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SUPREME COURT
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The Honorable Justice Ronald M. George, Chief Justice
and Associate Justices
California Supreme Court
350 McAllister St.
San Francisco, CA 94102

S167578

Re: A116362, Center for Biological Diversity v. FPL Group, Sept. 18, 2008

Dear Mister Chief Justice and Honorable Justices:

We write in our capacity as *amicus curiae* in the above-captioned matter, the opinion for which was filed and certified for publication on September 18, 2008. We hereby request partial depublication of the Appellate Court Opinion.

Summary

We agree with the two principal holdings of the case, that wildlife is and should be part of the Public Trust doctrine, and that private parties have standing to bring an action to protect those resources. Those holdings are either restatements of existing law or build naturally on a rich history of decisional and positive law. *See, e.g., Environmental Protection and Information Center v. California Dept. of Forestry and Fire Protection,* 44 Cal.4th 459, 515 (2008) ("the protection of water resources is intertwined with the protection of wildlife.")

However, we believe that the section entitled "A claim for breach of the Public Trust must be brought against the responsible public agencies," Appellate Opinion at p. 17, is both premature and paints with far too broad a brush. In brief, the Appellate Court has held that in every action brought by a private party to protect the Public Trust or its resources, the claim may not be brought directly against another private party. For reasons discussed below, neither traditional Public Trust concepts, nor California legal precedent, nor sound policy considerations require that a public agency be the (sole) defendant in every action by a private party to protect the Public Trust. We therefore respectfully suggest that this Court de-publish that final section.

Capacity to Request the Suggested Action

The California Rules of Court permit "any person" to request de-publication from the Supreme Court, (or publication of an unpublished opinion in the Court of Appeal), Cal. Rules of Court, rule 8.1125. This request may be made within thirty days of the date the lower court opinion becomes final.[1] *Id.*

Rationale for Requesting the Suggested Action

The Appellate Court opinion as written effectively prevents not only the present action by the Center for Biological Diversity but many types of future Public Trust actions from ever bring brought for resolution by the judiciary or indeed by anyone, surely a result the Court did not intend. While it may be true in many cases (and ELF expresses no opinion on the wisdom of doing so on these facts) that a court should abstain (or, as a related matter, invoke the doctrine of primary jurisdiction), it is a mistake to have any dispute about Public Trust resources resolved only as a dispute between the public and a government agency.[2]

1. The Opinion Impliedly Rejects This Court's Holding in *Marks v. Whitney* That A Private Party May Bring an Action Against Another Private Party to Enforce the Public Trust

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[1] As *amicus* in the Appellate Court action, we are not a "party" who may request a rehearing. *See* Cal. Code Civ. Proc. § 1008(a). Further, the rules are silent on whether or who can suggest partial publication or de-publication to the Court of Appeal. *See* Cal. Rules of Court, rule 8.1125. Therefore, we address this letter directly to this Court.

[2] The Opinion seems to hold that a private party may bring an action exclusively against a public agency. However, another interpretation has been suggested by Professor Richard Frank, that the responsible public agency must be included in any Public Trust action in addition to any private party defendant. *See* Frank, *A Public Trust Renaissance,* San Francisco Daily Journal (October 7, 2008) p. 7, www.dailyjournal.com (subscription required). This would entail more of a necessary party analysis than one regarding judicial abstention.

In *Marks v. Whitney,* 6 Cal.3d 251 (1971), this Court held that a private party can bring a Public Trust action against another private party to protect the Public Trust or enforce rights under it. *Marks* involved a dispute over tidelands between two adjoining neighbors, Marks and Whitney. Marks "asserted complete ownership of the tidelands and the right to fill and develop them," while Whitney asserted that Mark's tidal property was burdened by the Public Trust, and therefore could not be built upon. The Court agreed with Whitney that "there is absolutely no merit" to Marks' argument that he could fill the tidelands. 6 Cal.3d at 261.

This Court in *Marks* expressly recognized the right of a private party to bring an action against another private party "to request the court to recognize and declare the Public Trust easement on Marks tidelands." *Id.* In that case, Whitney could not have brought an action against a "responsible public agency" because, first, no agency had any responsibility over the land at issue and, second, the holding came in the context of a quiet title action amongst two private parties. The holding in the present case would apparently reject the principle of private right of action to enforce Public Trust uses and obligations against private parties—even as a component of a larger action.

2. <u>The Opinion Conflates Regulatory Agencies With Resource Users.</u>

The Appellate Court Opinion also appears to be contrary to this Court's landmark opinion in *National Audubon,* 33 Cal.3d 419 (1983). Two notable parts of that opinion are referenced here. First, the Court of Appeal correctly noted that this Court affirmed the principle of universal standing for any person to bring an action to protect the Public Trust. *Ibid* at 431, n. 11. That was particularly important there because the "responsible public agency" with authority over the Public Trust resources – Mono Lake and its environs – disclaimed any responsibility to act. *Audubon,* 33 Cal.3d at p.428.

Perhaps of greater importance, the private enforcers named the Los Angeles Department of Water and Power as defendant. But they did so not in LADWP's capacity as a "responsible public agency" with any regulatory authority over the Public Trust resources, or in the capacity of LADWP as a trustee to care for the resource. LADWP was simply a user of the resource whose use harmed the Public Trust interests, no different from any private user. Indeed, it is clear that LADWP had no authority as trustee over the Public Trust resources at issue, which was Mono Lake itself. LADWP was simply the diverter of water from upstream creeks that fed the lake. While the responsible public agency – the State Water Board – was joined to the action as an intervenor, the Court in no way suggested that LADWP was not a proper defendant.

The present opinion thus conflates public agencies having regulatory authority with resource users who may or may not be public entities. The language of the opinion here suggests that a private party could not assert Public Trust rights against, say, a farmer with an illegal diversion. In both that hypothetical as well as in *Audubon*, a private party should be able to maintain a Public Trust action for misuse of resources. While it may be that any proceedings to determine an appropriate remedy should be referred to a proper administrative agency (as was done in *Audubon* when this Court referred the matter to a hearing before the Water Board), the Supreme Court never so much as suggested in its ruling on standing in footnote 11 or anywhere else that LADWP should not have been named or that the Water Board ought to have been the only correct defendant in that action.

To analogize *Audubon* to the present case, CBD, like Audubon, was suing the offending user of Public Trust resources, the FPL Group. That defendant asserted that *no* Public Trust resource was present, and hence no Public Trust responsibilities. It is unclear whether the regulatory authorities agreed or disagreed with that position. This Court has now answered it. How that now-adjudicated responsibility is to be administered may indeed be properly referred to the public agencies. As the Court of Appeal noted, while "members of the public may seek to compel the agency to perform its duties. . .neither the public nor the court may assume the task of administering the trust." Slip Opinion at p.19. Perhaps a better course is to leave to the courts the duty to determine whether the Public Trust applies in a given circumstance to the actions of a given actor (public or private) and, if it does, refer the matter for actual administration to the regulatory agency, as was done in *Audubon.* In any case, a one-size-fits-all approach to parties ought to give way to case-specific determinations.

3. The Opinion Wastes Judicial Resources and Forecloses Recoveries by Private Parties.

While the Court of Appeal finds that the facts here foreclose any action by the Center for Biological Diversity, the Opinion actually forecloses any recovery, under any circumstances, by a private party against another private party for damages to the Public Trust. That is unsound.

Private parties sometimes suffer damage when Public Trust uses and resources are damaged. A recent example on this Court's doorstep is the loss of subsistence fishing due to the *Cosco Busan* oil spill a year ago. Following the spill, the Governor ordered the entire Bay closed to all fishing for over two weeks. *DFG Defines San Francisco Bay Fishing Closure Zones,* California Dept. Fish and Game (Nov. 14, 2007). There are upwards of 70,000 people who hold the special license to fish in the San Francisco Bay. During the period of closure all of them lost one of the most fundamental rights recognized under the Public Trust – the right to fish. Under the Court of Appeal's opinion, they can apparently seek recourse only against the State, which was itself harmed by the spill. But these fishermen and women would have no right of action at all against the *Cosco Busan* owners for damages to Public Trust resources. Whether of not the State seeks damages for harms to the Bay and its environs from the spill, the State will not necessarily seek or secure a recovery for the people who lost the right to fish for their families. The *Audubon* opinions cited *Marks* for the proposition that "any member of the general public has standing to raise a claim of harm to the Public Trust" *Audubon,* 33 Cal.3d at p. 431 n.11. Yet the Court of Appeal here seems to restrain that holding only to actions against a "responsible public agency."

However, even if such an action were brought against an agency, presumably to force it to file an action against the despoiler of the Public Trust resources, such an action would like as not come to nought. First, given the budgetary times the agency may for any number of reasons choose not to put resources toward such an action. Similarly, policy considerations entrusted to the agency alone restrain a court from requiring that a public agency pursue any enforcement action. Under the general doctrine of prosecutorial discretion, any action by a private party to force an agency to protect or seek damages for the Public Trust would run afoul of that long settled principle. *See Heckler v. Chaney,* 470 U.S. 821, 834 (1985). That concern is only heightened in a situation where the "responsible public agency" is itself complicit with the party that is violating the Public Trust (as was the case in *Audubon*, where the state water board resisted the action, held it had no authority to revisit the subject permits for diversions and argued that diversions were a protected Public Trust purpose anyway).

This concern is by no means limited to actions for damages. Private parties experiencing harm through loss of Public Trust resources bring private resources and perspective to a Public Trust action against a private party. A current example involves poaching in tidal pools near San Diego. *See, e.g.,* Tindall, *Tidal Attraction,* Sierra Magazine (May/June 2004), http://www.sierraclub.org/sierra/200405/tidepools.asp. When shrimp or other species are poached, a Public Trust resource is clearly damaged. Given the lack of resources in the state to police the entirety of the California coastline, a poacher could never be successfully challenged in a Public Trust action because the responsible state agency does not have the resources to provide adequate protections. Restricting any action to a lawsuit against the state agencies alone would be fruitless and fail to ultimately protect the Public Trust resources.

4. Abstaining from Action Is Not Always Proper

Whether or not the Appellate Court's decision to abstain from intervening was proper in the present case, it is improper to conclude that it is *always* the correct path. Here, Plaintiff's requested remedy included injunctive relief against FPL, which might conflict with administrative proceedings already addressing some or all of the relevant issues. *See,* Slip

Opinion at p.22. However, any holding that the agency is the only appropriate defendant should be limited to these facts of the case.

Indeed, the Opinion is somewhat inconsistent internally, in that it will severely limit future courts' ability to consider claims under the Public Trust. A court should not abstain, for example, in determining the scope of the Public Trust, as this Court of Appeal did not when it held non-aquatic wildlife are protected under the trust.[3] But under the Court of Appeal's holding no future court would determine the scope of the trust because the private party may be unable to bring an action a public agency (as where, as noted, there is prosecutorial discretion not to file any enforcement action or the agency is hostile to the Public Trust).[4]

5. The Public Trust is Not Limited or Defined By Traditional Trust Concepts

The Court of Appeal grounded its opinion on this point in large part on "traditional trust concepts." Slip Opinion at p. 18. Yet traditional trusts by definition only exist to hold property. However, and as the Court of Appeal noted, property concepts have historically been rejected when discussing the metes and bounds of the Public Trust, because the Public Trust includes non-property values and uses such as navigation, science, aesthetics, and recreation. *Audubon,* 33 Cal.3d at p. 434. As a further distinction from a traditional trust, the Public Trust protections also extend beyond the protected land or property itself to include, for example, the non-navigable streams that feed Mono Lake in *Audubon*. As traditional trust concepts do not limit the scope of the doctrine, neither should they limit Plaintiff's right to sue.

[3] The Appellate Opinion also asserts an agency must "strike a balance between the generation of clean renewable energy with wind turbines and the protection of raptors and other birds adversely affected by turbines." Slip Opinion at p.21. Yet protection of the Public Trust does not include weighing the value of the wildlife against, for example, the value of wind-generated power. This is another key holding in *Audubon,* where the Attorney General argued that "trust uses" encompasses all public uses, including water diversions. 33 Cal.3d at 440. The *Audubon* court countered: "we know of no authority which supports this view of the Public Trust." The state, therefore, must protect the trust uses, "surrendering that right of protection only in rare cases when the abandonment of the right is consistent with the purposes of the trust." *Id.* As applied to the present case, the County clearly may not 'abandon' the protection of the trust in favor of "balancing" it with energy use. Energy production is not a protected Public Trust value, and should not be considered as such. The Public Trust uses and resources must be protected independent of and in addition to energy production.

[4] In this respect, the opinion is unusual in that it rejects Plaintiff's ability to sue while addressing one of Plaintiff's arguments on the merits, i.e. that non-aquatic wildlife is protected by the Public Trust.

For the foregoing reasons, ELF requests this Court to de-publish the final part of the Opinion of the Court of Appeal.

Sincerely,

James Wheaton
For *amicus curiae* Environmental Law Foundation