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, INC.; FPL ENERGY, LLC; ESI BAY AREA GP, INC.; ESI BAY AREA, INC.; GREP BAY AREA HOLDINGS, LLC; GREEN RIDGE POWER LLC; ALTAMONT POWER LLC; ENXCO, INC.; SEAWEST WINDPOWER, INC.; PACIFIC WINDS INC.; WINDWORKS INC.;
and
ALTAMONT WINDS INC.,
Defendants and Respondents

Appeal from a Judgment Entered On the Pleadings,
The Honorable Bonnie Lewman Sabraw, Judge
Alameda Superior Court Case No. RG04183113

RESPONDENTS' BRIEF

FERGUSON & BERLAND
William S. Berland, Bar No. 043879
1816 Fifth Street
Berkeley, CA 94710
(510) 548-9005
bill@fergusonberland.com

Attorneys for Defendants and Respondents
FPL Group, Inc., FPL Energy, LLC; ESI Bay Area GP, Inc., ESI Bay Area, Inc., Altamont Power, LLC, Green Ridge Power, LLC

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I. INTRODUCTION

Plaintiffs and appellants Peter Galvin and the Center for Biological Diversity, Inc., appeal the trial court's dismissal of CBD's tenth cause of action for "Destruction of Public Trust Natural Resources." [1] CBD argued before the trial court, and continues to maintain on this appeal, that as private parties, they are entitled to use the Public Trust Doctrine to sue for harm to migratory birds allegedly caused by Respondents' ownership and operation of energy-producing wind turbines located in the Altamont Pass Wind Resource Area ("APWRA"). (AOB 2.)

CBD's argument fails to recognize that a cause of action brought by a private party under the Public Trust Doctrine is limited to, and must arise from, navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence. (See *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434-37.) CBD cannot state a private cause of action under the Public Trust Doctrine for alleged harm to migratory birds traveling through the APWRA because no navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence are implicated in this litigation. (See *Golden Feather Community Assn. v. Thermalito Irrigation District* (1989) 209 Cal.App.3d 1276, 1286-87.)

In an attempt to avoid the Public Trust Doctrine's limitation that a private cause of action must arise from navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence,

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[1] Plaintiffs and appellants Peter Galvin and the Center for Biological Diversity, Inc., are referenced herein collectively as "CBD." CBD's First Amended Complaint is referenced herein as the "FAC." Citations to Appellants' Opening Brief are referenced herein as "AOB." Citations to Appellants' Appendix are referenced herein as "AA." Citations to Respondents' Appendix are referenced herein as "RA." Citations to the Reporter's Transcript of Proceedings are referenced herein as "RT."

CBD argues that courts have, for more than 100 years, recognized a broad "public trust property" interest in birds. (AOB 16-20.) It follows, according to CBD, that this general "public trust property" interest in wildlife is within the scope of the Public Trust Doctrine sufficient to support a private cause of action. (*Ibid.*)

In support of this argument, CBD relies on a line of inapposite cases that, as the trial court observed, do not address the question whether there is a private cause of action under the Public Trust Doctrine, but instead dealt with lawsuits brought by the government in which statutory violations were enforced pursuant to a state's police power ("Police Power") to regulate, protect, and conserve wildlife. (AA 148.) This caselaw does not support CBD's position that a private party can state a cause of action under the Public Trust Doctrine for matters not arising from navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influences.

CBD further attempts to circumvent the Public Trust Doctrine's requirement that a private cause of action under the Doctrine be limited to, and must arise from, navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence by arguing that various state and federal wildlife protection statutes support their position that the migratory birds in this case are "public trust property," the loss of which can serve as the foundation for a private cause of action under the Public Trust Doctrine. (AOB 7-10, 20, 34; AA 18-20 [FAC ¶¶ 45-47, 63].) CBD faces an insurmountable hurdle with respect to this theory.

First, none of the wildlife protection statutes CBD cites codify the Public Trust Doctrine or purport to broaden its limited scope beyond navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence. Rather, these statutes, to the extent they use language such as "ownership" and "trust," do so solely

in order to explain the State's authority, pursuant to its Police Power, to regulate, protect, or conserve wildlife. Second, only the State is authorized to bring an action for a violation of these wildlife protection statutes. As a result, CBD lacks standing to enforce any alleged statutory violations. (See, e.g., Fish & G. Code, § 2014.)

In sum, CBD purports to assert a private right of action under the Public Trust Doctrine where none exists. Given that (1) this case neither arises from nor involves navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence; (2) migratory birds are not "public trust property" within the meaning of the Public Trust Doctrine; and (3) only the government can enforce a violation of the wildlife protection statutes CBD cites, the trial court properly concluded that "[n]o statutory or common law authority supports a cause of action by a private party for violation of the Public Trust Doctrine arising from the destruction of wild animals." (AA 147, 149.)

Accordingly, Respondents respectfully request that the Court AFFIRM the trial court's order granting Respondents' motion for judgment on the pleadings.

II. FACTS AND PROCEDURAL HISTORY

A. Respondents' Ownership And Operation Of Energy-Producing Wind Turbines In The APWRA.

Respondents own and operate wind turbines in the Altamont Pass, an area that has been designated by the State of California as a special wind resource area called the APWRA. [2] (AA 13 [FAC ¶ 38].) The turbines produce wind-powered electricity. (AA 13 [FAC ¶ 39].) CBD alleges that the wind turbines injure and kill migratory birds migrating through the APWRA. (AA 14 [FAC ¶¶ 45-47].)

For a number of years, Respondents have been working with various governmental agencies in an effort to balance two equally important environmental goals — producing wind-powered electricity, on the one hand, and preserving wildlife, on the other. (AA 18-20 [FAC ¶¶ 68-82, 84]; RA 89-92, 116-19, 123-26.) The U.S. Fish and Wildlife Service, California Department of Fish and Game, California Energy Commission, the Alameda County Board of Supervisors, California Attorney General, U.S. Attorney's Office, and Alameda County District Attorney's Office have all been actively working with Respondents to promote wind-powered energy while reducing avian impacts. (AA 18-20 [FAC ¶¶ 68-82, 84]; RA 89-92, 116-19, 123-26.)

In addition, on January 29, 2004, the County of Alameda formed the Wind Power Working Group to assist it in working to balance both of the above-mentioned environmental goals by identifying ways to reduce avian mortalities. (RA 116.) The Group consisted of numerous governmental

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[2] As referenced in this brief, defendants and respondents are referred to collectively as "Respondents" and includes FPL Group, Inc., FPL Energy, LLC, ESI Bay Area GP, Inc., ESI Bay Area, Inc., Grep Bay Area Holdings, LLC, Green Ridge Power LLC, Altamont Power LLC, Enxco, Inc., Seawest Windpower, Inc., Pacific Winds, Inc., Windworks, Inc., and Altamont Winds, Inc.

and non-governmental representatives, including but not limited to the California Department of Fish and Game, the U.S. Fish and Wildlife Service, Alameda County, wind turbine permit applicants, Californians for Renewable Energy ("CARE"), CBD, CBD's attorney, and property owners in the APRWA. (*Ibid.*)

B. CBD's Original Complaint.

Almost one year after the formation of the Wind Power Working Group, on November 1, 2004, CBD filed their initial complaint in Alameda County Superior Court. (RA 1-31.) The complaint contained nine causes of action under California's Unfair Competition Law ("the UCL"), as set forth in Business & Professions Code sections 17200 et seq. (RA 2:3-5, 3 [Compl. ¶ 1], 32.) Each of CBD's nine UCL causes of action presented a different statute under which Respondents' "regular business practices" were alleged to be "unlawful" and "unfair." (RA 21-28 [Compl. ¶¶ 84-131].) CBD brought the complaint on behalf Peter Galvin, all of its members, and the general public. (RA 2:1-3, 3-5 [Compl. ¶¶ 6-11].) The complaint sought declaratory relief, restitution, the imposition of statutory fines, and penalties. (RA 29-31 [Compl. ¶¶ A-F].)

CBD's original complaint did not include a cause of action under the Public Trust Doctrine. (RA 1-31; AA 134.) Nor did the original complaint allege that any navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence were at issue in this litigation. (RA 1-31.)

C. California's Voters Adopt Proposition 64.

On November 2, 2004, the day after CBD filed their complaint, the voters of California passed Proposition 64 thereby amending sections 17203 and 17204 the UCL. (RA 36:15-16; AA 135.) Proposition 64 introduced a standing requirement, which barred all private plaintiffs from

initiating or maintaining a UCL action on behalf of the general public. (RA 35:7-16; AA 135.) Proposition 64 included a further standing requirement for private plaintiffs acting in an individual capacity. Specifically, a private party must have "suffered [an] injury in fact" and "lost money or property" in order to initiate or maintain a UCL action. (RA 35:17-19; AA 135.)

D. Respondents' Demurrer To CBD's Complaint.

On January 12, 2005, Respondents filed a demurrer to the complaint challenging CBD's standing under the new requirements imposed by Proposition 64. (RA 74; see also AA 135.) In addition to the demurrer, Respondents filed a separate motion to strike CBD's prayers for injunctive relief, restitution, the imposition of fines, and penalties from the complaint. (*Ibid.*)

On February 10, 2005, the Hon. Ronald M. Sabraw heard Respondents' demurrer to the complaint in conjunction with motions in several other Proposition 64 cases pending in that department. (RA 34:2 - 35:3; AA 135, 161.) Judge Ronald Sabraw issued an order on February 17, 2005, ("First Order") in which he found that Proposition 64 was retroactive and, as a result, precluded private individuals whose UCL claims were filed before November 2, 2004, from continuing to litigate on behalf of the general public. (RA 33-67; AA 135-36.)

Judge Ronald Sabraw then applied his Proposition 64 ruling to the facts of CBD's complaint. (RA 33-67.) Judge Ronald Sabraw concluded that although the UCL claims brought by CBD on behalf of the general public could not proceed, the named plaintiffs could continue to individually litigate any UCL claims in their own interest. (RA 66:19 - 67:4; AA 136.) The First Order provided that CBD had sufficiently alleged an actual injury to property to satisfy the UCL's standing requirement pursuant to section 17204 because the wildlife at issue in the instant action

was part of the public trust which the State held for the benefit of the people. (RA 67:4-13; AA 136.)

E. Respondents' Motion To Strike Prayers For Relief From CBD's Complaint.

Several weeks later, on March 28, 2005, after additional briefing by the parties and another hearing, Judge Ronald Sabraw ruled on Respondents' motion to strike certain of CBD's prayers for relief from the complaint ("Second Order"). (RA 74-81; AA 136.) Judge Ronald Sabraw granted Respondents' motion and struck from the complaint CBD's prayers for restitution, the imposition of fines, and penalties, but denied Respondents' motion as to CBD's prayer for injunctive relief. (RA 75:16 - 80:19.)

In the Second Order, Judge Ronald Sabraw reasoned that CBD "never had any ownership in the birds in the sense of private property, so the value was not taken from them personally." (RA 76:10-13; AA 137.) Consequently, CBD did not, either in their individual capacity or through the public trust, have a proprietary interest in wild birds akin to an ownership interest in property to support an order under section 17203 of the UCL directing Respondents to restore to CBD the value of the birds that were injured or killed as a result of their alleged unlawful practices. (RA 77:12-15, 78:18-20.)

Judge Ronald Sabraw harmonized the reasoning of the Second Order with the First Order with respect to the sufficiency of CBD's property interest in migratory birds. (RA 78:21 - 79:4.) Judge Ronald Sabraw explained that the First Order focused on the issue of CBD's standing to assert a claim under section 17204 of the UCL, while the Second Order addressed a separate legal issue, the Court's ability to award monetary relief under section 17203 of the UCL. (RA 78:21 - 79:15.) In other words, the nature of the property interest held by CBD was never discussed

in the First Order. (RA 79:7-8.) In the Second Order, however, Judge Ronald Sabraw addressed this issue and concluded that members of the public did not have a property interest in wildlife in the sense of private ownership of property, but rather had an ownership interest in the sense of "control over the wild birds." (RA 79:7-12.) On that basis, Judge Ronald Sabraw held that CBD could pursue an action under the UCL because they lost a property interest (control over the wild birds), but the Court could not award monetary relief under the UCL because CBD never had a proprietary ownership interest in the wild birds. (RA 79:11-15; AA 137-38.)

Judge Ronald Sabraw's Second Order granted CBD leave to file an amended complaint consistent with his Second Order. (RA 80:22-24; AA 138.)

F. <u>CBD's First Amended Complaint.</u>

CBD filed their FAC, the operative complaint in this case, on April 15, 2005, adding a tenth cause of action for "Destruction of Public Trust Natural Resources." (AA 138; AA 30-31 [FAC ¶¶ 134-38].) Like the original complaint, CBD's FAC contains no allegations that navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence are at issue in this case. (AA 1-30.) Furthermore, none of the prayers for relief in CBD's FAC seek damages or restitution. (AA 31 [FAC ¶¶ A-F].)

While the CBD action was pending, on October 31, 2005, CARE and the Golden Gate Audubon Society filed actions in the Alameda County Superior Court petitioning for a writ of mandate under the California Environmental Quality Act and related statutes for review of Alameda County's Resolution Number R-2005-463 which granted Respondents' conditional use permits to continue operating the energy-producing wind turbines in the APWRA (the "CEQA" actions). (RA 104, 229)

On February 16, 2006, Judge Ronald Sabraw found the CEQA actions filed by CARE and the Golden Gate Audubon Society "related to" CBD's lawsuit, and transferred CBD's lawsuit to the judge overseeing the CEQA actions, the Honorable Bonnie L. Sabraw. (RA 231.) Thereafter, Respondents filed two motions for judgment on the pleadings. (AA 33-46, 133-34, 139 166.)

G. Respondents' Motions For Judgment On The Pleadings.

Respondents' motion for judgment on the pleadings was filed on July 10, 2006, and challenged CBD's tenth cause of action for "Destruction of Public Trust Natural Resources." (AA 33-46.) In that motion, Respondents argued that as private parties, CBD could not state a cause of action under the Public Trust Doctrine because CBD's lawsuit neither arises from nor involves navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence. (*Ibid*.)

Respondents also filed a renewed motion for partial judgment on the pleadings on August 4, 2006, that disputed each of CBD's first nine UCL causes of action. (AA 139, 166.) In this motion, Respondents argued that CBD lacked standing to bring each of their UCL causes of action based upon two recent appellate opinions which interpreted the newly passed Proposition 64. (*Ibid*.)

H. The Hearing On Respondents' Motions For Judgment On The Pleadings.

On September 20, 2006, Judge Bonnie Sabraw held a hearing to address both of Respondents' motions. (RT 13-67.) Prior to the hearing on the motions, Judge Bonnie Sabraw asked counsel for both CBD and Respondents to inform the court whether any published California opinions hold that private parties can raise claims to enjoin destruction of, or injury to, property under the Public Trust Doctrine that do not arise from navigable waters, tidal waterways or the land beneath them. (RA 234.) At

the hearing, counsel for CBD was unable to cite a single case in support of their argument that a private party can state a cause of action under the Public Trust Doctrine that does not arise from navigable waters, tidal waterways or the land beneath them. (RT 49:8 - 57:9; see also RT 44:27 - 45:4.) Accordingly, Judge Bonnie Sabraw found that "Plaintiffs have not cited to any authority in which a court of this state has approved such a cause of action." (AA 147.)

Judge Bonnie Sabraw also asked CBD's counsel whether a second amended complaint could be filed if the court granted Respondents' motion for judgment on the pleadings as to the tenth cause of action in the FAC. (RT 57:10-11; RA 235.) CBD's counsel responded that if the basis for the Judge's ruling was that migratory birds were not public trust property, CBD would have difficulty amending the FAC to state a cause of action under the Public Trust Doctrine. (RT 57:12 - 58:5.) At the conclusion of the hearing, Judge Bonnie Sabraw took the matter under submission. (RT 64:20-21.)

I. Judge Bonnie Sabraw's Order Granting Respondents' Motions For Judgment On The Pleadings And Dismissal Of CBD's First Amended Complaint.

On October 12, 2006, Judge Bonnie Sabraw granted both of Respondents' motions in a detailed written opinion. (AA 133-49.) With respect to CBD's first nine UCL claims, Judge Bonnie Sabraw held that CBD did not suffer an actual loss of money or property, and therefore lacked standing to bring these UCL causes of action. (AA 141-46.)

Judge Bonnie Sabraw's order further held that CBD's tenth cause of action in the FAC failed to state a cause of action because no statutory or common law authority supports a cause of action by a private party under the Public Trust Doctrine arising from the destruction of wild animals. (AA 146-47.) Significantly, her order also noted that courts have refused to

expand the Public Trust Doctrine's use by private parties beyond the Doctrine's traditional public trust interests in navigable and tidal waters, and for authority cited to *Golden Feather Community Assn., supra,* 209 Cal.App.3d 1276. (AA 147.)

As to the cases cited by CBD in support of their position that wildlife is public trust property, Judge Bonnie Sabraw's order noted that each of those cases were brought by the State using its Police Power to regulate, protect or conserve wildlife, not by private individuals under the Public Trust Doctrine and, as such, did not support CBD's argument. (AA 148.)

Judge Bonnie Sabraw also made clear that the Fish and Game statutes relied upon by CBD can only be enforced by the State and not by a private individual. (AA 148-49.)

Finally, Judge Bonnie Sabraw's order refused to grant CBD leave to amend because, as a matter of law, CBD could not amend the FAC to state a cause of action based upon Respondents' injury to, or destruction of, migratory birds traveling through the APWRA given that CBD lacked standing to bring any UCL claims, and could not state a cause of action under the Public Trust Doctrine. (AA 149.)

J. CBD's Decision To Appeal The Trial Court's Dismissal Of The First Amended Complaint.

On December 11, 2006, CBD filed a notice of appeal. (AA 152-54.) On May 18, 2007, CBD filed the AOB. CBD is only appealing the trial court's dismissal of the tenth cause of action under the Public Trust Doctrine in the FAC. (AA 153.) It does not contest the trial court's dismissal of CBD's nine UCL causes of action. (AA 145-46.)

III. LEGAL DISCUSSION

CBD "cannot simply cite a few facts and then invent causes of action to cover them." (*Mobley v. Los Angeles Unified School Dist.* (2001) 90 Cal.App.4th 1221, 1239.) Nevertheless, that is exactly what CBD has done in this case by inventing a purported cause of action for private parties under the Public Trust Doctrine arising from the alleged destruction of wildlife. The trial court correctly concluded that the cause of action CBD has attempted to manufacture has no basis in California law.

A. The Trial Court Properly Ruled That Migratory Birds Are Not Public Trust Property, The Loss Of Which Can Serve As The Basis For A Private Cause Of Action Under The Public Trust Doctrine.

An examination of the history, purpose, and scope of the Public Trust Doctrine demonstrates that a private cause of action under the Doctrine is limited to, and must arise from, navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence. No California Court has ever extended the Public Trust Doctrine beyond this narrow scope.

1. The History Of The Public Trust Doctrine Makes Clear That Its Purpose, Scope, And Use Is Limited To Navigable Waterways, Non-Navigable Streams Affecting Navigable Waterways, Or Waters Subject To Tidal Influence.

The Public Trust Doctrine is premised upon ownership of and the passing of title to tidelands, navigable lakes, streams, waterways, and the lands lying beneath them. (See *National Audubon Society, supra,* 33 Cal.3d at p. 434; see also *Golden Feather Community Assn., supra,* 209 Cal.App.3d at p. 1283.) The purpose of the Public Trust Doctrine is to preserve the common use of these waterways for navigation, commerce, and fishing, along with environmental and recreational values directly connected with these waterways. (See *Phillips Petroleum Co. v.*

Mississippi (1988) 484 U.S. 469, 487-88 [108 S.Ct. 791] dis. opn. of O'Connor, J., Stevens, J., and Scalia, J.; see also *People v. California Fish Co*. (1913) 166 Cal. 576, 584; *Marks v. Whitney* (1971) 6 Cal.3d 251, 259-60; *Golden Feather Community Assn., supra*, 209 Cal.App.3d at p. 1284.)

The Public Trust Doctrine's scope encompasses navigable waterways (including lakes and streams), as well as waters subject to tidal influence. (See *National Audubon Society, supra,* 33 Cal.3d at p. 435.) The Doctrine also includes non-navigable tributaries when their diversion harms navigable waters. (See *id.* at p. 437.)

Because the Public Trust Doctrine is limited to matters arising from navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence, a private party may assert a cause of action under the Doctrine when, and only when, one of these traditional waterway interests is at issue. (See *National Audubon Society, supra,* 33 Cal.3d at pp. 431, fn. 11, 435-37; see also *Golden Feather Community Assn., supra*, 209 Cal.App.3d at p. 1286.) As stated by the Appellate Court in *Golden Feather Community Assn.*:

> [T]he decisional law has been concerned only with the public trust doctrine as it relates to navigable waterways. (Citations.) That navigability is the measure of the public trust doctrine is indicated in our Constitution….

(*Golden Feather Community Assn., supra*, 209 Cal.App.3d at pp. 1284-85.)

CBD argues that *National Audubon Society* demonstrates that migratory birds can form the basis of a private cause of action under the Public Trust Doctrine and that a cause of action under the Doctrine need not arise from navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence. (AOB 27-34.) CBD is mistaken. *National Audubon Society* does not contemplate CBD's broad use of the Public Trust Doctrine by a private party. Rather, the Court

in *National Audubon Society* permitted a private cause of action under the Public Trust Doctrine only because it was limited to, and resulted from, action affecting a navigable waterway.

National Audubon Society involved harm to a navigable lake (Mono Lake), one of the Doctrine's traditional waterway interests, by the diversion of non-navigable tributaries. (See *National Audubon Society, supra*, 33 Cal.3d at pp. 435-37.) Unsurprisingly, the California Supreme Court held that the Public Trust Doctrine could be used to protect Mono Lake because the cause of action in that case involved a navigable body of water. (See *id.* at p. 437.)

Although *National Audubon Society* discussed the effect of water diverted from non-navigable streams on various wildlife living in Mono Lake, the California Supreme Court "found that the public trust doctrine provided a legal foundation for challenging the water diversions not based on the wildlife being a public trust resource, but on the fact that the diversions would impact the navigable waters of the lake itself." (AA 147; see also *National Audubon Society, supra*, 33 Cal.3d at pp. 435-37; *Golden Feather Community Assn., supra*, 209 Cal.App.3d at pp. 1284-86.) Indeed, *National Audubon Society* reaffirmed that "the core of the public trust doctrine [concerns] … the navigable waters of the state and the lands underlying those waters …." (*National Audubon Society, supra*, 33 Cal.3d at p. 425.)

CBD cites two additional cases, *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, and *People v. Gold Run Ditch & Mining Co.* (1884) 66 Cal. 138, in support of their broad claim that because "California common law recognizes the doctrine of public trust property … held by the state … as trustee for the public," a private cause of action under the Public Trust Doctrine need not result from one of the Doctrine's traditional waterway interests. (AOB 15.) In reality, both of these cases involved

matters which arose from navigable waterways or waters subject to tidal influence. (See *City of Berkeley, supra,* 26 Cal.3d at p. 521 [Tidelands in the San Francisco Bay granted to private parties did not convey title to the purchasers free of the public trust for commerce, navigation, fishing, and related uses.]; see also *Gold Run Ditch & Mining Co., supra,* 66 Cal. at p. 151, underline added ["The rights of the people in the navigable rivers of the State are paramount and controlling. The State holds the absolute right to all navigable waters and the soils under them, subject, of course, to any rights in them."].)

In summary, the history, scope, and use of the Public Trust Doctrine demonstrate that a private cause of action is limited to, and must arise from, navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence. CBD cannot state a cause of action under the Public Trust Doctrine because there are no such waters or waterways at issue here.

2. California Courts Have Declined To Extend The Public Trust Doctrine To Private Causes of Action Not Arising From Navigable Waterways, Non-Navigable Streams Affecting Navigable Waterways, Or Waters Subject To Tidal Influence.

California courts, including the authority CBD cites, have consistently limited a private cause of action under the Public Trust Doctrine to circumstances arising from navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence. (AOB 28-29; see also *National Audubon Society, supra,* 33 Cal.3d at pp. 431, fn. 11, 436-37.) [3]

Courts have refused to extend the Public Trust Doctrine's scope to support a cause of action brought by a private party under the Doctrine not

[3] See also *Marks, supra,* 6 Cal.3d at pp. 258-59; *Colberg, Inc. v. State of California ex rel. Dept. Pub. Works* (1967) 67 Cal.2d 408, 416.

arising from navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence. (See *Golden Feather Community Assn., supra,* 209 Cal.App.3d at pp. 1285-86; see also *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 709 [The Public Trust Doctrine could not be used for a cause of action for groundwater contamination in the absence of navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence.].)

Golden Feather Community Assn., supra, 209 Cal.App.3d 1276, is illustrative of the courts' refusal to extend the Public Trust Doctrine. In that case, plaintiff claimed that otherwise legal diversions of water interfered with fishing, wildlife, recreational, and aesthetic rights associated with the reservoir. (See *id.* at p. 1279.) The plaintiff attempted to use the Public Trust Doctrine to obtain injunctive relief to stop the diversions even though the reservoir was non-navigable and the challenged diversions had not affected any navigable waterways. (See *id.* at pp. 1280, 1282.)

The plaintiff in *Golden Feather Community Assn.* argued that the California Supreme Court's decision in *National Audubon Society* supported a broad application of the Public Trust Doctrine. (See *ibid.*) The Court of Appeal rejected the argument that *National Audubon Society* extended the Doctrine and held that even though "wildlife" and "recreational interests" were adversely impacted, the Doctrine did not apply because the cause of action did not arise from any of the Public Trust Doctrine's traditional waterway interests. (See *id.* at pp. 1282, 1286-87.)

In reaching this decision, the *Golden Feather Community Assn.* court reasoned that the Public Trust Doctrine could not be enlarged because "decisional law has been concerned only with the public trust doctrine as it relates to navigable waterways." (*Golden Feather Community Assn., supra,* 209 Cal.App.3d at pp. 1284-85.) Therefore, the Court concluded,

courts have "consistently limited application of the public trust doctrine to circumstances where the interest to be protected is a traditional public trust interest." (*Id.* at p. 1286.)

As in *Golden Feather Community Assn.*, CBD bases their claim for relief wholly upon the Public Trust Doctrine. As in *Golden Feather Community Assn.*, CBD attempts to improperly enlarge the scope of the Public Trust Doctrine to include a private cause of action not resulting from navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence. These efforts should be rejected for the same reasons stated in *Golden Feather Community Assn*. Indeed, CBD fails to cite a single case that contradicts *Golden Feather Community Assn.*, or that stands for the proposition that a private cause of action under the Public Trust Doctrine need not arise from navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence. [4]

CBD's discussion of generic standing principles neither diminishes nor provides a substitute for the Public Trust Doctrine's requirement that a private cause of action under the Doctrine be limited to, and must arise from, a navigable waterway, a non-navigable stream affecting a navigable waterway, or body of water subject to tidal influence. (AOB 31-33.)

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[4] In response to Judge Bonnie Sabraw's question during oral argument about whether or not CBD's counsel could provide the court with any legal authority in support of their proposition that a private party can state a cause of action under the Public Trust Doctrine where no navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence were at issue, CBD's attorney was unable to provide a single citation and conceded that no such authority exists. (RT 49:8 - 57:9.) Furthermore, Respondents have found no legal authority in which a private party has been permitted to state a cause of action under the Doctrine that arose from something other than navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence.

Indeed, none of the generic standing cases CBD cites in support of this argument address the scope of the public trust doctrine.

3. Caselaw CBD Cites Affirming State Police Power To Regulate, Protect, And Conserve Wildlife Does Not Enlarge The Scope Of The Public Trust Doctrine.

CBD improperly mixes two separate and discrete "public trust" concepts in support of their claim that wildlife is public trust property, the loss of which can serve as the basis for a private cause of action under the Public Trust Doctrine. CBD treats as one and the same (1) the Public Trust Doctrine's requirement that a private cause of action under the Doctrine is limited to, and must arise from, navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence, and (2) the source and extent of the State's Police Power to regulate, protect, or conserve wildlife. In reality, the Public Trust Doctrine and the State's Police Power are extraordinarily different legal principals. On the one hand, the Public Trust Doctrine is premised upon the actual ownership of navigable waterways, tidelands, and the passage of title to such property. On the other hand, State Police Power to regulate wildlife evolved from a completely different principal – the "non-ownership" of wildlife such as migratory birds. (See *Hughes v. Oklahoma* (1979) 441 U.S. 322, 335 [99 S.Ct. 1727]; see also *Douglas v. Seacoast Products, Inc.* (1977) 431 U.S. 265, 284 [97 S.Ct. 1740]; *Ex Parte Maier* (1894) 103 Cal. 476, 483.)

a. *The State, By Virtue Of Its Police Power, Has Sovereign Authority To Regulate, Protect, And Conserve Wildlife.*

The United States Supreme Court has repeatedly held that nobody – not even a state – owns or has title to wildlife not yet reduced to possession. (See *Missouri v. Holland* (1920) 252 U.S. 416, 434 [40 S.Ct. 382] ["To put the claim of the State upon title is to lean upon a slender reed[]" in reference to a state challenge to the Migratory Bird Treaty Act.]; see also

Douglas, supra, 431 U.S. at pp. 284-85 ["It is pure fantasy to talk of 'owning' wild fish, birds, or animals."].)

As further summarized by the United States Supreme Court in *Toomer v. Witsell* (1948) 334 U.S. 385 [68 S.Ct. 1156], "[t]he whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have the power to preserve and regulate the exploitation of an important resource." (*Toomer, supra,* 334 U.S. at p. 402.) The modern trend is to dispense with these references to "common ownership" since they are now regarded as a 19th century "legal fiction." (See *Hughes, supra,* 441 U.S. at p. 336.)

It is the "non-ownership" of wildlife, also characterized as a "negative community of interest," that provides the foundation for the State's police power as it relates to wildlife. Because no one individual possesses wildlife that has not yet been reduced to possession any more than another, control and regulation of wildlife rests with the concomitant power of sovereign authority to use public property for public purposes. (See *Geer v. Connecticut* (1896) 161 U.S. 519, 522-28, 533 [16 S.Ct. 600] [In order to determine whether Connecticut could prevent wildlife lawfully taken within its borders from being transported out of state without violating the commerce clause, the United States Supreme Court engaged in "a consideration of the nature of the property in game and the authority which the state had a right lawfully to exercise in relation thereto."], overruled on other grounds by *Hughes, supra,* 441 U.S. 322; see also *Viva! International Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 937, fn. 4 [Citing *Geer* for tracing the history of governmental power to control the private taking of wildlife.].)

This basis for State authority to regulate wildlife, such as migratory birds, is very different from the ownership in and title to navigable

waterways and tidelands that shape the Public Trust Doctrine's underpinnings.

b. *CBD Mischaracterizes Cases Addressing The State's Police Power To Regulate, Protect, And Conserve Wildlife.*

CBD erroneously cites various Police Power cases in support of their argument that migratory birds disconnected from navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influences, are "public trust property" within the Doctrine's scope. (AOB 2, 16-20.) Although these Police Power cases used "public trust" vocabulary similar to language which describes the Public Trust Doctrine's traditional waterway interests, none of the authority CBD cites involved a cause of action by a private party under the Public Trust Doctrine or addressed the scope and requirements of that Doctrine. Rather, the cases CBD references involved the interpretation and enforcement of a specific statute pursuant to the State's Police Power and are thus inapposite. [5]

People v. Truckee Lumber Co., *supra*, 116 Cal. 397, upon which CBD relies, involved an action brought by the Attorney General to prevent a lumber company from polluting the Truckee River. (AOB 16-17; see also *Truckee Lumber Co, supra,* 116 Cal. at pp. 398-99.) In that case, the

[5] See, e.g., *People v. Truckee Lumber Co.* (1897) 116 Cal. 397 [State action against a sawmill to enjoin pollution of a stream that flowed into navigable waters in violation of public nuisance statutes.]; *People v. Stafford Packing Co.* (1924) 193 Cal. 719, 723-24 [State action against fish canning company to enforce a statute which prohibited the use of fish for reduction purposes such as fertilizer.]; *People v. Monterey Fish Products Co.* (1925) 195 Cal. 548, 562-65 [State action against fish canning company to enforce statute which prohibited the use of fish for reduction purposes.]; see generally *California Trout, Inc. v. State Water Resources Control Board* (1989) 207 Cal.App.3d 585 [Action by a member of the general public against a state agency, the Water Resources Control Board, to enforce a statue that required water appropriation licenses conform to Fish & Game Code sections which called for fish be kept in good condition.].

Attorney General alleged the pollution was killing fish and obtained an injunction under nuisance statutes. (See *Truckee Lumber Co, supra*, 116 Cal. at pp. 398-99.) The defendant lumber company asserted that the complaint failed to state a cause of action because the Truckee River was not navigable, traversed only private land, and therefore the State did not have an interest sufficient to obtain an injunction. (See *id.* at pp. 399-400.) The California Supreme Court disagreed and held that the lumber company's activities constituted an actionable nuisance because such activities impinged upon the public's common ownership of fish in the Truckee River. (See *id.* at pp. 400-02.)

The *Truckee Lumber Co.* decision concerned the State's Police Power to regulate, protect, and conserve public fish in private water; it did not address the scope of the Public Trust Doctrine. (See *Golden Feather Community Assn.*, *supra*, 209 Cal.App.3d at pp. 1282, 1286, underline added [*Truckee Lumber Co.* "involved the state's right to protect public fish in private waters. It did not hold that the public has the right to take fish from private waters under some 'public trust theory' and in fact recognized otherwise."].)

That the *Truckee Lumber Co.* holding dealt with the extent of the State's Police Power, not the scope of the Public Trust Doctrine, is further evident in the *Truckee Lumber Co*. Court's reliance on *Ex Parte Maier*, *supra*, 103 Cal. 476:

> 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 in the people of the state (*Ex Parte Maier*, 103 Cal. 476, 483; 42 Am. St. Rep. 129), as in England it was in the king; and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of

> the sovereign, coming to us from the common law, and preserved and expressly provided for by the statutes of this and every other state of the Union.

(*Truckee Lumber Co, supra,* 116 Cal. at pp. 399-400, underline added.)

The underlined language refers to the sovereign authority of the State at common law to protect wildlife and the codification of those powers in such statutes as Fish & Game Code sections 711.7, 1600, and 1802, upon which CBD also relies. (AOB 20.) While *Truckee Lumber Co.*, and several older decisions, refer to "common ownership of wildlife" when discussing the State's regulatory power, such cases, as the above quote demonstrates, use this language in the context of the State's ability to control and regulate wildlife. The use of that language in that context has nothing to do with, and has never been interpreted as applying to, navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence.

People v. Stafford Packing Co., supra, 193 Cal. 719, and *People v. Monterey Fish Products Co.*, *supra,* 195 Cal. 548, cited by CBD, also are inapposite. (AOB 2, 17-20.) Both are State Police Power cases and did not involve the Public Trust Doctrine. Both cases relied upon *Geer*, *Maier*, and *Truckee Lumber Co.* in upholding the State's Police Power to enjoin fish packing companies from violating laws intended to conserve fish. (See *Stafford Packing*, *supra*, 193 Cal. at p. 721; see also *Monterey Fish Products Co.*, *supra,* 195 Cal. at p. 554.) In both cases, claims were brought by the Attorney General to enforce statutes that regulated the improper use of fish for reduction purposes. In neither of these decisions did the court consider the appropriateness of a private cause of action under the Public Trust Doctrine; nor was any ruling made permitting private parties to bring Public Trust Doctrine claims.

In another case CBD cites, *Arroyo v. California* (1995) 34 Cal.App.4th 755, a father brought a Tort Claims Act action against the State after his son was attacked by a mountain lion in a state park. (AOB 20.) The question there was whether mountain lions were part of the national condition on unimproved public lands and, thus, subject to Government Code section 831.2, a public immunity statute. (See *Arroyo, supra,* 34 Cal.App.4th at p. 761.) The *Arroyo* holding was unrelated to the Public Trust Doctrine, and surely did not purport to expand it. (See *id.* at p. 762.)

People v. Perez (1966) 51 Cal.App.4th 1168, is no more helpful to CBD's argument. (AOB 19-20.) That case focused on a 4th Amendment challenge to evidence seized at a California Department of Fish & Game checkpoint. (See *Perez, supra*, 51 Cal.App.4th at p. 1173.) In the course of rejecting that challenge, the Court of Appeal simply noted the obvious – the State has the power and duty to protect wildlife by allowing Fish and Game agents to operate regulatory checkpoints. (See *id*. at pp. 1175, 1179.)

Nor do any of the other decisions CBD briefly mentions bolster their claim that the Public Trust Doctrine can support a private cause of action under the Doctrine not resulting from navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influences. (AOB 19-20 citing *People v. Hovden Co.* (1932) 215 Cal. 54; *People v. Murrison* (2002) 101 Cal.App.4th 349; *Betchart v. Dept. of Fish & Game* (1984) 158 Cal.App.3d 1104; *People v. Glenn-Colusa Irrigation District* (1932) 127 Cal.App. 30; *People v. Harbor Hut Restaurant* (1983) 147 Cal.App.3d 1151.) Not one of these cases involved a cause of action by a private party under the Public Trust Doctrine. Rather, each involved the State's exercise of its Police Power to regulate, protect, and conserve fish.

c. *Private Parties Lack Standing To Enforce Government Wildlife Statutes.*

CBD relies primarily on California Fish & Game Code sections 711.7, 1600, and 1801-02, in support of their position that the migratory birds in this case are "public trust property." (AOB 20, 34; AA 14 [FAC ¶¶ 48, 136].) CBD further argues that the avian impacts caused by Respondents operation of energy-producing wind turbines in the APWRA constitute illegal "takings" in violation of state and federal statutes enacted to protect wildlife such as the migratory birds at issue in this case. (See Fish & G. Code, §§ 2000, 3503.5, 3511, 3513, 3800, subd. (a), 12000, subd. (a); 16 U.S.C. § 703 [Migratory Bird Treaty Act]; 16 U.S.C. § 668 [Bald and Golden Eagle Protection Act]; AA 17-27 [FAC ¶¶ 63, 86-89, 93-95, 104-05, 109-11, 115-16, 120-21].)

CBD's reliance on this statutory authority is misplaced for at least two reasons. First, as previously discussed, the wildlife protection statutes CBD cites use language such as "ownership" and "trust" to explain the source and extent of the State's regulatory powers. As stated by the United States Supreme Court, the "public trust language" in these statutes is "now generally regarded as a fiction expressive in legal shorthand of the importance to its people that a state has the power to preserve and regulate the exploitation of an important resource." (*Holland*, *supra*, 252 U.S. at p. 420.)

Second, only the government can enforce the statutory authority CBD cites – there is no private right of action. (See generally Fish & G. Code, § 2014, subd. (c) ["An action to recover damages under this section shall be brought in the name of the people of the state."]; Fish & G. Code, § 2583, subd. (a) [A civil penalty imposed under this chapter must be enforced by the Department of Fish and Game.]; Fish & G. Code, § 12000 [Fines for criminal liability.].) These statutes clearly provide that only

public prosecutors may sue for statutory violations which harm California's wildlife. [6]

4. The Public Trust Doctrine's Scope Should Not Be Extended To Support A Private Cause Of Action Not Arising From Navigable Waterways, Non-Navigable Streams Affecting Navigable Waterways, Or Waters Subject To Tidal Influence.

A private cause of action under the Public Trust Doctrine is limited to, and must arise from, navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence. There is no need to expand the Doctrine because the government has all the legal tools necessary to look after migratory birds if it believes such action is necessary. Furthermore, the voters of California have expressed their intent, as reflected by Proposition 64, discouraging lawsuits by private parties who have not suffered an actual loss of money or property when there are governmental remedies available to the State.

a. *An Effective Statutory Framework Is In Place Authorizing The State To Protect Migratory Birds.*

Numerous statutes furnish California's governmental parties with the right and power to protect migratory birds. (See, e.g., Fish & Game Code, §§ 711.7, subd. (a), 1801-02, 2014, 2583, 12000 et seq.) The State can enforce these wildlife protection statutes if it believes, under a given set of circumstances, that it is necessary and appropriate.

CBD's lawsuit against Respondents provides an excellent example of circumstances under which the State, although vested with the authority

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[6] As noted by Judge Bonnie Sabraw's order, although statutory authority "affirms that it is the policy of the state to conserve its natural resources and to prevent the willful or negligent destruction of wild birds, … [those statutes require] that any claims for damages for such destruction be brought in the name of the people of the state - not by a private individual." (AA 148-149.)

to prosecute, has, in the exercise of its discretion, chosen another course. The State, through various government agencies, has elected to work with, rather than file a lawsuit against, Respondents in an effort to balance the environmental goals of renewable wind-powered energy and the preservation of wildlife by reducing avian impacts. (AA 18-20 [FAC ¶¶ 68-82, 84]; RA 89-92, 116-19, 123-26.) [7]

In addition, the County of Alameda formed a Wind Power Working Group on January 29, 2004, to assist in balancing the above-mentioned environmental goals by identifying ways to reduce avian mortalities. (RA 116.)

This history demonstrates that the State has evaluated the specific circumstances of this case and decided that the prudent course of action is to proceed by way of meetings and negotiations between government agencies and Respondents rather than by enforcing wildlife protection statutes to the exclusion of other environmental goals. It is not for CBD to second guess the State's decision-making process and ongoing efforts, particularly when, as here, the State has exclusive power to prosecute and enforce these wildlife statutes.

b. *California's Voters Have Issued A Mandate Discouraging Environmental Lawsuits By Private Parties Who Have Not Suffered An Actual Loss Of Money Or Property.*

On November 2, 2005, the voters of California adopted Proposition 64 which amended Business & Professions Code sections 17203 and 17204, severely limiting the ability of private parties to initiate or maintain

[7] These agencies include the U.S. Fish and Wildlife Service, California Department of Fish and Game, California Energy Commission, the Alameda County Board of Supervisors, California Attorney General, U.S. Attorney's Office, and Alameda County District Attorney's Office. (RA 89-92, 116-19, 123-26.)

lawsuits under the broad provisions of the UCL. (See generally *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223.) Prior to Proposition 64's enactment into law, a private party was permitted to bring an action on behalf of the general public for unfair competition, alleging in effect, that if a business violated a statute in the course of its regular operations, that business engaged in unfair competition and/or unlawful business practices. (See *Mervyn's, LLC, supra,* 39 Cal.4th at p. 228.)

Following Proposition 64's ratification by the voters, a private party is prohibited from suing a business on behalf of the general public under the UCL. Additionally, a private party who pursues a UCL action individually must have suffered an actual loss of money or property in order to initiate a UCL cause of action. The voters' intent in adopting Proposition 64 is clear and unambiguous; transfer enforcement of the UCL from private to public prosecutors in order to end private enforcement of laws, including environmental statutes, through the UCL. (See *Mervyn's, LLC, supra,* 39 Cal.4th at pp. 228-29 ["[O]nly the California Attorney General and local public officials … [are] authorized to file and prosecute actions on behalf of the general public [citation].]".)

The history of the instant case suggests that CBD is attempting to avoid the intent of California's voters to limit private environmental lawsuits to situations where a private party has actually lost money or property. It was only after the passage of Proposition 64 and the initial rulings by Judge Ronald Sabraw that CBD decided to add a private cause of action under the public trust doctrine. It appears CBD did this in response to Proposition 64's newly imposed limitations effecting CBD's standing and ability to state a cause of action based upon environmental claims under the UCL.

CBD should not be permitted to execute an "end run" to avoid the intent of the voters as expressed in Proposition 64. Since CBD did not suffer any actual injury in the environmental claims raised, since they suffered no actual loss of money or property, the voters have determined that only the government has the right to sue. Here the government has chosen not to do so. It is not for CBD to say otherwise. To expand the Public Trust Doctrine now, allowing CBD, private parties, who have suffered no actual damages, to sue for environmental claims not arising from navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence would undermine the recently expressed intent of the voters of California.

c. *Permitting CBD's Private Cause of Action For "Destruction Of Public Trust Natural Resources" Would Pave The Way For A Potential Flood Of Private Environmental Lawsuits.*

The Public Trust Doctrine protects navigable waterways, non-navigable streams affecting navigable waterways, and waters subject to tidal influence. As previously discussed, the Doctrine's roots evolved from the manner in which title to navigable waterways and the lands underlying them was passed from sovereign to sovereign. It is for this very reason that the Public Trust Doctrine's scope has never been expanded to support a private cause of action that does not arise from navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influences. To extend the Public Trust Doctrine to migratory birds traveling through the APWRA would stretch the Doctrine far beyond the type of ownership interest in navigable waterways and the lands underlying them the Doctrine was intended protect.

Should the Court now enlarge the Public Trust Doctrine to permit private lawsuits based on causes of action beyond the Doctrine's limited scope, one can anticipate a flood of similar environmental lawsuits that

seek to bypass governmental efforts to balance multiple environmental goals and instead promote certain environmental interests at the expense of others. Given that private parties can no longer file environmental actions under the UCL unless able to demonstrate an actual loss of money or property, they, as CBD has done, will turn to the Public Trust Doctrine as the vehicle of choice to get any and all environmental claims before the courts.

This Court should not permit nor encourage such environmental lawsuits by private parties. If CBD and others want to be able to pursue such private action litigation, they should be seeking permission to do so from the legislature and not from the courts.

B. The Question Of Equitable Remedies Available For A Private Cause Of Action Under The Public Trust Doctrine Is Not A Proper Subject For Appellate Review.

CBD's FAC does not contain a prayer for restitution nor does it seek any form of monetary relief. (AA 31 [FAC ¶¶ A-F].) The FAC only includes prayers for injunctive relief. (*Ibid.*) Given that there is no prayer for restitution associated with CBD's tenth cause of action in the FAC, Respondents' motion for judgment on the pleadings neither raised nor addressed the issue of monetary relief that might be available for a private cause of action under the Public Trust Doctrine. In their opposition to Respondents' motion, CBD requested, for the first time, a ruling as to whether they were entitled to restitution. (AA 68:23 - 69:15.) Respondents argued in reply that CBD did not seek restitution in the FAC, and therefore, the issue was not properly before the trial court. (AA 81:17 - 82:3.)

During the hearing on Respondents motion for judgment on the pleadings as to the tenth cause of action before Judge Bonnie Sabraw, the question of restitution was discussed. (RT 50:14 - 57:9.) However, because that issue had not been pled and was not properly before the trial

court, it was neither considered nor ruled upon in Judge Bonnie Sabraw's order. [8]

Even if the matter had it been properly pled by CBD, the answer as to whether or not such relief is available would not affect the outcome of this appeal. Consequently the issue is not a proper subject for appellate review at this time because resolution of this issue is unnecessary to disposition of the appeal. (See, e.g., *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65; *Young v. Three for One Oil Royalties* (1934) 1 Cal.2d 639, 647–648; *Discover Bank v. Superior Court* (2005) 134 Cal.App.4th 886, 894.)

While appellate courts have discretion to resolve "unnecessary" issues that are "of great importance to the parties which may serve to avoid future litigation when the issue presented is one of continuing public interest and is likely to recur[,]" this rule of law does not apply here. (*Keitel v. Heubel* (2002) 103 Cal.App.4th 324, 332; see also *Auerbach v. Board of Supervisors* (1999) 71 Cal.App.4th 1427, 1441; *Community Redevelopment Agency v. Force Electronics* (1997) 55 Cal.App.4th 622, 630.) The Public Trust Doctrine is rarely invoked by a private party, and when it has been used by private litigants, courts have had no difficulty determining an appropriate remedy. (See, e.g., *National Audubon Society, supra*, 33 Cal.3d at pp. 452-453.) As a result, the issue of remedies available to private litigants under the Public Trust Doctrine is not one of continuing public interest or likely to recur.

If this Court reaches the question as to whether restitution is available to CBD under the Public Trust Doctrine as set forth in CBD's tenth cause of action, it should find that any monetary remedy CBD

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[8] Even CBD admits that Judge Bonnie Sabraw did not determine whether monetary remedies are available in an action brought by a private party under the Public Trust Doctrine. (AOB 12-13, 35.)

requests is unavailable. As noted above, the FAC contains no prayer for monetary relief; it seeks only injunctive relief. Since CBD has not sought monetary relief, the issue of whether restitution is a proper remedy in this case is not properly before the Court.

In addition, there is no legal basis to support CBD's claim for restitution. No California case has awarded restitution in a Public Trust Doctrine action brought by a private party; CBD has admitted as much. (AA 97:16 - 98:4.) For example, at the March 24, 2006, hearing before Judge Ronald Sabraw, CBD conceded that no public trust cases now authorize monetary relief. (RT 52:25 -57:9.) Again, at the September 20, 2006, hearing before Judge Bonnie Sabraw, CBD failed to cite a single case during oral argument in support of its claim that restitution is a proper form of relief for a private cause of action under the Public Trust Doctrine.

IV. CONCLUSION

CBD seeks to force a round peg into a square hole by manufacturing a cause of action for alleged harm to migratory birds. CBD closes their eyes to the long-established legal limitations of the Public Trust Doctrine. CBD ignores the very core of the Doctrine – that a private cause of action under the Public Trust Doctrine is limited to, and must arise from, navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence. Since this case involves only alleged harm to migratory birds traveling through the APWRA, and there are no allegations that navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence form the basis of CBD's tenth cause of action in the FAC, as a matter of law, CBD cannot state a cause of action under the Public Trust Doctrine.

For the foregoing reasons, Respondents' respectfully request that the Court SUSTAIN the trial court's order granting Respondents' motion for judgment on the pleadings.

DATED:

Respectfully submitted,

FERGUSON & BERLAND

By: _____

WILLIAM S. BERLAND
Attorney for Respondents
FPL GROUP, INC., FPL ENERGY, LLC, ESI BAY AREA GP, INC., ESI BAY AREA, INC., GREENRIDGE POWER, LLC, and ALTAMONT POWER, LLC