IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

No. C079672

COUNTY OF SISKIYOU,
Petitioner,

v.

THE SUPERIOR COURT OF SACRAMENTO COUNTY,
Respondent,

and

ENVIRONMENTAL LAW FOUNDATION, et al.,
Real Parties-in-Interest

Petition for Writ of Mandate and Stay of Judgment
After Judgment by the the Superior Court of Sacramento County
(Case No. 34-2010-80000583-CU-WM-GDS,
Honorable Christopher Krueger, Judge)

APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Third APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: C079672
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: JAMES S. BURLING, Cal. State Bar No. 113013 CHRISTOPHER M. KIESER, Cal. State Bar No. 235101 Pacific Legal Foundation 930 G Street, Sacramento, CA 95814 TELEPHONE NO.: (916) 419-7111 FAX NO. *(Optional)*: (916) 419-7747 E-MAIL ADDRESS *(Optional)*: jsb@pacificlegal.org; cmk@pacificlegal.org ATTORNEY FOR *(Name)*: Amici Curiae Pacific Legal Found., Cal. Farm Bureau	Superior Court Case Number: 34-2010-80000583-CU-WS-GDS *FOR COURT USE ONLY*
APPELLANT/PETITIONER: County of Siskiyou RESPONDENT/REAL PARTY IN INTEREST: Sacto. Super. Ct. & Envtl. Law Found.	
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 party (*name*): Pacific Legal Foundation

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)	
(5)	

☐ Continued on attachment 2.

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).

Date: July 21, 2015

CHRISTOPHER M. KIESER ▶

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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

Pacific Legal Foundation is the nation's oldest public interest law firm litigating for property rights, limited government, and individual liberty. Founded in Sacramento in 1973, PLF maintains offices in Bellevue, Washington; Palm Beach Gardens, Florida; and Washington, D.C. PLF and its supporters believe that expanding the public trust doctrine to groundwater extraction will have a significant deleterious effect on water rights in California.

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 Farm Bureau has a significant interest in the outcome of this case. Any judicial decision that restricts the ability of Californians to rely on groundwater as an important resource threatens catastrophic consequences for California agriculture and farming families.

Therefore, Pacific Legal Foundation and California Farm Bureau Federation request permission to file the accompanying letter brief amicus

curiae in support of Siskiyou County's petition for a writ of mandate to immediately review the superior court's decision in this case.

DATED: July 21, 2015.

Respectfully submitted,

JAMES S. BURLING
CHRISTOPHER M. KIESER

By _____
CHRISTOPHER M. KIESER

Attorneys for Amici Curiae
Pacific Legal Foundation and
California Farm Bureau Federation

PACIFIC LEGAL FOUNDATION

July 21, 2015

The Honorable Presiding Justice Vance W. Raye
and Honorable Associate Justices
California Court of Appeal, Third Appellate District
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

Re: *County of Siskiyou v. The Superior Court of Sacramento County* and *Environmental Law Foundation v. State Water Resources Control Board*, Case No. C079672, Letter Brief of Amicus Curiae of Pacific Legal Foundation and California Farm Bureau Federation in Support of Petition for Writ of Mandate

Dear Honorable Presiding Justice Raye and Associate Justices:

Pacific Legal Foundation is the Nation's oldest public interest law firm litigating for property rights, limited government, and individual liberty. Founded in Sacramento in 1973, PLF maintains offices in Bellevue, Washington; Palm Beach Gardens, Florida; and Washington, D.C. PLF and its supporters believe that expanding the public trust doctrine to groundwater extraction will have a significant deleterious effect on water rights in California.

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The County of Siskiyou has petitioned this Court for a writ of mandate to review the July 15, 2014, decision of the Superior Court for the County of Sacramento.[1] That decision radically expands the public trust doctrine to cover groundwater extraction, threatening the property rights and livelihoods of Farm Bureau members in Siskiyou County and throughout California. While

[1] The County previously petitioned the California Supreme Court for a writ of mandate to review the superior court's decision. That petition was denied. Since then, the County filed a motion for reconsideration in the superior court in light of the Sustainable Groundwater Management Act of 2014, Cal. Water Code § 10720, *et seq.* The superior court denied that motion on April 9, 2015.

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the California Supreme Court and this Court have broadened the public trust doctrine over the past several decades, no California court has ever applied the doctrine to groundwater. Doing so would eliminate any stopping point to the doctrine and raise serious constitutional concerns under the Fifth and Fourteenth Amendments.

The superior court's decision raises these 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.[2] This Court should exercise its discretion under California Rule of Court 8.486, grant the County's writ petition to review the superior court's decision, and hold that the public trust doctrine is not applicable to groundwater.

The Court Should Grant 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

Traditionally, the public trust doctrine in the United States applied only to the tidelands and navigable waterways. *See Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 436-37 (1892). And where it applied, even in California, it protected only navigation, commerce, and fishing uses. *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 521 (1980). However, in the latter half of the twentieth century, the California Supreme Court significantly broadened the trust to include diversions from tributaries of navigable waters that affect those waters, *Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 437 (1983), and recreational and ecological uses, *Marks v. Whitney*, 6 Cal. 3d 251, 259-60 (1971). While these expansions were far-reaching and unprecedented,[3] those decisions still implicitly recognized some limits to the doctrine's scope. The superior court purported reliance on *National Audubon Society* to hold that the public trust applies to groundwater extraction affecting navigable waters eviscerates those limits and creates serious constitutional questions.

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[2] *See, e.g.*, Jim Carlton, *California Drought Squeezes Wells*, Wall St. J., Aug. 28, 2014, *available at* http://www.wsj.com/articles/california-drought-squeezes-wells-1409268495 (last visited July 17, 2015); Erica Gies, *California's Underground Water War*, The Atlantic, Aug. 28, 2014, *available at* http://www.theatlantic.com/ technology/archive/2014/08/californias-epic-water-wars/379294/ (last visited July 17, 2015); Brian Clark Howard, *California Drought Spurs Groundwater Drilling Boom in Central Valley*, Nat'l Geographic, Aug. 16, 2014, *available at* http://news.nationalgeographic.com/news/2014/08/140815-central-valley-california-drilling-boom-groundwater-drought-wells/ (last visited July 17, 2015).

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

A. Under the superior court's decision, there is no limit to the application of the public trust doctrine.

Before this case, no published California decision 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, both this Court and the California Supreme Court have always maintained that an immediate and direct connection to surface water is a necessary condition before the public trust doctrine will apply. *See, e.g., State 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."); *Golden Feather Cmty. Ass'n v. Thermalito Irrig. Dist.*, 209 Cal. App. 3d 1276, 1284 (1989) ("There is substantial reason to conclude that the public trust doctrine does not extend to nonnavigable streams to the extent they do not affect navigable waters."). Only in Hawaii has the judiciary extended the public trust doctrine to groundwater, and that was authorized by 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). California courts lack similar constitutional authority.

Of course, it is for good reason that no California court, other than the superior court in this case, has applied the public trust doctrine to groundwater. Should it be extended in such a way, the doctrine would have no logical limit. To be sure, groundwater extraction can affect surface waters. But many things with only a remote connection to navigable surface waters—like

vehicle emissions, pesticides, and impervious pavement—can affect those waters.[4] Under the superior court's decision, all of these activities are potentially subject to public trust regulation.

B. The superior court's decision unconstitutionally usurps the Legislature's authority.

By extending the public trust doctrine to groundwater extraction, the decision below opens the door to regulation—under the guise of protecting trust waters—of productive activity far removed from navigable waters. That interpretation raises a serious constitutional 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). The superior court's broad interpretation invites bureaucratic policymaking unconstrained by legislative enactments. Further, it conflates the common law public trust doctrine with the existing statutory trust doctrine that the Legislature created to govern wildlife. *See Envtl. Prot. Info. Ctr. v. Cal. Dep't of Forestry & Fire Prot.*, 44 Cal. 4th 459, 515 (2008).

Even aside from the delegation problem, California courts have long disfavored judicial policymaking in the realm of the common law. For example, in *People v. Lim*, 18 Cal. 2d 872 (1941), the California Supreme Court said that the judiciary should not define the scope of the public nuisance tort. Instead, "[s]uch declarations of policy should be left for the legislature." *Id.* at 880. The same is true here. This Court should not do what the Legislature has declined to do, particularly after the Legislature passed a comprehensive groundwater regulation scheme just last year.[5]

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[4] *See* Keith D. Stolzenbach, *Atmospheric Deposition* (2006), *available at* http://environment.ucla.edu/reportcard/article1497.html (last visited July 17, 2015)(roads and wildfires are significant sources of dust that ultimately pollute water bodies through deposition); State Water Resources Control Board, Storm Water Pollution, *available at* http://www.swrcb.ca.gov/water_issues/ programs/outreach/erase_waste/swpollution.shtml (last visited July 17, 2015) (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").

[5] Legislation in other states illustrates that it is within the competence of state legislatures to regulate groundwater under the public trust doctrine. *See* Tenn. Code § 69-3-103(44) (defining "waters" for the purposes of public trust regulation as "any and all water, public or private, on or beneath the surface of the ground, that are contained within, flow through, or border upon Tennessee or any portion thereof, except those bodies of water confined to and retained within

(continued...)

The superior court brushed aside these concerns. It characterized the possible delegation problem as "mere hypotheticals that may arise in the future." County Appendix at 25 n.8. But hypotheticals are valuable when, as here, they reveal the logical conclusion of adopting a particular rule. The lower court's reasoning that allowed it to exercise judicial policymaking in an area of legislative competence admits of no limit other than the fertile imagination of environmental advocates and zealous agency bureaucrats. In short, it permits the State Water Resources Control Board to exercise unfettered discretion over important public policy decisions that should be left to the Legislature.[6] That is the essence of an unconstitutional delegation.

C. The superior court's decision raises serious questions regarding the taking of water rights.

The decision below creates a serious risk that private property could be taken without just compensation. The use of groundwater is a recognized property right in California. *See Peabody v. City of Vallejo*, 2 Cal. 2d 351, 370 (1935) (citing *Katz v. Walkinshaw*, 141 Cal. 116, 150 (1903)). Application of the public trust doctrine to groundwater has the potential to reduce a pre-existing right to use groundwater. Such an uncompensated reduction of the right to use could be an unconstitutional taking.

The Takings Clause of the Fifth Amendment (applied to the states through the Fourteenth Amendment) prevents governments from taking private property for public use without just compensation. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005). This prohibition applies to state courts as well. A legislature or a court, "by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980); *see also Stop the Beach Renourishment, Inc. v. Fla. Dep't*

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[5] (...continued)
the limits of private property in single ownership that do not combine or effect a junction with natural surface or underground water"); N.H. Rev. Stat. § 481:1 ("The general court [legislature] declares and determines that the water of New Hampshire whether located above or below ground constitutes a limited and, therefore, precious and invaluable public resource which should be protected, conserved and managed in the interest of present and future generations."); 10 V.S.A. § 1390(5) ("[I]t is the policy of the state that the groundwater resources of the state are held in trust for the public."). Since the California Legislature has not made any similar pronouncements, this Court should not reach out and do so itself.

[6] This is not to say that the Legislature *should* exercise any authority it does have. As described below, any legislative act declaring groundwater subject to the public trust could result in takings liability.

of Envtl. Prot., 560 U.S. 702, 714 (2010) (plurality opinion) ("It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat."); *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))).

Because water rights are usufructuary, *Nat'l Audubon Soc'y*, 33 Cal. 3d at 441, eliminating the right of use (like through public-trust inspired pumping restrictions) is akin to the drastic impacts of a physical invasion of real property or a regulation which denies the owner all economically viable use of property, both of which are categorical takings. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992). Such an impact on water rights should receive the same treatment. *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 the categorical standards were inapplicable, compensation would likely still be required under the multi-factor test established in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). Not only would imposition of the public trust have a significant negative economic impact, it would also dramatically frustrate existing investment-backed expectations based on the historic limitation of the public trust doctrine to activities having a significant effect on surface water. *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."); 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 extended application of the public trust doctrine."); Lawrence, *supra* n.3, at 1142 (until the early 1980s, "California public trust law dealt almost entirely with the tidelands"). These significant constitutional questions, ignored by the superior court, deserve speedy resolution in this Court.[7]

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[7] These issues cannot be avoided on the ground that public trust limitations on water rights are part of the background principles of property law and thus exempt Takings Clause analysis. *See Lucas*, 505 U.S. at 1029. Once it "drifts from its historical moorings," the public trust ceases to be a background principle of state property law, David L. Callies & J. David Breemer, *Selected*

(continued...)

Conclusion

Pacific Legal Foundation and the California Farm Bureau Federation respectfully request that this Court grant the County's writ petition to resolve these important questions.

Sincerely,

JAMES S. BURLING
CHRISTOPHER M. KIESER

By _____
CHRISTOPHER M. KIESER

Attorneys for Amici Curiae
Pacific Legal Foundation and
California Farm Bureau Federation

Encl.

cc: Service List

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[7] (...continued)
Legal and Policy Trends in Takings Law: Background Principles, Custom & Public Trust "Exceptions" and the (Mis)Use of Investment-Backed Expectations, 36 Val. U.L. Rev. 339, 373 (2002), because such background principles "cannot be newly legislated or decreed." *Lucas*, 505 U.S. at 1029. An extension of the public trust to groundwater would be tantamount to the creation of a new version of the trust, not an application of a background principle of state law.

DECLARATION OF SERVICE BY MAIL

I, Suzanne M. MacDonald, 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 July 21, 2015, true copies of Application to file Brief Amicus Curiae and Brief Amicus Curiae of Pacific Legal Foundation and California Farm Bureau Federation In Support of Petitioner were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 21st day of July, 2015, at Sacramento, California.

SUZANNE M. MACDONALD