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FILED APPLICATION ONLY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

No. C083239

ENVIRONMENTAL LAW FOUNDATION, et al.,
Plaintiffs and Respondents,

v.

STATE WATER RESOURCES CONTROL BOARD, et al.,
Defendants and Respondents,

and

COUNTY OF SISKIYOU,
Defendant and Appellant.

On Appeal from the Superior Court of Sacramento County
(Case No. 34-2010-80000583, Hon. Christopher Krueger, Judge)

APPLICATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF APPELLANT COUNTY OF SISKIYOU

DAMIEN M. SCHIFF, No. 235101
JEREMY TALCOTT, No. 311490
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: dms@pacificlegal.org
E-mail: jt@pacificlegal.org

Attorneys for Amici Curiae
Pacific Legal Foundation, et al.

TO BE FILED IN THE COURT OF APPEAL

State of California, Court of Appeal, Third Appellate District

Court of Appeal Case Number: **C083239**
Superior Court Case Number: **34-2010-80000583**

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State bar number, and address)*:

Damien M. Schiff, No. 235101, Jeremy Talcott, No. 311490, Pacific Legal Foundation, 930 G Street, Sacramento, CA 95814

TELEPHONE NO.: **(916) 419-7111** FAX NO. (*Optional*): **(916) 419-7747**

E-MAIL ADDRESS (*Optional*): **jt@pacificlegal.org**

ATTORNEY FOR (*Name*): **Amici Curiae Pacific Legal Foundation and California Farm Bureau Federation**

APPELLANT/PETITIONER: **County of Siskiyou**
RESPONDENT/REAL PARTY IN INTEREST: **Environmental Law Found., et al.**

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [✓] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following parties (*name*):

Amici Pacific Legal Foundation & Cal. Farm Bureau Federation

2.a. [✓] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of Interest (*Explain*):
(1)	
(2)	
(3)	
(4)	

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

/s/ Jeremy Talcott
JEREMY TALCOTT

Date: **August 10, 2017**

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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APPLICATION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE VANCE W. RAYE, PRESIDING JUDGE OF THE CALIFORNIA COURT OF APPEAL, THIRD APPELLATE DISTRICT:

Pursuant to California Rule of Court 8.882(d),[1] Pacific Legal Foundation and the California Farm Bureau Federation respectfully apply to file the accompanying amicus brief in support of Appellant County of Siskiyou. The Proposed Amici are familiar with the parties' arguments. They believe that the attached brief will aid the Court in its consideration of the issues presented in this case. In particular, the brief provides useful background as to the historical scope of the public trust doctrine, and details significant questions of state liability and constitutional avoidance raised by a judicial extension of the public trust doctrine to the use of groundwater.

[1] The Proposed Amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission. No person other than the Proposed Amici, their members, or their counsel made a monetary contribution to the brief's preparation or submission.

IDENTITY AND INTEREST OF AMICI

Amicus Pacific Legal Foundation (PLF) is the nation's oldest public interest law firm litigating for property rights, limited government, and individual liberty. Since its founding in 1973 in Sacramento, California, PLF has litigated nationwide for the preservation of property rights. PLF and its supporters believe that expanding the public trust doctrine to groundwater extraction will significantly harm water rights in California.

Amicus California Farm Bureau Federation (CFBF) is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing more than 48,000 agricultural, associate, and collegiate members in 56 counties. Many of the CFBF's members are engaged in livelihoods that directly depend on their access to groundwater. A decision restricting the ability of Californians to rely on groundwater as a resource could have catastrophic consequences for California agriculture and farming families.

The superior court's decision unsettles the expectations of large numbers of farmers and ranchers throughout the state who have relied on groundwater to sustain their livelihoods—especially during periods of natural and man-made drought conditions in

California. This Court should reverse the opinion of the superior court, and hold that the public trust does not extend to the use of groundwater, even where a groundwater basin is hydrologically connected to navigable waters.

I

THE JUDICIARY SHOULD NOT UNILATERALLY EXTEND PUBLIC TRUST CONSIDERATIONS TO THE REASONABLE USE OF GROUNDWATER

The history of the public trust doctrine is a contentious one. *See, e.g.*, James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 Duke Envtl. L. & Pol'y F. 1 (2007). The doctrine's initial adoption in America was limited to submerged lands beneath navigable waters and tidelands, which are held by the states in trust to preserve the public uses of navigation, commerce, and fishing. *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 435 (1892).

In a string of decisions, the California Supreme Court expanded the concept of the public trust. In California, the doctrine extends to protecting general recreational uses and preserving tidelands in their natural state. *Marks v. Whitney*, 6 Cal. 3d 251 (1971). The public trust has also been applied to prevent diversions of tributaries that are necessary to maintain navigable bodies of

water. *Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 437 (1983). Though these expansions of the doctrine were far-reaching and unprecedented,[2] the doctrine still contained inherent limits, such as the recognition that it could not be expanded to non-navigable streams that do not affect navigable waters. *Id.*; *Golden Feather Cmty. Ass'n v. Thermalito Irrigation Dist.*, 209 Cal. App. 3d 1276, 1284 (1989).

A. The History of the Public Trust Doctrine in California Does Not Support Its Extension to the Use of Groundwater

No published California decision has applied the public trust doctrine to activities only indirectly affecting surface waters. *See, e.g., Nat'l Audubon Soc'y*, 33 Cal. 3d at 440 ("Most decisions and commentators assume that 'trust uses' relate to uses and activities in the vicinity of the lake, stream, or tidal reach at issue."); *Santa Teresa Citizen Action Grp. v. City of San Jose*, 114 Cal. App. 4th 689, 709 (2003) ("As respondents point out, the doctrine has no direct application to groundwater sources."). Instead, the California courts have always required as a trigger for the trust's application an immediate and direct connection to surface water,

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[2] *See generally* Janice Lawrence, Lyon *and* Fogerty*: Unprecedented Expansions of the Public Trust*, 70 Cal. L. Rev. 1138 (1982).

as well as use that is directly harmful to trust uses. *See Nat'l Audubon Soc'y*, 33 Cal. 3d at 436-37 ("If the public trust doctrine applies to constrain fills which *destroy* navigation and other public trust uses in navigable waters, it should equally apply to constrain the extraction of water that *destroys* navigation and other public interests.") (emphases removed and added).

Only in Hawaii has the judiciary extended the public trust doctrine to groundwater, and that was done under the authority of recent constitutional amendments. *See* Jack Tuholske, *Trusting the Public Trust: Application of the Public Trust Doctrine to Groundwater Resources*, 9 Vt. J. Envtl. L. 189, 219-20 (2008); Joseph W. Dellapenna, *Changing State Water Allocation Laws to Protect the Great Lakes*, 24 Ind. Int'l & Comp. L. Rev. 9, 38 (2014) (noting that Hawaii is the only state to judicially apply the public trust doctrine to groundwater). Absent any similar constitutional authority, the superior court opinion extends public trust considerations to indirect impacts caused by the use of groundwater. JA 1981-95.

B. Important Questions of Significant Public Policy Should Be Left to the Legislature

A decision that opens the door to regulation of groundwater imposed under the guise of protecting public trust waters and resources raises the question of unlawful delegation. "An unconstitutional delegation of legislative power occurs when the Legislature confers upon an administrative agency unrestricted authority to make fundamental policy decisions." *Samples v. Brown*, 146 Cal. App. 4th 787, 804 (2007). Here, the extension of public trust protections to groundwater necessarily invites complicated balancing of rights by state and local administrative agencies before issuing permits for the extraction of groundwater—despite the long-standing constitutional and statutory rights adopted by the people and past legislatures of California.

The same concerns raised by the doctrine of unlawful delegation by the Legislature apply to a judicial opinion conferring the complicated balancing of rights involved in groundwater use to such agencies. Since fundamental policy decisions cannot be given away by the Legislature, courts should exercise caution before shifting such a decision away from the Legislature. *Cf. Kugler v.*

Yocum, 69 Cal. 2d 371, 376-77 (1968) (Noting that the unlawful delegation doctrine "rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues.").

The opinion is also questionable in light of the Legislature's recently passed, comprehensive groundwater regulation scheme, the Sustainable Groundwater Management Act of 2014.[3] S.B. 1168, S. (Cal. 2014); A.B.1739, Assemb. (Cal. 2014); and S.B. 1319, S. (Cal. 2014). California courts have long disfavored judicial policymaking in the realm of the common law. For example, the California Supreme Court has previously held that the judiciary should not define the scope of the public nuisance tort, because "[s]uch declarations of policy should be left for the legislature." *People v. Lim*, 18 Cal. 2d 872, 880 (1941). Respondents both assert that the SGMA "preserves" State Water Resources Control Board's

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[3] The legislation creates a framework for the sustainable use of groundwater through the creation of local and regional Groundwater Sustainability Agencies. *See, e.g.*, Univ. of Cal., Div. of Agric. & Nat. Res., *Sustainable Groundwater Management Act*, http://groundwater.ucdavis.edu/SGMA/. The question of takings liability as to that Act are a separate—though also unresolved—question. *See* Micah Green, Comment, *Rough Waters: Assessing the Fifth Amendment Implications of California's Sustainable Groundwater Management Act*, 47 U. Pac. L. Rev. 25, 42-47 (2015) (discussing possible application of regulatory takings doctrines to the Sustainable Groundwater Management Act).

(SWRCB) public trust authority under the common law simply because it does not include language to "exclude" or "alter" such authority from the SWRCB. Answering Brief of SWRCB at 24-26; Answering Brief of Env. Law Found. at 29-34. But the inquiries here are whether the common law in California has ever required such public trust considerations of the extraction of groundwater—it has not[4]—and whether the Legislature has shown an intent to expand public trust considerations to groundwater. This Court should not endorse an attempt to accomplish through judicial fiat what the Legislature has declined to do through its own comprehensive scheme of groundwater regulation.

Because there is no historical or legislative justification for a unilateral extension of the public trust doctrine by the judiciary, this Court should reverse the opinion of the superior court and hold that the public trust doctrine does not apply to the use of groundwater.

[4] *See*, *supra*, Part I-A.

II

THE APPLICATION OF PUBLIC TRUST OBLIGATIONS TO THE EXTRACTION OF GROUNDWATER REMOVES ANY LIMITING PRINCIPLE TO THE PUBLIC TRUST DOCTRINE

In a single footnote, the superior court dismissed the argument of Amici that the expansion of the public trust unmoors it from any limiting principle. JA 1991 n.8. The court stated that the question of whether activities "with more remote connection to waterways"[5] might "be too attenuated to fall within the public trust doctrine" was a question left for another day, reasoning that the application was limited to the direct "diversion" or "extraction" of water that affects navigable waterways. *Id.*

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[5] Amici PLF and CFBF noted below that numerous activities have indirect—though potentially significant—effects on the health of navigable waterways and public trust activities. *See, e.g.*, Mark Gold, et al., *2015 Environmental Report Card for Los Angeles County*, http://environment.ucla.edu/reportcard/article1497.html (roads and wildfires are significant sources of dust that ultimately pollute water bodies through deposition); State Water Resources Control Board, *Storm Water Pollution*, http://www.swrcb.ca.gov/water_issues/programs/outreach/erase_waste/swpollution.shtml (storm water pollution from "trash, cigarette butts, animal waste, pesticides, motor oil and other contaminants" creates "unhealthy surface waters, such as lakes, creeks and rivers, unhealthy ocean and beach conditions, and street and neighborhood flooding during the rainy season").

But this distinction significantly understates the logical impact of the decision. Since all water, surface or ground, originates from precipitation, numerous practices exist that divert rainfall, and could thus have significant impacts on the levels of navigable streams and associated public trust activities. *See* USGS, *Streamflow—The Water Cycle*, https://water.usgs.gov/edu/watercyclestreamflow.html.

A. Many Human Activities Directly Divert Water That Would Otherwise Directly Run Off Into Streams or Infiltrate Into Hydrologically Connected Groundwater Basins

Respondent Environmental Law Foundation (ELF) claims that the trial court opinion can be limited to extractions that have "deleterious effects on the navigable water of the Scott River . . . ." Answering Brief of ELF at 23. But many human activities substantially alter rates of erosion, surface runoff, infiltration, overland flow, and evapotranspiration, all of which plausibly could affect levels of navigable streams by directly diverting water that would otherwise enter the stream through runoff or infiltration into groundwater basins that are connected to navigable streams. *See* USGS, *Surface Runoff—The Water Cycle*, https://water.usgs gov/edu/watercyclerunoff.html; *and* USGS, *Infiltration—The*

Water Cycle, https://water.usgs.gov/edu/watercycleinfiltration html. Indeed, "much of the water in rivers comes directly from runoff from the land surface," and many human activities significantly affect levels of surface runoff, such as removal or alteration of vegetation, grading, paving, development, and the construction of drainage networks. *See* USGS, *supra*, *Surface Runoff—The Water Cycle*. Additionally, the removal or alteration of vegetation, agricultural uses, tillage, grading, development, and the addition of impervious surfaces all have "a great impact" on levels of infiltration that recharge groundwater basins. *See* USGS, *supra*, *Infiltration—The Water Cycle*.

B. Impacts of Human Activities on Navigable Waterways May Be Difficult to Predict or May Have Effects That Vary Over Time

Adding to this complexity is the fact that such trust-affecting behavior may have both aggravating and mitigating effects. For example, grading and replacing vegetation on a plot of land near a navigable waterway could increase direct surface runoff into the waterway, while also decreasing infiltration, diverting water that would otherwise replenish a hydrologically connected groundwater basin. *See, e.g.*, Food & Agric. Org. of the United Nations, *Effects of Plant Cover*, http://www.fao.org/docrep/t1765e/t1765e0h.htm.

Nor are the effects constant, activities such as changes in vegetation can temporarily reduce infiltration of water as root systems develop, then increase infiltration as the roots rot and create "tubes stabilized by organic matter" in the soil. *Id.*

Such human activities certainly qualify as a "diversion" of water, and may have far more substantial impacts on navigable waterways than the extraction of groundwater, through the myriad complex interactions that constitute streamflow of navigable waterways. *See, e.g.*, USGS, *supra*, *Streamflow—The Water Cycle*. Requiring public trust consideration of the extraction of groundwater due to its direct hydrological connection to a navigable waterway necessarily places many of these other activities under threat of public trust regulation. Contrary to the lower court's view, this threat cannot be avoided simply by declining to extend the doctrine to groundwater itself.[6] Any activity (such as groundwater pumping) that diverts or extracts water—leading to "less water in a navigable river" and "harming

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[6] Nor could it. Even under the expanded view of the doctrine in California, "the applicability of the public trust doctrine . . . turn[s] upon whether a body of water is . . . navigable in fact." *State v. Superior Court (Lyon)*, 29 Cal. 3d 210, 227 (1981).

public trust uses"—could require a consideration of the impact on the public trust.

Because the superior court's opinion lacks any limiting principle, this Court should reverse and hold that the public trust doctrine applies only to activities that—unlike groundwater extraction—directly affect navigable waters and tidelands, and protected uses of those waters.

III

THE AVOIDANCE CANON ENCOURAGES COURTS TO AVOID RAISING UNNECESSARY AND DIFFICULT CONSTITUTIONAL ISSUES

A basic canon of interpretation directs courts to construe statutes so as not to raise difficult constitutional questions. *In re Smith*, 42 Cal. 4th 1251, 1269 (2008). Though the purpose of the canon is prudential, it prevents the courts from deciding unnecessary issues by presuming that the Legislature does not casually seek to raise such difficult issues. *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 509 (1996). The California Supreme Court has observed that it "'will not decide constitutional questions where other grounds are available and dispositive of the issues of the case.'" *Santa Clara Cnty. Local Transp. Auth. v. Guardino*, 11 Cal. 4th 220, 230 (1995) (quoting *Palermo v. Stockton Theatres,*

Inc., 32 Cal. 2d 53, 66 (1948)). This same rationale should direct the Court to reasonably interpret a common law doctrine, such as the public trust doctrine, in a way that avoids serious constitutional questions. Because a judicial extension of the public trust doctrine to groundwater raises several such issues, this Court should decline such an interpretation.

A. The Extension of the Public Trust Doctrine to Groundwater May Constitute a Judicial Taking of Property Requiring Compensation Under the Fifth and Fourteenth Amendments

Under the Fifth Amendment to the United States Constitution (applied to the states through the Fourteenth Amendment), government may not take private property for a public use without paying just compensation to the owner. *See* U.S. Const. amend. V; *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005). This limitation on government action applies to action by state courts as well as state legislatures. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). Neither the legislature nor courts of the state may "by *ipse dixit* . . . transform private property into public property without compensation." *Id.* After all, "it would be absurd to allow a state to do by judicial decree what the Takings Clause forbids it to do by legislative fiat."

Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 714 (2010) (plurality opinion); *see also Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. 1985), *vacated on other grounds by* 477 U.S. 902 (1986) ("New law . . . cannot divest rights that were vested before the court announced the new law." (citing *Hughes v. Washington*, 389 U.S. 290, 295-98 (1967) (Stewart, J., concurring))).

The law of judicial takings is in early development, but an analysis under the relevant tests for legislative/executive takings is instructive. *See* D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. Rich. L. Rev. 903, 917 (2011); Ilya Somin, Stop the Beach Renourishment *and the Problem of Judicial Takings*, 6 Duke J. Const. L. & Pub. Pol'y 91, 104-06 (2011). That analysis consists of two steps. First, is there a property right that has been negatively affected by legislative/executive action? *See M&J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995). If so, then is the quality or quantity of that impact significant enough to require compensation? *See id.* Although not all land-use regulation that diminishes previously existing property rights implicates the protections of the Fifth Amendment,

a regulation that "goes too far" triggers the just compensation requirement. *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Regulatory takings analyses can be divided into three categories: physical appropriations, denial of all beneficial use, and a partial denial requiring ad hoc analysis. *Lingle*, 544 U.S. at 539. The first two categories are considered *per se* takings and automatically trigger the Fifth Amendment requirement of compensation. *Id.* First, where government regulation effects a physical invasion of property—however minor—it will be considered a regulatory taking. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Second, where a law completely deprives an owner of "all economically beneficial uses" of its property, government must compensate for the loss. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (emphasis removed). Regulations that do not fit within those two categories are analyzed under the multi-factor, ad hoc inquiry established in *Penn Cent. Transp. Co. v. New York City*. 438 U.S. 104 (1978). Under this inquiry, a court will consider the economic impact of the regulation, the investment-backed expectations of the property owner at the time he acquired the property, and the nature of the governmental action. *Id.* at 124.

Analysis under the Takings Clause is especially appropriate where a judicial decision "intentionally seizes private property to achieve a legitimate public end." *See* Eduardo M. Peñalver & Lior Jacob Strahilevitz, *Judicial Takings or Due Process?*, 97 Cornell L. Rev. 305, 312 (2012). The judicial expansion of the public trust doctrine to the lawful, reasonable use of underlying groundwater raises a serious risk of a judicial taking.

The right to use of groundwater underlying property is a long-established one in California. *See Peabody v. City of Vallejo*, 2 Cal. 2d 351, 370 (1935) (citing *Katz v. Walkinshaw*, 141 Cal. 116, 150 (1903)). Although landowners do not own the groundwater beneath their property, they do have a long-established right under the California Constitution to "reasonable and beneficial uses" of such water. *See* Cal. Const. art. X, § 2; *see also City of Santa Maria v. Adam*, 211 Cal. App. 4th 266, 278 (2012), *as modified on denial of reh'g* (Dec. 21, 2012). This overlying right is "based on ownership of the land and is appurtenant thereto." *City of Pasadena v. City of Alhambra*, 33 Cal. 2d 908, 925 (1949).

Because water rights in California are usufructuary, eliminating the existing right of use (like through public trust-inspired pumping restrictions) is analogous to government

regulations that are "from the landowner's point of view, the equivalent of a physical appropriation." *Lucas*, 505 U.S. at 1017 (finding a categorical taking of property when a regulation deprives an owner of all economically viable use of a property). After all, "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." *United States v. Causby*, 328 U.S. 256, 266 (1946) (finding a taking where the glide path of a military aircraft caused significant disruption to the agricultural use of land as a chicken farm). The loss of all rights to the reasonable use of underlying groundwater could have no less devastating an impact on landowners throughout multiple regions of California, and should be analyzed accordingly. *See* Josh Patashnik, *Physical Takings, Regulatory Takings, and Water Rights*, 51 Santa Clara L. Rev. 365, 367 (2011) (arguing in favor of a categorical takings rule for water rights); Jesse W. Barton, Note, Tulare Lake Basin Water Storage District v. United States*: Why it Was Correctly Decided and What This Means for Water Rights*, 25-SPG Environs Envtl. L. & Pol'y J. 109, 143-44 (2002) (same); *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1296

(Fed. Cir. 2008) (applying the categorical physical takings test to a water rights claim).

Even if a court declined to review a court's expansion of the public trust doctrine to groundwater under the categorical takings standards, compensation would likely still be required under the multi-factor test established in *Penn Cent. Transp. Co.*, 438 U.S. at 124. The imposition of the public trust doctrine on use of groundwater could have a significant negative economic impact on many landowners, and frustrate long-existing, investment-backed expectations to a water right that has never before been so limited. *See id.* ("The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations."); *see also* Huffman, *supra*, at 103 ("[A] careful review of the history—the precedent—does not make the case for extended application of the public trust doctrine."); Lawrence, *supra* n.2, at 1142 (until the early 1980s, "California public trust law dealt almost entirely with the tidelands"). Nor could the sudden judicial extension of the public trust doctrine to groundwater be considered a background principle of state property law. *Cf. Palazzolo v. Rhode Island*, 533 U.S. 606, 630

(2001) ("A law does not become a background principle for subsequent owners by enactment itself."); *see also Webb's Fabulous Pharmacies*, 449 U.S. at 164 (holding that the Fifth Amendment prohibitions on "transforming private property into public property" apply equally to the courts as the legislature).

The potential liability could be far-reaching. Groundwater accounts for 40% of water use in California. Pub. Policy Inst. of Cal., *Just the Facts: Groundwater in California*, http://www.ppic.org/publication/groundwater-in-california/ (May 2017). Eighty-five percent of Californians rely on groundwater for some portion of their annual water use. *Id.* Groundwater is the only source of water for many communities in California, and it is also a critical resource for many farmers and ranchers in the Central Valley and Central Coast agricultural regions. *Id.* As applied to these individuals, the economic disruption to reasonable, investment-backed expectations (and potential resulting damages) could be substantial.

B. Applying the Public Trust Doctrine to Groundwater Extraction May Deprive Landowners of Property Without Due Process of Law in Violation of the Fourteenth Amendment

Even if compensation is not required under the Takings Clause, a radical expansion of the public trust doctrine to groundwater may be constitutionally suspect. The Fourteenth Amendment prohibits state courts from depriving a person of property without due process of law. *See Stop the Beach Renourishment*, 560 U.S. at 735 (Kennedy, J., concurring in part and in the judgment) (discussing various authorities); *Hughes*, 389 U.S. at 296-97 (Stewart, J., concurring). Due process requires that a court's decision-making follow accepted norms of common law and statutory interpretation. *See Stop the Beach Renourishment*, 560 U.S. at 736-37 (citing Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 Utah L. Rev. 379, 435)). A court decision that radically and unexpectedly changes the law, and thereby deprives a person of property, violates the Due Process Clause. Walston, *supra*, at 435; Michael R. Salvas, *A Structural Approach to Judicial Takings*, 16 Lewis & Clark L. Rev. 1381, 1434 (2012);

David Wagner, Note, *A Proposed Approach to Judicial Takings*, 73 Ohio St. L.J. 177, 211 (2012).

As noted, the right to the reasonable use of groundwater is a long-established one in California, subject to statutory and constitutional protections and limitations. A judicial decision placing public trust limitations on the use of groundwater therefore raises significant constitutional questions as to whether property has been taken without just compensation or deprived without due process of law. Because the canon of constitutional avoidance directs courts to avoid such significant issues, this Court should reverse the trial court decision and find that the extraction of groundwater is not subject to the public trust doctrine.

CONCLUSION

Pacific Legal Foundation and the California Farm Bureau Federation respectfully request that this Court reverse the opinion

of the superior court, and hold that the public trust doctrine does not apply to the extraction of groundwater.

DATED: August 10, 2017.

Respectfully submitted,

DAMIEN M. SCHIFF
JEREMY TALCOTT

By /s/ Jeremy Talcott

Attorneys for Amici Curiae
Pacific Legal Foundation, et al.

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANT AND APPELLANT is proportionately spaced, has a typeface of 13 points or more, and contains 4,140 words.

DATED: August 10, 2017.

/s/ Jeremy Talcott
JEREMY TALCOTT

DECLARATION OF SERVICE

I, Jeremy Talcott, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On August 10, 2017, a true copy of APPLICATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF APPELLANT COUNTY OF SISKIYOU was electronically filed with the Court through truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's efiling system. Those who are not registered will receive a hard copy via first-class U.S. Mail, postage thereon fully prepaid, and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

JAMES R. WHEATON
Environmental Law Foundation
1736 Franklin Street
9th Floor
Oakland, CA 94612

RICHARD M. FRANK
University of California, Davis
School of Law
1 Shields Avenue
Davis, CA 95616

GLEN H. SPAIN
Pacific Coast Fed'n of Fishermen's Ass'ns, et al.
Northwest Regional Office
P.O. Box 11170
Eugene, OR 97440-3370

DANIEL FUCHS
Office of the State Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

RODERICK E. WALSTON
Best Best & Krieger LLP
2001 N. Main Street
Suite 390
Walnut Creek, CA 94596

JAMES M. UNDERWOOD
Siskiyou County Counsel
P.O. Box 659
Yreka, CA 96097

COURT CLERK
Sacramento County Superior Court
710 Ninth Street
Sacramento, CA 95814

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 10th day of August, 2017, at Sacramento, California.

/s/ Jeremy Talcott
JEREMY TALCOTT