

No. S220764

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

COUNTY OF SISKIYOU,
Petitioner

vs.

SUPERIOR COURT OF SACRAMENTO COUNTY,
Respondent

ENVIRONMENTAL LAW FOUNDATION, PACIFIC COAST
FEDERATION OF FISHERMEN'S ASSOCIATIONS,
INSTITUTE FOR FISHERIES RESOURCES, and STATE
WATER RESOURCES CONTROL BOARD,
Real Parties in Interest

On Petition for Writ of Mandate From an Order
Granting Judgment on the Pleadings

Sacramento County Superior Court, No. 34-2010-80000583
Hon. Allen H. Sumner

**PRELIMINARY RESPONSE OF REAL PARTIES IN
INTEREST ENVIRONMENTAL LAW FOUNDATION, PACIFIC
COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS,
AND INSTITUTE FOR FISHERIES RESOURCES**

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I. INTRODUCTION

Real parties in interest Environmental Law Foundation, Pacific Coast Federation of Fishermen’s Associations, and Institute for Fisheries Resources (collectively, “ELF”), the plaintiffs and petitioners below, submit this preliminary response to the petition for writ of mandate filed by petitioner County of Siskiyou (“County”) (Rule of Court 8.487(a)(1)). While ELF opposes the County on the merits, it supports the the County’s requested review. As discussed below, the extraordinary nature of this case leads ELF to believe that these important questions not only need to be settled by an appellate court, but requires a decision from this Court. ELF thus urges the Court to accept review of the decision below.

This case warrants review because of the substantial statewide significance of the issues presented. More than thirty years ago, in the seminal case *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 437, this Court held that, to protect navigable waterways from harm caused by diversions of non-navigable tributaries, the public trust can –indeed must -- be applied to those non-navigable waters. The present case revisits *National Audubon* with an important corollary question: does the public trust doctrine also protect navigable waterways from harm resulting from withdrawals of interconnected groundwater? ELF argues, and the trial court found, that it does.¹ To date, no appellate court has applied the logic of *National Audubon* to situations involving harm to the public trust resources

¹ Although the County’s petition characterizes the primary question in terms of whether the public trust doctrine “applies to groundwater” in situations where groundwater withdrawals affect public trust uses, ELF emphasizes that it is not seeking to have groundwater itself declared as a public trust resource that deserves protection, absent some effect on navigable waters. The trial court recognized the difference. (See County’s Appendix of

caused by groundwater pumping. But a definitive appellate ruling on this question is long overdue. Unlike surface waters, which for exactly a century have been subject to the most stringent permitting and regulatory regime, groundwater pumping has been nearly unmeasured, unregulated and unlimited in California. But groundwater usage is now among the central concerns as the state heads ever deeper into the current water crisis. The water system at issue in this case—the Scott River Valley—is only one of many water systems in California with surface water and interconnected groundwater. A decision here would not be limited to the Scott River, but would have broad implications for a substantial number of surface water–groundwater systems, helping to supply the fundamental rules and boundaries state lawmakers and regulators will need as the State moves to a new paradigm in water use.

It is now more important than ever to preserve the state’s water resources. As the California drought worsens, increased groundwater pumping around rivers like the Scott River diminishes their surface flows. This places not just the rivers themselves at grave risk, but also all of the public trust resources dependent upon those waters, such as fish and wildlife. A final decision from this Court that clarifies the role of the public trust doctrine and what obligations it places on the government trustees would have important consequences for how the state manages water policy, including what steps the government must take to protect California’s imperiled water-dependent public trust resources.

The County’s petition argues that the issues are of such statewide significance that this Court should exercise its discretion to hear the case.

Exhibits, vol. 1, pp. 22, 23-24 [hereinafter cited in the form “1 Pet. App. 22, 23-24”].) ELF would instead reframe the question as it is stated in the text above.

ELF, in also urging this Court to accept review, agrees with the County on this point.

Needless to say, however, ELF parts ways with the County when it comes to the merits. The trial court was correct: the public trust doctrine protects navigable waterways from harm caused by groundwater extraction. Similarly, the state and its subdivisions, including the County, are under an affirmative obligation to consider the public trust when issuing well permits and to protect the public trust so far as it is feasible to do so. ELF's position on the merits will be fully addressed in its formal return, should this Court accept review of the matter. For now, ELF respectfully requests, for all of the reasons below, that the Court issue an alternative writ, an order to show cause, or any other appropriate order to direct that this matter be heard and decided expeditiously by this Court.

II. ARGUMENT

The Supreme Court has original mandate jurisdiction to review “matters of public importance requiring prompt resolution.” (*Cal. Housing Finance Agency v. Elliot* (1976) 17 Cal.3d 575, 580; see *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 845.) This Court should exercise its discretion to review the issues presented by the County's petition.

A. The application of the public trust doctrine to groundwater management is an ideal question for this Court's review

This case presents a novel and significant issue of law concerning the proper application of the public trust doctrine to withdrawals of groundwater that affect interconnected public trust waters throughout the state. Coupled with the urgency of the situation in the Scott River, as well as the urgency created by a record-breaking statewide drought, ELF respectfully urges this Court to accept immediate review of the case.

1. The public trust doctrine is an archetypal subject of great public importance warranting this Court's immediate review

This Court has already demonstrated that the applicability of the public trust doctrine to situations involving the urgent need to preserve public waters, lands and resources is a significant issue of public importance that justifies review through an original writ proceeding. As the County notes in its petition, many of the seminal public trust doctrine cases in this state were heard in the Supreme Court in precisely this manner. (See, e.g., *National Audubon, supra*, 33 Cal.3d at p. 425; *State v. Superior Court (Lyon)* (1981) 29 Cal.3d 210, 216; *State v. Superior Court (Fogerty)* (1981) 29 Cal.3d 240, 244; *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 520.)

All of these cases reflected this Court's implicit or express recognition that matters involving the public trust doctrine hold great and urgent importance to the public. In one such case concerning whether the public trust doctrine applied to nontidal as well as tide and submerged lands along the California coast, this Court wrote that these were "issues which are of vast importance to the general public as well as to the owners of land bordering upon navigable lakes and streams." (*Lyon, supra*, 29 Cal.3d at p. 216.) This Court explained: "Substantial areas of land will be affected by our decision Lands of the type involved in this proceeding constitute a resource which is fast disappearing in California; they are of great importance for the ecology, and for the recreational needs of the residents of the state." (*Ibid.*) In a companion case involving the Lake Tahoe shorezone, this Court noted the existence of an "urgent need to prevent deterioration and disappearance of this fragile resource" as justification for its action in concluding that the state could not be estopped from asserting the public

trust rights of the public applicable to these lands. (*Fogerty, supra*, 29 Cal.3d at p. 247.)

In the present case, the Scott River and its interconnected groundwater are resources that, like Clear Lake in *Lyon* or the Lake Tahoe shorezone in *Fogerty*, are similarly “fast disappearing” and in urgent need of preservation. As alleged in the operative petition below and undisputed by the parties, groundwater withdrawals for irrigation essentially dewater the Scott every year, imperiling the existence of the river itself and the fish and other resources dependent upon it. No one would seriously dispute that the Scott River—a habitat for wildlife and fish, including endangered coho salmon—is important to the ecology – and the agricultural economy -- of the Scott River Valley, or that it is in the public interest to keep the river watered in the summer, lest its resources be destroyed. But the impact of this case will go far beyond the Scott River Valley, and the cases cited above teach us that this Court’s attention is necessary now to preserve the same interests in the Scott and all similar rivers that the Court sought to preserve in cases such as *Lyon* and *Fogerty*.

2. This case implicates many of the same concerns found in *National Audubon*

Perhaps the best example of this Court’s recognition of the significance of the public trust doctrine—both in terms of the weightiness of the legal issues involved and the necessity of prompt judicial action—is the *National Audubon* case itself. Like the other cases referenced above, *National Audubon* came to this Court over thirty years ago through an original petition for writ of mandate. The question presented was whether the public trust doctrine operates to protect Mono Lake from harm caused by diversions of its nonnavigable tributaries. This Court decided that question was

significant enough to accept review directly from the superior court. (*National Audubon, supra*, 33 Cal.3d at p. 425.)

The present case can be thought of in some ways as *National Audubon II*. The parallels between this case and *National Audubon* are substantial. Because this case raises issues that follow directly from those presented in *National Audubon*, and because of the current water emergency in this State, ELF respectfully urges that this Court should likewise accept the invitation to immediately address the matter now.

a. Both *National Audubon* and the present action focus on disputes over whether and how to integrate the public trust doctrine with an extant water system

The Court in *National Audubon* sought to resolve a pressing legal question concerning the public trust doctrine and its relationship to the state's appropriative water rights system. The Court noted that the case “[brought] together for the first time two systems of legal thought: the appropriative water rights system which since the days of the gold rush has dominated California water law, and the public trust doctrine which, after evolving as a shield for the protection of tidelines, now extends its protective scope to navigable lakes.” (*National Audubon, supra*, 33 Cal.3d at p. 425.) These two systems had been “on a collision course,” but by taking the case, the Court was able to settle disputes concerning the relationship between the two systems and “integrate the teachings and values” of both systems. (*Ibid.*)

The present case similarly brings together two separate approaches to managing water. As the courts have observed, California is the “only western state that still treats surface water and groundwater under separate and distinct legal regimes.” (*North Gualala Water Co. v. State Water Res.*

Control Bd. (2006) 139 Cal.App.4th 1577, 1590.) Like the “collision course” traveled by the competing theories in *National Audubon*, the legal and hydrological fiction of treating surface water and groundwater separately is now recognized as a hindrance to sound water management policy. Among other things, these dual systems of water management gives rise to any number of “thorny issues of classification and boundary-setting,” with the effect that “classification disputes in this field quickly take on an Alice-in-Wonderland quality because the legal categories . . . are drawn from antiquated case law and bear little or no relationship to hydrological realities.” (*Ibid.*)

The Scott River case now provides an opportunity to treat the dual systems as a single unit in the one situation where doing so makes the most sense—that is, where the surface water and groundwater are hydrologically interconnected. The groundwater that feeds the Scott River is a near-perfect analog to the nonnavigable tributaries that fed Mono Lake. The Court in *National Audubon* held that “[i]f 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. Both actions result in the same damage.” (*National Audubon, supra*, 33 Cal.3d at p. 436-37.) Here, the trial court applied this logic for the first time to groundwater connected to a navigable public trust waterway:

The public trust doctrine would prevent pumping directly out of the Scott River harming public trust uses. So too under *National Audubon* the public trust doctrine would prevent pumping a non-navigable tributary of the Scott River harming public trust uses of the river. The court finds no reason why the analysis of *National Audubon* would not apply to the facts alleged here.

(1 Pet. App. 23.) As a result, the trial court held that “the public trust doctrine protects navigable rivers from harm caused by extraction of groundwater, where the groundwater is so connected to the navigable water that its extraction adversely affects public trust uses.” (*Ibid.*)

The County challenges this ruling, asserting in essence that the principles laid down in *National Audubon* are limited to the specific facts of that case. ELF by contrast *National Audubon* serves as precedent fully applicable to situations involving not only nonnavigable tributaries but also interconnected groundwater. As the original architect of the principle relied upon by the trial court and ELF in treating the groundwater of the Scott River as an integral part of the Scott River Valley system, this Court is in the best position to settle this dispute. ELF respectfully urges the Court to take this opportunity to do so.

b. Both *National Audubon* and the present case rely on prompt judicial action to protect an endangered public resource

The present case additionally shares with *National Audubon* and its predecessor public trust cases the concern that prompt judicial relief is necessary lest an invaluable public resource become irreparably damaged. The *National Audubon* Court recognized the very practical reasons why the Mono Lake case needed to be heard immediately. The City of Los Angeles was diverting virtually all of the water from the surface streams feeding into Mono Lake, with the result that there was “little doubt that both the scenic beauty and the ecological values of Mono Lake are imperiled.” (*National Audubon, supra*, 33 Cal.3d at pp. 424-25.)

The consequences of any ruling on the Scott River would likewise be significant, at a level on par with the peril facing Mono Lake before the *National Audubon* decision. ELF’s petition in the trial court alleged that

groundwater pumping near the Scott River has led to decreased surface flows. (1 Pet. App. 98-99, ¶¶ 17, 20-23.)² As a result of the decreased flows, the Scott River is often dewatered in the summer and early fall, reducing the river to a series of shallow pools. (1 Pet. App. 100-101, ¶ 24.) Aside from the damage to the river itself, this also injures the river's major fish populations, including steelhead trout, chinook salmon, and coho salmon, the latter of which is protected under both the federal and state Endangered Species Acts and various state laws. (1 Pet. App. 99, ¶¶ 21, 25.) The diminishment of these fish populations in turn adversely affects major commercial, tribal, and recreational fisheries that support local and coastal economies.

Speedy resolution by this Court, particularly by declaring that the public trust doctrine protects these public trust resources and uses from harm caused by unregulated groundwater pumping, is necessary to address this pressing problem. Just as the *National Audubon* Court felt it was prudent to hear the case immediately after the superior court proceedings to avert ecological disaster in Mono Lake, ELF believes that the situation in the Scott River is urgent enough to warrant immediate review.

B. Courts and this Court in particular have a crucial role to play in forging a new legal regime in managing groundwater to address the current crisis now and in the long term

Prompt judicial resolution in this Court is further necessary because although the Governor and the Legislature have and are making important attempts to address the state's groundwater crisis, these solutions will not

² As noted in the operative petition and the trial court's decision, the Scott River was subject to an adjudication in 1980. While that adjudication addressed some groundwater pumping within 500 feet of the river, it did not address all groundwater withdrawals that affect the surface flow. *See, County of Siskiyou v. Superior Court (2013) 217 Cal.App.4th 83, 90.*

provide relief in the near term, and will benefit from this Court’s unique role in addressing the interplay of the Public Trust Doctrine and legislative and administrative efforts.

Earlier this year, Governor Brown declared a state of emergency because of dire water conditions in California. (See Governor’s Proclamation of State of Emergency, No. 1-17-2014 (Jan. 17, 2014), available at <http://gov.ca.gov/news.php?id=18368>.) The Governor’s proclamation ordered the Department of Water Resources to, among other things, “evaluate changing groundwater levels, land subsidence, and agricultural land fallowing as the drought persists,” identify “groundwater basins with water shortages” and “gaps in groundwater monitoring,” and “work with counties to help ensure that well drillers submit required groundwater well logs for newly constructed and deepened wells in a timely manner.” (*Id.* ¶¶ 11, 12.)³ But by its very nature as an emergency order, this relief is temporary, limited in scope, and not tailored for long-term preservation of the state’s groundwater, including those connected to surface waters.

The Legislature as well has passed a package of bills that are currently pending before the Governor that would, very broadly speaking, regulate groundwater pumping at a state level for the first time—but even this solution, while more permanent than the executive action, leaves significant gaps in the short term and may not fully solve the problem. The bills, SB 1168, SB 1319, and AB 1739, if approved by the Governor, will require

³ The Governor issued a second declaration of a state of emergency in April, renewing the orders of the January proclamation and adding additional directives. (Governor’s Proclamation of Continued State of Emergency, No. 4-25-2014 (Apr. 25, 2014), ¶ 8, available at <http://gov.ca.gov/news.php?id=18496>.)

local government agencies to adopt groundwater basin plans to assure sustainable levels. As relevant here, certain provisions would require the state Department of Water Resources and other agencies to categorize every groundwater basin by January 1, 2017. (See Sen. Bill No. 1168, sent to Governor Aug. 29, 2014 (2013-14 Reg. Sess.) § 3.) Local water agencies must regulate certain groundwater basins under plans to be adopted by January 30, 2020; noncompliant basins will be subject to oversight plans developed by the State Water Resources Control Board. (E.g., Assem. Bill No. 1739, sent to Governor Aug. 29, 2014 (2013-14 Reg. Sess.) § 19.)

These are all laudable goals, but with deadlines years away, the adoption of this legislation would fail to remedy any situation that requires immediate relief. ELF filed the present action in 2010, before the state experienced the current drought crisis. Yet even then groundwater extractions in the Scott River harmed the surface waters and injured endangered fish and other wildlife. California's severe drought has since only increased the risk of ecological disaster and both accelerated and vastly expended the potential destruction of surface waters and the public trust resources dependent on them, throughout the State.

Equally important is that the legislation does not address the legal issue in this case, and one which will potentially provide an important core principle in any groundwater plan: does the Public Trust require that protections for public trust waters and resources extend to interconnected groundwaters? Only this Court can supply the answer, and help guide the new groundwater regime that is emerging in this State.

As this Court has repeatedly noted, the judiciary carries a significant role in determining the scope of, uses of, obligations toward, and limitations on, the public trust resources of the State. Ever since *National Audubon*, it

has been settled that the courts possess concurrent original jurisdiction with the State Water Resources Control Board in enforcing water rights. (*National Audubon, supra*, 33 Cal.3d at pp. 449-51.)

Thus in the field of water rights, it is the judiciary that declares “the purpose of the trust, the scope of the trust, . . . and the powers and duties of the state as trustee of the public trust.” (*National Audubon, supra*, 33 Cal.3d at p. 434.) It has always been the courts’ “traditional role” to “determine in the first instance what is and what is not a public benefit.” (*County of Orange v. Heim* (1973) 30 Cal.App.3d 694, 715, citations omitted.)

Therefore, a judicial decision holding that the public trust doctrine protects public trust resources from groundwater extractions that injure those resources is only complemented by—not made superfluous—by legislation regulating groundwater. (*National Audubon, supra*, 33 Cal.3d at p. 446, fn. 27 [codification of some public trust duties in the Water Code did not “render the judicially fashioned public trust doctrine superfluous”].) Ultimately the courts harmonize the doctrine and any statutory or regulatory scheme if they conflict. (See *id.* at pp. 445-48.) This is precisely the situation now presented before the Court.

Particularly given the statewide implications of this case, only this Court can fully and finally resolve these controversies. The County points out that the issues are fully ripe for appellate decision, and it would be judicially inefficient to decline review now only to have the matter presented again in substantially the same form at later stages in the proceedings. Moreover, this case presents the ideal opportunity for further development of the public trust doctrine, at a time when judicial action is most urgent. The *National Audubon* decision, now three decades old, remains the main

authority on the modern public trust doctrine. As one court of appeal recently wrote:

Although subsequent Supreme Court cases have acknowledged the public trust doctrine, they have not elaborated on its role in California jurisprudence. (E.g., [*Envtl. Protection Information Ctr. v. Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 515]; [*In re Bay-Delta etc.* (2008) 43 Cal.4th 1143, 1154].) *Audubon Society* remains the most recent Supreme Court authority governing application of the doctrine in this context.

(*Light v. State Water Res. Control Bd.* (2014) 226 Cal.App.4th 1463, 1481.)

Only a decision by this Court describing the nonalienable duties and powers of the state with respect to groundwater can provide definitive guidance to all other actors involved in future water management—from local irrigation districts to the regional and state water boards, all the way up to the Governor and the Legislature. And the immediate practical consequences are weighty: a decision from this Court holding that the state, and by extension local agencies, has both the power and the *present* duty to regulate groundwater to preserve the public trust would give the state a means to provide effective relief from the groundwater crisis by requiring considered management of our precious water resources.

ELF therefore respectfully urges this Court to take this opportunity to settle previously unanswered questions concerning the relationship between the state and its groundwater resources and provide vital direction for lawmakers, regulators, and users of groundwater on the application of the public trust doctrine for the fast approaching future regime.

III. CONCLUSION

For the foregoing reasons, ELF respectfully requests this Court to issue an alternative writ or order to show cause, or any other proper order, to direct that the matter presented by the County's petition for writ of mandate be heard and decided in this Court.

In the alternative, ELF requests that, in lieu of summarily dismissing the County's petition, this Court transfer the petition to the Court of Appeal with directions to issue an alternative writ or other order requesting that the matter presented by the County's petition for writ of mandate be heard and decided.

Respectfully submitted,

ENVIRONMENTAL LAW FOUNDATION

Dated: September 4, 2014

By: _____
James Wheaton
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CERTIFICATE OF COMPLIANCE

In accordance with California Rules of Court, rule 8.204, I certify that the foregoing was produced on a computer, is composed in 13-point Times New Roman, and, exclusive of the portions exempted by rule 8.204, subd. (c)(3), contains 3,941 words according to the word count function of the word processor program used to prepare this brief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: September 4, 2014

Lowell Chow

CERTIFICATE OF SERVICE

I, Nicole Feliciano, am employed in the County of Alameda, California. I am over the age of 18 and not a party to this action. My business address is 1736 Franklin Street, 9th Floor, Oakland, CA 94612.

On September 4, 2014, I served the following document(s):

PRELIMINARY RESPONSE OF REAL PARTIES IN INTEREST ENVIRONMENTAL LAW FOUNDATION, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, AND INSTITUTE FOR FISHERIES RESOURCES

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I declare under penalty of perjury that the foregoing is true and correct and that this was executed on September 4, 2014 in Oakland, California.

Nicole Feliciano
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