

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT, DIVISION FIVE

**GRANT REYNOLDS,**

Plaintiff-Appellant,

v.

**CITY OF CALISTOGA,**

Defendant-Respondent.

Case No. A134190

Consolidated with:

Case No. A135501

Napa County Superior Court, Case No. 26-46826  
The Honorable Raymond A. Guadagni, Judge

**PROPOSED STATE WATER RESOURCES  
CONTROL BOARD AND CALIFORNIA  
DEPARTMENT OF FISH AND WILDLIFE'S  
AMICUS CURIAE BRIEF IN SUPPORT OF  
NEITHER PARTY**

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## **INTRODUCTION**

The State Water Resources Control Board (“SWRCB”) and the California Department of Fish and Wildlife (“DFW”)<sup>1</sup> respectfully request leave to file this brief as amici curiae. The brief addresses three issues directly relevant to the dispute between the parties. First, the City of Calistoga (“City”) mischaracterized arguments advanced by the Attorney General’s Office on behalf of the SWRCB and DFW as amici curiae in the court below. Second, as a matter of law, the City is not a trustee agency for purposes of the public trust issues presented in this case. Third, if the City’s dam does not release sufficient water to maintain fish in good condition, the State trustees’ remedies are not limited to an action for judicial review of the City’s determination of adequate flows.

To the extent the City seeks to uphold the superior court’s judgment on the ground that it is a trustee agency, and that as a trustee agency it satisfies the public trust by striking what it believes is the appropriate balance between the needs of the fishery and municipal supply, those claims are in error for the reasons set forth below.

## **FACTS AND PROCEDURAL HISTORY**

In Case No. 26-46826, plaintiff Grant Reynolds (“Reynolds”) in propria persona filed a complaint against the City raising multiple claims. (Appellant’s Appendix Volume 1: Index 4: Page 24 (“AA #:#:#.”).) One of the claims in that action was that the City failed to release sufficient water below Kimball Creek Dam (dam), which the City owns, to support a healthy population of fish. (*Ibid.*) In a February 10, 2010 order, the trial court initially granted the City’s motion for judgment on the pleadings. Reynolds sought reconsideration. (AA 4:95:850.)

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<sup>1</sup> On January 1, 2013, the name of the Department of Fish and Game was changed to the Department of Fish and Wildlife. This brief refers to the Department of Fish and Wildlife by its current name, even though prior briefs and cases refer to it as the Department of Fish and Game or DFG.

On March 25, 2010, the SWRCB and DFW filed a joint amicus brief in support of Reynolds's motion for reconsideration, arguing that under *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 (*Audubon*), the SWRCB and the courts have concurrent jurisdiction to apply the public trust doctrine, meaning that an action may be brought directly against a diverter alleged to be unreasonably affecting public trust resources. (AA 4:117 at p. 1008.) Accordingly, if Reynolds has standing to bring an action alleging violation of the public trust in water resources, he could bring the action directly against the City, instead of being limited to challenging the SWRCB and DFW as trustee agencies. (*Id.* at pp. 1008-1009.)

The City filed an opposition to the amicus brief. (AA :138:1147-1161.) In its opposition, the City argued that: a) the City is not a proper defendant in Reynolds's public trust claim because the SWRCB is the agency responsible for protecting the public trust in water allocations and is the agency that issued the City's water rights licenses; and b) the City is not a subdivision of the State, and therefore cannot be responsible for administering the public trust. (AA 5:138:1155.)

The SWRCB and DFW explained in their Reply Brief in Support of Amicus Curiae ("Reply Brief") that the City, as owner and operator of the dam, had an obligation to comply with the public trust doctrine and Fish and Game Code section 5937. (Appellant's Request for Judicial Notice, Volume 1: Tab 16: pages 142-149 ("ARJN #:#:#").)<sup>2</sup> On May 3, 2010, the superior court granted Reynolds's motion for reconsideration and reinstated the public trust cause of action against the City in Case No. 26-46826. (AA 5:153:1225-1229.)

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<sup>2</sup> The City in its Respondent's Brief cites to the Reply Brief in Support of Amicus Curiae using two separate citations, Vol. 7, Respondent's Appendix ("RA") -01835-01842 on page 16 and Vol. 8, RA-02314-2322 on page 7. For the Court's ease, amici will cite to ARJN 1:16:142-149 when citing to the Reply Brief in Support of Amicus Curiae.

The superior court also granted Reynolds's and the City's joint request to stay the proceedings, during which time the City undertook its own public trust investigation. (AA 5:175:1309.) On August 23, 2011, that investigation concluded with the adoption of the Kimball Reservoir Bypass Plan ("Plan") by Resolution No. 2011-091 ("Resolution") and supported by the Staff Report (AA 16:312:4128-4130). In taking these actions, the City misconstrued the briefs previously filed by the SWRCB and DFW, as well as their characterization of the City's public trust role:

Calistoga has previously considered its public trust obligations to be satisfied so long as the City complied with the terms of the Amended Licenses.

In May of 2010, Calistoga learned that SWRCB and the Department of Fish and [Wildlife] had a different view. Although the Napa County Superior Court had initially dismissed a public trust claim filed against the City, in an *amicus curiae* ("friend of the court") brief filed in support of a motion for reconsideration of that decision, the Attorney General, on behalf of SWRCB and [DFW], stated that in their view SWRCB had not, in fact, evaluated the public trust implications of Calistoga's use of water under the Amended Licenses. (Appendix 2 [Amended Licenses].) The two state agencies took no position on whether Calistoga's use of water comported with the public trust doctrine, and instead, asserted that Calistoga had an independent responsibility to ensure that its use of water from Kimball Creek complied with the public trust doctrine. (*Id.*) But the brief emphatically asserted that responsibility for the public trust falls on all "public agencies," and that the City in its operation of Kimball Reservoir acted in the same manner as other "trustee" agencies, such as the SWRCB. (*Id.*)

The City has heeded the Attorney General's explanation of the doctrine, and since May of 2010, the City has been discharging its responsibility as a trustee agency by conducting a detailed analysis of the current operation of Kimball Reservoir, the hydrology of the Kimball Creek watershed, the biological needs of fish in Kimball Creek, and possible operational changes to Kimball Reservoir.

(AA 16:312:4128, 4132 [Plan].)

Both the SWRCB and DFW filed written objections to the Plan (AA 14:285:3592, at 3605 [DFW’s objections]; ASSRJN 4:40:656 [SWRCB objections].) The City adopted the Plan over those objections. (AA 15:304:3990; 15:304:3968; 15:304:3954; 16:342:4354.)

Reynolds refused to dismiss his public trust complaint, and on August 24, 2011, the City filed a motion to dismiss the Second Amended Complaint as moot. (AA 15:308:4048-16:313:4159.) On September 30, 2011, the court below issued an order granting the City’s motion. (AA 16:330:4237.) That order disposed of the only remaining cause of action, so the City requested and was granted judgment and Reynolds’s action against the City was dismissed with prejudice. Reynolds’s motion for reconsideration was denied and this appeal followed.

## **ARGUMENT**

### **I. THE CITY MISCHARACTERIZED THE POSITION OF THE SWRCB AND DFW IN THIS APPEAL AND IN THE UNDERLYING MUNICIPAL ACTIONS**

The trial court dismissed this action as moot based on the City’s adoption of the Kimball Reservoir Bypass Plan. (AA 16:330:4237.) The City’s argument that it is a trustee agency and that, as a trustee agency, its adoption of the Plan discharged its obligations under the public trust doctrine is premised solely on a misreading of the SWRCB and DFWs’ trial court Memorandum of Points and Authorities in Support of Amicus Curiae and Reply Brief in Support of Amicus Curiae (“trial court amicus briefs”). (AA 16:312:4125-4156; ARJN 1:16:142-149.) The City argues that the trial court amicus briefs “stated that the City had the same trustee responsibilities that the SWRCB had” (City of Calistoga’s Respondent’s Brief (“Response”), p. 7) and “emphatically asserted that the responsibility of the public trust falls on all ‘public agencies,’ and that the City in its operation of Kimball Reservoir acted in the same manner as other ‘trustee’ agencies, such as SWRCB.” (AA 16:312:4125 at 4132.) Tellingly, the City does not quote from or cite to any specific page in the trial court amicus briefs for this assertion. In fact, the trial court

amicus briefs make no such assertions. (AA 4:117:1008-1017; ARJN 1:16:142-149.)

What the SWRCB and DFW actually wrote is:

Even if it applied to water right cases, *Bio Diversity* [<sup>1</sup>] ... does not stand for the proposition that only a *trustee* state agency may be sued for breach of the public trust; rather it holds that a responsible public agency may be sued.

(AA 4:117:1008-1017.) Because the superior court had determined that *Bio Diversity* meant that only the permitting agency, and not the actor directly causing the harm, could be sued for harm to the public trust, the SWRCB and DFWs' brief was aimed at correcting that misreading. The City, as the diverter, has responsibilities to protect the public trust (see, e.g., Fish & G. Code, § 5937); those responsibilities, however, are the same responsibilities as any other diverter, public or private, and are not akin to the authority and responsibilities of a trustee agency.

The position of the SWRCB and DFW in the trial court amicus briefs are most accurately characterized by language from the brief itself – “it is absurd to suggest that a public agency that seeks permits for and carries out an activity is any less responsible for the impacts of that activity than other agencies that issue the requested permits.” (ARJN 1:16:147.) Nowhere do the trial court amicus briefs say that the City has the same trustee responsibilities as the SWRCB or DFW, both trustee agencies, or that the City may engage in the type of balancing reserved for trustee agencies involved in the cases cited in the City's Response. (Response, pp. 17-26.)

## **II. THE CITY IS NOT A TRUSTEE AGENCY**

No authority supports the City's assertion that it is a trustee agency with trust responsibility to balance competing water uses. In the area of water resources and water allocation, the courts have recognized the State's responsibility to protect

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<sup>1</sup> *Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349.

public trust uses whenever feasible. (See, e.g., *Audubon, supra*, 33 Cal.3d 419; *California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, 631 (*Cal Trout I*); *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 289 (*Cal Trout II*)). These decisions have similarly recognized that the SWRCB is the state agency with trust responsibility to protect public trust uses.

As explained above, after the court below corrected its ruling based on the SWRCB's and DFW's filings, the superior court granted reconsideration and denied the City's motion for judgment on the pleadings. The City and Reynolds agreed to stay the action while the City completed and adopted a bypass plan. (AA 16:330:4237.) The City contends that in adopting the Plan it discharged its public trust obligations. In support of this claim, the City contends that:

[The public trust doctrine] and Section 5937 vest the City Council in the first instance with discretion to determine after consultation with other trustee agencies such as [DFW] how much water is sufficient to keep fish in good condition.

(Response, p. 24.) This argument appears to assume that, as a trustee agency, the City has the same authority as "other trustee agencies" to determine how much water must be left in the stream to maintain fish in good condition. But the City is not a trustee agency for all purposes, and is not one when it comes to the public trust in water resources.

As defined in the California Environmental Quality Act (CEQA) regulations ("CEQA Guidelines") (Cal. Code Regs., tit. 14, § 15000, et seq.), "'Trustee Agency' means a state agency having jurisdiction by law over natural resources affected by a project which are held in trust for the people of the State of California." (Cal. Code Regs., tit. 14, § 15386; see also generally *Audubon, supra*, 33 Cal.3d at p. 437.) The City is not a state agency with jurisdiction by law over water resources held in trust for the people of the State of California.

Instead, the City’s obligations under the public trust arise from its proprietary operations of the dam. (See *Audubon, supra*, 33 Cal.3d at pp. 449-451 [environmental group may bring suit directly against a diverter alleged to be violating the public trust, without exhausting administrative remedies before the State Water Board]; see also *Natural Resources Defense Council v. Patterson* (E.D. Cal. 2004) 333 F.Supp.2d 906, 918 [Fish & G. Code, § 5937 “places a single duty on the dam owner, directing the dam owner to maintain” any fish below the dam].) The City is making diversions of water that may adversely affect public trust uses. Unlike a trustee agency, which is assigned responsibility for protecting the trust from harm by others, the City’s obligation to protect the public trust is to not cause harm by its own actions. (See *Audubon, supra*, 33 Cal.3d at pp. 424-25 [reciting public trust impacts of City of Los Angeles’ diversions that were alleged to violate the public trust].)

As the California Supreme Court recognized in *Audubon*, the courts and the SWRCB have concurrent jurisdiction to determine whether a water diversion is appropriately protecting public trust resources. (*Audubon, supra*, 33 Cal.3d at pp. 449-451.) Again, the City is just like any other diverter, public or private. The City may be subject to a judicial or administrative proceeding if its water diversions are harming the public trust; however, the City is not a trustee of those public trust resources.

### **III. THE CITY’S ADOPTION OF A BYPASS PLAN DOES NOT LIMIT THE REMEDIES AVAILABLE TO TRUSTEE AGENCIES**

The Supreme Court’s recognition of the SWRCB’s trust obligations, and the Legislature’s delegation of trust obligations to the DFW (see Fish & G. Code, § 1802), place a continuing obligation on trustee agencies to protect public trust uses. (See, e.g., *Cal Trout I, supra*, 207 Cal.App.3d at p. 631.) The City’s determination of what is appropriate in its own bypass plan does not displace or otherwise limit the responsibility of the trustee agencies. Any work the City did may assist and inform the trustee agencies, but it does not divest them of their trust responsibilities.

The City contends that having evaluated fisheries impacts and having decided what it believes is the appropriate balance, it has fully complied with the public trust doctrine. (Response, p. 24 [“The public trust requires no more than what the City has done here”].) Any suggestion that a diverter like the City is only required to balance the competing needs of public trust uses and other uses such as municipal supply,<sup>3</sup> and that whatever balance the diverter strikes is deemed to be protection of public trust uses to the extent feasible, conflicts with precedent and burdens the effective administration of the public trust.

While trustee agencies are charged with evaluating what is necessary to protect the public trust resources within their purview, the City is not a trustee agency within the meaning of the CEQA Guidelines. The City’s obligation is to act in a manner consistent with the determinations of the trustee agencies, where such determinations have been made. (See, e.g., *Cal Trout II*, *supra*, 218 Cal.App.3d at p. 212 [order based on section 5946 of the Fish and Game Code, requiring instream flows to maintain fish in good condition in accordance with precise flows set by the SWRCB, once the SWRCB sets those flows, and with interim flows to be set by the superior court pending the SWRCB’s action]; see also *Environmental Defense Fund, Inc. v. East Bay Muni. Utility Dist.* (1980) 26 Cal.3d 183, 198 [recognizing water right permittee and licensee obligations to comply with terms and conditions and the SWRCB’s continuing administration of those rights].)

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<sup>3</sup> The City argues that the public trust merely requires the City to “weigh all competing public trust interests namely both the fish downstream of the reservoir and the needs of the City’s water users.” This statement implies that municipal supply is a public trust use. (Response, p. 24.) The Supreme Court has made clear, however, that the public trust doctrine applies to uses in or immediately adjacent to the stream, such as fishing and water dependent recreation, and not to municipal or other uses of water diverted for offstream use. (*Audubon*, *supra*, 33 Cal.3d at p. 440.) Thus, the balancing at issue in this case is between the needs of a public trust use—maintaining fish in good condition—and another use, municipal supply, that is not a public trust use.

Where trustee determinations have not yet been made or are not final, the City's obligation is to operate in accordance with its best judgment as to what is required. In those circumstances, though, the City's decision is not determinative of what is necessary to protect public trust resources. A trustee agency, or a court with concurrent jurisdiction (see *Audubon, supra*, 33 Cal.3d at pp. 449-451), retains authority to evaluate whether the City's diversions satisfy the public trust doctrine, or statutes like Fish and Game Code section 5937 intended to protect trust resources.

In this regard, the City's responsibilities are no different from any other person subject to the law. A person driving a vehicle, for example, has an obligation to drive at a reasonable or prudent rate of speed in light of road conditions. (Veh. Code, § 22350.) The driver may not fully be in compliance with the law, even though the driver determined for himself or herself that he or she was driving safely. (*Fortier Transp. Co. v. Union Packing Co.* (1950) 96 Cal.App.2d 748, 754 [recognizing that jury decides whether conditions supported compliance with the basic speed law].) Ultimately, the Highway Patrol and the courts retain the final say on whether the rate of speed was indeed reasonable for the conditions.

In the public trust context, the dangers of determining the law for oneself are manifest when that determination is contrary to the recommendations or determinations of trustee agencies with primary responsibility for applying the law. That is what happened here. The SWRCB and DFW provided comments to the City indicating that the plan was inadequate to protect public trust uses. (See *ante* pp. 5-6.) Those comments were omitted from the Plan.

The City's adoption of a bypass plan to provide more water downstream does not limit the remedies available to the trustee agencies. The City asserts that it is a trustee agency, that adoption of a bypass plan satisfies its public trust obligations, and that the only remedy available to Reynolds is a mandamus proceeding to review the bypass plan for abuse of discretion. (Response, pp. 1, 7-8, 16-17, 31.) Even if accepted as true, this position cannot, as a legal matter, limit the authority of the

SWRCB or DFW to require substantive compliance with appropriate determinations of what the public trust resources require. After all, in the area of water diversions, the courts have recognized the State's responsibility for continuous supervision and control, either via the courts or the SWRCB's approval of water diversions, to protect public trust uses. (*Audubon, supra*, 33 Cal.3d at pp. 425-426; *Cal Trout I, supra*, 207 Cal.App.3d at p. 631.) Allowing the City's determinations to limit the authority of the trustee agencies would conflict with these longstanding judicial decisions.

The City is in essentially the same position as was the Los Angeles Department of Water and Power (LADWP) in *Audubon, supra*, 33 Cal.3d 419. In that case, the California Supreme Court held that in public trust cases, as with most water allocation issues within the purview of the SWRCB, the SWRCB and the courts have concurrent jurisdiction. (*Id.* at pp. 449-451.) A party with standing to challenge an alleged violation of the public trust in water resources has the option of asking the SWRCB to initiate proceedings or to bring an action directly against the person or entity alleged to be diverting water in violation of the public trust. (*Id.* at pp. 449-451, 452.) LADWP, like the City here, is a public agency operating a water project, and has not been vested with trustee authority over the public trust resources at issue.

As the SWRCB and DFW made clear in the trial court amicus briefs, Any remedy with the SWRCB would be in a proceeding before the SWRCB, which the SWRCB has discretion to initiate or not. Because the SWRCB's authority is discretionary, not ministerial, the Plaintiff has no remedy in court if the SWRCB chooses not to initiate administrative proceedings. As a practical matter, the Plaintiff's remedy, if any, is against the party alleged to be diverting in violation of the public trust.

(AA 16:312:41253.)

The SWRCB and DFW express no view as to the form of action or standard of review when a non-trustee party, such as Reynolds, challenges the City's bypass plan. It is important to emphasize, however, that the adoption of a bypass plan by

the City does not deprive a trustee agency of its jurisdiction and responsibility to protect the public trust, where feasible. Trustee agencies are not limited to the remedy of a mandamus action against the diverter, to the exclusion of administrative procedures before the SWRCB or other remedies available to the trustee agencies. (See, e.g. *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 148-151 [State Water Board has authority under the public trust doctrine to modify previously issued water right permits to set or modify requirements for protection of fish and other instream uses].) Such a limitation would be inconsistent with the seminal public trust cases identifying the State's, and in particular the SWRCB's, duty of continuing supervision. (*Audubon, supra*, 33 Cal.3d at pp. 425-426; *Cal Trout I, supra*, 207 Cal.App.3d at p. 631.) To limit a trustee agency to an action in mandamus challenging the City's Plan would be inconsistent with the principle of concurrent jurisdiction, and would seriously undermine the ability of the SWRCB and DFW to carry out their public trust responsibilities.

### **CONCLUSION**

The City is not a trustee agency. Moreover, the City's determination of the public trust needs does not have any preclusive effect on the SWRCB or DFW in carrying out their trust responsibilities.

Dated: October 21, 2013

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that the attached **PROPOSED STATE WATER RESOURCES CONTROL BOARD AND CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE'S AMICUS CURIAE BRIEF IN SUPPORT OF NEITHER PARTY** uses a 13 point Times New Roman font and contains 3693 words.

Dated: October 21, 2013

KAMALA D. HARRIS  
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/s/ J. KYLE NAST

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**DECLARATION OF SERVICE**

Case Name: **Reynolds v. City of Calistoga**

Case No.: **A134190**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004. On October 21, 2013, I served the following document(s):

**PROPOSED STATE WATER RESOURCES CONTROL BOARD  
AND CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE'S  
AMICUS CURIAE BRIEF IN SUPPORT OF NEITHER PARTY**

on the parties through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) **By First Class Mail:** I caused each such envelope to be placed in the internal mail collection system at the Office of the Attorney General in a sealed envelope, for deposit in the United States Postal Service with postage thereon fully prepaid, that same day in the ordinary course of business.

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(B) **By Electronic Copy**: I served the attached document by transmitting a true copy via electronic service of the Court.

**Supreme Court of California  
Office of the Clerk, First Floor  
350 McAllister Street  
San Francisco, CA 94102**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 21, 2013, at San Francisco, California.

Michelle CoSeng

Declarant

*/s/ Michelle CoSeng*

Signature