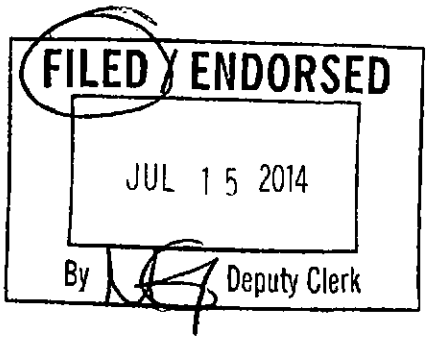

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

ENVIRONMENTAL LAW FOUNDATION, et al.

Petitioners,

v.

STATE WATER RESOURCES CONTROL BOARD, et al.

Respondents.

Case No.: 34-2010-80000583

ORDER AFTER HEARING ON CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS

The County of Siskiyou's motion for judgment on the pleadings is denied, and the cross-motion for judgment on the pleadings by Petitioners Environmental Law foundation, et al., is granted.

On May 16, 2014, hearing was held on the court's tentative ruling granting Petitioners' motion for judgment on the pleadings and denying the motion for judgment on the pleadings by Respondent County of Siskiyou. Petitioners were represented by James Wheaton, Lowell Chow and Richard Frank. County of Siskiyou was represented by Roderick E. Walston. Respondent State Water Resources Control Board was represented by Deputy Attorneys General Mark Pool and Daniel M. Fuchs.

Based on the pleadings and arguments presented, the tentative ruling, as modified below, is adopted as the court's statement of decision.[1]

[1] The County requested hearing on the court's tentative ruling to raise an issue not addressed by the tentative ruling: Does the Board have authority to regulate groundwater under the public trust doctrine? The parties disagreed whether Petitioners pled a cause of action against the Board stating an actual case and controversy raising this issue. The County thus requested permission to file a cross-complaint against the Board to put the issue before the court. The court granted the County's request.

The County also asked the court to defer adopting its tentative ruling until it also rules on the Board's authority. The court postponed ruling on this request until the County filed its cross-complaint and the Board filed a response.

The County filed its cross-complaint against the Board on June 13, 2014. The Board informed the court it intends to demur to the cross-complaint. Given the court's writ calendar,

INTRODUCTION

Petitioners the Environmental Law Foundation, Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources bring this an action against Respondents County of Siskiyou ("County") and the State Water Resources Board ("Board") raising an issue of first impression: Does the public trust doctrine apply to groundwater hydrologically connected to a navigable river? Petitioners seek a declaration it does. They also seek a writ of mandate or injunction compelling the County to stop issuing well drilling permits until it complies with its duties under the public trust doctrine. No affirmative relief is sought against the Board – just declaratory relief but not specific to the Board.

In its answer to the petition, the County asserted four affirmative defenses: (1) the public trust doctrine does not apply to groundwater; (2) the Board has no authority to regulate groundwater under the public trust doctrine; (3) the County is not required to regulate groundwater under the public trust doctrine; and (4) the public trust doctrine does not apply in this case because a 1980 decree by the Siskiyou County Superior Court adjudicated all rights to the groundwater at issue.

Petitioners and the County filed cross-motions for judgment on the pleadings, seeking a ruling on the County's affirmative defenses. The cross-motions raise two legal issues: Does the public trust doctrine apply to the facts alleged? If so, does it impose any duties on the County that can be enforced by writ of mandate or injunction?

As explained below, the court concludes the public trust doctrine protects navigable waterways from harm caused by groundwater extraction, and Petitioners state facts sufficient to entitle them to judgment so declaring. The court also concludes the County, as a subdivision of the State, is required to consider the public trust when it issues well drilling permits. Again, Petitioners state facts sufficient to entitle them to a writ or injunction compelling the County to do so. The court thus grants Petitioners' motion for judgment on the pleadings and denies the County's motion.

Although Petitioners are entitled to judgment on three of the County's affirmative

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hearing on the Board's demurrer is scheduled February 27, 2015. The court therefore finds resolution of the question of application of the public trust doctrine to groundwater affecting navigable waters should not be delayed pending hearing on the Board's demurrer.

defenses, they are not entitled to judgment against the County. The County denies most of the factual allegations in the petition. Petitioners must still prove those allegations to prevail on the merits. This ruling thus does not dispose of this case; it simply allows the case to proceed beyond the pleading stage.

Nor does this ruling address the Board's authority, *vel non*, to regulate groundwater under the public trust doctrine. Petitioners seek no affirmative relief against the Board or declaratory relief specific to the Board. Contrary to Petitioners' assertion, the declaratory relief sought here would not "settle" the question of the Board's authority. (Petitioner's Resp. to Court's Req. at 4:13-14.) Moreover, neither motion for judgment on the pleadings is brought by, or asserted against, the Board. The County raises the Board's lack of authority as an affirmative defense. However, the Board's authority is not relevant to whether the petition states facts sufficient to constitute a cause of action ***against the County***. It is thus unnecessary to address the Board's authority in ruling on the cross-motions for judgment on the pleadings.

BACKGROUND

When ruling on a motion for judgment on the pleadings, the court accepts as true all factual allegations in the challenged pleading. (*County of Orange v. Association of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 32.) Here the petition alleges the following facts.

The Scott River located in Siskiyou County is a navigable waterway used for boating and fishing. (Pet. ¶ 16.) In the past two decades the Scott River experienced decreased flows caused in part by groundwater pumping. (Pet. ¶ 22.) Groundwater is water beneath the surface of the ground. (See, e.g., Water Code § 1005.1; § 5000, subd. (a); § 10752, subd. (a); § 31142.24, subd. (g); § 60015; § 75502.) Petitioners use the terms "interconnected groundwater" to refer to groundwater so hydrologically connected to the Scott River that its pumping causes decreased flows in the river. (See, e.g., Pet. ¶¶ 17, 20, 22.) According to Petitioners, at times almost every gallon of groundwater pumped decreases the flow of the Scott River by the same amount. (Pet. ¶ 22.)

As a result of these decreased flows, the Scott River is often "dewatered" in the summer and early fall. The river is then reduced to a series of pools. (Pet. ¶ 24.) This, in turn, has injured the river's fish populations. (Pet. ¶ 21.) Although not explicitly alleged, it is implicit this also

impacts the Scott River's navigability, rendering it less suitable for boating and other recreational activities. (Pet. ¶¶ 24-26.)

The County is responsible for issuing permits for wells used to pump groundwater. (Pet. ¶ 3.) Petitioners allege the County does not consider the effect groundwater pumping will have on the Scott River when it issues its permits. (Pet. ¶¶ 36-39.) Petitioners believe the public trust doctrine requires the County to consider those effects when issuing permits to pump groundwater. Petitioners thus seek (1) a declaration groundwater hydrologically connected to navigable surface waters is protected by the public trust doctrine, and must be managed consistent with the public trust doctrine; and (2) a writ or injunction compelling the County to stop issuing permits until it complies with its duties under the public trust doctrine.[2] (Pet. at 12:6-9.)

This litigation follows a 1980 degree issued by the Siskiyou County Superior Court adjudicating "all surface water rights in the Scott River stream system" and "all rights to ***ground water*** that is interconnected with the Scott River," and reserving jurisdiction to thereafter "change or modify the [decree] as the interests of justice so require." (Pet. ¶ 18; *In the Matter of Determination of the Rights of the Various Claimants to the Waters of Scott River Stream System*, Siskiyou County Superior Court, Decree No. 30662 (Jan. 16, 1980) [emphasis added].)[3] Petitioners allege the decree does not apply to new wells constructed "at least 500 feet from the Scott River or at the most distant point from the river on the land that overlies the interconnected groundwater, whichever is less." (Pet. ¶ 18.) Petitioners refer to this as the "zone of

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[2] Precisely what the County's duties may be is not alleged in Petitioners' prayer, and thus need not be determined in ruling on this motion. (See *Kramer v. Intuit Inc.* (2004) 121 Cal.App.4th 574, 578 [pleading motion does not determine ***what*** relief is available – only whether plaintiff has alleged facts sufficient to entitle it to ***some*** relief.) As explained below, the County has a duty to consider the public trust when issuing well drilling permits. If the County fails to consider the public trust, mandate would lie to compel it to do so. (*California Assn. of Health Services at Home v. State Dept. of Health Care Services* (2012) 204 Cal.App.4th 676, 683.) Although mandate will lie to compel the County to ***exercise*** its discretion, it will not lie to compel the County to exercise its discretion in a ***particular manner***. (*Id.*; *Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997, 1004.) It would initially be up to the County to determine its duties under the public trust doctrine.

[3] The 1980 decree, alleged in the petition, is a judicially noticeable fact that may be considered in ruling on this motion. (Code Civ. Proc. § 438, subd. (d).) Both parties asked the court to judicially notice the decree. The request is granted. The decree is attached to Petitioners' Memo of Points and Authorities and the County's November 16, 2010, Request for Judicial Notice.

adjudication." (Pet. ¶¶ 18, 19, 23, 24, 36-39, 42.) The relief Petitioners request applies ***only*** to permits for new wells outside the "zone of adjudication. This litigation thus does not address (1) wells inside the zone of adjudication, or (2) wells or groundwater rights adjudicated by the 1980 decree.[4] (Pet. ¶¶ 36-39, 12:6-9.)

STANDARD OF REVIEW

A motion for judgment on the pleadings, like a demurrer, "attacks only defects disclosed on the face of the pleadings or by matters that can be judicially noticed." (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999; see also Code Civ. Proc. § 438, subd. (d).) The court accepts the truth of all factual allegations in the pleadings, giving them a liberal construction. (*County of Orange, supra*, 192 Cal.App.4th at 32; *Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal. 4th 524, 528 [demurrer].)

A respondent may bring a motion for judgment on the pleadings on the ground the petition does not state facts sufficient to constitute a cause of action against it. (Code Civ. Proc. § 438, subd. (c)(1)(B)(ii).)

Petitioners may bring a motion for judgment on the pleadings on the ground the petition does state facts sufficient to constitute a cause of action and the County's answer does not state facts sufficient to constitute a defense. (Code Civ. Proc. § 438, subd. (c)(2).)

ANALYSIS

1. The public trust doctrine protects navigable waters from harm caused by the extraction of groundwater

A. The public trust doctrine

The public trust doctrine is a common law doctrine whose roots stretch back to Roman law. Under the doctrine the State of California, as sovereign, owns all navigable waterways within its borders, but not in the usual proprietary sense. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 482.) Instead, the State holds title as trustee of a public trust for the benefit of the People of California. (*Colberg, Inc. v. State* (1967) 67 Cal.2d 408, 416.) As the United States Supreme Court explained over a century ago, "It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty

[4] If this is incorrect, Petitioners should so state at the hearing.

of fishing therein freed from the obstruction or interference of private parties." (*Illinois Central Railroad Co. v. Illinois* (1882) 146 U.S. 387, 452.)

The nature of the State's title imposes fiduciary-like obligations: The State has a duty to supervise and administer the trust so the public may continue to use navigable waterways for trust purposes. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 437 ["*National Audubon*"]; *Illinois Central, supra,* 146 U.S. at 453.) The State cannot abdicate its duties. (*Illinois Central, supra,* 146 U.S. at 453.)

However, the State's obligation to protect the public trust is not absolute. Instead, the State's obligation is to ***consider*** the public trust when allocating water resources, and to preserve trust uses ***whenever feasible***. (*National Audubon, supra,* 33 Cal.3d at 446 [emphasis added].) These caveats are important. The doctrine does not prohibit the State from permitting actions that harm public trust uses. As our Supreme Court recognized, "The population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values." (*Id.*) The public trust doctrine thus does not strip the State of the power "to grant usufructuary licenses that will permit an appropriator to take water from flowing streams and use that water in a distant part of the state, even though this taking does not promote, and may unavoidable harm, the trust uses at the source stream." (*Id.*) When it grants such licenses, however, the State must consider the public trust: "As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust . . . and to preserve, so far as consistent with the public interest, the uses protected by the trust." (*Id.* at 446-47.)

Early cases generally recognized three public uses protected by the doctrine: navigation, commerce and fishing. (*Illinois Central, supra,* 146 U.S. at 452; *Bohn v. Albertson* (1951) 107 Cal.App.2d 738, 749.) However, our Supreme Court recognized the doctrine is "sufficiently flexible to encompass changing public needs." (*Marks v. Whitney* (1971) 6 Cal.3d 251, 259.) It is now well established the public trust doctrine also protects the public's right to use navigable waters for hunting, bathing, swimming, boating and recreation. (*Id.* at 259.) It also protects environmental uses: "one of the most important public uses of [navigable waters] is the preservation of those lands in their natural state, so that they may best serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds

and marine life, and which favorable affect the scenery and climate of the area." (*Id.* at 259-60.)

The public trust doctrine applies to all "navigable waterways," including lakes, rivers and streams. (*National Audubon*, *supra*, 33 Cal.3d at 435.) A waterway is navigable if it is capable of being used for recreational boating for at least part of the year. (*Id.* at 435, fn. 17 ["A waterway usable only for pleasure boating is nevertheless a navigable waterway and protected by the public trust"]; *People ex rel. Baker v. Mack* (1971) 19 Cal.App.3d 1040, 1044 ["the test of navigability is met if the stream is capable of boating for pleasure."]; *State of California v. Superior Court* (1981) 29 Cal.3d 210, 230 fn. 18 [river may be deemed navigable even though only navigable for part of the year].)

Petitioners allege the Scott River is a navigable waterway used for boating, rafting and fishing. (Pet. ¶ 16.) For this motion the court must assume this is true.[5] (*County of Orange*, *supra*, 192 Cal.App.4th at 32.) The issue then is not whether the public trust doctrine applies to the ***Scott River***. The issue is whether the public trust doctrine applies to ***groundwater*** so connected to a navigable river that its extraction harms trust uses of the river. Relying primarily on *National Audubon*, Petitioners argue the public trust doctrine applies. The court concludes they are correct.

B. Under *National Audubon* the public trust doctrine applies to the facts alleged here

National Audubon concerned diversion of water from streams flowing into Mono Lake. Because Mono Lake received much of its water from these streams, the diversion was causing the level of the lake to drop, imperiling its "scenic beauty" and its "ecological values." (*National Audubon*, *supra*, 33 Cal.3d at 424-25.) Mono Lake itself was navigable; the streams being diverted were not. (*Id.* at 435.) The central issue in *National Audubon* was whether the public trust doctrine applied to diversions from these non-navigable streams. The Supreme Court held it did.

The Court's analysis went back to one of the earliest public trust cases in California, *People v. Gold Run D. & M. Co.* (1884) 66 Cal. 138 ["*Gold Run*"].) In *Gold Run* the State used the public trust doctrine to enjoin a mining company from dumping sand and gravel into an

[5] In its answer to the petition, the County did not deny the Scott River is navigable. The County asserted only that the Scott River has never been "determined to be" navigable. (Answer ¶ 16.) The County subsequently filed a cross-complaint against the Board. In the cross complaint, it contends the Scott River is not navigable. (Cross-Compl., ¶ 62.)

unnavigable stream that flowed into the navigable Sacramento River, because the dumping raised the bed of the Sacramento River impairing navigation. (*National Audubon, supra,* 33 Cal.3d at 436; see also *Gold Run, supra,* 66 Cal. at 145-46.) The Court in *National Audubon* also cited another early case, *People v. Russ* (1901) 132 Cal. 102. In *Russ* the public trust doctrine allowed the State to require removal of dams erected on non-navigable tributaries to a navigable river, because the dams decreased the water flowing into the river, adversely affecting its navigability. (*National Audubon, supra,* 33 Cal.3d at 436.)

The Court in *National Audubon* found the reasoning of these early cases applied to diversion of water from a non-navigable tributary adversely affected a downstream navigable river or lake: "If the public trust doctrine applies to constrain *fills* which destroy navigation and other public trust uses in navigable waters, it should equally apply to constrain the *extraction* of water that destroys navigation and other public interests. Both actions result in the same damage to the public trust. [Citations.] [¶] We conclude that the public trust doctrine . . . protects navigable waters from harm caused by diversion of nonnavigable tributaries." (*Id.* at 436-37 [italics in original, internal quotes omitted].)

Although the facts alleged here are different, it is a difference without a legal distinction. *National Audubon* involved extraction of water from non-navigable surface streams. This case involves extraction of underground water. But the result is allegedly the same – decreasing the flow of navigable waters harming public trust uses.

The public trust doctrine would prevent pumping directly out of the Scott River harming public trust uses. So too under *National Audubon* the public trust doctrine would prevent pumping a non-navigable tributary of the Scott River harming public trust uses of the river. The court finds no reason why the analysis of *National Audubon* would not apply to the facts alleged here. The court thus finds the public trust doctrine protects navigable waters from harm caused by extraction of groundwater, where the groundwater is so connected to the navigable water that its extraction adversely affects public trust uses.

This formulation is slightly different than the declaration Petitioners seek. Petitioners request a declaration groundwater hydrologically connected to navigable surface flows is protected by the public trust doctrine. However, the court does not find ***groundwater*** itself is a resource protected by the public trust doctrine. (Compare *In re Water Use Permit Applications*

(Hawaii 2000) 9 P.3d 409, 445-47.)[6] California case law has applied the public trust doctrine to protect ***navigable waters***; groundwater is not navigable. (*Lyon, supra*, 29 Cal.3d at 228 ["it is navigability which is the touchstone in determining whether or not the public trust applies"]; *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 709 [public trust doctrine "has no direct application to groundwater resources."].) The court thus finds only that the public trust doctrine applies when the extraction of groundwater causes harm to navigable waters harming the public's right to use those navigable waters for trust purposes.

As applied to the facts alleged here, the public trust doctrine protects the Scott River and the public's right to use the Scott River for trust purposes, including fishing, rafting and boating. It also protects the public's right to use, enjoy and preserve the Scott River in its natural state and as a habitat for fish. (See *Marks, supra*, 6 Cal.3d at 259-60 ["one of the most important public uses . . . is the preservation of those lands in their natural state and as environments which provide food and habitat for birds and marine life"].) If the extraction of groundwater near the Scott River adversely affects those rights, the public trust doctrine applies.[7]

The County argues the public trust doctrine does not apply to groundwater, because groundwater is not navigable. This is true, but not dispositive. Again, the court does not hold the public trust doctrine applies to groundwater itself. Rather, the public trust doctrine applies if extraction of groundwater adversely impacts a navigable waterway to which the public trust doctrine does apply.

The County quotes the following language from *National Audubon*: "the public trust doctrine . . . protects navigable waters from harm caused by *diversion* of nonnavigable *tributaries*." (*National Audubon, supra*, 33 Cal.3d at 437 [emphasis added].) It asserts the facts

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[6] In *In re Water Use Permit Applications*, the Hawaii Supreme Court held the public trust doctrine did apply to ***all*** water in Hawaii. (*Id.* at 490.) This was based in part on a provision in Hawaii's constitution declaring all natural resources, including water, are held in trust by the State for the benefit of the people. (*Id.* at 442.) Thus, water itself, wherever found, was a natural resource subject to the public trust. (*Id.* at 445.)

Petitioners do not ask the court to go as far as the Hawaii Supreme Court. Moreover, no California case has held the public trust doctrine applies to water itself. (But see Water Code § 102: "All water within the State is the property of the people of the State.")

[7] Again, for purposes of these motions for judgment on the pleadings, the court assumes groundwater extraction near the Scott River adversely affects public trust uses as Petitioners allege. However, to prevail on the merits Petitioners must prove this allegation, which the County denies.

in this case do not involve diversion of tributaries, but extraction of groundwater. This again is a distinction without a difference.

The County argues ***extraction*** of groundwater is not a ***diversion***. (County MPA at 4 fn. 2 [emphasis added].) Perhaps. But the County does not explain why the difference between extracting as opposed to diverting water changes the analysis. The end result is the same -- less water in a navigable river harming public trust uses. The County also ignores the fact the Court in *National Audubon* explained it was not limiting its holding to ***diversion*** of water, but also encompassed extraction: "the public trust doctrine . . . should equally apply to constrain the ***extraction*** of water that destroys navigation and other public interests." (*National Audubon, supra*, 33 Cal.3d at 436 [emphasis in original].)

The County argues a tributary is a ***surface*** body of water flowing into a larger body of water. From this the County concludes because groundwater flows underground, it cannot be considered a tributary. Again a distinction without a difference. *National Audubon* is not limited to tributaries, but applies more generally to "extraction *of* ***water***" that harms a navigable waterway. (*National Audubon, supra*, 33 Cal.3d at 436 [emphasis added].) This is precisely what Petitioners allege here: extraction of water from under the ground is directly harming public trust uses of the Scott River.

If pumping groundwater impairs the public's right to use a navigable waterway for trust purposes, there is no sound reason in law or policy why the public trust doctrine should not apply. [8]

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[8] Amicus curiae California Farm Bureau Federation argues "extending" the public trust doctrine to apply to extraction of groundwater would lead to a slippery slope of no stopping. If the public trust doctrine allows the State to regulate groundwater extraction harming navigable waterways, the Federation worries it could be used to regulate things with more remote connection to waterways, like vehicle emissions or use of pesticides.

This argument fails for two reasons. First, the issue before this court is not whether the public trust doctrine ***should*** apply to groundwater as alleged in the petition. The question is whether the doctrine ***does*** apply following the Supreme Court's decision in *National Audubon.*

Second, the possibility other activities affecting navigable waters may be too attenuated to fall within the public trust doctrine is a question for another day. The court decides the case before it, not hypotheticals that may arise in the future. (See, e.g., *People v. Balint* (2006) 138 Cal.App.4th 200, 210.)

2. The Legislature has not released the County from its obligations under the public trust doctrine

The County's remaining arguments are directed at Petitioners' request for injunctive and writ relief, and concern the County's duty, if any, under the public trust doctrine. The County argues even if the public trust doctrine applies to extraction of groundwater as alleged here, the doctrine does not impose any specific duty on the County.

Petitioners seek a writ of mandate or injunction compelling the County to stop issuing permits to drill wells for groundwater in the Scott River basin until it complies with its duties under the public trust doctrine. Again, Petitioners do not assert what the County's duty may be. The County nevertheless argues it has no duty to regulate groundwater under the public trust doctrine because the Legislature has given it complete discretion to decide whether to regulate groundwater. Accordingly, neither mandate nor injunctive relief will lie to compel the County to exercise its discretion. The court is not persuaded.

The County relies on Water Code section 10750 et seq., where the Legislature declared "groundwater is a valuable natural resource in California" and should be managed accordingly. (§ 10750.) To help manage this resource the Legislature authorized local agencies, such as the County, to adopt groundwater management plans to manage groundwater resources within their jurisdictions. (§ 10753, subd. (a) ["Any local agency . . . ***may*** . . . adopt and implement a groundwater management plan"] [emphasis added]; § 10750.4 ["Nothing in this part requires a local agency . . . to adopt or implement a groundwater management plan"].) If a local agency decides to adopt a groundwater management plan, it is subject to substantive and procedural requirements. (See e.g., §§ 10753.2 and 10753.5 [public notice and hearing requirements], § 10753.7 [outlining components of plan].)

From this grant of authority to adopt a groundwater management plan, the County makes a big leap: Because the Legislature did not require the County to implement a groundwater management plan, the County cannot be required to regulate groundwater under the public trust doctrine. This argument fails for several reasons.

First, section 10750 et seq. does not subsume the public trust doctrine, rendering it inapplicable to groundwater. As our Supreme Court instructs, the public trust doctrine and California's statutory water rights system co-exist; neither occupies the field to the exclusion of the other. (*National Audubon, supra*, 33 Cal.3d 419, 445.) Moreover, in *Baldwin v. County of*

Tehama (1994) 31 Cal.App.4th 166, the Court held section 10750 et seq. does not occupy the field of groundwater regulation or preclude "further local action." (*Id.* at 181.) The Court in *Baldwin* acknowledged a "common thread" in state law suggesting a legislative determination that "problems of groundwater management should be addressed on the local level." (*Id.* at 182.) The Court found, however, "no implication of a policy in these statutes that legislative action to foster local response is comprehensive, i.e., that the mechanism for local response to the problem is to be limited to [any particular] statutory schemes." (*Id.*) The court thus finds no evidence the Legislature, in enacting section 10750 et seq., intended to ***preclude*** the County from applying the public trust doctrine where necessary.

Second, there is no conflict between authorizing the County to adopt a groundwater management plan, and requiring it to comply with the public trust doctrine. The public trust doctrine applies when the extraction of groundwater harms navigable waters and the public's use for trust purposes. If the County's issuance of well permits will result in extraction of groundwater adversely affecting the public's right to use the Scott River for trust purposes, the County must take the public trust into consideration and protect public trust uses when feasible. Such a requirement does not conflict with the County's discretion to decide whether or not to implement an overall groundwater management plan.

Third, while the County has discretion whether to adopt a groundwater management plan, it does not have discretion to ignore its duties under the public trust doctrine. Although administration of the public trust rests primarily with the State as sovereign, the County is a subdivision of the State. (Cal. Const. art XI, § 1, subd. (a) ["The State is divided into counties which are legal subdivisions of the State."]; *Baldwin*, *supra*, 31 Cal.App.4th at 175-76 [references to "the State" includes counties].) As a subdivision of the State, the County "shares responsibility" for administering the public trust. (See *Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1370, fn. 19 ["the county, as a subdivision of the state, shares responsibility for protecting our natural resources and may not approve of destructive activities without giving due regard to the preservation of those resources."].) The State cannot abdicate its duties under the public trust doctrine. (*Illinois Central*, *supra*, 146 U.S. at 452 ["The State can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers"]; *National Audubon*, *supra*, 33 Cal.3d at 438 [trust property "is a subject of public concern to the whole people of the State" and thus "cannot

be alienated"].) Neither can the County.

As the Court explained in *National Audubon*, the Legislature may grant licenses to appropriate water. (*National Audubon, supra*, 33 Cal.3d at 446.) When it does so, the Legislature, or its authorized agent, has "an affirmative duty to take the public trust into account . . . and to protect public trust uses whenever feasible." (*Id.*) Thus as a legal subdivision of the State, the County has an affirmative duty to consider the public trust when it issues permits to appropriate groundwater.

The County also argues requiring it to consider the public trust when issuing well permits would subject its actions to judicial review, requiring courts to "fashion and apply" their own "common law public trust principles." (County MPA at 19:2-3.) This would effectively transfer responsibility for managing California's groundwater from the legislative branch to the judicial branch. Not only is the judicial branch "ill-equipped" to assume this "policy-making" role, but doing so would infringe on the Legislature's policy-making role and thus violate the separation of powers doctrine. (*Id.* at 19:15-16.)

This argument is based almost entirely on a single sentence in a footnote in *City of Long Beach v. Mansell* (1970) 3 Cal.3d 464: "*The administration of the trust by the state is committed to the Legislature, and a determination of that branch of government made within the scope of its powers is conclusive* in the absence of clear evidence that its effect will be to impair the power of succeeding legislatures to administer the trust in a manner consistent with its broad purposes." (*Id.* at 482 fn. 17 [emphasis added].) From this one sentence the County concludes only the Legislature can administer the public trust, and a "system of regulation based on judicially-fashioned public trust principles" would usurp the Legislature's "conclusive" judgment in administering the trust.

The court is not persuaded.

The central issue in *Mansell* was whether the Legislature's action in releasing tidelands from the public trust violated a state constitutional provision prohibiting the grant to private persons of tidelands within two miles of any city. (*Id.* at 478.) In deciding this issue, the Supreme Court examined the relationship between the constitutional prohibition and the public trust doctrine. It noted although public trust tidelands are generally not alienable, the State may determine such lands are no longer useful for trust purposes and free them from the trust. (*Id.* at 482.) It is in this context the Court in *Mansell* added the footnote stating the Legislature's

determination on such matters is conclusive.

The Court in *Mansell* cited its earlier decision in *Mallon v. City of Long Beach* (1955) 44 Cal.2d 199 to support this statement. Similar to *Mansell*, *Mallon* involved a statute freeing from the public trust income derived from trust tidelands. As in *Mansell*, this legislative determination was deemed conclusive: "the Legislature has found and determined that . . . the income derived from the production of oil and gas from the tide and submerged lands of Long Beach harbor is no longer required for navigation, commerce and fisheries, nor for such uses, trusts, conditions and restrictions as are imposed by statutes granting the said tide and submerged lands in trust. *That* determination and finding is conclusive upon this court." (*Mallon*, *supra*, at 206-07 [emphasis added, internal quotes and cites omitted].)

Mansell and *Mallon* thus stand for a limited proposition: If the Legislature determines public trust lands or waterways are no longer useful for trust purposes and frees them from the trust, that determination is conclusive. It will not be second guessed by the courts. Neither case is applicable here. The Legislature has not released the Scott River from the public trust. Therefore, requiring the County to consider the public trust in approving well permits does not infringe upon any "conclusive" legislative determination.

Finally, the County's suggestion the separation of powers doctrine prohibits courts from applying common law public trust principles is belied by over a century of judicial decisions doing just that. Federal courts have been applying common law public trust principles since at least 1892. (*Illinois Central*, *supra*, 146 U.S. at 453.) California's courts have been applying public trust principles even longer, since the *Gold Run* decision of 1884. (*National Audubon*, *supra*, 33 Cal.3d at 436 [calling *Gold Run* "one of the epochal decisions of California history.")

3. The requested relief does not intrude on the 1980 decree

The County's last argument is *sui generis*: The public trust doctrine cannot be applied to groundwater interconnected with the Scott River because the Legislature enacted a statutory system for adjudicating rights to water in "stream systems." (Water Code § 2500 et seq.) This statutory scheme specifically applies to the Scott River. (§ 2500.5.) Pursuant to this statutory scheme, in 1980 the Siskiyou County Superior Court issued a decree adjudicating all water rights in the Scott River, including ground water interconnected to the Scott River.[9] The County argues

[9] As noted above, the court has judicially noticed the decree at the request of both parties.

any further regulation of groundwater by this court would impermissibly intrude on the jurisdiction of the Siskiyou County Superior Court.

An interesting argument, but not on point. Petitioners are clear: Their petition applies only to new wells that lie beyond the area adjudicated by the 1980 decree. (See, e.g., Pet. ¶ 18, 12:8.) By definition, the relief requested in the petition does not affect rights adjudicated by the 1980 decree.

CONCLUSION

For the foregoing reasons, the County's motion for judgment on the pleadings is denied, and Petitioners' cross-motion for judgment on the pleadings is granted.

Dated: July 14, 2014

Allen Sumner
Judge of the Superior Court of California,
County of Sacramento

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

ENVIRONMENTAL LAW FOUNDATION **Case Number: 34-2010-80000583**

vs.

STATE WATER RESOURCES CONTROL BOARD

CERTIFICATE OF SERVICE BY MAILING (C.C.P. Sec. 1013a(4))

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the foregoing **ORDER AFTER HEARING** by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at 720 9th Street, Sacramento, California, each of which envelopes was addressed respectively to the persons and addresses shown below:

Environmental Law Foundation
1736 Franklin Street, 9th Floor
Oakland, CA 94612
Attn: James Wheaton / Lowell Chow

Pacific Coast Federation of Fishermen's Associations
Institute for Fisheries Resources
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Eugene, OR 97440-3370
Attn: Glen Spain

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Attn: Brian Morris / Natalie Reed

Natural Resources Defense Council
111 Sutter Street, 20th Floor
San Francisco, CA 94104
Attn: Michael Wall

I, the undersigned Deputy Clerk, declare under penalty of perjury that the foregoing is true and correct.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

Dated: July 15, 2014

By: M. GARCIA,
Deputy Clerk