

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO

ENVIRONMENTAL LAW FOUNDATION, et  
al.

Petitioners and Plaintiffs,

v.

STATE WATER RESOURCES CONTROL  
BOARD, et al.

Respondents and Defendants.

---

COUNTY OF SISKIYOU,

Cross-Complainant,

v.

STATE WATER RESOURCES CONTROL  
BOARD,

Cross-Defendant.

Case No.: 34-2010-80000583

ORDER AFTER HEARING ON  
MOTIONS FOR SUMMARY  
JUDGMENT

On May 13, 2016, hearing was held on the parties' motions for summary judgment. Plaintiffs Environmental Law Foundation, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources were represented by James Wheaton, Lowell Chow and Richard Frank. Respondent and Cross-Defendant State Water Resources Control Board was represented by Deputy Attorney General Daniel Fuchs. Respondent and Cross-Complainant County of Siskiyou was represented by Roderick E. Walston. Having considered the parties' papers and arguments, the court now issues the following final order.

## INTRODUCTION

Three separate but related summary judgment motions are before the court: (1) Plaintiffs' motion for summary judgment (or, more precisely, summary adjudication) on its claim for declaratory relief against Defendant State Water Resources Control Board ("the Board"); (2) the Board's motion for summary judgment on a cross-complaint for declaratory relief filed against it by the County of Siskiyou ("the County"); and (3) the County's motion for summary judgment on its cross-complaint for declaratory relief against the Board. The issue raised by all three motions is whether the Board has the authority and duty under the public trust doctrine to regulate extractions of groundwater that affect public trust uses in a navigable river. Plaintiffs and the Board believe the answer is yes; the County believes the answer is no. Each party seeks a judicial declaration confirming its view of the law.

In its tentative ruling, the court denied all three motions, finding declaratory relief was not available because there is no real controversy between the parties. At the hearing, Plaintiffs and the County urged the court to decide the issue on the merits, arguing there *is* a real controversy between the parties. The Board agreed there is a real controversy between it and the County, but took no position as to whether such a controversy exists between it and Plaintiffs. For the reasons discussed below, the court remains concerned that there is no actual controversy between the parties. It nonetheless reaches the merits of the motions because, as our Supreme Court has held, "If the issue of justiciability is in doubt, it should be resolved in favor of justiciability in cases of great public interest." (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 432, fn.14 [*"National Audubon"*].) This is such a case. The court thus reaches the merits, and finds that the Board *does* have the authority and duty under the public trust doctrine to regulate extractions of groundwater that affect public trust uses in a navigable river. It therefore grants Plaintiffs' and the Board's motions for summary judgment, and denies the County's motion.

## BACKGROUND

The procedural background is complicated. Much of it has already been detailed in prior rulings of this court, and is not repeated in great detail here. (See Order After Hearing on Cross Motions for Judgment on the Pleadings, filed July 15, 2014; Tentative Ruling on Demurrer and Motion for Reconsideration and April 9, 2015, Minute Order adopting same.)

### ***The Petition and Complaint***

Plaintiffs are the Environmental Law Foundation, the Pacific Coast Federation of Fishermen's Associations and the Institute for Fisheries Resources. This litigation started when they brought an action against the Board and the County raising an issue of first impression: Does the public trust doctrine apply to groundwater that is hydrologically connected to a navigable river? The navigable river in question is the Scott River, located in Siskiyou County. (Pet. ¶ 16.)<sup>1</sup> Plaintiffs allege that, in the past two decades, the Scott River has experienced decreased flows caused by groundwater pumping. (Pet. ¶ 22.) According to Plaintiffs, at certain times of the year almost every gallon of groundwater pumped decreases the flow of the Scott River by the same amount. (Pet. ¶ 22.) As a result of these decreased flows, the Scott River is often "dewatered" in the summer and early fall. (Pet. ¶ 24.) This dewatering, in turn, has injured the river's fish populations. (Pet. ¶ 21.) Although not explicitly alleged, it is implicit that this dewatering also impacts the Scott River's navigability, and renders it less suitable for boating and other recreational activities. (Pet. ¶¶ 24-26.) Finally, Plaintiffs allege the County issues permits for wells that are used to extract groundwater. (Pet. ¶¶ 10, 36, 38.)

The petition and complaint contains two causes of action. By their first cause of action, which is asserted solely against the Board, Plaintiffs seek a judicial declaration that groundwater which is hydrologically connected to navigable surface waters must be managed and protected in a manner consistent with the public trust doctrine and/or that the Board has authority under the public trust doctrine to protect groundwater in the circumstances alleged in this case. (Pet., 1<sup>st</sup> Cause of Action and Prayer for Relief.) By their second cause of action, which is asserted solely against the County, Plaintiffs seek a writ of mandate or an injunction compelling the County to stop issuing well permits unless and until it complies with its public trust duties. (*Id.*, 2<sup>nd</sup> Cause of Action and Prayer for Relief.) Although not clear from the petition and complaint itself, the parties have stipulated that Plaintiffs also seek declaratory relief against the County on the legal question raised by this litigation.<sup>2</sup> (Stip., p. 3.)

---

<sup>1</sup> The relevant pleading is the second amended petition and complaint, filed October 4, 2013; the court refers to this as the "petition and complaint," abbreviated simply as "Pet."

<sup>2</sup> According to a stipulation that the parties filed on June 28, 2016 (hereafter "stipulation" or "stip."), Plaintiffs have withdrawn their claim for injunctive relief against the County and seek only declaratory relief. It is unclear from the stipulation whether Plaintiffs have also withdrawn their claim for mandate relief against the County, although it appears that this may be the case.

### ***The County's Answer***

In its answer to the petition, the County asserted four affirmative defenses: (1) the public trust doctrine does not apply to groundwater; (2) the Board has no authority to regulate groundwater under the public trust doctrine; (3) the County is not required to regulate groundwater under the public trust doctrine; and (4) the public trust doctrine does not apply in this case because a 1980 decree by the Siskiyou County Superior Court adjudicated all rights to the groundwater at issue.

### ***The Cross-Motions for Judgment on the Pleadings***<sup>3</sup>

Plaintiffs and the County filed cross-motions for judgment on the pleadings as to the County's affirmative defenses. The Board was not a party to these motions. The cross-motions raised two legal issues: (1) Does the public trust doctrine apply to the facts alleged? (2) If so, does it impose any duties on the County that could be enforced by writ of mandate or injunction? The court concluded that the public trust doctrine protects navigable waterways from harm caused by groundwater extraction, and that Plaintiffs had alleged facts sufficient to entitle them to a judgment so declaring. The court also concluded that the County, as a subdivision of the State, is required to consider the public trust when it issues well drilling permits, and that Plaintiffs had alleged facts sufficient to entitle them to a writ or injunction compelling the County to do so. The court thus granted Plaintiffs motion for judgment on the pleadings, and denied the County's motion, as to three of the affirmative defenses. The court's order, however, did not address the Board's authority to regulate groundwater under the public trust doctrine, primarily because neither of the motions was brought by, or asserted against, the Board.<sup>4</sup> It was thus unnecessary to address the Board's authority in ruling on the motions.

---

<sup>3</sup> The cross-motions for judgment on the pleadings were ruled upon by the Honorable Allen H. Sumner. Subsequently, this matter was transferred to the undersigned judge.

<sup>4</sup> The court's order also did not dispose of the case; it merely allowed it to proceed past the pleading stage. In order to prevail, Plaintiffs would still have to prove the facts alleged in the complaint, many of which were disputed. As discussed in more detail below, the parties have attempted to circumvent any potential problems of proof by simply stipulating to all of the relevant facts.

### ***The Court Raises Justiciability Concerns About Plaintiffs' Claim Against the Board***

Before the cross-motions for judgment on the pleadings were heard, the court, *sua sponte*, raised an issue that had not been raised by the parties – whether there was an actual case or controversy between Plaintiffs and the Board that was sufficiently definite to warrant declaratory relief. (See April 11, 2014 Order.) Plaintiffs' cause of action against the Board was based on the allegation that the Board *denied* it had authority under the public trust doctrine to protect groundwater that is hydrologically connected to public trust waters. (Pet. ¶ 33.) In its answer to the complaint, however, the Board *admitted* it had such authority. (Board Answer, ¶ 2.) It thus appeared to the court that there might be no actual controversy between Plaintiffs and the Board, and with no actual controversy, declaratory relief was unavailable. (See *Taxpayers for Improving Public Safety v. Schwarzenegger* (2009) 172 Cal.App.4<sup>th</sup> 749, 768.) The court thus asked the parties to address two issues: (1) whether an actual controversy existed between Plaintiffs and the Board; and (2) if there was no actual controversy, whether Plaintiffs' claim against the Board should be dismissed.

All three parties filed briefs addressing these issues – the Board agreed there was no controversy and that Plaintiffs' sole claim against it should be dismissed; Plaintiffs and the County disagreed. The issue was discussed, but not decided, at the hearing on the cross-motions for judgment on the pleadings. Because the parties disagreed whether there was an actual controversy between Plaintiffs and the Board, the County requested permission to file a cross-complaint against the Board in order to ensure that the issue of the Board's authority stayed before the court. The court granted the request.

### ***The County's Cross-Complaint***

The County filed its cross-complaint against the Board.<sup>5</sup> The cross-complaint is interesting. Rather than alleging facts in the traditional sense, it alleges facts about the procedural background of this case, and it notes the court's concerns about whether Plaintiffs are entitled to seek declaratory relief against the Board. The County then alleges there is an actual controversy between it and the Board regarding whether the Board is authorized to regulate the use of groundwater under the public trust doctrine in the circumstances alleged in this case, and

---

<sup>5</sup> The Board demurred to the cross-complaint. The demurrer was overruled in part and sustained in part. The demurrer did not raise justiciability.

it seeks a judicial declaration that the Board *lacks* such authority.

### ***The Present Motions***

The parties have stipulated that the sole remaining question to be decided by the court is a purely legal one: “Whether the State Water Board has the authority and duty under the public trust doctrine to regulate extractions of groundwater that affect public trust uses in the Scott River.” (Stip., p. 5.) As noted above, Plaintiffs and the Board believe the answer to that question is yes, and the County believes the answer is no. In order to obtain a judicial declaration answering this question, Plaintiffs have filed a motion for summary judgment on their claim against the Board for declaratory relief, and the Board and the County have filed cross-motions for summary judgment on the County’s cross-complaint for declaratory relief.

All three motions are based on the following stipulated facts:

- The Scott River is located in Siskiyou County, California. (Fact 1.)
- The Scott River is a navigable waterway for purposes of the public trust doctrine. (Fact 2.)
- In 1980, the Siskiyou County Superior Court issued a decree adjudicating the rights to all surface water and some groundwater in the Scott River stream system. (Fact 3.)
- Groundwater underlies certain areas in the Scott River watershed outside the area adjudicated by the decree. (Fact 4.)
- This litigation only concerns groundwater that was not adjudicated by the decree. (Facts 5-8.)
- The decree defines “interconnected groundwater” as groundwater that is so closely and freely connected with the surface flow of the Scott River that its extraction causes a reduction in the surface flow of the Scott River. (Fact 6.) Presumably, that same definition applies here.
- Pumping of interconnected groundwater is having a negative effect on the Scott River’s surface flows. (Fact 9.)
- The County has adopted a permit program for new wells. (Fact 10.)
- The County has adopted a program that regulates the extraction of groundwater for use outside the basin from which it is extracted. (Fact 11.)

Although the parties have stipulated to these facts, most do not appear particularly relevant to the present motions. Instead, all three motions raise what is essentially an issue of law: does the Board have authority under the public trust doctrine over groundwater extractions that affect public trust uses in navigable waters like the Scott River, and a corresponding duty to exercise that authority in some way? Presumably, this question could be answered in the abstract, and without the benefit of any stipulated or undisputed facts. In its tentative ruling, the court found that the abstract nature of the parties' dispute, particularly when combined with the Board's *agreement* with Plaintiffs' interpretation of the law, tended to show that the present motions seek to resolve an abstract legal question rather than an actual controversy between the parties. The court also tentatively concluded that, without an actual controversy, declaratory relief was not available.

At the hearing on the motions, Plaintiffs and the County attempted to convince the court that an actual controversy *does* exist, and that the court should rule on the merits. The Board, in contrast, was "agnostic" and took no position on whether this dispute is justiciable. Plaintiffs also suggested that the court issue a ruling in the alternative – i.e., a ruling that acknowledges this case appears to be non-justiciable, but that nonetheless issues a decision on the merits. The court takes Plaintiffs' suggestion for reasons that are explained below.

## ANALYSIS

### 1. The Issue of Justiciability

The court begins its analysis by reiterating the fact that all three summary judgment motions are directed solely at competing claims for declaratory relief regarding the existence of the Board's authority and duty under the public trust doctrine to regulate groundwater extractions that adversely impact public trust uses in a navigable river. The court has raised the issue of justiciability at several prior junctures in this matter.

The fundamental basis for declaratory relief is the existence of an actual controversy between the parties. (*Taxpayers for Improving Public Safety, supra*, 172 Cal.App.4th at 768; *City of Cotati v. Cashman* (2002) 29 Cal. 4th 69, 79; Code Civ. Proc., § 1060.) Code of Civil Procedure section 1060 provides in pertinent part: "Any person ... who desires a declaration of his or her rights or duties with respect to another ... may, *in cases of actual controversy* relating

to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties . . . .” (Emphasis added.)

The actual controversy requirement is one aspect of the doctrine of justiciability. (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4<sup>th</sup> 1559, 1573.) “California courts will decide only justiciable controversies. [Citations.] The concept of justiciability is a tenet of common law jurisprudence and embodies [t]he principle that courts will not entertain an action which is not founded on an actual controversy . . . .” (*Id.* [internal quotes and cite omitted].) The actual controversy requirement is related to the “well established” rule that “courts do not give advisory opinions. There must be a justiciable controversy which admits of specific and conclusive relief by judgment . . . for the court to exercise its discretion to declare rights.” (*Southern California Edison Co. v. State Farm Mut. Auto. Ins. Co.* (1969) 271 Cal.App.2d 744, 748.) The actual controversy requirement and the rule against advisory opinions are, in turn, both related to the concept of ripeness:

The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions. [Citation.] It is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of legal opinion. It is in part designed to regulate the workload of courts by preventing judicial consideration of lawsuits that seek only to obtain general guidance, rather than to resolve specific legal disputes. However, the ripeness doctrine is primarily bottomed on the recognition that judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy.

(*Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal.3d 158, 170.) “A controversy is ‘ripe’ when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made.” (*Id.* [internal quotes and cite omitted].)

The possible lack of an actual, justiciable, controversy between the parties first arose because the Board, in its answer to the petition and complaint, made the following admission: “The State Board admits it has authority, under the public trust doctrine, over groundwater diversions that affect public trust uses of navigable waters and fish in non-navigable waters.” (Board Answer, ¶ 2.) The Board thus essentially *agreed* with Plaintiffs’ position regarding its authority. This agreement has not wavered over the lengthy course of this



litigation. Most recently, in its response to Plaintiffs' motion for summary judgment, the Board once again reiterated its agreement with Plaintiffs' formulation of its authority. As noted above, the parties have stipulated that the sole remaining issue to be decided is whether the Board has the authority and duty under the public trust doctrine to regulate extractions of groundwater that affect public trust uses in the Scott River. In their motion papers, Plaintiffs and the Board *agree* that the answer to this question is *yes*. (Pls. Memo of Ps and As at 1:26-28; Board Resp. at 3:16-18.) And if Plaintiffs and the Board agree on the existence of the Board's authority, there would appear to be no actual controversy between the parties, and thus no basis, or need, for declaratory relief.

Plaintiffs argue an actual controversy does exist. They cite the general rule that a party's voluntary cessation of wrongful conduct does not render a case moot,<sup>6</sup> especially where there is no assurance that the party will not resume the conduct in the future. (*Kidd v. State* (1998) 62 Cal.App.4<sup>th</sup> 386, 398.) This is because a "unilateral decision" to change one's conduct "is also unilaterally rescindable." (*Id.*) Plaintiffs argue the Board's current position that it has authority under the public trust doctrine over groundwater diversions that affect public trust uses of navigable waters is at odds with a contrary position it has taken in the past. Given the allegations in this case, the court is not convinced this is true.

In the original petition and complaint, Plaintiffs alleged that in March and July of 2009, they "petitioned the [Board] to review its policies and practices corresponding to the management of the Scott River groundwater resources, and were summarily denied both times primarily on the basis that [Plaintiffs] were not holders of water rights." (§ 14.) In the second amended petition and complaint (which is the relevant pleading), however, Plaintiffs alleged the Board denied their petitions "in part on the basis that [Plaintiffs] were not holders of water rights *and on the basis that the [Board] does not have the appropriate authority over percolating groundwater resources to fulfill [Plaintiffs'] requests.*" (§ 14 [italics added].) The court is concerned that Plaintiffs added the italicized allegation simply in order to create a controversy. The court has also reviewed the Board's so-called summary denials, and finds both to be

---

<sup>6</sup> Mootness, which is another justiciability doctrine, is essentially the flip side of ripeness. While an unripe case is one "in which parties seek a judicial declaration on a question of law, though no actual dispute or controversy ever existed between them," a moot case is one "in which an actual controversy did exist but, by the passage of time or a change in circumstances, ceased to exist." (*Wilson & Wilson, supra*, 191 Cal.App.4<sup>th</sup> at 1573.)

ambiguous.<sup>7</sup> It is thus not clear from the denials that the Board has actually taken a position that is at odds with its position in this case.

Moreover, and more importantly, even if the Board did not agree that it has authority under the public trust doctrine to regulate groundwater extractions that affect public trust uses in navigable waters, the court would still be inclined to find there is no actual controversy in this case. In this regard, the court notes that the County and the Board *do* disagree, quite vehemently, over the existence and extent of the Board's authority.<sup>8</sup> But mere legal disagreement is not sufficient either to create an actual controversy or to entitle a party to declaratory relief. (See *Fiske v. Gillespie* (1988) 200 Cal.App.3d 1243, 1246 ["abstract desire" for declaration of what the law allows does not constitute the type of actual controversy that justified declaratory relief].)

The court reiterates that this case does not concern the Board's authority or duty to take any particular action because, as noted, Plaintiffs seek no affirmative relief against the Board. In other words, Plaintiffs are not asking the Board to take any action regarding groundwater extractions that are harming public trust uses in the Scott River. Instead, they simply seek a judicial declaration that the Board has the authority to do so. Precisely what action the Board might take is never specified, but is instead apparently left to future litigation. Moreover, although the Board agrees it has authority to take some (unspecified) action, there is no hint that it is actually considering taking any action to regulate groundwater extractions that are harming public trust uses in the Scott River. The court is thus not being asked to decide whether the Board's authority is broad enough to take a particular action, or even whether under a particular set of facts the Board could be compelled to take *some* action as opposed to *no* action. To frame the issue in terms of the County's cross-complaint rather than Plaintiffs' complaint, the County seeks a judicial declaration that the Board lacks authority to regulate groundwater extractions in

---

<sup>7</sup> Plaintiffs have previously provided the court with their March 23 and July 1, 2009, petitions to the Board, and the Board's responses thereto. In its April 20, 2009, response, the Board suggests it could take action against groundwater diverters who were causing an unreasonable adverse impact to public trust resources in the Scott River. And in its August 28, 2009, response, the Board suggests it could take action on "a public trust complaint naming parties and having supporting information," but that it "will not take action in response to your July 1, 2009 letter or re-direct staff from existing programs to initiate an investigation on the Scott River watershed on its own motion at this time."

<sup>8</sup> Indeed, and as noted above, the County filed its cross-complaint against the Board for one reason: to keep the Board in the case in light of the court's concerns that there was no controversy between Plaintiffs and the Board.

the circumstances alleged in this case, even though the Board has not sought to exercise such authority. The court is thus faced with parties who seek declaratory relief regarding the existence of the Board's authority in an area where (1) the Board has neither acted nor threatened to act, and (2) no-one seeks to require it to act. It is difficult to see how the court could issue a declaration that would definitively and conclusively settle the issue of the Board's authority in this case. (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal. App. 4th 333, 360 [declaratory judgment "must decree, not suggest, what the parties may or may not do."].) If "judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy," then the lack of facts in this case makes all of the requests for declaratory relief very problematic. (*Pacific Legal Foundation, supra*, 33 Cal.3d at 170.)

Despite its reservations, however, the court is also cognizant of our Supreme Court's statement in *National Audubon* that "If the issue of justiciability is in doubt, it should be resolved in favor of justiciability in cases of great public interest." (*National Audubon, supra*, 33 Cal.3d at 432, fn. 14.) It explained:

The usual objections to advisory opinions do not apply to the present case. This is not a collusive suit [citation], nor an attempt to get the courts to resolve a hypothetical future disagreement [citation]. It is, rather, one phase of a hotly contested current controversy. The only conceivable basis for refusing to decide the present case is that our decision will not finally resolve that controversy, but will serve only as an interim resolution of some issues necessary to the final decision. That fact, however, is insufficient to render the issue nonjusticiable. . . . [I]t is in the interest of the parties and the public that a determination be made; "even if that determination be but one step in the process, it is a useful one." [Citation.]

(*Id.*) This case is similar. Although the declaration the parties seek appears advisory in many respects, it does involve an issue of public interest, and it is thus in the interest of the parties and the public that a determination be made. Moreover, the court recognizes that its prior orders have already determined many of the issues raised by the present motions. Finally, the few remaining issues that the court has not already decided are relatively easy to resolve. The court thus resolves its doubts in favor of justiciability and proceeds to consider the merits.

## 2. The Merits

The present motions concern only the existence, *vel non*, of the Board's authority and duty under the public trust doctrine to take *some* action regarding groundwater extractions, where those extractions harm public trust uses in public trust waters. Precisely *what* that action would be is an issue that is left for another day.

In its prior order on the cross motions for judgment on the pleadings, the court extensively discussed the public trust doctrine, and that discussion is not repeated in great detail here. For present purposes, it is sufficient to note that the court held the public trust doctrine protects navigable waters from harm caused by extraction of groundwater, where the groundwater is so connected to the navigable water that its extraction adversely affects public trust uses. (See Order on Motions for Judgment on the Pleadings, pp. 7-10.) The court also held that administration of the public trust rests primarily with the State as sovereign. (*Id.*, p. 12.) It is thus implicit in the prior order that *the State* has authority under the public trust doctrine to protect navigable waters from the type of harm alleged in this case. The prior order, however, did not address whether *the Board* has such authority. The court now holds that it does.

As just noted, the authority to administer the public trust rests primarily with the State, as sovereign. (See, e.g., *National Audubon*, *supra*, 33 Cal.3d at 437 [“the sovereign” owns all navigable waterways as trustee of a public trust for the benefit of the people, and “the state” has the authority and obligation to administer the public trust]; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 482 [“the state” holds title to navigable waterways in trust and for purpose purposes]; *Colberg, Inc. v. State* (1967) 67 Cal.2d 408, 416 [“The State of California holds all of its navigable waterways . . . ‘as trustee of a public trust for the benefit of the people.’”]; *Illinois Central Railroad Co. v. Illinois* (1882) 146 U.S. 387, 452 [title to navigable waters is “held in trust for the people of the State” and “the State” cannot “abdicate its trust” over such waters].)

In California, the Board is the legislatively-created entity that has been given both the responsibility “for the orderly and efficient administration of the water resources of the state,” and the authority to exercise the “adjudicatory and regulatory functions of the state in the field of water resources.” (Water Code § 174; see also *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4<sup>th</sup> 421, 428.) The Board's authority to administer the State's water resources has been described as “broad,” “open-ended,” and “expansive.” (*National Audubon*, *supra*, 33 Cal.3d at 449.) The Board has authority to “take all

appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.” (Wat. Code § 275.) “The Board’s authority to prevent unreasonable or wasteful use of water extends to all users, regardless of the basis under which the users’ water rights are held.” (*Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4<sup>th</sup> 1463, 1482.) The Board has “any powers . . . that may be necessary or convenient for the exercise of its duties authorized by law,” including the power to “make such reasonable rules and regulations as it may from time to time deem advisable in carrying out its powers and duties.” (Wat. Code § 186, subd. (a), and § 1058.) The Water Code as a whole, as construed by the courts, “vest[s] in the Board broad adjudicatory and regulatory power and suggest the Board’s regulatory authority is coincident with that of the Legislature.” (*Light, supra*, 226 Cal.App.4<sup>th</sup> at 1485.) Given the Board’s broad authority to administer the State’s water resources, it is but a short step to the conclusion that the Board has the authority to administer the public trust on behalf of the State. In other words, assuming the public trust doctrine is applicable to the facts alleged in this case, the Board is the logical entity to exercise the State’s authority and obligations thereunder. Simply put, if not the Board, then who?

The County makes several arguments in opposition. None persuades.

The County argues the Sustainable Groundwater Management Act (or “SGMA”), which was enacted in 2014, authorizes the Board to regulate groundwater under certain specified circumstances, and thus implicitly *precludes* it from regulating groundwater under any other circumstances (including, presumably, the circumstances alleged in this case). The court has already rejected this argument when it denied the County’s motion for reconsideration.<sup>9</sup> (See Ruling on Demurrer and Motion for Reconsideration, pp. 2-5.) After thoroughly analyzing the issue, the court concluded there was no evidence that the Legislature intended for SGMA to occupy the field or to supplant common law doctrines like the public trust doctrine. The court also concluded, consistent with the Supreme Court’s decision in *National Audubon*, that SGMA and the public trust doctrine can coexist, that neither occupies the field to the exclusion of the other, and that there is no inherent conflict between them. Rather than repeating its analysis of this issue, the court simply incorporates it by reference into this order.

---

<sup>9</sup> The County asked the court to reconsider its order on the cross motions for judgment on the pleadings based on “new law.” The new law was SGMA, which was enacted two months after the order was issued.

In its cross-complaint, the County alleges that Water Code sections 1200 and 1221 preclude the Board from regulating groundwater. It barely mentions these sections in its Memorandum of Points and Authorities – and for good reason, because neither section is applicable to the facts alleged in this case.

Section 1200 “limits the Board’s *permitting authority* over subsurface water as follows: ‘Whenever the terms stream, lake or other body of water, or water occurs in relation to applications to appropriate water or permits or licenses issued pursuant to such applications, such term refers only to surface water, and to subterranean streams flowing through known and definite channels.’” (*North Gualala Water Company v. State Water Resources Control Board* (2006) 139 Cal.App.4<sup>th</sup> 1577, 1581, fn.1 [emphasis added].) In other words, the Board has no permitting authority over groundwater unless the groundwater is part of a subterranean stream that flows through known and definite channels. (*Id.* at 1582 fn.4, 1585.) This case, however, does not involve the Board’s permitting authority.<sup>10</sup>

Section 1221 provides, “*This article shall not be construed to authorize the board to regulate groundwater in any manner.*” (Emphasis added.) “This article” refers to Article 1.7, a so-called “area of origin” law, or a law which grants a preferential right to use water in the area in which it originates. (See, e.g., *El Dorado Irrigation Dist. v. State Water Resources Control Board* (2006) 142 Cal.App.4<sup>th</sup> 937, 947-48 [discussing history of California’s area of origin laws].) Article 1.7 designates seven river systems as “protected areas,”<sup>11</sup> and prohibits certain water exports that would deprive the protected area “of the prior right to all the water reasonably required to adequately supply the beneficial needs of the protected area.” (§§ 1215.5, 1216.) Again, however, this case does not involve exporting water from a protected area.

In its response, the County states it *agrees* that sections 1200 and 1221 apply only to the Board’s permitting authority (which is not at issue here), but it then argues that both sections demonstrate “that the Legislature’s policy is that the State Board generally does not have authority to regulate groundwater, and has such authority only where the Legislature expressly grants such authority – and thus the State Board does not have authority to regulate groundwater under the public trust doctrine.” The court is not convinced that sections 1200 and 1221 evidence a Legislative policy that the Board has no authority over groundwater unless the

---

<sup>10</sup> No-one in this case suggests the Board has authority to require a permit or license to appropriate groundwater.

<sup>11</sup> The Scott River system is not one of the protected areas. (§ 1215.5.)

Legislature expressly grants such authority. Moreover, even if the court assumes such a Legislative policy exists, it is not dispositive or even particularly relevant because the court is not now holding that the Board has plenary authority to regulate groundwater under the public trust doctrine.

In its order on the cross motions for judgment on the pleadings, the court stopped far short of holding that groundwater itself is protected by the public trust doctrine. Indeed, the court specifically noted that the public trust doctrine applies only to navigable waters, that groundwater is not navigable, and that the public trust doctrine thus does not apply to groundwater itself. The court held that the public trust doctrine does apply to a navigable river like the Scott River, and protects the public's right to use the Scott River for trust purposes – a holding with which all parties in this case would presumably agree. The court then held, “If the extraction of groundwater near the Scott River adversely affects those rights, the public trust doctrine applies.” The limited nature of this holding bears emphasizing. Indeed, in its prior order, the court stressed that its formulation of the law was slightly different than the declaration Plaintiffs requested:

[Plaintiffs] request a declaration groundwater hydrologically connected to navigable surface flows is protected by the public trust doctrine. However, the court does not find *groundwater* itself is a resource protected by the public trust doctrine. [Citation.] California case law has applied the public trust doctrine to protect *navigable waters*; groundwater is not navigable. [Citations.] The court thus finds only that the public trust doctrine applies when the extraction of groundwater causes harm to navigable waters harming the public's right to use those navigable waters for trust purposes. [¶] As applied to the facts alleged here, the public trust doctrine protects the Scott River and the public's right to use the Scott River for trust purposes . . . . [Citation.] If the extraction of groundwater near the Scott River adversely affects those rights, the public trust doctrine applies.

Similarly, the court is not now holding that the Board has plenary authority under the public trust doctrine to regulate groundwater. Instead, the court's holding is much narrower, and, again, may be slightly different than the parties' formulation of the issue. The court holds only that, if groundwater extractions adversely affect the public's right to use a navigable waterway like the Scott River for trust purposes, then the Board has authority under the public trust doctrine to take action to protect the public's right.

The County makes another argument that is somewhat difficult to understand (and also

somewhat surprising given many of the County’s prior arguments in this case). The County begins by acknowledging the Board has authority to prevent unreasonable uses of water – including groundwater. The County then acknowledges the Board has authority “to prevent individual uses of groundwater that do not conform to the reasonable use standard, including groundwater uses that unreasonably impair public trust uses.”<sup>12</sup> The County then concludes that the Board’s authority in this area “lies in the Constitution and statutes, not the non-constitutional, non-statutory public trust doctrine.” The court disagrees. The fact that the Board has certain constitutional and statutory authority regarding the State’s water resources does not mean that it lacks what might be termed common law authority. As *National Audubon* teaches, California’s statutory and constitutional water rights system can and do coexist with common law doctrines like the public trust doctrine. (*National Audubon, supra*, 33 Cal.3d at 445; see also *Verdugo v. Target Corp.* (2014) 59 Cal.4<sup>th</sup> 312, 326 [“as a general rule, [u]nless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules. Accordingly, [t]here is a presumption that a statute does not, by implication, repeal the common law.”].)

The court thus finds that the Board has *authority* under the public trust doctrine to regulate extractions of groundwater that affect public trust uses in the Scott River. That leaves only the question of the Board’s *duty*. The public trust cases speak of the State’s “*affirmative duty* to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.” (*National Audubon, supra*, 33 Cal.3d at 446 [emphasis added].) And our Supreme Court held in *National Audubon* that “the public trust is more than an affirmation of the state’s *power* to use public property for public purposes. It is an affirmation of the *duty* of the state to protect the people’s common heritage of streams, lake, marshlands and tidelands.” (*National Audubon, supra*, 33 Cal.3d at 441 [emphasis added].) In other words, the State’s authority (or “power”) under the public trust doctrine comes with a corresponding duty to use it.<sup>13</sup> If, as the court has found, the Board is the logical entity to exercise the State’s authority under the public trust doctrine, then it follows that the Board has the same “affirmative duty” as the State. Thus, the answer to the question raised by these

---

<sup>12</sup> Which is certainly close to Plaintiffs’ and the Board’s view of the law.

<sup>13</sup> Or, to quote Spider-Man, “With great power comes great responsibility.” (See *United States v. Cortes-Caban* (1<sup>st</sup> Cir. 2012) 691 F.3d 1, 30 [discussing origin of quote].)



motions – whether the Board has the authority and duty under the public trust doctrine to regulate extractions of groundwater that affect public trust uses in the Scott River – is *yes*.

Although not extensively briefed, Plaintiffs and the Board appear to disagree about the nature of the Board’s duty, and, in particular, about whether the Board’s duty is best described as mandatory or discretionary.<sup>14</sup> The parties agree that the Board has broad discretion to determine precisely how to discharge its duty under the public trust doctrine. Plaintiffs, however, argue the Board has a “mandatory duty” to exercise its authority “in some manner,” and could thus be legally compelled to “do *something* and not *nothing*.” Precisely what that “something” might be is never specified. Plaintiffs also briefly accuse the Board of “inaction” in this case, even though they do not seek to compel the Board to take any action.

The Board, in contrast, argues it has absolute discretion to decide whether, when, and how it will discharge its public trust duties, and that, like a criminal prosecutor, it has “sole discretion” to determine which violations it will prosecute. (See, e.g., *Dix v. Superior Court* (1991) 53 Cal.3d 442, 451 [criminal prosecutor “has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek” and that discretion is generally “not subject to judicial control”].) The Board also argues, quite persuasively, that it does not have a mandatory duty to seek out, monitor and mitigate all harms to public trust resources in the State, and that imposing such a duty would not be fiscally or practically feasible. The Board also notes that what may appear to be doing nothing may actually “reflect the exercise of prosecutorial discretion or limited resources” rather than the abdication of a duty. (See, e.g., *Siskiyou County Farm Bureau v. Department of Fish and Wildlife* (2015) 237 Cal.App.4<sup>th</sup> 411, 443 [“past nonenforcement does not necessarily reflect a formal administrative interpretation precluding enforcement, but could instead reflect the exercise of prosecutorial discretion or limited resources”].) Indeed, in the context of this case, doing nothing could also reflect a decision to wait and see whether, and to what extent, SGMA addresses the issues raised by this litigation.<sup>15</sup> Doing nothing could also reflect a decision to allow groundwater extractions despite

---

<sup>14</sup> The County does not discuss the nature of the Board’s duty, because it does not believe that duty exists.

<sup>15</sup> Although the court finds that SGMA does not *preclude* the Board from regulating groundwater extractions that adversely affect public trust uses in a navigable river, this does not mean that SGMA is irrelevant to the issues raised by this litigation. As the County notes, the Legislature stated its intent in enacting SGMA was “[t]o manage groundwater basins through the actions of local governmental agencies to the greatest extent feasible, while minimizing state

the fact that those extractions harm public trust uses in the Scott River. As the court noted in its order on the cross-motions for judgment on the pleadings:

[T]he State's obligation to protect the public trust is not absolute. Instead, the State's obligation is to *consider* the public trust when allocating water resources, and to preserve trust uses *whenever feasible*. (*National Audubon, supra*, 33 Cal.3d at 446.) These caveats are important. The doctrine does not prohibit the State from permitting actions that harm public trust uses. As our Supreme Court recognized, "The population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values." (*Id.*) The public trust doctrine thus does not strip the State of the power "to grant usufructuary licenses that will permit an appropriator to take water from flowing streams and use that water in a distant part of the state, even though this taking does not promote, and may unavoidable harm, the trust uses at the source stream." (*Id.*) When it grants such licenses, however, the State must consider the public trust: "As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust . . . and to preserve, so far as consistent with the public interest, the uses protected by the trust." (*Id.* at 446-47.)

Thus, there might be circumstances where the State (or the Board) could discharge its duty under the public trust doctrine while also allowing groundwater extractions that affect public trust uses in the Scott River.

The Board's argument that its discretion is absolute likely goes too far. But as the above discussion highlights, its discretion is undoubtedly broad and could be exercised in a myriad of ways. Moreover, how it chooses to exercise its discretion is undoubtedly influenced by things

---

intervention to only when necessary to ensure that local agencies manage groundwater in a sustainable manner." (Wat. Code § 10720.1., sub. (h).) SGMA encourages local management of groundwater basins by authorizing local agencies to form "groundwater sustainability agencies" and adopt "groundwater sustainability plans." (§ 10723, subd. (a), § 10727.) The Board must review and evaluate all groundwater sustainability plans, and may recommend corrective actions to address deficiencies. (§ 10733, 10733.4.) If no local groundwater sustainability agency is formed, or if no local groundwater sustainability plan is adopted, the Board may adopt an interim groundwater sustainability plan for a particular groundwater basin. (§ 10735 et seq.) SGMA was enacted less than a year and a half ago and its implementation has only recently begun. The Board thus might well decide to wait and see if local agencies, including the County, form a groundwater sustainability agency and adopt a groundwater sustainability plan that addresses groundwater extractions that adversely affect the Scott River.


like enforcement priorities, judicious resource allocation, staffing, and budgets. In short, defining the scope and nature of the Board's duty is inevitably dependent on all of the facts and circumstances of a particular case. Here, however, we have no such facts. Again, the Board has not taken any action to regulate groundwater extractions that affect public trust uses in the Scott River, and Plaintiffs do not seek to compel it to take any action. For all of the reasons discussed in section 1, the court concludes that the issue of whether the Board's duty is best described as mandatory or discretionary will need to await "an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy." (*Pacific Legal Foundation, supra*, 33 Cal.3d at 170.) This conclusion is reinforced by the fact that the issue of whether the Board's duty is mandatory or discretionary was not raised in either the petition and complaint or the parties' stipulation regarding the scope of the present motions. Finally, it is reinforced by Code of Civil Procedure section 1061, which provides, "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances."

### CONCLUSION

For the reasons stated above, the court finds and declares that the Board has the authority and duty under the public trust doctrine to regulate extractions of groundwater than affect public trust uses in the Scott River. It thus grants Plaintiffs' and the Board's motions for summary judgment, and denies the County's motion.

Counsel are directed to jointly prepare a formal judgment in this case, attaching this order and all orders incorporated herein as exhibits, and thereafter submit it to the court for signature and entry of judgment. If counsel are unable to agree on a formal judgment, they should follow the procedures outlined in Rule of Court 3.1312.

Dated: August 4, 2016



---

Christopher E. Krueger  
Judge of the Superior Court of California,  
County of Sacramento