

1 DAMIEN M. SCHIFF, No. 235101
E-mail: dms@pacificlegal.org
2 Pacific Legal Foundation
930 G Street
3 Sacramento, California 95814
Telephone: (916) 419-7111
4 Facsimile: (916) 419-7747
5 Attorney for Amicus Curiae
California Farm Bureau Federation
6
7

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SACRAMENTO
10

11 ENVIRONMENTAL LAW FOUNDATION;)
PACIFIC COAST FEDERATION OF FISHERMEN'S)
12 ASSOCIATIONS; INSTITUTE FOR FISHERIES)
RESOURCES; and DOES 1-100,)
13)
Petitioners,)
14)
v.)
15)
STATE WATER RESOURCES CONTROL BOARD;)
16 COUNTY OF SISKIYOU; and DOES 1-100, inclusive,)
17)
Respondents.)

No. 34-2010-80000583

**BRIEF AMICUS CURIAE
OF CALIFORNIA FARM
BUREAU FEDERATION IN
SUPPORT OF RESPONDENT
COUNTY OF SISKIYOU'S
MOTION FOR JUDGMENT
ON THE PLEADINGS**

Date: April 11, 2014
Time: 10:30 a.m.
Dept. 42
Judge: Hon. Allen H. Sumner

Original Complaint Filed:
June 23, 2010

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. THE AVOIDANCE CANON ENCOURAGES COURTS TO AVOID DECIDING UNNECESSARY AND DIFFICULT CONSTITUTIONAL ISSUES 1

II. APPLICATION OF THE PUBLIC TRUST DOCTRINE TO GROUNDWATER EXTRACTION WOULD RAISE SERIOUS CONSTITUTIONAL ISSUES 2

A. A Court Acts Unconstitutionally When It Radically and Unpredictably Changes the Law, or Otherwise Eliminates a Well-Established Property Right 2

1. The Due Process Clause as Applied to State Courts 2

2. The Takings Clause as Applied to State Courts 3

B. Application of the Public Trust Doctrine to Groundwater Extraction Raises Serious Questions under the Due Process Clause 3

C. Application of the Public Trust Doctrine to Groundwater Extraction Raises Serious Questions Under the Takings Clause 7

1. The Tests for Judicial Takings 7

2. Application of the Judicial Takings Tests to the Expansion of the Public Trust Doctrine 8

3. The “Background Principles” Defense 9

CONCLUSION 10

DECLARATION OF SERVICE BY MAIL

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

TABLE OF AUTHORITIES

	Page
Cases	
1 <i>Baldwin v. County of Tehama</i> , 31 Cal. App. 4th 166 (1994)	6
2 <i>Bush v. Gore</i> , 531 U.S. 98 (2000)	9
3 <i>California v. Superior Court (Lyon)</i> , 29 Cal. 3d 210 (1981)	4, 8
4 <i>Casitas Mun. Water Dist. v. United States</i> , 543 F.3d 1276 (Fed. Cir. 2008)	8
5 <i>Chicago, B. & Q.R. Co. v. City of Chicago</i> , 166 U.S. 226 (1897)	2
6 <i>City of Berkeley v. Superior Court</i> , 26 Cal. 3d 515 (1980)	4
7 <i>County of Los Angeles v. Berk</i> , 26 Cal. 3d 201 (1980)	3
8 <i>Envtl. Prot. Info. Ctr. v. Cal. Dep't of Forestry & Fire Prot.</i> , 44 Cal. 4th 459 (2008)	6
9 <i>Esplanade Props., LLC v. City of Seattle</i> , 307 F.3d 978 (9th Cir. 2002)	9
10 <i>Golden Feather Cmty. Ass'n v. Thermalito Irrig. Dist.</i> , 209 Cal. App. 3d 1276 (1989)	4
11 <i>Hughes v. Washington</i> , 389 U.S. 290 (1967)	2
12 <i>Ill. Cent. R.R. Co. v. Illinois</i> , 146 U.S. 387 (1892)	4
13 <i>In re Smith</i> , 42 Cal. 4th 1251 (2008)	1
14 <i>In re Water Use Permit Applications</i> , 9 P.3d 409 (Haw. 2000)	5
15 <i>Katz v. Walkinshaw</i> , 141 Cal. 116 (1903)	7
16 <i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982)	8
17 <i>Lucas v. S.C. Coastal Council</i> , 505 U.S. 1003 (1992)	8-10
18 <i>M&J Coal Co. v. United States</i> , 47 F.3d 1148 (Fed. Cir. 1995)	7
19 <i>Marks v. Whitney</i> , 6 Cal. 3d 251 (1971)	4
20 <i>N.D. State Water Comm'n v. Bd. of Mgrs.</i> , 332 N.W.2d 254 (N.D. 1983)	5
21 <i>Nat'l Audubon Soc'y v. Superior Court</i> , 33 Cal. 3d 419 (1983)	3-4, 9-10
22 <i>New York Times v. Sullivan</i> , 376 U.S. 254 (1964)	2
23 <i>Orange County Water Dist. v. Arnold Eng'g Co.</i> , 196 Cal. App. 4th 1110 (2011)	8
24 <i>Palermo v. Stockton Theatres, Inc.</i> , 32 Cal. 2d 53 (1948)	1
25 <i>Peabody v. City of Vallejo</i> , 2 Cal. 2d 351 (1935)	7

	Page
1	
2	<i>Penn Cent. Transp. Co. v. New York City</i> , 438 U.S. 104 (1978) 8
3	<i>People v. Superior Court (Romero)</i> , 13 Cal. 4th 497 (1996) 1
4	<i>People v. Williams</i> , 16 Cal. 3d 663 (1976) 1
5	<i>Personal Watercraft Coal. v. Bd. of Supervisors</i> , 100 Cal. App. 4th 129 (2002) 4
6	<i>Robinson v. Ariyoshi</i> , 753 F.2d 1468 (9th Cir. 1985) 3
7	<i>Samples v. Brown</i> , 146 Cal. App. 4th 787 (2007) 6
8	<i>Santa Clara County Local Transp. Auth. v. Guardino</i> , 11 Cal. 4th 220 (1995) 1
9	<i>Santa Teresa Citizen Action Group v. City of San Jose</i> , 114 Cal. App. 4th 689 (2003) 4
10	<i>Shelley v. Kraemer</i> , 334 U.S. 1 (1948) 2
11	<i>Stevens v. City of Cannon Beach</i> , 510 U.S. 1207, 114 S. Ct. 1332 (1994) 9
12	<i>Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.</i> , 560 U.S. 702, 130 S. Ct. 2592 (2010) 2-3
13	<i>Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency</i> , 535 U.S. 302 (2002) 7
14	<i>United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n</i> , 247 N.W.2d 457 (N.D. 1976) 5
15	<i>United States v. Causby</i> , 328 U.S. 256 (1946) 7
16	<i>United States v. State Water Res. Control Bd.</i> , 182 Cal. App. 3d 82 (1986) 3-4
17	<i>Webb's Fabulous Pharmacies, Inc. v. Beckwith</i> , 449 U.S. 155 (1980) 3
18	<i>Wright v. Goleta Water Dist.</i> , 174 Cal. App. 3d 74 (1985) 6
19	
20	Miscellaneous
21	
22	D. Benjamin Barros, <i>The Complexities of Judicial Takings</i> , 45 U. Rich. L. Rev. 903 (2011) 7
23	
24	Barton, Jesse W., <i>Tulare Lake Basin Water Storage District v. United States: Why It Was Correctly Decided and What This Means for Water Rights</i> , 25 <i>Environ's Envtl. L. & Pol'y J.</i> 109 (2002) 8
25	
26	Callies, David L. & Breemer, J. David, <i>Background Principles, Custom and Public Trust "Exceptions" and the (Mis)Use of Investment- Backed Expectations</i> , 36 <i>Val. U. L. Rev.</i> 339 (2002) 9
27	
28	

	Page
1	
2 Dep't of Water Res., Groundwater Management, <i>available at</i>	
3 http://www.water.ca.gov/groundwater/gwmanagement/dwr_role.cfm	
4 (last visited Feb. 5, 2014)	6
5 Huffman, James L., <i>Speaking of Inconvenient Truths—A History of the</i>	
6 <i>Public Trust Doctrine</i> , 18 Duke Envtl. L. & Pol'y F. 1 (2007)	9
7 Lawrence, Janice, Lyon and Fogerty: <i>Unprecedented Extensions</i>	
8 <i>of the Public Trust</i> , 70 Cal. L. Rev. 1138 (1982)	4, 9-10
9 Patashnik, Josh, <i>Physical Takings, Regulatory Takings, and Water Rights</i> ,	
10 51 Santa Clara L. Rev. 365 (2011)	8
11 Salvias, Michael R., <i>A Structural Approach to Judicial Takings</i> ,	
12 16 Lewis & Clark L. Rev. 1381 (2012)	3
13 Sax, Joseph L., <i>Liberating the Public Trust Doctrine from Its Historical Shackles</i> ,	
14 14 U.C. Davis L. Rev. 185 (1980)	10
15 Smith, Zachary A., <i>Rewriting California Groundwater Law: Past Attempts</i>	
16 <i>and Prerequisites to Reform</i> , 20 Cal. W. L. Rev. 223 (1983)	6
17 Somin, Ilya, <i>Stop the Beach Renourishment and the Problem</i>	
18 <i>of Judicial Takings</i> , 6 Duke J. Const. L. & Pub. Pol'y 91 (2011)	7
19 State Water Res. Control Bd., <i>Storm Water Pollution, available at</i>	
20 http://www.waterboards.ca.gov/water_issues/programs/	
21 outreach/erase_waste/swpollution.shtml (last visited Feb. 5, 2014)	5
22 Stolzenbach, Keith D., UCLA Inst. of the Env't & Sustainability, <i>Atmospheric Deposition,</i>	
23 <i>available at</i> http://www.environment.ucla.edu/reportcard/article.asp?parentid=1497	
24 (last visited Feb. 5, 2014)	5
25 Tuholske, Jack, <i>Trusting the Public Trust: Application of the Public Trust</i>	
26 <i>Doctrine to Groundwater Resources</i> , 9 Vt. J. Envtl. L. 189 (2008)	5
27 Wagner, David, Note, <i>A Proposed Approach to Judicial Takings</i> ,	
28 73 Ohio St. L.J. 177 (2012)	3, 7
Walston, Roderick E., <i>The Constitution and Property: Due Process, Regulatory</i>	
<i>Takings, and Judicial Takings</i> , 2001 Utah L. Rev. 379	2-3

1 The rationale that supports the canon as applied to statutory construction also supports the
2 canon's application to judicial decisions construing common law principles. In other words, just
3 as a court should not raise constitutional issues needlessly with respect to legislative action, so too
4 with respect to judicial action. Accordingly, to the extent that a court may reasonably interpret a
5 common law doctrine, like the public trust doctrine, in a way that avoids serious constitutional
6 questions, the court should do so.

7 II

8 APPLICATION OF THE PUBLIC TRUST 9 DOCTRINE TO GROUNDWATER EXTRACTION 10 WOULD RAISE SERIOUS CONSTITUTIONAL ISSUES

11 A. A Court Acts Unconstitutionally When It Radically 12 and Unpredictably Changes the Law, or Otherwise 13 Eliminates a Well-Established Property Right

14 State courts, as much as state legislatures and executive officials, are subject to the
15 constraints of the Federal Constitution. See *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948); *New York*
16 *Times v. Sullivan*, 376 U.S. 254, 265 (1964). In particular, the Due Process and Takings Clauses
17 of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, limit the
18 power of state courts. See *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 235 (1897);
19 *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 130 S. Ct. 2592,
20 2602 (2010) (plurality opinion); *id.* at 2614 (Kennedy, J., concurring in part and concurring in the
21 judgment).

22 1. The Due Process Clause as Applied to State Courts

23 The Fourteenth Amendment, as applied to the state judiciary, forbids a court from depriving
24 a person of property without due process of law. See *Stop the Beach Renourishment*, 130 S. Ct.
25 at 2614 (Kennedy, J., concurring in part and in the judgment) (discussing various authorities);
26 *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring). And due process
27 of law, for a court, means that its decision-making must follow accepted norms of common law and
28 statutory interpretation. See *Stop the Beach Renourishment*, 130 S. Ct. at 2615 (citing Roderick E.
Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*,
2001 Utah L. Rev. 379, 435)). Thus, if a court's decision radically and unexpectedly changes the

1 law, and thereby deprives a person of property, then the decision violates the Due Process Clause.
2 Walston, *supra*, at 435; Michael R. Salvas, *A Structural Approach to Judicial Takings*, 16 Lewis
3 & Clark L. Rev. 1381, 1434 (2012); David Wagner, Note, *A Proposed Approach to Judicial*
4 *Takings*, 73 Ohio St. L.J. 177, 211 (2012).

5 **2. The Takings Clause as Applied to State Courts**

6 The Takings Clause forbids the taking of private property for public use without just
7 compensation. This protection, as applied to the judiciary, means that a state court cannot through
8 its decision-making eliminate what had previously been a well-established property right, unless
9 the state compensates the property owner for the loss. *See Webb's Fabulous Pharmacies, Inc. v.*
10 *Beckwith*, 449 U.S. 155, 164 (1980); *Stop the Beach Renourishment*, 130 S. Ct. at 2602 (plurality
11 opinion). *See also County of Los Angeles v. Berk*, 26 Cal. 3d 201, 213 (1980) (considering whether
12 retroactive application of a judicial decision can “be deemed to so betray the legitimate and
13 reasonable reliance interests of property owners that its application to them and their property
14 amounts to an unconstitutional taking of vested rights”); *Robinson v. Ariyoshi*, 753 F.2d 1468,
15 1474 (9th Cir. 1985) (holding that a state court decision adopting the riparian ownership doctrine
16 cannot divest property owners of pre-existing rights to divert water).

17 **B. Application of the Public Trust Doctrine to Groundwater Extraction** 18 **Raises Serious Questions under the Due Process Clause**

19 A judicial decision that radically and unpredictably changes the law may violate principles
20 of due process. *See Stop the Beach Renourishment*, 130 S. Ct. at 2614 (Kennedy, J., concurring
21 in part and concurring in the judgment). The public trust doctrine is a creature of the common law.
22 *See Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 433-34 (1983). Thus, a court's radical
23 and unpredictable reworking of the doctrine—such as its expansion to groundwater
24 extraction—would be unconstitutional.¹

25 _____
26 ¹ A court could not ameliorate the unconstitutional effects of such a decision by limiting it to
27 prospective application. Water rights in California are subject to the doctrine of “continuing
28 That jurisdiction gives the State Water Resources Control Board the power to limit *existing* water

(continued...)

1 Traditionally, the public trust doctrine in this country applied only to tidelands and
2 navigable waters. *See Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 436-37 (1892). And when it
3 applied, the trust protected only navigation, commerce, and fishing uses. *City of Berkeley v.*
4 *Superior Court*, 26 Cal. 3d 515, 521 (1980). During the latter half of the twentieth century,
5 however, California courts expanded the trust to include tributaries of navigable waters, *Nat'l*
6 *Audubon Soc'y*, 33 Cal. 3d at 437, and to cover recreational and ecological uses as well, *Marks v.*
7 *Whitney*, 6 Cal. 3d 251, 259-60 (1971). As radical as these expansions of the doctrine may be, *see*
8 *generally* Janice Lawrence, Lyon and Fogerty: *Unprecedented Extensions of the Public Trust*, 70
9 Cal. L. Rev. 1138 (1982), the decisions at least implicitly recognized some limitation to the
10 doctrine's scope. Indeed, the California courts have never applied the doctrine to just *any* activity
11 that may have a measurable effect on trust waters. *Cf. Nat'l Audubon Soc'y*, 33 Cal. 3d at 440
12 (“Most decisions and commentators assume that ‘trust uses’ relate to uses and activities in the
13 vicinity of the lake, stream, or tidal reach at issue”); *Santa Teresa Citizen Action Group v. City*
14 *of San Jose*, 114 Cal. App. 4th 689, 709 (2003) (observing that the doctrine “has no direct
15 application to groundwater resources”). Rather, the courts have consistently maintained that a
16 necessary (although not sufficient) condition for application of the public trust is an immediate and
17 direct connection to surface water. *See California v. Superior Court (Lyon)*, 29 Cal. 3d 210, 227
18 (1981) (“[T]he applicability of the public trust doctrine does not turn upon whether a body of water
19 is subject to the ebb and flow of the tide, but upon whether it is navigable in fact.”); *Personal*
20 *Watercraft Coal. v. Bd. of Supervisors*, 100 Cal. App. 4th 129, 144 (2002) (“The public trust
21 doctrine is no longer confined to coastal areas lapped by the waves of the Pacific, but extends to
22 nontidal bodies such as inland waterways and lakes, the lands beneath them, as well as any streams
23 and tributaries that affect any navigable waters.”). *Cf. Golden Feather Cmty. Ass'n v. Thermalito*
24 *Irrig. Dist.*, 209 Cal. App. 3d 1276, 1284-87 (1989) (declining to extend the public trust doctrine

25
26
27 ¹ (...continued)
28 rights based on changing factual circumstances, such as emerging impacts to public trust resources.
See id. at 149-50. Hence, a court could not avoid the due process implications of a radical change
in the public trust doctrine by limiting its decision to prospective application.

1 to man-made reservoirs and non-navigable streams that do not affect navigable waters). The only
2 state judiciary clearly to have extended the public trust to groundwater—Hawaii—has done so
3 based in part on recent state constitutional amendments.² See Jack Tuholske, *Trusting the Public*
4 *Trust: Application of the Public Trust Doctrine to Groundwater Resources*, 9 Vt. J. Env'tl. L. 189,
5 219-20 (2008) (discussing *In re Water Use Permit Applications*, 9 P.3d 409 (Haw. 2000)). The
6 California judiciary, however, has no parallel authority on which to justify a similar expansion of
7 the doctrine.

8 One very good reason why the California courts have not extended the doctrine beyond
9 surface water is that the doctrine would then have no stopping point. It is true, as Petitioners
10 Environmental Law Foundation, *et al.*, contend, that groundwater extraction can affect surface
11 waters. Pet'r Mem. P&As at 8-10. But it is also true that many things, such as vehicle emissions,
12 pesticides, and impervious pavement can affect surface waters even though they have only a remote
13 connection to such waters. See, e.g., Keith D. Stolzenbach, UCLA Inst. of the Env't
14 & Sustainability, *Atmospheric Deposition*³ (observing that roads and wild fires are a significant
15 source of dust that ultimately pollutes water bodies through atmospheric deposition); State Water
16 Res. Control Bd., *Storm Water Pollution*⁴ (observing that storm water pollution from trash,
17 cigarette butts, motor oil, and the like leads to “unhealthy surface waters, such as lakes, creeks and
18 rivers, [as well as] unhealthy ocean and beach conditions.”). By extending the doctrine to
19 groundwater extraction, the judiciary would assign Respondent State Water Resources Control

20
21 ² Petitioners contend that the North Dakota Supreme Court also has extended the doctrine to
22 groundwater. Pet'r Mem. P&As at 14 (citing *United Plainsmen Ass'n v. N.D. State Water*
23 *Conservation Comm'n*, 247 N.W.2d 457, 461 (N.D. 1976)). But in *United Plainsmen* the question
24 of whether the doctrine applies specifically to groundwater was not at issue. Rather, the case
25 concerned whether the doctrine—whatever its relationship to groundwater—applies only “to
26 conveyances of real property,” or instead to water permitting generally. See *id.* at 460-61.
27 Moreover, it does not appear that the North Dakota Supreme Court has ever cited *United*
28 *Plainsmen* for the proposition that the public trust doctrine applies to groundwater. Cf. *N.D. State*
Water Comm'n v. Bd. of Mgrs., 332 N.W.2d 254, 258 (N.D. 1983) (citing *United Plainsmen* for
the proposition that “[t]he State holds the navigable waters in ‘trust’ for the public.”).

³ Available at <http://www.environment.ucla.edu/reportcard/article.asp?parentid=1497> (last visited Feb. 5, 2014).

⁴ Available at http://www.waterboards.ca.gov/water_issues/programs/outreach/erase_waste/swpollution.shtml (last visited Feb. 5, 2014).

1 Board the power to regulate all sorts of productive activity far removed from navigable waters and
2 the original purposes of the doctrine. Such an interpretation would itself raise a serious question
3 of an unconstitutional delegation of law-making power to an administrative agency. *See, e.g.,*
4 *Samples v. Brown*, 146 Cal. App. 4th 787, 804 (2007) (the Legislature cannot pass off
5 “fundamental policy decisions” to an administrative agency). Moreover, such an extension would
6 conflate the traditional public trust doctrine with the existing “statutory” trust doctrine that the
7 Legislature has created to govern wildlife. *See Envtl. Prot. Info. Ctr. v. Cal. Dep’t of Forestry &*
8 *Fire Prot.*, 44 Cal. 4th 459, 515 (2008). Hence, the public trust doctrine would become an
9 unprecedented open-ended grant of environmental regulatory power to the judiciary and the
10 administrative state.

11 Further, expansion of the doctrine would conflict with the intent of the California
12 Legislature, which has often considered but never enacted a comprehensive groundwater regulatory
13 scheme. *See Dep’t of Water Res., Groundwater Management, available at*
14 http://www.water.ca.gov/groundwater/gwmanagement/dwr_role.cfm (last visited Feb. 5, 2014)
15 (“Though the regulation of groundwater has been considered on several occasions, the California
16 Legislature has repeatedly held that groundwater management should remain a local
17 responsibility.”); Zachary A. Smith, *Rewriting California Groundwater Law: Past Attempts and*
18 *Prerequisites to Reform*, 20 Cal. W. L. Rev. 223, 241-42 (1983) (observing that numerous bills
19 were submitted to implement recommendations concerning groundwater regulation from the
20 Governor’s Commission to Review California Water Rights Law but they were defeated). Rather,
21 the Legislature has left groundwater extraction largely unregulated at the state level. *See Baldwin*
22 *v. County of Tehama*, 31 Cal. App. 4th 166, 174 (1994); *Wright v. Goleta Water Dist.*, 174 Cal.
23 App. 3d 74, 87 (1985). Extending the doctrine to groundwater would make a state agency an
24 immediate, and the judiciary the ultimate, regulator of groundwater, a result in conflict with this
25 statutory history.

26 Although the California courts have expanded the public trust doctrine beyond its historic
27 scope, the courts have never countenanced a doctrine far removed from surface water and so broad
28 as to include groundwater extraction. Not only would such an extension have no precedential

1 warrant, it would mark a radical change in groundwater regulation in this state, directly at odds
2 with the Legislature’s repeated refusal to enact such a comprehensive regulatory regime.
3 Consequently, for the judiciary to expand the doctrine to groundwater extraction would be so
4 radical and unexpected as to raise serious due process concerns.

5 **C. Application of the Public Trust Doctrine to Groundwater Extraction**
6 **Raises Serious Questions Under the Takings Clause**

7 The use of groundwater is a legally protected property right. *See Peabody v. City of Vallejo*,
8 2 Cal. 2d 351, 370-71 (1935); *Katz v. Walkinshaw*, 141 Cal. 116, 150 (1903). Application of the
9 public trust doctrine to groundwater extraction could only serve to reduce, rather than expand, a
10 pre-existing right to use groundwater. Such an uncompensated reduction in the right of use could
11 violate the Takings Clause.

12 **1. The Tests for Judicial Takings**

13 Although the law of judicial takings is emerging, commentators generally agree that to
14 determine whether a judicial taking has occurred (*i.e.*, whether a court decision has eliminated a
15 property right) requires recourse to the existing legislative/executive takings tests. *See*
16 D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. Rich. L. Rev. 903, 917 (2011);
17 Ilya Somin, *Stop the Beach Renourishment and the Problem of Judicial Takings*, 6 Duke J. Const.
18 L. & Pub. Pol’y 91, 104-06 (2011). *But see* Wagner, *supra*, at 213 (arguing that a judicial takings
19 test should be less demanding than existing legislative/executive takings tests). The analysis for
20 legislative/executive takings comprises two questions. First, is there a property right that has been
21 negatively affected by legislative/executive action? *See M&J Coal Co. v. United States*, 47 F.3d
22 1148, 1154 (Fed. Cir. 1995). If so, then is the quality or quantity of that impact significant in such
23 a way as to require compensation? *See id.* To help answer these questions, the case law divides
24 legislative/executive takings law into two broad categories of regulatory and physical takings. *See*
25 *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322-24 (2002).

26 The paradigmatic taking requiring compensation occurs when the government physically
27 invades and occupies one’s land, *see id.* at 322, such as when, for example, military jets repeatedly
28 fly low over one’s property and disturb one’s use and enjoyment. *See United States v. Causby*, 328

1 U.S. 256, 266-67 (1946). This is a categorical rule: regardless of the economic impact of the
2 expropriation, or the reasons behind it, compensation is required. In turn, the umbrella of
3 regulatory takings covers a number of tests, including two categorical rules. When the government
4 forces a property owner to submit to a permanent physical occupation by a third party,
5 compensation is required. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421
6 (1982). Compensation is also required when the government regulates a property in such a way
7 as to deny all economically viable use. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030
8 (1992). But, when government regulation does not produce a physical invasion, and does not
9 completely deprive the property owner of economically viable use, the courts employ a balancing
10 factor test. These factors are the economic impact of the regulation, the investment-backed
11 expectations of the property owner at the time he acquired the property, and the nature of the
12 government action. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

13 **2. Application of the Judicial Takings Tests to**
14 **the Expansion of the Public Trust Doctrine**

15 Application of the public trust doctrine to groundwater that results in a diminution of use
16 would raise serious takings issues under the aforementioned tests. Because water rights are
17 usufructury, *Orange County Water Dist. v. Arnold Eng'g Co.*, 196 Cal. App. 4th 1110, 1125 n.5
18 (2011), eliminating the right of use is akin to the drastic impact of physical invasion on real
19 property; therefore, such an impact categorically warrants compensation.⁵ *See* Josh Patashnik,
20 *Physical Takings, Regulatory Takings, and Water Rights*, 51 Santa Clara L. Rev. 365, 367 (2011)
21 (advocating for a categorical rule of compensation for water rights); Jesse W. Barton, *Tulare Lake*
22 *Basin Water Storage District v. United States: Why It Was Correctly Decided and What This*
23 *Means for Water Rights*, 25 *Environ. L. & Pol'y J.* 109, 143-44 (2002) (same). *Cf. Casitas*
24 *Mun. Water Dist. v. United States*, 543 F.3d 1276, 1296 (Fed. Cir. 2008) (applying the categorical
25

26 ⁵ The usufructury nature of water rights distinguishes them from other property rights that may
27 be subject to the trust, in which substantial rights of use may survive the trust's application. *Cf.*
28 *Lyon*, 29 Cal. 3d at 232 (explaining that, notwithstanding application of the trust to Lyon's shore
property, Lyon "may utilize [his property] in any manner not incompatible with the public's interest
in the property.").

1 physical takings test to a water right takings claim). Alternatively, under a regulatory takings
2 framework, application of the public trust could so diminish a groundwater right that the water
3 right, as well as the overlying land, lose all economically viable use. *Cf. Lucas*, 505 U.S. at 1030.
4 And a taking may also occur under the *Penn Central* test. Not only would imposition of the public
5 trust have a significant negative economic impact, it would also dramatically frustrate existing
6 investment-backed expectations that have been based on the historic limitation of the public trust
7 to activities having a direct and immediate impact on surface waters. *See* James L. Huffman,
8 *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 Duke Envtl. L. &
9 Pol’y F. 1, 103 (2007) (“[A] careful review of the history—the precedent—does not make the case
10 for expanded application of the public trust doctrine.”). *See also* Lawrence, *supra*, at 1142 (until
11 the early 1980s, “California public trust law dealt almost entirely with tidelands.”).

12 3. The “Background Principles” Defense

13 If a government limitation is consistent with background principles of property law, then
14 there is no taking. *See Lucas*, 505 U.S. at 1029. *See generally* David L. Callies & J. David
15 Breemer, *Background Principles, Custom and Public Trust “Exceptions” and the (Mis)Use of*
16 *Investment-Backed Expectations*, 36 Val. U. L. Rev. 339 (2002). But a court cannot avoid the
17 unconstitutional outcomes discussed above by characterizing an expanded public trust as a
18 background principle of California water law. Although the public trust, broadly speaking, is such
19 a principle, *see Nat’l Audubon Soc’y*, 33 Cal. 3d at 437; *Esplanade Props., LLC v. City of Seattle*,
20 307 F.3d 978, 985-86 (9th Cir. 2002), the Takings Clause cannot be evaded through a creative and
21 unjustified expansion of a background principle. Background principles “cannot be newly
22 legislated or decreed.” *Lucas*, 505 U.S. at 1029. Otherwise, “the Takings Clause . . . would . . .
23 afford no protection against state power,” *Bush v. Gore*, 531 U.S. 98, 115 n.1 (2000) (Rehnquist,
24 C.J., concurring), and the Supreme Court’s decision in *Lucas* requiring compensation for a
25 regulatory wipe-out in value “would be a nullity,” *Stevens v. City of Cannon Beach*, 510 U.S. 1207,
26 114 S. Ct. 1332, 1334 (1994) (Scalia, J., dissenting from denial of cert.). Therefore, the public trust
27 ceases to be a background principle to the extent that it “shifts from its historical moorings.”
28 Callies & Breemer, *supra*, at 373.

1 The public trust doctrine traditionally was limited to tidelands and navigable waters and to
2 activities that have direct impacts on navigation, commerce, and fishing. *See, e.g., Nat'l Audubon*
3 *Soc'y*, 33 Cal. 3d at 434; Lawrence, *supra*, at 1148. What Petitioners demand, however, is an
4 expansion vastly beyond these original limitations. *See generally*, Joseph L. Sax, *Liberating the*
5 *Public Trust Doctrine from Its Historical Shackles*, 14 U.C. Davis L. Rev. 185 (1980). *Cf. Lucas*,
6 505 U.S. at 1032 n.18 (background principles must be based on “objectively reasonable application
7 of relevant precedents”). That demand is all the more significant given the serious constitutional
8 questions that already exist with the California Supreme Court’s expansion of the public trust
9 doctrine in the early 1980s. *See Lawrence, supra*, at 1158 (concluding that the California Supreme
10 Court’s expansion of the public trust doctrine in the early 1980s “is just as vulnerable to
11 constitutional attack as other regulatory takings”). Accordingly, reliance on purported “background
12 principles” cannot avoid the serious takings implications of expanding the public trust doctrine to
13 groundwater extraction.

14 CONCLUSION

15 Sound judicial practice requires that courts avoid decisions that raise serious constitutional
16 issues when reasonable interpretations of law are available that do not raise such issues. Here,
17 Petitioners’ request that the Court expand the public trust doctrine to groundwater extraction would
18 raise serious constitutional issues of due process of law and uncompensated takings. Yet, limiting
19 the public trust doctrine to activities—unlike groundwater extraction—that have a direct and
20 immediate effect on surface waters would be fully consistent with the case law. Therefore, the
21 Court should avoid raising the aforementioned constitutional issues by holding, as a matter of law,
22 that the public trust doctrine does not extend to groundwater extraction.

23 DATED: February 26, 2014.

24 Respectfully submitted,

25 
26 DAMIEN M. SCHIFF

27 Attorney for Amicus Curiae
28 California Farm Bureau Federation