

Court of Appeal No. **A116362**

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

CENTER FOR BIOLOGICAL
DIVERSITY, INC., and PETER
GALVIN,

Plaintiffs and Appellants,

vs.

FPL GROUP, INC.; FPL ENERGY,
LLC; ESI BAY AREA GP, INC.;
ESI BAY AREA, INC.; GREP BAY
AREA HOLDINGS, LLC; GREEN
RIDGE POWER LLC; ALTAMONT
POWER LLC; ENXCO, INC.;
SEAWEST WINDPOWER, INC.;
PACIFIC WINDS, INC.; WINDWORKS,
INC.; and ALTAMONT WINDS, INC.,

Defendants and Respondents.

Supreme Court No.

Alameda County Superior Court
Case No. RG04-183113

The Hon. Bonnie L. Sabraw, Judge

**APPELLANTS CENTER FOR BIOLOGICAL DIVERSITY, INC. AND
PETER GALVIN'S**

PETITION FOR REVIEW

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ISSUE PRESENTED FOR REVIEW

May a member of the public maintain an action for equitable relief against a private party that is destroying public trust wildlife in violation of law and without any permit authorizing the destruction, and pursue that action to a judgment on the merits?

REASONS WHY REVIEW SHOULD BE GRANTED

California's wildlife is a public trust resource. The Court of Appeal here held that, although members of the public having standing to bring an action to protect public trust resources that are being unlawfully destroyed, they may only bring an action against "public agencies responsible for protecting these trust resources," Op. at 2, and may not bring an action against the party causing the destruction.

Review should be granted because the Court of Appeal's decision conflicts with this Court's decisions in *Marks v. Whitney*, 6 Cal.3d 251, 261-62 (1971) and *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 431 n.11 (1983). In *Marks v. Whitney* and *National Audubon*, the Court held that members of the public could assert public trust causes of action directly against those who were harming public trust resources, including private parties. The Court of Appeal's decision here prohibits such suits, and thus conflicts with these decisions.

Review should also be granted because this action presents a question of statewide importance: whether members of the public may maintain a public trust cause of action seeking equitable relief against a private party that is destroying public trust wildlife. The Court of Appeal's alternative remedy of suing only "public agencies responsible for protecting these trust resources," Op. at 2, is illusory, for in this case there is no basis

for suing the Department of Fish and Game, the agency with exclusive trust responsibilities for public trust wildlife. Nor do the Court of Appeal's policy arguments for its ban on lawsuits seeking relief against private parties that are destroying public trust resources have merit: Its analogy of public trusts to private trusts is faulty and its argument that administrative proceedings should be the exclusive venue in which members of the public may seek relief against a party illegally destroying public trust resources arises out of a misreading of *National Audubon*.

STATEMENT OF FACTS

The region around Altamont Pass in eastern Alameda County has one of the highest population densities of raptors in the world. First Amended Complaint ("FAC") ¶¶ 42-44. (The FAC is found at Appellants' Appendix ("AA") 001 to 032.) It has the highest known density of breeding pairs of Golden Eagles. FAC ¶ 44. It is also rich in other raptors, such as hawks, falcons, and owls, as well as non-raptor bird species. FAC ¶ 42. The Altamont Pass region is also an important raptor wintering area and raptor migratory route. FAC ¶ 42.

For thousands of years these magnificent birds have soared the skies of Altamont Pass free and unhindered. Beginning more than twenty years ago, in the early 1980s, the wind power industry began erecting wind turbines on the ridges where these raptors roam. FAC ¶¶ 38, 45. Eventually, there came to be over 5,000 turbines installed at Altamont Pass, turbines that are now inefficient and obsolete by industry standards. FAC ¶¶ 3, 38, 51-54.

In 1984, the first reports came in that the Altamont wind turbines were killing raptors. FAC ¶ 69. The turbine blades strike the birds as they are flying and dismember them. FAC ¶¶ 55, 82. According to scientific estimates at the time the complaint was filed, the Altamont wind

turbines kill from 880 to 1,300 eagles, hawks, falcons, and owls each year, including between 75 and 116 Golden Eagles annually. FAC ¶ 4. Current scientific estimates of raptor mortality are even higher. This kill rate is far higher than the rate at which birds are killed by any other wind power project in the world. FAC ¶ 49.

The result is that, since the 1980s, the Altamont wind power industry has illegally slaughtered 17,000 to 26,000 or more eagles, hawks, falcons, and owls, each of which is protected under state and federal law. FAC ¶ 46. It has also killed tens of thousands of other protected birds. FAC ¶¶ 1, 46.

Defendants own or operate, or participate in the acts of others who own or operate, obsolete killer wind turbines at Altamont Pass. FAC ¶¶ 12-37. Defendants are profit-making business entities; revenues for electricity sales from wind turbines at Altamont Pass totaled over \$380 million in the six years from 1999 to 2004. FAC ¶ 40. Most of the defendants are subsidiaries of huge multibillion-dollar corporations; defendants' parent corporations include the electric utility holding company FPL Group of Florida (FAC ¶¶ 12-15, 17, 18), Vestas of Denmark (FAC ¶¶ 16-18), and Electricité de France (FAC ¶ 29).

Altamont Pass was the first commercial wind energy development in the world, and the wind turbines installed there in the 1980s were the first generation of wind energy technology. FAC ¶ 51. By current standards, these first-generation machines are woefully obsolete and inefficient; they are several generations behind the current state of the art. FAC ¶¶ 3, 51-54. Many of the machines at Altamont Pass are capable of generating only 100 kilowatts of electricity. FAC ¶ 51. State-of-the-art

turbines can generate up to 3 megawatts (3,000 kilowatts) per turbine—30 times the capacity of the existing turbines at Altamont. FAC ¶ 51.

Equally important, it has long been thought that the installation of state-of-the-art turbines will substantially reduce raptor mortality at Altamont Pass. FAC ¶¶ 3, 52. Since 1998, defendants have repeatedly announced various plans to replace their obsolete, first-generation wind turbine generators at Altamont Pass with large state-of-the-art turbines. FAC ¶ 54. Defendants, however, have never implemented any of these repowering plans, except for one small wind turbine generator replacement project involving just 31 turbines. FAC ¶ 54. Defendants expect to continue using the vast majority of the obsolete, first-generation wind turbine generators at Altamont Pass for 10 or more additional years. FAC ¶ 54.

Defendants have no state or federal permit, license, or other authorization to take, injure, kill, or harm birds with their wind turbines. FAC ¶¶ 60-62. Nothing in the Fish and Game Code or its regulations authorizes defendants to kill thousands of eagles, hawks, falcons, owls, and other birds, nor do these statutes provide for the possibility of such authorization. FAC ¶ 87. To the contrary, by their killings of eagles, hawks, falcons, owls, and other birds, defendants are flagrantly violating numerous criminal and civil prohibitions of the Fish and Game Code, the federal Bald Eagle and Golden Eagle Protection Act, and the federal Migratory Bird Treaty Act. FAC ¶¶ 1, 59, 63.

Defendants are violating section 2000 of the Fish and Game Code by killing thousands of birds with their Altamont Pass wind turbines. FAC ¶¶ 86-89. Under section 2000, “[i]t is unlawful to take any bird, mammal, fish, reptile, or amphibian except as provided in this code or regulations made pursuant thereto.” The Fish and Game Code provides that to “take” a

creature means to “kill” it, even if the killing occurs unintentionally in the course of an industrial or mechanical process. Fish & Game Code § 86; *Dept. of Fish and Game v. Anderson-Cottonwood Irrigation Dist.*, 8 Cal.App.4th 1554, 1558, 1560, 1562-63, 1568 (1992) (fish killed by blades of irrigation pumps “incidental to lawful irrigation activity” were “taken” within the meaning of section 86).

In addition to the general prohibition of section 2000, a number of other Fish and Game Code provisions independently prohibit defendants’ conduct here. Section 3503.5 of the Fish and Game Code specifically prohibits the taking or destruction of eagles, hawks, falcons, and owls: “It is unlawful to take, possess, or destroy any birds in the orders Falconiformes [i.e., eagles, hawks, and falcons] or Strigiformes [i.e., owls] (birds-of-prey) or to take, possess, or destroy the nest or eggs of any such bird except as otherwise provided by this code or any regulation adopted pursuant thereto.” FAC ¶¶ 93-95. Defendants are both “tak[ing]” and “destroy[ing]” eagles, hawks, falcons, and owls. *Ibid.*

Section 3511 of the Fish and Game Code provides special protection to Golden Eagles: “(a) (1) Except as provided in Section 2081.7, fully protected birds or parts thereof may not be taken or possessed at any time. No provision of this code or any other law shall be construed to authorize the issuance of permits or licenses to take any fully protected bird, and no permits or licenses heretofore issued shall have any force or effect for that purpose. . . . [¶] (b) The following are fully protected birds: . . . (7) Golden eagle” Defendants are violating this absolute, no-exceptions prohibition of the taking of Golden Eagles. *Ibid.*

Section 3800(a) of the Fish and Game Code also prohibits the killing of hawks, falcons, owls, and other birds: “All birds occurring naturally in California that are not resident game birds, migratory game birds, or fully

protected birds are nongame birds. It is unlawful to take any nongame bird except as provided in this code or in accordance with regulations of the commission” FAC ¶¶ 104-105. Hawks, falcons, and owls are nongame birds. Fish & Game Code §§ 3500 (defining game birds), 3800(a) (defining nongame birds). By participating in the killing of thousands of hawks, falcons, owls, and other birds, defendants are violating the prohibition of section 3800(a). FAC ¶¶ 104-105.

Defendants are also committing thousands of violations of the federal Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703. FAC ¶¶ 109-111. The MBTA is a “comprehensive statutory prohibition” that is set forth in “expansive” terms. *Andrus v. Allard*, 444 U.S. 51, 59-60 (1979). The MBTA prohibits the killing “by any means or in any manner” of any member of the bird species that it protects: “it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, [or] possess . . . any migratory bird, any part, nest, or eggs of any such bird” 16 U.S.C. § 703. The MBTA is a strict liability criminal statute, requiring no proof of intent. FAC ¶ 109; *United States v. Corrow*, 119 F.3d 796, 805 (10th Cir. 1997) (collecting cases); *United States v. Moon Lake Electric Ass’n*, 45 F.Supp.2d 1070, 1073-74 (D. Colo. 1999). The bird species protected by the MBTA include all North American eagles, hawks, falcons, and owls. FAC ¶ 110; 50 C.F.R. § 10.13 (listing protected species).

Defendants are also violating section 3513 of the Fish and Game Code, which prohibits the killing of any nongame bird (including eagles, hawks, falcons, and owls) that is also protected under the federal Migratory Bird Treaty Act: “It is unlawful to take or possess any migratory nongame bird as designated in the Migratory Bird Treaty Act or any part of such migratory nongame bird except as provided by rules and regulations

adopted by the Secretary of the Interior under provisions of the Migratory Treaty Act.” FAC ¶¶ 115-116.

Defendants are also violating the federal Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. § 668. FAC ¶¶ 120-121. The BGEPA is a “sweepingly framed prohibition,” *Andrus v. Allard*, 444 U.S. at 56, that contains criminal and civil prohibitions against the taking of Golden Eagles. *See United States v. Hugs*, 109 F.3d 1375, 1378 (9th Cir. 1997) (“[P]rotection of bald and golden eagles serves a compelling government interest.”); *United States v. Jim*, 888 F.Supp. 1058, 1063 (D. Ore. 1995) (“the BGEPA is promoting a compelling interest in protecting the declining numbers of golden eagles”). Subdivision (a) makes it a criminal offense to “knowingly, or with wanton disregard for the consequences of his act take . . . in any manner . . . any golden eagle” 16 U.S.C. § 668(a). Subdivision (b) makes it a civil offense to “take . . . in any manner . . . any golden eagle.” 16 U.S.C. § 668(b). Under the BGEPA, “ ‘take’ includes also pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb.” 16 U.S.C. § 668c. By participating knowingly or with wanton disregard in the taking and killing of hundreds of Golden Eagles by means of the Altamont Pass wind turbines, defendants have committed criminal and civil violations of the BGEPA. FAC ¶ 121.

Defendants’ thousands of violations of the Fish and Game Code are criminal offenses. FAC ¶ 89. Section 12000(a) of the Fish and Game Code makes any violation of the Fish and Game Code and its regulations criminal offenses: “Except as expressly provided otherwise in this code, any violation of this code, or of any rule, regulation, or order made or adopted under this code, is a misdemeanor.” *Ibid.*

Plaintiff Center for Biological Diversity, Inc., is a nonprofit conservation organization that is a national leader in protecting wild

creatures and the habitats on which they depend. FAC ¶ 6. The Center has over 12,000 members, more than 4,400 of whom are Californians. FAC ¶ 8. The Center's members and staff have researched, studied, observed, and sought protection for the raptor and other birds that frequent the vicinity of Altamont Pass. FAC ¶ 8. The Center's members and staff derive scientific, recreational, conservation, spiritual, and aesthetic benefits from the existence in the wild of the raptor and other birds that are being killed, injured, or otherwise harmed by defendants' wind turbines. FAC ¶¶ 8, 9.

Plaintiff Peter Galvin is a conservation biologist and is the Conservation Director of the Center for Biological Diversity. FAC ¶ 10. He is a citizen and resident of California and has visited the Altamont Pass region and observed its creatures and habitats. FAC ¶ 10.

Despite the clear statutory prohibitions against killing, injuring, or harming eagles, hawks, falcons, and owls, the Altamont Pass wind power industry has resisted repeated efforts over the past 20 years to compel it to conform its conduct to the law. FAC ¶¶ 67, 83. Defendants have undertaken no effective mitigation measures, and have made no attempt to compensate for their destruction of public trust wildlife, to restore its value, or remediate the consequences of its destruction. FAC ¶¶ 4, 65. Defendants have to date escaped all legal liability for their crimes. FAC ¶¶ 68-84. Plaintiffs and the general public are being irreparably harmed by defendants' continuing destruction of public trust wildlife. FAC ¶¶ 66, 91, 133, 138.

PROCEDURAL HISTORY

This is an appeal from a judgment on the pleadings dismissing plaintiffs' action on the ground that the facts alleged in plaintiffs' complaint fail to state a cause of action under any possible legal theory.

Plaintiffs filed this action on November 1, 2004 and on April 15, 2005 filed their first amended complaint, the operative pleading at issue here. The first amended complaint alleges that defendants are unlawfully killing thousands of raptors and other birds as a regular part of their business practices. The first amended complaint states a common-law cause of action for destruction of public trust resources. FAC ¶¶ 134-38. The public trust cause of action alleges that defendants are unlawfully destroying public trust wildlife by their wanton, unlawful, and unremediated killing of raptors and other birds, and it prays for injunctive, declaratory, and other equitable relief. FAC ¶¶ 134-38; Prayer. In their public trust cause of action, plaintiffs allege that the wanton, unlawful, and unremediated killing of raptors and other birds by defendants violated the public trust doctrine. FAC ¶¶ 134-38. The first amended complaint also states causes of action against defendants under the Unfair Competition Law (UCL), Business and Professions Code section 17200, under that statute's "unlawful business practice" and "unfair business practice" prongs.

The trial court, early in the litigation, invited both Alameda County and the State of California to intervene in plaintiffs' action if they thought it necessary or appropriate to do so. 2/17/05 Order at 34:24 to 35:2 (Respondent's Appendix ("RA") 66:24 to 67:2). The State of California and Alameda County each expressly disclaimed on the record any interest in participating in this litigation. Supplemental Appellants' Appendix ("SAA") 1, 2.

The trial court twice denied repeated motions by defendants to stay or dismiss the action on the basis of the UCL abstention or primary jurisdiction doctrines. RA 94-101; RA 228-31. The gist of defendants' motions was that the court should stay or dismiss the action because

Alameda County was conducting zoning permit proceedings related to defendants' wind turbines. Defendants made one motion before the Alameda County Board of Supervisors renewed defendants' zoning permits on September 22, 2005. Defendants made a second motion after renewal of the permits and the filing of two lawsuits challenging the procedural adequacy under the California Environmental Quality Act (CEQA) of the permit renewal. Plaintiffs were not parties to either of those lawsuits.

Subsequently, defendants moved for judgment on the pleadings on plaintiffs' public trust cause of action, contending that wildlife is not a public trust resource and therefore there was no common-law cause of action for its destruction. AA 033, 036, 047, 050. While that motion was pending, defendants moved for judgment on the pleadings on plaintiffs' UCL causes of action.

The trial court granted both motions for judgment on the pleadings and dismissed the action. AA 133 to 151. The trial court granted judgment on the pleadings on plaintiffs' public trust cause of action on the ground that wildlife is not a public trust resource whose destruction gave rise to a cause of action by members of the public. 10/12/06 Order at 16 (AA 148). The trial court's order dismissed the action without leave to amend, and thereby constituted a final judgment under Code of Civil Procedure section 581d. 10/12/06 Order at 17 (AA 149). Plaintiffs timely appealed the judgment. AA 152.

In addition to the regular briefing, the parties filed supplemental briefs and supplemental reply briefs addressing questions posed by the Court of Appeal in its pre-argument order of January 31, 2008.

The Court of Appeal filed its opinion on September 18, 2008. The opinion is attached hereto. On October 2, 2008, plaintiffs filed a petition for rehearing in the Court of Appeal. On October 9, 2008, the Court of

Appeal modified the opinion without any change in the judgment and denied the petition for rehearing. A copy of the Court of Appeal's order is attached hereto.

ARGUMENT

I. The Court Of Appeal's Decision Conflicts With This Court's Holdings in *National Audubon* and *Marks v. Whitney*

As the first stage of its analysis, the Court of Appeal correctly reaffirmed that, under a long line of existing and well-settled precedent, California's wildlife is protected as part of the public trust. Op. at 8-14; *see, e.g., People v. Truckee Lumber Co.*, 116 Cal. 397, 399 (1897) (“The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the state.”).

The Court of Appeal, however, as the next stage of its analysis then held that members of the general public may not enforce the public trust rights in wildlife against private parties who are destroying wildlife. Op. at 17. This holding was erroneous and conflicts with the prior decisions of this Court in *National Audubon* and *Marks v. Whitney*.

This Court has held that every member of the public has standing to sue to protect public trust resources. *National Audubon*, 33 Cal.3d at 431 n.11; *Marks v. Whitney*, 6 Cal.3d at 261. Moreover, as this Court's decisions in both *Marks v. Whitney* and *National Audubon* demonstrate, the standing of members of the public extends to seeking relief directly against those who are themselves destroying or harming public trust resources.

In *Marks v. Whitney*, a decision the Court of Appeal failed to address in its opinion, this Court held that one private party can maintain an action to prevent the destruction of public trust resources by another private party. *Marks v. Whitney* was a quiet title action between two neighbors. 6 Cal.3d at 256. Marks asserted “complete ownership of the tidelands” abutting his upland property and “the right to fill and develop them.” *Ibid.* Whitney filed a cross-complaint for a declaration that the tidelands were burdened

with a public trust easement, asserting that Marks could not destroy the public trust tidelands by filling and building upon them. *Id.* at 256, 260-61, 262. The trial court held that Whitney lacked standing to assert public trust claims. *Id.* at 256. This Court reversed, holding that Whitney had standing to seek relief against Marks “to recognize and declare the public trust easement on Marks’ tidelands.” *Id.* at 256, 262. It further held that “the court may not bar members of the public from lawfully asserting or exercising public trust rights.” and that “it is also within the province of the trier of fact to determine whether any particular use to which Marks wishes to devote his tidelands constitutes an unlawful infringement upon the” public trust. *Id.* at 260-61.

The Court thus held that Whitney could assert public trust claims directly against Marks to prevent him from destroying public trust resources by filling in his tidelands. It did not require that Whitney, instead of asserting claims against Marks, assert claims against the State Lands Commission, the trustee of the public trust rights in Mark’s tidelands. *See* Public Resources Code § 6301 (“All jurisdiction and authority remaining in the State as to tidelands and submerged lands as to which grants have been or may be made is vested in the [State Lands] commission.”); *Marks v. Whitney*, 6 Cal.3d at 257 n.1 (discussing State Lands Commission’s role as trustee of public trust easement in conveyed tidelands held by Marks). Because the Court of Appeal’s holding here would require just that result, it conflicts with this Court’s holding in *Marks v. Whitney* and review should be granted.

The Court of Appeal’s decision here also conflicts with this Court’s decision in *National Audubon*. In *National Audubon*, this Court held that members of the public like plaintiff Peter Galvin and environmental organizations like the Center for Biological Diversity have standing to sue

those who are injuring public trust resources to prevent and remediate that harm. *National Audubon* was a public trust action brought by the National Audubon Society and others to prevent the defendant Department of Water and Power of the City of Los Angeles (“DWP”), from continuing to cause, among other harms, harm to migratory birds dependent on Mono Lake, a navigable water body protected by the public trust. 33 Cal.3d at 429-31. DWP was diverting water from nonnavigable streams flowing into Mono Lake, causing the lake to shrink and causing a variety of harms to birds and other public trust resources. *Ibid.*

DWP argued that the plaintiffs lacked standing to sue DWP to enforce these public trust rights, just as the Court of Appeal here held that plaintiffs lack standing to sue defendants to enforce the public trust rights in the wildlife defendants are killing. *National Audubon*, 33 Cal.3d at 431 n.11 (“DWP contended that plaintiffs lack standing to sue to enjoin violations of the public trust”). This Court, relying on its previous holding in *Marks v. Whitney*, flatly rejected this argument and held that members of the public have standing to sue those who are harming public trust resources to enforce their public trust rights: “. . . *Marks v. Whitney, supra*, 6 Cal.3d 251, expressly held that any member of the general public (p. 261) has standing to raise a claim of harm to the public trust. We conclude that plaintiffs have standing to sue to protect the public trust.” *National Audubon*, 33 Cal.3d at 431 n.11 (citations omitted); *accord, In re Water of Hallett Creek Stream System*, 44 Cal.3d 448, 472 n.16 (1988) (“This court has also recognized the standing of . . . any member of the general public to raise a claim of harm to the public trust.”).

The Court of Appeal recognized that members of the public have standing to assert claims of harm to the public trust. However, its novel limitation of public trust standing to only claims against “public agencies

responsible for protecting these trust resources,” Op. at 2, thereby excluding claims against the party destroying public trust resources, conflicts with *National Audubon*. In *National Audubon*, DWP was the party destroying trust resources, not a “public agenc[y] responsible for protecting the[] trust resources,” Op. at 2, and thus would not have been a proper defendant under the Court of Appeal’s holding. DWP’s role in *National Audubon* was no different from that of a private water appropriator in taking water from the streams flowing into Mono Lake and harming Mono Lake and the wildlife dependent upon it. In making its diversions, DWP was not acting as a regulator or a trustee of public trustee rights. DWP has no regulatory authority over the waters flowing into Mono Lake nor any regulatory authority over water use, wildlife, or any other interest or resource protected by the public trust. DWP is also not the trustee of the public trust resources it was harming.

Like plaintiffs’ action, *National Audubon* thus was an action by private plaintiffs seeking injunctive and declaratory relief “[t]o abate th[e] destruction” caused by a defendant, DWP, that held no public trust rights and was harming public trust resources. 33 Cal.3d at 431. Yet the Court of Appeal’s decision here would have prohibited National Audubon Society from suing DWP because it was not a “public agenc[y] responsible for protecting the[] trust resources,” Op. at 2. Because this Court did authorize National Audubon Society to sue DWP for harming public trust resources, the Court of Appeal’s decision here conflicts with the Court’s decision in *National Audubon* and review should be granted.

II. Review Is Necessary To Settle A Question Of Statewide Importance

Even if the Court of Appeal’s holding did not conflict with this Court’s decisions in *National Audubon* and *Marks v. Whitney*, review

would still be required. The ability of members of the public to sue private parties who are destroying public trust wildlife is a right of statewide importance that this Court should protect and reaffirm against the erosion threatened by the Court of Appeal's decision.

The Court of Appeal's position that members of the public should be limited to suing only public agencies when private parties are illegally destroying public trust resources lacks any support in the common law or the relevant statutes, and presents an illusory remedy that will offer no relief.

A. The Court Of Appeal's Remedy Of Suing State And Local Agencies Is Illusory

The facts of this case illustrate why the Court of Appeal's remedy of suing public agencies is illusory. A review of the statutory background is helpful. The Legislature has specifically forbidden any governmental entity, including the Department of Fish and Game and Alameda County, from issuing any permit authorizing defendants to kill Golden Eagles because they are "fully protected birds." Fish & Game Code § 3511. The Legislature has in addition prohibited the killing of other raptors like eagles, hawks, falcons, and owls. Fish & Game Code § 3503.5. It has generally prohibited the killing of wildlife in Fish and Game Code section 2000. The Legislature has crafted a number of exemptions to the prohibitions against killing wildlife for various agricultural and industrial activities. *See, e.g.*, Fish & Game Code §§ 3800, 3801.5. It has never created any similar exemption for wind turbines. Thus, nothing in the Fish and Game Code or its regulations authorizes defendants to kill tens of thousands of eagles, hawks, falcons, and owls or authorizes any state or local agency to permit defendants to do so.

An action against the Department of Fish and Game, the trustee of the public trust in wildlife, would be utterly ineffectual because the Department has done nothing to authorize defendants' conduct, either by issuing them any sort of permit or otherwise. The Department has not made any "final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer." Code of Civil Procedure § 1094.5, subd. (a). Accordingly, an administrative mandamus action would not lie against it, because it has taken no action. *Ibid.* Nor would ordinary mandamus lie to compel it to act, because the Department has no mandatory duty to prosecute defendants for their violations of wildlife protection statutes. *See* Code of Civil Procedure § 1085. Instead, enforcement of the wildlife protection statutes is left to the Department's prosecutorial discretion.

An action against Alameda County would fail because it neither is the trustee for public trust wildlife nor has any regulatory authority over wildlife, and properly has not authorized defendants' destruction of public trust wildlife. The Legislature has not given Alameda County any authority to issue any permit authorizing defendants to kill eagles, hawks, falcons, owls, and other birds in violation of the Fish and Game Code and public trust law. Nor has the Legislature delegated trustee powers or any authority whatsoever over raptors and other public trust wildlife resources to Alameda County.

Because Alameda County lacks the power to authorize violations of California's wildlife protection laws or to authorize defendants' destruction of public trust wildlife, it cannot use its land use permitting proceedings to authorize or excuse violations of wildlife protection laws or the destruction

of public trust wildlife. Any purported authorization by Alameda County of defendants' unlawful conduct here would be utterly void. Under the California Constitution, a county has no power to override general state law, including wildlife protection laws and public trust common law: "Under article XI, section 7 of the California Constitution, '[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.' [¶] 'If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.'" *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal.4th 893, 897 (1993).

Properly recognizing its lack of authority, Alameda County has not purported to authorize defendants to kill raptors and other birds or to destroy wildlife public trust resources. Defendants' county zoning permits do not authorize or require them to destroy wildlife public trust resources.¹

Thus, an action against Alameda County would fail because it has not purported to authorize defendants' unlawful destruction of public trust wildlife, because it has no fiduciary duties to protect public trust wildlife given that it is not the trustee, and because it has no duty to enforce wildlife protection statutes. Because Alameda County has not authorized defendants' unlawful conduct, it has not acted "in excess of jurisdiction;" because it has no legal duty to enforce wildlife protection statutes or to act as trustee for public trust wildlife, it has not failed to "proceed[] in the manner required by law." Code of Civil Procedure § 1094.5, subd. (b).

¹ No other state or local agency has purported to authorize defendants' unlawful conduct, nor does any state or local agency have the power to do so. Defendants require no permit or authorization from any state agency to operate their wind turbines.

Accordingly, an action for administrative mandate would fail. Nor, given the absence of any mandatory duty on the County's part, would ordinary mandamus lie.² Thus, the remedy of suing public agencies instead of the private party that is destroying public trust resources is illusory and ineffectual.

B. The Court Of Appeal's Policy Arguments Lack Merit

In addition, the Court of Appeal's policy arguments in favor of barring suits against private parties destroying public trust resources lack merit. The Court of Appeal's first policy argument, an analogy it draws between the public trust and private trusts (Op. at 18), does not withstand analysis. If the trustee of a private trust permits a third party to destroy trust assets or the trustee otherwise breaches his or her fiduciary duties, the beneficiary of the trust can bring an action to replace the trustee, thereby terminating the trustee's power over the trust. Probate Code §§ 15642, 17200. The state, however, has a monopoly on the office of trustee of the public trust. A member of the public cannot bring an action to oust the state as trustee of the public trust, no matter how much destruction of public trust resources the state permits private parties to commit or how flagrantly the state breaches its fiduciary duty to protect public trust resources. Because the state cannot be ousted as trustee and cannot be compelled to act, the only feasible remedy for protecting public trust resources from illegal destruction by a private party when the state fails to act is an action

² The Court of Appeal's speculation that a CEQA action would have been possible here, Op. at 22 n.19, runs aground on the fact that Alameda County found that the 2005 renewal of defendants' permits, originally issued in the 1980s, was exempt from CEQA under the "existing facilities" exemption, 14 Cal. Code Reg. § 15301. RA 123.

for equitable relief against the private party that is the cause of the destruction.

In any event, as explained previously, the conclusion drawn by the Court of Appeal from its private trust analogy—that members of the public may not sue directly those who are harming public trust resources—has already been rejected by this Court in *Marks v. Whitney* and *National Audubon*.

Equally unavailing is the Court of Appeal’s second policy argument: that administrative proceedings should be the exclusive venue in which members of the public may seek relief against a party illegally destroying public trust resources, and that private lawsuits against a party illegally destroying public trust resources should be banned. Op. at 19-20. The Court of Appeal grounds this argument on a misreading of *National Audubon*. In that case, the Legislature had created a scheme for comprehensively regulating the harm-causing activity the DWP was engaging in—the diversion of water—by assigning to a state administrative agency, the State Water Board, the task of balancing the public trust in water resources against requests for water diversions. The Legislature had granted to the State Water Board both the authority to issue permits authorizing the DWP to make diversions that harmed public trust resources and the duty as trustee to protect those resources. *National Audubon*, 33 Cal.3d at 449 (discussing “legislative intent to grant the Water Board a ‘broad,’ ‘open-ended,’ ‘expansive’ authority to undertake comprehensive planning and allocation of water resources”); 446-47 (“As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the

public trust, and to preserve, so far as consistent with the public interest, the uses protected by the trust.” (citation omitted)).

Procedurally, the Legislature had created a special statutory procedure permitting courts in their discretion to refer issues in water rights lawsuits to the State Water Board, either for a determination of the issue by the Board sitting as a referee or for an investigation of the physical facts at issue. *National Audubon*, 33 Cal.3d at 449. In addition, the plaintiffs in *National Audubon* could have brought an administrative proceeding before the State Water Board to raise their public trust claims. *Ibid.* (“plaintiffs have a remedy before the Water Board”).

Notwithstanding the comprehensive regulatory scheme for water use, the Court refused to require even the exhaustion of administrative remedies before members of the public could bring public trust actions against those harming public trust resources, much less bar entirely, as the Court of Appeal did here, lawsuits against those who are harming public trust resources. *National Audubon*, 33 Cal.3d at 449 (holding that “remedies before the Water Board are not exclusive, but that the courts have concurrent original jurisdiction” over actions to enforce public trust rights), 452 (same). Indeed, the Court permitted the plaintiffs to sue DWP even though it was conducting its diversions under a valid permit from the State Water Board. *Id.* at 445 (rejecting DWP’s argument that “the recipient of a board license enjoys a vested right in perpetuity to take water without concern for the consequences of the trust”), 447, 449. (Similarly, in *Marks v. Whitney*, the Court held that issuance of a permit to the defendant does not bar a public trust action: “Reclamation with or without prior authorization from the state does not ipso facto terminate the public trust nor render the issue moot.” *Marks v. Whitney*, 6 Cal.3d at 261.) The Court also rejected the argument that the court hearing the plaintiffs’ action

against the DWP must refer the matter to the State Water Board, holding instead that any such referral was discretionary. *National Audubon*, 33 Cal.3d at 426, 451 (“the court *may* refer the case to the board” (emphasis added)), 452 (same).

Thus, the Court of Appeal’s holding that members of the public may not bring an action directly against those who are destroying public trust resources conflicts with *National Audubon*.

Moreover, the Court of Appeal not only misread this Court’s decision in *National Audubon*, it ignored the fundamental differences between the statutory scheme in that case and this one. The statutes prohibiting defendants’ killing of public trust wildlife bears no similarity to the statutory scheme governing water rights and the public trust in *National Audubon*. Unlike the State Water Board, Alameda County has not been granted by the Legislature the power to issue permits authorizing defendants to destroy public trust resources. Nor, unlike the State Water Board, has Alameda County been granted any trustee powers over public trust wildlife. Not surprisingly, there also is no statutory procedure for referring public trust wildlife lawsuits to Alameda County.

More broadly, unlike the statutory scheme in *National Audubon*, the Legislature has not given any state or local agency the power or duty to “balance” public trust wildlife resources against the industrial development of wind power. Contrary to the Court of Appeal’s opinion at pages 20 to 22, neither Alameda County nor any other state or local agency has any legal authority to engage in any ad hoc “balancing” of defendants’ highly profitable operation of their obsolete wind turbines against the laws prohibiting the destruction of wildlife. The balance was struck long ago by the Legislature, when it prohibited the wildlife killings that defendants are committing on a daily basis with their obsolete wind turbines. No

administrative agency has any authority to upset the balance struck by the Legislature. In particular, Alameda County has not been delegated any authority by the Legislature to regulate wildlife, to regulate the windpower industry, or to bargain away the public trust rights that all Californians possess in the wildlife that defendants are killing. Under the Court of Appeal’s own definition, it is not a “public agenc[y] responsible for protecting the[] trust resources.” Op. at 2.

Thus, not only the holding but also the facts of *National Audubon* are contrary to the Court of Appeal’s notion that plaintiffs must sue Alameda County and cannot sue the parties who are destroying public trust resources.

III. The Court Of Appeal’s Alternative Holding That Courts Should Abstain From Inquiring Into The Illegal Conduct Of Defendants Lacks Merit

In an alternative holding, the Court of Appeal held that under the UCL abstention doctrine, the trial court should have abstained from deciding this action on its merits. This holding was error on multiple grounds.

First, the Court of Appeal erroneously failed to defer to the trial court’s rulings on the abstention question. The trial court twice denied defendants’ abstention motions. RA 94-101; RA 228-31. The trial court’s decisions are reviewed for an abuse of discretion. *Shamsian v. Department of Conservation*, 136 Cal.App.4th 621, 641 (2006). The trial court’s exercise of its discretion in this regard was correct, and there is no basis in the record for finding an abuse of discretion or for reversing on appeal the trial court’s decision on these issues.

The Court of Appeal, however, gave no deference to the trial court’s rulings and treated the issue as one it could review de novo. This was error;

whether to abstain is a fact-intensive inquiry committed to the sound discretion of the trial court. The Court of Appeal neither concluded that the trial court had abused its discretion nor stated any basis for such a conclusion. Its holding is erroneous for that reason alone.

Second, the UCL abstention doctrine is inapplicable here. The UCL abstention doctrine arose in the context of the pre-Proposition 64 version of the UCL as a means of cutting back on the wide-ranging scope of UCL actions. It has grown in the lower courts without any judicial supervision from this Court, receiving its modern impetus instead from Justice Brown's dissent in *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal.4th 553, 595 (1998), calling for creation of a novel UCL abstention doctrine. *See Desert Healthcare Dist. v. PacifiCare, FHP, Inc.*, 94 Cal.App.4th 781, 794 (2001) (endorsing in dicta Justice Brown's dissent in *Stop Youth Addiction*). Now that the number and scope of UCL actions have been substantially cut back by Proposition 64's strict standing requirements, it is questionable whether the UCL abstention doctrine continues to have a meaningful role to play in UCL litigation. It certainly has no place in this public trust action for equitable relief where defendants' conduct is not only destroying public trust resources but is prohibited by statute.

Unlike plaintiffs' action, the UCL lawsuits in two of the three UCL abstention decisions the Court of Appeal relied upon were all ones in which the defendants were not violating any statutory prohibition. *See Desert Healthcare*, 94 Cal.App.4th at 794; *Shamsian*, 136 Cal.App.4th at 633, 641-42. In the third decision, any UCL action was barred as a matter of law because the statutory prohibition was committed to the exclusive

enforcement of the Department of Health Care Services. *Alvarado v. Selma Convalescent Hospital*, 153 Cal.App.4th 1292, 1304 (2007).³

Plaintiffs' action is also unlike *Desert Healthcare*, *Shamsian*, and *Alvarado* for another fundamental reason as well. In each of those cases, there was a regulatory scheme with the power to authorize the conduct by the defendants that the plaintiffs were challenging. Here, there is no

³ In *Desert Healthcare*, 94 Cal.App.4th 781, the plaintiffs alleged that the contracts the defendant health care plan made with providing physicians were acts of unfair competition under the UCL. The Court of Appeal rejected that contention, holding that the plaintiff had failed to state a UCL claim because the agreements "were specifically approved of by the Knox-Keene Act [, which regulates health care plans]. As such, there was nothing unlawful, unfair, or fraudulent about those agreements." *Id.* at 793. Even though it had already held the plaintiff had failed to state a claim, the *Desert Healthcare* court went on in dicta to endorse Justice Brown's dissent in *Stop Youth Addiction* calling for creation of a novel UCL abstention doctrine. *Desert Healthcare*, 94 Cal.App.4th at 794. *Shamsian*, 136 Cal.App.4th at 642, was another UCL action in which the defendants were not violating any statutory prohibition and were not destroying public trust resources in which the plaintiffs had a beneficial interest. The plaintiffs in *Shamsian* sought to base their UCL claim on an assertion that the court should use "a statement of legislative intent" to fashion a new legal standard by which to judge the lawfulness of the defendants' conduct. *Shamsian*, 136 Cal.App.4th at 633, 641. *Alvarado v. Selma Convalescent Hospital*, 153 Cal.App.4th 1292 (2007), was a UCL action in which the trial court concluded that the statute the defendants allegedly violated was one that was committed to the exclusive enforcement of the Department of Health Care Services. *Id.* at 1304. Even apart from the abstention doctrine, the exclusive nature of the statutory remedy alone barred any UCL action. *California v. Altus Finance*, 36 Cal.4th 1284, 1303 (2005) (UCL actions barred where statutory remedy is exclusive; "the fact that there are alternative remedies under a specific statute does not preclude a UCL remedy, unless the statute itself provides that the remedy is to be exclusive"). Notably, *Shamsian* and *Alvarado* were both cases where the respective trial courts had ordered abstention and the Court of Appeal held that the trial courts had not abused their discretion, unlike here where the trial court twice denied defendants' abstention motions.

government agency with the power to authorize defendants to kill Golden Eagles and other raptors, nor has any agency purported to do so.

Defendants' abstention argument fails for another reason as well: In a case like this one seeking only equitable relief, the proper time for weighing the equities and deciding whether the case is an appropriate one in which to award relief is at the end of the lawsuit, after the parties have presented a full evidentiary record, not at the threshold before the court knows the facts.⁴

⁴ Nor does the Court of Appeal's suggestion (Op. at 24) that Alameda County is a necessary and indispensable party have merit. The trial court invited Alameda County to intervene in plaintiffs' action and the county declined. RA 66:24 to 67:2; SAA 2. Clearly, Alameda County does not consider itself a necessary and indispensable party, and Alameda County's determination is correct. It has no power or authority to authorize defendants' killing of birds and is not the trustee of public trust wildlife; thus, it has no legally recognized interest in the subject matter of the lawsuit. Nor do plaintiffs seek any relief against Alameda County or any modification of the terms of the permits it has issued. Thus, the county does not have "any interests at stake that could be 'directly and immediately' impacted by the outcome of the case." *Countrywide Home Loans v. Superior Court*, 69 Cal.App.4th 785, 795 (1999).

"[W]e must ask what contribution [Alameda County] could make to the proceeding before the trial court. In other words, what precisely are they foreclosed from doing by not being named as parties to the lawsuit?" *Deltakeeper v. Oakdale Irrigation Dist.*, 94 Cal.App.4th 1092, 1107 (2001). The answer is "nothing," because it has no cognizable interest in the public trust wildlife that defendants are destroying and no power to authorize that destruction. Because the county has no legally cognizable interest in the continuing destruction of public trust wildlife that would be prejudiced by its nonjoinder, its "absence as [a] part[y] will not harm anyone's protectible interests." *Countrywide*, 69 Cal.App.4th at 798.

In any event, if Alameda County were a necessary and indispensable party, the proper decision on appeal would be to remand so that it could be joined in the action, not to affirm the dismissal.

In deciding whether to exercise its equitable powers, a court of equity must consider the equities of both the plaintiff and the defendant, something it can only do at the end, not the beginning of the case, after it has a complete evidentiary record by which to judge. *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal.4th 163, 180-81 (2000). The court’s duty to weigh the equities cannot be abdicated on the basis of ungrounded speculation and supposition before the court has received a shred of evidence.

“A court cannot properly exercise an equitable power without consideration of the equities on both sides of a dispute. This principle of equity jurisprudence has been applied in a variety of contexts in which the court is called upon to exercise equitable power. . . . ‘[I]n all such cases the court should weigh the competing equities which bear on the issue . . . and should then grant or deny injunctive relief depending on the overall balance of those equities.’ . . . [¶]. . . ‘[E]quity is, peculiarly, a forum of conscience.’ . . . [¶] . . . In short, consideration of the equities between the parties is necessary to ensure an equitable result.” *Cortez*, 23 Cal.4th at 180-81.

The Court of Appeal alluded to the inadequacy of the record before it for making any determinations on the need for and appropriateness of the equitable relief that plaintiffs seek when it stated: “We are in no position at this time and *on this record* to pass judgment on the sufficiency of those efforts or to express any opinion as to whether the public trust over these natural resources is being adequately enforced.” Op. at 24-25 (emphasis added). The conclusion it drew from the fact that there is not yet an evidentiary record—that the case should be stopped in its tracks rather than proceeding forward to create the evidentiary record on which an informed equitable judgment can be reached—was the wrong one, however. The

case should proceed to trial so the evidentiary record necessary for the trial court's informed exercise of its equitable discretion can be presented.

Accordingly, the Court of Appeal's alternative holding that the trial court should have abstained is erroneous and is no barrier to this Court's review of the Court of Appeal's decision.

CONCLUSION

The petition for review should be granted.

Dated: October 28, 2008

Respectfully submitted,

Richard R. Wiebe
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Peter Galvin

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204, subdivision (c)(1), I certify that this brief contains 8232 words.

Richard R. Wiebe

CERTIFICATE OF SERVICE

I am over the age of 18 years, a member of the State Bar of California, and not a party to this action. My business address is 425 California Street, Suite 2025, San Francisco, California, 94104, which is located in the county where the service described below took place.

On the date stated below, I served true and correct copies of the following document(s):

APPELLANTS CENTER FOR BIOLOGICAL DIVERSITY, INC., AND PETER GALVIN'S PETITION FOR REVIEW

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

Dated: October 28, 2008

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