

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

**FIRST APPELLATE DISTRICT
DIVISION THREE**

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.

No. A116362

Alameda County Superior Court
Case No. RG04-183113

The Hon. Bonnie L. Sabraw, Judge
Department 512: (510) 670-6312

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

REPLY BRIEF ON APPEAL

FROM A JUDGMENT OF DISMISSAL ON THE PLEADINGS

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INTRODUCTION

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' complaint alleges that defendants are illegally killing many thousands of eagles, hawks, falcons, owls, and other protected birds with their small, inefficient, and obsolete wind turbines at Altamont Pass, California. This wildlife is public trust property, and plaintiffs' complaint asserts a public trust cause of action against defendants seeking equitable relief for their destruction of public trust wildlife.

To establish its public trust cause of action, plaintiffs must show that wildlife is public trust property and that private citizens have standing to raise a claim of harm to public trust wildlife. Plaintiffs satisfy each of these requirements because, as they demonstrated in their opening brief, their public trust cause of action lies at the intersection of two well-established lines of legal authority. The first is the line of authority establishing that wildlife is public trust property. The second is the line of authority establishing that California's citizens have the right to bring an action to remedy harm to public trust interests. Because wildlife is public trust property, and because members of the public have standing to bring an action to protect public trust interests, plaintiffs have stated a cause of action to remedy the destruction of public trust wildlife by defendants.

Defendants attack both of these lines of authority, but none of the grounds they raise is persuasive. With respect to the first question presented—Is there a common law public trust property right in wildlife?—defendants seek to exclude wildlife from protection under the public trust. Defendants contend that our Supreme Court has never recognized public trust property rights in wildlife. Not so; the Supreme Court has repeatedly

held that wildlife is public trust property, and the Legislature has confirmed this property right by statute. Defendants also rely on statements by the United States Supreme Court questioning the concept of state ownership of wildlife, but those statements were dicta made in cases holding only that states could not interpose their ownership of wildlife to avoid their obligations under federal law. As both the California Supreme Court and the United States Supreme Court have held, ultimately it is state law, not federal law, that creates and defines property rights.

With respect to the second question presented—Do plaintiffs and other members of the public have standing to enforce the public trust in wildlife?—defendants seek to have this Court cut back on the broad standing to protect public trust interests established by our Supreme Court. Neither law nor policy supports this proposed cutback. There is no legal authority and no reasoned basis for treating the public trust interest in wildlife as less entitled to protection than other public trust interests. Nor does the existence of wildlife protection statutes in any way preclude common-law actions to remedy harm to public trust wildlife.

Finally, it is both procedurally appropriate and judicially efficient for this Court to set forth the potential equitable remedies that will be available on remand should plaintiffs succeed in proving up their cause of action for the destruction of public trust wildlife.

ISSUES TO BE DECIDED ON APPEAL

1. Under the Supreme Court and Court of Appeal decisions holding that California's wildlife is public trust property and the legislative enactments decreeing that California's wildlife is public trust property, is wildlife a category of public trust property?
2. Under the Supreme Court's decision in *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 431 n. 11 (1983) , holding that "any member of the general public has standing to raise a claim of harm to the public trust," do California's citizens have standing to bring a common-law public trust action to remedy defendants' unlawful destruction of wildlife public trust property?
3. Are the ordinary equitable remedies of injunctive relief, declaratory relief, and restitution potentially available here to remedy defendants' ongoing destruction of wildlife public trust property?

ARGUMENT

I. Defendants Erroneously Contend That California’s Wildlife Is Not Public Trust Property

As plaintiffs’ opening brief demonstrates, there is abundant and conclusive case law and statutory authority establishing that California’s wildlife is public trust property. Defendants, however, deny that wildlife is public trust property. Their arguments lack merit and would lead this Court into conflict with controlling Supreme Court decisions.

A. The Existence Of Other Public Trust Property Interests Does Not Alter Or Defeat The Public Trust Property Interest In Wildlife

The GREP defendants first argue that because tidelands and submerged lands are public trust property and because there is a public trust easement in navigable waters above those lands, the only possible form of public trust property is a public trust easement in tidelands, submerged lands, and navigable waters.¹ GREP Brief at 13-20 (at 15: “the Public Trust Doctrine applies *only* where the public’s easement in navigable waters or tidelands can be traced in the specific property at issue” (emphasis original)). The FPL defendants make a similar argument. FPL Brief at 13 (“the Public Trust Doctrine is limited to matters arising from navigable waterways, non-navigable streams affecting navigable waterways, or waters subject to tidal influence”). This argument is both a logical non sequitur and contrary to controlling Supreme Court precedent.

¹ The GREP defendants are GREP Bay Area Holdings, LLC; AES SeaWest, Inc. (formerly SeaWest WindPower, Inc.); and enXco, Inc. Defendants Pacific Winds, Inc.; Windworks, Inc.; and Altamont Winds, Inc. have filed a joinder in the brief of the GREP defendants.

The FPL defendants are FPL Group, Inc.; FPL Energy, LLC; ESI Bay Area GP, Inc.; ESI Bay Area, Inc.; Altamont Power LLC; and Green Ridge Power LLC.

The existence of other categories of public trust property rights neither conflicts with nor precludes the existence of a separate public trust property right in California's wildlife.² Defendants make no attempt to explain how the existence of public trust rights in tidelands and submerged lands could preclude the existence of separate public trust property rights in wildlife.

More importantly, as explained in plaintiffs' opening brief at 16-20, the Supreme Court has repeatedly confirmed that public trust property rights in wildlife do exist. *People v. Truckee Lumber Co.*, for example, was a decision in which the status of wildlife as public trust property was absolutely essential to the Supreme Court's holding. That case was a nuisance action brought on the theory that the defendant's killing of fish was an "obstruction to the free use of property;" if the fish were not property, the action would necessarily fail: "The first point made against the complaint is that the facts alleged do not constitute a public nuisance within the definition of our code. But this objection would seem to overlook the most material feature of the complaint. It is alleged that the acts of defendant have the effect of polluting and poisoning the waters of the river, and thereby killing and destroying the fish therein. Anything which is 'an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or any considerable number of persons,' is a public nuisance. (Pen. Code, sec. 370; Civ. Code, secs. 3479, 3480.) The fish

² The GREP defendants mischaracterize plaintiffs' position by claiming that plaintiffs assert they are the exclusive private owners of the wildlife that defendants are killing. GREP Brief at 20-21. Not so. As explained in both the First Amended Complaint at ¶ 48 (AA at 14-15) and in plaintiffs' opening brief, California's wildlife is public trust property, with the state holding legal title as trustee for the people of California, each of whom has a beneficial interest in the public trust property.

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” *People v. Truckee Lumber Co.*, 116 Cal. 397, 399 (1897).

Because wildlife is public trust property, the Supreme 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* [in fish] 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.” *Truckee Lumber*, 116 Cal. at 400 (emphasis added).

In its later decision in *People v. Stafford Packing Co.*, the Supreme Court reiterated that it was the invasion of public trust property rights in wildlife that was at issue in *Truckee Lumber*. The Court first noted that there were three possible statutory bases for a nuisance action: “A nuisance is ‘anything which is injurious to health, or is indecent or offensive to the senses, or an *obstruction to the free use of property*, so as to interfere with the comfortable enjoyment of life or property’ (Civ. Code, sec. 3479; Pen. Code, sec. 370.)” *People v. Stafford Packing Co.*, 193 Cal. 719, 726 (1924) (italics original).

The Court in *Stafford Packing* then explained that only the obstruction of public trust property rights in fish was at issue in *Truckee Lumber*: “Appellant insists that the decision rested upon the circumstance that the alleged nuisance there complained of was a nuisance *per se* in that it polluted the waters and rendered them unfit for use. A careful reading of that opinion makes it clear that this is not so. That decision was rested not upon the circumstances that the pollution of the waters created a condition

which was ‘injurious to health’ or ‘offensive to the senses,’ but upon the fact that it was an invasion of the *property rights* which were held by the state in trust for the people of the state. In other words, it was ‘an obstruction to the free use of property.’ . . . ‘The fish within our waters constitute the most important constituent of *that species of property* commonly designated as wild game 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*’ . . . It is thus made plain that the basis of equitable interposition in that case was the threatened injury to the property rights of the people which are held in trust by the state for the people. Appellant suggests that the court there rested its action upon the circumstance that the act there complained of ‘unlawfully obstructed the free use’ of the Truckee River, but the court in its opinion expressly recognized that the case did not come within that definition of a nuisance for the reason that the Truckee River was not a navigable stream.” *Stafford Packing*, 193 Cal. at 726-28 (emphasis original).

In addition, the Supreme Court in *Truckee Lumber* rejected any limitation of public trust property rights in wildlife to wildlife inhabiting waters flowing over public trust submerged lands. 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. The Supreme Court held that the fish were still public trust property notwithstanding that they were on private lands and 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].” *Truckee Lumber*, 116 Cal. at 402.

Stafford Packing and People v. Monterey Fish Products Co., 195 Cal. 548, 564 (1925), were likewise cases in which the existence of a public trust property right in wildlife was essential to the Supreme Court’s holding. In *Stafford Packing*, the defendant was destroying fish in violation of a fish conservation statute. The defendant contended that the statutory remedies of fish conservation statute were exclusive, and that because the statutory remedies did not provide for injunctive relief, no such relief was possible. In particular, it contended that injunctive relief was not available under a nuisance theory: “Appellant’s principal contention is that the state cannot maintain an action in equity for the purpose of obtaining an injunction to prevent the violation of law, except when expressly authorized thereto by statute, and that the sole exception to this rule is where an act sought to be abated or prevented is a public nuisance which affects the health, morals or safety of the people.” *Stafford Packing*, 193 Cal. at 725. The Supreme Court rejected this contention, holding, as in *Truckee Lumber*, that because fish are public trust property, the defendant’s destruction of fish was an obstruction to the free use of property that amounted to a nuisance. “Having determined that the acts complained of constituted a wrongful invasion of those property rights [of the people in fish] 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.

In *Monterey Fish*, the defendant was committing an unlawful waste of fish. Once again, the Supreme Court held that injunctive relief was available under a nuisance theory because the fish were public trust wildlife property with which the defendant was interfering: “The use of fish which was admittedly made by the defendant herein was not merely a violation of prohibitory provisions of a statute, but was also a wrong committed against the property right of the plaintiff. It was such an obstruction to the free use of property as to interfere with the comfortable enjoyment thereof by the people of the state of California and as such constituted a nuisance (*People v. Truckee Lumber Co., supra; People v. Stafford Packing Co., supra.*)” *Monterey Fish*, 195 Cal. at 564.

The status of fish as public trust property was similarly at issue in *People v. Glenn-Colusa Irrigation District*, 127 Cal.App. 30, 36 (1932) . In that case, an irrigation district was destroying salmon, striped bass, and shad by pumping irrigation water that carried the fish out of the Sacramento River and into irrigation canals and fields. There, too, the court held that a nuisance action for obstruction of property was proper because fish were public trust wildlife property: “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.” *Ibid.* “[T]he facts disclosed in this case a nuisance at common law (*People v. Truckee Lumber, supra*)” *Id.* at 38.

This understanding that California common law recognizes public trust property rights in wildlife has also been affirmed by the Legislature. Fish & Game Code §§ 1600 (“Fish and wildlife are the property of the people”); 711.7, subd. (a) (“The fish and wildlife resources are held in trust for the people of the state by and through the department [of Fish and Game].”); 1802 (department is “trustee for fish and wildlife resources”).

Thus, defendants' contention that wildlife is not public trust property is meritless.

B. Federal Law Respects California's Power To Recognize Property Rights In Wildlife

Although it is the clear command of California decisional and statutory law that wildlife is public trust property, defendants argue that decisions by the United States Supreme Court have abolished the public trust property rights in wildlife that California has recognized. GREP Brief at 20-21, 30 n. 7; FPL Brief at 18-19, 24. Defendants err, for there is no true conflict between California law and the holdings of the United States Supreme Court decisions on which they rely.

As plaintiffs' opening brief explains at 23-24, both the California Supreme Court and the United States Supreme Court have held that the creation and definition of property rights is preeminently a state-law function that falls outside the limited and enumerated powers of the federal government. " 'Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States.' 'This principle applies to the [public trust ownership of] banks and shores of waterways, and we have consistently so held.' " *State of California ex rel. State Lands Commission v. Superior Court*, 11 Cal.4th 50, 74 (1995) (quoting *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378-79 (1977); see also 429 U.S. at 378: " 'The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state.' "). Defendants do not contest these holdings.

Nor are the property rights that states may recognize limited to real property and tangible chattels. For example, the United States Supreme

Court has recognized that states may create property rights in trade secrets, notwithstanding the intangible nature of trade secrets and the fact that state law provides that public disclosure of the secret extinguishes the property right. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001-1004 (1984). California has exercised its sovereign power to create many new and varied categories of intangible property rights, including not only trade secrets but also property rights in the personalities of dead celebrities. Civil Code § 3344.1, subd. (a) (creating rights in name, voice, signature, photograph, and likeness of deceased personalities); subd. (b) (“The rights recognized under this section are property rights”); *Comedy III Prods. v. Saderup*, 25 Cal.4th 387, 409 (2001) (“the Legislature has granted to the heirs and assigns of celebrities the property right to exploit the celebrities’ images”). If California can create property rights in something as ephemeral as the ghost of Elvis, it can recognize property rights in the living birds of California.

Thus, defining property rights is a fundamental attribute of state sovereignty, and California has exercised its sovereignty to recognize public trust property rights in wildlife. Contrary to the contention of defendants, the United States Supreme Court decisions on which they rely do not hold that states are prohibited from creating public trust property rights in wildlife. As explained below and in plaintiffs’ opening brief at 23-25, the principle on which those decisions are based is that a state may not interpose its ownership of wildlife to avoid specific obligations that the federal Constitution and federal statutes would otherwise impose on the state. Application of this unremarkable principle to the public trust ownership of wildlife is no different than its application to any other state property. For example, if a state owns a university building, the federal Constitution prohibits it from conducting racially segregated educational

programs or designating segregated drinking fountains within the building; the state's ownership of the building does not shield it from complying with the Constitution in the use of its property. That constitutional limitation does nothing to disturb the state's property interest in the building, just as federal limitations on a state's use of its wildlife does nothing to disturb or destroy California's public trust property interest in its wildlife.

A close examination of the cases on which defendants rely demonstrates this proposition. In *Missouri v. Holland*, 252 U.S. 416 (1920), the state of Missouri sued the federal government to enjoin enforcement of federal regulations promulgated pursuant to the Migratory Bird Treaty Act that limited bird-hunting. Missouri contended that the tenth amendment to the federal Constitution limited the power of the federal government to enter into the Migratory Bird Treaty and to enact the Migratory Bird Treaty Act: “[T]he question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States.” *Id.* at 432. The federal government did not contest the state's property interest in the birds and did not seek to extinguish that property interest. *Id.* at 431. Nor did either the treaty or the act purport to terminate public trust property rights in wildlife.

The United States Supreme Court, in an opinion by Justice Holmes, held that the treaty was valid and therefore the Migratory Bird Treaty Act and its implementing regulations were a constitutional exercise of the federal government's authority and were binding on Missouri. *Missouri v. Holland*, 252 U.S. at 435 (“We are of the opinion that the treaty and the statute must be upheld”). The Court repeatedly emphasized that except as limited by the treaty and the act, Missouri's authority over wildlife was plenary. *Id.* at 434 (“No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it

does not follow that its authority is exclusive of paramount powers.); *ibid.* (“but for the treaty the State would be free to regulate this subject itself”); *ibid.* (“No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power.”).

Similarly, in *Toomer v. Witsell*, 334 U.S. 385 (1948), South Carolina imposed discriminatory license fees on out-of-state shrimp fishermen from Georgia and Florida who fished in its waters. The Supreme Court analyzed the constitutionality of this discrimination and held that the Privileges and Immunities Clause of the federal Constitution prohibited South Carolina from discriminating against citizens of other states. *Id.* at 403. “In line with this underlying purpose [of cementing the several states into a single union], it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.” *Id.* at 396. “By that [license fee] statute South Carolina plainly and frankly discriminates against non-residents, and the record leaves little doubt but what the discrimination is so great that its practical effect is virtually exclusionary.” *Id.* at 396-97. The discriminatory license fee was unconstitutional because it violated “the constitutional command that the State exercise that power [over wildlife], like its other powers, so as not to discriminate without reason against citizens of other States.” *Id.* at 402.

Likewise, *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977), addressed a Virginia statute that discriminated against nonresident fishermen by prohibiting them from fishing in its waters. “The issue in this case is the validity of two Virginia statutes that limit the right of nonresidents and aliens to catch fish in the territorial waters of the Commonwealth.” *Id.* at 267. A nonresident American corporation owned by foreigners was excluded from fishing in Virginia waters by these

statutes and sued, contending that federal licensing of its fishing vessels preempted the restrictions of the Virginia statutes. *Id.* at 271-72. The Supreme Court agreed:³ “The challenged statutes thus deny appellees their federally granted right to engage in fishing activities on the same terms as Virginia residents. They violate the ‘indisputable’ precept that ‘no State may completely exclude federally licensed commerce.’ ” *Id.* at 283.

In *Hughes v. Oklahoma*, 441 U.S. 322 (1979), the Supreme Court addressed an Oklahoma statute that permitted intrastate commerce in minnows but prohibited their export out of the state. The Court held that the statute’s discrimination against interstate commerce violated the Commerce Clause. *Id.* at 338. The Court emphasized that its decision was limited to prohibiting economic discrimination and protectionism that treated interstate commerce in wildlife less favorably than intrastate commerce. The Court said its decision “does not leave the States powerless to protect and conserve wild animal life within their borders. Today’s decision makes clear, however, that States may promote this legitimate purpose only in ways consistent with the basic principle that ‘our economic unit is the Nation,’ and that when a wild animal ‘becomes an article of commerce . . . its use cannot be limited to the citizens of one State to the exclusion of citizens of another State.’ ” *Id.* at 338-39.

This case, of course, presents no attempt to use the public trust property rights in wildlife to avoid any of California’s obligations under the

³ The plaintiff in *Douglas v. Seacoast Products, Inc.* challenged Virginia’s discrimination against nonresidents as conflicting directly with the Commerce Clause as well as conflicting with federal vessel licensing statutes enacted under the Commerce Clause. Because the Court decided that the federal statutes authorized the plaintiff to fish in Virginia’s waters and thereby prohibited Virginia’s discrimination against nonresident fishermen, it did not reach the direct Commerce Clause challenge. 431 U.S. at 271-72 & n. 5, 275-77, 283, 286-87.

federal Constitution or federal statutory or treaty law, to discriminate against out-of-state citizens, or to discriminate against interstate commerce in favor of intrastate commerce. Thus, the United States Supreme Court decisions relied on by defendants are inapposite and cannot serve as a basis for rejecting controlling California Supreme Court decisions and California statutory law declaring wildlife to be public trust property.

Notwithstanding the narrowness of the holdings of these decisions, defendants rely on dicta in these decisions describing state ownership of wildlife as a “legal fiction.” See *Hughes v. Oklahoma*, 441 U.S. at 336 (“the 19th-century legal fiction of state ownership”); *Douglas v. Seacoast Products, Inc.*, 431 U.S. at 284 (“The ‘ownership’ language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing ‘the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.’ ”); *Toomer v. Witsell*, 334 U.S. at 402 (“The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.”); *Missouri v. Holland*, 252 U.S. at 434 (“Wild birds are not in the possession of anyone; and possession is the beginning of ownership.”).

Despite this expansive dicta regarding the ownership of wildlife, the holdings of these cases are narrowly limited, as explained above, to striking down attempts by states to invoke state ownership of wildlife to avoid an obligation created by the federal Constitution or federal treaty or statute. These decisions do not purport to extinguish state-created public trust property rights in wildlife.

To the extent this dicta in these cases might be read to suggest that a state cannot recognize public trust property rights in wildlife, that dicta is

neither controlling nor supportable. It is not controlling because “[a]n appellate decision is not authority for everything said in the court’s opinion but only ‘for the points actually involved and actually decided.’” *Santisas v. Goodin*, 17 Cal.4th 599, 620 (1998) . As explained above, the federal decisions on which defendants rely turn not on whether wildlife is public trust property but on whether the state is asserting its property interest as a ground for unconstitutionally discriminating against out-of-state citizens, for unconstitutionally discriminating against interstate commerce, or for avoiding some other federal obligation.⁴

Any broader rule purporting to outlaw as a matter of federal law state-created public trust property rights in wildlife would be insupportable because it would conflict with the well-established rule described above that property rights are creations of state, not federal, law. Federal courts, including the United States Supreme Court, are courts of limited jurisdiction, and lack any free-roving commission to extinguish property rights created by state law. While the federal courts can require that state-created property rights be exercised in conformance with federal law, they cannot destroy state-created property rights that do not conflict with federal law.

⁴ An analogous example of the limits of dicta is the United States Supreme Court’s decision in *Ruckelshaus v. Monsanto*. When considering whether state-created trade secret rights were a species of property, the Court encountered similarly dogmatic and enigmatic dicta from Justice Holmes’s majority opinion in *E. I. du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 102 (1917), questioning whether trade secrets could be a form of property. The Court swiftly distinguished and disposed of this dicta, and did not let it obstruct its recognition that a state can create property rights even in something as incapable of physical possession as an intangible idea whose status as property evaporates once it is exposed to the glare of publicity. *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1004 n. 9.

At bottom, defendants' argument on this point is that federal law preempts states from recognizing public trust property rights in wildlife. Defendants, however, fail at the threshold to carry their burden of proving preemption because they do not identify any federal constitutional, statutory, or treaty provision that they contend expressly or impliedly preempts a state from recognizing public trust property rights in wildlife. Absent a specific, identifiable federal constitutional, statutory, or treaty provision that is alleged to preempt state law, there can be no conflict with state legal rules and thus no preemption. *See Viva! International Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, 41 Cal.4th 929, 939-40 (2007) ("preemption analysis is not a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives but an inquiry into whether the ordinary meaning of state and federal law conflict" (internal quotation marks, brackets, and citations omitted)), 935 ("California is free to regulate within its own borders unless federal law or the United States Constitution require otherwise."); *see also id.* at 936 (burden of proving preemption is on party claiming preemption).

Indeed, rather than preempting state legal rules regarding wild birds, the Migratory Bird Treaty Act expressly authorizes states to make legal rules that provide additional protection for birds. 16 U.S.C. § 708 ("Nothing in this subchapter shall be construed to prevent the several States and Territories from making or enforcing laws or regulations not inconsistent with the provisions of said conventions or of this subchapter, or from making or enforcing laws or regulations which shall give further protection to migratory birds, their nests, and eggs"). California's public trust property right in wildlife is an example of such a rule providing additional protection for birds, and there is no inconsistency between the federal protection of birds provided under the Migratory Bird Treaty Act

and the protection that results from recognition of public trust property rights in wildlife. *See Viva! International Voice for Animals*, 41 Cal.4th at 941-42, 944, 952 (holding that a savings clause in the federal Endangered Species Act similar to 16 U.S.C. § 708 demonstrated Congress’s intent not to preempt state legal rules protecting endangered species). This is not a case where federal law affirmatively authorizes conduct that state law condemns; instead, defendants are both violating the Migratory Bird Treaty Act and unlawfully destroying public trust wildlife.

C. The *Golden Feather*, *Santa Teresa*, and *Brady* Decisions Are Inapposite

Defendants also contend that *Golden Feather Community Ass’n v. Thermalito Irrigation Dist.*, 209 Cal.App.3d 1276 (1989), rejects the existence of public trust property rights in wildlife. GREP Brief at 17-19; FPL Brief at 16-17. This contention is erroneous. As explained in plaintiffs’ opening brief at 21-22, *Golden Feather* was not a wildlife public trust property case, but an attempt to create a novel public trust right to the maintenance of a particular water level in an artificial, nonnavigable reservoir. The Court of Appeal stated: “When we have eliminated everything which is not at issue in this case it can be seen that we confront a very narrow issue. Specifically, we must determine whether members of the public may, through a judicial action asserting the public trust doctrine, insist that an authorized diverter of a nonnavigable stream continue the diversion of water but forego the authorized uses thereof in order to maintain an artificial reservoir for the recreational (primarily fishing) use of the public.” *Id.* at 1283.

As the Court of Appeal noted, the plaintiffs were not trying to conserve fish populations but were trying to preserve their ability to kill fish: “Here plaintiffs do not seek to enjoin a nuisance which is alleged to

be harming public fisheries; rather they seek to compel defendants to maintain an artificial body of water so that members of the public may fish in it. The *Truckee Lumber* decision involved the state's right to protect public fish in private waters. It did not hold that the public has the right to take fish from private waters under some 'public trust' theory, and in fact recognized otherwise." *Golden Feather*, 209 Cal.App.3d at 1282. The Court specifically reaffirmed that "[t]he general right and ownership of wild animals, the most important constituent of which are fish, is in the people of the state." *Ibid*.

The Court of Appeal specifically noted that the century-old public trust property right in wildlife was a "traditional public trust interest:" "[W]here the interest to be protected is a traditional public trust interest. . . . the courts have held that the state has broad powers to protect those interests [¶] Examples of these authorities are the *Truckee Lumber* and *Audubon* decisions. . . . Each of these cases involved the protection of a traditional, recognized public trust interest." *Golden Feather*, 209 Cal.App.3d at 1286.

The plaintiffs in *Golden Feather* lost because the court found the purported public trust interest in maintaining a particular water level in an artificial, nonnavigable body of water on which they founded their suit did not exist. Because plaintiffs rely on the "traditional, recognized public trust interest" in wildlife, 209 Cal.App.3d at 1286, *Golden Feather* has no application here.

Likewise, defendants' contention (GREP Brief at 19; FPL Brief at 16) that the Court of Appeal's refusal to recognize a novel public trust right in groundwater in *Santa Teresa Citizen Action Group v. City of San Jose*, 114 Cal.App.4th 689 (2003), , somehow abolishes the public trust property right in wildlife is meritless. There is no contradiction between

the absence of a public trust right in groundwater and recognition of a public trust property right in wildlife.

As explained in plaintiffs' opening brief at 25-27, *People v. Brady*, 234 Cal.App.3d 954 (1991), (discussed in the GREP Brief at 22-24) also does not support defendants. *Brady* does not address the availability of a civil cause of action for the destruction of wildlife public trust property. At issue in *Brady* was only a narrow question of statutory interpretation of a criminal statute: the scope of Penal Code section 487, the grand theft statute, which criminalizes the taking of "money, labor or real or personal property." The defendant was charged with grand theft for taking abalone from the state's waters; at issue in *Brady* was whether the Legislature intended the statutory term "personal property" to encompass abalone taken from the wild. *Brady*, 234 Cal.App.3d at 957 ("The question is whether the abalone, illegally taken from the state's coastal waters, can be considered 'personal property' of the state within the meaning of the statute.").

The *Brady* court concluded that the Legislature did not intend the term "personal property" as used in the Penal Code section 487 to include wildlife. *Brady*, 234 Cal.App.3d at 959-60 (at 960: "the Legislature was aware of the precise issue that is now before us and decided not to expand the scope of the theft statute"). The *Brady* court also discussed the state's ownership of wildlife as set forth in *Truckee Lumber* and *Monterey Fish* and, relying on the United States Supreme Court's decisions in *Douglas v. Seacoast Products, Inc.* and *Hughes v. Oklahoma*, stated: "The term 'ownership' should not be taken to imply that the state has title to these and other wild animals." *Id.* at 957.

As discussed above, the federal decisions on which the *Brady* court relied for this statement are dictum to the extent they assert that states are forbidden by federal law from creating property rights in wildlife. To the

extent the *Brady* court's discussion suggests that there is no public trust property right in wildlife for any purpose it is a misreading of *Truckee Lumber* and its progeny for the reasons described above. It is also dictum, for the only question before the *Brady* Court was the question of the Legislature's intent in drafting Penal Code section 487, not the status of wildlife as public trust property for other purposes or the availability of civil actions to protect wildlife public trust property. In addition, contrary to the assertion of the GREP defendants at 23, the *Brady* court did not discuss or acknowledge the Legislature's affirmation of wildlife as public trust property in Fish & Game Code sections 1600, 711.7, subd. (a), and 1802.

Thus, defendants' authorities provide no basis for disregarding the conclusion of the Supreme Court and the Legislature that California's wildlife is public trust property.

D. Public Trust Property Interests Are Not Limited To Real Property Easements And Servitudes

The GREP defendants erroneously assert that public trust property interests only take the form of an easement or servitude. GREP Brief at 13-17. In doing so, they do not correctly describe even the public trust property rights in tidelands and submerged lands, much less other public trust property rights, for they focus only on the public trust property rights that exist in tidelands and submerged lands that are privately owned and ignore the public trust property rights that exist in tidelands and submerged lands in which California owns the fee interest.

Public trust rights take the form of an easement in tidelands or submerged lands only in cases in which the fee interest in those lands is privately owned. The existence of public trust rights in particular tidelands and submerged lands in which the fee interest is privately owned depends

on a number of different circumstances. For tidelands conveyed by a Spanish or Mexican land grant whose title was confirmed by a federal land patent issued in proceedings under the Act of March 3, 1851, 9 Stat. 632, there is no public trust easement unless the public trust easement was expressly reserved in the federal land patent. *Summa Corp. v. California*, 466 U.S. 198, 209 (1984). For lands conveyed by California after statehood, the existence of public trust rights turns on, among other factors, the nature and terms of the legislation authorizing the conveyance, the purpose of the conveyance, and whether the land remains submerged or subject to tidal action. *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 523-25, 531-34 (1980); *People v. California Fish Co.*, 166 Cal. 576, 596-99 (1913).

Tidelands and submerged lands that have not been conveyed to private owners, however, are publicly owned in fee. “Both tidelands and the beds of navigable rivers are owned by the state in trust for the public.” *State of California ex rel. State Lands Commission v. Superior Court*, 11 Cal.4th at 63; *see also* Civil Code § 670 (“The state is the owner of all land below tide water, and below ordinary high-water mark, bordering upon tide water within the state; of all land below the water of a navigable lake or stream”); Cal. Const., art. X, § 3 (forbidding state from conveying tidelands within two miles of incorporated municipalities). Where the state has absolute fee ownership, public trust rights do not exist as a servitude or easement; instead, the entirety of the state’s absolute ownership is public trust property held by the state in trust for the people of California. *State of California ex rel. State Lands Commission v. Superior Court*, 11 Cal.4th at 63-64. Thus, the FPL defendants’ suggestion that easements and servitudes are the only form of public trust property rights is not even true for tidelands and submerged lands. More importantly, the fact that some

public trust property rights in tidelands and submerged lands take the form of easements and servitudes does nothing to invalidate the existence of public trust property rights in wildlife that the Supreme Court has recognized.

II. Plaintiffs Have Standing To Bring An Action To Enforce Their Public Trust Property Rights In Wildlife

As plaintiffs have demonstrated above and in their opening brief, wildlife is a category of public trust property and the destruction of wildlife public trust property is subject to judicial relief. And, as plaintiffs demonstrated in their opening brief at 27-34, they and every other member of the public have standing to sue to remedy harms to public trust interests both under the law of public trust standing set forth in *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983), and under more general principles of standing.

Defendants argue that citizen standing to enforce public trust property rights is limited to enforcing public trust property rights in tidelands, submerged lands, and navigable waters. This argument lacks merit.

Nothing in the language or the rationale of *National Audubon* narrowly limits public trust standing to trespasses to public trust property rights in tidelands, submerged lands, and navigable waters. The Supreme Court's statement of public trust standing under the common law is unqualified and unequivocal: “. . . *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).

There is no principled basis for cutting back on the scope of public trust standing to exclude public trust wildlife property from the public trust interests that members of the public may sue to protect. The unfortunate history of public trust interests shows that the state does not always fulfill its fiduciary duties as trustee of those interests. In *National Audubon*, for example, the State Water Board had failed to take public trust interests into account in authorizing water diversions by the Department of Water and Power of Los Angeles. *National Audubon*, 33 Cal.3d at 428, 437, 440. In *City of Berkeley v. Superior Court*, the state had purported to grant absolute fee title to tidelands to private parties without reserving as it should have an easement for public trust interests. *City of Berkeley*, 26 Cal.3d at 518, 522, 524, 531, 533-34. In order to ensure that the public trust interests and property rights collectively held by all Californians are adequately protected from private appropriation or destruction, the common law gives members of the public standing to bring actions to enforce public trust interests whether or not the state is roused to action. As the ongoing destruction of thousands of eagles, hawks, falcons, owls, and other birds by defendants demonstrates, public trust wildlife is equally subject to private appropriation and destruction as are other public trust interests, and standing for members of the general public to enforce the public trust is equally appropriate and necessary.

No case supports the conclusion that public trust wildlife property is somehow excluded from the spectrum of public trust interests that members of the general public can sue to protect, or that there exist any public trust interests that are not subject to enforcement by the general public. To the contrary, in *National Audubon*, the Supreme Court made no distinction among the various types of public trust interests that the general public had standing to sue to protect: “The principal values plaintiffs seek to protect,

however, are recreational and ecological—the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds. Under *Marks v. Whitney*, *supra*, 6 Cal.3d 251, it is clear that protection of these values is among the purposes of the public trust.” *National Audubon*, 33 Cal.3d at 435. Nor did the defendant’s conduct in *National Audubon* take the form of a trespass to any easement, servitude, or other property interest in public trust lands or public trust waters. Thus, defendants’ formalistic attempt to limit general public standing to enforcing the public trust to cases of public trust property rights in tidelands, submerged lands, and navigable waters runs counter to *National Audubon*.

As explained in plaintiffs’ opening brief at 31-34, allowing members of the public to sue for harms to the public trust wildlife property they collectively own accords with the general law of standing as well. Plaintiffs and other members of the public suffer an injury in fact to their public trust interests in the raptors and other birds of Altamont Pass when defendants unlawfully destroy these birds. The public trust interests in the birds include not only the public trust property interest in the birds but other recreational and ecological values provided by the birds and protected by the public trust. Plaintiffs’ Opening Brief at 32-33; *National Audubon*, 33 Cal.3d at 435. The harms to plaintiffs’ public trust interests in the raptors and other birds that defendants are destroying gives plaintiffs a “stake in the resolution of [their] complaint [that] assumes the proportions necessary to ensure that [they] will vigorously present [their] case,” and gives them an “ ‘intens[e] . . . claim to justice.’ ” *Harman v. San Francisco*, 7 Cal.3d 150, 159 (1972). The traditional standing test is therefore satisfied as well.

Defendants make two additional arguments against standing by members of the general public to enforce the public trust property right in wildlife, neither of which is availing. First they contend that there is no

public trust property right in wildlife, and therefore there can be no general public standing to enforce that nonexistent right. This argument collapses in light of the authority described above and in plaintiffs' opening brief that demonstrates that the public trust property right in wildlife is established by Supreme Court decisional law and recognized by the Legislature.

Defendants' second argument is that plaintiffs should be denied standing because statutory remedies for their bird-killing exist that the state has failed to pursue. Defendants thus cynically seek to turn the very statutes that prohibit their destruction of birds, statutes that they violate every day, into a shield that would protect their ongoing destruction from judicial scrutiny. This argument is meritless.

It is the settled rule that statutory remedies do not by implication repeal existing common law rights. To the contrary, "unless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules. A statute will be construed in light of common law decisions, unless its language clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter. Accordingly, there is a presumption that a statute does not, by implication, repeal the common law." *California Association of Health Facilities v. Dep't of Health Services*, 16 Cal.4th 284, 297 (1997) (brackets, internal quotation marks, and citations omitted). Thus, "where a statutory remedy is provided for a preexisting common law right, the newer remedy is generally considered to be cumulative, and the older remedy may be pursued at the plaintiff's election." *Rojo v. Kliger*, 52 Cal.3d 65, 79 (1990) (Fair Employment and Housing Act does not supplant common law causes of action for employment discrimination).

Here, the Legislature has not abrogated the common law public trust property rights in wildlife. To the contrary, it has affirmed those rights. Fish & Game Code §§ 1600 (“Fish and wildlife are the property of the people”); 711.7, subd. (a) (“The fish and wildlife resources are held in trust for the people of the state by and through the department [of Fish and Game].”); 1802 (department is “trustee for fish and wildlife resources”). Nor has it expressed any intent to restrict standing to enforce public trust rights in wildlife. Given the absence of any legislative intent to preclude standing by members of the general public to enforce common law public trust property rights, defendants’ argument fails. It would be a travesty of justice and a perversion of the common law to permit defendants to continue unabated their destruction of public trust wildlife by cloaking themselves in the very wildlife protection statutes they contemptuously violate every day.

In addition, the Supreme Court has made clear that the enforcement of the common law public trust property right in wildlife is not limited by the existence of alternative statutory remedies under wildlife protection statutes. In *Stafford Packing*, the defendant made a similar argument that its violation of a fish conservation statute made the statutory remedy exclusive and barred the state from seeking injunctive relief unauthorized by the statute for its destruction of public trust property. The Supreme Court rejected this argument: “The effect of those regulations 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.” *Stafford Packing*, 193 Cal. at 730 (emphasis original). Similarly, in *Monterey Fish*, the Supreme Court held that the fact that the defendant’s killing of wildlife violated statutory prohibitions did not make

the statutory remedy exclusive: “The use of fish which was admittedly made by the defendant herein was not merely a violation of prohibitory provisions of a statute, but was also a wrong committed against the property right of the plaintiff.” *Monterey Fish*, 195 Cal. at 564. “The circumstance that [the defendant] may be prosecuted criminally for a violation of the penal provisions of the statute affords no adequate remedy for the civil wrong, which consists of an invasion of plaintiff’s property right (*People v. Truckee Lumber Co.*, *supra*; *People v. Stafford Packing Co.*, *supra*).” *Monterey Fish*, 195 Cal. at 566.

The decision in *National Audubon* also demonstrates that the existence of alternative statutory remedies does not bar an action by the general public to enforce public trust rights. There exists a complex statutory scheme regulating water rights in California, and extensive statutory remedies in the areas of water rights. Under this scheme, the State Water Board has authority to comprehensively regulate the use of water, including authority to protect public trust interests. *National Audubon*, 33 Cal.3d at 449 (“we have discerned a legislative intent to grant the Water Board a ‘broad,’ ‘open-ended,’ ‘expansive’ authority to undertake comprehensive planning and allocation of water resources”).

The Supreme Court held in *National Audubon* that the National Audubon Society and other members of the general public could have initiated administrative proceedings before the State Water Board to challenge water uses that harm public trust interests. *National Audubon*, 33 Cal.3d at 449. Yet notwithstanding the comprehensive regulatory scheme for water use, far more extensive than the statutory regulation of wildlife, the Court refused to require even the exhaustion of administrative remedies before members of the public could bring public trust actions, much less hold, as defendants propose here, that the existence of the administrative

and regulatory scheme barred public trust actions entirely. *Ibid.* (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).

Thus, there is no reasoned basis for accepting defendants’ invitation to create a novel exception to the general rule announced in *National Audubon* that “any member of the general public has standing to raise a claim of harm to the public trust” and thereby deny California’s citizens standing to bring actions to protect their interest in public trust wildlife. *National Audubon*, 33 Cal.3d at 431 n. 11 (citation omitted).

III. Defendants’ Other Arguments Lack Merit

A. The Equitable Discretion Of The Trial Courts Will Forestall Any Abuse Of The Public Trust Cause Of Action

Defendants assert that unless this Court rejects the established public trust property rights in wildlife and rejects the established right of Californians to seek relief for harm to public trust rights, there will be a “flood” of lawsuits seeking to stop the destruction of public trust wildlife. FPL Brief at 28-29; GREP Brief at 29. There is no basis for this assertion; thankfully, cases like this one where defendants are engaging in the massive and illegal destruction of wildlife over many years are few and far between. Defendants identify no other industry or person who is illegally killing wildlife on the scale that they are and who is similarly situated to them.

In any event, determining the appropriate equitable relief for the destruction of public trust wildlife remains firmly committed to the sound discretion of our trial courts, which will remain vigilant as always in ensuring that the strong arm of equity is an instrument of justice and not a

tool of oppression. The courts can be trusted to wisely exercise their equitable discretion to carefully fashion remedies that appropriately protect public trust wildlife from wanton destruction.

B. Plaintiffs Do Not Seek To Enforce Statutes Prohibiting Defendants From Killing Wildlife

The FPL defendants set up and knock down a straw man by suggesting that plaintiffs are seeking to enforce Fish and Game Code statutory provisions prohibiting the killing of wildlife for which there is no private right of action. FPL Brief at 24. Not so; plaintiffs do not seek to enforce these statutes but instead seek to enforce common law public trust property rights in wildlife.

C. “Migratory” Wildlife Is Protected Public Trust Property

Defendants repeatedly emphasize the adjective “migratory” in describing the birds they are killing. In doing so, defendants apparently mean to suggest that even if California could recognize a public trust property interest in native wildlife, it could not do so with respect to wildlife that has migrated into the state. This suggestion is erroneous.

First, the California Supreme Court has recognized migratory wildlife as public trust property. The fish in the Truckee River (including the migratory Lahontan cutthroat trout) that the Supreme Court protected in *Truckee Lumber* were interstate travelers swimming in a great fish highway that joined Pyramid Lake in Nevada with Lake Tahoe, which also lies partly in Nevada: “This court will take judicial cognizance of the fact that the river has its source in Lake Tahoe, a large navigable body of water lying partly in this state, and that it flows thence into the state of Nevada, and empties into Pyramid Lake, also navigable; and the court may also take notice of a fact so common and notorious that between these two bodies of

water the river affords, and has from time immemorial, a natural and free highway for the passage of the fish inhabiting these lakes.” *Truckee Lumber*, 116 Cal. at 401. Likewise, salmon, shad, and striped bass are migratory fish that are public trust property. *People v. Glenn-Colusa Irrigation District*, 127 Cal.App. at 36. Salmon, shad, and striped bass are anadromous fish, and they roam the oceans before returning to their natal streams in California.

Moreover, the word “migratory” is a term of art in wildlife statutes that designates certain species for protection whether or not particular individuals or populations within the species are in fact migratory. *Humane Society of the United States v. Glickman*, 217 F.3d 882, 884 (D.C. Cir. 2000) (populations of Canada geese resident year-round in Virginia are “migratory birds” protected by the federal Migratory Bird Treaty Act). Nor, in any event, is plaintiffs’ cause of action limited to birds protected by the Migratory Bird Treaty Act.

Finally, even if California’s wildlife public trust property excluded migratory-in-fact wildlife that traveled to California from outside the state, the question of whether any one or more of the tens of thousands of eagles, hawks, falcons, owls, and other birds killed by defendants was in fact a migrant from outside of California would simply be a disputed fact to be proven or disproven in the litigation. It would provide no basis for a conclusion that as a matter of law there is no cause of action for destruction of public trust wildlife property.

D. Proposition 64 Does Not Bar Common Law Actions To Enforce Public Trust Rights

Nor, contrary to the argument of defendants (GREP Brief at 27; FPL Brief at 26-28), do the limitations that Proposition 64 imposed on Unfair Competition Law (UCL) and false advertising actions under Business and

Professions Code sections 17200 et seq. and 17500 et seq. apply to public trust actions. Proposition 64 by its terms amended only certain specific sections of the Business and Professions Code to limit private party standing to bring UCL actions under section 17200 and false advertising actions under section 17500. It did not alter or limit, either expressly or by implication, common law actions brought to enforce public trust rights, and defendants cite no statutory text or other authority in support of their argument to the contrary.

E. The Factual Assertions Of Defendants Are Inadmissible And Irrelevant To Determining Whether The Complaint States A Cause Of Action

In support of their arguments, defendants assert disputed facts concerning their zoning permit proceedings. *See, e.g.*, GREP Brief at 28 & n. 6, 29, 31-32; FPL Brief at 26. The disputed factual assertions of defendants are both inadmissible and irrelevant to determining whether plaintiffs' complaint states a cause of action, and plaintiffs object to any consideration of defendants' assertions.

F. Restraining Defendants From Killing Public Trust Wildlife Is Not A Taking Of Private Property For Public Use

Finally, the GREP defendants argue that any court order restraining them from continuing to kill hundreds of eagles, hawks, falcons, and owls annually would be a "taking of private land without 'just compensation,' as otherwise required by the Constitution." GREP Brief at 34. This argument, in addition to resting on factual assertions found nowhere in the complaint, lacks any foundation in law or logic. Defendants' wanton destruction of wildlife is a private taking of public trust property, not a public taking of private property. "[T]he state owns the fish . . . as a trustee for the people of the state. . . . [T]o permit the defendant to continue the

taking and destruction of the property of the plaintiff . . . would be in effect to allow and to legalize the unauthorized seizure and taking of property for a use other than a public use.” *Monterey Fish*, 195 Cal. at 565.

Nor is a court order restraining defendants from killing birds a “declaration that private property is subject to a public trust easement,” GREP Brief at 33. Laws, regulations, and court orders prohibit or limit an innumerable variety of socially undesirable conduct, from murder to stock fraud to unsafe working conditions to sexual harassment to the discharge of pollutants; conduct that, because it must occur somewhere, often can and does occur on private property. The fact that the prohibited conduct may occur on private property, however, does not turn the prohibition into an “easement” on that property that is “taken” by the prohibition.

To the contrary, a takings claim requires that, “before the question turns to the amount of compensation due, ‘the property owner must first clear the hurdle of establishing that the public entity has, in fact, taken [or damaged] his or her property’” As part of this threshold showing, the plaintiff must demonstrate that the government has ‘taken or damaged’ a cognizable property right.” *Regency Outdoor Advertising, Inc. v. City of Los Angeles*, 39 Cal.4th 507, 516 (2006) (citations omitted; bracketed material and ellipsis original) (billboard company had no cognizable property “right to be seen” from city street and thus no takings claim). Here, defendants have no cognizable property right to kill eagles, hawks, falcons, owls, and other birds; thus, a court order restricting defendants’ killing of the eagles, hawks, falcons, owls, and other birds is not the taking of a property right from them.

IV. It Is Appropriate And Efficient For The Court To Address The Scope Of Remedies Available On Remand

This lawsuit has been pending since 2004, and defendants have been unlawfully killing eagles, hawks, falcons, owls, and other birds for far longer. The question of potential remedies for defendants' destruction of public trust property is entirely foreseeable, and it can and should be efficiently addressed now by this Court, so that if plaintiffs prevail below on remand the trial court can expeditiously award relief without further dispute over what remedies are available to the trial court.

Defendants do not contest the general availability of equitable remedies for the destruction of public trust property or the specific availability of injunctive and declaratory relief. They contest only the availability of restitution. As explained in plaintiffs' opening brief at 37, restitution would go not to plaintiffs but to the state as trustee for the wildlife property that defendants have destroyed.

Defendants' only argument against the availability of restitution as a potential equitable remedy is that there is no reported public trust decision ordering restitution for the destruction of public trust wildlife property. This argument lacks merit. "Code of Civil Procedure section 187 provides that a court with jurisdiction over a matter is given all the means necessary to carry out its jurisdiction and that 'any suitable process or mode of proceeding' may be employed to effectuate it. 'The business of the courts is to administer justice as nearly as may be in accordance with fixed rules of law and procedure, aided wherever and whenever proper and necessary by established and governing principles which relate to equity jurisprudence.'" (*Estate of Kline* (1934) 138 Cal.App. 514, 520.) [¶] In addition, the term 'remedy' signifies the judicial means for enforcing a cause of action or redressing a wrong. (3 Witkin, *Cal. Procedure* (3d ed. 1985) Actions, § 2, p. 34 citing Civ. Code, § 3523 declaring that '[for]

every wrong there is a remedy.’) ‘[A] remedy may be entirely created by judicial decision where statutory procedure for the enforcement of a right is lacking.’ (*Id.*, § 3, p. 34.)” *Halperin v. Raville*, 176 Cal.App.3d 765, 772 (1986).

Defendants do not contest that *Stafford Packing* held that equitable relief is available to remedy the destruction of trust property. *Stafford Packing*, 193 Cal. at 730. They do not contest that restitution is a well-recognized equitable remedy within the inherent powers of the trial court. *See* Plaintiffs’ Opening Brief at 36-37. Given the absence of any substantial argument by defendants in support of their position that restitution is not a potentially available remedy for the destruction of public trust wildlife property, the question is not a doubtful or difficult one that that the Court should defer deciding.

Defendants additionally suggest that plaintiffs have not adequately prayed for restitutionary relief. This argument does not address the question of what remedies are potentially available for the destruction of public trust property. Nor is it meritorious.

Plaintiffs’ First Amended Complaint prays for the following relief:

“C. That the Court preliminarily and permanently enjoin and restrain defendants, and each of them and their officers, directors, agents, employees, successors, assignees, subsidiaries, transferees, and all other persons acting or claiming to act on behalf thereof or in concert therewith, in any manner, directly or indirectly, from participating in or causing any further taking, injuring, killing, harming, harassing, molesting, or disturbing of birds in violation of California or federal wildlife laws by the operation of Altamont Pass wind turbine generators;

“D. That the Court preliminarily and permanently enjoin and compel defendants, and each of them, to mitigate and remediate the

environmental consequences of their bird-killing and bird-harming activities, and to *restore* the environment and wildlife to the conditions that would exist but for defendants' unlawful acts;"

First Amended Complaint at 31 (Appellants' Appendix, Tab 1 at 31 (emphasis added)).

The prayer by plaintiffs in paragraph D that defendants "restore" the wildlife public trust property they have destroyed encompasses restitution: " 'Restore' and 'restitution' have a well understood meaning. 'Restore' means 'return' and 'restitution' is the act of returning the thing which is restored." *Stop Youth Addiction v. Lucky Stores*, 17 Cal.4th 553, 581 (1998). As explained in plaintiffs opening brief at 37, restitution includes the concept of substitutionary restitution: when property subject to restitution cannot be restored in kind because it is both taken and destroyed, the monetary value of the property is restored instead. "Restitution is commonly understood as 'an act of restoring or a condition of being restored ... (a) a restoration of something to its rightful owner (b) a making good of or giving an equivalent for some injury.' (Merriam-Webster's 11th Collegiate Dict., *supra*, at p. 1062.) It obligates the defendant wrongdoer to restore to the victim the value of those things he or she was deprived of by the wrongful act. Therefore, in making restitution to the victim, i.e., restoring the monetary value of the things the victim lost, the defendant is not restoring a penalty to the victim." *People v. Boudames*, 146 Cal.App.4th 45, 52 (2006).

In addition, plaintiffs also included a general prayer for relief:

"F. That the Court award such other and further relief as may appear necessary and appropriate."

First Amended Complaint at 31 (Appellants' Appendix, Tab 1 at 31).

This, too, is a sufficient prayer for restitution: “Plaintiff’s general prayer for ‘such other and further relief as the Court may deem proper’ was sufficient to plead entitlement to disgorgement [to the plaintiff of amounts paid to the defendant by the plaintiff, i.e., a form of restitution] as a remedy.” *Slovensky v. Friedman*, 142 Cal.App.4th 1518, 1536 (2006). More generally, “[u]nder the prayer for general relief the court can give such judgment as plaintiffs show themselves entitled to, and as may be necessary to effect justice between the parties and protect the rights of both.” *Matteson v. Wagoner*, 147 Cal. 739, 745 (1905).

Finally, as explained in plaintiffs’ opening brief at 35, a court of equity in a contested case is not confined in any event to the relief prayed for in the complaint, but “may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue.” Code Civ. Pro. § 580, subd. (a). “It is the usual rule that in a contested case plaintiff may secure relief justified by the allegations of the complaint and the evidence, even though the relief is greater than or different from that demanded.” *Singleton v. Perry*, 45 Cal.2d 489, 498-499 (1955); *accord*, 4 Witkin, *California Procedure* (4th ed. 1997), Pleading, § 458, p. 555 (“the rule is well settled that in a contested case the plaintiff may secure relief different from or greater than that demanded”).

CONCLUSION

It may be that defendants will eventually succeed somehow in demonstrating that in fact they are not killing any public trust wildlife, or in persuading the trial court that even though they are killing public trust wildlife the court in its equitable discretion should withhold any remedy for that wrong. But those are questions that lie far down the road.

Before this Court today is the much simpler question of whether on the face of their complaint plaintiffs state a cause of action: “We treat as

admitted all material facts properly pleaded, give the complaint's factual allegations a liberal construction, and determine de novo whether the complaint states a cause of action under any legal theory." *Sanchez v. City of Modesto*, 145 Cal.App.4th 660, 671 (2006). In this appeal, determining whether the complaint states a cause of action turns on determining, first, whether California's wildlife is public trust property, and, second, whether California's citizens have standing to enforce their interest in public trust wildlife. For the reasons stated above and in plaintiffs' opening brief, the answer to both of these inquiries is "Yes." Accordingly, the trial court's judgment dismissing the action should be reversed.

Dated: November 5, 2007

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 11,381 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 BRIEF

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In addition, I served the aforementioned document(s) on the following persons by placing copies in sealed envelopes, addressed as shown below, and providing for their delivery to the addressee by the method specified:

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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: November 5, 2007

Richard R. Wiebe