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 No. RG4183113

RESPONDENTS' BRIEF

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Court of Appeal
State of California
First Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: A116362 Division Three

Case Name: Center for Biological Diversity, Inc., et al. v. FPL Group, Inc., et al.

Please check the applicable box:

☐ There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 8.208(d)(3).

☑ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1. Vestas Americas A/S	Parent of GREP Bay Area Holdings, LLC
2. Vestas Wind Systems A/S	Parent of Vestas Americas A/S
3.	
4.	

Please attach additional sheets with Entity or Person information if necessary.

Signature of Attorney/Party Submitting Form

Printed Name: GEORGE T. CAPLAN
Address: KAYE SCHOLER LLP, 1999 Avenue of the Stars, Suite 1700, Los Angeles, California 90067
State Bar No: 43821
Party Represented: GREP Bay Area Holdings, LLC

IF SUBMITTED AS A STAND-ALONE DOCUMENT, SUBMIT A SEPARATE PROOF OF SERVICE ON ALL PARTIES WITH YOUR CERTIFICATE.

Court of Appeal
State of California
First Appellate District

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☐ There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 8.208(d)(3).

☑ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1. AES SeaWest, Inc.	New Name of SeaWest WindPower, Inc.
2. SeaWest Holdings, Inc.	Parent of AES SeaWest, Inc.
3.	
4.	

Please attach additional sheets with Entity or Person information if necessary.

Signature of Attorney/Party Submitting Form

Printed Name: GEORGE T. CAPLAN
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State Bar No: 43821
Party Represented: AES SeaWest (formerly SeaWest WindPower)

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☑ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1. Advanced International Renewables (AIR) of America, Inc.	Parent of enXco, Inc.
2.	
3.	
4.	

Please attach additional sheets with Entity or Person information if necessary.

Signature of Attorney/Party Submitting Form

Printed Name: GEORGE T. CAPLAN
Address: KAYE SCHOLER LLP, 1999 Avenue of the Stars, Suite 1700, Los Angeles, California 90067
State Bar No: 43821
Party Represented: enXco, Inc.

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Introduction

Reading CBD's Opening Brief, one might think that case law actually exists authorizing a private party to prosecute public wildlife actions under the Public Trust Doctrine.[1] A century of decision making, however – including the *very* authority cited by CBD in its Opening Brief – is overwhelmingly clear that no such authority exists. The State, of course, has the police power to regulate public wildlife issues, but private parties do not possess such police power.

Indeed, private plaintiffs may not prosecute public lawsuits as a general rule. This general rule was underscored by the voters' adoption of amendments to Business & Professions Code sections 17203 and 17204 under Proposition 64, which the California Supreme Court notably described as "an initiative measure in which the voters have chosen their own legal representatives [*i.e.*, public prosecutors] for cases brought ostensibly on their behalf[.]" *Californians For Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223, 233 (2006). The rule also is reflected by the fact that private parties are prohibited from prosecuting wildlife lawsuits under the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, and the comparable state wildlife statutes. Such actions must be prosecuted by public lawyers, not private plaintiffs.

The Public Trust Doctrine is a limited exception to that general rule. Under the Public Trust Doctrine, private parties may prosecute lawsuits to

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[1] Plaintiff and Appellant Center for Biological Diversity, Inc., and its conservation director, Plaintiff and Appellant Peter Galvin, are referenced herein as "CBD." The First Amended Complaint is referenced herein as the "Complaint." Citations to the Appellants' Opening Brief ("AOB" or "Opening Brief"), Appellants' Appendix ("AA"), and Consolidated Respondents' Appendix ("RA") are by page number. Citations to the Reporter's Transcript ("RT") are by page:line.

preserve the public trust easement in tidelands or navigable waters, but *only* because case law has repeatedly held that California citizens hold a *literal* and *actual* easement in such waterways and the lands beneath them. In fact, application of the Public Trust Doctrine has been expressly *limited* to circumstances involving tidelands and navigable waters; where tidelands or navigable waters are not involved, a cause of action under the Public Trust Doctrine has been squarely ***disallowed***. *E.g., Golden Feather Community Ass'n v. Thermalito Irrigation Dist.*, 209 Cal. App. 3d 1276 (1989); *Santa Teresa Citizen Action Group v. City of San Jose*, 114 Cal. App. 4th 689, 709 (2003).

The cases upon which CBD primarily relies – *People v. Truckee Lumber Co.*, 116 Cal. 397 (1897), and *People v. Stafford Packing Co.*, 193 Cal. 719 (1924) – hold that public prosecutors have the authority to bring a public nuisance action or to enforce regulatory statutes, not that private parties possess prosecutorial power under the Public Trust Doctrine. The cases upon which CBD relies simply reflect the State's power to regulate environmental issues under the Fish & Game Code and related common law and regulatory provisions. In 40 pages of briefing, however, CBD fails to acknowledge that *not a single case* supports its contention that the Public Trust Doctrine permits private parties to prosecute wildlife lawsuits. CBD also fails to acknowledge that the cases which squarely have addressed the issue unanimously have held that no claim may be stated under the Public Trust Doctrine where tidelands and navigable waterways are not affected.

To try to circumvent the force and effect of this established body of case law, CBD claims to hold title in wild migratory birds and to state a Public Trust Doctrine claim on that basis. The Public Trust Doctrine, however, is grounded upon a public easement in tidelands and navigable waterways, not "title" to wild birds. Moreover, the U.S. Supreme Court

specifically has held that no state or individual legally owns migratory birds "that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away." *Missouri v. Holland*, 252 U.S. 416, 432 (1920). The U.S. Supreme Court held that this rule applies even if state statutes proclaim public "title" in wildlife held "in trust for the people." *Id.* Indeed, it is *specifically* because no state or individual legally holds title in migratory birds that *Holland* confirmed the constitutionality of the Migratory Bird Treaty Act, 16 U.S.C. § 703 ("MBTA") and held that the federal Act does not infringe upon states' ownership rights in migratory birds flying within their borders. *Id.* at 434. The Court held that the MBTA does not unconstitutionally infringe upon state rights in wild migratory birds, as the State of Missouri had contended, because no state and no individual may assert ownership in migratory wildlife: "Wild birds are not in the possession of anyone; and possession is the beginning of ownership." *Id.*

The State Legislature declined to grant private parties the ability to enforce the Fish & Game Code. Instead, it created a process that potentially enables private involvement together with the U.S. Fish and Wildlife Service, California Department of Fish and Game, California Energy Commission, County Board of Supervisors, California Attorney General, U.S. Attorney's Office, and County District Attorney's Office – which is exactly what occurred here. *See* Statement of the Case, Part III, *infra*. Yet, despite the broad cross-section of responsible public officials diligently working with all interested parties to reconcile public concern for the development of wind energy resources in California with the mitigation of avian collisions, CBD aims through its dismissed lawsuit to completely shut down "operation of Altamont Pass wind turbine generators." AA031 (*Compl.*, Prayer ¶ C).

Anticipating such legal excess, the Second Circuit in *United States v.*

FMC Corp, 572 F.2d 902, 905 (2d Cir. 1978), stated with respect to the MBTA that courts should be circumspect of lawsuits prosecuting owners and operators of airplanes, plate glass modern office buildings, automobiles, or picture windows in residential dwellings into which birds fly, and that the prosecutorial discretion of public lawyers rather than private interest groups constitutes a vital safeguard under the MBTA: "Certainly, construction that would bring every killing within the [MBTA], such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings into which birds fly, would offend reason and common sense."

Although CBD contends that private parties may prosecute wildlife lawsuits under the Public Trust Doctrine, every appellate court to address the issue has squarely held that the Public Trust Doctrine is limited to circumstances involving tidelands or navigable waters in which "chain of title" demonstrates the existence of an actual public trust easement. *See* Argument, Parts I (A-C) & II (A), *infra*. That rule is unambiguous and governs this case. CBD may not prosecute a cause of action under the Public Trust Doctrine because it holds no public trust easement in the lands at issue which admittedly involve neither tidelands nor navigable waterways, and the Public Trust Doctrine does not apply.

Factual Background

Over 20 years ago, the State of California designated the Altamont Pass in Livermore, California, as the Altamont Pass Wind Resource Area ("APWRA") to cultivate its enormous wind energy potential. AA013 (*Compl.* ¶ 38). Windmills were installed as private industry developed wind-powered electricity for California citizens. *Id.* (*Compl.* ¶ 39).

The First Amended Complaint alleges that numerous eagles, hawks, falcons and owls are killed each year as they collide with windmills located

in the APWRA. AA014 (*Compl.* ¶¶ 45-47). The complaint further alleges that the defendants own or operate the windmills, and that these avian impacts constitute illegal "takings" under Fish & Game Code §§ 2000, 3503.5, 3511, 3513, 3800(a), 12000(a); the Migratory Bird Treaty Act, 16 U.S.C. § 703; and the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668. AA017 (*Compl.* ¶ 63).

The U.S. Fish and Wildlife Service, California Department of Fish and Game, California Energy Commission, Board of Supervisors of the County of Alameda, California Attorney General, U.S. Attorney's Office, and Alameda County District Attorney's Office all have been involved in seeking to balance the two important but competing environmental goals of developing wind-generated electricity resources while mitigating avian fatalities. AA018-020 (*Compl.* ¶¶ 68-82, 84); RA107-166 (9-22-05 Resolution, pp. 10-13); RA89-93 (7-6-05 Attorney General Letter).

CBD does not assert that there is any nexus between the APWRA and tidelands or navigable waters. To the contrary, CBD conceded to the trial court that no such nexus exists. RT57:10-58:5.

Statement of the Case

I. The Original Complaint Did Not Include a Cause of Action Under the Public Trust Doctrine.

On November 1, 2004, CBD and Peter Galvin filed the complaint in this case alleging nine causes of action under Business and Professions Code section 17200 *et seq.* (the "UCL"), but not a cause of action under the Public Trust Doctrine. RA1-32.

Defendants demurred on the ground that Proposition 64, adopted by California's voters on November 2, 2004, barred Plaintiffs' UCL claims because CBD neither suffered injury in fact nor lost money or property. RA35-36. CBD argued in response that the complaint in this action was

filed a day before Proposition 64 was adopted and that the amendments of Proposition 64 did not apply to pending cases. *Id.* The trial court held that the standing requirements of Proposition 64 apply to pending cases, but that "Plaintiffs have sufficiently alleged an actual injury to property held in trust for themselves to satisfy the standing requirements of section 17204 at the pleading stage." RA67 (2-17-05 Order at 35:4-12).

On January 12, 2005, Defendants filed a motion to strike Plaintiffs' prayers for declaratory relief, fines and penalties, and restitution. The Court struck the prayers for penalties and restitution, leaving only the prayers for an injunction and declaratory relief. RA75-80 (3-28-05 Order at 2:16-7:19). The court held that restitution is not available here because "The plaintiffs never had ownership interest in the birds in the sense of private property, so that value was not taken from them personally and cannot be restored to them personally." RA76 (*Id.* at 3:11-13). Moreover:

> [A]s with the individual Plaintiff, ***the State of California does not own or have a specific property interest in particular birds, fish or other wildlife***. . . . Plaintiffs have not identified *any cases* where the Attorney General or a District Attorney has recovered compensation for the conversion of water, air, or wildlife. Case law regarding the use of public assets consistently involves injunctions and fines rather than compensation for the loss of those public assets.

RA76, 78 (*Id.* at 3:16-17, 5:13-17 [emphasis added]).

The trial court also ordered that "[o]n or before April 15, 2005, Plaintiffs must file a First Amended Complaint." The court further set a briefing schedule for a motion to dismiss on abstention grounds and a motion to stay on primary jurisdiction grounds in consideration of the fact that several state and federal agencies were addressing the very issues raised

by this action. RA80 (*Id.* at 7:22-8:4).

II. The First Amended Complaint Added a Cause of Action Under the Public Trust Doctrine.

On April 15, 2005, Plaintiffs filed their First Amended Complaint which continued to allege nine causes of action under the UCL and added a tenth cause of action entitled "Destruction of Public Trust Natural Resources." AA030 (*Compl.* at ¶¶ 134-138).

On August 30, 2005, the court ruled on the abstention and primary jurisdiction motions and held: "The Alameda County entities are currently engaged in a review of the windmill operations of the Defendants. This Court will not enter orders directing Defendants to comply with the various bird protection statutes until the Alameda County entities agencies have had the opportunity to complete their process and issue their decisions. This will allow the court to take advantage of administrative expertise and help assure uniform application of regulatory laws." RA98-99 (8-30-05 Order at 5:25-6:4). Thus, the trial court waited for a determination by the Alameda County Board of Supervisors of the similar pending issues.

III. The Alameda County Board of Supervisors' Resolution

On September 22, 2005, Alameda County adopted Resolution Number R-2005-463, which is 29 pages long and includes an additional 31 pages of charts and exhibits. RA107-166. The Resolution carefully recounts the events leading to the Board of Supervisors' determination. *Id.*

As the Resolution describes, the County spent two years to "aggressively respond to the greatest extent feasible [to] the ongoing but unintentional death of various species of raptors and other birds in the Altamont Pass area, while also maintaining sustainable levels of wind energy production as a renewable, non-polluting source of energy." RA123 (9-22-05 Resolution, Caplan Decl. at p. 17). The County held eight public

hearings between November 11, 2003 and September 22, 2005, to receive public testimony and reports. RA110, 114-115, 119-122 (Resolution at pp. 4, 8-9, 13-16).

On January 29, 2004, the County instituted a Wind Power Working Group "to assist the County in addressing operational issues and identifying appropriate measures to reduce avian mortality[.]" RA116 (*Id.* at p. 10). It consisted of representatives of: (i) the California Department of Fish and Game; (ii) the U.S. Fish and Wildlife Service; (iii) Alameda County; (iv) the wind turbine permit applicants; (v) CAlifornians for Renewable Energy ("CARE"); (vi) CBD; (vii) CBD's counsel; and (viii) property owners in the APWRA. *Id.* This cross-section of representatives examined how to create an adaptive management plan that "would incorporate the key recommendations in the California Energy Commission's ("CEC") August 2004 report while providing for a high degree of testing and monitoring to observe the relative benefit of each measure[.]" RA119 (*Id.* at p. 13). The County convened the Wind Power Working Group nine times between June 16, 2004 and March 29, 2005. RA118-120 (*Id.* at pp. 12-14).

The County Board of Supervisors then "reviewed the environmental analysis prepared for the permit extensions, public comments thereto, County Staff Reports pertaining to the project, all conditions and attachments prepared for the permit extensions, [and] all evidence reviewed at the duly noticed public hearings for the permit extensions[.]" RA122 (*Id.* at p. 16). The County's September 22, 2005 Resolution granting the conditional use permits imposed nine new conditions on wind turbine use aimed at mitigating avian collisions in the Altamont Pass Wind Resource Area. RA121-122 (*Id.* at pp. 15-16).

On or about October 28, 2005, CAlifornians for Renewable Energy ("CARE") and the Golden Gate Audubon Society ("Audubon Society") filed

actions in Alameda County Superior Court petitioning for a writ of mandate for review of the County's Resolution under the California Environmental Quality Act, Public Resources Code sections 21000 *et seq.* ("CEQA"), and related statutes. RA171-222. The two actions are *CAlifornians for Renewable Energy v. County of Alameda*, Case No. RG05-239552, and *Golden Gate Audubon Society et al. v. County of Alameda*, Case No. RG05-239790 (the "CEQA actions"). RA171, 187. Although CBD had been involved in the County proceedings and had standing to petition the Superior Court, it did not seek review of the County's Resolution. On February 16, 2006, the judge overseeing this action transferred this action to the judge overseeing the CEQA actions, the Honorable Bonnie Lewman Sabraw. RA230-231; AA138.

IV. Dismissal of CBD's First Amended Complaint

Defendants filed a motion for judgment on the pleadings to renew the issues raised in the demurrer challenging CBD's standing under the UCL, and separately moved for judgment on the pleadings as to the tenth cause of action under the Public Trust Doctrine. AA133-134. Both motions were scheduled for hearing on September 20, 2006. On the day before the hearing, September 19, 2006, the trial court issued a tentative ruling to the parties that states, *inter alia*:

> PARTIES ARE TO APPEAR, prepared to specifically address the following questions, as well as all other issues and arguments raised in their papers:
>
> 1. Why should the Court revisit its previous decision that the wild birds at issue in this action are public trust property? What, if any, new facts, circumstances, law, or arguments are being presented by Defendants here that were not before Department 22 when the Court made its decision in February

2005 that the wild birds are public trust property?

2. (a) Are there any published opinions in California in which private parties have been precluded from raising claims to enjoin destruction of or injury to property that has been determined to be public trust property? (b) Are there any cases demonstrating that private parties can raise such claims concerning public trust property that is not navigable waters, tidal waterways, or the land beneath them?

3. How do defendants distinguish the California Supreme Court's holding approved in National Audubon that "any member of the general public has standing to raise a claim of harm to the public trust"? *See National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 431 n.11 (1983). Are there any cases since 1983 that have in any way limited that holding as to standing?

4. Does Fish & Game § 2014 preempt a common law public trust claim based on the willful or negligent taking of wild birds? If so, is there any claim encompassed by the Tenth Cause of Action [*i.e.*, "Destruction of Public Trust Natural Resources"] that would not be encompassed by Fish & Game § 2014?

5. If the Court should grant the motion for judgment on the pleadings as to the Tenth Cause of Action, is there any way for the claim to be amended to state a cause of action?

RA233-235. During the September 20, 2006 hearing, CBD's counsel could identify *no case* in which the Public Trust Doctrine had been applied beyond tidelands and navigable waterways, and acknowledged that the claims at issue have *no connection* to tidelands or navigable waterways. RT49:8-58:5.

On October 12, 2006, the court granted both motions and ordered that CBD's action be dismissed. AA149. The court held that the UCL claims fail because "the public's power to control and regulate wildlife . . . is not a property interest . . . and, therefore, Plaintiffs have not alleged sufficient property interest" to maintain a cause of action. AA145. The court further held:

> Since loss of the power or right to control wildlife is, at most, loss of an abstract interest owned commonly by all members of the public, and *not loss of property* owned by Plaintiffs individually *that would potentially allow this Court to order restitution*, this Court finds that Plaintiffs do not have standing to bring the UCL claims alleged in this action.

AA145-AA146 (emphasis added).

The trial court also ruled that the Public Trust Doctrine claims fail because claims under the Public Trust Doctrine are limited to "navigable and tidal waters and tidelands." AA147. Citing *Golden Feather Community Ass'n v. Thermalito Irrigation Dist.*, 209 Cal. App. 3d 1276, 1284 (1989), the trial court held: "Appellate courts have refused to expand the use of the public trust doctrine by private parties beyond the traditional public trust interest in navigable and tidal waters and tidelands." *Id.*

Indeed, the trial court's ruling underscored that the California Supreme Court in *National Audubon Society v. Superior Court*, 33 Cal. 3d 419 (1983), held that the claims under the Public Trust Doctrine could be made concerning the impact of the diversion of water from non-navigable streams upon various wildlife living in Mono Lake *only* because such diversion would impact the navigable waters of the lake itself, "not based on the wildlife being public trust resources[.]" *Id.* (emphasis in original). Likewise, the court held, "[t]he cases on which Plaintiffs rely to support their

position that wildlife is public trust property, the loss of which can serve as the basis for a cause of action by any member of the public, are all cases brought by the ***state*** or ***governmental parties***, using their ***police power*** to regulate, protect, or conserve wildlife, ***not by private individuals***." AA148. Thus, the trial court held that the Public Trust Doctrine claim also fails as a matter of law, and dismissed CBD's action. AA149.

V. CBD's Appeal

On December 11, 2006, CBD filed a notice of appeal. AA153, On May 18, 2007, CBD filed its Opening Brief. The Opening Brief *does not contest the trial court's ruling that "Plaintiffs do not have standing to bring the UCL claims alleged in this action,"* nor does it contest the trial court's dismissal of the first through ninth causes of action. AA145-146 (emphasis added). Rather, the Opening Brief addresses the tenth cause of action asserting that a private party may prosecute any and all wildlife claims under the Public Trust Doctrine. As discussed in the next section, this is contrary to the established rule *disallowing* a Public Trust Doctrine lawsuit that is admittedly unrelated to tidelands or navigable waterways.

Argument

I. The Cause of Action Under the Public Trust Doctrine Fails Under Well-Settled Law.

A. The Public Trust Doctrine is Grounded in the Public's Easement and Servitude in Tidelands and Navigable Waters.

California's "Public Trust Doctrine" – also referred to as the "Tidelands Public Trust Doctrine"[2] – is based upon the public's literal and actual ownership of the State's tidelands and navigable waters. The Supreme Court has specifically held:

> [T]he English common law evolved the concept of the public trust, under which the sovereign ***owns*** all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people. The State of California ***acquired title*** as trustee to such lands and waterways upon its admission to the union; from the earliest days its judicial decisions have recognized and enforced the trust obligation.

National Audubon Society v. Superior Court, 33 Cal. 3d 419, 434 (1983) (citations and quotation marks omitted; emphasis added).

Indeed, for almost a century, the California Supreme Court consistently and notably has characterized the Public Trust Doctrine as an "easement." *See, e.g., National Audubon Society*, 33 Cal. 3d at 434 (characterizing the Public Trust Doctrine as "[p]ublic trust easements.")

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[2] *See, e.g., City of Los Angeles v. Venice Peninsula Properties*, 205 Cal. App. 3d 1522, 1529 (1988) ("The so-called Tidelands Public Trust Doctrine is a creature of the United States and California law and is an incident of sovereign title in tidelands property").

(citing *Marks v. Whitney*, 6 Cal. 3d 251, 259 (1971)); *State of California v. Superior Court (Lyon)*, 29 Cal. 3d 210, 234 (1981) (same); *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 524-25 (1980) (same); *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 485 (1970) (describing the "common law public trust" in tidelands and navigable waters as a "public easement"); *Patton v. City of Los Angeles*, 169 Cal. 521, 532 (1915) (same); *People ex inf. Webb v. California Fish Co.*, 166 Cal. 576, 591, 598-99 (1913) (Under the Public Trust Doctrine, "[a] public easement and servitude exists over these lands . . .").[3]

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[3] *See also Bolsa Chica Land Trust v. Superior Court*, 71 Cal. App. 4th 493, 499-500 (1999) (referring to the Public Trust Doctrine as a "public trust *easement*" in certain wetlands) (emphasis added); *Herbert A. Crocker & Co. v. Transamerica Title Ins. Co.*, 27 Cal. App. 4th 1722, 1826-27 (1994) ("the state and the city were claiming title to a fee portion of this property as a result of a public trust *easement*") (emphasis added); *Fogerty v. State of California*, 187 Cal. App. 3d 224, 233 (1986) ("the property owners' fee simple title in the shorezone is impressed with a public trust analagous to an *easement*, acquired by the State of California pursuant to the doctrine of prescription and held for the benefit of the public for purposes of commerce, navigation, fishing, recreation and preservation of the land in its natural state.") (emphasis added); *Carstens v. California Coastal Com.*, 182 Cal. App. 3d 277, 288 (1986) ("Public trust *easements* are traditionally defined to include navigation, commerce and fishing. . . .") (emphasis added); *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal. App. 3d 484, 505 (1982) ("When tidelands have been granted by the state to a private party, that party receives the title to the soil, subject to the public's right to use the property for purposes such as commerce, navigation, fishing, as well as for environmental and recreational purposes. In other words, such lands are subject to a public trust *easement*.") (citations omitted; emphasis added); *City of Oakland v. Hogan*, 41 Cal. App. 2d 333, 345 (1940) ("A grant of rights in tidelands or submerged lands is subject to a public *easement*. Though the grant be absolute, still there were vested in the public authorities the right to administer the public trust pertaining to said lands, and the right to make changes and improvements in the interests of navigation and commerce.") (emphasis added.)

Golden Feather Community Ass'n v. Thermalito Irrigation Dist., 209 Cal. App. 3d 1276, 1284 (1989), thus summarized: "The public trust doctrine is based upon public access and usage of navigable waters and *pursuant to that doctrine the public has an easement and servitude upon such waters*." (Emphasis added.)

B. The Public Trust Doctrine Can Not be Applied Absent Chain of Title Showing an Actual Public Easement, as the California and U.S. Supreme Courts Have Held.

Demonstrating that the Public Trust Doctrine derives from the public's actual easement in tidelands and navigable waters – and that this is not just legal fiction or loose metaphor – the California *and* the U.S. Supreme Courts, interpreting California's Public Trust Doctrine, have held that the Public Trust Doctrine applies *only* where the public's easement in navigable waters or tidelands can be traced in the specific property at issue.

City of Los Angeles v. Venice Peninsula Properties, 31 Cal. 3d 288 (1982), addressed whether certain tidelands of the Ballona Lagoon in the Marina del Rey area of Los Angeles were subject to the Public Trust Doctrine. *See id.* at 292. The trial court "determined that the state holds in trust for the people the easements claimed in the city's complaint, and that the state or its successors have the right to construct the improvements in the lagoon without exercising the power of eminent domain." *Id.* at 293.

The California Supreme Court carefully traced the chain of title of the lands in question back to 1839 "while California was a part of Mexico." *Id.* at 297. Finding that Mexico had laws comparable to the Public Trust Doctrine, the Court held that "when California was ceded by Mexico, the title of defendants' predecessors was subject to the interests of the public in the tidelands included in the grant." *Id.* Thus, the California Supreme Court affirmed the trial court's ruling that the Public Trust Doctrine applies to

those tidelands. The Court reached that conclusion by examining chain of title in the specific tidelands at issue and finding that they were encumbered with "the burden of the public trust." *Id.* at 302-03.

The U.S. Supreme Court agreed with the California Supreme Court that the Public Trust Doctrine applies only where there is an actual easement, but required even stricter proof of title. In *Summa Corp. v. California ex rel. Lands Comm'n*, 466 U.S. 198 (1984), a unanimous Court held that California's Public Trust Doctrine applies only where chain of title demonstrates that the specific lands at issue are encumbered by a public trust easement. *Id.* at 209. Indeed, the U.S. Supreme Court reversed the California Supreme Court's ruling in *Venice Peninsula Properties* holding that the public easement in the tidelands at issue had not been recorded in the federal patent proceedings initiated in 1851 to resolve the ownership and burdens upon privately held lands once California joined the Union in 1850. *Id.*

Thus, the U.S. Supreme Court *expressly* recognized that California's Public Trust Doctrine derives from an actual and literal public easement in certain navigable waters and tidelands:

> The public trust easement claimed by California in this lawsuit has been interpreted to apply to all lands which were tidelands at the time California became a State, irrespective of the present character of the land. ***Through this easement***, the State has an ***overriding power to enter upon the property and possess it***, to make physical changes in the property, and to control how the property is used. Although the landowner retains legal title to the property, he controls ***little more than the naked fee***, for any proposed private use remains ***subject to the right of the State or any member of the public to assert***

the State's public trust easement.

Id. at 204-05 (citations omitted; emphasis added).

Thereupon, in *Summa Corp.* the U.S. Supreme Court reversed the California Supreme Court by holding that California's public trust easement, as with any other servitude to land, was required to have been specifically asserted in the 1851 federal patent proceedings enacted to resolve the fee interest ownership of lands possessed by individuals before California joined the Union: "*We hold that California cannot at this late date assert its public trust easement over petitioner's property . . .*," under the Public Trust Doctrine. *Id.* at 209 (emphasis added).

C. California Courts Have Specifically Declined to Extend the Public Trust Doctrine Absent a Nexus to Tidelands or Navigable Waters.

Predictably, California's Courts of Appeal and Supreme Court have refused to extend the Public Trust Doctrine to situations unrelated to tidelands or navigable waters. For example, *National Audubon Society v. Superior Court, supra*, considered whether the Public Trust Doctrine can be asserted to enjoin "conduct affecting *nonnavigable* tributaries to navigable waterways." 33 Cal. 3d at 435-36 (emphasis added). In *National Audubon*, the plaintiffs claimed that the diversion of waters from nonnavigable tributaries was harming Mono Lake, a navigable waterway subject to a public trust easement. *Id.* The Court held that the Public Trust Doctrine protects navigable waters from harm caused by the diversion of nonnavigable tributaries. *Id.* at 437. The Court, however, specifically declined to rule that the Public Trust Doctrine covers nonnavigable streams unrelated to tidelands or navigable waters. *Id.* at 437 & n.19.

Golden Feather Community Ass'n v. Thermalito Irrigation Dist., supra, squarely addressed and resoundingly rejected that possibility. In

Golden Feather, the plaintiffs sought to enjoin the use of waters from Concow Lake for a hydroelectric project. 209 Cal. App. 3d at 1279. The planned hydroelectric project would drain the waters of Concow Lake "to the point where fishing, wildlife and recreational uses will be destroyed and the plaintiffs will be denied access to the waters of the reservoir for fishing purposes." *Id.* The parties – as here – agreed that the dispute did not involve tidelands or navigable waters, but the plaintiffs sought to extend the Public Trust Doctrine to nonnavigable waters. *Id.* at 1280, 1283; RT57:10-58:5.

The court in *Golden Feather* reviewed the long history of California's Public Trust Doctrine, and, once again, confirmed that the doctrine applies only where tidelands or navigable waterways are affected – *i.e.*, where the impacted property is subject to a public trust easement: "[U]pon admission to the union the state acquired title to these properties in trust and subservient to the public rights of navigation and fishery. . . . *No similar "chain of title" argument can be made here*." *Id.* at 1285 (emphasis added). As "the waters at issue are nonnavigable . . . [and] plaintiffs do not seek to enjoin an activity, such as diversion of a stream, which harms a public trust interest in tidelands or navigable waters," the court held that "*the public trust doctrine does not apply* . . ." *Id.* at 1278, 1286-87 (emphasis added). Although the plaintiffs in *Golden Feather* asserted damage to fish and other wildlife in Concow Lake, the court held that the Public Trust Doctrine does not apply because the interests involved have no nexus to tidelands or navigable waters. *Id.*

Notably, *Golden Feather* recognized the State's broad power to police environmental issues, but also underscored that this does not thereby subject all California wildlife and land to private causes of action under the Public Trust Doctrine: "While the state has broad constitutional and statutory

authority to control diversion of water, and may impose conditions upon authorized diversions, we are aware of ***no authority*** which holds that the mere fact of diversion operates ***to convey otherwise private land into the public trust***." *Id.* at 1285 (emphasis added; citation omitted). The State's ample power to regulate environmental issues (*see* Argument, Part II(C), *infra*, and authorities cited) neither "convey[s] otherwise private land into the public trust" nor creates a private right of action where none has ever existed. *Id.*

Likewise, in *Santa Teresa Citizen Action Group v. City of San Jose*, 114 Cal. App. 4th 689, 709 (2003), the court refused to apply the Public Trust Doctrine to a claim of groundwater contamination unrelated to tidelands or navigable waters. The court held: "Under the public trust doctrine, the state has title as trustee to all tidelands and navigable lakes and streams and is charged with preserving these waterways for navigation, commerce, and fishing, as well as for scientific study, recreation, and as open space and habitat for birds and marine life," but that "the doctrine has no direct application to groundwater sources" unrelated to tidelands or navigable waters. *Id.*

CBD does not assert in the First Amended Complaint or in its Opening Brief that it possesses a public trust easement in the APWRA. To the contrary, before granting judgment on the pleadings without leave to amend, the trial court made a specific factual inquiry and CBD conceded that the claims at issue do not impact upon tidelands or navigable waters. RT57:10-58:5. Given that CBD admits that the APWRA has no nexus to tidelands or navigable waters, CBD can not assert a claim under the Public Trust Doctrine.

D. CBD Does Not Own Wild Migratory Birds.

CBD claims that a Public Trust Doctrine claim is proper because it alleges that it "owns" wild migratory birds. *See, e.g.*, AOB 15-20. But the Public Trust Doctrine is grounded upon a public easement in land, not a claim of "title" in wild migratory birds. Moreover, CBD cannot assert property ownership of wild migratory birds, as a matter of law. The U.S. Supreme Court made this clear in *Missouri v. Holland*, 252 U.S. 416, 434 (1920): "Wild birds are not in the possession of anyone; and possession is the beginning of ownership."

In *Holland*, the State of Missouri prevented a United States game warden from enforcing the Migratory Bird Treaty Act of July 3, 1918, 16 U.S.C. § 703, 40 Stat. 755 (the "MBTA"), as well as related regulations promulgated by the Secretary of Agriculture, on the ground that the states own the wild birds within their borders, and the treaty and statutes are void as an interference with the states' rights. *Id.* at 431-32. Writing for the majority, Justice Holmes clarified that the states have the power to regulate the killing and sale of such birds. Until capture, however, no person or government entity can assert an actual ownership interest in migratory birds "that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away." *Id.*

Notably, Justice Holmes made clear that the states' *lack* of property ownership in wild migratory birds constitutes *the precise basis* for the constitutionality of the MBTA. *Id.* at 434. The State of Missouri's challenge to federal enforcement of the MBTA was rejected ***specifically*** because the states do ***not*** hold actual title in migratory birds: "The subject matter [*i.e.*, migratory birds] is only transitorily within the State and has no

permanent habitat therein." *Id.* at 434-35.[4]

Thus, CBD does not own or possess wild migratory birds. In fact, CBD admits that the bird species at issue in this action are subject to the MBTA, and even asserts a cause of action (not at issue on appeal) under the MBTA. AA25-26 (FAC at ¶ 109 ["The bird species protected by the MBTA include all North American eagles, hawks, falcons, and owls."]); *see also* AOB at 1 (identifying "eagles, hawks, falcons, and owls" as the birds presently at issue). It is inconceivable for CBD to maintain that it owns migratory birds when the U.S. Supreme Court established the MBTA's constitutionality *specifically* because such migratory birds do *not* belong to the citizens of individual states: "Wild birds are not in the possession of anyone; and possession is the beginning of ownership." *Holland*, 252 U.S. at 434.

CBD cites several cases supposedly standing for the proposition that the State and/or the People of California "own" California's wildlife, and that this provides a basis to assert a claim under the Public Trust Doctrine. *See* AOB at 19-20. However, only one such citation concerns migratory birds, *People v. Perez*, 51 Cal. App. 4th 1168, 1175 (1996), and that case simply stands for the rule that the State has the power to regulate hunting. *Id.* ("Hunting is a highly regulated activity; hunting seasons, bag and possession limits, manner, place, means and hours of taking and possessing are regulated, and there are restrictions on the type, sex, maturity, and other physical characteristics of wildlife that may be taken."). *Perez* notably did *not* hold that private individuals have standing to assert a claim under the Public Trust Doctrine for harm to migratory birds, which would contradict

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[4] *See also Toomer v. Witsell*, 334 U.S. 385, 401 (1948) (same regarding "free-swimming fish which migrate through the waters of several States and are off the coast of South Carolina only temporarily.").

express U.S. Supreme Court authority.

The Public Trust Doctrine is different than the State's power to regulate and police environmental issues. As the Supreme Court in *National Audubon Society v. Superior Court*, *supra*, held, "the public trust is *more than an affirmation of state 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, lakes, marshlands and tidelands*, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." *National Audubon*, 33 Cal. 3d at 441 (emphasis added).

Golden Feather Community Ass'n v. Thermalito Irrigation Dist., *supra*, further clarified:

> Where it is necessary to protect public trust interests the state may have power over properties which are not themselves within the public trust, ***but this does not mean that such properties are deemed to be added to the public trust***. . . Decisional authorities have, thus far at least, consistently limited application of the public trust doctrine to circumstances where the interest to be protected is a traditional public trust interest.

209 Cal. App. 3d at 1286 (emphasis added). Indeed, although the plaintiffs in *Golden Feather* alleged harm to fish, the court expressly held that the Public Trust Doctrine does not apply because – as here – the plaintiffs could not assert a nexus to tidelands or navigable waters. *Id.* at 1284-85.

Likewise, in *People v. Brady*, 234 Cal. App. 3d 954 (1991), the First District addressed whether the State of California owns wildlife. In that case, defendants were observed by fish and game officers illegally taking 196 abalone from the coastal waters off the Mendocino Coast where

commercial fishing for abalone was prohibited. The attorney general brought a criminal action against defendants, *inter alia*, for grand theft under Penal Code section 487. *Id.* at 956.

Defendants moved to set aside that count "on the ground that their activities did not constitute theft of personal property," and the trial court granted defendants' motion. *Id.* at 957. The First District affirmed because wildlife is not the actual property of the State: "A State does not stand in the same position as the owner of a private game preserve and it is ***pure fantasy*** to talk of 'owning' wild fish, birds, or animals." *Id.* at 958 (quoting *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284-85 (1977) (emphasis added, internal quotation marks omitted). Rather, this "must be understood as no more than a 19th-century legal ***fiction*** expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.' [Citations.] *Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution.*" *Id.* (emphasis added, some internal quotation marks omitted).

Brady specifically rejected the notion that statutes such as Fish & Game Code sections 1600, 711.7(a), and 1802, or cases stating that wildlife is the property of the People of California, reflect actual public ownership. *Id.* at 961. Rather, such language simply reflects "the long-accepted principle that *the state* has comprehensive regulatory powers to protect and preserve these [wildlife] resources for the benefit of the public." *Id.* (emphasis added.) Indeed:

> [T]he language in these cases [and statutes] indicating the state "owns" the fish for regulatory reasons cannot be stretched to mean that the fish and wild animals are the personal property of the state, like the law books in the court's library or the

desks in our state offices. ***This language merely describes the comprehensive rights of the state to take action in the name of the people of this state***, including the absolute prohibition of fishing and hunting to preserve and protect these natural resources.

Id. at 961 (emphasis added).

* * *

By all measures, CBD can not assert the Public Trust Doctrine to the claims at issue here. *Golden Feather*, the only authority to squarely address the question whether the Public Trust Doctrine applies beyond tidelands and navigable waters, specifically held that it does not. And while CBD asserts that it possesses title to wild migratory birds and, therefore, has private standing to protect "its" property rights, the U.S. Supreme Court, as the very basis for affirming the constitutionality of the Migratory Bird Treaty Act, held precisely the opposite.

II. The Public Trust Doctrine Can Not Be Extended to Encompass Wildlife Unrelated to Tidelands and Navigable Waters, as CBD Seeks.

A. The Private Right of Action Under the Public Trust Doctrine Is Based upon the Public's Actual Easement and Servitude in Tidelands and Navigable Waters.

Members of the public possess standing to prosecute a private cause of action under the Public Trust Doctrine only because they possess an actual easement in tidelands and navigable waters. *See, e.g., Summa Corp.*, 466 U.S. at 205 ("any member of the public" may "assert the State's public trust easement" in tidelands and navigable waters); *National Audubon*, 33 Cal. 3d at 431 n.11 (same); *see also Marks*, 6 Cal. 3d at 262 ("Whitney had standing to raise this issue. . . .Where the interest concerned is one that, as here,

constitutes a *public burden upon land* to which title is quieted, and affects the defendant as a member of the public, that *servitude* should be explicitly declared [as a defense in a quiet title action concerning tidelands].") (emphasis added).

Where the public easement in tidelands and navigable waters is unaffected, however, there is no case law permitting private individuals to prosecute wildlife actions under the Public Trust Doctrine. Notably, *People v. Truckee Lumber Co.*, 116 Cal. 397 (1897) – upon which CBD extensively relies to assert its standing in this action (*see* AOB at 16-20) – was a *State action* for *public nuisance* brought by *public prosecutors*, not a private action brought under the Public Trust Doctrine. *Id.*

In *Truckee Lumber*, the public prosecutor filed a complaint for public nuisance to enjoin dumping by a lumber mill into the Truckee river. *Id.* The defendant asserted that the public nuisance claim failed because the Truckee river was not a navigable waterway and it passed through private lands, so there is no public right to enforce. The Court held that *the State's police powers* to regulate pollution under the public nuisance statutes are not so limited: "***The dominion of the state*** for the purposes of protecting its sovereign rights in the fish within its waters . . . is not restricted to protection only when found within what may in strictness be held to be navigable or otherwise public waters." *Id.* at 400-01 (emphasis added).

That rule is well established. As the Supreme Court very recently confirmed, "wildlife management" is "an area typically regulated by, and historically within the traditional police powers of, the states[.]" *Viva! Intern. Voice For Animals v. Adidas Promotional Retail Operations*, 41 Cal.4th 929, 937 (2007); *see also id.* at 937 n.4 and authorities cited. *Truckee Lumber*, however, made no ruling permitting *private* citizens to

bring public trust claims.[5] Nor could it. The Public Trust Doctrine has been expressly limited to circumstances affecting tidelands or navigable waters where a public trust easement exists. *E.g., Golden Feather Community Ass'n v. Thermalito Irrigation Dist., supra,* 209 Cal. App. 3d at 1278, 1286-87; *Santa Teresa Citizen Action Group v. City of San Jose, supra,* 114 Cal. App. 4th at 709.

B. The Legislature Has Declined to Grant Private Parties the Power to Prosecute Wildlife Lawsuits.

The Legislature has specifically declined to permit private citizens to prosecute public wildlife claims; the governing state wildlife statutes permit prosecution only by public lawyers and agencies, not private individuals. Fish & Game Code section 2014, for example, provides:

It is the policy of this state to conserve its natural resources

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[5] The same is true of *People v. Stafford Packing Co.*, 193 Cal. 719 (1924), which likewise concerned public prosecution under a state statute prohibiting preventable waste of sardines in a fish cannery. That case held that fish are an important public resource properly subject to State regulation, and that the State is entitled to enact statutes to prevent unnecessary waste. *Stafford Packing* did not hold that the Public Trust Doctrine applies to fish or wildlife, and did not involve the Public Trust Doctrine at all.

To the extent *Stafford Packing* used the language of "property rights" to describe the State's power to regulate wildlife, the U.S. Supreme Court's subsequent holding is instructive that, when describing the State's power to regulate fish and wildlife issues as in *Stafford Packing*, "[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 *power to preserve and regulate the exploitation of an important resource.*" *Toomer v. Witsell, supra,* 334 U.S. at 402 (emphasis added). By all counts, *Stafford Packing* is *not* authority for CBD's ersatz contention that land use affecting any wildlife is subject to private prosecution under the Public Trust Doctrine, when the appellate courts that actually addressed the issue held exactly the opposite.

> and to prevent the willful or negligent destruction of birds, mammals, fish, reptiles, or amphibia. [¶] *The state* may recover damages in a civil action against any person or local agency which unlawfully or negligently takes or destroys any bird, mammal, fish, reptile, or amphibian protected by the laws of this state. . . . An action to recover damages under this section *shall be brought in the name of the people of the state*, in a court of competent jurisdiction in the county in which the cause of action arose.

(Emphasis added). There is no comparable statutory provision empowering private individuals to prosecute wildlife lawsuits.

Indeed, California voters specifically *disapproved* private standing for such public lawsuits when they amended Business & Professions Code sections 17203 and 17204 under Proposition 64, which the Supreme Court notably has described as "an initiative measure in which the voters have chosen their own legal representatives [*i.e.*, public prosecutors] for cases brought ostensibly on their behalf[.]" *Californians For Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223, 233 (2006).

Likewise, under the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act, private parties are prohibited from prosecuting federal wildlife lawsuits. The Eighth Circuit held in *Defenders of Wildlife v. Administrator, E.P.A.*, 882 F.2d 1294, 1301-02 (8th Cir. 1988): "[N]either the Bald and Golden Eagle Protection Act nor the Migratory Bird Treaty Act contain provisions for private rights of action. . . . Further, [plaintiffs] concede that they could not assert a private right of action, express or implied, under the Bird Acts." (Citations omitted.)

There are good reasons that the state and federal Legislatures have declined to grant private parties standing to prosecute public actions under

wildlife statutes. First and foremost, environmental lawsuits tend to address complex matters of public policy. For instance, the issues raised by the instant action raise the question of how to balance two competing environmental goals: the first of which is the development of California wind energy resources to combat global warming and reduce the air pollutants that harm people, wildlife and natural resources; and the second of which is the reduction of collisions of migratory birds into wind turbines. This issue – as it arises in the APWRA – has been addressed by the responsible public agencies and prosecutors.[6] Special interest lawsuits outside of any statutory framework are not likely to result in balanced and integrated public policy.

Indeed, prosecutorial discretion is central to the integrity of public environmental laws. The Second Circuit in *United States v. FMC Corp*, 572 F.2d 902, 905 (2nd Cir. 1978), stated that prosecutorial discretion is an important safeguard under the MBTA:

> Certainly, construction that would bring every killing within the [MBTA], such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings into which birds fly, would offend reason and common sense. . . . ***Such situations properly can be left to***

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[6] The U.S. Fish and Wildlife Service, California Department of Fish and Game, U.S. Department of Energy/National Renewal Energy Laboratory, California Energy Commission, Alameda County Planning Department/Board of Zoning Adjustments, California Attorney General, U.S. Attorney's Office, and Alameda County District Attorney's Office all have been involved in seeking to balance the two legitimate but competing environmental goals of preserving the viability of the Altamont Pass Wind Resource Area while mitigating the avian fatalities that result from wind energy production. AA018-020 (*Compl.* ¶¶ 68-82, 84); RA107-166 (9-22-05 Resolution, pp. 10-13); RA89-93 (7-6-05 Attorney General Letter).

the sound discretion of prosecutors and the courts.

(Emphasis added.)

Likewise, the Ninth Circuit has specifically held that courts lack jurisdiction to second-guess such prosecutorial discretion under the Migratory Bird Treaty Act. *Alaska Fish and Wildlife Federation and Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 938 (9th Cir. 1987) ("The MBTA explicitly delegates the authority to adopt regulations and discretionary enforcement powers to the Secretary of the Interior. *See* 16 U.S.C. §§ 704, 712. The discretion granted to the Fish and Wildlife Service precludes our review of the Service's failure to enforce the MBTA.").

But the rule CBD advocates – *i.e.*, that private parties, in fact, possess the prosecutorial discretion to bring public lawsuits on all wildlife issues – provides no limit to the lawsuits that can be brought, "such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings into which birds fly." *FMC Corp*, 572 F.2d at 905. Moreover, private prosecution of public issues would permit multiple plaintiffs to file repeated lawsuits concerning the exact same issues and subject matter because *res judicata* would not apply. Private plaintiffs would be permitted to file repeated lawsuits without due process limitations and with potential conflicting results on public policy issues.

C. The State Has Established a Statutory Framework to Protect Wildlife Resources, and the Issues Raised in this Case Have Been Extensively Addressed.

While the Public Trust Doctrine does not apply in this case, the issues raised have been extensively addressed by state and federal public regulators and lawyers. Indeed, as opposed to the situation in *National Audubon Society v. Superior Court*, *supra*, 33 Cal. 3d at 426, in which water rights were determined "*without any consideration of the impact upon the public*

trust," here, in sharp contrast, the specific problem of avian impacts with wind turbines in the APWRA has been extensively addressed and is continuing to be addressed on an ongoing basis.

It is the State's policy to "encourage the preservation, conservation, and maintenance of wildlife resources . . ." Fish & Game Code § 711.7(a). The Legislature has declared the Department of Fish and Game to be "trustee" of the fish and wildlife resources of the state,[7] and has passed laws setting forth the framework within which the Department of Fish and Game and public prosecutors are empowered to manage and protect wildlife resources. *Id.* §§ 1801-02; *see also id.* at § 1801(h) ("It is not intended that this policy shall provide any power to regulate natural resources or commercial or other activities connected therewith, *except as specifically provided by the Legislature.*") (emphasis added).

In the Appellants' Opening Brief (pages seven though ten), CBD cites eight state and federal statutes that it asserts were enacted to protect the very wildlife at issue in this litigation: Fish & Game Code §§ 2000, 3503.5, 3511, 3513, 3800(a), 12000(a); the Migratory Bird Treaty Act, 16 U.S.C. § 703; and the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668. Additionally, through CEQA, the State has established a specific regulatory scheme permitting private individuals and organizations to participate in the

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[7] The fact that such statutes use the term "trustee" does not denote an actual ownership interest in wildlife. *Toomer v. Witsell*, *supra*, 334 U.S. at 402 (holding that such statutory language is regarded as nothing more than "a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource."). To the contrary, *Missouri v. Holland*, *supra*, 252 U.S. at 434, held that even though in that case an "assertion of title to migratory birds" was "embodied in statute," there nevertheless can be no title in wild migratory birds: "Wild birds are not in the possession of anyone; and possession is the beginning of ownership."

protection of wildlife and to address environmental concerns.[8]

For example, in this case, the County Board of Supervisors spent two years to "aggressively respond to the greatest extent feasible [to] the ongoing but unintentional death of various species of raptors and other birds in the Altamont Pass area, while also maintaining sustainable levels of wind energy production as a renewable, non-polluting source of energy." RA123 (9-22-05 County Resolution, p. 17). The County held *eight* public hearings between November 11, 2003 and September 22, 2005, to receive relevant testimony. RA110, 114-115, 119-122 (*Id.*, pp. 4, 8-9, 13-16).

On January 29, 2004, the County also instituted a Wind Power Working Group "to assist the County in addressing operational issues and identifying appropriate measures to reduce avian mortality[.]" RA116 (*Id.*, p. 10). The Wind Power Working Group consisted of representatives of the state Department of Fish and Game and the U.S. Fish and Wildlife Service, as well as several private organizations including CBD. *Id.* The County convened the Wind Power Working Group *nine* separate times between June 16, 2004 and March 29, 2005, in addition to all of the work and study done by participants and scientists between formal meetings. RA118-120 (*Id.*, pp. 12-14).

The County Board of Supervisors then "reviewed the environmental analysis prepared for the permit extensions, public comments thereto, County Staff Reports pertaining to the project, all conditions and

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[8] The CEQA statutes expressly provide that: "The maintenance of a quality environment for the people of this state now and in the future is a matter of statewide concern." *Id.* § 21000(a). Consistent with this broad objective, the California Supreme Court in *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 259 (1972), held that CEQA must "be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language."

attachments prepared for the permit extensions, [and] all evidence reviewed at the duly noticed public hearings for the permit extensions[.]" RA122 (*Id.*, p. 16). On September 22, 2005, the County adopted Resolution Number R-2005-463. The Resolution is 29 pages long, and has an additional 31 pages of charts and exhibits. It carefully recounts the events leading to the Board of Supervisors determination, and the details of the mitigation plan that was implemented as new conditions of the CUPs after several years of careful study, hearings, working groups, and analysis. *See* RA107-166. The Resolution imposed nine new conditions on wind turbine use in the APWRA. RA121-122 (9-22-05 County Resolution, pp. 15-16).

On or about October 28, 2005, CARE and the Audubon Society filed actions in Alameda County Superior Court petitioning for a writ of mandate under CEQA. RA171-222. Since then, the CEQA actions brought by CARE and the Audubon Society have settled with the imposition of even more stringent requirements upon the operation of wind turbines in the APWRA. CBD did not petition for a writ of mandate to review the County's grant of the conditional use permits to operate wind turbines.

D. The Public Trust Doctrine Gives the State Extraordinary Powers in Limited Situations And, for That Additional Reason, Cannot Simply Be Extended as CBD Seeks.

As stated above, the Public Trust Doctrine can not be applied to wildlife for several independent reasons: (1) the Public Trust Doctrine has never applied to wildlife unconnected to tidelands or navigable waters; (2) courts have specifically *disallowed* application of the Public Trust Doctrine beyond the parameters of tidelands and navigable waters in which an actual public trust easement exists; (3) CBD does not own wild migratory birds as a matter of law; and (4) a public statutory framework exists to preserve wildlife, but precludes private actions. There is also an *additional* reason

that the Public Trust Doctrine can not be extended to encompass all wildlife claims, as CBD seeks: the Public Trust Doctrine provides the State with extraordinary powers to take vested property rights without paying any compensation, but only within the very limited context of tidelands and navigable waters.

Under the California Constitution, the State normally must provide "just compensation" to the owner of private property when exercising its eminent domain power. Cal. Const., art. I, § 19 ("Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner."); *Mt. San Jacinto Community College Dist. v. Superior Court*, 40 Cal. 4th 648, 653 (2007) ("When the government exercises its power of eminent domain, and condemns . . . private property for public use, it must pay 'just compensation' to the owner.").

The declaration that private property is subject to a public trust easement under the Public Trust Doctrine reduces the property value. *See, e.g., Herbert A. Crocker & Co. v. Transamerica Title Ins. Co.*, 26 Cal. App. 4th 1722, 1729 (1994) ("Crocker had suffered damage, and it was appreciable: the value of his property had been diminished by virtue of the existence of the public trust easement [under the Public Trust Doctrine]."). But the State is not required to compensate private property owners for making a determination that their private property is encumbered by a public trust easement. As the California Supreme Court emphasized in *National Audubon*, 33 Cal. 3d at 440:

> [T]he determination [in *State of California v. Superior Court (Fogerty)*, 29 Cal. 3d 240, 249 (1981)] that the [private] property was subject to the [public] trust, despite its implication as to future uses and improvements, was not

considered a taking requiring compensation.[9]

Thus, because the Public Trust Doctrine is grounded in the public's actual easement in navigable waters and tidelands, the State may avoid the constitutional obligation to provide "just compensation" when declaring that private property is encumbered. *See id.* Unprecedented extension of the Public Trust Doctrine to cover any and all land use affecting wildlife, however, would conceivably permit the taking of private land without "just compensation," as otherwise required by the Constitution.

III. In All Events, CBD May Not Obtain Monetary Recovery Under the Public Trust Doctrine.

CBD asks this Court to rule on issues not even pled in its Complaint, *i.e.*, whether monetary recovery is ever available on a Public Trust Doctrine claim. *See* AA031. The Complaint in this action does not seek restitution. Indeed, this issue is entirely hypothetical; although CBD argues that "a trial court has the inherent power to order restitution as a form of ancillary relief,"[10] the trial court here *has not made any determination regarding remedies one way or the other* because the causes of action fail as a matter of law. Whether monetary relief is ever available under the Public Trust Doctrine is not an "issue that 'appears certain to arise on remand'" (AOB 35; citation omitted), as CBD erroneously asserts, because the trial court may never reach the issue, or may rule that monetary recovery is inappropriate

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[9] Under *Fogerty*, 29 Cal. 3d at 249, the owners of shoreline property in Lake Tahoe would be entitled to compensation if enforcement of the public trust required them to *remove* improvements that had been built in good faith. But the landowners are not entitled to compensation for a determination that their land is subject to a public trust easement, which otherwise would require inverse condemnation proceedings. *See National Audubon*, 33 Cal. 3d at 440.

[10] *See* AOB 37-38 (citation and internal quotation marks omitted).

under the facts of this case.

Moreover, there is no ground or reason to determine in this theoretical context that monetary recovery is "potentially" available under the Public Trust Doctrine. As the trial court correctly stated in a prior order concerning the UCL claims: "Plaintiffs have not identified any cases where the Attorney General or a District Attorney has recovered compensation for the conversion of water, air, or wildlife. Case law regarding the use of public assets consistently involves injunctions and fines rather than compensation for the loss of those public assets." RA78 (3-28-05 Order at 5:13-17). CBD, likewise, does not identify a single such case on appeal. If courts have not awarded monetary remedies to public prosecutors, there is little reason for this Court to rule that such relief is potentially available to private plaintiffs.

In fact, CBD purports in its AOB to seek restitution on behalf of the California Department of Fish & Game. *See* AOB at 37. But this only underscores the backwardness of CBD's instant monetary claims. The relevant wildlife statutes (*e.g.*, Fish & Game Code § 2014) give the public agencies power to prosecute wildlife lawsuits and recover damages, but nowhere permit private parties to prosecute such lawsuits. Nevertheless, CBD amazingly asserts that it possesses the right to obtain monetary remedies *on behalf of the very public agencies* that, in fact, possess the prosecutorial discretion but are not parties to this action. CBD possesses no such prosecutorial right, and cannot purport to possess such right by simply asserting that the "restitution" it seeks will be given to the Department of Fish & Game or to any other public agency.

Conclusion

The discussion above demonstrates that CBD's position is not supported by law or public policy. Existing law and good public policy demonstrate that there is no justification to extend the Public Trust Doctrine cause of action beyond its current application, which requires a direct nexus to a tideland or navigable waterway in which an actual public trust easement burdens the land at issue. The trial court's judgment should be affirmed.

DATED: September 6, 2007

Respectfully submitted,

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By: 
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Certification Pursuant to
California Rule of Court 8.360(b)(1)

I, George T. Caplan, counsel for defendants and respondents, certify pursuant to California Rule of Court 8.360(b)(1) that the number of words, including footnotes, in Respondents' Brief totals 10,587 according to the word processing program used to create the brief.

George T. Caplan

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Kaye Scholer LLP, 1999 Avenue of the Stars, Suite 1700, Los Angeles, California 90067.

On **September 6, 2007**, I served the foregoing document described as: **RESPONDENTS' BRIEF** on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

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Executed on **September 6, 2007**, at Los Angeles, California.

SHANTA TEEKAH
Name

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