PACIFIC LEGAL FOUNDATION

September 2, 2014

Honorable Chief Justice Tani G. Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, CA 94102

Re: *County of Siskiyou v. Superior Court*, No. S220764

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The California Farm Bureau Federation is the state's largest farm organization, comprising 53 county Farm Bureaus and representing over 32,000 farm families and 74,000 individual members in 56 counties. The County of Siskiyou has petitioned this Court for a writ of mandate to review the decision of the Superior Court for the County of Sacramento.[1] That decision radically expands the public trust doctrine to cover groundwater extraction, and thereby threatens the property rights and livelihoods of Farm Bureau members in Siskiyou County and throughout the state. Although this Court has, over the last several decades, broadened the public trust doctrine to cover a number of activities and waters not traditionally falling within the doctrine's ambit, the Court has never applied the doctrine to groundwater. Application of the public trust doctrine to groundwater extraction would eliminate any stopping-point to the doctrine's further expansion, and would raise serious constitutional issues of uncompensated takings of groundwater rights under the Fifth and Fourteenth Amendments to the United States Constitution.

The decision below raises these serious issues at a moment when farmers throughout the state have been forced, on account of natural and man-made drought conditions, to rely on increased groundwater pumping to sustain their livelihoods. *See, e.g.*, Jim Carlton, *California Drought Squeezes Wells*, Wall St. J., Aug. 28, 2014[2]; Erica Gies, *California's Underground Water War*, The

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[1] The Farm Bureau was allowed to participate below as amicus after its motion to intervene was denied. That denial is currently on appeal before the Third District. *See Envtl. Law Found. v. State Water Resources Control Bd.*, No. C067600.

[2] *Available at* http://online.wsj.com/articles/california-drought-squeezes-wells-1409268495.

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Atlantic, Aug. 28, 2014[3]; Brian Clark Howard, *California Drought Spurs Groundwater Drilling Boom in Central Valley*, Nat'l Geographic, Aug. 15, 2014.[4]

Any judicial decision that might restrict the ability to rely on this important water supply threatens catastrophic consequences for California agriculture. Accordingly, the Farm Bureau respectfully requests that the Court exercise its discretionary authority under Rule 8.486 to accept Siskiyou County's writ and to decide the scope of the public trust doctrine as applied to groundwater.[5]

THE COURT SHOULD HEAR THE COUNTY'S WRIT PETITION TO DETERMINE AN IMPORTANT AND PRESSING QUESTION OF STATEWIDE SIGNIFICANCE CONCERNING THE SCOPE OF THE PUBLIC TRUST DOCTRINE AS APPLIED TO GROUNDWATER

Relying on this Court's decision in *National Audubon Society v. Superior Court*, 33 Cal. 3d 419 (1983), the Superior Court below held that the public trust doctrine extends to groundwater extraction that affects navigable waters. *See* County Appendix at 22-25. Traditionally, the public trust doctrine in this country applied only to tidelands and navigable waters. *See Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 436-37 (1892). And when it applied, the trust protected only navigation, commerce, and fishing uses. *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 521 (1980). During the latter half of the twentieth century, however, this Court expanded the trust to include diversions from tributaries of navigable waters that affect those waters, *Nat'l Audubon Soc'y*, 33 Cal. 3d at 437, and to cover recreational and ecological uses of public trust waters, *Marks v. Whitney*, 6 Cal. 3d 251, 259-60 (1971). As radical as these expansions of the doctrine may be on their own terms, *see generally* Janice Lawrence, *Lyon and Fogerty: Unprecedented Extensions of the Public Trust*, 70 Cal. L. Rev. 1138 (1982), the decisions at least implicitly recognized some limitation to the

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[3] *Available at* http://www.theatlantic.com/technology/archive/2014/08/californias-epic-water-wars/379294/.

[4] *Available at* http://news.nationalgeographic.com/news/2014/08/140815-central-valley-california-drilling-boom-groundwater-drought-wells/.

[5] The Rules of Court do not expressly authorize the submission of a letter in support of a writ application. *See* Cal. R. Ct. 8.485-8.493 (rules governing writs of mandate in the Supreme Court). *Cf.* Cal. R. Ct. 8.500(g) (authorizing amicus letters in support of petitions for review). Nevertheless, just as amici curiae can provide the Court helpful information in determining whether to grant a petition for review, so too can they present the Court helpful information in determining whether to accept a writ application. The Farm Bureau respectfully suggests that this letter will assist the Court in its determination whether to accept the County's writ.

doctrine's scope. The Superior Court's decision blows away these limitations and thereby raises a host of serious constitutional and policy questions.

A. The Superior Court's Decision Provides No Stopping-Point to Public Trust Doctrine Regulation

Prior to the Superior Court's decision below, no published decision from the California judiciary had held that activities only indirectly affecting surface waters fall within the public trust doctrine's scope. *Cf. 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 Group v. City of San Jose*, 114 Cal. App. 4th 689, 709 (2003) (observing that the doctrine "has no direct application to groundwater sources"). Rather, this Court and the Courts of Appeal have consistently maintained that a necessary (although not sufficient) condition for application of the public trust is an immediate and direct connection to surface water. *See California v. Superior Court (Lyon)*, 29 Cal. 3d 210, 227 (1981) ("[T]he applicability of the public trust doctrine does not turn upon whether a body of water is subject to the ebb and flow of the tide, but upon whether it is navigable in fact."); *Personal Watercraft Coal. v. Bd. of Supervisors*, 100 Cal. App. 4th 129, 144 (2002) ("The public trust doctrine is no longer confined to coastal areas lapped by the waves of the Pacific, but extends to nontidal bodies such as inland waterways and lakes, the lands beneath them, as well as any streams and tributaries that affect any navigable waters."). *Cf. Golden Feather Community Ass'n v. Thermalito Irrig. Dist.*, 209 Cal. App. 3d 1276, 1284-87 (1989) (declining to extend the public trust doctrine to man-made reservoirs and nonnavigable streams that do not affect navigable waters). The only state judiciary clearly to have extended the public trust to groundwater—Hawaii—has done so based in part on recent state 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) (discussing *In re Water Use Permit Applications*, 9 P.3d 409 (Haw. 2000)). The California judiciary, however, has no parallel authority on which to justify a similar expansion of the doctrine.

One very good reason why no California court—other than the Superior Court below—has extended the doctrine beyond surface water is that the doctrine would then have no stopping point. To be sure, groundwater extraction can affect surface waters. But it is also true that many things, such as vehicle emissions, pesticides, and impervious pavement can affect surface waters even though they have only a remote connection to such waters. *See, e.g.*, Keith D. Stolzenbach, UCLA Inst. of the Env't & Sustainability, Atmospheric Deposition[6] (observing that roads and wild fires are a significant source of dust that ultimately pollutes water bodies through atmospheric deposition); State Water

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[6] *Available at* http://www.environment.ucla.edu/reportcard/article1497.html.

Res. Control Bd., Storm Water Pollution[7] (observing that storm water pollution from trash, cigarette butts, motor oil, and the like leads to "unhealthy surface waters, such as lakes, creeks and rivers, [as well as] unhealthy ocean and beach conditions"). The Superior Court's decision makes all of these activities potentially subject to public trust regulation, notwithstanding their seemingly remote connection to waters traditionally considered to be within the public trust.

B. The Superior Court's Decision Usurps the Legislature's Authority

By extending the doctrine to groundwater extraction, the Superior Court's decision opens the door to the State Water Resources Control Board's regulation of all sorts of productive activity far removed from navigable waters and the original purposes of the doctrine, under the guise of protecting trust waters. That interpretation raises a serious question of an unconstitutional delegation of law-making power to an administrative agency. *See, e.g.*, *Samples v. Brown*, 146 Cal. App. 4th 787, 804 (2007) (the Legislature cannot pass off "fundamental policy decisions" to an administrative agency). Further, it conflates the traditional public trust doctrine with the existing "statutory" trust doctrine that the Legislature has created to govern wildlife. *See Envtl. Prot. Info. Ctr. v. Cal. Dep't of Forestry & Fire Prot.*, 44 Cal. 4th 459, 515 (2008).

The Superior Court dismissed these concerns on the grounds that they represent mere "hypotheticals that may arise in the future." County Appendix at 25 n.8. Of course, the very nature of hypotheticals is that they are *hypothetical*, *i.e.*, conjectural. Nevertheless, hypotheticals are valuable because they can reveal the logical conclusions of adopting a rule, the ultimate impacts of which may not be immediately appreciated, such as with the decision below. The aforementioned hypotheticals reveal that the rationale of the Superior Court's decision—"If [X] impairs the public's right to use a navigable waterway for trust purposes, there is no sound reason in law or policy why the public trust doctrine should not apply," County Appendix at 25—admits of no limit other than the fertile imagination of environmental advocates and zealous agency bureaucrats.

Further, the timing of the Superior Court's decision is acutely inopportune in light of the Legislature's passage last week of Assembly Bill 1739 and Senate Bill 1168, the first major statewide legislative effort to regulate groundwater use.[8] Judicial and administrative intrusion into the controversial matter of groundwater regulation seems particularly inapt given the Legislature's recent interest in dealing with many of the concerns that otherwise would be addressed by the public trust doctrine.

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[7] *Available at* http://www.swrcb.ca.gov/water_issues/programs/outreach/erase_waste/swpollution.shtml.

[8] As of this writing, the Governor has not yet signed these bills into law.

C. The Superior Court's Decision Raises Serious Questions Regarding the Taking of Water Rights

One of the most important impacts ignored by the Superior Court is the risk that its decision will lead to the taking of private property without just compensation. The use of groundwater is a legally protected property right. *See Peabody v. City of Vallejo*, 2 Cal. 2d 351, 370-71 (1935); *Katz v. Walkinshaw*, 141 Cal. 116, 150 (1903). Application of the public trust doctrine to groundwater extraction could only serve to reduce, rather than expand, a pre-existing right to use groundwater. Such an uncompensated reduction in the right of use could be unconstitutional.

The Takings Clause of the Fifth Amendment, incorporated into the Fourteenth Amendment, forbids the taking of private property for public use without just compensation. This protection, as applied to the judiciary, means that a state court cannot through its decision-making eliminate what had previously been a well-established property right, unless the state compensates the property owner for the loss. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 713-15 (2010) (plurality opinion). *See also County of Los Angeles v. Berk*, 26 Cal. 3d 201, 213 (1980) (considering whether retroactive application of a judicial decision can "be deemed to so betray the legitimate and reasonable reliance interests of property owners that its application to them and their property amounts to an unconstitutional taking of vested rights"); *Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. 1985) (holding that a state court decision adopting the riparian ownership doctrine cannot divest property owners of pre-existing rights to divert water).

Because water rights are usufructury, *Orange County Water Dist. v. Arnold Eng'g Co.*, 196 Cal. App. 4th 1110, 1125 n.5 (2011), eliminating the right of use (through public-trust-inspired pumping restrictions) is akin to the drastic impact of physical invasion on real property, which categorically warrants compensation. *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) (physical occupation of property requires compensation). Hence, such an impact on water rights should merit the same categorical treatment. *See* Josh Patashnik, *Physical Takings, Regulatory Takings, and Water Rights*, 51 Santa Clara L. Rev. 365, 367 (2011) (advocating for a categorical rule of compensation 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 Environs Envtl. L. & Pol'y J. 109, 143-44 (2002) (same). *Cf. Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1296 (Fed. Cir. 2008) (applying the categorical physical takings test to a water right takings claim); *Allegretti & Co. v. County of Imperial*, 138 Cal. App. 4th 1261, 1271-75 (2006) (declining to apply the physical takings test to county groundwater regulation).

Alternatively, under a regulatory takings framework, application of the public trust could so diminish a groundwater right that the water right, as well as the overlying land, would lose all economically viable use. *Cf. Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992) (regulation that denies all value requires compensation). Even if imposition of the public trust did not completely eliminate the value of a groundwater right, compensation would still likely be owed. Not only would imposition of the public trust have a significant negative economic impact, it would also dramatically frustrate existing investment-backed expectations that have been based on the historic limitation of the public trust to activities having a direct and immediate impact on surface waters. *See* James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 Duke Envtl. L. & Pol'y F. 1, 103 (2007) ("[A] careful review of the history—the precedent—does not make the case for expanded application of the public trust doctrine."). *See also* Lawrence, *supra*, at 1142 (until the early 1980s, "California public trust law dealt almost entirely with tidelands"). *Cf. Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (regulation that leaves some value may still require compensation, based on 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 government action). These grave constitutional questions concerning the intersection of private property rights and the public trust doctrine, ignored by the Superior Court below, merit speedy resolution in this Court.[9]

CONCLUSION

Until now, no California court has ever held that groundwater extraction may be regulated under the public trust doctrine. The trial court decision so extending the doctrine threatens the water rights of farmers throughout the state. That threat could not come at a worse time, given the increased reliance on groundwater pumping as a result of the drought. The trial court's decision also raises unprecedented constitutional concerns about the relationship among the public trust doctrine, judicial

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[9] These questions cannot be avoided on the ground that public trust limitations on water rights are exempt from takings analysis as "background principles" of property law. *Cf. Lucas*, 505 U.S. at 1029 (describing "background principles" defense to a takings claim). The public trust ceases to be a background principle once it "drifts from its historical moorings," David L. Callies & J. David Breemer, *Background Principles, Custom and Public Trust "Exceptions" and the (Mis)Use of Investment-Backed Expectations*, 36 Val. U. L. Rev. 339, 373 (2002), because background principles "cannot be newly legislated or decreed," *Lucas*, 505 U.S. at 1029. As demonstrated in the text, extending the public trust to groundwater extraction would be tantamount to a "new" version of the trust, and thus such an expanded doctrine would not constitute a background principle.

decision-making, and the Constitution's Takings Clause. The Farm Bureau therefore respectfully requests that the Court accept the County's writ application and set the matter for full merits briefing.

Sincerely,

DAMIEN M. SCHIFF
Principal Attorney

cc: Attached Service List