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THE PUBLIC TRUST DOCTRINE: COULD A PUBLIC TRUST DECLARATION FOR WILDLIFE BE NEXT?

By

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It has been more than 10 years since a case involving the Public Trust Doctrine was decided by the California Supreme Court. However, at least three such cases have been accepted for review in the past year and two are still pending. The cases are *California Earth Corps v. State Lands Commission* [No. S134300]; *Laub v. Davis* [No. S138975], and *Environmental Protection Information Center v. California Department of Forestry and Fire Protection (Pacific Lumber)* [No. S140547].

These grants of review may be coincidental or they may portend the most significant ruling from the Supreme Court about the Public Trust Doctrine since the landmark *National Audubon Society v. Superior Court* [(1983) 33 Cal.3d 419, 189 Cal. Rptr. 346] and the important decision of *State of Cal. ex rel. State Lands Com. v. Superior Court* [(1995) 11 Cal.4th 50, 44 Cal. Rptr. 2d 399].

The last of the three cases recently accepted by the Supreme Court provides an opportunity for the Supreme Court to significantly affect the evolution of the Public Trust Doctrine. Whereas in the past, this doctrine has normally been applied to water and lands under and adjacent to water, the doctrine further lends itself to application to wildlife resources. State statutes have recognized that wildlife is held in public trust and courts have recognized the state's duty to protect wildlife as a public trust asset. However, to this point, there has apparently been no explicit analysis by the California Supreme Court of wildlife as being subject to the Public Trust Doctrine. In light of efforts at the state and federal level to significantly restrain the ability of public agencies to protect wildlife resources through "no surprises" provisions in resource management agreements, the Public Trust Doctrine is a critically important reminder of the duty of government to preserve wildlife to protect the public's right to enjoy and benefit from a diverse ecosystem and the duty of courts to carefully scrutinize any attempts to abandon the public trust in those resources.

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I. Background: The Public Trust Doctrine Has Traditionally Been Invoked in Cases Related to Water

The Public Trust Doctrine is an affirmation that certain natural resources are held in common, rather than susceptible to private ownership, and that the government may not abdicate its responsibility for management of those resources. The Public Trust Doctrine was already ancient when Roman law was encoded by Justinian. " 'By the law of nature these things are common to mankind—the air, running water, the sea and consequently the shores of the sea.' (Institutes of Justinian 2.1.1.)" [*National Audubon*, 33 Cal.3d at 433–434.]

The classic expression of the Public Trust Doctrine in American jurisprudence was *Illinois Central R. R. Co. v. Illinois* [(1894) 146 U.S. 387]. The United States Supreme Court held that the state of Illinois could not permanently alienate the public trust shoreline of Lake Michigan to a private railroad company because of the public trust nature of the lands. The Illinois legislature in 1869 granted the entire shorefront of Chicago to the Illinois Central Railroad. In 1873, the Illinois legislature repealed the 1869

grant and sought a declaration the grant was void. The Supreme Court so held, reasoning that the lands that devolved to the state were not a mere proprietary ownership interest that could be alienated at the will of the Legislature. The Court unequivocally held that "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, than it can abdicate its public powers in the administration of government and the preservation of the peace" [*Illinois Central R. R. Co.*, 146 U.S. at 454].

Tidelands and submerged lands have always been a resource held in common, and are a traditional staple of public trust analysis. [*People v. California Fish* [(1913) 166 Cal.576, 596]; *City of Long Beach v. Mansell* [(1970) 3 Cal.3d 462, 91 Cal. Rptr. 23]; *Illinois Central R. R. Co. v. Illinois*, *above*.] California has approximately four million acres of tidelands, lake, and river property that by long-standing law are held in trust for the people of California. Public trust lands are held by public agencies as trustees for the benefit of the public and are so identified with the sovereign power of government that abandonment of the public trust is strictly limited by constitutional, common, and statutory law. For example, since 1879, an aspect of the Public Trust Doctrine has been part of the California Constitution prohibiting the sale or grant of tidelands within two miles of an incorporated city or town: "All tidelands within two miles of any incorporated city . . . shall be withheld from grant or sale to private persons, partnerships, or corporations. . . ." [Cal.Const., Art. X, sec. 3.] "The tide lands are, and from the beginning of our government have been, dedicated to public use for purposes of navigation and fishery" [*People v. California Fish* [(1913) 166 Cal. at 596.]

Public trust assets such as tidelands remain subject to the public trust, even if they are conveyed to private parties. The California Supreme Court stated "The common law public trust . . . insures that when such lands [tidelands] are subject to the trust . . . they remain so subject even after alienation." [*City of Long Beach*, 3 Cal.3d at 482.] Public trust lands thus may not be alienated from the state free of public trust restrictions except in unique circumstances, where public inquiry and findings are made regarding the public purposes served to ensure trust assets that are removed from the trust are relatively small and have no further value for the purposes of the public trust. [*City of Long Beach*, 3 Cal.3d at 485.] At times, courts have determined that attempted conveyances of public trust land convey bare legal title but remain subject to the public trust. [*People v. California Fish*, 166 Cal. at 611–612.]

Early cases involving hydraulic mining decided by both state and federal courts in California in 1884 established the Public Trust Doctrine as bedrock environmental protection in California law. [*See People v. Gold Run D. & M. Co.* [(1884) 66 Cal. 138, 4 P. 1152]; *Woodruff v. North Bloomfield G.M. Co.* [(1884) 18 Fed. 753].] A Debris Commission "was empowered to regulate hydraulic mining and prevent the discharge of mining debris into California waterways, and to commence the process of restoring the

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navigability of rivers and protecting their banks" [*State of Cal. ex rel. State Lands Com.*, 11 Cal. 4th at 77].

One of the more recent explications of the Public Trust Doctrine in *National Audubon Society v. Superior Court, above*, involved diversions by the Los Angeles Department of Water and Power of stream flows to Mono Lake, a striking and unusual natural body of water. The resulting drop in water levels harmed the public trust uses of Mono Lake: "The ultimate effect of continued diversions is a matter of intense dispute, but there seems little doubt that both the scenic beauty and the ecological values of Mono Lake are imperiled." [*National Audubon Society*, 33 Cal. 3d at 424–425.] The California Supreme Court held that the Public Trust Doctrine applied to protect navigable waters from harm by diversion of nonnavigable tributaries.

Following longstanding precedent, the Court recognized the scope of the public trust concept as reaching beyond early English Common Law assumptions that it only applied within the reach of the tides:

> Early English decisions generally assumed the public trust was limited to tidal waters and the lands exposed and covered by the daily tides . . . many American decisions, including the leading California cases, also concern tidelands. (See, e.g., City of Berkeley v. Superior Court (1980) 26 Cal.3d 515 [162 Cal. Rptr. 327, 606 P.2d 362]; Marks v. Whitney, supra, 6 Cal.3d 251; People v. California Fish Co. (1913) 166 Cal. 576 [138 P. 79].) It is, however, well settled in the United States generally and in California that the public trust is not limited by the reach of the tides, but encompasses all navigable lakes and streams.

[*National Audubon Society*, 33 Cal.3d at 435.] "We conclude that the Public Trust Doctrine, as recognized and developed in California decisions, protects navigable waters from harm caused by diversion of non-navigable tributaries" [*National Audubon Society*, 33 Cal.3d at 437.]

The last time the California Supreme Court addressed the Public Trust Doctrine was in *State of Cal. ex rel. State Lands Com. v. Superior Court, above*. There, the Court was concerned with determining ownership of accreted lands. "'Accretion' is the gradual and imperceptible accumulation of land due to the action of a boundary river, stream, lake, pond or tidal waters." [*State of Cal. ex rel. State Lands Com., 11 Cal. 4th at 63.] The court determined that artificial accretion of land should not result in alienation of public trust lands. [State of Cal. ex rel. State Lands Com.*, 11 Cal.4th at 73.] Even in this short treatment of the Public Trust Doctrine, the Court reaffirmed the inability of a public agency to abdicate its trustee role, and it emphasized the importance of the public interests being protected.

While tidelands and submerged lands have long been subject to the Public Trust Doctrine, wildlife, like public trust land, is a resource held in common that benefits humankind generally. Wildlife is not subject to "ownership" by a state in the sense that the state has title to it, but rather the state has "power to preserve and regulate the exploitation of an important resource. . . ." [*Hughes v. Oklahoma* [(1979) 441 U.S. 322, 335 (citations and internal quotations omitted).] When wildlife is thought of as a resource held in common, the application of the Public Trust Doctrine to it seems eminently logical. Although government is not the owner of wildlife, it is responsible for its management and may not abdicate that responsibility except in unique circumstances and where the legislative intention is explicitly stated.

II. Recent Supreme Court Interest Cases With Public Trust Issues

During the past 10 years, the public trust has come up in various cases, but not with the profound, far-reaching effects of a decision such as *National Audubon, above*. However, the grant of review in the past year of three cases involving the Public Trust Doctrine suggests that the California Supreme Court is very interested in the evolution of this doctrine.

California Earth Corps v. State Lands Commission

In August 2005, the Supreme Court granted review in *California Earth Corps v. State Lands Commission* [No. S134300]. After the Legislature enacted revisions to Pub. Res. Code § 6307, the Supreme Court dismissed review of the case in January 2006. This case involved the exchange between the State Lands Commission and the City of Long Beach of approximately three acres of public trust tidelands in the Queensway Bay area of the City of Long Beach for ten acres of property adjacent to the Los Angeles River. The petitioner contended, among other things, that the exchange violated the Public Trust Doctrine as it constituted an abandonment of public trust tidelands that were still useful for public trust purposes. The court of appeal ruled on narrower statutory grounds that the exchange was not authorized because it did not enhance the configuration of the shoreline, as asserted by the State Lands Commission and required by the Public Resources Code when an exchange was to be made.

Laub v. Davis

The Supreme Court also accepted review of *Laub v. Davis* [Nos. S138975, 138974] on January 25, 2006. This case had been reported as *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* [(2005) 34 Cal. Rptr. 3d 696, 2005 CELR 533]. The public trust was one component of this complex case. The Third District Court of Appeal set aside on various

grounds the environmental impact report prepared pursuant to the California Environmental Quality Act for a program to improve San Francisco Bay's and Sacramento-San Joaquin Delta's ecosystem, water quality and quantity, and the Delta's levee stability. The public trust was implicated in this case because the California Resources Agency certified an EIR that recognized "when planning and allocating water resources, the State of California must consider the public trust and preserve for the public interest the uses protected by the trust." The EIR further stated that "in administering water rights laws and approving water diversions, the State also has a duty of continuous supervision over the taking and use of appropriated water to protect these public trust uses." However, there may have been many reasons for a grant of review, including the alternatives analysis of the EIR, so there is little likelihood that the Public Trust Doctrine will figure prominently in the eventual decision of this case.

Environmental Protection Information Center v. California Department of Forestry and Fire Protection (Pacific Lumber)

This year, the Supreme Court granted review in *Environmental Protection Information Center v. California Department Of Forestry And Fire Protection (Pacific Lumber)* [(2005) 37 Cal. Rptr. 3d 31 ("*EPIC*")] [No. S140547]. In *EPIC*, environmental groups and a union filed action against the California Department of Forestry and Fire Protection and the California Department of Fish and Game challenging a lumber company's old growth timber harvesting plan.

One of the issues presented in the case is related to the public trust: "Whether the Court of Appeal erred in holding that the Department of Fish and Game ('CDFG') may include a 'no surprises' provision in an incidental take permit under the California Endangered Species Act ('CESA') that precludes CDFG from requiring additional mitigation measures needed to ensure species' survival if circumstances change or to protect the public trust, even though there is no statutory authority for this provision." Thus, the case could have profound ramifications for the scope of the Public Trust Doctrine and for potential "no surprises" provisions in agreements involving wildlife during CDFG's implementation of CESA. The case also has implications for implementation of the Natural Community Conservation Planning Act [Fish & Game Code § 2800 et seq.], which contains provisions for "no-surprises" agreements [Fish & Game Code §§ 2810, 2820(f)]. Under the Natural Community Conservation Planning Act, "Any person, or any local, state, or federal agency, independently, or in cooperation with other persons, may undertake natural community conservation planning" [Fish & Game Code § 2809]. Therefore, the pronouncements in the case on this issue alone could have far-reaching impacts.

Recognition of the Expanse of the Public Trust Doctrine and the Consequences of that Scope

Wildlife Resources Are a Public Trust Asset

It should be recognized that the Legislature, through the Fish and Game Code, has stated, "The fish and wildlife resources are held in trust for the people of the state by and through the Department" [Fish & Game Code § 711.7 (a)]. CDFG has "jurisdiction over the conservation, protection, and management of fish, wildlife, and native plants, and habitat necessary for biologically sustainable populations of those species" [Fish & Game Code §§ 702, 1802]. It holds this jurisdiction as "trustee for fish and wildlife resources" [Fish & Game Code § 1802]. While the public trust may be embodied in various provisions of the Fish and Game Code, such statutory provisions "do not render the judicially fashioned public trust doctrine superfluous" [*National Audubon Society*, 33 Cal.3d at 447].

Courts also have recognized that wildlife is held by the state in trust for the benefit of the people. [*People v. Monterey Fish Products Co.* [(1925) 195 Cal. 548, 563 ("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")]; *People v. Harbor Hut Rest.* [(1983) 147 Cal. App. 3d 1151, 1154, 196 Cal. Rptr. 7 ("It is beyond dispute that the State of California holds title to its tidelands and wildlife in public trust for the benefit of the people")]; *Betchart v. Calif. Dept. of Fish and Game* [(1984) 158 Cal. App. 3d 1104, 1106, 205 Cal. Rptr. 135 ("California wildlife is publicly owned and is not held by owners of private land where wildlife is present")].] Moreover, at least one court has recognized:

> In all cases, the application of the public trust doctrine depends upon the interest for which protection is sought and the manner in which that interest is to be protected. Decisional authorities have, thus far at least, consistently limited application of the public trust doctrine to circumstances where the interest to be protected is a traditional public trust interest. Where such an interest is involved the courts have held that the state has broad powers to protect those interests, even where otherwise nonpublic trust properties are affected.

[*Golden Feather Community Assn. v. Thermalito Irrigation Dist.* [(1989) 209 Cal. App. 3d 1276, 1286, 257 Cal. Rptr. 836].]

From a philosophical perspective, one may ask why shouldn't the Public Trust Doctrine be applied to wildlife? *National Audubon* may have broken the shackles of limiting the Public Trust Doctrine to relatively physically fixed, geographic locations such as tidelands and lakes when it found that water itself, and the uses to which it was put, implicated the Public Trust Doctrine. If the Public Trust Doctrine encompasses a mobile resource such as water, and is not necessarily limited to the channels and vessels that contain that water, then why wouldn't the Public Trust Doctrine encompass the mobile resource of "wildlife," without regard to where that wildlife is?

Public Trust Assets May Not Be Placed Beyond Public Regulation

What would be the consequence of a judicial confirmation that wildlife is a public trust asset? The core of the Public Trust Doctrine is the state's duty to exercise continued supervision over the public trust [*National Audubon*, 33 Cal.3d at 437]. The state must not place the public trust beyond the direction and control of the state [*National Audubon*, 33 Cal.3d at 437–438]. "Courts have held that since the state has an obligation as trustee which it may not lawfully divest, whatever title the grantee has taken is impressed with the public trust and must be read in conformity with it." [Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 486–487.] Even where the Legislature has appeared to authorize the abandonment of the public trust, courts have carefully scrutinized such alleged authorizations:

> Statutes purporting to authorize an abandonment of . . . public use will be carefully scanned to ascertain whether or not such was the legislative intention, and that intent must be clearly expressed or necessarily implied. It will not be implied if any other inference is reasonably possible. And if any interpretation of the statute is reasonably possible which would not involve a destruction of the public use or an intention to terminate it in violation of the trust, the courts will give the statute such interpretation.

[*National Audubon Society*, 33 Cal.3d at 438, quoting *People v. California Fish Co.*, *above*, 166 Cal. at 597; *accord*, *City of Berkeley v. Superior Court* [(1980) 26 Cal.3d 515, 528, 162 Cal. Rptr. 327].]

The Public Trust Doctrine is underpinned by the Police Power Doctrine, i.e., that a public entity may not surrender an inherent attribute of its sovereignty. "The state can no more abdicate its trust over property in which the whole people are interested . . . so as to leave them entirely under the use and control of private parties, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." [*Illinois Cent. R.R. Co.*, 146 U.S. at 453.] "Even if the city and county had made an express contract granting to the plaintiff the right to make interments in this ground in perpetuity, such contract would have no force as against a future exercise by the legislative branch of the government of its police power. [Citation.] This power cannot be bargained or contracted away, and all rights and property are held subject to it." [*Laurel Hill Cemetery v. City & County of San Francisco* [(1907) 152 Cal. 464, 475]; *accord*, *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* [(2001) 86 Cal. App. 4th 534, 563, 103 Cal. Rptr. 2d 447, 2001 CELR 79].]

III. Arguments in *EPIC* Regarding No Surprises and the Public Trust

As was reported at 2006 CELR 77, *EPIC* involves the 1996 headwaters agreement between Pacific Lumber, the State of California and the United States. The agreement would allow Pacific Lumber to sell an old-growth forest known as the Headwaters Forest to the state and federal governments in return for permission to harvest its remaining timberlands subject to review and approval by state and federal agencies. A habitat conservation plan was required for state and federal approvals pursuant to the California Endangered Species Act (CESA) and the federal Endangered Species Act. In August 1998, the state Legislature enacted Assembly Bill No. 1986 (AB 1986) to authorize $245.5 million for the purchase of the Headwaters Forest. It required as a condition of its funding that additional restrictions be placed on Pacific Lumber's timber operations beyond those contained in the draft habitat conservation plan. Pacific Lumber and the state and federal governments executed an implementation agreement to carry out the habitat conservation plan. One element of this plan and agreement was a so-called "no surprises" provision that assured Pacific Lumber that even under unforeseen circumstances it would not be required to commit additional land, water, or money to preserve protected species and no additional restrictions on land use or water use would be imposed. In 1999, an administrative mandamus action was filed by the Environmental Protection Information Center and the Sierra Club (hereafter, collectively "EPIC") challenging the approval of the agreement by the Department of Forestry and issuance of an incidental take permit by the California Department of Fish and Game.

Among the issues *EPIC* presents to the Supreme Court is the argument that the "no surprises" rule was as an abdication of government's responsibility to manage endangered species in a way that ensures their survival and thus violates the public trust. Once a governmental body commits to a "no surprise" provision by agreeing not to increase the level of protection for an endangered or threatened species, even if evidence shows that the species continues to decline, government has abdicated its responsibility to act as a

trustee for that resource. The court of appeal disagreed, stating:

> We reject the underlying premise of both parties that the Department of Fish and Game has been given extra-statutory powers by virtue of its status as "trustee" of the fish and wildlife. Within the same code section granting trustee status to the Department of Fish and Game, the Legislature has stated that the policy of wildlife preservation does not bestow "any power to regulate natural resources or commercial or other activities connected therewith, except as specifically provided by the Legislature." (Fish & Game Code, § 1801, subd. (h).) Thus, the authority of the Department of Fish and Game is strictly limited to the powers bestowed by statute.

[*EPIC*, 37 Cal. Rptr. 3d 31, 71.] The court of appeal referred to federal regulations and the Natural Community Conservation Planning Act as areas where "no surprises" policies had been adopted:

> The "no surprises" rule is an established policy of the federal wildlife agencies. (50 C.F.R. § 17.22.). . . . The no-surprises rule is reflected in state law, too, in the Natural Community Conservation Planning Act (Fish & Game Code, § 2800 et seq.), which was enacted in 2002, after the administration actions were taken in this case. The state act authorizes the Department of Fish and Game to enter into an agreement to implement a plan for comprehensive management and conservation of multiple wildlife species, and the act specifically authorizes the Department of Fish and Game to "provide assurances for plan participants commensurate with long-term conservation assurances and associated implementation measures. . . . " (Fish & Game Code, §§ 2820, subd. (f), 2810.) . . . Although those statutory provisions do not govern the Implementation Agreement here, they do show the no-surprises provisions to be within the pale.

[*EPIC*, 37 Cal. Rptr. 3d at 65.]

The court of appeal, reversing the trial court, found there was no impermissible abdication of the state's trustee role as it said, "The Habitat Conservation Plan also calls for what is known as 'adaptive management,' which allows modification of the prescriptions as new information becomes available on the effectiveness of those prescriptions" [*EPIC*, 37 Cal. Rptr. 3d at 72].

In its brief to the Supreme Court, EPIC contended there was an abdication of the state's trustee responsibility. EPIC pointed to portions of the implementation agreement in which CDFG agreed not to ever recommend or require Pacific Lumber to provide any new, additional or different conservation or mitigation measures for take (defined by Fish & Game Code § 86 as capture or killing) of covered species (which include both listed and unlisted species), beyond those in the Habitat Conservation Plan and the implementing agreement. Covered species would include currently listed wildlife species such as the endangered marbled murrelet and the threatened bank swallow and unlisted species. Even if the best available science established that additional conservation measures were needed to respond to a substantial species decline, CDFG could not recommend or require additional Pacific Lumber mitigation, irrespective of California law requiring it to act. In addition, CDFG agreed that for foreseeable fires, landslides, and floods, it would never require Pacific Lumber to implement any conservation or mitigation measures or "planned response" beyond what Pacific Lumber, at its discretion, determined to be "practicable." CDFG also agreed to not require Pacific Lumber to implement additional measures for "unforeseen" circumstances without Pacific Lumber's consent, even if the change was caused by Pacific Lumber directly, or cumulatively as a result of Pacific Lumber's activities in combination with other events.

In asserting that the court of appeal was incorrect, EPIC relied on cases such as *National Audubon*, in which the Supreme Court stated that a state agency may not grant rights free of the trust, but must retain the power to reexamine decisions in light of later circumstances [*National Audubon*, 33 Cal.3d at 447 (holding the Water Board had the "power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust")]. The Court in *National Audubon* recognized water appropriation may be necessary, but required that the public trust always be considered:

> Just as the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests. [Citations]. 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 [citation], and to preserve, so far as consistent with the public interest, the uses protected by the trust.

[*National Audubon Society*, 33 Cal.3d at 446.]

Similarly, in *California Trout, Inc. v. State Water Resources Control Board* [(1989) 207 Cal. App. 3d 585, 629–633, 255 Cal. Rptr. 184] the court held that permits to appropriate water that had ripened into licenses could not insulate the Los Angeles Department of Water and Power from application of a subsequently enacted statute designed to protect the environment. The state, through the Water Board, had the power to reconsider previous decisions in order to protect trust interests, and no private right could be acquired that would prevent that reconsideration.

The application of the Public Trust Doctrine perhaps is not an issue of CDFG being given extra-statutory powers

as the trustee of fish and wildlife. Rather, the government itself, through the Legislature, inherently has the power and duty to act as trustee. Without specific statutory authorization, CDFG would not have the authority to surrender that police power. [*National Audubon Society*, 33 Cal.3d at 438; *People v. California Fish Co.*, 166 Cal. at 597.]

IV. Conclusion

It is this author's view that it should be recognized that the Public Trust Doctrine applies to a resource such as wildlife held in common for the benefit of all humankind. The doctrine applies in tandem with statutes such as CESA, and is not displaced by them. The Legislature's delegation of wildlife management authority to CDFG does not include authorization for CDFG to refrain from exercising that authority in the future to protect wildlife and such authority should not be implied. While such authority might be granted within the narrow confines of a statute such as Natural Community Conservation Planning Act, it should not be inferred absent explicit provisions approved by the Legislature. The Supreme Court's review of the *EPIC* case provides an opportunity for the Court to apply the precepts of the Public Trust Doctrine to confirm that protection of wildlife, like protection of tidelands and water, may only be abandoned under rare and unique circumstances specifically authorized by the Legislature.

ADMINISTRATIVE LAW AND ENVIRONMENTAL LITIGATION

Cases

Prop 64 Amendment of UCL Standing Rules Applies to Pending Cases

Californians for Disability Rights v. Mervyn's
No. S131798, Cal. S.Ct.
7/25/06 Daily J. D.A.R. 9607, 2006 Cal. LEXIS 8774
July 24, 2006

Proposition 64's amendment of the standing provisions of the Unfair Competition Law [Bus. & Prof. Code § 17204] to provide that a private person has standing to sue only if he or she "has suffered injury in fact and has lost money or property as a result of such unfair competition" applies to cases already pending when Prop 64 took effect.

Facts and Procedure. Plaintiff Californians for Disability Rights, a nonprofit corporation, sued defendant Mervyn's, a corporation that owns and operates department stores, for alleged violations of the unfair competition law [Bus. & Prof. Code § 17200 et seq.]. Plaintiff alleged that pathways between fixtures and shelves in defendant's stores were too close to permit access by persons who use mobility aids such as wheelchairs, scooters, crutches and walkers. Plaintiff did not claim to have suffered any harm as a result of defendant's conduct. Instead, plaintiff purported to sue on behalf of the general public under Bus. & Prof. Code § 17204. As relief, plaintiff sought an order declaring defendant's practices to be unlawful, an injunction barring those practices and requiring remedial action, costs and expenses of suit, and attorneys' fees. The trial court entered judgment for defendant and plaintiff appealed.

While the appeal was pending, the voters approved Proposition 64. California law previously authorized any person acting for the general public to sue for relief from unfair competition [former Bus. & Prof. Code § 17204]. After Proposition 64, a private person has standing to sue only if he or she "has suffered injury in fact and has lost money or property as a result of such unfair competition" [Bus. & Prof. Code § 17204]. Mervyn's moved to dismiss the appeal, arguing the measure eliminated plaintiff's standing to prosecute the action. The court of appeal denied the motion, holding that Proposition 64's standing provisions did not apply to cases pending when the measure took effect. The Supreme Court granted Mervyn's petition for review and reversed the court of appeal, in a unanimous opinion written by Justice Werdegar.

Prop 64 Standing Requirements Apply to Pending Cases. The Court rejected defendant's argument that Prop 64 expressly declared that the new standing provisions applied to pending cases. The Court stated that language pointed to by defendant was not sufficiently clear to compel the inference that the voters did intend the provisions so to apply. The Court noted that it has been cautious not to infer the voters' or the Legislature's intent on the subject of prospective versus retrospective operation from "vague phrases" [*Myers v. Philip Morris Cos.* [(2002) 28 Cal.4th 828, 123 Cal. Rptr. 2d 40] and "broad, general language" [*Evangelatos v. Superior Court* [(1988) 44 Cal.3d 1188, 246 Cal. Rptr. 629] in statutes, initiative measures and ballot pamphlets. Accordingly, the Court did not attempt to infer from the ambiguous general language of Proposition 64 whether the voters intended the measure to apply to pending cases.