

S167578

**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. **S167578**

Court of Appeal No. A116362
First District Court of Appeal

Alameda County Superior Court
Case No. RG04-183113

The Hon. Bonnie L. Sabraw, Judge

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

REPLY IN SUPPORT OF THEIR 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?

ARGUMENT

In their answer opposing review, defendants make the novel contention that public trust wildlife species without a “nexus” (a vague concept they never define) to navigable waters or tidelands are public trust wildlife only by virtue of statutory law. They further contend, with equal novelty, that no action may be brought by members of the public against a private party killing wildlife unlawfully and without authorization if that wildlife lacks a “nexus” to navigable waters or tidelands. They assert that this Court’s decision in *Environmental Protection and Information Center v. California Department of Forestry*, 44 Cal.4th 459 (2008) (“*EPIC*”), so holds.

Defendants’ contentions lack merit. First, the *EPIC* decision has no application here because it addressed the entirely different issue of the scope of a state agency’s duty to protect public trust wildlife enforceable against the agency in a mandamus action. No question was presented in *EPIC* regarding the ability of members of the public to bring an action to enjoin a private party from killing public trust wildlife. Second, the common law has protected all of California’s wildlife as a public trust resource for over one hundred years, and defendants provide no basis for reconsidering that well-settled issue. No decision has ever held that California’s wildlife species are subject to varying degrees of protection

under the public trust depending on whether they have a “nexus” with navigable waters or tidelands.

I. In *Environmental Protection and Information Center v. California Department of Forestry*, This Court Did Not Address Or Restrict Public Trust Actions Against Private Parties Destroying Public Trust Resources

The issue posed by the petition for review is whether a member of the public may maintain an action for equitable relief against a private party destroying public trust wildlife unlawfully and without authorization. In their answer opposing review, defendants argue that in its decision in *EPIC* the Court has already addressed this issue and has prohibited actions by members of the public to enjoin private parties from killing public trust wildlife unlawfully and without authorization if that wildlife has no nexus to navigable waters or tidelands. Defendants are mistaken.

The *EPIC* decision addressed a quite different public trust issue: What is the scope of a state agency’s duty to protect public trust resources? *EPIC* was an administrative mandamus action against, among others, the Department of Fish and Game (“DFG”) challenging, among other actions, DFG’s decision to issue an incidental take permit to Pacific Lumber authorizing it to kill endangered and threatened species. 44 Cal.4th at 477. Along with numerous other claims, the environmental organization petitioners (“EPIC”) contended that the permit violated DFG’s statutory and common-law duties to protect public trust wildlife: “EPIC contends that the Incidental Take Permit constituted abandonment of the DFG’s public trust obligation to protect the natural resources of this state by virtue of the no surprises clauses, discussed above, and because of improper delegation to Pacific Lumber to determine which northern spotted owl sites will receive protection and which will be eliminated.” *EPIC*, 44 Cal.4th at 514-15.

The focus of the Court’s opinion in *EPIC* was not the public trust issue but on other issues, including CEQA issues and logging sustained-yield-plan issues, arising out of the massive and complex administrative proceedings associated with the Headwaters Forest agreement between the state and federal governments and Pacific Lumber. The public trust discussion occupies less than a single page’s worth of text in a 55-page opinion and cites only a single decision, *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983).

This Court’s holding in *EPIC* with respect to the public trust was limited to the issue of the scope of a state agency’s enforceable duties to protect public trust wildlife. Examining section 1801 of the Fish and Game Code, the Court noted that the Legislature had expressed the state’s policy “ ‘to encourage the preservation, conservation, and maintenance of wildlife resources under the jurisdiction and influence of the state,’ ” but had also stated that “ ‘[i]t is not intended that this policy shall provide any power to regulate natural resources or commercial or other activities connected therewith, except as specifically provided by the Legislature.’ ” *EPIC*, 44 Cal.4th at 515 (quoting Fish & Game Code § 1801). The Court held that for this reason “the duty of *government agencies* to protect wildlife is primarily statutory.” *EPIC*, 44 Cal.4th at 515 (emphasis added). “Generally speaking, therefore, we will look to the statutes protecting wildlife to determine if DFG or another *government agency* has breached its duties in this regard.” *Ibid.* (emphasis added).

The Court nonetheless analyzed DFG’s actions under both its statutory and common law duties to protect public trust wildlife. It held that DFG had breached its statutory duties to protect public trust wildlife under the California Endangered Species Act because the “no surprises” clause of the incidental take permits violated the Act. 44 Cal.4th at 515.

The Court analyzed EPIC's second public trust claim, "that in the Incidental Take Permit DFG improperly delegated to Pacific Lumber which northern spotted owl sites should be preserved," *ibid.*, as a claim that DFG had violated its common-law duty to protect public trust wildlife. The Court found that DFG had not in fact delegated to Pacific Lumber the selection of protected spotted owl sites but "that DFG has maintained its authority to review Pacific Lumber's site-specific decisions." *Ibid.* For that reason, the Court held: "We therefore conclude the Incidental Take Permit did not violate a common law public trust duty." *Ibid.*

The question of whether a state agency has an affirmative duty to take or refrain from a particular administrative action affecting public trust resources is far different from the question of whether a member of the public may bring an action to prevent a private party from illegally and without authorization destroying public trust resources. A state agency's duties and powers are fixed by statute. An agency's duties cannot exceed the scope of its powers; otherwise, it could only fulfill its duties by acting *ultra vires*. As applied to the public trust, this means that any particular agency's public trust duties cannot exceed the powers it has been granted by the Legislature. Because an agency's powers are limited by statute, a mandamus action likewise cannot compel an agency to act beyond the scope of its statutory powers, or to act where it lacks any statutory authority whatsoever. As applied to a mandamus action to protect public trust resources by compelling or prohibiting a particular agency action, this means, as the Court held, that the agency's duties must generally be measured by the statutes under which it operates.

All of these limitations on a state agency's duties to act affirmatively to protect public trust wildlife, however, are a consequence of the law governing administrative agencies; they have absolutely nothing to do with

a private party's duty to refrain from destroying public trust resources beneficially owned by members of the public, or its amenability to a suit for equitable relief if it violates that duty. An agency's duties are not the measure of a private party's duties. That a particular agency's power and duty to protect a particular public trust resource may be limited by statute does not mean that private parties are then free to ravage that same resource. A private party's duty to refrain from destroying public trust resources unlawfully and without authorization does not depend upon whether a particular state agency has an enforceable affirmative duty to stop the private party from doing so.

Likewise, the common-law cause of action against a private party to prevent the unlawful and unauthorized destruction of public trust resources is independent of the mandamus cause of action against a state agency for breaching its duties to protect public trust resources. Whether a state agency has a duty to protect public trust resources that can be enforced by mandamus is logically independent of whether a private party can be enjoined from destroying public trust resources. The Court's decision in *EPIC* spoke only to the latter, and not to the former.

Thus, contrary to defendants' assertions in their answer, the Court's *EPIC* decision does not address any question of whether members of the public may sue to enjoin a private party from killing unlawfully and without authorization public trust wildlife.

II. There Is No Basis For Reconsidering The Numerous Decisions Of This Court And The Courts Of Appeal Over The Past 110 Years Holding That Wildlife Is A Protected Public Trust Resource Under The Common Law

The Court of Appeal in its decision correctly reaffirmed the long line of existing and well-settled precedent holding that all of California's wildlife is fully protected as a public trust resource. Op. at 8-14.

Defendants contend that the *EPIC* decision held that only wildlife with a “nexus” to navigable waters or tidelands is public trust wildlife protected under the common law against unauthorized and unlawful destruction by private parties. Defendants additionally make a cursory argument that, if the Court grants the petition for review, it should also review the question of whether “a private party may state a claim for a public trust cause of action when the alleged harm to wildlife has no nexus to tidelands or navigable waters.” Defs. Ans. at 1; *see also id.* at 19-20.

Defendants' theory that only wildlife species with a “nexus” to tidelands or navigable waters are fully protected public trust resources lacks any basis in law and was soundly rejected by the Court of Appeal. “To the contrary it has long been recognized that wildlife are protected by the public trust doctrine.” Op. at 11. “[I]t is clear that the public trust doctrine encompasses the protection of undomesticated birds and wildlife.” *Id.* at 13.

The Court of Appeal was correct. For more than 110 years, this Court has recognized under the common law that wild game, including not just fish but birds and mammals, is a protected public trust resource. As the Court stated in *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.” In reaching this

conclusion, the Court relied on its earlier decision in *Ex parte Maier*, 103 Cal. 476, 483 (1894), holding under the common law that deer and other wild game were public trust resources.

Truckee Lumber was a nuisance action in which an injunction was sought against a polluting sawmill whose discharges were killing fish. *Truckee Lumber*, 116 Cal. at 398-99. Because the action was brought on the theory that the killing of the fish was an “obstruction to the free use of property,” the nuisance action could not be maintained unless there was a common-law public trust property right in the fish with which the defendant was interfering. *Id.* at 399.

The defendant sawmill contended that the complaint against it failed to state a claim for nuisance because the fish it were killing were not public trust property, and therefore its killing of them could not be an “obstruction to the free use of property.” *Truckee Lumber*, 116 Cal. at 399. After affirming that “wild game” is a “species of property” owned by “the people of the state” (*ibid.*), the Court rejected the defendant’s contention that the complaint failed to allege an interference with property: “The complaint shows that by the repeated and continuing acts of defendant this *public property right* is being and will continue to be greatly interfered with and impaired; and that such acts constitute a nuisance, both under our statute and at common law, is not open to serious question.” *Id.* at 400 (emphasis added). Thus, the Court expressly held in *Truckee Lumber* that 1) “wild game” is a “species of property” and 2) the “ownership” of that “property right” is “in the people of the state.” The definition of public trust property, of course, is property owned by the people of the state and held by the state “not in its proprietary capacity but as trustee for the public.” *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 521 (1980);

accord, *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 151 (1884) (the state is “trustee of a public trust for the benefit of the people”).

Moreover, in *Truckee Lumber* the Court rejected the notion that only wildlife inhabiting navigable waters or tidelands are protected under the common law as public trust resources. The defendant in *Truckee Lumber* contended that the fish it was destroying were not public trust property because they were in non-navigable waters flowing over privately owned streambeds; it argued, as do defendants here, that in the absence of public trust waters or lands, there could be no public trust property right in wildlife. *Truckee Lumber*, 116 Cal. at 400. The Court held that the fish were still public trust property notwithstanding that they were on private lands and notwithstanding that there was no public trust easement of navigation, commerce, or fishery in the waters in which they swam: “The mere fact, then, that the interference or obstruction [of property] complained of may in fact be in a stream where the right of fishery is exclusively in private riparian owners, does not make the acts here complained of any less an invasion of the public right, nor prevent the state from protecting its general interest in the property [i.e., the fish].” *Id.* at 402.

In *People v. Stafford Packing Co.*, 193 Cal. 719 (1924), the Court again reaffirmed that wildlife is a public trust resource owned by the people and held in trust for them by the state. The Court quoted with approval and emphasis its earlier statement in *Truckee Lumber* describing “‘*that species of property commonly designated as wild game, the general right and*

ownership of which is in the people of the state.’ ” Stafford Packing, 193 Cal. at 727 (emphasis original).¹

The status of wildlife, including birds, as public trust property remains settled law today. *E.g., People v. Murrison, 101 Cal.App.4th 349, 360 (2002)* (“The state owns the fish in its streams in trust for the public.”); *People v. Perez, 51 Cal.App.4th 1168, 1175 (1996)* (Birds; “California holds title to its wildlife in public trust for the benefit of the people.”); *Arroyo v. California, 34 Cal.App.4th 755, 762 (1995)* (Mountain lions; “California courts deem wild animals to be owned by the people of the

¹ The Court in *Stafford Packing* also rejected the suggestion made by defendants here that public trust wildlife is protected against private depredation only by statute and not by the common law. At issue in *Stafford Packing* was whether injunctive relief was available to prevent the defendant’s “wasteful destruction of fish at the rate of millions per month” (193 Cal. at 729), which was both a violation of an express statutory provision for the conservation of fish and a violation of the common-law public trust property rights in wildlife. The defendant contended that only the statutory remedies provided by the fish conservation statute, which did not include injunctive or other equitable relief, could be imposed on it. *Id.* at 725.

The Court rejected this contention. It held that, because the common-law public trust property right in wildlife exists independent of statute, equitable relief was available to remedy the defendant’s destruction of public trust wildlife and that the fact that the defendant’s conduct was also a statutory violation did not make the statutory remedies exclusive: “The effect of [the fish conservation statute] was to make the [defendant’s] use of fish . . . both wrongful and unlawful, but the court in the action herein was not at all concerned with the *unlawfulness* of those acts but only with their *wrongfulness* as an invasion of the *property rights* of the people. Having determined that the acts complained of constituted a wrongful invasion of those property rights and having further determined that the threatened continuance thereof would work irreparable injury for which there was no adequate remedy at law, there was a complete foundation for equitable interposition and equitable relief.” *Stafford Packing, 193 Cal. at 730 (emphasis original).*

state.”); *California Trout v. State Water Resources Control Board*, 207 Cal.App.3d 585, 630 (1989) (“Wild fish have always been recognized as a species of property the general right and ownership of which is in the people of the state.”); *Betchart v. Dept. of Fish & Game*, 158 Cal.App.3d 1104, 1106 (1984) (Deer; “California wildlife is publicly owned”); *People v. Glenn-Colusa Irrigation District*, 127 Cal.App. 30, 36 (1932) (“The title to and property in the fish within the waters of the state are vested in the state of California and held by it in trust for the people of the state.”).

In light of this overwhelming authority, “[i]t is beyond dispute that the State of California holds title to its . . . wildlife in public trust for the benefit of the people.” *People v. Harbor Hut Restaurant*, 147 Cal.App.3d 1151, 1154 (1983). Because the status of wildlife as a public trust resource under the common law is well settled by decisions of this Court and the Courts of Appeal, and because there is no conflict on this point between the decision of the Court of Appeal below in this action and the decision of any other court, the Court should deny review of the additional issue proposed by defendants.

Defendants, however, make the meritless contention that the Court in *EPIC* abrogated *sub silencio* this chain of precedent, stretching back more than a century, recognizing that the common law protects public trust wildlife. Although the Court’s decision in *EPIC* discussed the fact that the public trust doctrine has both statutory and common-law dimensions, it noted that there is “doubtless an overlap between the two public trust doctrine.” 44 Cal.4th at 515. The harm to wildlife at issue was the killing of birds in connection with Pacific Lumber’s timber harvesting operations; there was no “nexus” to navigable waters or tidelands. *Id.* at 470-71, 477, 506. As discussed above, the Court nevertheless applied both the statutory

and common-law public trust doctrines in its analysis of whether DFG had breached its duties to protect public trust wildlife. *Id.* at 515.

The *EPIC* decision thus does not hold that only wildlife with a “nexus” to navigable waters or tidelands is public trust wildlife protected by the common law against unauthorized and unlawful destruction by private parties. Nor do *National Audubon* or *Marks v. Whitney*, 6 Cal.3d 251 (1971), so hold. Nor is there any other authority holding that members of the public may not sue to enjoin a private party from unlawfully and without authorization killing public trust wildlife, wildlife owned not by the state but by the people. To the contrary, as explained in the petition for review, *Marks v. Whitney* and *National Audubon* hold that members of the public may assert a public trust cause of action directly against those who are injuring public trust resources, including private parties.

CONCLUSION

The petition for review should be granted.

Dated: December 1, 2008

Respectfully submitted,

Richard R. Wiebe
Attorney for Appellants
Center For Biological Diversity, Inc., and
Peter Galvin

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204, subdivision (c)(1), I certify that this brief contains 3249 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 REPLY IN SUPPORT OF THEIR 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: December 1, 2008

Richard R. Wiebe