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Dear Plumas County Supervisors:

This office has been retained by a group of concerned citizens in Plumas County regarding the County's current General Plan Update project. This letter has two purposes. First, this letter is to remind the County's leadership of the reverence that the United States places on private property rights so that the County will reconsider its current course of action. Second, the letter advises you of some of our clients' concerns with the Plan's general character and specific issues, and asks for changes. We explain that many of the Plan's features may not be in the best interests of the County's citizens and, as written, infringe on their private property rights.

We hope that County officials will seriously and thoroughly reconsider the Plan's current trajectory in light of the issues addressed in this letter. Additionally we have prepared an alternative General Plan Update that will achieve the goals of Plumas County while protecting private property rights. That draft plan will be sent to you under separate cover.

## I. INFRINGEMENT ON PRIVATE PROPERTY RIGHTS

According to the U.S. Supreme Court, if the Fifth Amendment is to have any meaning, “it must include the right to prevent the government from gaining an ownership interest in one’s property outside the procedures of the Takings Clause.” Dolan v. City of Tigard, 512 U.S. 374, 385 (1994). Specifically, the Fifth Amendment to the U.S. Constitution prohibits the taking of private property for a public purpose, without due process and just compensation. U.S. Const. Amend. V. The Fifth Amendment was drafted by the founding fathers based upon the original abuses of private property when it was used for military impressments during the revolutionary war. See, e.g., William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 791-92 (1995). This practice offended the long established principle that government officials could not take private property without legislative authority, a right laid down in the Magna Carta. See, e.g., *id.* at 787-89 (1995). John Jay wrote that it was “the undoubted Right and inalienable Privilege of a Freeman not to be divested . . . [of] Property, but by Laws to which he has assented . . . . Violations of the inestimable Right by the King of Great Britain, or by an American Quarter Master; are of the same Nature . . . .”<sup>1</sup>

Both as enacted and originally drafted, the Fifth Amendment strictly prohibits unauthorized takings by executive officials by permitting the taking of private property for public use only when the legislature made just compensation available. Madison’s original draft of the Fifth Amendment provided that “No person *shall be . . . obligated to relinquish his property*, where it may be necessary for public use, without a just compensation.” 1 Annals of Cong. 451-52 (J. Gales ed. 1834) (emphasis added). See also Shepherd, *Land Use Regulation In the Rehnquist Court: The Fifth Amendment and Judicial Intervention*, 38 Cath. U. L. Rev. 847, 853-56 (1989). The plain implication – carried forward in the final text of the amendment – was that where just compensation was unavailable, the taking was constitutionally prohibited.

It is also important to note that the remedy for the taking of private property under the Constitution is not just limited to the payment of just compensation. To the contrary, the Supreme Court has barred injunctions that would effectuate a taking, without ever suggesting that the property owner was required to endure the taking and

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<sup>1</sup> Matthew P. Harrington, “Public Use” and the Original Understanding of the So-Called “Takings” Clause, 53 Hastings L.J. 1245, 1290 (2002) (quoting John Jay, A Hint to the Legislature of the State of New York (1778), in 1 John Jay: The Making of a Revolutionary, Unpublished Papers 1745-1780 461-62 (Richard B. Morris ed., 1975)).

seek only compensation after it was completed. See, e.g., Kaiser Aetna v. United States, 444 U.S. 164, 169, 180; Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 412 (1922). It has further held that declaratory and injunctive relief was available to invalidate government action that would affect a taking. See, e.g., Eastern Enterprises v. Apfel, 524 U.S. 498, 521, (1998) (striking down federal statute under Takings Clause); Hodel v. Irving, 481 U.S. 704, 718 (1987) (same); Nollan v. California Coastal Comm'n, 483 U.S. 825, 841-42 (1987) (striking down a state permit condition that would have effected a taking); Dolan v. City of Tigard, 512 U.S. 374, 381-83, 396 (1994) (striking down a locally required permit condition that would have effected a taking of private property). Clearly, these cases stand for the proposition that the Fifth Amendment forbids the use of procedures designed to extract or control property while avoiding compensation.

The federal cases cited above apply to all 50 states. California also recognizes private property rights, and has codified a “takings” clause similar to the U.S. Constitution’s Fifth Amendment: “Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.” Cal. Const. Art. I Sec. 19. The California Court of Appeals has recognized that a central purpose of the takings clause is to prevent a small number of property owners from bearing the costs of public policies. See 152 Valparaiso Associates v. City of Cotati, 65 Cal.Rptr.2d 551, 556 (Cal. App. 1997).

As described below, the current Plumas County General Plan Update subordinates private property rights to concepts like “sustainable development,” “smart growth,” and climate change mitigation. This practice violates private property rights, which historically have benefitted from extensive legal protection and status.

## **II. LANDOWNERS IN PLUMAS COUNTY HAVE ALREADY BORNE SIGNIFICANT COSTS ASSOCIATED WITH ENVIRONMENTAL “IMPROVEMENT” PROJECTS**

As you are aware, Plumas County is primarily rural; the County has one of the lowest population densities of any County in California. The Federal Government owns most of the County’s land area. The privately-owned land is primarily agricultural. All too often, the interests of such agricultural property owners are subordinated to environmental purposes, with the result that private property owners disproportionately bear the associated costs. This is exactly the problem the California court recognized in 152 Valparaiso Associates v. City of Cotati, 65 Cal.Rptr.2d 551, 556 (Cal. App. 1997).

Such disproportionate cost allocation is a pervasive trend throughout the West, and Plumas County is no exception. The best example of this problem is the “plug and pond” activities by Feather River Coordinated Resource Management (“FRCRM”). FRCRM is a partnership of over 24 government and private conservation entities. Signatories include Plumas County<sup>2</sup> and Plumas Corporation. According to Plumas Corporation’s website, its original purpose was to encourage economic development, however now its sole activity is participating in FRCRM.

FRCRM receives approximately 60% of its funding from the State of California. Since the mid-1980s, it has been the driving force behind projects aimed at “improving” the Feather River watershed, which is located almost entirely in Plumas County. “Pond and plug” is a major watershed restoration technique and involves constructing a series of ponds in a water channel, thereby spreading out the water over the meadow. These widespread “plug and pond” activities have had mixed success, but one clear result: downstream water users in Plumas County and other counties have suffered devastating losses to their water supplies.

In nearly 30 years, FRCRM has implemented dozens of such projects with the cooperation of Plumas County, despite consistent opposition by County residents who depend on the water. The County has therefore been complicit in allowing a small yet vocal “industry” to thrive, despite serious and sustained public opposition. It is an example of how Plumas County residents, like many rural landowners across the West, have borne the brunt of allegedly environmentally-oriented, often misguided policies. Therefore, our clients and many other residents of Plumas County are generally opposed to having their interests further supplanted by environmental goals. This is particularly the case when these “goals” may not be realistic or achievable, or worse when there are not real environmental problems that need to be corrected in the first place. They are opposed to the further infringements on their property rights and daily lives that allegedly environmentally-oriented policies usually bring. Most importantly, they are exasperated that rather than protect them from such infringements, the Plumas County leadership enables them. With this context in mind, please consider the following concerns.

### **III. THE PLAN’S VISION FOR PLUMAS COUNTY IS HIGHLY INAPPROPRIATE**

The Plan’s attention to County-specific issues is appropriate. However, the Plan goes well beyond local resource issues and adopts “global climate change” and “sustainable development” as primary and pervasive themes. See General Plan p. 13-15. The Plan is intended to double as Plumas County’s “Climate Action Plan” and such goals and policies are denoted by a green tree symbol. Consistent with the potentially all-

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<sup>2</sup> Plumas County was dropped as a signatory in May, 2013.

encompassing, lifestyle-altering nature of climate change efforts, this tree symbol appears throughout the Plan. For several reasons, the Plumas County leadership's enthusiasm for the climate change / sustainable development movement alarms many residents.

#### **A. Inconsistency with Plumas County Character and Economy**

The County's adoption of climate change policies<sup>3</sup> is at odds with the overall rural, slow-growing character of the County. As explained above, because of its rural nature, Plumas County landowners bear significant costs associated with implementation of alleged environmentally-oriented policies; these policies practically always originate from sources outside the County and rarely benefit the County. "Sustainable development" concepts are inherently ominous and suspicious because they generally portend adverse consequences for rural citizens and economies. Rather than be mindful of the problem, it appears that Plumas County officials are embracing this disturbing trend with the current General Plan.

The County's actions appear to be driven by a constant pursuit for grant money and the influence of environmentally-oriented Non-Governmental Organizations ("NGO"s). The resulting projects may be in the County's revenue-raising interests; they may benefit certain County employees; and they may benefit the citizens of California and the particular group behind a given project. However, these projects are generally not in the interests of County landowners. By their nature, NGOs are not concerned with the welfare of the County and generally do not care about the impact their activities have on actual people and private property rights. With the proposed General Plan update, the County appears to be continuing such activities, raising serious questions about the County's ability to act in the interests of its constituents.

For example the General Plan anticipates the population will grow *less than 1% per decade for the next 40 years*. General Plan p. 20. Given that the County expects practically no growth or development for the foreseeable future, the County's duty to plan "for the physical development of the county or city" would seem to represent a minimal undertaking. See Cal. Gov. Code § 65300. However, the General Plan's sustainable development goals and policies seem designed for a county that is primarily urban and expecting significant growth and tax revenue. The Plan seeks to achieve high-density infill development (p. 39), implement a policy of "Complete Street Design" (p. 92, 97), provide bicycle and pedestrian trails (p. 94, 97, 179), create a transportation network that will "protect and enhance the environment" (p. 95), create "balanced and sustainable communities" (p. 113), and create a "strategic energy plan" with a dizzying

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<sup>3</sup> It should be noted that there is significant scientific debate about whether "climate change" or "global warming" is man-made or man-influenced phoneme or if the change in climate is the result of long term natural warming and cooling phases.

array of policies relating to energy generation and conservation (p. 115-122, 183). Regardless of one's views on these policies *per se*, placing them in the General Plan seems inappropriate given the County's lack of growth and modest funds. Thus, the County's citizens are afraid that grant money will end up funding many such projects; past experience has shown that grant money comes with unfavorable strings attached that may harm County residents and their private property.

### **B. Significant Planning for Environmental Purposes is Not Required**

The General Plan's large-scale adoption of climate change policies alarms many residents because it is unnecessary. While California law requires the County to engage in long-term planning, the County's obligation is to plan merely "for the physical development of the county or city." Cal. Gov. Code § 65300. The Plan does not state any statutory mandate that Plumas County, population 20,000, take action to address global climate change. The Plan, on page 14, discusses recent executive orders and legislation aimed at reducing California's greenhouse gas ("GHG") emissions. However, the Plan is not clear exactly how the recent directives impact the County's planning process or otherwise mandate climate change action on the part of Plumas County. The County should determine, on its own, exactly what the State of California requires *vis-a-vis* global climate change, and determine the least intrusive way to comply with these mandates in a way that considers and protects private property and the County's tax base. We believe that any action beyond the bare minimum requirements will needlessly harm Plumas County's economy and many residents.

### **C. Climate Change and Sustainable Development Concepts are All-Encompassing**

The third reason why climate change and "sustainable development" policies worry many Plumas County residents is the amorphous and yet pervasive nature of these concepts. The word "sustainable" appears dozens of times in the plan. On page 199, the Plan defines "sustainable development" as follows:

Development that maintains or enhances equity, economic opportunity, and community well-being while protecting and restoring the natural environment upon which people and economies depend. Sustainable development meets the needs of the present without compromising the ability of future generations to meet their own needs.

The above text is hardly a definition at all, and yet this amorphous concept is a cornerstone of the proposed General Plan Update. The County should be very hesitant to voluntarily take on the burden of developing “sustainability” and risk putting itself at the mercy of environmental interests.

Similarly, having the General Plan double as a Climate Action Plan is worrisome. The Plan truly does appear to place “climate change” interests above all others. The Land Use element is the most important piece of any general plan; the introduction, in its entirety, reads:

Plumas County is committed to protecting its communities in a manner that also addresses climate change. As part of the “Goals” section of this element, policies and implementation measures related to climate change are denoted with the symbol: [green tree]

The reference to the climate change symbol appears in the introductory statement to each plan element. The Plan also articulates three general steps relating to climate change (p. 13-15). However, the Plan does not articulate any actual GHG or climate-related goals and does not reflect that Plumas County is actually required to implement a Climate Action Plan. As indicated above, we suggest that the appropriate goal is to have the plan satisfy the County’s minimum planning obligations on such topics.

#### **D. Unnecessary Burden**

The current General Plan, dating from the early 1980s, runs approximately 40 pages exclusive of appendices. The current General Plan Update runs 235 pages exclusive of appendices and the required Housing element. With such an expansion of content, our clients are concerned that the County is assuming an unrealistic burden and responsibility. The Plan Update includes a phrase similar to “the County shall” hundreds of times, and undertakes to vaguely “encourage,” “promote,” and “support” literally hundreds of issues and policies. Many of the goals or projects that the County “shall” implement are very amorphous or of dubious value. For example, page 93 of the Plan states that “[t]he County shall encourage the expansion of public transit services to nearby urban areas.” In reality, Plumas County is rural and its “urban” areas, such as they are, lie far apart; expanding public transit makes little sense. Page 94 contemplates that the County will amend the County Code to facilitate pedestrian and bicycle traffic in new developments, and will provide a “comprehensive integrated system of facilities” for pedestrians and cyclists. The County has neither the funds nor the need for such a system. Individual cities and towns are free to create such facilities, however, the County has no business connecting them when they are far apart and separated by rough terrain. Such wrongheaded policies will impose a needless burden on the existing population of Plumas County. There also may be the possibility of future legal action against the County if the County sets forth goals in the Plan it cannot achieve.

There is no possible way that the County can “encourage,” “promote,” and “support” the hundreds of causes, goals, and issues that appear in the General Plan. The only conceivable justification for what would otherwise be meaningless content is the County’s goal of obtaining grant money from state, federal, and other sources to initiate specific projects. As explained above, these projects tend to be of dubious or even negative value for most County residents.

In conclusion, Plumas County is a low growth, rural County with significant agricultural and private property interests. It is not the sort of place that would invite governments and NGOs to micro manage citizens’ lives for the sake of climate change. It offers practically no opportunity to build the sort of compact, sustainable, communities and automobile-free lifestyle that the General Plan seems to idealize. It is not a place that needs to be “saved” from imminent urban sprawl. Rather than reflect and accept this truth, the General Plan seeks to radically change it.

#### **IV. SPECIFIC RECOMMENDATIONS**

We believe the best way for the County to truly recognize and plan in the best interests of Plumas County residents and property owners, the current General Plan should be withdrawn entirely and the County should start over with a wholly transformed outlook. We will provide such an alternative plan for your consideration. A new General Plan should include the following:

##### **A. The Land Use Designations**

The Land Use Designations appearing on pages 40-51 and 54-55 are easily the most pernicious part of the land use element and should be removed from the plan entirely. The Designations section is one of the few concrete, actionable items in the General Plan, which the County commits to implement via zoning changes (see page 49, 59-63). Ostensibly, the purpose of the Designations is to “recognize and allow” a diversity of land uses and ensure that there is “adequate” land in each category. We are very alarmed that the planners would undertake to impose an “adequate” balance of land uses for the entire County. A great diversity of land uses already exists in the County, with no apparent need for any adjustment.

A study of the Designation descriptions on pages 42-48 shows that their primary purpose is further limiting housing densities in each category beyond the restrictions currently existing in the County’s zoning ordinances, as if to stop imminent urban sprawl. As stated above, the County is expecting a near-zero growth rate for the foreseeable future. There is no need to impose what amounts to a county-wide zoning overlay district. The only result will be further burdens on the property rights of rural landowners and potential litigation.

## **B. Agricultural Setbacks**

Page 59 states that the County will develop “agricultural buffer setbacks.” This vague provision appears to treat agricultural uses in the same manner as disfavored, hazardous uses like oil extraction, requiring separation between them and other land uses. Such setbacks are highly inappropriate in Plumas County, where agricultural and other uses are already highly intermingled with little or no conflict. Such setbacks will, on a massive scale, prevent landowners from using the property as they see fit, with no health or safety justification. These setbacks must be removed.

## **C. The Optional Elements**

The General Plan Update includes three optional elements - Economics, Agriculture and Forestry, and Water. As one of the least-populated counties in California, the Plumas County leadership should not do any planning beyond the state’s minimum requirements unless clearly necessary. These elements are not necessary and should be removed.

The Plan spends approximately 35 pages on the Economics Element. On its face, this element is inappropriate given the legal obligation to plan for the County’s “physical development.” This element risks adding needless bureaucracy to the already over-regulated California business environment and belies the modest resources of Plumas County. Practically all the content in the Economics element is vague and presumptuous wishful thinking not specifically actionable, further undermining its usefulness. Much of such content focuses on green energy and energy efficiency. Like much of the other environmentally-oriented content, this content seems aimed at obtaining grant funding for pet projects that will not benefit county residents and not benefit the economy at large. The best thing the County can do to develop the County’s economy is minimize the regulatory and tax burden on businesses.

The Water and Agriculture and Forestry elements are 35 pages. While many of the policies would seem directed at protecting the agriculture economy, our clients are concerned that in reality these policies will invite further unwanted interference with their agricultural operations and way of life. For example, the County should not set environmental quality policies that are needlessly redundant with state and federal environmental laws. We suspect the focus on conservation, environmental quality, sustainability, and climate change is primarily aimed at securing future grant money for unwelcome projects in Plumas County.

#### **D. The GHG Inventory, Climate Change, and Sustainability**

In its three steps to address global climate change, the General Plan contemplates that Plumas County will complete a GHG inventory. Plan p. 14. We have learned recently that the County has decided to remove the Inventory from the Draft Environmental Impact Report ("DEIR"). The reasons for this removal appear to be glaring methodological problems with analyzing Plumas County's emissions. We are very concerned that the County failed to recognize such problems earlier.

We are glad that the County has removed the flawed GHG inventory. If indeed the Inventory is not part of the General Plan Update, the Plan may not purport to function as Plumas County's CAP because it would be missing key information (a baseline), and because proper environmental impact analysis would not be possible. Accordingly, the County must remove from the General Plan all references to the CAP. Since Plumas County is not yet ready to lay a proper foundation for any efforts to measurably reduce GHG emissions, all the Plan's goals and policies aimed toward this purpose should be removed, to the extent allowable under California law.

Going forward, the County must independently determine the State of California's minimum planning obligations on climate change and sustainability. The General Plan should not go beyond them unless the additional provisions would clearly benefit county constituents, rather than the county government or NGOs. Any other strategy fails to recognize and respect the rural, slow growing nature of Plumas County.

#### **E. Specific NGOs**

As if confirming our suspicion that securing grant money and pet projects is a central goal of the Plan, the Plan names specific NGOs, such as Feather River Coordinated Resource Management in the Water element. These references should be eliminated.

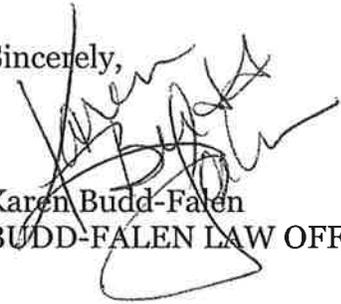
### **V. JUSTIFICATION**

The General Plan in its current form appears to be highly adverse to the interests of most county residents, owing to the overwhelmingly rural nature of Plumas County. Accordingly, the Plumas County government has a clear, perhaps even ethical duty to justify its course of action on both legal and practical grounds. The County must justify, to Plumas County residents and property owners, this planning action that appears on its face to be patently and needlessly adverse to their interests. This explanation also must be made to the Plumas County leadership to enable a real and informed choice regarding the County's direction in the next few decades. We therefore request justification and look forward to receiving it.

July 8, 2013  
Page 11

On behalf of our clients in Plumas County we appreciate the opportunity to provide these comments. As stated above, to further the interests of Plumas County landowners, under separate cover, we will transmit to you an alternative County Land Use Plan that we request be analyzed through the required legal procedures adopted by the Board of County Supervisors. Should you have any questions, please do not hesitate to contact me.

Sincerely,



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