IN THE 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.	No. A116362 Alameda County Superior Court Case No. RG04-183113 The Hon. Bonnie L. Sabraw, Judge Department 512: (510) 670-6312

APPELLANTS CENTER FOR BIOLOGICAL DIVERSITY, INC. AND PETER GALVIN'S

OPENING BRIEF ON APPEAL

FROM A JUDGMENT OF DISMISSAL ON THE PLEADINGS

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INTRODUCTION

This is an appeal from a judgment on the pleadings dismissing plaintiffs' action on the ground that the facts alleged in plaintiffs' complaint fail to state a cause of action under any possible legal theory.

The trial court's judgment should be reversed, and the action remanded for further proceedings, because the complaint states a well-founded cause of action. Defendants are businesses that operate approximately 5,000 obsolete, inefficient, first-generation wind turbine electricity generators at Altamont Pass in eastern Alameda and Contra Costa Counties. Defendants' thousands of obsolete wind turbines kill an estimated 880 to 1,300 eagles, hawks, falcons, and owls each year, including between 75 and 116 Golden Eagles, as part of their normal industrial activity of generating electricity for profit. As the blades of the turbines spin, they strike and dismember birds.

Since the 1980s when the turbines were first installed, the Altamont Pass wind power industry has illegally slaughtered 17,000 to 26,000 eagles, hawks, falcons, and owls. In addition to killing these protected raptors, defendants have killed tens of thousands of other protected birds.

In the six years from 1999 to 2004, Altamont's wind turbines took in $380 million in revenue. Because of rising electricity prices and windfall revenues since the California energy crisis of 2000, defendants have repeatedly postponed plans to replace their existing obsolete wind turbines with new, larger, more efficient wind turbines. Using only 500 new turbines, defendants could generate more electricity than the amount they currently generate using their 5,000 existing obsolete turbines, and the new turbines would kill far fewer birds.

Defendants' killings of raptors are in violation of numerous federal and state wildlife protection laws. Defendants have no permit or other

authorization for these illegal killings. These massive bird killings by Altamont Pass wind turbine generators have been widely known for more than 20 years, but defendants have not taken any effective steps towards reducing their killing of birds or towards providing restitution for the wildlife they destroy.

The Supreme Court has long held that the wildlife of California is public trust property owned by the people of California and held for them by the state as trustee. *See, e.g.*, *People v. Stafford Packing Co.*, 193 Cal. 719 (1924). The Supreme Court has also held that members of the public and environmental organizations like plaintiffs Peter Galvin and the Center for Biological Diversity have standing to enforce their property rights in public trust property. *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983). Accordingly, plaintiffs have stated a claim under the common law for destruction of public trust property by alleging that defendants are unlawfully killing public trust wildlife in the form of thousands of raptors and other birds.

Disregarding this controlling precedent, however, the trial court held that defendants are immune from suit by members of the public whose public trust property defendants are wantonly destroying, and that members of the public cannot bring any cause of action against defendants for their destruction of public trust property. Because the trial court's decision is contrary to controlling precedent and is contrary to the public interest, it should be reversed.

ISSUES TO BE DECIDED ON APPEAL

1. Under the Supreme Court and Court of Appeal decisions holding that California's wildlife is public trust property and legislative enactments decreeing that California's wildlife is public trust property, is wildlife a category of public trust property?

2. Under the Supreme Court's decision in *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 431 n.11 (1983), holding that "any member of the general public has standing to raise a claim of harm to the public trust," do California's citizens have standing to bring a common-law public trust action to remedy defendants' unlawful destruction of wildlife public trust property?

3. Are the ordinary equitable remedies of injunctive relief, declaratory relief, and restitution potentially available here to remedy defendants' ongoing destruction of wildlife public trust property?

STATEMENT OF FACTS

The region around Altamont Pass in eastern Alameda and Contra Costa Counties has one of the highest densities of raptors in the world. First Amended Complaint ("FAC") ¶¶ 42-44. (The FAC is found at Appellants' Appendix ("AA") 001 to 032.) It has the highest known density of breeding pairs of Golden Eagles. FAC ¶ 44. It is also rich in other raptors, such as hawks, falcons, and owls, as well as non-raptor bird species. FAC ¶ 42. The Altamont Pass region is also an important raptor wintering area and raptor migratory route. FAC ¶ 42.

Plaintiff Peter Galvin is a conservation biologist and is the Conservation Director of the Center for Biological Diversity. FAC ¶ 10. For more than 10 years he has been actively involved in saving wild creatures and the natural habitats on which they depend in California and throughout the world. FAC ¶ 10. He has performed scientific research studying raptors. FAC ¶ 10. He is a citizen and resident of California and has visited the Altamont Pass region and observed its creatures and habitats on a number of occasions. FAC ¶ 10.

Plaintiff Center for Biological Diversity, Inc., is a nonprofit conservation organization that is a national leader in protecting wild creatures and the habitats on which they depend. FAC ¶ 6. The Center has over 12,000 members, more than 4,400 of whom are Californians. FAC ¶ 8. The Center's members and staff have researched, studied, observed, and sought protection for the bird populations and the individual birds that frequent the vicinity of Altamont Pass. FAC ¶ 8. The Center's members and staff derive scientific, recreational, conservation, spiritual, and aesthetic benefits from the existence in the wild of the bird populations and the individual birds that frequent the vicinity of Altamont Pass. FAC ¶ 8.

In particular, the Center has members and staff who observe, enjoy, study, and derive spiritual and aesthetic satisfaction from the Golden Eagles, Red-tailed Hawks, American Kestrels, Burrowing Owls, and birds of other species that inhabit or pass through the Altamont Pass region and that are being killed, injured, or otherwise harmed by defendants' activities. FAC ¶ 9.

For thousands of years these magnificent birds have soared the skies of Altamont Pass free and unhindered. Beginning more than twenty years ago, in the early 1980s, the wind power industry began erecting wind turbines on the ridges where these raptors roam. FAC ¶¶ 38, 45. Eventually, there were over 5,000 turbines installed at Altamont Pass, turbines that are now considered obsolete by industry standards. FAC ¶¶ 3, 38, 51-54.

In 1984, the first reports came in that the turbines were killing raptors. FAC ¶ 69. The turbine blades strike the birds as they are flying and dismember them. FAC ¶¶ 55, 82. The latest scientific estimates are that the Altamont wind turbines kill from 880 to 1,300 eagles, hawks, falcons, and owls each year, including between 75 and 116 Golden Eagles annually. FAC ¶ 4. This kill rate is far higher than the rate at which birds are killed by any other wind power project in the world. FAC ¶ 49.

The result is that, since the 1980s, the Altamont wind power industry in its pursuit of profits has illegally slaughtered 17,000 to 26,000 or more eagles, hawks, falcons, and owls, each of which is protected under federal and state law. FAC ¶ 46. It has also killed tens of thousands of other protected birds. FAC ¶¶ 1, 46.

Defendants own or operate, or participate in the acts of others who own or operate, obsolete killer wind turbines at the Altamont Pass Wind Resource Area in eastern Alameda and Contra Costa Counties. FAC

¶¶ 12-37. Defendants are profit-making business entities; revenues for electricity sales from wind turbines at the Altamont Pass Wind Resource Area totaled over $380 million in the six years from 1999 to 2004. FAC ¶ 40. Most of the defendants are the subsidiaries of huge multibillion-dollar corporations; defendants' parent corporations include the electric utility holding company FPL Group of Florida (FAC ¶¶ 12-15, 17, 18), Vestas of Denmark (FAC ¶¶ 16-18), and Electricité de France (FAC ¶ 29).

Altamont Pass was the first commercial wind energy development in the world, and the wind turbines installed there in the 1980s were the first generation of wind energy technology. FAC ¶ 51. By current standards, these machines are woefully obsolete, and are several generations behind the current state of the art. FAC ¶¶ 3, 51-54. Many of the machines at Altamont Pass are capable of generating only 100 kilowatts of electricity. FAC ¶ 51. State-of-the-art turbines can generate up to 3 megawatts (3,000 kilowatts) per turbine—30 times the capacity of the existing turbines at Altamont. FAC ¶ 51.

Equally important, it has long been thought that the installation of state-of-the-art turbines will substantially reduce raptor mortality at Altamont. FAC ¶¶ 3, 52. Since 1998, defendants have repeatedly announced various plans to replace their obsolete, first-generation wind turbine generators at the Altamont Pass Wind Resource Area with large state-of-the-art turbines. FAC ¶ 54. Defendants, however, have never implemented any of these repowering plans, except for one small wind turbine generator replacement project involving just 31 turbines. FAC ¶ 54. Defendants expect to continue using the vast majority of the

obsolete, first-generation wind turbine generators at Altamont Pass for 10 or more additional years. FAC ¶ 54.

Defendants have no federal or state permit, license, or other authorization to take, injure, kill, harm, harass, molest or disturb birds with their wind turbine generators. FAC ¶¶ 60-62. Nothing in the Fish and Game Code or its regulations authorizes defendants to kill thousands of eagles, hawks, falcons, owls, and other birds. FAC ¶ 87. To the contrary, by their killings of eagles, hawks, falcons, owls, and other birds, defendants are flagrantly violating numerous criminal and civil prohibitions of the Fish and Game Code, the federal Bald Eagle and Golden Eagle Protection Act, and the federal Migratory Bird Treaty Act. FAC ¶¶ 1, 59, 63.

Defendants are violating section 2000 of the Fish and Game Code by killing thousands of birds with their Altamont Pass wind turbine generators. FAC ¶¶ 86- 89. Under section 2000, "[i]t is unlawful to take any bird, mammal, fish, reptile, or amphibian except as provided in this code or regulations made pursuant thereto." The Fish and Game Code provides that to "take" a creature means to "kill" it, even if the killing occurs unintentionally in the course of an industrial or mechanical process. Fish & Game Code § 86; *Dept. of Fish and Game v. Anderson-Cottonwood Irrigation Dist.*, 8 Cal.App.4th 1554, 1558, 1560, 1562-63, 1568 (1992) (fish killed by irrigation pump blades "incidental to lawful irrigation activity" were "taken" within the meaning of section 86).

In addition to the general prohibition of section 2000, a number of other Fish and Game Code provisions independently prohibit defendants' conduct here. Section 3503.5 of the Fish and Game Code specifically prohibits the taking or destruction of eagles, hawks, falcons, and owls: "It is unlawful to take, possess, or destroy any birds in the orders Falconiformes [i.e., eagles, hawks, and falcons] or Strigiformes [i.e., owls]

(birds-of-prey) or to take, possess, or destroy the nest or eggs of any such bird except as otherwise provided by this code or any regulation adopted pursuant thereto." FAC ¶¶ 93-95. Defendants are both "tak[ing]" and "destroy[ing]" eagles, hawks, falcons, and owls. *Ibid*.

Section 3511 of the Fish and Game Code provides special protection to Golden Eagles: "(a) (1) Except as provided in Section 2081.7, fully protected birds or parts thereof may not be taken or possessed at any time. No provision of this code or any other law shall be construed to authorize the issuance of permits or licenses to take any fully protected bird, and no permits or licenses heretofore issued shall have any force or effect for that purpose. . . . [¶] (b) The following are fully protected birds: . . . (7) Golden eagle . . . ." Defendants are violating this absolute, no-exceptions prohibition of the taking of Golden Eagles. *Ibid*.

Section 3800(a) of the Fish and Game Code also prohibits the killing of eagles, hawks, falcons, and owls: "All birds occurring naturally in California that are not resident game birds, migratory game birds, or fully protected birds are nongame birds. It is unlawful to take any nongame bird except as provided in this code or in accordance with regulations of the commission . . . ." FAC ¶¶ 104-105. Section 472 of title 14 of the California Code of Regulations also prohibits the taking of nongame birds. FAC ¶¶ 104-105. Hawks, falcons, and owls are nongame birds. Fish & Game Code §§ 3500 (defining game birds), 3800(a) (defining nongame birds). By participating in the killing of thousands of eagles, hawks, falcons, and owls, defendants are violating the prohibitions of section 3800(a) and 14 Cal. Code Regs. § 472 against the taking of nongame birds. FAC ¶¶ 104-105.

Defendants are also committing thousands of violations of the federal Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703. FAC ¶¶ 109-

111. The MBTA is a "comprehensive statutory prohibition" that is set forth in "expansive" terms. *Andrus v. Allard*, 444 U.S. 51, 59-60 (1979). The MBTA prohibits the killing "by any means or in any manner" of any member of the bird species that it protects: "it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, [or] possess . . . any migratory bird, any part, nest, or eggs of any such bird . . . ." 16 U.S.C. § 703. The MBTA is a strict liability criminal statute, requiring no proof of intent. FAC ¶ 109. *United States v. Corrow*, 119 F.3d 796, 805 (10th Cir. 1997) (collecting cases); *United States v. Moon Lake Electric Ass'n*, 45 F.Supp.2d 1070, 1071 (D. Colo. 1999). The bird species protected by the MBTA include all North American eagles, hawks, falcons, and owls. 50 C.F.R. § 10.13 (listing protected species). FAC ¶110.

Defendants are also violating section 3513 of the Fish and Game Code, which prohibits the killing of any nongame bird (including eagles, hawks, falcons, and owls) that is also protected under the federal Migratory Bird Treaty Act: "It is unlawful to take or possess any migratory nongame bird as designated in the Migratory Bird Treaty Act or any part of such migratory nongame bird except as provided by rules and regulations adopted by the Secretary of the Interior under provisions of the Migratory Treaty Act." FAC ¶¶ 115-116.

Defendants are also violating the federal Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. § 668. FAC ¶¶ 120-121. The BGEPA is a "sweepingly framed prohibition," *Andrus v. Allard*, 444 U.S. at 56, that contains criminal and civil prohibitions against the taking of Golden Eagles. *See United States v. Hugs*, 109 F.3d 1375, 1378 (9th Cir. 1997) ("[P]rotection of bald and golden eagles serves a compelling government interest."); *United States v. Jim*, 888 F.Supp. 1058, 1063 (D. Ore. 1995)

("the BGEPA is promoting a compelling interest in protecting the declining numbers of golden eagles"). Subdivision (a) makes it a criminal offense to "knowingly, or with wanton disregard for the consequences of his act take . . . in any manner . . . any golden eagle . . . ." 16 U.S.C. § 668(a). Subdivision (b) makes it a civil offense to "take . . . in any manner . . . any golden eagle." 16 U.S.C. § 668(b). Under the BGEPA, " 'take' includes also pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb." 16 U.S.C. § 668c. By participating knowingly or with wanton disregard in the taking and killing of hundreds of Golden Eagles by means of the Altamont Pass wind turbine generators, defendants have committed criminal and civil violations of the BGEPA. FAC ¶ 121.

Defendants' thousands of violations of the Fish and Game Code are criminal offenses. FAC ¶ 89. Section 12000(a) of the Fish and Game Code makes any violation of the Fish and Game Code and its regulations criminal offenses: "Except as expressly provided otherwise in this code, any violation of this code, or of any rule, regulation, or order made or adopted under this code, is a misdemeanor." *Ibid*.

Despite the clear statutory prohibitions against killing, injuring, or harassing eagles, hawks, falcons, and owls, the Altamont Pass wind power industry has resisted repeated efforts over the past 20 years to compel it to conform its conduct to the law. FAC ¶¶ 67, 83. Defendants have undertaken no effective mitigation measures, and have made no attempt to compensate for their destruction of public trust wildlife, to restore its value, or remediate the consequences of its destruction. FAC ¶¶ 4, 65. Defendants have to date escaped all legal liability for their crimes. FAC ¶¶ 68-84. Plaintiffs and the general public are being irreparably harmed by defendants' continuing destruction of public trust wildlife property. FAC ¶¶ 66, 91, 133, 138.

PROCEDURAL HISTORY

Plaintiffs filed this action on November 1, 2004. The complaint alleged that defendants were unlawfully killing thousands of raptors and other birds as a regular part of their business practices, and stated causes of action against defendants under Business and Professions Code section 17200 under that statute's "unlawful business practice" and "unfair business practice" prongs. The complaint prayed for declaratory relief, restitutionary relief, and other monetary relief under section 17202, Business and Profession Code. All defendants demurred on the ground that Proposition 64, enacted November 2, 2004, was retroactive and that plaintiffs lacked standing under Proposition 64's amendments to section 17204 of the Business and Professions Code. On February 17, 2005, the trial court overruled the demurrer by written order, holding that Proposition 64 was retroactive but that plaintiffs had standing under Proposition 64 because, given that wildlife is public trust property owned by the people of California, plaintiffs had suffered actual injury and had lost property by reason of defendants' destruction of wildlife. Defendants also moved to strike plaintiffs' prayers for declaratory relief, restitutionary relief, and other monetary relief. On March 24, 2005, the trial court denied by written order the motion to strike with respect to plaintiffs' prayer for declaratory relief and granted it with respect to plaintiffs' prayer for restitutionary relief and for other monetary relief.

Thereafter, on April 15, 2005, plaintiffs filed their first amended complaint, the operative pleading at issue here. In their first amended complaint, plaintiffs added a common-law cause of action for destruction of public trust property to their Business and Professions Code section 17200 causes of action and added a prayer for injunctive relief. FAC ¶¶ 86-138; Prayer at ¶¶ C, D. In their public trust cause of action, plaintiffs

alleged that the wanton, unlawful, and unremediated killing of raptors and other birds by defendants violated the public trust doctrine. FAC ¶¶ 134-38. Defendants filed a motion to strike plaintiffs' prayer for injunctive relief. The trial court denied the motion to strike by written order on June 24, 2005.

On July 10, 2006, defendants moved for judgment on the pleadings on plaintiffs' public trust cause of action, contending that wildlife was not public trust property and therefore there was no common-law cause of action for its destruction. AA 033, 036, 047, 050. On August 4, 2006, defendants moved for judgment on the pleadings on plaintiffs' Business and Professions Code section 17200 causes of action, contending that plaintiffs had not alleged a loss of property satisfying the standing requirements of section 17204 of the Business and Professions Code.

By written order filed on October 12, 2006, and served by the clerk on October 16, 2006, the trial court granted both motions for judgment on the pleadings and dismissed the action. AA 133 to 151. The trial court granted judgment on the pleadings on plaintiffs' public trust cause of action on the ground that wildlife was not public trust property whose destruction gave rise to a cause of action by members of the public. 10/12/06 Order at 16 (AA 148). Using similar reasoning, the trial court dismissed plaintiffs' section 17200 causes of action on the ground that the destruction of public trust wildlife was not a loss of property under section 17204 of the Business and Professions Code. 10/12/06 Order at 13-14 (AA 145-46). The trial court's order dismissed the action without leave to amend, and thereby constituted a final judgment under Code of Civil Procedure section 581d. 10/12/06 Order at 17 (AA 149). Plaintiffs timely appealed the judgment on December 11, 2006. AA 152.

In dismissing the action without leave to amend the complaint, the trial court determined that there was no cause of action that could be stated on the facts alleged in plaintiffs' first amended complaint. 10/12/06 Order at 17. The inevitable consequence of this holding is to grant defendants immunity from any liability whatsoever to the members of the public whose public trust property they have been destroying with impunity for many years.

STANDARD OF REVIEW

This Court reviews independently a judgment on the pleadings granted by the trial court, without any deference to the trial court's determination. *Gerawan Farming v. Lyons*, 24 Cal.4th 468, 515 (2000); *Smiley v. Citibank*, 11 Cal.4th 138, 146 (1995), *aff'd*, 517 U.S. 735 (1996). In performing its de novo review, a Court of Appeal "accepts as true the factual allegations that the plaintiff makes. In addition, it gives them a liberal construction." *Gerawan Farming*, 24 Cal.4th at 515-516 (citations omitted).

Accordingly, "[t]he standard of review for an order granting judgment on the pleadings is the same as that for an order sustaining a general demurrer: We treat as admitted all material facts properly pleaded, give the complaint's factual allegations a liberal construction, and determine de novo whether the complaint states a cause of action under any legal theory. We may rely on any applicable legal theory in affirming or reversing because we review the trial court's disposition of the matter, not its reasons for the disposition." *Sanchez v. City of Modesto*, 145 Cal.App.4th 660, 671 (2006) (citation and internal quotation marks omitted).

ARGUMENT

I. California's Wildlife Is Public Trust Property

Determining whether the facts alleged by plaintiffs state a cause of action for the destruction of public trust property turns on two distinct inquiries: 1) Is California's wildlife a category of public trust property owned by the people of California and held in trust for them by the state? 2) Do members of the public have standing to raise a claim for harm to wildlife public trust property?

Turning to the first of these questions, Is California's wildlife a category of public trust property owned by the people of California and held in trust for them by the state as trustee? The answer to this question is "yes," for the following reasons.

A. The Categories Of Public Trust Property Recognized By California Law Include California's Wildlife

California common law recognizes the doctrine of public trust property. Public trust property is property held by the state "not in its proprietary capacity but as trustee for the public." *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 521 (1980); *accord, People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 151 (1884) (the state is "trustee of a public trust for the benefit of the people").

California common law recognizes several different categories of public trust property ownership. Navigable and tidal waters together with the submerged lands beneath them form one important category of public trust property: "Both tidelands and the beds of navigable rivers are owned by the state in trust for the public." *State of California ex rel. State Lands Commission v. Superior Court*, 11 Cal.4th 50, 63 (1995). In the case of navigable or tidal waters and submerged lands, "[p]ublic trust easements

are traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes. The public has the same rights in and to tidelands. [¶] . . . [O]ne of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." *Marks v. Whitney*, 6 Cal.3d 251, 259-260 (1971) (citations omitted).

A separate, equally important category of public trust property that California recognizes is the public trust ownership of wildlife. For more than 100 years, it has been the common law of California that all wildlife, including the many hundreds of eagles, hawks, falcons, owls, and other birds illegally killed each year by defendants, is property owned by the people of California, with the state holding legal title as trustee. At the end of the nineteenth century, the Supreme Court affirmed the people's ownership of wildlife in *People v. Truckee Lumber Co.*, 116 Cal. 397, 399 (1897): "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."

Truckee Lumber demonstrates that wildlife public trust property, like other forms of public trust property, is a true property right owned by the public. *Truckee Lumber* was a nuisance action in which an injunction was sought against a polluting sawmill whose discharges were killing fish. *Truckee Lumber*, 116 Cal. at 398-99. Because the action was brought on

the theory that the killing of the fish was an "obstruction to the free use of property" (Penal Code § 370, Civil Code § 3479), the nuisance action could not be maintained unless there was a property right in the fish with which the defendant was interfering. *Id*. at 399.

The defendant sawmill contended that the complaint against it failed to state a claim for nuisance because the fish it were killing were not property, and therefore its killing of them could not be an " 'obstruction to the free use of property.' " *Truckee Lumber*, 116 Cal. at 399. After affirming that wildlife is a "species of property" owned by "the people of the state" (*ibid*.), the Supreme Court rejected the defendant's contention that the complaint failed to allege an interference with property: "The complaint shows that by the repeated and continuing acts of defendant this *public property right* [in fish] is being and will continue to be greatly interfered with and impaired; and that such acts constitute a nuisance, both under our statute and at common law, is not open to serious question." *Truckee Lumber*, 116 Cal. at 400 (emphasis added). Thus, the Supreme Court expressly held in *Truckee Lumber* that 1) wildlife is a "species of property" and 2) the "ownership" of that "property right" is "in the people of the state."

In *People v. Stafford Packing Co.*, 193 Cal. 719 (1924), the Supreme Court again rejected the contention that wildlife was not property owned by the people and held in trust for them by the state. At issue in *Stafford Packing* was whether injunctive relief was available for the defendant's "wasteful destruction of fish at the rate of millions per month" (*id*. at 729), which was both a violation of an express statutory provision for the conservation of fish and a violation of the public trust property rights in wildlife. The defendant contended that only the statutory remedies provided by the fish conservation statute, which did not include injunctive

or other equitable relief, were available for its conduct. The Supreme Court rejected this contention. It held that, because the public trust property right in wildlife exists independent of statute, equitable relief was available to remedy the defendant's invasion of the public trust property rights of the people.

In its decision in *Stafford Packing*, the Supreme Court first reaffirmed its earlier holding in *Truckee Lumber* that the public trust ownership of wildlife was a true property right. The Court emphasized in italics that it was the invasion of the property rights in wildlife that was at issue in *Truckee Lumber*: "That decision [i.e., *Truckee Lumber*] was rested not upon the circumstances that the pollution of the waters created a condition which was 'injurious to health' or 'offensive to the senses,' but upon the fact that it was an invasion of the *property rights* [in fish] which were held by the state in trust for the people of the state. In other words, it was 'an obstruction to the free use of property.' " *Stafford Packing*, 193 Cal. at 726 (emphasis original). The Court continued: "[T]he basis of equitable interposition in that case was the threatened injury to the *property rights* of the people which are held in trust by the state for the people." *Id.* at 727 (emphasis added).

Turning to the case before it, the Supreme Court in *Stafford Packing* held that the defendant's destruction of public trust wildlife property provided an independent ground for equitable relief, completely apart from the defendant's violation of the fish conservation statute: "The effect of those regulations was to make the [defendant's] use of fish . . . both wrongful and unlawful, but the court in the action herein was not at all concerned with the *unlawfulness* of those acts but only with their *wrongfulness* as an invasion of the *property rights* of the people. Having determined that the acts complained of constituted a wrongful invasion of

those property rights and having further determined that the threatened continuance thereof would work irreparable injury for which there was no adequate remedy at law, there was a complete foundation for equitable interposition and equitable relief." *Stafford Packing*, 193 Cal. at 730 (emphasis original). Had the defendant's destruction of wildlife not been a destruction of public trust property but only the violation of a regulatory statute that did not authorize equitable relief, there would have been no basis for equitable relief.

Thus, in *Stafford Packing* the Supreme Court once again held that wildlife was property owned by the people of the state, and that the form of ownership was a public trust. Subsequently, the Supreme Court repeatedly reaffirmed that the public trust ownership of wildlife is a true property right. In *People v. Monterey Fish Products Co.*, the Court again distinguished between statutes protecting wildlife and the common-law public trust property right in wildlife: "The use of fish which was admittedly made by the defendant herein was not merely a violation of prohibitory provisions of a statute, but was also a wrong committed against the *property right*" of the people. 195 Cal. 548, 564 (1925) (emphasis added). The Court further stated: "The title to and property in the fish within the waters of the state are vested in the state of California and held by it in trust for the people of the state." *Id*. at 563. In *People v. K. Hovden Co.*, the Court again described public trust ownership of wildlife as "the well-recognized property right of the People." 215 Cal. 54, 56 (1932); *see also id.* at 57 ("the property right of the People").

The status of wildlife, including birds, as public trust property remains settled law today. *E.g.*, *People v. Murrison*, 101 Cal.App.4th 349, 360 (2002) ("The state owns the fish in its streams in trust for the public."); *People v. Perez*, 51 Cal.App.4th 1168, 1175 (1996) (Birds; "California

holds title to its wildlife in public trust for the benefit of the people."); *Arroyo v. California*, 34 Cal.App.4th 755, 762 (1995) (Mountain lions; "California courts deem wild animals to be owned by the people of the state."); *California Trout v. State Water Resources Control Board*, 207 Cal.App.3d 585, 630 (1989) ("Wild fish have always been recognized as a species of property the general right and ownership of which is in the people of the state."); *Betchart v. Dept. of Fish & Game*, 158 Cal.App.3d 1104, 1106 (1984) (Deer; "California wildlife is publicly owned"); *People v. Glenn-Colusa Irrigation District*, 127 Cal.App. 30, 36 (1932) ("The title to and property in the fish within the waters of the state are vested in the state of California and held by it in trust for the people of the state.").

The Legislature has also acknowledged and confirmed the common-law public trust property ownership of birds and other wildlife in a number of statutes. Fish & Game Code §§ 1600 ("Fish and wildlife are the property of the people"); 711.7, subd. (a) ("The fish and wildlife resources are held in trust for the people of the state by and through the department [of Fish and Game]."); 1802 (department is "trustee for fish and wildlife resources"). These statutes are independent and conclusive authority for the public trust property ownership of the raptors and other birds defendants are destroying, and like the decisional law cited above are binding here.

In light of this overwhelming authority, "[i]t is beyond dispute that the State of California holds title to its . . . wildlife in public trust for the benefit of the people." *People v. Harbor Hut Restaurant*, 147 Cal.App.3d 1151, 1154 (1983).

B. The Decisions On Which Defendants Relied Below Are Inapposite

In the trial court, rather than attempting to rebut the controlling authority of *Truckee Lumber* and its progeny, defendants relied on a handful of inapposite decisions, none of which denies that California's wildlife is public trust property or that its destruction gives rise to legal liability under the public trust doctrine. Among the inapposite decisions relied on by defendants is *Golden Feather Community Ass'n v. Thermalito Irrigation Dist.*, 209 Cal.App.3d 1276 (1989). *Golden Feather* was not a wildlife public trust property case. Instead, it was an attempt to create a novel public trust right to the maintenance of a particular water level in an artificial, nonnavigable reservoir, although the public trust in water extends only to navigable and tidal waters. "Plaintiffs assert that the public trust doctrine must be extended to all waters within the state, whether or not navigable waters are affected." *Id.* at 1283. The Court of Appeal took great pains "to emphasize that we are concerned in this case with only a narrow and specific issue." *Id.* at 1280. It carefully noted that the case did not involve navigable waters, nor did it involve a diversion of nonnavigable tributary waters that caused any harm to navigable waters or harm to any public trust interest. *Ibid*.

Nor did *Golden Feather* involve public trust wildlife property rights; the Court of Appeal noted carefully that "[t]his case does not involve the situation presented in *People v. Truckee Lumber*." *Golden Feather*, 209 Cal.App.3d at 1282. The Court specifically reaffirmed: "The general right and ownership of wild animals, the most important constituent of which are fish, is in the people of the state." 209 Cal.App.3d at 1282.

On "the very narrow issue" (209 Cal.App.3d at 1283) of whether the public trust doctrine extended to nonnavigable waters to require the maintenance of a specified water level in a nonnavigable, artificial body of

water, the Court in *Golden Feather* held that "the public trust doctrine does not apply in these circumstances" (*id*. at 1278). It distinguished its holding from cases like plaintiffs' that involve a well-established public trust interest like the century-old public trust property right in wildlife: "[W]here the interest to be protected is a traditional public trust interest. . . . the courts have held that the state has broad powers to protect those interests . . . . [¶] Examples of these authorities are the *Truckee Lumber* and *Audubon* decisions. . . . Each of these cases involved the protection of a traditional, recognized public trust interest." *Id*. at 1286. "In contrast to existing authorities, the plaintiffs in this case do not seek protection of a recognized public trust interest since they concede the waters at issue are nonnavigable and the reservoir is an artificial body of water. Moreover, plaintiffs do not seek to enjoin an activity, such as diversion of a stream, which harms a public trust interest." *Id.* at 1286-87. Thus, the plaintiffs in *Golden Feather* lost because the court found the purported public trust interest in nonnavigable waters on which they founded their suit did not exist. Because plaintiffs Galvin and the Center for Biological Diversity rely on the well-established public trust ownership of wildlife, *Golden Feather* has no application here.

At various times in this litigation, defendants have also argued that federal law prohibits wildlife from being public trust property because, in defendants' view, wildlife is not physically "possessed" by the state. These federal decisions are inapposite here, first, because it is state law, not federal law, that creates and defines cognizable property interests and, second, because those decisions do not purport to define property interests in wildlife for purely state law purposes like the public trust doctrine but only hold that a state government may not interpose its ownership of

wildlife to avoid its obligations under the federal Constitution and federal law.

Property rights, including public trust property rights, are created and determined by state law, as the California Supreme Court and the United States Supreme Court have both repeatedly held. As the California Supreme Court has stated with respect to public trust property rights: " 'Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States.' 'This principle applies to the [public trust ownership of] banks and shores of waterways, and we have consistently so held.' " *State of California ex rel. State Lands Commission v. Superior Court*, 11 Cal.4th at 74. Thus, in *State of California ex rel. State Lands Commission v. Superior Court*, the Supreme Court applied state rules of property ownership, and not federal law, to determine whether the property in question was public trust property.

The United States Supreme Court has likewise made clear that creating and defining property interests is a matter of state law, not federal law, and is an important aspect of state sovereignty. "Property interests, of course, are not created by the [federal] Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Nor, contrary to defendants' assertion, is there any rule of federal law that cognizable property interests can only exist if the property is tangibly possessed by its owner. To the contrary, "the types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.' " *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) (giving examples of property interests

in licenses, welfare benefits, right to utility service, right to high school education, and in inchoate causes of action not reduced to a judgment). Thus, there is not, and cannot be, an overriding rule of federal law prohibiting California from recognizing a public trust property right in its wildlife.

The federal decisions in *Missouri v. Holland*, 252 U.S. 416 (1920), *Toomer v. Witsell*, 334 U.S. 385 (1948), and *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977), on which defendants have relied are not to the contrary. Those were all cases in which a state government, contrary to the command of the Supremacy Clause (U.S. Const., art. VI), sought to interpose state ownership of wildlife to avoid specific obligations that the federal Constitution and federal statutes would otherwise impose on the state—the treaty-making power and federal statutory law in *Missouri v. Holland*; the privileges and immunities clause in *Toomer*; and the commerce clause and federal statutory law in *Douglas v. Seacoast Products, Inc.*

In *Missouri v. Holland*, Missouri sought to enjoin the federal government from enforcing the Migratory Bird Treaty and the federal Migratory Bird Treaty Act, asserting that its ownership of wildlife gave it "exclusive authority" over wild birds. 252 U.S. at 434. In an unremarkable holding, the United States Supreme Court held that the Supremacy Clause required Missouri to comply with the federal treaty and statute, just as the Supremacy Clause requires Missouri to comply with every other federal treaty or statute. *Id*. at 432, 434-35. In *Toomer*, South Carolina claimed that its ownership of fish allowed it to impose discriminatory license fees on out-of-state shrimp fishermen fishing in its waters; the Supreme Court, in another run-of-the-mill application of the Supremacy Clause, held that the Privileges and Immunities Clause of the federal Constitution prohibited

South Carolina from discriminating against citizens of other states. 334 U.S. at 403. In *Douglas v. Seacoast Products, Inc.*, Virginia sought to prohibit federally licensed nonresident fishermen from fishing in its waters while permitting state residents to fish. The Supreme Court held that the Commerce Clause and the Supremacy Clause forbade Virginia from excluding licensed nonresident fishermen in favor of resident fishermen. 431 U.S. at 283.

Thus, these cases stand for the unsurprising proposition that a state cannot use its ownership of wildlife as a pretext to avoid complying with an overriding federal constitutional or federal statutory obligation—Missouri cannot claim that its ownership of wildlife trumps the federal government's treaty-making powers, and South Carolina and Virginia cannot claim that their ownership of wildlife allows them to unconstitutionally discriminate against out-of-state residents in granting privileges to use wildlife. All of these cases are ultimately founded on the Supremacy Clause's command that federal law is paramount to conflicting state law. Neither in those cases nor in any other case has the United States Supreme Court ever held that those who under state law hold property rights in wildlife may not assert those property rights against private parties who wantonly destroy wildlife. Nor, unlike those cases, is this a case where the people's ownership of wildlife is being interposed by a state government to evade state compliance with some overriding federal law or constitutional provision. Thus, these cases do not impair the clearly established California law set forth above under which raptors, other birds, and other wildlife are public trust property.

Finally, any reliance defendants may place on *People v. Brady*, 234 Cal.App.3d 954 (1991), another decision they relied on below, is likewise misplaced. *Brady* does not address the availability of a civil cause of action

for the destruction of public trust wildlife property. At issue in *Brady* was only a narrow question of statutory interpretation of a criminal statute: the scope of Penal Code section 487, the grand theft statute, which criminalizes the taking of "money, labor or real or personal property." The defendant was charged with grand theft for taking abalone from the coastal waters of the state; the question on review was whether the Legislature intended the statutory term "personal property" to encompass abalone taken from the wild. *Brady*, 234 Cal.App.3d at 957 ("The question is whether the abalone, illegally taken from the state's coastal waters, can be considered 'personal property' of the state within the meaning of the statute.").

The *Brady* court concluded that the Legislature did not intend the term "personal property" as used in the Penal Code section 487 to include wildlife. *Brady*, 234 Cal.App.3d at 959-60. It noted that the common-law crime of larceny, on which Penal Code section 487 is based, criminalized the taking of only certain forms of property. *Ibid.* Excluded from common-law larceny were such forms of property as crops, written instruments, dogs, and wildlife. *Ibid*. In writing the statutory crimes of larceny and grand theft, the Legislature expanded the definition of larceny to include all of these forms of property except wildlife. "Having chosen to change the common law and criminalize the taking of some property and animals, the Legislature's failure to punish, as theft, the taking of wild animals from their natural habitat, reflects the legislative intent to continue the common law rule that the unlawful taking or killing of animals in the wild is not larceny." *Ibid*.

Thus, *Brady's* holding encompasses only the narrow criminal law determination that in enacting Penal Code section 487 the Legislature had not intended to expand the common-law definition of larceny, which excluded many categories of property, to include the theft of wildlife. *Id.* at

959-60 (at 960: "the Legislature was aware of the precise issue that is now before us and decided not to expand the scope of the theft statute").

In holding that the Legislature had not intended to expand the common-law definition of larceny to make theft of wildlife a crime under Penal Code section 487, the *Brady* Court readily acknowledged that it was within the power of the Legislature to make wildlife one of the categories of property covered by Penal Code section 487: "It may be that the Legislature will find it necessary to amend Penal Code section 487 to include the poaching of fish and wild life from public areas. But under the current statutory scheme, they have not done so." *Brady*, 234 Cal.App.3d at 962.

Thus, defendants' authorities provide no support for their contention in the trial court that California's wildlife is not public trust property, and do not contradict the settled authority to the contrary.

II. Plaintiffs Have Standing To Bring An Action To Enforce The Public Trust In Wildlife

As *Truckee Lumber* and its progeny cited above show, wildlife is a form of public trust property and the destruction of wildlife public trust property is subject to judicial relief. That is, the people of California possess a primary right to be free from the unlawful destruction of their wildlife by defendants. The inquiry into plaintiffs' standing that follows focuses on who has the right to seek relief for the violation of that primary right. As the Supreme Court has held, the right to seek such relief is not limited to the state, but extends to every member of the public.

Every member of the public has standing to sue to enforce public trust property rights. *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 431 n.11 (1983). In *National Audubon*, the Supreme Court held that members of the public like plaintiff Peter Galvin and

environmental organizations like the Center for Biological Diversity have standing to sue those who are injuring public trust property to prevent and remediate that harm.

National Audubon was a public trust action brought by environmental organizations to prevent the defendant, the Department of Water and Power of the City of Los Angeles ("DWP"), from continuing to cause harm to migratory birds dependent on Mono Lake, a navigable water body protected by the public trust. 33 Cal.3d at 429-31. DWP was diverting water from nonnavigable streams flowing into Mono Lake, causing the lake to shrink and causing a variety of harms to the public trust. *Ibid*. As the Supreme Court noted, the harms to the public trust that the plaintiffs sought to prevent were not limited to harm to the waters of Mono Lake and its submerged lands: "The principal values plaintiffs seek to protect, however, are recreational and ecological—the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds." *National Audubon*, 33 Cal.3d at 435.

In *National Audubon*, DWP argued that the plaintiffs lacked standing to sue to enforce these public trust rights, just as defendants here contend that plaintiff Galvin and the Center for Biological Diversity lack standing to sue to enforce the public trust property rights in the wildlife defendants are killing. *National Audubon*, 33 Cal.3d at 431 n.11 ("DWP contended that plaintiffs lack standing to sue to enjoin violations of the public trust"). The Supreme Court flatly rejected this argument and held that members of the public have standing to sue those who are harming public trust property to enforce their public trust property rights: ". . . *Marks v. Whitney*, *supra*, 6 Cal.3d 251, expressly held that any member of the general public (p. 261) has standing to raise a claim of harm to the public trust. We conclude that plaintiffs have standing to sue to

protect the public trust." *National Audubon*, 33 Cal.3d at 431 n.11 (citations omitted); *accord*, *In re Water of Hallett Creek Stream System*, 44 Cal.3d 448, 472 (1988) ("This court has also recognized the standing of . . . any member of the general public to raise a claim of harm to the public trust."); *Marks v. Whitney*, 6 Cal.3d at 261 (private parties have standing to enforce public trust property rights against other private parties).

The Supreme Court's holding in *National Audubon* that members of the public have standing to enforce their public trust property rights applies here to give plaintiffs Galvin and the Center for Biological Diversity standing to seek relief for defendants' unlawful destruction of public trust wildlife property. Like plaintiffs' action, *National Audubon* was an action by private plaintiffs seeking injunctive and declaratory relief "[t]o abate th[e] destruction" caused by a defendant, DWP, that held no public trust property rights and was damaging public trust property. 33 Cal.3d at 431. (Like the defendants here, DWP, "a public utility owned and operated by the City of Los Angeles," *County of Inyo v. Public Utilities Commission*, 26 Cal.3d 154, 156 (1980), is neither the trustee of the public trust nor a beneficiary of the public trust, for DWP is neither the state nor one of the people of the state.)

Moreover, as the Supreme Court noted in *National Audubon*, its holding that members of the public have standing to sue to protect public trust property rights flowed directly from its earlier holding in *Marks v. Whitney* that in an action between private parties one private party has standing to enforce public trust property rights against the other. *Marks v. Whitney*, 6 Cal.3d at 261. In *Marks v. Whitney*, the defendant had asserted public trust property rights as a defense in a quiet title action; *National Audubon* affirmed that a plaintiff could assert public trust property rights as

a standalone cause of action against those who were causing harm to the public trust.

In *National Audubon*, the Supreme Court did not narrowly limit public trust standing for members of the public to only cases of harm to navigable waters and exclude cases of harm to other public trust property, as the trial court erroneously suggested (10/12/06 Order at 15). Nothing in the text or between the lines of the Supreme Court's decision in *National Audubon* offers any support for the notion that the Court intended to limit standing to sue for harm to the public trust to only certain categories of public trust interests, or to exclude the well-established public trust property right in wildlife.

Nor is there any basis in law or logic for treating the public trust property right in wildlife as a lesser, disfavored public trust property right, unworthy of the same protection as that accorded to navigable waters and submerged lands. The property right that members of the public possess in public trust wildlife is fully equal to the rights they possess in navigable waters and submerged lands, and its enforcement is fully as important in an era when many species are imperiled and facing not just decimation of their numbers but extinction. And the purpose of public trust standing is the same in both cases: it is to ensure vigorous protection of public trust property against private encroachment and destruction by allowing members of the public to enforce those rights even when the limited enforcement resources of the state are insufficient to the task.

Moreover, even with respect to standing to sue for harm to the public trust in Mono Lake, the Supreme Court did not narrowly limit the harms that give rise to standing to harms to the navigable waters themselves. Instead, it took an expansive view of the public trust interests that members of the public could sue to protect, and held that these included harm to birds

that use "the lake for nesting and feeding," harm to "the purity of the air," harm to "scenic views of the lake and its shore," and harm to other "recreational and ecological" values. *National Audubon*, 33 Cal.3d at 435; *see also id*. at 429-30 (describing harms to birds from the defendant's conduct). "Under *Marks v. Whitney*, *supra*, 6 Cal.3d 251, it is clear that protection of these values is among the purposes of the public trust." *National Audubon*, 33 Cal.3d at 435.

National Audubon's rule that members of the public have standing to seek relief for harm to the public trust against those who are causing the harm accords with the general jurisprudence of standing to sue. As the Supreme Court has unanimously stated: "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a . . . court, and not in the issues he wishes to have adjudicated. A party enjoys standing to bring his complaint into court if his stake in the resolution of that complaint assumes the proportions necessary to ensure that he will vigorously present his case. As Professor Jaffe has stated, we must determine standing by a measure of the intensity of the plaintiff's claim to justice." *Harman v. San Francisco*, 7 Cal.3d 150, 159 (1972) (citations and internal quotation marks omitted; ellipsis original). Another oft-cited formulation of standing is that of the Court of Appeal in *California Water & Telephone Co. v. County of Los Angeles*, 253 Cal.App.2d 16, 23 (1967). The court there held that a plaintiff has standing if the plaintiff has "suffered [or] is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented." 253 Cal.App.2d at 23.

Even if *National Audubon* did not exist to provide an independent basis for plaintiffs' standing to sue, plaintiffs would still have standing because they meet all of these various formulations of the traditional

standing test. Plaintiff Galvin and the thousands of members of the Center for Biological Diversity who are citizens of California have a direct ownership interest in the wildlife that defendants are unlawfully destroying, and have standing on that basis alone. The harm to their ownership interest that plaintiffs are suffering from defendants' wanton destruction of these magnificent raptors and other birds gives plaintiffs a "stake in the resolution of [their] complaint [that] assumes the proportions necessary to ensure that [they] will vigorously present [their] case," and gives them an "intens[e] . . . claim to justice." *Harman v. San Francisco*, 7 Cal.3d at 159. It is an "injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented." *California Water & Telephone Co. v. County of Los Angeles*, 253 Cal.App.2d at 23. Plaintiffs' vigorous litigation of this action for the past two and one-half years also demonstrates that all of the relevant facts and issues not just will be but already are being adequately presented and zealously advocated.

In addition, plaintiff Galvin and the Center's members and staff visit the Altamont Pass region and have researched, studied, observed, and sought protection for the bird populations and the individual birds that frequent the vicinity of Altamont Pass. Plaintiff Galvin and the Center's members and staff derive scientific, recreational, conservation, spiritual, and aesthetic benefits from the existence in the wild of the bird populations and the individual birds that frequent the vicinity of Altamont Pass. In particular, they observe, enjoy, study, and derive spiritual and aesthetic satisfaction from the Golden Eagles, Red-tailed Hawks, American Kestrels, Burrowing Owls, and birds of other species that inhabit or pass through the Altamont Pass region. All of these interests of plaintiffs are gravely harmed by defendants' killings of thousands of raptors and thousands of other birds.

The harms to these interests that plaintiffs are suffering by reason of defendants' wanton destruction of these magnificent raptors and other birds also gives plaintiffs a "stake in the resolution of [their] complaint [that] assumes the proportions necessary to ensure that [they] will vigorously present [their] case," and gives them an "intens[e] . . . claim to justice." *Harman v. San Francisco*, 7 Cal.3d at 159. These harms, too, are "injur[ies] of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented." *California Water & Telephone Co. v. County of Los Angeles*, 253 Cal.App.2d at 23. Plaintiffs thus have an active and vigorous stake in remedying defendants' unlawful ongoing killings of thousands of raptors and other birds.

Indeed, plaintiffs would have standing even under the more rigid and restrictive standing requirements that Article III of the federal Constitution imposes on the federal courts. *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 183 (2000) ("We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." " 'Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing.' ").

Accordingly, there is no merit to defendants' position that, notwithstanding the clear authority of *National Audubon*, they are free to ravage the public trust and destroy wildlife with impunity, forever extinguishing the public's property rights in the magnificent raptors and other birds they are killing, and that no Californian has standing to sue to stop their depredations. It would radically cut back California's existing common-law public trust doctrine and conflict with existing Supreme Court

precedent to hold either that California's wildlife is not public trust property, as defendants argued below, or that members of the public lack standing to raise a claim of harm to wildlife public trust property, as the trial court held.

More fundamentally, rejecting plaintiffs' cause of action for destruction of public trust wildlife property would be contrary to the public interest and to the public policy of the state, for it would subject California's fragile and threatened wildlife populations to industrial-scale destruction by wealthy, out-of-state corporations, as is occurring right now at Altamont Pass. Fish & Game Code § 1600 ("The protection and conservation of the fish and wildlife resources of this state are hereby declared to be of utmost public interest."). Rejecting this cause of action would also be contrary to this Court's duty as a court of equity established to render complete justice and enforce obligations created by law, and would turn it into an instrument of injustice. Civil Code §§ 1427 ("An obligation is a legal duty, by which a person is bound to do or not to do a certain thing."); 1428 ("An obligation arising from operation of law may be enforced in the manner provided by law, or by civil action or proceeding."); 3523 ("For every wrong there is a remedy.").

III. The Full Range Of Equitable Remedies Is Available In This Action For The Destruction Of Public Trust Property

For the reasons demonstrated above, plaintiffs have stated a cause of action for destruction of public trust property against defendants, and are entitled to a reversal of the trial court's judgment dismissing their action. Consideration of the particular remedies that may be available for their cause of action is not a part of that analysis: " 'The "cause of action" is to be distinguished from the "remedy" and the "relief" sought, for a plaintiff may frequently be entitled to several species of remedy for the enforcement

of a single right.' " *Bay Cities Paving & Grading, Inc. v. Lawyers Mutual Ins. Co.*, 5 Cal.4th 854, 860 (1993); *see also* 4 Witkin, *California Procedure* (4th ed. 1997), Pleading, § 24, p. 85, § 30, p. 92 ("Another basic distinction is between the cause of action (the primary right and duty, and the violation thereof) and the remedy or relief sought.").

Nevertheless, because defendants have repeatedly contested the forms of relief available for their unlawful destruction of public trust wildlife, it would serve judicial economy and materially advance the progress of this litigation on remand for this Court to affirm the availability of equitable relief for the public trust cause of action alleged by plaintiffs. *Ung v. Koehler*, 135 Cal.App.4th 186, 200 (2005) (addressing issue that "appears certain to arise on remand, and is an issue of law that can be decided on undisputed facts").

In a contested case like this one, "the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue." Code Civ. Pro. § 580, subd. (a); 4 Witkin, *California Procedure* (4th ed. 1997), Pleading, § 458, p. 555 ("the rule is well settled that in a contested case the plaintiff may secure relief different from or greater than that demanded").

In *Stafford Packing*, the Supreme Court held that a defendant's destruction of public trust wildlife property is subject to the full range of equitable remedies: "Having determined that the acts complained of constituted a wrongful invasion of those [public trust] property rights and having further determined that the threatened continuance thereof would work irreparable injury for which there was no adequate remedy at law, there was a complete foundation for equitable interposition and equitable relief." *Stafford Packing*, 193 Cal. at 730. "Equitable relief" includes injunctive relief, declaratory relief, and restitution.

The Supreme Court has held that injunctive relief is available to protect public trust wildlife property. *Stafford Packing*, 193 Cal. at 730; *Monterey Fish*, 195 Cal. at 564-66.

Declaratory relief is available as well. Declaratory relief is authorized generally by Code of Civil Procedure section 1060 ("Any person . . . who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties . . . ."). "Where . . . a case is properly before the trial court, under a complaint which is legally sufficient and sets forth facts and circumstances showing that a declaratory adjudication is entirely appropriate, the trial court may not properly refuse to assume jurisdiction; and if it does enter a dismissal, it will be directed by an appellate tribunal to entertain the action. Declaratory relief must be granted when the facts justifying that course are sufficiently alleged." *Columbia Pictures Corp. v. De Toth*, 26 Cal.2d 753, 762 (1945).

Restitution is another classic form of equitable relief. "[A] court of equity may exercise the full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the *status quo ante* as nearly as may be achieved." *People v. Superior Court*, 9 Cal.3d 283, 286 (1973) (affirming inherent equitable power of court of equity to award restitution). In particular, " 'a trial court has the inherent power to order restitution as a form of ancillary relief.' " *Fletcher v. Security Pacific Nat'l Bank*, 23 Cal.3d 442, 452 (1979). This includes substitutionary restitution. "Restitution is substitutionary when the plaintiff is given a money substitute for the thing or the entitlements taken from him." 1 D. Dobbs *Law of Remedies* (2d ed. 1993) § 4.4 at 625. "Money is

given because the specific item gained by the defendant is not capable of restoration. This may be because he has consumed or transferred or damaged it." *Id*. at 627.

Restitution here would not go to plaintiffs, but to the California Department of Fish and Game as the trustee of the property defendants have destroyed. The restitution would not become part of the state's general fund but would be impressed with the trust and its use would be limited to trust purposes. *National Audubon*, 33 Cal.3d at 439 n.20 ("revenues derived from the use of trust property ordinarily must be used for trust purposes"); *see also* Cal. Const., art. XVI, § 9 ("Money collected under any state law relating to the protection or propagation of fish and game shall be used for activities relating thereto.").

Moreover, the Supreme Court has held that the availability of statutory or regulatory remedies for the unlawful destruction of public trust property does not bar the availability of common-law equitable remedies. In *Monterey Fish*, when faced with the unlawful destruction of public trust wildlife, the Supreme Court stated: "[The defendant] is operating without a permit and in violation of the law. The circumstance that it may be prosecuted criminally for a violation of the penal provisions of the statute affords no adequate remedy for the civil wrong, which consists of an invasion of plaintiff's property right." 195 Cal. at 566. The Court also rejected the suggestion that an action at law for damages is an adequate substitute for equitable relief to protect public trust property. "It is further apparent that to relegate the state to an action for damages would be to defeat *pro tanto* the legislative policy of conserving the fish . . . . . [T]o permit the defendant to continue the taking and destruction of the property of plaintiff, even though the defendant be required to pay the full value thereof as damages, would be in effect to allow and to legalize the

unauthorized seizure and taking of property for a use other than a public use." 195 Cal. at 565. The Court therefore held that injunctive relief was appropriate. In *Stafford Packing*, the Supreme Court similarly held that injunctive relief was appropriate notwithstanding the existence of parallel statutory remedies because of the "*wrongfulness*" of the defendant's conduct "as an invasion of the *property rights* of the people." *Stafford Packing*, 193 Cal. at 730 (emphasis original).

Thus, the existence of statutory remedies for the destruction of public trust wildlife such as the damages remedy of Fish and Game Code section 2014 does not restrict the availability of equitable relief for the same conduct. The Court of Appeal so held in *Dept. of Fish and Game v. Anderson-Cottonwood Irrigation Dist.*, 8 Cal.App.4th 1554 (1992). That case was an action for injunctive relief to prohibit the defendant from killing fish with the blades of its irrigation pumps "incidental to lawful irrigation activity." *Id*. at 1560, 1568. The Court of Appeal held that, regardless of whether the defendant was liable for damages under the statutory remedy of section 2014, it was subject to the equitable remedy of injunctive relief because the statutory remedy was not exclusive. *Id*. at 1564 ("section 2014 does not immunize [the defendant] from injunctive relief"). This holding accords with the general rule that statutory remedies are cumulative to common-law remedies: " 'Statutes are not presumed to alter the common law otherwise than the act expressly provides.' " *Saala v. McFarland*, 63 Cal.2d 124, 130 (1965). "[W]here a statutory remedy is provided for a preexisting common law right, the newer remedy is generally considered to be cumulative, and the older remedy may be pursued at the plaintiff's election." *Rojo v. Kliger*, 52 Cal.3d 65, 79 (1990).

Thus, the full range of equitable remedies are potentially available in plaintiffs' action for destruction of public trust property.

CONCLUSION

The trial court's judgment dismissing the action should be vacated and the action remanded for further proceedings.

Dated: May 15, 2007

Respectfully submitted,

Richard R. Wiebe
Attorney for Appellants
Center For Biological Diversity, Inc., and
Peter Galvin

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204, subdivision (c)(1), I certify that this brief contains 11,276 words.

_____

Richard R. Wiebe

CERTIFICATE OF SERVICE

I am over the age of 18 years, a member of the State Bar of California, and not a party to this action. My business address is 425 California Street, Suite 2025, San Francisco, California, 94104, which is located in the county where the service described below took place.

On the date stated below, I served true and correct copies of the following document(s):

APPELLANTS CENTER FOR BIOLOGICAL DIVERSITY, INC., AND PETER GALVIN'S OPENING BRIEF; APPELLANTS' APPENDIX

by placing copies in sealed envelopes, addressed as shown below, and tendering them to an employee of Federal Express Corporation (FedEx), with delivery fees provided for, for overnight delivery:

George T. Caplan Kaye Scholer LLP 1999 Avenue of the Stars, Suite 1700 Los Angeles, CA 90067	William S. Berland Ferguson & Berland 1816 Fifth Street Berkeley, CA 94710	John N. Zarian Stoel Rives LLP 101 S. Capitol Boulevard Suite 1900 Boise, ID 83702
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Attorney for GREP Bay Area Holdings, Seawest Windpower, and Enxco	Attorney for FPL Group, Inc.; FPL Energy, LLC; Altamont Power, ESI Bay Area, ESI Bay Area GP, and Green Ridge Power	Attorney for Pacific Winds, Windworks, and Altamont Winds

In addition, I served the aforementioned document(s) on the following persons by placing copies in sealed envelopes, addressed as shown below, and providing for their delivery to the addressee by the method specified:

Via U.S. Mail	By Hand
The Hon. Bonnie Sabraw **Alameda County Superior Court** 1225 Fallon Street Oakland, CA 94612	**Supreme Court (four copies)** 350 McAllister St. San Francisco, CA

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: May 15, 2007

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Richard R. Wiebe