

1 EDMUND G. BROWN JR.
Attorney General of California
2 JOHN DAVIDSON
Supervising Deputy Attorney General
3 JOHN DAVIDSON
Supervising Deputy Attorney General
4 State Bar No. 50364
455 Golden Gate Avenue, Suite 11000
5 San Francisco, CA 94102-7004
Telephone: (415) 703-5525
6 Fax: (415) 703-5480
E-mail: John.Davidson@doj.ca.gov
7 *Attorneys for*
Department of Fish & Game and State Water
8 *Resources Control Board*

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF NAPA - HISTORIC COURTHOUSE
12

13 GRANT REYNOLDS,

14 Petitioner,

15 v.

16 CITY OF CALISTOGA, a Municipal
Corporation of the State of California
17 Department Of Fish & Game, California State
Water Resources Control Board, Does 1-30
18 and Roes 1-30.

19 Respondents.
20
21

Case No. 26-46826

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
AMICUS CURIAE**

Date: March 29, 2010
Time: 8:30 a.m.
Dept: A
Judge: Honorable Raymond A. Guadagni
Trial Date: July 6, 2010

22
23 **INTRODUCTION**

24 This case involves the public trust in water. In *National Audubon Society v. Superior Court*
25 (*Audubon*) (1983) 33 Cal.3 419, the California Supreme Court held that in public trust cases, as
26 with most water allocation issues within the purview of the State Water Resources Control Board
27 (“SWRCB”), the SWRCB and the courts have concurrent jurisdiction. (*Id.* at pp. 449-451.) A
28 party with standing to challenge an alleged violation of the public trust in water resources has the

1 option of asking the SWRCB to initiate proceedings or to bring an action directly against the
2 person or entity alleged to be diverting water in violation of the public trust. (*Id.* at pp. 449-451,
3 452.) Relying on *Center for Biological Diversity, Inc. v. FPL Group, Inc. (Bio Diversity)* (2008)
4 166 Cal.App.4th 1349, 1370, this court issued an order that can be interpreted to reach the
5 opposite result: that a plaintiff’s exclusive remedy is against the SWRCB. But *Bio Diversity*
6 involves the public trust in terrestrial wildlife, not water resources, and expressly recognizes that
7 the rule is different for the public trust in water. (*Id.* at pp. 1364, 1368.) *Audubon’s* rule of
8 concurrent jurisdiction in water cases controls here. Additionally, while the SWRCB takes not
9 position as to the viability of the public trust case as pled, even under *Bio Diversity*, City of
10 Calistoga, as a subdivision of the state with authority over the diversion facilities, would be a
11 potentially viable defendant.

12 Moreover, any remedy with the SWRCB would be in a proceeding before the SWRCB,
13 which the SWRCB has discretion to initiate or not. Because the SWRCB’s authority is
14 discretionary, not ministerial, the Plaintiff has no remedy in court if the SWRCB chooses not to
15 initiate administrative proceedings. As a practical matter, the Plaintiff’s remedy, if any, is against
16 the party alleged to be diverting in violation of the public trust.

17 Accordingly, the SWRCB and the Department of Fish and Game (“DFG”) request to be
18 permitted to file this brief as amici curiae, and request that the court grant reconsideration and
19 modify its order to make clear that any remedy before or against the SWRCB is not exclusive,
20 and to avoid any suggestion that Plaintiff may bring a case against the SWRCB under the
21 circumstances presented by this case.

22 PROCEDURAL HISTORY

23 In Case No. 26-46826, Plaintiff Grant Reynolds *in propria persona* filed against City of
24 Calistoga (“City”) raising multiple claims. One of the claims is that the City has failed to release
25 sufficient water below its dams to support a healthy population of fish beneath Kimball Creek
26 Dam, which the City owns.

27 On February 10, 2010, this court entered an Order Granting Defendant’s Motion for a
28 Judgment on the Pleadings (“February 10, 2010 Order”) without leave to amend. The
Order states inter alia that:

1 The court finds the case of *Center for Biological Diversity, Inc. v. FPL Group, Inc.*
2 (Bio Diversity) (2008) 166 Cal.App.4th 1349, 1370, controlling here. It provides that
3 a claim for breach of the public trust must be brought against the agencies responsible
4 for the trust property, in this case the State Water Resources Control Board
5 (SWRCB).

6 On February 22, 2010, Grant Reynolds served a petition for writ of mandamus, Case No.
7 26-51244, on the SWRCB and Department of Fish and Game (“DFG”) alleging similar claims
8 regarding compliance with Fish and Game Code section 5937 at Kimball Dam as those raised in
9 Case No. 26-46826. On the same day, Mr. Reynolds filed a motion to reconsider the February
10 10, 2010 Order in Case No. 26-46826.

11 STATEMENT OF FACTS

12 City of Calistoga has a permit and licenses issued by the SWRCB to divert water for
13 municipal purposes at Kimball Creek Dam, at the headwaters of the Napa River. (Third
14 Amended Unlimited Complaint, ¶s 13, 87, 96; S-6; S-9; Amended License for Diversion and Use
15 of Water, No. 9615, Amended License for Diversion and Use of Water, No. 9616, Permit for
16 Diversion and Use of Water, No. 20395.) Plaintiff’s complaint can be fairly read to allege that
17 the operation of such dam is an impermissible infringement on the public trust, and a violation of
18 Fish and Game Code section 5937. (Third Amended Unlimited Complaint, ¶s 86, 91-93, 95-97.)

19 ARGUMENT

20 I. WATER ALLOCATION PUBLIC TRUST CASES ESTABLISH THE RIGHT TO SUE THE 21 DIVERTER DIRECTLY, DUE TO CONCURRENT JURISDICTION IN WATER RIGHT 22 CONFLICTS

23 In the February 10, 2010 Order, the court found *Center for Biological Diversity v. FPL*
24 (2008) 166 Cal.App.4th 1349 (*Bio Diversity*) to be controlling precedent. *Bio Diversity*,
25 determined that the public trust doctrine extends to wildlife. (*Id.* at pp. 1359-64.) In a case
26 involving terrestrial wildlife, as opposed to fish and other public trust resources in water, plaintiff
27 could not directly sue a private wind farm for raptor deaths that allegedly infringed on the public
28 trust. (*Id.* at p. 1371.) Instead, plaintiff’s remedy would have been to challenge Alameda

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1 County¹ as a permitting entity or “any other state agency or subdivision of the state [that]
2 failed to discharge its responsibilities under the public trust.” (*Id.* at p. 1370.) *Bio Diversity*
3 emphasizes that, because the public trust requires the balancing of competing values, state
4 agencies or subdivisions, rather than private parties, are to be held responsible for alleged
5 breaches of the public trust. (*Id.* at pp. 1369-70.)

6 In reaching its conclusion, the *Bio Diversity* court differentiated the situation before it from
7 that in *Audubon, supra*, 33 Cal.3d 419, the seminal water public trust case in the state. (*Bio*
8 *Diversity, supra*, 166 Cal.App.4th at pp. 1364, 1368.) Not only is the nature of the public trust in
9 terrestrial wildlife primarily statutory, while that of the public trust in water is primarily common
10 law, but the long history of concurrent jurisdiction in water rights allows aggrieved parties to file
11 in court against diverters in the first instance. (*Ibid.*) *Bio Diversity* distinguishes the wildlife
12 action before it from the water release issues in *Audubon*, because in *Audubon*, “the court read the
13 particular statutory provisions related to water rights to confer concurrent original jurisdiction on
14 the courts to determine those rights.” (*Bio Diversity, supra*, 166 Cal.App.4th at p. 1368.) In water
15 rights, the statutory court referral process allows the court to access the administrative agency’s
16 expert knowledge and comprehensive planning responsibilities, as appropriate to resolution of the
17 questions involved. (*Ibid* [citing *Audubon*]; see generally Wat. Code, § 2000 et seq [authorizing
18 any state court to make a reference to the SWRCB, as referee, in a case involving water right
19 issues].)

20 Assuming Mr. Reynolds has standing to raise public trust issues, either before the SWRCB
21 or the courts, the position of the parties and the SWRCB in *Audubon, supra*, 33 Cal.3d 419, is
22 closely analogous to the position of the parties and the SWRCB in the current case. *Audubon*
23 involved a suit by a non-profit citizen’s group against the Los Angeles Department of Water and
24 Power (LADWP), a public entity which diverts water from tributaries to Mono Lake for public
25 water supply. (*Id.* at pp. 426-27.) Plaintiffs alleged that LADWP’s water diversions from

26 ¹ The court refers to proceedings before and actions by the East County Board of Zoning
27 Adjustments, and the Alameda County Board of Supervisors, to which the Zoning decision was
28 appealed. The court also refers to these events as before “Alameda County” and this brief adopts
that nomenclature for simplicity.

1 tributaries to Mono Lake violated the public trust. (*Id.* at pp. 429-31.) The California Supreme
2 Court held the Plaintiffs could bring an action against LADWP without first initiating any
3 proceeding involving the SWRCB. (*Id.* at pp. 426, 452.) Here, a private citizen has sued the
4 City of Calistoga, a public entity which operates a dam for public water supply on Kimball Creek.
5 Mr. Reynolds alleges that the dams do not release sufficient water to maintain the fishery below
6 the dam in good health. In both *Audubon* and in the present instance, the SWRCB had authorized
7 the defendants to divert water in the manner being challenged. (See *Audubon, supra*, 33 Cal.3d at
8 p. 428.) As in *Audubon*, the suit here is against a SWRCB-authorized diverter for failure to
9 adequately protect instream water resources. (See also *Environmental Defense Fund v. East Bay*
10 *Municipal Utility District* (1980) 26 Cal.3d 183, at p. 199 [allowing citizen group to “seek court
11 aid in the first instance” against public utility for instream impacts of SWRCB-authorized
12 diversion]; *Natural Resources Defense Council v. Patterson* (E.D. Cal. 2004) 333 F.Supp.2d 906
13 [allowing citizen’s group to sue United States Bureau of Reclamation for violating Fish & G.
14 Code, § 5937 below SWRCB-permitted dam.]

15 *Even if Bio Diversity Were To Apply to Water Right Public Trust Cases, City of Calistoga,*
16 *as a Political Subdivision of the State, May be Properly Sued for Breach of Public Trust.*

17 Even if it applied to water right cases, *Bio Diversity, supra*, 166 Cal.App.4th 1349, does not
18 stand for the proposition that only a *trustee* state agency may be sued for breach of public trust:
19 rather it holds that a responsible public agency may be sued.

20 *Bio Diversity* discusses in detail Alameda County proceedings in permitting a wind farm,
21 the ensuing litigation by other parties, and the county’s suitability as a defendant for a public trust
22 case, based on its exercise of permitting authority. (*Id.* at pp. 1356-59, 1368-69, 1370-71, 1372.)
23 The Court of Appeal dismisses the suggestion that Alameda County should not be held
24 accountable for public trust infringement because no statute delegates public trust responsibility
25 to it: “the county, as a subdivision of the state, shares responsibility for protecting our natural
26 resources and may not approve of destructive activities without giving due regard to the
27 preservation of those resources.” (*Id.* at p. 1370, fn. 19.) Here, the City, like the Alameda
28 County, is a political subdivision of the state. As owner of the Kimball Creek Dam, the City

1 exercises even greater responsibility over the disputed project than that exercised by Alameda
2 County as a permitting authority in *Bio Diversity*.

3 *Bio Diversity* mentions DFG’s role as trustee for wildlife in the state, and holds that
4 plaintiff’s could have sued DFG as a trustee agency, and cites traditional trust cases in which the
5 trustee is subject to suit for breach. (*Id.* at p. 1367.) But, the court finds that the case presented
6 “no occasion ... to address the responsibility that sundry agencies bear in this regard [public trust
7 for wildlife].” (*Id.* at p. 1369.) The court thus explicitly refrained from making a determination
8 as to which public agencies, exactly, might be subject to suit, but clearly indicates with its
9 discussion of Alameda County’s permitting and its reference to “sundry” agencies that the trustee
10 agency does not carry sole responsibility. (*Id.* at pp. 1356-59, 1368-69, 1370-71, 1372.)

11 The SWRCB and DFG have no opinion as to whether the instant complaint as pled presents
12 a viable claim against the City, but if it does, and even assuming *Bio Diversity* applies to water
13 cases, the complaint is not subject to dismissal on the theory that any suit must be brought against
14 the SWRCB or DFG instead. *Bio Diversity* does not stand for the proposition that only a trustee
15 agency, to the exclusion of a political subdivision of the state that has even greater control over
16 the activity in question, may be sued for protection of public trust resources.

17 **II. AN ACTION AGAINST DFG OR THE SWRCB IS NOT A VIABLE OPTION TO AN ACTION**
18 **AGAINST THE DAM OWNER FOR VIOLATIONS LIKE THOSE ALLEGED HERE.**

19 Neither the SWRCB nor DFG has a mandatory duty to take action under the public trust
20 doctrine, or its particular expression in Fish and Game Code section 5937, in the circumstance
21 presented here. Similarly, neither agency has the mandatory duty to enforce against the City of
22 Calistoga, if the City’s actions in operating its dam violate the public trust.

23 A mandamus action² against a state agency may be brought only for a failure to carry out a
24 mandatory, ministerial duty set forth by statute, or to take specific action if a certain set of

25 ² While the February 10, 2010 Order does not specify the type of action envisioned, a writ
26 of mandamus appears to be the only potentially relevant type of court action under the
27 circumstances alleged. Indeed, this is the type of action filed against amici on February 22, 2010.
28 There is no agency action for which a writ of administrative mandamus would be appropriate. If
the February 10, 2010 Order intended to instruct Plaintiffs that their only available action would
be initiate an administrative process, such as a complaint proceeding in front of the SWRCB,
amici respectfully request that the court so clarify on reconsideration.

1 circumstances is presented. (See, e.g., *California Trout, Inc. v. State Water Resources Control*
2 *Board* (1990) 218 Cal.App.3d 187, 201-202; *Bradley v. Lacy* (1997) 53 Cal.App.4th 883, 894.)
3 “A ministerial act is an act that a public officer is required to perform in a prescribed manner in
4 obedience to the mandate of legal authority and without regard to his own judgment or opinion
5 concerning such act’s propriety or impropriety, when a given state of facts exists. Discretion, on
6 the other hand, is the power conferred on public functionaries to act officially according to the
7 dictates of their own judgment.” (*Transdyn/Cresci JV v. City and County of San Francisco* (1999)
8 72 Cal.App.4th 746, 752.) In this case, and in contrast to a ministerial duty, the SWRCB and
9 DFG have broad discretion in applying the public trust doctrine and Fish and Game Code section
10 5937.

11 **III. FISH AND GAME CODE SECTION 5937 IMPOSES RESPONSIBILITY ON THE DAM**
12 **OWNER, NOT A REGULATORY AGENCY**

13 Fish and Game Code section 5937 requires, in part, that:

14 “The owner of any dam shall allow sufficient water at all times to pass through a
15 fishway or, in the absence of a fishway, allow sufficient water to pass over, around or
16 through the dam to keep in good condition any fish that may be planted or exist below
17 the dam.”

18 [Italics added.]

19 “Owner” is defined as the entity “owning, controlling or operating” the facility. (Fish & G.
20 Code, § 5900, subd. (c).) Thus, section 5937 imposes a responsibility on the dam owner, not on
21 any particular regulatory agency.

22 **IV. FISH AND GAME CODE SECTION 5937 DOES NOT IMPOSE ANY MANDATORY DUTY**
23 **ON THE SWRCB TO ALTER CONDITIONS IN CITY OF CALISTOGA’S WATER RIGHT**
24 **PERMITS**

25 As discussed in SWRCB Order WR 95-2, available at
26 [http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/1995/wro95-](http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/1995/wro95-02.pdf)
27 [02.pdf](http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/1995/wro95-02.pdf), Fish and Game Code section 5937 imposes no mandatory duty on the SWRCB. (*Id.* at pp.
28 4 – 8.) The SWRCB described only two narrow circumstances in which the SWRCB has a
mandatory duty to include provisions to apply Fish and Game Code section 5937 in water permits
or licenses, neither of which was applicable in that case nor are they it in the instant case. (*Id.* at
pp. 6-7.) The SWRCB only has a mandatory duty to insert conditions in water diversion permits

1 or licenses to comply with Fish and Game Code section 5937 where: (1) such obligation is made
2 mandatory under Fish and Game Code section 5946 or (2) where the permit is issued after 1975,
3 when California Code of Regulations, title 23, section 782 was adopted. (See *Id.* at pp. 6-7.)

4 Fish and Game Code section 5946 provides, in part: “[n]o permit or license to appropriate
5 water in District 4½ shall be issued by the State Water Rights Board after September 9, 1953,
6 unless conditioned upon full compliance with Section 5937.” (*Ibid.* [italics added].) In
7 *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, the court found that the
8 SWRCB had a legal duty to impose the requirements of Section 5937 on water diversion permits
9 for a diversion in District 4½. However, Fish and Game Code section 5946, not to section 5937,
10 made the action mandatory. District 4½ encompasses only parts of Inyo and Mono counties: it
11 does not include Kimball Creek. (Fish & G. Code, § 11012.)

12 California Code of Regulations, title 23, section 782 provides that all diversion permits that
13 use a dam for diversion contain specific requirements for fish protection or a condition mimicking
14 the language in Fish and Game Code § 5937. The regulation was adopted by the SWRCB in
15 1975, and is not retroactive. (57 Ops.Cal.Atty.Gen. 577, 580 (1974); SWRCB Order WR 95-2 at
16 p. 7.) The only permit issued to the City of Calistoga after 1975 is conditioned to comply with
17 Fish and Game Code 5937 and California Code of Regulations, title 23, section 782.³

18 Thus, the SWRCB has no mandatory duty to add provisions to City’s permits to protect the
19 public trust.⁴

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21 _____
22 ³ Here, in order to further clarify our arguments and the SWRCB’s actions vis-à-vis
23 defendants, amici have prepared a motion to take judicial notice of City of Calistoga’s licenses
24 and permit for water diversion and use related to Kimball Creek Dam. The SWRCB issued two
25 licenses for diversion and use of water to City of Calistoga in 1971, License Nos. 9615 & 9616,
26 under the terms of their respective permits, which were also issued before 1975. The SWRCB
27 also issued a permit for diversion and use of water to the City of Calistoga in 1989, Permit No.
28 20395. This permit contains a specific provision for the protection of fish, as required under
California Code of Regulations, title 23, section 723. Condition 20 of the permit reads: “For the
protection of fish and wildlife, permittee shall during the period: (a) from November 16 through
February 29 bypass a minimum of 5.0 cubic feet per second or the total streamflow, whichever is
less; (b) from March 1 through November 15 bypass all surface inflow.”

⁴ It is worth noting that nothing in the City’s licenses or permits prohibits the City from
releasing or bypassing additional flows to comply with Fish and Game Code 5937.

1 **V. NEITHER DFG NOR THE SWRCB HAS A MANDATORY DUTY TO ENFORCE AGAINST**
2 **ALLEGED VIOLATIONS OF FISH AND GAME CODE 5937 OR THE PUBLIC TRUST**

3 Fish and Game Code section 12000 makes violation of Fish and Game Code requirements a
4 misdemeanor, and DFG has the authority to refer cases to the Attorney General or District
5 Attorney for prosecution. (See *id.*, § 706; Gov. Code, § 11157.)

6 In the criminal context it is generally accepted that “[t]he prosecutor ordinarily has sole
7 discretion to determine whom to charge, what charges to file and pursue, and what punishment to
8 seek.” (*Dix v. Superior Court of Humboldt County* (1991) 53 Cal.3d 442, 451.) “The
9 prosecution’s authority in this regard is founded, among other things, on the principle of
10 separation of powers, and generally is not subject to supervision by the judicial branch.” (*People*
11 *v. Birks* (1998) 19 Cal.4th 108, 134.)

12 The administrative/civil enforcement contest is treated no differently. (See *People v.*
13 *Superior Court* (1977) 70 Cal.App.3d 341, 344 [Business and Professions Code violations,
14 “[p]rosecutorial discretion permits the choice among possible defendants which to prosecute,
15 whether to prosecute, and in what order to prosecute.”].)

16 The administrative and civil proceedings through which section 5937 of the Fish and Game
17 Code may be enforced involve the SWRCB. (See *California Trout, Inc. v. Superior Court* (1990)
18 218 Cal.App.3d 187, 203 [Although fisheries involve the expertise of DFG, there is no
19 administrative remedy before DFG in a case concerning violation of Fish & G. Code, § 5937].)
20 The permissive language in the statutes authorizing civil and administrative enforcement by the
21 SWRCB underscore the discretionary nature of enforcement responsibilities. Water Code
22 sections 1831 and 1052 grant the SWRCB the discretion to issue cease and desist orders or
23 impose civil liability for certain violations. Both statutes use the term “may.” California Code of
24 Regulations, title 23, section 784, subdivision (a), regarding the SWRCB’s authority to require
25 releases of stored water, emphasizes the board’s “discretionary” authority in prescribing and
26 modifying permit terms and conditions. Similarly, the SWRCB under its continuing supervision
27 over water use has the “authority” to reconsider water rights decisions to impose public trust
28 conditions, not “obligation” to do so. (*National Audubon Society*, *supra*, 33 Cal.3d, at p. 447.)

1 Thus, the SWRCB and DFG have the discretion and independence to decide which
2 violations each will enforce, and how, e.g. through referral to the Attorney General's office for
3 prosecution, through an administrative process, or through settlement.

4 Both the SWRCB and DFG operate with finite resources, and must have the ability and
5 discretion to selectively apply those resources towards enforcement actions. As the leading
6 United States Supreme Court case on agency enforcement discretion recognizes:

7 an agency's decision not to prosecute or enforce ... is a decision generally committed
8 to an agency's absolute discretion ... an agency decision not to enforce often involves
9 a complicated balance of a number of factors which are peculiarly within its expertise.
10 Thus, the agency must not only assess whether a violation has occurred, but whether
11 agency resources are best spent on this violation or another, whether the agency is
likely to succeed if it acts, whether the particular enforcement action requested best
fits the agency's overall policies, and, indeed, whether the agency has enough
resources to undertake the action at all. An agency generally cannot act against each
technical violation of the statute it is charged with enforcing.

12 *Heckler v. Chaney* (1985) 470 U.S. 821, 832.

13 CONCLUSION

14 An action or administrative proceeding involving SWRCB is not the exclusive remedy for
15 claims involving breach of the public trust in water, including the expression of the public trust in
16 Fish and Game Code section 5937. Additionally, as neither the SWRCB nor DFG have an
17 unfulfilled mandatory duty under the public trust or Fish and Game Code section 5937, there is no
18 viable court case against either trustee agency. Therefore, amici respectfully request that the
19 February 10, 2010 Order be modified to clarify that a lawsuit against the SWRCB is not the sole
20 remedy for water related violations like those alleged by the plaintiff.

21 Dated: March 25, 2010

Respectfully Submitted,

22 EDMUND G. BROWN JR.
23 Attorney General of California

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26 JOHN DAVIDSON
27 Supervising Deputy Attorney General
*Attorneys for Department of Fish & Game
and State Water Resources Control Board*

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