ORIGINAL

1st Civil. No. A116362

COURT OF APPEAL
of the
STATE OF CALIFORNIA

First Appellate District
Division Three

CENTER FOR BIOLOGICAL DIVERSITY, INC., and PETER GALVIN,
Plaintiffs and Appellants,
vs.
FPL GROUP, et. al. And ALTAMONT WINDS INC,
Defendants and Respondents

Appeal from a Judgment Entered On the Pleadings,
The Honorable Bonnie Sabraw, Judge
Alameda Superior Court No. RG4183113

BRIEF OF *AMICUS CURIAE* ENVIRONMENTAL LAW FOUNDATION SUPPORTING PLAINTIFFS AND APPELLANTS

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BRIEF OF *AMICUS CURIAE* ENVIRONMENTAL LAW FOUNDATION

I. Introduction

The Environmental Law Foundation ("ELF") is an environmental non-profit founded on Earth Day in 1991 with a long-standing commitment to preservation and maintenance of California's natural resources, including through application of the state common law Public Trust Doctrine. ELF currently has a Public Trust Project, designed to preserve, protect and defend the Public Trust Doctrine for today and California's future.

ELF submits this brief in the hope that it will assist the court in charting a third course different from those suggested by the parties regarding whether and how the Public Trust Doctrine applies to wildlife. The parties present the court with two firmly held but conflicting positions. Plaintiffs assert that the law currently recognizes non-aquatic wildlife as a core asset protected by and subject to the Public Trust Doctrine. Defendants assert with equal certainty that the Public Trust Doctrine has not, does not, and cannot ever include any protection for wildlife.

ELF offers a third course to resolution of this case. In brief ELF offers (a) that there is not in fact certainty on the issue; (b) that neither positive law nor case law in California have yet recognized wildlife's role in the Public Trust Doctrine; (c) that this Court is the first to squarely face the issue. Therefore, the question before this Court is not whether the law of the Public Trust Doctrine in California already embraces non-aquatic wildlife, but whether it should do so. ELF respectfully

suggest that the answer is affirmative and offers case law, historical and scholarly authority to show why this court should take the step of recognizing that wildlife is and ought to be part of the bundle of public resources included in – and protected by – the Public Trust Doctrine.

While charting a middle course, much of this brief necessarily criticizes the approach offered by Defendants. We do so because Defendants' argument against inclusion of wildlife protection is based on such gross mischaracterizations of Public Trust case law that, were any of these mischaracterizations adopted by the Court, it would require the Court to ignore or overrule many precedents, rendering the Public Trust Doctrine inoperative in many contexts where it has already been firmly established and recognized.

Defendants' first fundamental error is to misconstrue the Public Trust Doctrine as strictly tied to land and land-based real property interests. In fact, American jurisprudence has since the early 19th century included water itself, not just the lands beneath it, as well as aquatic wildlife such as fish, within the Public Trust Doctrine.

Second, Defendants' construe the Public Trust Doctrine as if it were simply another species of private property encumbrance, albeit an encumbrance held in public hands. Assets within the Public Trust Doctrine are not simply easements on real property held by a public agency. Those assets are instead an attribute of sovereignty itself, akin to the police powers. As such they exist not by dint of any deed, or indeed by any constitution, statute or ordinance. Rather the assets within the

Public Trust Doctrine became part of the bundle of responsibilities, powers and obligations of the state at the moment that state was created, and can neither be freely alienated nor cabined by positive enactments.

Defendants construct a cramped interpretation of the Public Trust Doctrine in order to exclude wildlife as a Public Trust Doctrine asset. Yet non-aquatic wildlife, like tidal lands, navigable waters, waters in steams that feed Public Trust resources, and fish, are each a resource that cannot be owned, but is owned by all and held in trust by the sovereign. And just as with tidelands, waters, and aquatic wildlife already recognized under the Public Trust Doctrine, the state retains a sovereign – not ownership – interest in protecting and preserving these resources as trustee for the people, regardless of their physical location.

The judicial role in the Public Trust Doctrine is unique. The Public Trust Doctrine has a rich history, extending back before the existence of this state or even this nation. As it has evolved over time, it has done so by organic growth in common law, in cases decided by courts. Courts have consistently recognized more, not fewer, interests and assets within the public trust. Courts do not administer the assets; that is left to the state. But it is uniquely the province of the Courts to say what the Public Trust is; the duty to recognize assets and interests protected by the Public Trust Doctrine in California has been performed only by the courts.[1] Courts

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[1] Indeed, the courts retain the ultimate authority to determine what assets and interests are within the Public Trust. When the Legislature seek to define the assets or interests subject to the Public Trust Doctrine, or state agencies define their roles in protecting them, courts show no deference whatsoever. The Supreme Court in its Public Trust Doctrine jurisprudence does not pause to discuss any standard of review or tradition

have the power and duty to exercise their discretion to determine the reach of the public trust doctrine, and to recognize changes in the assets and interests protected by it. This was done most dramatically by the high court in *Marks v. Whitney*, 6 Cal. 3d. 251 (1971), where the court added, *inter alia*, ecological interests to the bundle of public interests under the Public Trust Doctrine.[2]

The Court further enlarged Public Trust interests in *National Audubon Society v. Superior Court*[3] to save Mono Lake's wildlife and ecology. In doing so, the Court grew the doctrine in two remarkable ways. First, it recognized that the Public Trust Doctrine encompasses not just the land beneath navigable waters, but the water itself and all on which it depends. Second, it imposed Public Trust obligations on entirely non-navigable tributaries previously not included in the Doctrine.

The undisputed facts in this case prove that California's current laws and regulatory oversight by the executive have failed to protect outstanding and endangered species from being killed by outdated windmills. Just as the Supreme Court did for Mono Lake's wildlife in *Audubon,* the Court here can and must fill this regulatory void and require application of the the doctrine to the State's wildlife

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of deference. It asserts and fulfills its unique role in deciding fundamental questions about the reach of the Public Trust Doctrine. *See Audubon*, 33 Cal. 3d at 713 [courts have continuing role to protect and define the Public Trust, despite legislative enactment of comprehensive regulatory scheme over water, and courts have concurrent jurisdiction with State Water Board to protect the Public Trust when agency will not].

[2] For this reason, this brief consistently refers to both Public Trust assets (physical objects such as land or water or fish) and interests (such as the public interest in ecological integrity or scenic beauty or recreation). One is corporeal; the other inchoate. Cases expressly recognize both are protected by the Public Trust Doctrine.

[3] 33 Cal.3d 419 (1983) ("*Audubon*").

resources. Courts in California have looked at but never expressly been asked to rule on whether protection of wildlife is part of those interests and assets. No case law counsels against it; much counsels for it. It is time for this Court to explicitly acknowledge the role of wildlife in the Public Trust Doctrine.

II. The Public Trust Doctrine Includes Land, Water, and Natural Resources

Defendants go astray, as discussed below in detail, when they claim that the Public Trust assets are strictly limited to those tied to real estate, and then to real estate to which the state holds a fee or easement ownership interest.[4] In the eyes of Defendants, the public trust doctrine "is based on the public's literal and actual ownership of the State's tidelands and navigable waters," and "applies *only* where the public's easement in navigable waters or tidelands can be traced in the specific property at issue." GREP Brief at 13;15. This is wildly incorrect.

A. The Public Trust Doctrine Is Not Simply A Property Interest, But an Attribute of State Sovereignty

The history of the Public Trust Doctrine is rich, and long. Two separate strains are relevant to this case. One strain extends from the Institutes of Justinian, through the Magna Carta, into English Common Law, and to the newly formed

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[4] Respondents' Brief for Defendants GREP Bay Area Holdings, LLC, et. al. ("GREP Brief") at pp. 13-16.

United States and every state admitted since.[5] The second extends from the same Roman Law, but passes through the dictates of Alphonse the Wise in Spain, through the lands it acquired in the New World, which it eventually ceded to Mexico following its revolution, which then passed to the United States and eventually California following the Mexican-American War and Treaty of Guadalupe Hidalgo.[6]

The Public Trust Doctrine protects both physical assets and inchoate interests. Those assets and interests are not "owned" by anyone (including the state itself) but are held in trust for all persons.[7] The Doctrine traditionally started with tidelands, but California courts have since held it protects both assets and interests that include all navigable waters, fish, navigation, commerce, ecological preservation, and recreation.[8] What makes these assets and interests unique among all other types of assets is that they are not owned in the traditional sense. They are instead a common heritage of all, available to all, and managed or held in trust by the sovereign.

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[5] Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right* (1980-1981) 14 U.C. Davis L. Rev. 195, 197 (herinafter Stevens.)

[6] *Id.*

[7] "By the law of nature these things are common to mankind–the air, running water, the sea and consequently the shores of the sea." Institutes of Justinian 2.1.1.

[8] The public trust interests "have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing or other purposes." *Audubon*, 33 Cal.3d at p. 434, *citing Marks,* 6 Cal.3d at p.259. "The principal uses [the Audubon] plaintiffs seek to protect, however, are recreational and ecological– the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds. Under *Marks v. Whitney, supra*, it is clear that protection of these values is among the purposes of the public trust." *Id.* at p. 435 (internal citations omitted), *citing Marks,* 6 Cal.3d at p. 251.

As far back as 1821, the courts have been historically aware of a legal distinction between private, public and common property. Common property (property encumbered with a public trust), said Chief Justice Kirkpatrick of the New jersey Supreme Court, includes "the air, the running water, the sea, the fish and the wild beasts. [These are] things in which a sort of transient usufructuary possession only, can be had. . ." Arnold v. Mundy, 6 N.J.L. 1, 71 (1821) (citations omitted)."[9]

The third of these types, "common property," is unique for two reasons. First, as noted, this includes things which cannot be owned by anyone – public or private. Second, common assets and interests under the Public Trust Doctrine are not "property" in the usual sense at all. Rather, they are aspects of sovereignty itself. As many commentators and courts have noted, starting with the United States Supreme Court in *Illinois Central,*[10] "The state can no more abdicate its trust over property. . .then it can abdicate its police powers in the administration of government and the preservation of peace."[11] This aspect of Public Trust Doctrine protection is most obvious when one contemplates that inchoate interests are also protected, irrespective of actual property or objects.

Hence, just as the police power is not tied to notions of property or ownership

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[9] *See* G. Meyers, *Variation on as Theme: Expanding The Public Trust Doctrine to Include Protection of Wildlife*, 19 Envtl. L. 723, 725 n. 4 (1988-1989).

[10] *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 454 (1892).

[11] *See also*, Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. Davis L. Rev. 195, 196 (1980-1981) for a discussion of the historic bases for the Trust and its confines, and noting a "judicial response in the form of declarations that the public trust is inalienable as an attribute of sovereignty. . ."

but to an understanding of the powers and obligations of the sovereign, so too assets and interests found in the Public Trust are there not by virtue of ownership but because they in fact are owned by no one.[12]

Therefore in discussing the Public Trust Doctrine and the assets and interests governed by it, it is important not to be caught by juridical categories for real property or chattels. The Public Trust Doctrine borrows words, phrases and concepts from those areas, such as "trust" and "land," but applies very different meanings and obligations upon them.

B. Public Trust Assets Are Not Based on Ownership of Real Property

Defendants's argument goes entirely off the rails on the application of the modern public trust doctrine when they cite English common law to conclude that a state needs actual "acquired title" and "ownership" of land in order to exercise its public trust responsibilities.[13] That is wrong. Literal, legal ownership of land or

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[12] "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, ... than it can abdicate its police powers in the administration of government and the preservation of the peace." *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 521. Contrast this sovereign interest with a mere real estate interest such as the ground upon which this courthouse sits; unlike public trust interests, the state is free to sell or lease the courthouse property if it chooses to do so.

[13] "The English common law evolved the concept of the public trust, under which the sovereign owns all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people..." GREP Brief at 13, *citing Audubon,* 33 Cal.3d at p.434.

Curiously, Defendants quote *Venice Peninsula Properties* for support, even though Defendants trumpet its rejection by *Summa Corp. See* GREP Brief at p.16. *Summa* did limit application of the public trust doctrine regarding some lands that passed under the Treaty

other resources has *never* defined what assets are protected by the doctrine.

The Audubon opinion, in which Defendants find that reference to English law, expressly acknowledged that early English decisions limited the public trust to "tidal waters and the lands exposed and covered by the daily tides."[14] But a continued reading of the opinion explains that the modern application of the doctrine is "*not* limited by the reach of the tides, but encompasses *all navigable lakes and streams*."[15] Other California cases have made explicit that all lands under those lakes and streams are protected by the public trust doctrine as well. For example, in *City of Berkeley*,[16] the Court expressly overturned two earlier rulings that tidelands could be granted free of the public trust, and instead held that all lands granted by the State Board of Tide Land Commissioners pursuant to an 1870 statute were subject to the public trust.[17]

Indeed, it is a well recognized aspect of the Public Trust Doctrine that, when the state does in fact pass title to real property to a private party, the transfer of title does not extinguish the Public Trust obligations imposed upon the state. California

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of Guadalupe Hidalgo. But this limitation applied only to actual land granted – the real estate itself – not to the waters, shores, or aquatic wildlife assets also protected by the Public Trust Doctrine.

[14] *Audubon,* 33 Cal.3d at 435.

[15] *Id.* (emphasis added), *citing Illinois Central,* 146 U.S. 387.

[16] *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515.

[17] 26 Cal.3d at p. 534. At no point in the *City of Berkeley* decision does the California Supreme Court refer to the public trust as an "easement" or "servitude." *See also Marks v. Whitney,* 6 Cal.3d 251 ("The state holds tidelands in trust for public purposes.")

cases dating back to *California Fish*, (1913) 166 Cal. 576, have held that express legislative intent is required for land to be transfered from the state to private individuals free of the trust obligations, and that "it will not be implied if any other inference is reasonably possible.[18] Subsequently, the Court in *City of Berkeley* interpreted *California Fish* to require an inquiry into whether the legislature intended to transfer the land in question expressly free of public trust obligations.[19]

Commentators have noted this disconnect between land ownership and Public Trust assets for over a quarter of a century. "[P]ublic trust uses – historically assured by the common law concept of ownership of the bed of a waterway – are being increasingly furthered by new and expanded definitions of public rights having nothing to do with bed ownership."[20] A host of California cases recognize, for example, public rights of passage over water "irrespective of ownership of the bed."[21] Recent scholarship confirms that even after the property at issue passes into private

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[18] 166 Cal. at p. 597. ("Statutes purporting to authorize an abandonment of.... public use will be carefully scanned to ascertain whether or not such was the legislative intention, and that intent must be clearly expressed or implied."); *City of Berkeley,* 26 Cal.3d at p. 525 ("The effect of *California Fish* was to retain the public's right in vast grants of tidelands purportedly conveyed in fee....") The U.S. Supreme Court's *Illinois Central* decision goes a step further than California, determining that a single legislature does not have the power to "give away nor sell the discretion of its successors" and thus did not have the power to convey the entire waterfront of the city to a private party free of the trust. 146 U.S. at p. 452.

[19] 26 Cal.3d at p. 525.

[20] Stevens, 14 U.C. Davis L. Rev. at p.202.

[21] *Ibid*, 14 UC David L.Rev. at 209 and 207-208 (citing *People ex rel. Baker v. Mack*, 19 Cal. App.3d 1040, 1050 (1971) ["the question of title to the river bed was irrelevant"] at 207, and *People v. El Dorado County*, 96 Cal. App.3d 403 (1980).

h ands, the public trust obligations remain with the state.[22]

In particular, Defendants turn the opinion in *Golden Feather*[23] inside out in claiming that it limits the sovereign authority to protect and regulate public trust resources to real estate the state owns. In fact, *Golden Feather* states the opposite conclusion: "the state cannot divest itself of the trust obligation and any conveyance of title of such property to a private person is necessarily subject to the trust."[24] The *Golden Feather* holding applies only to situations where there is a man made body of water created after the admission of California, and therefore the State by definition did not "acquire title to such lands and waterways upon its admission to the union."[25]

Hence, state-controlled title or ownership is not a limitation on Public Trust assets. Nor are Public Trust assets and interests grounded (pardon the pun) in land alone.

C. Public Trust Assets Include Assets That Are Not Connected at All to Real Property

Unlike a literal easement or servitude, the Public Trust Doctrine protects all

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[22] Carstens, *The Publicv Trust Doctrine: Could A Public Trust Declaration for Wildlife Be Next?*" Envtl Law RPublic Trustr (Vol 2006, No. 9) at 407.

[23] *Golden Feather Community Association v. Thermalito Irrigation District* (1989) 209 Cal.App.3d 1276.

[24] *Ibid* at 1285.

[25] *Ibid* at 1283.

navigable waters in California, even if lands underlying those waters are privately held. The California Supreme Court characterized the relationship between the state and its waters as a trusteeship.[26] The disconnect between land ownership and protection of water is long-standing.[27]

This is not insignificant to the case before this court. Water, unlike land but like wildlife, shares two essential attributes with the wildlife at issue here. First, they are both mobile.[28] Second, neither can be owned by anyone, publicly or privately.[29] And water itself is indisputably included in the bundle of assets protected by the Public Trust Doctrine. The California Supreme Court could not have been clearer about this. While noting that the Public Trust Doctrine grew out of early English decision solely with land covered by tides (and hence owned by the sovereign), that connection to tideleands, or indeed to land at all, has long since been severed. "It is, however, well, settled in the United States generally and in California that the public trust is not limited by the reach of the tides, but encompasses all navigable lakes and streams."[30] This is true regardless of who in fact owns the land beneath those navigable waters.

But in *Audubon* the Court went further, and held that even the water in non-

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[26] *Ivanhoe Irr. Dist. v. All Parties*, (1957) 47 Cal.2d 597, 620.

[27] *See Stevens*, 14 UC Davis L.Rev at 202, 207-209.

[28] Carstens, 2006 Cal. Envtl L. Rprt. 9: 410.

[29] Meyers, 19 Envtl. L. at 729. ("Like water bodies in their natural state, wildlife cannot be owned.")

[30] *Audubon*, 33 Cal. 3d at 435; *see also People v. Truckee Lumber*, (1897) 116 Cal. 397, 401.

navigable streams was subject to Public Trust obligations and protections. "We conclude that the public trust doctrine, as recognized and developed in California, decisions, protects navigable waters from harm caused by diversions of nonnavigable tributaries."[31]

The Court then held that the obligations of the Public Trust Doctrine could be imposed on any waters affecting the public trust assets or interests, and therefore even the upstream creeks and streams from which the LADWP was diverting water could be and indeed had to be in conformity with the Public Trust Doctrine obligations to protect Mono Lake. As a result, the protections eventually imposed to protect Mono Lake were utterly unrelated to the land beneath the lake or the navigability of the lake. The diversions in fact affected neither.[32] Thus, the Court held interests having nothing to do with real property must be protected. "The principal values plaintiffs seek to protect, however, are recreational and ecological – the scenic views of the lake and its shore, the purity of the air, and *the use of the lake for the nesting and feeding by birds.* Under *Marks v. Whitney*, [citation omitted] it is clear that protection of the these values is among the purposes of the public trust."[33]

Hence the Public Trust Doctrine includes water within the bundle of assets, an asset that is mobile and which California law expressly notes cannot be owned by

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[31] 33 Cal.3d at 437. This was entirely consistent with the decision in *Truckee*.

[32] 33 Cal.3d at 424-425 (noting impacts on size and shape of lake, but focusing only on hazards to birds and "scenic beauty and the ecological values of Mono Lake.")

[33] 33 Cal.3d at 435 (emphasis added).

any person, whether public or private. Moreover, the interests that may be protected are not limited to navigation or even water-borne activities of man at all. And, tellingly, the Court expressly held that protecting birds is a trust interest.

III. It Is Appropriate for this Court to Find That Wildlife Is Among the Assets Protected by the Public Trust Doctrine

Defendants are wrong in asserting that wildlife never has been and never can be part of the Public Trust Doctrine, because they wrongly cabin the Public Trust Doctrine to notions of real estate and ownership. That does not, however, answer the question of whether wildlife already is, or if not, should be, part of the Public Trust Doctrine. To this we now turn our attention.

A. The Public Trust Can and Should Protect Wildlife

Plaintiffs in this case believe the question has already been answered. Others are less certain. In the words of one Public Trust advocate, "State statutes have recognized that wildlife is held in public trust and courts have recognized the state's duty to protect wildlife as a public trust asset. However, up to this point, there has been no explicit analysis by the California Supreme Court of wildlife being subject to the Public Trust Doctrine." [34] In his 2006 note in the California Environmental

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[34] Carstens, *The Public Trust Doctrine: Could A Public Trust Declaration for Wildlife Be Next?* 2006 Envtl L. Rprt., 9: 405 (hereinafter Carstens). Meyers too acknowledges the transitional state of the doctrine. "[T]he public trust doctrine, *as currently used by most states,* does not protect wildlife or wildlife habitat per se, but is instead restricted to water-based protections." Meyers, 19 Envtl. L. at 724, n. 4. (emphasis added) Meyers contrasts the reduced contemporary use of the doctrine with *Arnold v. Mundy*, 6 N.J.L. 1, 71 (1821), a case holding that state protection includes "the air. ..and the wild

Law Reporter, Douglas Carstens examined three cases then up for review before the California Supreme Court that might address whether wildlife was protected under the Public Trust Doctrine. One case was resolved as moot; one raises the issue at best obliquely.[35] The third raises it directly, though other issues before the Court could resolve the case without deciding the wildlife in the Public Trust Doctrine issue. The status of each case as of 2006 is discussed at pp. 408-409. The *EPIC* case, which most directly raises the wildlife issue, was stayed pending bankruptcy proceedings involving a defendant. However, the stay has been lifted and briefing is complete before the Supreme Court.[36]

Assuming that this Court is called upon to decide whether wildlife is included in the Public Trust, amici respectfully suggest that the answer is, and probably always has been, affirmative: that wildlife are encompassed in the assets protected by the Public Trust Doctrine or, at minimum, protecting wildlife is among the values and interest that Public Trust Doctrine protects. The trend of case law, the pronouncements of positive law, and scholarly opinion all point uniformly to an affirmative answer. Carstens sums it up well:

. . .wildlife, like public trust land, is a resource held in common that

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beasts," neither of which is "water-based." *Ibid.* Meyers then advocates a transition from the current, "homocentric" approach to wildlife management to one that acknowledges legal "rights of the resource" unmediated by human needs. *Ibid* at 725.

[35] Carstens at p. 405. The cases are *California Earth Corps v. State Lands Commission,* Supreme Court No. S134300; *Laub v. Davis,* No. S138975; and *Environmental Protection Information Center v. California Department of Forestry and Fire Protection (Pacific Lumber),* No. S140547.

[36] The case was stayed after Defendant entered bankruptcy proceedings, but the stay was lifted and the case reinstated on August 1, 2007.

benefits humankind generally. Wildlife is not subject to "ownership" by the state in the sense that the state has title to it, but rather the state has "power to preserve and regulate the exploitation of an important resource. . .[*Hughes v. Oklahoma* (1979) 441 U.S. 3222, 335 (citations and internal quotations omitted] When wildlife is thought of as a resource held in common, the application of the Public Trust Doctrine to it seems eminently logical. Although government is not the owner of the wildlife, it is responsible for its management. . .[37]

B. No Existing Caselaw Controls This Action

It is important in beginning this inquiry to note that, contrary to Defendant's assertions, nothing forcloses inclusion of wildlife or protection of wildlife from the Public Trust Doctrine. Both parties argue that the California cases *Truckee Lumber* and *Stafford Packing* demonstrate either the State's ownership in wildlife, or lack thereof.[38] However, neither case actually addresses wildlife unconnected to tidelands. *Truckee Lumber* concerned the state's ability to protect "its sovereign rights in the fish within its waters, and their reservation for the common enjoyment of its citizens." 193 Cal. at p. 400. No wildlife other than fish was considered. Likewise, the *Stafford Packing* held that "the general right and ownership of fish is in the people of the state and that the state has the right to regulate and control the taking and disposition thereof." 193 Cal. at p. 725. Again, the *Stafford Packing* case concerned only the state's sovereign interest in fish. Moreover, the U.S. Supreme

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[37] Carstens at p.408.

[38] *People v. Truckee Lumber Co.,* (1897) 116 Cal. 397; *People v. Stafford Packaging*, (1924) 193 Cal. 719.

Court's 1979 *Hughes* decision[39] formally overruled these early California cases' formulation of a state's literal ownership over its wildlife resources. At the same time, the decision in *Hughes* re-affirmed the fundamental principles underlying the theory of state control, namely the sovereign duty of the state to protect and regulate its public trust resources. Because this duty is derived from its sovereign authority, it is not based on property ownership or rights, but rather based on the theory of a state's interest in public trust resources regardless of where the resource is located.

Defendant's argument that wildlife protection is barred under existing caselaw runs counter to the very caselaw they cite.[40] Defendants first cite to *Golden Feather,* which as explained *supra* at p.10 , specifically affirms the state's public trust duties, and applies only to artificial, man-made bodies of water. Defendants then conflate whether wildlife is covered under the doctrine with whether Plaintiffs have standing under the doctrine, and wrongly conclude that Plaintiffs lack private standing. Yet, as further detailed below, *Audubon* assures private standing to enforce the state's public trust duties.[41] Furthermore, private standing neither ensures nor inhibits wildlife protection under the public trust doctrine. Defendants then cite *Truckee Lumber* and spuriously conclude that because the state brought the action in this 1893 case, Plaintiffs in this case lack private standing[42]. This argument bears

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39 *Hughes v. Oklahoma,* (1979) 441 U.S. 322.

40 *See* GREP Brief at p. 24.

41 *Audubon,* 33 Cal.3d at p. 431 n.11, ("Any member of the general public...has standing to raise a claim of harm to the public trust.") (internal citations omitted) *citing Marks,* 6 Cal.3d at p.261-262.

42 GREP Brief at p.25.

no fruit because, again, *Audubon* affirmed private standing to raise a claim of harm to the public trust. While Defendants give bold-face prominence to "the dominion of the state" to protect its fish, actually enforcing this dominion may be instigated by private individuals. In fact, the Court in *California Trout* specifically allowed a private suit to protect fish, even though the public trust protection of aquatic species is not a "public easement in tidelands and navigable waters." [43] Incredibly, Defendants argue that *Stafford Packing* also bars private standing– all subsequent cases to the contrary notwithstanding.[44] ELF readily acknowledges, as Defendants do, that wildlife is "typically regulated by, and historically within the police powers of, the states."[45] Yet the state's purview over wildlife actually supports its complementary protection under the public trust doctrine, as the doctrine exists precisely for Courts to enforce these very duties to police and protect the state's natural resources. Similarly, as explained below, the Fish & Game Code's protection of wildlife does nothing to lessen the state's public trust interest in that wildlife, but rather underlies its enactment. Indeed, the State Water Code served as the legal framework for the *Audubon* decision, and yet the Court in *Audubon* allows private enforcement of the State Water Board's public trust duties under the Water Code.

Finally, Defendants misconstrue the U.S. Supreme Court's *Summa Corp* decision regarding the state's ability to enter and control private lands, in an effort

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[43] *California Trout, Inc., v. State Water Resources Control Board,* (1989) 207 Cal.App.3d 585.

[44] GREP Brief at p.26 n.5.

[45] GREP Brief at p.25.

to limit (or eliminate) *all* public trust powers of the state. In fact *Summa* applies only to those lands in what eventually became California that had been granted to private parties prior to ratification of the Treaty of Guadalupe Hidalgo. *Summa Corp. v. California ex rel. State Lands Commission,* (1984) 466 U.S. 198, 209. Following statehood, there were "proceedings taken pursuant to the Act of 1851" to adjudicate and settle claims of private ownership in lands granted to private parties by Mexico (or before it, Spain) and ceded by Mexico under the Treaty. However, if the land at issue was not subject to a land adjudication "pursuant to the [Mexican lands'] Act of 1851, the state retains its public trust interest in its resources independently of the ultimate disposition of the title. Defendants made no showing here that their land – let alone the birds – was adjudicated pursuant to the Act of 1851. Absent such a finding, *Summa* has no relevance. Moreover, even if there were an adjudication of the land in question here under the 1851 Act, *Summa* deals only with the real estate asset in the public trust. The decision, and the adjudications which it referenced, have no relation whatsoever to other, non-real estate, assets governed by the Public Trust Doctrine. It is precisely this distinction between the different forms of property discussed earlier – private, public and common – that Defendants fail to grasp, and why their discussion of *Summa* avails them nothing. For instance, using Defendants' argument it would be have to be the case that waters that flow across private lands for which there was an adjudication are not subject at all to the Public Trust Doctrine, or that a landowner could either take the water free from state control or bar or otherwise restrict public access to navigate that waterway. That neither is tenable points to the overbreadth of Defendants' reading of *Summa Corp.* Thus Defendant's

caselaw, like that of Plaintiffs, does not dictate whether wildlife is included under the Public Trust Doctrine.

C. Public Trust Assets Already Include Other Animal Resources

1. Fish Are Already Part of the Public Trust

The state's Public Trust Doctrine assets already includes the fish themselves and an interest in the fisheries and aquatic wildlife of the state.[46] The *California Trout* Court further explained that the public trust interest in its fisheries is the basis for the holding in *Truckee Lumber,* where the Supreme Court declared that the state's ability to protect its "sovereign rights in the fish" is not restricted to "navigable or otherwise public waters," and extends to "all waters within the state, public and private."[47]

Accordingly, the Public Trust Doctrine recognizes all fish – wherever they may be found – as part of the assets in the public trust. As such, their inclusion does not depend on property, or navigable waters. Moreover, fish are mobile. They may move in and out navigable waters, and even in and out of the state. Nonetheless, the case law uniformly holds that all fish are part of the public trust. *California Trout* affirmed once again the simple, well-established principle that "*wild fish have always been recognized* as a species of property and the general right and ownership of

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[46] *Id.* at pp. 629-630.

[47] *Id.* at p.629, *quoting People v. Truckee Lumber,* (1897) 116 Cal. 397. *See also In re Steuart Transportation Co.,* (E.D. Va. 1980) 495 F. Supp. 38, 39 (using a public trust analysis to conclude that a state could recover damages for harm done to waterfowl from an oil spill.)

which is the people of the state."[48]

2. Other States Recognize Other Animals in the Public Trust

There is well-established caselaw recognizing a "state wildlife trust" doctrine under which States are wards of their wildlife. One Texas court characterized the wildlife trust as, "the general ownership of wild animals, as far as they are capable of ownership, is in the state, not as a proprietor, but in its sovereign capacity as the representative and for the benefit of all its citizens in common."[49] This is the chief result of the U.S. Supreme Court's *Hughes* decision, which reinforced the trust duties (but not outright ownership) upon the states.[50] This "state wildlife trust" principle is what makes statutes such as the Fish and Game Code possible, and gives rise to the parallel *parens patriae* doctrine. Historically, protection of wildlife and the lands they depend on was part of state common law. The State of Alaska has taken the wildlife trust principle furthest and inscribed it in their constitution that wherever fish, wildlife and waters occur in their natural state, they are reserved to the people for common use. Alaska Const. Art. VIII § 3 (1999).

Critically, both the state wildlife trust and public trust doctrines reflect the same sense of community responsibility for its natural resources.[51] These shared

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[48] 207 Cal.App. 3d at 630, *citing Stafford Packing,* 193 Cal. at 727. Of course, the California Constitution recognizes the right to fish on all lands and waters of the state, a constitutional expression of the common law principle. *See* Cal. Const. Art. 1, section 25.

[49] *State v. Bartee,* (Tex. App. 1994) 894 S.W. 2d 34, 41.

[50] 441 U.S. at 335-336.

[51] *See* Babcock, Hope, *Should* Lucas v. South Carolina Coastal Council *Protect Where the Wild Things Are?* (2000) 85 Iowa L. Rev. 849, 898.

values are nothing new; and the application of the public trust doctrine to land-based habitat is *not* an expansion of power, but rather a court's exercise of its discretion to protect a state's resources based on long-standing, long-accepted concepts of state responsibility for its wildlife.[52] The public's entrustment of its resources is based on shared values of wildlife, as with other natural resources, for which responsibility ultimately redounds to the state. These shared values grant trusteeship of wildlife to the state, and constitute background principles that are known to all land owners, whether Defendants acknowledge it in this case or not.[53] In terms of killing migratory birds, these shared values dictate that indiscriminate killing of these birds is illegal. This simple conclusion forms the basis for this state's sovereign interest in protecting its wildlife. Defendants cannot seriously contend otherwise.

3. Though The State Does Not Own Wildlife, It Remains Responsible for Its Protection

A state does not "own" wildlife in the way a private individual owns real property or chattels. This was the Supreme Court's key holding in *Hughes,* which held that interstate commerce was not burdened by states' proprietary ownership rights in wildlife (birds). Specifically, the *Hughes* court declared that "the fiction of state ownership may no longer be used to force those outside the State to bear the full

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52 *Id.*

53 *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992) (incorporating common law into takings jurisprudence, which inheres "in the restrictions that the background principles of the State's law of property and nuisance already place on land ownership.")

costs of 'conserving' the wild animals within its borders when equally effective nondiscriminatory conservation measures are available."[54]

In denying actual state ownership of birds, the *Hughes* court overruled *Geer v. Connecticut*,[55] and its commonly held theory of a state inheriting "ownership" of wildlife from the sovereign.[56]

In California, cases such as *Truckee Lumber* and *Stafford Packaging* shared the same underlying principles used in the Supreme Court's turn-of-the-century *Geer* decision, which inscribed a state's right to "control and regulate the common property in game," based on the long-held proposition that the King's dominion over wildlife transferred to the individual states upon their creation.[57] The *Truckee Lumber* Court shares this formulation of sovereign-derived authority, writing that "the fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is the people of the state;" and these species are state property precisely because originally "the right and power to protect and preserve such property [...] is

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[54] 441 U.S. at p. 337.

[55] 161 U.S. 519 (1896).

[56] *See, e.g., Fields v. Wilson,* (Or. 1949) 207 P.2d 153 at p.156 ("animals are *ferae naturae,* and while in a state of freedom their ownership, as far as a right of property can be asserted, is in the state, not as a proprietor, but in its sovereign capacity for the benefit of and in trust for its people in common."); *Cook v. State,* (Wash. 1937) 74 P.2d 199 at p. 202 ("property rights in *ferae naturae* were in the sovereign. The killing, taking and regulation of game and other wildlife were subject absolute government control for the common good. This absolute power to control and regulate passed with the title to the game and wildlife to the several states subject only to the applicable provisions of the Federal Constitution. ")

[57] *Arnold v. Mundy,* 6 N.J.L. 1 (N.J. 1821); *Geer,* 161 U.S. 519.

one of the recognized prerogatives of the sovereign."[58] Thirty years later, the Court quotes this entire passage *verbatim* in *Stafford Packing.*[59] In other words, both cases stand for the same principle, that state "ownership" of its resources, i.e. the power to protect and regulate, was passed down to a state at the time of its founding.

A half-century after *Stafford Packing*, the U.S. Supreme Court clarified the term "common property" to mean "a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource."[60] In clarifying (and dismissing) the "legal fiction" of "ownership" the *Hughes* did not question, limit or overrule that the "power to preserve and regulate" the birds remained intact. Instead, the *Hughes* Court reaffirmed the *Toomer* holding that state wildlife ownership was "no more than a 19th century fiction," but also recognized the need to preserve "the legitimate state concerns for conservation and protection of wild animals underlying the 19th Century fiction of state ownership."[61] *Hughes* then preserves the "state concerns for conservation and protection" and merely dispenses with a "fiction" of literal state ownership.

Indeed, the *Hughes* preservation of a state's right to "conservation and protection" only amplifies the fact that state interests were never bound by real property or ownership of the asset to be protected. Rather, this power they derived

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58 116 Cal. at pp. 399-400.

59 193 Cal. 719 at p.727.

60 *Toomer v. Witsell,* (1948) 334 U.S. 385.

61 441 U.S. at 335-36.

from the powers of the sovereign, not from the law of property.[62]

Thus, the duty to protect is not (and never has been) dependent on ownership. Decisions of other states clarify and underscore this understanding. The Alaska Supreme Court confirmed the State's ongoing duty to protect wildlife after *Hughes*: "After *Hughes*, the statements in the Alaska Constitutional Convention regarding sovereign ownership... are technically incorrect. Nevertheless, the trust responsibility that accompanied state ownership remains."[63] So too, this continuing responsibility for wildlife is reflected in the ability to collect money damages for injuries to the public trust.[64]

In California, the most recent case that considered the State's modern interest in wildlife is *California Trout*,[65] where the California Supreme Court affirmed once again the *Truckee Lumber* holding that "wild fish have always been recognized as a species of property and the general right and ownership of which is the people of the state." [66] Meyers argues that the *Hughes* court "advanced the proposition that the state has a duty to exercise the legitimate state/public concerns for conservation, protection, and regulation of wildlife that underlie 'the 19th-century legal fiction of

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62 *See, e.g., Commonwealth v. Alger,* (1851) 61 Mass (7 Cush.) 55, 83 ("whether this power be traced to the right of property of right of sovereignty as its principle source, it must be regarded as held in trust for the best interest of the public.")

63 *Pullen v. Ulmer*, (Alaska 1996) 923 P.2d 54, at60.

64 *See State v. Gillette,* (Wash.Ct.App. 1980) (awarding money damages against landowner who destroyed salmon eggs by driving a tractor through a stream bed on his land.)

65 *California Trout v. State Water Resources Control Board,* (1989) 207 Cal.App.3d. 585.

66 207 Cal.App. 3d at p.211, *citing Stafford Packing,* 193 Cal. at p. 727.

state ownership.'"[67] The Public Trust Doctrine is the common law judicial enforcement of this duty; and "the state may not abdicate its duty to preserve and protect the public's interest in common natural resources."[68]

4. The Public Trust Doctrine Historically Has Included References, Sometimes Explicitly, To Inclusion of Non-Fish Species

In setting out the broad parameters and boundaries of the Public Trust Doctrine, courts have repeatedly suggested – certainly they have never rejected – inclusion of an interest in protection for wildlife.

As noted, one of the earliest decisions of the Public Trust in American law stems from an 1821 decision of the New Jersey Supreme Court, which in discussing the public trust as it applied to oyster beds, defined the Public Trust to include "the air, the running water, the sea, the fish *and the wild beasts*."[69]

More recently, a district court after the Supreme Court's *Hughes* decision, in ruling on a case where a vessel damaged migrating water fowl, held that "Under the

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[67] Meyers, 19 Envtl. L. at p. 730.

[68] *Id.*

[69] *Arnold v. Mundy*, 6 N.J.L. 1, 71 (1821). Almost two hundred years before *Arnold*, the Massachusetts Bay Colony adopted the "'great pond' ordinance of 1641 [that] guaranteed the public's right to fish *and fowl* in ponds greater than ten acres in size. . .similar protections were afforded freshwater lakes in Maine and New Hampshire." Stevens, 14 U.C. Davis L. Rev at p. 199.

Public Trust Doctrine, the State of Virginia and the United States have the right and the *duty to protect and preserve the public's interest in natural wildlife resources.* Such right does not derive from ownership of the resources but from a duty owing to the people."[70] As noted, Alaska has most explicitly held that wildlife resources are unquestionably included in the Public Trust.[71]

But one need not travel to a distant land or the distant past to find references to wildlife other than fish included in the Public Trust Doctrine. Several California cases do it. They all recognize the state's interest and duty to hold in trust the wildlife resources of the state. "The title to and property in the fish within the waters of the state are vested in the state of California and held by it in trust for the people of the state."[72] "It is beyond dispute that the State of California holds title to its tidelands *and wildlife* in public trust for the benefit of the people."[73] "*California wildlife is publicly owned* and is not held by owners of private land where wildlife is present."[74] Legislative enactments echo these rulings in positive enactments.[75]

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[70] *In re Steuart Transp. Co.*, 495 F.Supp. 38, 40 (E.D. Va 1980) (emphasis added).

[71] *Owsichek v. Alaska Guide Licensing and Control Board,* 763 P.2d 488 (Alaska 1988) (highlighting the Public Trust Doctrine contained in the "common use" clause of the Alaska Constitution).

[72] *People v. Monterey Fish Products Co.,* 195 Cal. 548, 563 (1925).

[73] *People v. Harbor Hut Restaurant*, 147 Cal. App. 3d 1151, 1154 (1983) (emphasis added).

[74] *Betchart v. California Department of Fish & Game*, 158 Cal.App. 3d 1104, 1106 (1984) (emphasis added).

[75] As Plaintiffs note, the California Legislature has enacted various statutes recognizing and codifying the protection of wildlife. "The fish and wildlife resources are held in trust for the people of the state by and through the Department." Fish and Game

Similarly, many cases recognize hunting and enjoying wildlife as protected interests under the Pubic Trust Doctrine– and there can be no interest in hunting or enjoying wildlife if there is no corresponding state interest in the wildlife. For example, in *People ex rel Baker*,[76] the court struck down a landowner's attempt to prevent passage down the Fall River. In ruling on the issue of navigability, the court noted that "It hardly needs citation of authority that the rule is that a navigable stream may be used by the public for boating, swimming, fishing, *hunting and all recreational purposes*." (Emphasis added.) Likewise, in *Marks v. Whitney*,[77] the California Supreme Court made it clear that the interests protected by the Public Trust Doctrine were not limited to water, navigation or fish. It expressly recognized hunting, as the lower court did the same year. It went on to hold that the interests served by the public trust included "preservation of these lands in their natural state, so that they may serve as ecological units for scientific study, for open space, and as *environments which provide food and habitat for birds* and marine life, and which

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Code § 711.7(a). *See also* § 1802. As noted above, these enactments merely state who is responsible in the state for management of these public trust resources; they do not displace the continuing role for the courts to apply the Public Trust Doctrine. "While the public trust may be embodied in various provisions of the Fish and Game Code, such statutory provisions 'do not render the judicially fashioned public trust doctrine superfluous." Carstens, 14 U.C. Davis L.Rev. at 409 (quoting *Audubon*, 3 Cal.3d n. 27).

Nor, as Defendants would have it, does the absence of private right of action under the Fish and Game Code provisions affect any right to directly enforce the Public Trust Doctrine in the courts. As the Supreme Court noted in exactly the circumstances here, where no agency action is taken, the courts retain an important role "to require consideration of public trust uses in cases filed directly in the courts." *Ibid.* As discussed below, there is no question but there is universal standing to protect and enforce the public trust. *Ibid* at 431 n. 11 ["any member of the general public has standing to raise a claim of harm to the public trust." (citing *Marks v. Whitney*).

[76] *People ex rel Baker v. Mack*, 19 Cal. App.3d 1040, 1044 (1971).

[77] 6 Cal. 3d 251, 259-260 (1971).

favorably affect the scenery and climate of the area."[78]

But perhaps the most noteworthy acknowledgment of the inclusion of non-aquatic species' inclusion in the zone of interests protected by the Public Trust Doctrine is *Audubon* itself. The Court expressly held that water-based uses, what it called the "traditional triad of uses – navigation, commerce and fishing – did not limit the public interest in the trust res."[79] The Court cited the previous language from *Marks* approvingly, and went on to hold expressly that even where, as there, the case did not involve any issues of navigability, or any aquatic species to speak of, the Public Trust Doctrine nonetheless protects values that are "recreational and ecological – the scenic views of the lake and its shore, the purity of the air and the use of the lake for nesting and feeding by birds [citing *Marks*]. It is clear that protection of these values is among the purposes of the public trust."[80]

As both Carstens and Meyers suggest (albeit from very different perspectives), "there is sufficient precedent and logical justification for including wildlife within the coverage of resources protected by the Public Trust Doctrine."[81] Carstens reasons, "if the Public Trust Doctrine encompasses a mobile resource such as water, and is not necessarily limited to the channels and vessels that contain the water, then why wouldn't the Public Trust Doctrine encompass the mobile resource

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78 *Id.* (Emphasis added)

79 3 Cal. 3d at 434.

80 *Ibid.* at 435.

81 Meyers at 728.

of 'wildlife,' – without regard to where that wildlife is?"[82] Carstens concludes that, "[w]hen wildlife is thought of as a resource held in common the application of the Public Trust Doctrine to it seems eminently logical."[83]

D. The Judiciary Has Both Power and Precedent to Include Wildlife In the Public Trust

The Public Trust Doctrine is that most unusual of species: a judicially created and controlled power to protect the state's interests when the state itself does not. As the Virginia district court in *Steuart Transportation* put it, the public trust doctrine is invoked by the judiciary "where no individual cause of action would lie."[84] One of the most telling rulings of the *Audubon* decision was that courts and agencies had concurrent jurisdiction over claims relating to the public trust. In *Audubon*, the State Water Board had argued that it was within the original jurisdiction of the agency to make water rights determinations, and therefore a court could not make an independent judgment prior to administrative exhaustion of this remedy. In response, the Court held that "to embrace [the administrative] system of thought and reject [the judicial] would lead to an unbalanced structure."[85]

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82 Carstens at p. 400.

83 *Ibid.* at 408.

84 *In re Steuart Transp. Co.*, 495 F.Supp. at p. 40. The *Steuart* Court likewise notes that the doctrine of *parens patriae* is based on the same principle.

85 *Audubon,* 33 Cal.3d at 445.

In so holding, the *Audubon* Court reserved the judicial power to apply the common law Public Trust Doctrine as an entity separate from legislative and executive functions. This power remains with the California courts today– and may be applied in the present case. Flexibility in its application is inherent in the doctrine, as its protected uses "are sufficiently flexible to encompass changing public needs."[86] Moreover, when the *Audubon* Court declared that recreational and ecological *values* were covered by the doctrine, the Court expressly added values to the protected interests of the public trust doctrine[87]. These values – recreational and ecological– are identical in the present case. Plaintiffs seek the protection of the same values here, so that these birds, like those in *Audubon*, are not subjected to wanton killings by Defendants.

As noted by Stevens, change in the Public Trust Doctrine has been constant. "The law is '[t]he felt necessities of the times,' said Justice Holmes. Nowhere is this more readily demonstrated than in the field of public trust law. . .changing needs have led to different definitions of public trust uses which were lower priorities – if recognized at all – in the 19th century."[88]

Nor should this Court shy from recognition of wildlife protection in the Public Trust Doctrine because of action (or inaction) by the legislative or executive

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86 *Id.* at p. 434.

87 *Id.* at p. 435 ("The principal uses [the Audubon] plaintiffs seek to protect, however, are recreational and ecological [...]it is clear that *protection of these values* is among the purposes of the public trust.") (emphasis added) (internal citations omitted), *citing Marks,* 6 Cal.3d at p. 251.

88 Stevens at 196; *see also ibid.* at 222-223 ("the enumeration of public trust uses has expanded and contracted to meet modern necessities.")

branches of the state. The Judiciary shares a co-equal (and perhaps superior) role to the Legislature and executive agencies when it comes to defining the precise application or boundaries of the Public Trust Doctrine to a particular resource. It must be remembered that many of the Public Trust cases that arise come after action by the legislative branch has sought to transfer Public Trust properties to private hands. "Happily, [the Public Trust Doctrine] was available when needed to protect the public's rights in navigable waters against their supposed legislative protectors.[89]

One of the most outrageous schemes involved the Illinois Legislature's attempted conveyance of lands constituting the bed of Lake Michigan along the entire Chicago waterfront."[90] This conveyance (and subsequent undoing) are of course the basis for the United States Supreme Court's decision in *Illinois Central*. The Supreme Court showed absolutely no deference to the legislature in making its own determination of what resources were in the Public Trust and not subject to alienation. As the *Audubon* court notes, *Illinois Central* "remains the primary authority even today, almost nine decades after it was decided." [91]

A long line of cases in California evinces a similar "strict scrutiny" by the courts over legislative efforts to define what resources are and are not within the Public Trust Doctrine, in the context of land conveyances. The California Supreme Court noted that legislative enactments are as often antithetical to the Public Trust

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89 Stevens, 14 U.C. Davis L.Rev at p. 210.

90 Stevens, 14 U.C. Davis L. Rev at pp. 210-211.

91 *Audubon,* 33 Cal.3d at p. 437.

as protective of it. "If there is any one abuse greater than another that I think the people of the State of California have suffered at the hands of their lawmaking power, it is the abuse that they have received in the granting out and disposition of the lands belonging to the State. . ."[92]

Consequently, the California Supreme Court has directed courts to ensure that any act touching upon the public trust resources "will be carefully scrutinized and scanned," to find any interpretation possible that will prevent, rather than allow, "destruction of the public use.'[93] As Stevens notes, "the same court" dismissed the notion of "deference to legislative grants," in favor of its opposite, judicial skepticism.[94]

The Supreme Court 75 years later made clear that legislative enactments neither limit nor displace the court's role in deciding the boundaries of the Public Trust Doctrine. "The doctrine applies in tandem with statutes such as C[alifornia] E[ndangered] S[pecies] A[ct], and is not displaced by them."[95] Nowhere was this more forcefully illustrated than in *Audubon*, where the Supreme Court held that, in the face of a legislative scheme as important and comprehensive as the Water Code with its role for the State Water Resources Control Board, or the California

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92 *City of Long Beach v. Mansell*, 3 Cal 3d 462, 505 App. B, *as quoted in* Stevens, 14 U.C. Davis L. Rev at 215.

93 *People v. California Fish Co.,* 168 Cal. 576, 597 (1913).

94 Stevens at p. 217, n. 101, *quoting City of Oakland v. Oakland Waterfront Co*, 118 Cal 160 (1897).

95 Carstens at p. 412.

Environmental Quality Act, the courts retain an important continuing role. "These enactments do not render the judicially fashioned public trust doctrine superfluous. . .The noncodified public trust doctrine remains important both to confirm the state's sovereign supervision and to require consideration of public trust uses in cases filed directly in the courts without prior proceedings before the [water] board."[96]

Similarly, the action – or inaction – by state agencies here is no impediment to the courts stepping in to define the scope of the Public Trust or assign responsibility to protect it. It is worth remembering that in *Audubon* it was the state agency responsible for protecting the Public Trust, the State Water Board, that adamantly disclaimed any ability or authority to do so, not least because it required that it revisit water allocations made long ago.[97] In the face of this failure to protect the resource, judicial action was not just an adjunct, it was required.

IV. Recognition of wildlife as part of the bundle of public trust assets in this case is not precluded by any existing legal doctrines

Defendants advance several additional arguments why public trust recognition for the wildlife is unwise or prohibited in this case. Each is wrong.

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[96] *Audubon*, 33 Cal. 3d at p. 447 n. 27.

[97] 33 Cal.3d at 445 (describing DWP's erroneous views of water rights as "a *vested right in perpetuity* to take water without concern for the consequences to the trust.")(emphasis added).

A. CBD's Ownership of Wildlife Is Irrelevant to Its Right to Challenge Management of Public Trust Resources

Defendants go to surprising lengths to demonstrate that the Center for Biological Diversity does not own the thousands of birds killed by Altamont windmills.[98] CBD's ownership or lack thereof has absolutely no bearing on the case. As explained above, the U.S. Supreme Court held in *Hughes* that a state maintains its public trust obligations regardless of any "19th Century fiction" of actual ownership. Incredibly, Defendants infer the opposite: "until capture, however, no person or government entity can assert an actual ownership interest in migratory birds" and consequently no public trust protection applies.[99] They further extrapolate that because CBD does not physically own the birds, Plaintiff has no "private standing." This is false; for standing purposes, "any member of the general public has standing to raise a claim of harm to the public trust."[100] Plaintiffs in *Audubon* made no such claim to ownership of the birds or other public trust resources, and CBD makes no such claim in the present case, either. Instead, the "actual ownership" issue is a red herring as it makes no difference for citizen standing to raise the public trust doctrine, who are asking the Court to invoke the doctrine to protect those birds killed by the Altamont windmills.

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98 GREP Brief at 20-24.

99 GREP Brief at 20, 24.

100 *Audubon,* 33 Cal.3d. at 431, n.11.

B. Electricity Is Not A "Favored" Utilization That Recieves Special Treatment Under The Public Trust Doctrine.

Defendants claim that electrical generation is a favored use. First, eletricity generation has never been a "public trust use." Moreover, under the Public Trust Doctrine, "the state is not burdened with an outmoded classification favoring one mode of utilization over another."[101] In the context of *Audubon* this meant that the water utilization by the Los Angeles Department of Water and Power was not somehow privileged versus protection of the public trust resources in Mono Lake. Likewise, Defendants seem to claim that their right to electrical production somehow trumps the state's right to protect its wildlife. No such precedent exists, nor do Defendants cite to any.

C. The Public Trust Is A Background Principle Under *Lucas*

Defendants erroneously claim that a state's assertion of public trust rights over its wildlife is tantamount to a constitutional taking.[102] However, the Public Trust Doctrine is not considered a taking because both the *Palazzolo* regulatory takings analysis and the *Penn Central* balancing test implicate the public trust as is a "background principle" that should be a part of reasonable investor-backed expectations.

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101 *Audubon,* 33 Cal.3d at p. 434. Stevens also discusses the fact that, contrary to Defendants' assertion, there is in fact "no rigid prioritization of public trust uses." Stevens, 14 U.C. Davis L. Rev at p. 223 (*and see* discussion at 223-230: "*The Prioritization of Public Trust Rights.*")

102 GREP brief at p. 34.

Under the U.S. Supreme Court's seminal *Lucas* holding on regulatory takings[103] an individual's rights of ownership are "confined by limitations on the use of land which inhere in the title itself." Even under this rigorous test, the Public Trust Doctrine, as a state interest which is not extinguished when title passes from the state to an individual, is just such a limitation. *Lucas* and its successor case *Palazzolo v. Rhode Island,*[104] calls these "inherent limitations" "background principles" and identify several factors that make non-nuisance actions fall into this category of non-compensable regulation of private land use. The public trust doctrine is one such background principle firmly ensconced in the California common law.

V. Conclusion

When faced with a choice between Plaintiff's and Defendants polarized views of the Public Trust Doctrine, the *Audubon* court declared that it "was unable to accept either position."[105] There, as here, the court was forced to navigate between a Plaintiff that assumed too much, and a Defendant that declaimed both jurisdiction and responsibility. As in *Audubon*, the Court here should chart a middle course, one that neither takes for granted the inclusion of wildlife in the Doctrine, but also one that follows a logical genesis of caselaw, and just as important, shared values of this

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103 *Lucas v. North Carolina Coastal Commission*, (1992) 505 U.S. 1003, 1027.

104 (2001) 533 U.S. 606.

105 *Audubon,* 33 Cal.3d at p. 445 (noting the extremes of both positions-- that Plaintiff's version of the Doctrine meant that "most appropriative water rights in California were acquired and are presently being used unlawfully," while Defendant would have the Doctrine "'subsumed' into the appropriative rights water system, quietly disappeared.")

state in its wildlife.

This court has the power and ability under *Audubon* to recognizes wildlife and protection of wildlife under the Public Trust Doctrine. In urging the court to do so, ELF wishes to make clear that it is not opposed to wind energy, the use of windmills, or even the presence of windmills on Defendant's property in Altamont pass. To the contrary, ELF fully believes that wind power plays an important role in sources of renewable energy.

Instead, ELF is concerned by Defendants' insistence that it has *no* public trust responsibilities whatsoever. This extreme position leads them to believe they may keep their outdated, inefficient, and deadly windmills operating at Altamont, despite repeated promises and commitments to replace them with newer, safer and more efficient windmills that would have a fraction of the current impact on migratory birds. Defendants apparently believe that because their windmills are on private property they can kill thousands of birds in clear violation of California law. This could not be further from the truth. The killing of these raptors, however, is illegal regardless of the character of the underlying real property. When faced with unlawful activities, this state's duty as protector of its resources is not limited by real property boundaries. Likewise, the doctrine is not limited by actual, physical ownership of a public trust resource – and as a result, it may be applied to more than land, water and aquatic wildlife. When there is a legal void to fill in protection of California's natural resources, time and time again the judiciary has stepped in and invoked the public trust doctrine to provide an independent basis for protection. The

needless killing of birds by the Altamont windmills represents just such a void where the state has not found an adequate remedy, and this court should fill that void by applying the doctrine in the present case.

Dated: 28 January 2008

Respectfully submitted,

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