



November 8, 2018

The Honorable Chief Justice Tani Gorre Cantil-Sakauye
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Envtl. Law Found., et al. v. State Water Res. Control Bd., et al.*, No. S251849

Dear Chief Justice Tani Gorre Cantil-Sakauye and Associate Justices:

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under California law for the purpose of litigating matters affecting the public interest. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. Thousands of individuals nationwide support PLF, as do many organizations and associations. PLF is headquartered in Sacramento, California, and has offices in Bellevue, Washington; Washington, D.C.; and Palm Beach Gardens, Florida.

The Foundation has litigated many cases defending private property rights in the Supreme Court of the United States. *See, e.g., Knick v. Township of Scott*, 862 F.3d 310 (3d Cir. 2018), *cert. granted*, 86 U.S.L.W. 3438 (U.S. Mar. 5, 2018) (No. 17-647); *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). PLF attorneys have also been regular participants in property cases in the California Supreme Court, including most recently: *Lynch v. Cal. Coastal Comm'n*, 3 Cal. 5th 470 (2017); *City of Perris v. Stamper*, 1 Cal. 5th 576, 585 (2016); *Prop. Reserve, Inc. v. Superior Court*, 1 Cal. 5th 151 (2016); *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435 (2015); *Tuolumne Jobs & Small Business Alliance v. Superior Court*, 59 Cal. 4th 1029 (2014).

I

**THIS COURT SHOULD GRANT REVIEW BECAUSE THE
APPLICATION OF PUBLIC TRUST OBLIGATIONS TO ALL ACTIVITIES
WITH POTENTIALLY DELETERIOUS EFFECTS ON NAVIGABLE WATERWAYS
REMOVES ANY LIMITING PRINCIPLE TO THE PUBLIC TRUST DOCTRINE**

The opinion of the Third District Court of Appeal unmoors the public trust doctrine from any limiting principle. *Envtl. Law Found. v. State Water Res. Control Bd.*, 26 Cal. App. 5th 844 (Ct. App. 2018) (Hereinafter *ELF*). The opinion opens the door for public trust expansion far beyond the extraction of water that is hydrologically connected to navigable waterways. The court held that the “pivotal fact” is “not whether water is diverted or extracted,” but rather “the impact of the activity,”—presumably, any activity—“on the public trust resource.” *Id.* at 859. Comparing the facts of this case to those at issue in *National Audobon Society v. Superior Court*, 33 Cal. 3d 419 (1983), and in *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138 (1884), the court reduced the reasoning of each case to encompass any activities that “negatively impact[] a navigable waterway.” *ELF*, 26 Cal. App. 5th at 860. But such a broad reading of those cases invites almost unlimited expansion of the public trust doctrine beyond its historical limitations.

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

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* (Dec. 15, 2016), <https://water.usgs.gov/edu/watercyclerrunoff.html>; USGS, *Infiltration—The Water Cycle* (Dec. 15, 2016) <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, *Surface Runoff—The Water Cycle*, *supra*. 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, *Infiltration—The Water Cycle*, *supra*.

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 both increase direct surface runoff into the waterway while 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 over time. A change 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.* But the court of appeal’s decision leaves it unclear whether counties like Siskiyou may take mitigating effects like these into account. Nor is it clear how such complicated interplays are to be interpreted by reviewing courts.

Many non-water-related human activities can have far more substantial impacts on navigable waterways than the direct extraction of groundwater, through the myriad complex interactions that constitute streamflow of the navigable waterways. *See, e.g.*, USGS, *Streamflow—The Water Cycle* (Dec. 15, 2016) <https://water.usgs.gov/edu/watercycle/streamflow.html>. Requiring public trust consideration of any activity with potentially deleterious impacts on navigable waterways necessarily places many of these and other activities under threat of public trust regulation. Contrary to the decisions below, this threat cannot be avoided simply by declining to extend the doctrine to groundwater itself. Any activity (such as groundwater pumping) that diverts or extracts water—leading to “less water in a navigable river” and “harming public trust uses”—could require a consideration of the impact on the public trust.

Because the court of appeal’s opinion lacks any limiting principle, this Court should grant review to establish an appropriate boundary to the public trust doctrine, one properly limited to direct impacts on navigable waterways.

II
THIS COURT SHOULD GRANT REVIEW BECAUSE THE
OPINION BELOW WILL HAVE FAR-REACHING IMPACT WITHIN CALIFORNIA

The opinion of the court of appeal has potential impacts in—at a minimum—dozens of counties within California. In the absence of any limiting principle—*see supra*, Part I—this is likely to lead to confusion in local governments as to when they may rely on ministerial procedures, as well as increased litigation over land-use decisions that have historically been far outside the public trust doctrine.

At least 32 California counties rely on pumping groundwater to meet one-third or more of their water needs. Natural Resources Agency, *California's Groundwater—Update 2013*, Appendix C at 6-7, <https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/Groundwater-Management/Data-and-Tools/Files/Statewide-Reports/California-Groundwater-Update-2013/California-Groundwater-Update-2013---Appendix-C.pdf>. A “good deal” of this groundwater pumping draws on waters tributary to surface waters. Joseph L. Sax, *We Don't Do Groundwater: A Morsel of California Legal History*, 6 U. Denv. Water L. Rev. 269 (2003). Most local governments, like Siskiyou, employ a ministerial permitting program for the construction and drilling of wells. *See* Diane Kindermann Henderson, *The Language of Water: California's Water Lexicon Expands*, 56-AUG Orange County Law. 10 (2014). Thus, at present, dozens of California counties apply ministerial review to permit requests for the construction and drilling of wells which may affect navigable surface waters. And, as previously discussed, myriad other activities aside from groundwater pumping may have some deleterious (or enhancing) effect on waters within the public trust.

The court of appeal's decision creates significant uncertainty about whether and where such ministerial review is adequate. It calls for considerations of public trust obligations over any activity which may harm public trust resources—potentially requiring local governments to create mechanisms for discretionary review where no such mechanism currently exists. In the absence of further guidance and clarification, cities and counties will be left uncertain as to exactly where their public trust obligations end.

Undoubtedly, this will open the floodgates of litigation as various interest groups compete to define exactly which activities are sufficiently connected to observable impacts on public trust resources to warrant public trust consideration. But the

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California court system is already overloaded with environmental challenges to land-use decisions. *See, e.g.*, Marko Mlikotin, *California Must Address CEQA Lawsuit Abuse*, Sacramento Business Journal (Feb. 15, 2018), <https://www.bizjournals.com/sacramento/news/2018/02/15/another-voice-california-must-address-ceqa-lawsuit.html>; Press Release, Holland & Knight, *New Holland & Knight Study Links CEQA Litigation Abuse to California Housing Crisis* (Dec. 13, 2017), <https://www.hklaw.com/publications/New-Holland-Knight-Study-Links-CEQA-Litigation-Abuse-to-California-Housing-Crisis-12-13-2017>. California courts are likely to see additional environmental litigation asserting public trust requirements for any activity that may be traceable to downstream impacts on public trust waterways.

This Court should grant review in order to provide California's counties with much-needed guidance on whether, where, and how they must incorporate public trust considerations when reviewing permit applications not directly related to resources within the public trust. The decision of the court of appeal, if left to stand without further clarification, will likely lead to confusion and further overload California's dockets as the doctrine expands far beyond its historical scope.

CONCLUSION

The court of appeal's decision expands the public trust doctrine even beyond the expansion represented in the opinion of the district court. Rather than limiting its holding to "diversion" or "extraction," the court held that any activity having some alleged deleterious impact on public trust resources requires local governments to consider implications on the public trust. But there is no limit to the types of human activities which may impact navigable waters and other public trust resources—the question is only how far back the "butterfly effect" can be traced. Without a limiting principle, local governments will be unsure which activities require a consideration of potential public trust impacts, and that uncertainty will provide fertile ground for extensive environmental litigation of land-use activities that have long been far outside the scope of the public trust doctrine.

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To avoid that troubling outcome, this Court should grant review.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "J. Talcott", is written over a horizontal line.

JEREMY TALCOTT, No. 311490

Attorney for Amicus Curiae
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DECLARATION OF SERVICE BY MAIL

I, Barbara A. Siebert, 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 November 8, 2018, true copies of LETTER BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANT, CROSS-COMPLAINANT, AND APPELLANT 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 8th day of November, 2018, at Sacramento, California.


BARBARA A. SIEBERT