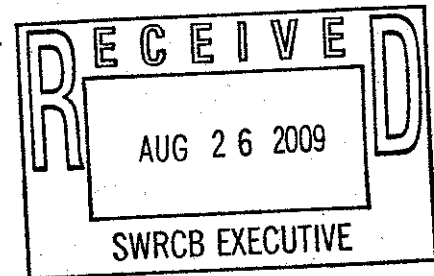


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Comment Letter: Cal Am CDO Hearing Workshop

The Public Trust Alliance applauds the Board for formulating a draft Cease and Desist Order that appears to be strong enough to spur California American Water Company to real, sustained action. To the extent that the order might create hardship for local citizens while desalination facilities are being constructed, we suggest that the Board appropriately address such hardships, if any, as they arise, rather than watering down the order. The long history of this case has shown what happens whenever the Board leaves a loophole for delay.

In addition, we urge the Board to take appropriate action to dedicate sufficient water to instream uses. Without such action, endangered/threatened species are inadequately protected.

Further, we express our concern about the Pebble Beach Company's continued assertion of a "water entitlement" that exists outside of, and insulated from, the normal Board rules and procedures for creating and overseeing water rights. The acquisition of a water right is subject to a permit procedure involving notice to all affected parties of the actual content of the water right, and a hearing in which affected parties may raise their concerns. That appears not to have occurred in the case of the Pebble Beach Company water entitlement.

Moreover, even when the Board issues a permit under the legally required procedures offering full protection to the public, the resulting water right remains subject to the Board's continuing affirmative duty of oversight as a trustee of public trust resources.¹ In its role as trustee, the Board can and must curtail vested water rights, to the maximum extent feasible, when it is necessary to do so to protect public trust resources. Public resources protected under this standard include water-based ecosystems. The Board cannot waive this right or abdicate this

¹ National Audubon Society v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983).

duty simply by expressing approval of a reclamation project or by failing to object to a business deal between the Pebble Beach Company and the Monterey Peninsula Water Management District.

We do not doubt that the reclamation project is a worthy project. However, neither the beneficial effects of the project nor the money expended by the participants exempts the project from water rights law. This reality is also clear under the broader concepts of property law. When the state manages its water resources in its capacity as trustee or property owner, rather than as a regulator, the necessary restrictions that it implements to protect public trust values are not subject to claims of a regulatory "taking" of private property rights.² Moreover, the public trust doctrine is a background principle of property law, within the meaning of *Nollan* and *Dolan*.³ It conditions a "property owner's" reasonable expectations as to what it receives under a purported property right. The doctrine can preclude takings claims on the simple ground that the government cannot "take" from private owners what they do not own. The Pebble Beach Company had no reasonable expectation that it would be exempt from public trust oversight.

We find regrettable any possibility that participants in a worthy project might remain unpaid for their efforts. But it was never a viable solution to pay for the project with water belonging to people of the state. The parties involved lacked the authority to make such a deal. Nor should the money expended by project participants buy them an exemption from community-wide cutbacks designed to protect public trust resources. That would be fundamentally inconsistent with the public nature of water and public values of fairness and political equality.

Respectfully submitted,

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² See, e.g., Anna R.C. Caspersen, *Comment: The Public Trust Doctrine and the Impossibility of "Takings" by Wildlife*, 23 B.C. ENVTL. AFF. L. REV. 357, 370 (1996); Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1120-24 (2006) (regarding the federal government's authority under the Property Clause).

³ *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).