as a defendant or to limit its representative capacity to only that of the State Lands Commission. At most, the stipulation supports a finding that Plaintiffs agreed with the State that it would be acting in this action through the State Lands Commission as the State commission "involved in this matter." The State does not cite, and we are unaware of, any case, statute, or rule that makes such a stipulation the

equivalent of an amendment to a complaint and/or irrevocably binds a party (e.g., Plaintiffs) to that stipulation such that the party loses forever the right to claim the other named party (e.g., the State) is liable as a party to the action. Furthermore, as Plaintiffs assert, if the trial court is persuaded the State obtained their assent to that stipulation through misrepresentation that *only* the State Lands Commission was involved in this matter and no other State agency, department, board, or commission was possibly involved, whether through action or inaction, then that stipulation presumably will not be enforced for equitable reasons. Alternatively, the trial court may grant Plaintiffs leave to amend their complaint and/or that stipulation to add the California Coastal Commission (or any other arm of the State acting on its behalf) as a named defendant. We reject the State's assertion that Plaintiffs cannot state a cause of action against it based on the actions or inactions of the California Coastal Commission on its behalf.

Because the State has not carried its burdens of production and persuasion to show there are no triable issues of material fact and it is entitled to summary adjudication as a matter of law on Plaintiffs' inverse condemnation cause of action, the trial court erred by granting the State's motion for summary adjudication on that cause of action. (*Aguilar, supra*, 25 Cal.4th at pp. 850-851, 855.) We conclude the State has not carried its burden to show one or more elements of the inverse condemnation cause of action cannot be established or that there is a complete defense to that cause of action. (§ 437c, subd. (p)(2).)

IV

Cause of Action for Removal of Lateral Support

Plaintiffs contend the trial court erred by granting Defendants' motions for summary adjudication of their cause of action for removal of lateral support.

A

"At common law every owner of land was entitled to lateral support of that land from every other coterminous owner. This was an absolute right incident to the land itself. The coterminous owner who excavated upon his property, by the exercise of proper care and the application of proper means of support, was compelled to protect adjoining property in its natural state from sliding into the excavation." (*Wharam v. Investment Underwriters* (1943) 58 Cal.App.2d 346, 349.) "The general rule of the right to lateral support is . . . as follows: [¶] '[A] person who withdraws the naturally necessary lateral support of land in another's possession, or support which has been substituted for the naturally necessary support, is liable for a subsidence of such land of the other as was naturally dependent upon the support withdrawn, in the absence of a superseding cause or other reason for relieving him. . . .'" (*Puckett v. Sullivan* (1961) 190 Cal.App.2d 489, 493 (*Puckett*)). The common law rule of lateral support is not confined to coterminous (or adjoining) lands, but rather " 'extends to property separated by intervening parcels owned by other persons.' " (*Id.* at p. 494.) Alternatively stated, the common law rule of lateral support may also apply to impose liability on owners of land not coterminous or adjacent, but instead separated by intervening parcel(s). (*Ibid.*; Rest.2d Torts, § 817, com. g, illus. 6, p. 67.) Under the common law rule, a coterminous land owner is "strictly

liable for damages resulting from the withdrawal of lateral support of land in its natural, unimproved state." (*Holtz, supra*, 3 Cal.3d at p. 301, fn. 3.) Furthermore, the land owner, the excavating contractor, and any other parties who participate in the excavation may be held jointly liable for removal of lateral support. (*Wharam*, at p. 351; *Green v. Berge* (1894) 105 Cal. 52, 57-58.) *Green* stated: "Whoever deprives [a landowner] of this [lateral] support for his land . . . performs an unlawful act. The general rule is that all who unite in such acts are wrongdoers, and are responsible in damages. . . . Having participated in [the excavation], [the contractor] cannot avoid responsibility by pleading that he did the work under a contract." (*Green*, at p. 58.)

If a land owner satisfies certain statutory conditions, the strict liability standard for the common law rule of lateral support is replaced with a negligence standard. (Civ. Code, § 832; *Marin Mun. Water Dist. v. Northwestern Pac. R. R. Co.* (1967) 253 Cal.App.2d 83, 91; *Holtz, supra*, 3 Cal.3d at p. 301, fn. 3; 6 Miller & Starr, Cal. Real Estate (3d ed. 2001) §§ 14:26, 14:27, pp. 71-74.) Under Civil Code section 832, an excavating land owner is relieved "from the absolute duty to provide *lateral* support to the land of a coterminous surface owner, provided he gives notice of the excavation to his neighbor and exercises ordinary care in excavating, both as required by the statute. To this extent, the statute relaxes the common law duty of lateral support." (*Marin Mun. Water Dist.*, at p. 91.) Civil Code section 832 provides:

"Each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for purposes of construction or improvement, under the following conditions:

"1. Any owner of land or his lessee intending to make or to permit an excavation *shall give reasonable notice to the owner or owners of adjoining lands* and of buildings or other structures, stating the depth to which such excavation is intended to be made, and when the excavating will begin.

"2. *In making any excavation, ordinary care and skill shall be used, and reasonable precautions taken to sustain the adjoining land as such*, without regard to any building or other structure which may be thereon, and there shall be no liability for damage done to any such building or other structure by reason of the excavation, except as otherwise provided or allowed by law. [¶] . . . [¶]

"4. *If the excavation is intended to be or is deeper than the standard depth of foundations, which depth is defined to be a depth of nine feet below the adjacent curb level, at the point where the joint property line intersects the curb and if on the land of the coterminous owner there is any building or other structure the wall or foundation of which goes to standard depth or deeper[,] then the owner of the land on which the excavation is being made shall, if given the necessary license to enter on the adjoining land, protect the said adjoining land and any such building or other structure thereon without cost to the owner thereof, from any damage by reason of the excavation, and shall be liable to the owner of such property for any such damage, excepting only for minor settlement cracks in buildings or other structures.*" (Italics added.)

Since the enactment of Civil Code section 832 in 1872, there apparently have not been any published cases interpreting the meaning of "reasonable notice" as used in that statute. (6 Miller & Starr, Cal. Real Estate, *supra*, at § 14:28, p. 77.) However, even if reasonable notice is given, the common law strict liability standard nevertheless applies if the excavation is deeper than nine feet *or* is deeper or performed in a manner different from and more dangerous than that described in the notice. (Civ. Code, § 832; 6 Miller & Starr, Cal. Real Estate, *supra*, at § 14:28, p. 77.)

To the extent a public entity's excavation is part of a public project that damages adjacent private property, that public entity's liability for that damage is generally in inverse condemnation rather than for the common law or statutory duty of lateral support. (*Holtz v. San Francisco Bay Area Rapid Transit Dist.* (1976) 17 Cal.3d 648, 653, citing *Holtz, supra*, 3 Cal.3d 296.)

B

In moving for summary adjudication of Plaintiffs' cause of action for removal of lateral support, Port argued Civil Code section 832 does not apply to submerged lands, Plaintiffs' properties are not coterminous with the Turning Basin or the Channel, and reasonable notice was given to Plaintiffs of the dredging projects. Its separate statement of undisputed material facts, Port asserted its tidelands separate the State's Turning Basin and the Channel from Plaintiffs' properties. Port argued Plaintiffs received reasonable notice of each of the dredging projects through publications in the federal register and local newspapers and through availability of project documents in the public library. In moving for summary adjudication, the State made arguments similar to Port's arguments.

In opposing those motions for summary adjudication, Plaintiffs argued Port was required to give reasonable notice of the Channel dredging on the State's land because that dredging removed lateral support from Port's land, which, in turn, removed lateral support from Plaintiffs' properties. In their separate statement of undisputed and disputed material facts, Plaintiffs did not dispute that Port's tidelands separate the State's Turning Basin and Channel from Plaintiffs' properties, but asserted the tidelands are held in trust by Port, and the State is the beneficial owner of the tidelands. They disputed Port's

assertion that they were given reasonable notice of the dredging projects. Plaintiffs asserted as undisputed facts that:

"The Port admits that it did not provide any of the Plaintiffs with notice of any of the dredging projects, the public notices did not state that the dredging projects would remove lateral support, the only Plaintiff who received notice of any of the dredging projects was Captain Sewall, Sewall only received notice of the 1998 and 2002 Turning Basin dredging projects, and the notice that Captain Sewall received with respect to the 1998 and 2002 Turning Basin dredging projects was inadequate because it explicitly denied that the dredging projects would remove lateral support."

They further asserted: "The dredging projects removed lateral support from the State's land, which, in turn, removed lateral support from the Port's land, which, in turn, removed lateral support from Plaintiffs' land." They also asserted:

"The dredging of the Turning Basin and [the] Channel resulted in the steepening and deepening of the offshore gradients adjacent to Plaintiffs' properties, and the movement of these offshore gradients closer to Plaintiffs' properties [¶] . . . [¶] . . . Through an ongoing process set in motion by the steepening and deepening of these gradients and the movement of these gradients closer to Plaintiffs' properties, sediment that previously provided lateral support to Plaintiffs' properties is now being pulled down these gradients and carried out into . . . Bay."

In reply, Port argued it did not have a Civil Code section 832 duty to provide reasonable notice of the dredging projects because it did not own the lands being dredged. It also argued that reasonable notice did not have to state the dredging would remove lateral support. The State argued it did not have a Civil Code section 832 duty to provide reasonable notice of the dredging projects because it did not excavate or permit its lands to be excavated.

C

We conclude Defendants have not carried their burdens of production and persuasion to show there are no triable issues of material fact on, and they are entitled as a matter of law to summary adjudication of, Plaintiffs' cause of action for removal of lateral support. Plaintiffs' complaints sufficiently alleged that Defendants violated both their common law duty and Civil Code section 832 duty to provide lateral support. Plaintiffs alleged Defendants held in trust title to the tidelands and submerged lands adjacent to their properties and they are entitled to lateral support from that coterminous land. Plaintiffs further alleged the dredging activity on that land deprived their properties of lateral support and damaged their properties. They alleged Defendants did not provide them with reasonable notice under Civil Code section 832. They alleged Port failed to use ordinary care and reasonable precautions during its dredging operations, and the State failed to use ordinary care and reasonable precautions when authorizing those dredging operations.

Contrary to Defendants' assertions, there is nothing in common law or Civil Code section 832 precluding the application of the duty of lateral support to owners of submerged lands.²¹ Defendants do not cite any cases or other authority persuading us

²¹ *Miramar Co. v. City of Santa Barbara, supra*, 23 Cal.2d 170, cited by Defendants, is a factually inapposite inverse condemnation case, as discussed above, and does not address the issue of whether the common law or Civil Code section 832 duty of lateral support applies to an owner of submerged lands.

the duty of lateral support cannot, or should not, apply to owners of submerged lands.²² Accordingly, for purposes of this case, we presume an owner of submerged lands has a duty to provide lateral support.

Furthermore, we reject Defendants' argument that Plaintiffs failed to allege a common law duty of lateral support and merely alleged a Civil Code section 832 duty. Construing the factual allegations in the complaints favorably to Plaintiffs, we conclude the facts alleged by Plaintiffs did, in effect, state a cause of action under the common law duty of lateral support, as well as under Civil Code section 832 (which does not, in our view, create an independent duty of lateral support but rather lowers the common law standard from strict liability to negligence in certain circumstances). Plaintiffs alleged that the dredging of the Turning Basin and the Channel deprived their properties of lateral support and damaged their properties. Therefore, they sufficiently alleged a common law cause of action for removal of lateral support.

²² One need only imagine a simple hypothetical to recognize the questionable validity of Defendants' proposed exception to the duty of lateral support. Assume a land owner has a small pond on his property with a maximum water depth of three feet. One edge of that pond is located within five feet of his neighbor's land. The owner decides to excavate/dredge the pond to increase the maximum depth of the pond to 10 feet. However, because of the increased slope caused by the excavation/dredging and the unstable nature of the local soils, the owner's land subsides into the pond, thereby removing the lateral support for his neighbor's land. As a result, the neighbor's land subsides. There is no logical reason to deprive the neighbor of a cause of action against the excavating owner for removal of lateral support, whether based on common law or Civil Code section 832, simply because that owner excavated a pond instead of dry, or fast, land.

We also reject Defendants' argument that the common law duty of lateral support does not apply to non-coterminous land. However, as discussed above, the duty of lateral support applies to all land that provides lateral support to other land. (*Puckett, supra*, 190 Cal.App.2d at p. 494 [the common law duty of lateral support is not confined to coterminous (or adjoining) lands, but rather " 'extends to property separated by intervening parcels owned by other persons' " (i.e., non-coterminous lands)]; Rest.2d Torts, § 817, com. g, illus. 6, p. 67.) Therefore, to extent the land on which the dredging of the Turning Basin and the Channel is not coterminous or adjacent to Plaintiffs' properties and is instead separated by an intervening parcel, that intervening parcel cannot preclude common law liability for removal of lateral support that caused damage to Plaintiffs' properties.²³

²³ *Puckett, supra*, 190 Cal.App.2d 489, cited by Defendants, does not support their contrary assertion, but rather supports Plaintiffs' common law cause of action for removal of lateral support as to non-coterminous lands. To the extent *Puckett* stated that a negligence, rather than strict liability, standard applied in that case, we believe that statement was dictum because the trial court in that case found the defendants were negligent in excavating the supporting land. (*Id.* at pp. 493, 495.) Therefore, to affirm the trial court's judgment, *Puckett* did not have to address whether the strict liability or negligence standard applied in that case. In any event, *Puckett* is not binding precedent on us and we are not persuaded that a lesser standard than strict liability (i.e., negligence) should apply to a common law cause of action for removal of lateral support merely because the excavation is performed on non-coterminous land that supports the plaintiff's land. Furthermore, to the extent Defendants argue Plaintiffs did not allege Defendants were negligent in excavating, or participating in the excavation of, the Turning Basin and the Channel, we disagree because Plaintiffs alleged Defendants failed to use ordinary care and reasonable precautions when excavating, or authorizing the excavation of, that land.

Furthermore, to the extent Defendants argue they cannot be held liable for removal of lateral support because they did not participate in the excavation/dredging of the Turning Basin and the Channel, they have not carried their burdens of production and persuasion to show there is no triable issue of fact regarding their participation in that excavation/dredging. As noted above, the owner of the excavated land, the excavation contractor, and all other parties who participate in the excavation may be held jointly liable at common law for removal of lateral support. (*Wharam v. Investment Underwriters, supra*, 58 Cal.App.2d at p. 351; *Green v. Berge, supra*, 105 Cal. at pp. 57-58.) *Green* stated: "Whoever deprives [a landowner] of this [lateral] support for his land . . . performs an unlawful act. The general rule is that all who unite in such acts are wrongdoers, and are responsible in damages. . . . Having participated in [the excavation], [the contractor] cannot avoid responsibility by pleading that he did the work under a contract." (*Green*, at p. 58.) Therefore, to the extent Defendants owned the land on which the excavation/dredging was performed or sufficiently participated in that excavation/dredging, they may be held jointly liable to Plaintiffs for damage caused to their properties from removal of lateral support.

Finally, we reject Defendants' argument that there are no triable issues regarding their compliance with Civil Code section 832 and they are entitled to summary adjudication as a matter of law on Plaintiffs' cause of action for removal of lateral support. The question of whether Plaintiffs were given reasonable notice pursuant to Civil Code section 832 is a mixed question of fact and law that, based on the record in this case, requires factfinding based on further evidence to show what actions were taken

to provide Plaintiffs with notice. Also, although there have not been any cases deciding what constitutes "reasonable notice" under Civil Code section 832, we strongly doubt that in cases involving a relatively small, identifiable group of affected landowners, constructive notice by publication in newspapers or elsewhere and/or availability of documents in a local library is sufficient to constitute such reasonable notice. Rather, we believe actual notice (e.g., by mail or personal service) should generally be required in such cases to be "reasonable" under Civil Code section 832. For purposes of summary adjudication, Defendants have not shown Plaintiffs received reasonable notice. Furthermore, it is unclear whether Port and the State may rely on notice provided to Plaintiffs by Navy and Army. As the alleged owners of the land excavated/dredged, Port and the State arguably may be required to directly provide reasonable notice to Plaintiffs to avail themselves of the more forgiving negligence standard under Civil Code section 832.

Also, although Civil Code section 832 expressly applies only to coterminous land, Port and the State have not shown there is no triable issue regarding whether the tidelands and submerged lands of Bay where the excavation/dredging was performed are not coterminous with Plaintiffs' properties. Plaintiffs argue, and Defendants have not persuaded us otherwise, that the State has title to the submerged lands dredged and also has a residual interest as the grantor of tidelands to Port in trust, thereby making the State's lands contiguous to Plaintiffs' properties for purposes of Civil Code section 832 (as well as under common law). Plaintiffs also allege Port has a similar interest in the tidelands and submerged lands of Bay, but that interest appears to be unclear at this stage

and is therefore unsuitable for summary adjudication. Furthermore, Defendants have not carried their burden to show Plaintiffs cannot prove Defendants acted negligently in dredging the Turning Basin and the Channel. Therefore, Defendants have not carried their burden to show they complied with Civil Code section 832 as a matter of law.

We conclude Defendants have not carried their burdens of production and persuasion to show there are no triable issues of material fact on, and they are entitled as a matter of law to summary adjudication of, Plaintiffs' cause of action for removal of lateral support. (*Aguilar, supra*, 25 Cal.4th at pp. 850-851, 855.) We conclude Defendants have not carried their burden to show one or more elements of the cause of action for removal of lateral support cannot be established or that there is a complete defense to that cause of action. (§ 437c, subd. (p)(2).)

V

Nuisance Cause of Action

Plaintiffs contend the trial court erred by granting Defendants' motion for summary adjudication of their nuisance cause of action. Plaintiffs and Defendants did not provide separate, substantive analyses of the elements of a nuisance cause of action below or on appeal and simply joined their assertions regarding that cause of action with their assertions regarding the inverse condemnation and/or removal-of-lateral-support causes of action. A "nuisance" includes "[a]nything which is . . . an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property" (Civ. Code, § 3479.) To constitute a nuisance, the plaintiff must prove the defendant's invasion of the plaintiff's interest in the use and enjoyment of property

was substantial and unreasonable (i.e., the gravity of the harm outweighs the social utility of the defendant's conduct). (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938; *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1154.) Based on our discussion of the issues in the inverse condemnation and removal of lateral support sections above, we conclude Defendants have not carried their burdens of production and persuasion to show there are no triable issues of material fact on, and they are entitled as a matter of law to summary adjudication of, Plaintiffs' nuisance cause of action. (*Aguilar, supra*, 25 Cal.4th at pp. 850-851, 855.) We conclude Defendants have not carried their burden to show one or more elements of the nuisance cause of action cannot be established or that there is a complete defense to that cause of action. (§ 437c, subd. (p)(2).)

VI

Necessary and Indispensable Parties

Plaintiffs contend the trial court erred in concluding that Defendants are entitled to summary judgment because necessary and indispensable parties (i.e., Navy and Army) to their causes of action for inverse condemnation, removal of lateral support, and nuisance were not, and could not be, joined as defendants in this action.

A

Section 389 sets forth the governing principles for determinations whether an unnamed party is "necessary" and must be joined in an action and, if not, whether that necessary party is "indispensable" and the action must be dismissed. Section 389 provides:

"(a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

"(b) If a person described in paragraph (1) or (2) of subdivision (a) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder."

If a court concludes a person is a "necessary" party under section 389, subdivision (a), it then must determine whether the person is also "indispensable" under section 389, subdivision (b). "Whether a party is necessary and/or indispensable is a matter of trial court discretion in which the court weighs 'factors of practical realities and other considerations.' " (*Hayes v. State Dept. of Developmental Services* (2006) 138 Cal.App.4th 1523, 1529.) However, courts should "be careful to avoid converting [section 389 from] a discretionary power or a rule of fairness . . . into an arbitrary and burdensome requirement which may thwart rather than accomplish justice." (*Bank of California v. Superior Court* (1940) 16 Cal.2d 516, 521.)

"A trial court abuses its discretion when its decision exceeds the bounds of reason by being arbitrary, capricious or patently absurd." (*Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1420.) However, when exercising a grant of discretion, a court's scope of discretion is defined by the particular law being applied. (*Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 933.) "In other words, judicial discretion must be measured against the general rules of law and, in the case of a statutory grant of discretion, against the specific law that grants the discretion." (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393.) A discretionary ruling based on an error of law necessarily constitutes an abuse of discretion. (See *In re Charlisse C.* (2008) 45 Cal.4th 145, 159; *Bisno v. Douglas Emmett Realty Fund 1988* (2009) 174 Cal.App.4th 1534, 1550.)

B

We conclude the trial court abused its discretion by implicitly finding the federal defendants (i.e., Navy and Army) are "necessary" parties to this action within the meaning of section 389, subdivision (a).

Ability to award complete relief. Contrary to Defendants' assertion, there is nothing in the record showing that in the absence of the federal defendants the trial court cannot accord *complete relief among those already parties* to the action (i.e., Plaintiffs and Defendants). (§ 389, subd. (a).) First, Plaintiffs do not seek any relief in their quiet title cause of action that depends on joinder of, or otherwise relates to, Navy or Army. Regarding their inverse condemnation cause of action, Plaintiffs seek an award of monetary damages against Defendants for the taking of or damage to their properties.

Contrary to Defendants' assertion, such an award does not require that Navy or Army be joined as parties. We reject Defendants' conclusory argument that Plaintiffs will be unable to apportion liability to them without joining Navy or Army. To the extent Defendants substantially participated jointly with Navy and/or Army in the Turning Basin and/or Channel dredging projects, they may be subject to joint liability to Plaintiffs for inverse condemnation damages. Therefore, Plaintiffs may obtain complete relief against Defendants without joining the federal defendants. To the extent Defendants assert they may have claims in indemnity or contribution against Navy and/or Army, those claims can be asserted in a collateral action in another forum and therefore do not preclude the trial court from according complete relief among Plaintiffs and Defendants. (Cf. *Countrywide Home Loans, Inc. v. Superior Court* (1999) 69 Cal.App.4th 785, 794-795 ["It is well settled that '[j]oint tortfeasors are not necessary to afford complete relief.' "].) Similarly, to the extent Defendants argue the absence of Navy or Army may impair their ability to obtain and present evidence and/or defend the conduct of the federal defendants, that argument, even if true, would not make Navy or Army necessary parties. (Cf. *Brown v. United States* (Fed.Cl. 1998) 42 Fed. Cl. 538, 563-564.) Accordingly, section 389, subdivision (a), does not require that the trial court be able to accord complete relief in inverse condemnation as to unnamed parties, but only among those already parties to the action.

Furthermore, the trial court can accord complete relief among the existing parties on Plaintiffs' causes of action for nuisance and removal of lateral support without the joinder of Navy or Army. Plaintiffs seek injunctive relief or, in the alternative, monetary

damages for those causes of action. Plaintiffs seek an injunction against Defendants requiring the installation of appropriate corrective measures to prevent further loss of lateral support, erosion and destruction of their properties. Alternatively, they seek damages from Defendants for the damage to their properties. Defendants argue the trial court cannot accord complete injunctive relief on those causes of action without joining Navy and Army, asserting a permit may first be required from those federal defendants for Defendants to take the erosion mitigation and/or repair measures Plaintiffs seek. However, assuming *arguendo* a permit from Navy, Army, or other federal agency may be required for Defendants to take the affirmative action Plaintiffs seek, we believe the trial court can nevertheless accord complete relief among the existing parties by appropriately framing any injunctive relief so that Defendants will not be required to act unless such permit is obtained (i.e., a conditional injunction). In any event, it is possible the trial court could accord complete relief among the existing parties by awarding monetary damages instead of injunctive relief. Or, alternatively, if a condition for injunctive relief (e.g., a federal government permit) is not met, the judgment could award alternative relief of monetary damages against Defendants. We conclude, based on the undisputed facts in this case, the trial court can accord *complete relief among those already parties* to the action (i.e., Plaintiffs and Defendants) without joining Navy or Army as parties. (§ 389, subd. (a).)

Potential harm to unnamed federal defendants. We further conclude, based on the undisputed facts in this case, the federal defendants who are not parties to this action have not claimed an interest in the subject of this action and their absence from this

action will not impair or impede their ability to protect any such interest. (§ 389, subd. (a).) Plaintiffs assert, and Defendants apparently do not disagree, neither Navy nor Army have, at any point during the proceedings in this action, sought to join or intervene in this action or have otherwise expressed any interest in this action. On the contrary, the record shows that after Plaintiffs added Army as a defendant in this action, Army removed the action to federal court. Plaintiffs filed their second amended complaint (SAC) in federal court, alleging nuisance, inverse condemnation, and removal-of-lateral-support causes of action against only Port and various Administrative Procedure Act causes of action against only Army and/or Navy. Thereafter, the federal court granted Plaintiffs' motion to remand back to the state court their causes of action against Port and the State. In so doing, the federal court impliedly found neither Navy nor Army was a necessary party to Plaintiffs' state law causes of action against Port, stating: "In the event that Plaintiffs prevail on their state law claims and secure an injunction in state court, the remedy can be conditioned upon obtaining the necessary federal permits." Defendants do not cite any interest that Navy or Army has in the instant action.²⁴

Potential harm to Defendants. We further conclude, based on the undisputed facts in this case, that Defendants are not at substantial risk of incurring double or inconsistent

²⁴ As discussed above, to the extent Navy or Army may be liable to Defendants for contribution and/or indemnity should Plaintiffs obtain a monetary award against Defendants, that possible claim against Navy or Army does not rise to the level of an "interest" in the action that may be impaired or impeded if they are not parties to this action. Rather, such collateral claims can be addressed in a separate proceeding in another forum.

obligations if Navy and Army are not joined as parties to this action. (§ 389, subd. (a).) Joinder of an unnamed party may be required to avoid inconsistent obligations, but not to avoid inconsistent adjudications. "Inconsistent obligations occur when a party is unable to comply with one court's order without breaching another court's order concerning the same incident. [Citation.] Inconsistent adjudications or results, by contrast, occur when a defendant successfully defends a claim in one forum, yet loses on another claim arising from the same incident in another forum." (*Delgado v. Plaza Las Americas, Inc.* (1st Cir. 1998) 139 F.3d 1, 3.) "The possibility that because of an absentee joint tortfeasor [or other jointly liable person], a defendant may be liable in the original action and lose a subsequent action for contribution against the joint tortfeasor is not the kind of inconsistency contemplated by the 'multiple liability clause.'" (2 Moore's Manual: Federal Practice and Procedure (Matthew Bender 2011) § 14.04[1][d], fn. omitted.)

In this case, there is no possibility that Defendants might face inconsistent *obligations* by reason of defending this action in the trial court and separately asserting contribution, indemnification, or other causes of action against Navy or Army in another forum (e.g., a federal court). Even if the trial court and other forum were to make inconsistent findings or adjudications, Defendants nevertheless would not be subject to inconsistent obligations because of those judgments. Defendants do not persuade us to reach a contrary conclusion.

Conclusion. Because none of the section 389, subdivision (a), factors apply based on the undisputed facts in this case, the trial court abused its discretion by improperly applying the law and finding Navy and Army are "necessary" parties to this action within

the meaning of section 389, subdivision (a). (*Horsford v. Board of Trustees of California State University*, *supra*, 132 Cal.App.4th at p. 393; *In re Charlissee C.*, *supra*, 45 Cal.4th at p. 159; *Bisno v. Douglas Emmett Realty Fund 1988*, *supra*, 174 Cal.App.4th at p. 1550.)

C

Because we conclude neither Navy nor Army is a necessary party to this action, we need not, and do not, address whether either of those parties is indispensable to this action. Rather, because the trial court erred in impliedly finding those parties are necessary parties to this action, it also erred by finding they are indispensable parties and granting Defendants' motion for summary judgment based on that finding. (§§ 389, 437c.)

DISPOSITION

The judgment is reversed and the matter is remanded with directions that the superior court vacate its order granting Defendants' motions for summary judgment and issue a new order denying their motions for summary judgment or, in the alternative, summary adjudication in their entirety. Plaintiffs are awarded their costs on appeal.

McDONALD, J.

WE CONCUR:

McCONNELL, P. J.

McINTYRE, J.