Hearing date: August 8, 2025
Hearing time: 9:00 AM
Judge / Calendar:
Hon. Anne E. Egeler / Dispositive Motions

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

FRIENDS OF GRAYS HARBOR, et al., Plaintiffs, vs. WASHINGTON STATE PARKS AND RECREATION, et al., Defendants.	No. 24-2-01187-34 **MSJ 2:** PLAINTIFFS' MOTION TO ENFORCE GLOBAL SETTLEMENT AND ARMY CORPS COVENANT AGAINST THE STATE OF WASHINGTON

I. RELIEF REQUESTED

Plaintiffs Friends of Grays Harbor and Grays Harbor Audubon (hereafter "FOGH") move for partial summary judgment to enforce the Global Settlement[1] and Army Corps Covenant against the State of Washington.

II. EVIDENCE RELIED UPON

This Motion is supported by: (1) Plaintiffs' Complaint and Proposed First Amended Complaint and exhibits thereto; (2) Defendants' answers and admissions; (3) Declaration of Arthur Grunbaum and the attachments thereto; (4) Declaration of Knoll Lowney and the Plaintiffs' Factual Record attached thereto; (5) Declaration of Danielle Davis and the attachments thereto; and (6) the Combined Statement of Facts.

III. INTRODUCTION AND SUMMARY

This is not a close issue. As a matter of contract, conservation easement, and property law, the State is obviously bound by the permanent wetland protections in the Global Settlement both as a party to the agreement and as a successor to Mox Chehalis. The State is in clear breach of the Global Settlement's wetland protections.

The State is also in clear breach of the Global Settlement's conservation easement, which was recorded in 2010 (the "Army Corps Covenant") and is enforceable as a matter of federal and state law. The State is in clear violation because the Links 2 Project runs the golf course and commercial roads directly through the preserved wetlands.

In addition to the law, the equities also strongly support Plaintiffs' arguments. The State signed the Global Settlement to resolve seven years of protracted litigation and a pending appeal,

[1] All capitalized terms in this Motion have the meaning ascribed in the Combined Statement of Facts.

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with no end of the litigation in sight, and also to achieve State-requested and State-developed protections for wetlands and water quality.[2]

The State later purchased the Property expressly for parkland and habitat preservation (calling on FOGH for support), and specifically to protect the wetlands from a golf course development. It cannot now reverse course and continue the golf course project without respecting the Global Settlement's permanent wetland protections. They are binding directly as a contract and additionally because key protections were formalized into a federal easement.

IV. AUTHORITY AND ARGUMENT

A. The State of Washington's pursuit of the Links 2 Project breaches its contractual duties under the Global Settlement.

The State is a party to the Global Settlement and is in clear and intentional breach thereof.

1. The State is bound by the Global Settlement.

The State is directly bound by the Global Settlement,[3] to which it is a party.[4] "The whole panoply of contract law rests on the principle that one is bound by the contract which he voluntarily and knowingly signs."[5] "One cannot, in the absence of fraud, deceit or coercion be heard to repudiate his own signature voluntarily and knowingly fixed to an instrument whose contents he was in law bound to understand."[6] The State bargained for and received valuable consideration for the Global

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[2] For example, the Global Settlement incorporated conditions on the Links Project developed by the Department of Ecology to protect water quality, including the wetlands. Because Mox Chehalis had agreed not to fill wetlands, the State could only achieve these protections through settlement.
[3] "[S]ettlement agreements are considered to be contracts, [and] their construction is governed by the legal principles applicable to contracts[.]" *Stottlemyre v. Reed*, 35 Wn. App. 169, 171, 665 P.2d 1383, 1385 (1983) (citations omitted).
[4] PFR 64 (Global Settlement); *see also* Plaintiffs' Motion to Enforce the Global Settlement and Durable Conditions Against City of Westport, filed concurrently herewith, at fns 73-77.
[5] *Nat'l Bank of Washington v. Equity Inv'rs*, 81 Wn.2d 886, 912-913, 506 P.2d 20 (1973).
[6] *Id.*

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Settlement – through the cessation of the land use battle and enforcement of its water quality conditions – and it cannot now avoid its obligations.[7]

The State was one of the main beneficiaries of the Global Settlement, since it bore much of the costs of the protracted land use dispute. Multiple state agencies oversaw years of contentious permitting, and they were parties to years of permit appeals; state agencies spent years adjudicating administrative appeals; and then state courts spent years adjudicating judicial appeals. The Global Settlement stopped this bleeding and is adequate consideration.[8]

In addition, the Global Settlement was expressly designed to achieve environmental measures sought by the State's agencies. As the Global Settlement explains, when the Links course layout was modified to avoid all wetland fill, it also eliminated the State's authority to impose the extensive water quality standards it had developed for the project, but the Global Settlement stepped in to require the golf course to nevertheless comply with the State's conditions.[9]

While the Global Settlement did not anticipate the State taking over the Links project, it was expressly "*binding upon . . . successors and assigns*"[10] and "*subsequent owners.*"[11] Thus, the State is bound to all of Mox Chehalis' obligations, having purchased the property from Mox Chehalis' successor JD Financial.[12]

[7] PFR 49-50 (Global Settlement).
[8] "It is a sufficient consideration to relinquish, or to agree to relinquish, a defense in a suit; to waive the right to a jury trial; to forbear, or to agree to forbear, from contesting judgment; not to appeal, or to abandon an appeal." *In re Estate of Holmes*, 137 Wash. 58, 61, 241 P. 660, 661 (1925) (citations omitted).
[9] PFR 54 (Global Settlement)
[10] PFR 62-63 (Global Settlement) (emphasis added).
[11] PFR 76 (Wetland Mitigation Plan) (emphasis added).
[12] PFR 309 (Purchase & Sale Agreement).

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2. **The State is breaching the Global Settlement Agreement.**

The State's pursuit of the Links 2 Project is a direct breach of the Global Settlement because the State is seeking to permit a final golf course design that (1) fills wetlands,[13] (2) returns the driving range to its original wetland location,[14] and (3) places numerous golf course features and roads within areas that are permanently protected under the Global Settlement.[15] The Global Settlement plainly prohibits these three actions, and others.[16]

In addition to violating express contractual terms, the State's effort to circumvent the contract violates the Global Settlement's implied duty of good faith and fair dealing. A party to a contract cannot orchestrate to deprive another party of their core benefit of the bargain.[17] As described in Plaintiffs' Motion to Enforce against the City, strong public policy requires enforcement of settlement agreements, especially of protracted litigation. That is especially true here when the failure to enforce the settlement will require a repeat of the same protracted litigation.

To protect FOGH's bargained-for rights under the Global Settlement, and in the interest of judicial economy and public policy favoring the finality of settlements, the Courts should prohibit the State from pursuing a golf course project that violates the Global Settlement.

B. The State is also breaching the Global Settlement as a conservation easement.

Even if the State had not been an original party, the Global Settlement runs with the land as a conservation easement and therefore precludes the State (or any future owner) from proceeding with the Links 2 Project.

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[13] PFR 468-69 (Links 2 DEIS Presentation)
[14] PFR 458-59 (Links 2 DEIS)
[15] *Id.*; *see also* PFR 546-52 (Declaration of Danielle Davis and Exhibits, hereinafter "Davis Decl.").
[16] PFR 50-51 (Global Settlement).
[17] *Larson Motors, Inc. v. Jet Chevrolet, Inc.*, No. 83124-1-I, 2022 Wash. App. LEXIS 1611, *13 (Ct. App. Aug. 8, 2022); *see also* Plaintiffs' Motion to Enforce Settlement and Durable Conditions Against the City of Westport, Section V.D (citing good faith cases).

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Treating the Global Settlement as a conservation easement is consistent with state law and legislative intent. Since 1979, Washington law has explicitly relaxed property law requirements to facilitate conservation easements, which are defined as a "development right, easement, covenant, restriction, or other right, or any interest less than the fee simple, to protect, preserve, maintain, improve, restore, limit the future use of, or conserve for open space purposes, any land or improvement on the land."[18] The Legislature has specifically authorized conservation organizations like FOGH to acquire conservation easements through relaxed property rules[19] or by "acquir[ing] . . . [the] contractual right necessary to protect, preserve, maintain, improve, restore, limit the future use of, or otherwise conserve selected open space land,"[20] including "wetlands, beaches or tidal marshes."[21]

In enabling conservation easements (aka "development rights" or "development futures"), the Legislature's express goal was to relax technical property law requirements to allow property owners to give up some development potential and thereby preserve important environmental amenities.[22] RCW 64.04.130 was needed because "due to the rigidities and technicalities of property law and long-standing judicial interpretations…[t]here is question [sic] as to whether [conservation easements] are even recognized in Washington."[23] In addition to authorizing conservation easements,

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[18] RCW 64.04.130. *See also* RCW 64.65.101(2) (defining a conservation easement as "a nonpossessory property interest created for one or more" conservation purposes, including "[r]etaining or protecting the natural, scenic, wildlife, wildlife habitat, biological, ecological, or open space values of real property" and "[p]rotecting natural resources, *including wetlands*, grasslands, and riparian areas[.]" (emphasis added)).
[19] *See* RCW 64.04.130.
[20] RCW 84.34.210.
[21] RCW 84.34.020(1).
[22] PFR 594-95 (1979 Legislative Report).
[23] PFR 594 (1979 Legislative Report).

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the Legislature relaxed rules for their conveyance such they that only need to be "*substantially* in the form required by law" for other property conveyances.[24]

In relaxing property law technicalities for conservation easement, the Legislature reported that "'[c]onservation futures' are an innovative addition to the various real property rights that have long been recognized in real property law. Proponents believe that clarification is needed to show that the Legislature intended to authorize the creation of development rights as real property interests."[25] Through such conservation futures, "fragile wildlife habitat or ecologically sensitive areas . . . could be preserved without eliminating future development of an owner's entire property, and without regard to whether the property is classified under the open space legislation."[26] The bill was passed with an emergency clause.[27]

The Global Settlement meets the legislative definition of a conservation easement or "conservation future." The clear intent of the parties to the Global Settlement was to create a permanent, enduring conservation easement over sensitive wetland and uplands areas on the Property.[28] Where, as here, the landowner agrees to permanently protect an important environmental feature on their property, that commitment constitutes a conservation easement and is enforceable against all future owners. Accordingly, the Court should hold that the Global Settlement is a conservation easement that binds the State and any future owners who seek to build a golf course on the Property.

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[24] RCW 64.04.130 (emphasis added).
[25] PFR 594 (1979 Legislative Report).
[26] *Id*.
[27] PFR 595 (1979 Legislative Report).
[28] *See Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 247-50, 215 P.3d 990, 1000-1002 (2009) (finding that intent of the parties at the time of drafting right-of-way controlled over subsequent adverse conduct and documents).

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Even before the codification of conservation easements, Washington law respected equitable servitudes, the modern version of a covenant running with the land,[29] and the Global Settlement meets all of the standards to be enforceable against the State and all future owners as an equitable servitude.[30]

First, the Global Settlement is an enforceable contract between the original parties, as the original parties admit.[31] Second, its environmental protections constitute "a promise to do or refrain from doing a physical act upon the land" and therefore "touch and concern" the land, [32] and it was also expressly drafted to "apply to and be binding upon . . . successors and assigns"[33] and "subsequent owners."[34] Third, FOGH is an original party to the Global Settlement seeking to enforce the agreement against the State as a successor. And finally, the State had notice of the Global Settlement as it was a party to the contract and, after being involved in the protracted land use dispute on so many fronts and for so many years, it also had inquiry notice as to the resolution of the litigation.[35]

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[29] *See Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 691, 974 P.2d 836, 840 (1999) (describing real and equitable covenants).

[30] The traditional elements of an equitable servitude in Washington are (1) a promise, in writing, which is enforceable between the original parties, (2) which touches and concerns the land or which the parties intend to bind successors, (3) plaintiff standing to enforce the servitude against an original party or successor, and (4) sufficient notice such that the property owner cannot claim to be an innocent purchaser for value. *Dickson v. Kates*, 132 Wn. App. 724, 732, 133 P.3d 498, 502 (2006); *Hollis*, 137 Wn.2d at 691.

[31] *See* Plaintiffs' Motion to Enforce the Global Settlement and Durable Condition Against City of Westport, filed concurrently herewith, at Section V.B.1.

[32] *See Deep Water,* 152 Wn. App. at 259 ("A promise to do or refrain from doing a physical act upon the land…is an example of a covenant that touches and concerns the land.").

[33] PFR 62 (Global Settlement).

[34] PFR 76 (Wetland Mitigation Plan)*; see also Deep Water*, 152 Wn. App. at 259-60 (even absent express language, an agreement that touches and concerns the land is enough to bind successors).

[35] As discussed more below and in Plaintiffs' Motion for Partial Summary Judgment on the State's Bona Fide Purchaser Defense, filed concurrently herewith, the State cannot claim bona fide purchaser status. *See infra,* Section IV.C.3.

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C. The State's pursuit of the Links 2 Project violates the Global Settlement's recorded conservation easement ("Army Corps Covenant").

1. The Army Corps Covenant is enforceable.

One of the Global Settlement's core requirements was that 100+ acres of wetlands were to be permanently preserved and thus protected from development through the recording of a legally binding conservation easement.[36] This conservation easement was recorded in late 2010.[37]

The Army Corps required the Global Settlement's easement to be formally recorded to resolve the Army Corps enforcement action against the former owners of the Property for "knowing and willful" violations of the federal Clean Water Act through illegal wetland fill.[38] The State recognized that wetland impacts from these activities were extensive and still observable a decade later in 2021.[39]

This Army Corps Covenant required that the 100+ acres of wetlands protected by the Global Settlement be protected from development and "managed for wetland mitigation and forested habitat preservation purposes *in accordance with the* [Global Settlement] *agreement identified under the DOE Revised Shorelines Permit* #2007-SW-02407-A."[40] As contemplated by Global Settlement, the Army Corps Covenant is expressly binding on future owners.[41]

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[36] PFR 73 (Wetland Mitigation Plan).
[37] PFR 264 (Email from Naglich to Army Corps); PFR 269 (Army Corps Covenant).
[38] PFR 190-91 (Army Corps Notice of Violation). The Army Corps extensively documented the enforcement action against the former owners and its resolution, so there is no question that the Army Corps Covenant is the same conservation easement required by the Global Settlement. See PFR 222-223 (Email from Naglich to Army Corps); PFR 225 (Army Corps Internal Memo) ("Corps staff requested that…the mitigation agreed to in a Court Order with Ecology and Friends of Grays Harbor be documented.").
[39] PFR 396 (WSLP Restoration Feasibility Study).
[40] PFR 271 (Army Corps Covenant) (emphasis added).
[41] *Id.*

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The Army Corps Covenant is enforceable under federal law, notwithstanding any state-law arguments that Defendants may offer (although it plainly also qualifies as conservation easement and equitable servitude under state law[42]). It has been established since the 1970s that federal conservation easements acquired pursuant to an important national policy like the Federal Clean Water Act are enforceable regardless of any state law conflict.[43] Multiple courts enforced federal conservation easements at a time when they were still unenforceable under state law. For example, the court in *Little Lake Misere* held that "in a setting in which the rights of the United States are at issue in a contract to which it is a party and 'the issue's outcome bears some relationship to a federal program, no rule may be applied which would not be wholly in accord with that program.'"[44]

Since those early cases, the Courts have repeatedly held that conservation easements acquired pursuant to a federal policy of national scope are enforceable regardless of state laws. For example, *North Dakota v. United States* held "[t]o respond to the inherently fluctuating nature of wetlands, the Secretary [of the Interior] has chosen to negotiate easement agreements imposing restrictions on after-expanded wetlands as well as those described in the easement itself. As long as North Dakota landowners are willing to negotiate such agreements, the agreements may not be abrogated by state law."[45] *Sierra Club v. Marsh* applied the federal easement exception established in *Little Lake Misere* and *North Dakota v. United States* to uphold conservation easements acquired under the Endangered

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[42] The Army Corps Covenant is a conservation easement because it was drafted with the intent to preserve the Property and is binding on subsequent owners. PFR 271 (Army Corps Covenant). It also meets the standard for an equitable servitude. *See* fns. 29 and 30.
[43] *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973) [hereinafter "*Little Lake Misere*"] (state law would have abrogated the explicit terms of a prior land acquisition of the United States under the Migratory Bird Conservation Act and was therefore not applied); *United States v. Albrecht*, 496 F.2d 906, 911 (8th Cir. 1974) (state law barring conveyance of real property not applicable where it would hinder a national program of acquiring land for waterfowl production areas).
[44] *Little Lake Misere*, 412 U.S. at 604 (citation omitted).
[45] *North Dakota v. United* States, 460 U.S. 300, 319 (1983).

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Species Act ("ESA") against a challenge based upon state law, finding that "[t]he federal government is trying to discharge its obligations under a high priority federal program to protect endangered species. A private landowner wants to donate the land to the government to effectuate these purposes" and the "ESA is unquestionably a 'Congressionally declared program of national scope.'"[46] Thus, state law could not form the basis for a challenge to the federal easement.[47] In *United States v. Van Leuzen*, the court applied *Little Lake Misere* in the context of a wetland fill violation under the Clean Water Act,[48] the exact authority that the Army Corps employed in mandating the Army Corps Covenant.

United States v. 32.38 Acres of Land also relied upon *Little Lake Misere* to hold that federal property rights (there, a lease renewal right) are not subject to state law. Even if violating state law, "notions of federal supremacy nonetheless validated the United States' renewal rights"[49] and the "imposition of state law restrictions on the lease terms would frustrate the accomplishment of a Congressional program of national scope."[50] Applying state law "to abolish the bargained-for rights of the United States would wrongfully deprive it of the benefit of its bargain with the City and raise the specter of ongoing changes in state law which would perpetually linger over all federal officials seeking to implement a program of national scope or importance."[51]

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[46] *Sierra Club v. Marsh*, 692 F. Supp. 1210, 1215 (S.D. Cal. 1988) (citation omitted).
[47] *Id.*; *see also North Dakota*, 460 U.S. at 319.
[48] *United States v. Van Leuzen*, 816 F. Supp. 1171, 1180 (S.D. Tex. 1993).
[49] *United States v. 32.38 Acres of Land*, CASE NO: 99-CV-1622 W(RBB), 99-CV-1623 W(RBB), 2000 U.S. Dist. LEXIS 23648, at *22 (S.D. Cal. Mar. 8, 2000).
[50] *Id.* at *25.
[51] *Id.* at *26. The court repeatedly relied upon *Little Lake Misere*, *id.* at *24, 27, confirming that this protection of federal property rights applies equally to federally acquired conservation easements.

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Here, the Army Corps was expressly acting under its Clean Water Act authority when it bargained for a conservation easement,[52] a recognized property right under Washington state law.[53] The Army Corps has produced an extensive record showing its negotiation with Mox Chehalis over resolution of its Clean Water Act enforcement action.[54] That record shows that the Army Corps specifically required Mox Chehalis to record the easement that FOGH had negotiated in the Global Settlement.[55] The Army Corps ended its enforcement action only when "on December 14, 2010, the required deed restriction for the site was recorded with Grays Harbor County. This document identifies . . . wetlands to be preserved from future development, as required by the Corps of Engineers, to resolve the violation."[56]

2. The State is violating the Army Corps Covenant.

The State's Links 2 Project directly violates the Army Corps Covenant by placing commercial roads and golf course features within the easement's conservation areas. Just by way of example, the Links 2 Project depends upon connecting the "clubhouse" to the golf course by a road that goes right through the conservation easement's preservation area, and numerous other features are proposed within the preserved areas.[57]

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[52] *See* PFR 285 (Letter from Army Corps resolving violation). Requiring a conservation easement is common to resolve Clean Water Act violations. *See e.g., Benham v. Ozark Materials River Rock, LLC*, No. 11-CV-339-JED-FHM, 2017 U.S. Dist. LEXIS 220345, at *14 (N.D. Okla. June 1, 2017) ("[G]iven Ozark's past actions demonstrating its willingness to violate the CWA, the Court finds that a conservation easement is proper to protect the mitigation area in perpetuity."); *United States v. Bedford*, No. 2:07cv491, 2009 U.S. Dist. LEXIS 44126, at *4 (E.D. Va. May 22, 2009) (imposing deed restrictions to protect wetlands in perpetuity).

[53] *See* RCW 34.04.130 (conservation easements are property rights).

[54] *See* PFR 190 *et seq*.

[55] PFR 285 (Letter from Army Corps resolving violation).

[56] *Id*.

[57] *See* PFR 547 (Davis Decl., ¶ 5 and Exhibits).

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The Army Corps Covenant specifically requires that "[t]here shall be no agricultural, commercial, or industrial activity allowed in the Property; nor shall any right of passage across or upon the Property be allowed or granted if that right of passage is used in conjunction with agricultural, commercial, industrial activity."[58] The Links 2 Project, as proposed by the State, is thus in violation of the conservation easement established by the Army Corps Covenant.

3. The State's bona fide purchaser defense will fail.

As described in the Plaintiffs' Motion for Partial Summary Judgment on the State's Bona Fide Purchaser Defense, the State cannot fill protected wetlands in a state park based upon its claim of ignorance. If the State did not know about the Army Corps Covenant when it purchased the property, it was only due to its negligence. The State knew that the Global Settlement and Revised SSDP required Mox Chehalis to record a conservation easement over these wetlands, and there is no excuse for the State not performing the 30-second online search of the Grays Harbor County Auditor's database that confirms the recorded easement.[59] The State negotiated to have the seller provide the State with "due diligence materials" including any easements and other key environmental documents related to the Property,[60] but the State closed the purchase without receiving or asking for these documents.[61] In fact, the State purchased the half-built project without even asking for the project permits, which would have also led the State to the easements over the Property.[62]

[58] PFR 570 (Army Corps Covenant). In the Army Corps Covenant, "Property" refers to the 114.44 acres of wetland preservation and creation within the larger Links parcel. PFR 569.
[59] *See* PFR 6 (Declaration of Arthur Grunbaum, ¶ 21 and Exhibit B thereto).
[60] PFR 313 (Purchase & Sale Agreement).
[61] PFR 792 (State's Answer to Plaintiff's First Set of Interrogatories to Washington State Parks and Recreation Commission, Interrogatory No. 4)
[62] *See* Plaintiffs' Motion for Summary Judgment on State's Bona Fide Purchaser Defense; PFR 384 (Parks Commission did not look for the the Shorelines Permit until years after closing).

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When the State finally asked for the wetland permits (about six years after purchase),[63] it immediately found the Army Corps Covenant – and then immediately began to attack it, claiming "there are plenty of holes to poke with this shoddy agreement,"[64] and it is "not likely legally binding on State Parks."[65] You would expect the State to have greater respect for a federal easement protecting the same rare wetlands the State had been trying to protect for a decade.

V. CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' Motion for Partial Summary Judgment and enter the declaratory and injunctive relief set forth in Plaintiffs' proposed order.

RESPECTFULLY SUBMITTED this 11th day of July, 2025.

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[63] PFR 382-83 (FOIA Request).
[64] PFR 389 (Email from Merkelbach).
[65] PFR 437 (WSLP Golf Links Leadership Update presentation).