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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

SAN FRANCISCO BAYKEEPER, INC., Petitioner, vs. CALIFORNIA STATE LANDS COMMISSION, Respondents, HANSON MARINE OPERATIONS, INC.; HANSON AGGREGATES, LLC; JERICO PRODUCTS, INC., MORRIS TUG & BARGE, INC.; and SUISUN ASSOCIATES, Real Parties in Interest.	Case No. CPF-12-512620 Date Filed: November 16, 2012 **OPPOSITION TO MOTION TO DISCHARGE PEREMPTORY WRIT OF MANDATE** Date: February 10, 2017 Time: 9:30 a.m. Dept.: 503 Judge: Hon. Garrett L. Wong

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

INTRODUCTION **1**

FACTS OF THE CASE **1**

I. The Sand Mining Leases **1**

II. Procedural History **2**

III. SLC's Reapproval Process **3**

LEGAL STANDARD **4**

I. The Public Trust Doctrine **4**

II. Standard of Review **5**

ARGUMENT **6**

I. SLC Erred as a Matter of Law When It Defined Sand Mining as a Public Trust Use. **6**

A. Sand Mining Does Not Fit into the Common Law Definition of Navigation or Waterborne Commerce. 7

B. Courts Have Universally Analyzed Natural Resource Extraction from Trust Property as Non-Public Trust Uses 9

C. The Legislature Has Determined Mining on Sovereign Lands Is a Non-Trust Use. 10

D. The Fact that Sand Mining May Confer a Public Benefit Does Not Render It a Public Trust Use 10

II. SLC's Conclusion that Sand Mining Will Not Impair Coastal Beaches Is Not Supported by Substantial Evidence. **11**

III. SLC's Action Was Prejudicial Error. **15**

CONCLUSION **15**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

California Cases

Boone v. Kingsbury (1928) 206 Cal. 148 .... 9, 11

Carstens v. Cal. Coastal Com. (1986) 182 Cal.App.3d 277 .... 14, 15

Citizens for East Shore Parks v. Cal. State Lands Com. (2011) 202 Cal.App.4th 549 .... 5, 8

Colberg, Inc. v. State ex rel. Dept. of Public Works (1967) 67 Cal.2d 408 .... 8, 10

County of Orange v. Heim (1973) 30 Cal.App.3d 694 .... 5, 6

Hayes v. A.J. Associates, Inc. (1993) 846 P.2d 131 10

Marks v. Whitney, 491 P.2d 374 (Cal. 1971)].) 10

National Audubon Society v. Superior Court (1983) 33 Cal.3d 419 .... passim

People v. Gold Run Ditch & Mining Co. (1884) 66 Cal. 138 9

Ross v. Cal. Coastal Com. (2011) 199 Cal.App.4th 900 6

San Franciscans Upholding the Downtown Plan v. City & County of San Francisco (2002) 102 Cal.App.4th 656 .... 6, 11

San Francisco Baykeeper v. Cal. State Lands Com. (2015) 242 Cal.App.4th 202 .... passim

SN Sands Corp. v. City and County of San Francisco (2008) 167 Cal.App.4th 185 6

Topanga Assn. for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506 .... 5, 6

Yamaha Corp. of America v. State Bd. of Equalization (1998) 19 Cal.4th 1 6

Zack's, Inc. v. City of Sausalito (2008) 165 Cal.App.4th 1163 .... 5, 6, 15

Federal Cases

Illinois Central R. Co. v. Illinois (1892) 146 U.S. 387 .... 4, 12

Statutes

Code Civ. Proc. § 1094.5(b) 5

Gov. Code § 66600 4

Pub. Res. Code § 6009 4

Pub. Res. Code § 6895 .... 5, 10

Pub. Res. Code § 6900 .... 5, 7, 10

Pub. Res. Code § 21002 12

Pub. Res. Code § 30001 4

Other Authorities

Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention (1969) 68 Mich. L. Rev. 471 4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
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21
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INTRODUCTION

In 2015, the Court of Appeal found that the California State Lands Commission ("SLC") failed to consider the public trust doctrine when it authorized private companies to increase sand mining and remove 1.5 million cubic yards of sand annually from San Francisco Bay. As a result, this Court issued a peremptory writ of mandate ordering SLC to reevaluate the sand mining leases in light of SLC's duty to protect public trust resources and uses. In response, SLC reissued the same leases, shirking its obligation to only authorize sand mining at sustainable rates that would protect public trust resources. When reapproving the leases, SLC unlawfully defined sand mining as a public trust use, disregarding applicable case law and relying on the same rationale that was rejected by the Court of Appeal. Further, SLC's reapproval repeated the erroneous conclusion that the sand mining under the leases will not harm public trust resources, specifically coastal beaches such as Ocean Beach. To reach this conclusion, SLC ignored or mischaracterized the overwhelming scientific evidence that sand mining in the Bay is a major cause of coastal erosion. In short, although SLC added a perfunctory public trust discussion, SLC failed to comply with the peremptory writ of mandate because it did not reevaluate the leases consistent with the Court of Appeal decision or public trust law. SLC also failed to reissue the leases in a manner that protects public trust resources. This Court should not discharge the peremptory writ of mandate as requested by SLC, but should order SLC to fulfill the agency's public trust obligations by reissuing leases that comply with pubic trust law and protect public trust resources and uses.

FACTS OF THE CASE

I. The Sand Mining Leases

Sand mining in San Francisco Bay results in the erosion of nearby beaches and the irreversible loss of vital sediment within the Bay. (*See, e.g.*, AR 468-69, 481, 500, 3391; SAR 2188-90.)[1] Because of this harm, Baykeeper has challenged SLC's grant of four 10-year leases under the San Francisco Bay and Delta Sand Mining Project ("leases"). (AR 295-96, 334; SAR

[1] Citations to the Administrative Record appear as: "AR [page number(s), excluding leading zeros]." Citations to the Supplemental Administrative Record appear as: "SAR [page number(s), excluding leading "SUPP" and zeros]."

373-457.) If allowed to proceed, these leases would allow Hanson Marine Operations, Inc. ("Real Party"), to extract up to 1.5 million cubic yards of sand annually from the Central Bay, almost double the historic volume mined from this area. (AR 322, 496; SAR 27.)

The leases allow the Real Party to mine sand in known sediment transport pathways. (AR 26262; SAR 1954, 1963, 2188-90, 2258-59, 2279.) Absent intervention, coarse sediment or sand is naturally transported from the Sacramento and San Joaquin watersheds, through San Francisco Bay, out the Golden Gate, where it is deposited on the San Francisco Bar. (AR 26262; SAR 1954, 1963, 2279, 2258.) The San Francisco Bar is a large shoal at the mouth of San Francisco Bay, which feeds Ocean Beach and other nearby beaches. (*Id*.) In recent decades, Ocean Beach, a coastal beach south of the Golden Gate, has experienced the highest rate of erosion in California. (AR 9795, 26055.) This erosion has already caused significant damage to wastewater and transportation infrastructure. (AR 9795, 26041.) Studies of the sediment transport pathway, led by the United States Geological Survey ("USGS"), have concluded that "the likely cause of the erosional trend [at Ocean Beach] is a reduction in the sediment supply to the region." (AR 26055; *see* AR 26052.) USGS has shown a clear connection between the sand mining at issue here, reduced sediment supply in the Bay, and erosion at Ocean Beach. (*See* AR 26041-60, 26261-82; SAR 2188-90.) Researchers predict that, if sand mining continues to be permitted at unsustainable rates as the current leases allow, these impacts will worsen. (*See* AR 26052; SAR 2188-90, 2253.)

II. Procedural History

Baykeeper challenged SLC's approval of the leases in 2012, alleging violations of the California Environmental Quality Act, Public Resources Code section 21100 *et seq*. ("CEQA"), and the public trust doctrine. (Verified Petition for Writ of Mandate, filed November 16, 2012.) This Court denied Baykeeper's petition and entered judgment for SLC. (Order Denying Petition for Writ of Mandate, filed April 28, 2014; Judgment Denying Petition for Writ of Mandate, filed May 19, 2014.) Baykeeper subsequently appealed its CEQA and public trust claims.

On November 18, 2015, the Court of Appeal issued its opinion finding that SLC's environmental review of the leases mostly complied with CEQA. (*See San Francisco Baykeeper*

v. Cal. State Lands Com. (2015) 242 Cal.App.4th 202, 215-32 (*Baykeeper*).) However, Baykeeper prevailed on its public trust claim. (*Id*. at 243.) The Court of Appeal found that SLC failed to fulfill its obligation to consider the public trust when it approved the leases. (*Id*.)

On remand on April 28, 2016, this Court entered the Judgment Granting Petition for Writ of Mandate, finding that SLC had violated the public trust doctrine. On May 16, 2016, the Peremptory Writ of Mandate ("Writ") issued, ordering SLC to set aside the leases, and "before voting on whether to reapprove the leases, conduct a public trust analysis and reconsider the leases in light of the common law public trust doctrine consistent with this Court's Judgment and the First District Court of Appeal's November 18, 2015 decision." (Writ, ¶ 1.) The Writ ordered SLC to return to the Writ no later than 180 days from the issuance. (*Id*. at ¶ 3.) This Court retained jurisdiction to consider the return and the objections to the return. (*Id*. at ¶ 4.)

III. SLC's Reapproval Process

One month after the Writ issued, on June 16, 2016, SLC published the agenda for its June 28 hearing, which included an action to set aside and concurrently reapprove the leases. (SAR 1, 10). A few days before the hearing, SLC published a staff report for the agenda item. (SAR 21-58 ("Staff Report").) The Staff Report recommended that SLC approve the same leases and find that sand mining is a public trust use for the purposes of waterborne commerce and navigation. (SAR 30-34.) It also recommended that SLC find that the sand mining approved by the leases would not impair public trust resources and uses. (SAR 32-42.)

Baykeeper submitted written and oral comments to SLC, explaining why the Staff Report's analysis was contrary to law and fact. (*See* SAR 109-113, 488-504.) Baykeeper alerted SLC to the Staff Report's flawed public trust analysis and specifically noted that the Staff Report included overly-broad definitions of waterborne commerce and navigation that were unsupported by legal authority and already rejected by the Court of Appeal. (SAR 489-92.) Baykeeper also alerted SLC that the Staff Report mischaracterized or disregarded the scientific evidence showing that the leases will have a detrimental impact on the San Francisco Bar and nearby coastal beaches. (SAR 492-95.) Despite Baykeeper's comments, on June 28, 2016, SLC voted to

reapprove the same sand mining leases using its flawed public trust analysis. (SAR 44, 367.)

SLC filed its Return to Peremptory Writ, along with its Motion to Discharge the Peremptory Writ of Mandate, on November 10, 2016. Baykeeper timely objected to the Return to the Peremptory Writ of Mandate on December 9, 2016.

LEGAL STANDARD

I. The Public Trust Doctrine

The public trust doctrine protects the public's right to access and use public trust resources, such as submerged and tidal lands. (*See National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 433-8 (*National Audubon*); *see also* Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention (1969) 68 Mich. L. Rev. 471, 537 [the doctrine is a "device for ensuring that valuable governmentally controlled resources are not diverted to the benefit of private profit seekers"].) The State of California holds title and ownership of trust lands, including the floor of San Francisco Bay and the California coast, "as trustee of a public trust for the benefit of the people." (*National Audubon,* 33 Cal.3d at 434; *see* Gov. Code § 66600; Pub. Res. Code § 30001.) SLC, as the agency charged with trustee duties, has an "affirmative duty to take the public trust into account . . . and to protect public trust uses whenever feasible." (*National Audubon*, 33 Cal.3d at 446; *see* Pub. Res. Code § 6009.)

To evaluate a trustee agency's compliance with the public trust doctrine, the California judiciary applies the well-established test from *Illinois Central R. Co. v. Illinois* (1892) 146 U.S. 387, 455-6 (*Illinois Central*). (*Baykeeper*, 242 Cal.App.4th at 233.) Under this test, a trustee agency may permit the use of public trust resources in only two circumstances: (1) when the use is an accepted public trust use that will result "in the improvement of the [public] interest thus held," or (2) when the permitted use will occur "without detriment to the public interest in the lands and waters remaining." (*Illinois Central,* 146 U.S. at 455-6.)

Under *Illinois Central*, the State must first determine whether the activity being permitted is a public trust use. Public trust uses are broad in so far as they protect the many *public* uses of trust resources, including navigation, commerce, fishing, recreation, and ecosystem preservation.

(*See Baykeeper*, 242 Cal.App.4th at 233; *Citizens for East Shore Parks v. Cal. State Lands Com.* (2011) 202 Cal.App.4th 549, 571 (*Citizens*).) However, a public trust use is not simply any use that provides a public benefit. (*Baykeeper*, 242 Cal.App.4th at 235.) A public trust use must "facilitate[] public access, public enjoyment, or public use of trust land." (*Id*. at 236.)

When the proposed activity constitutes a public trust use, the State has discretion to permit one public trust use to the detriment of another. (*National Audubon,* 33 Cal.3d at 440.) Thus, if the activity being permitted is a public trust use, the State need not consider the second step of the *Illinois Central* test. If, however, an activity is not a cognizable public trust use, the State must determine whether the activity interferes with a trust resource or a recognized trust use and must "protect public trust uses whenever feasible." (*National Audubon,* 33 Cal.3d at 435-37, 446.)

II. Standard of Review

SLC's issuance of the leases is a quasi-adjudicative decision reviewed under the abuse of discretion standard. (*See Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 509-12, 515 (*Topanga*).)[2] Under this standard, the court determines "if [SLC] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc. § 1094.5(b); *Topanga*, 11 Cal.3d at 515.) The first issue in this case—whether sand mining constitutes a public trust use—is a legal issue reviewed *de novo*. (*See National Audubon,* 33 Cal.3d at 440-41; *Citizens,* 202 Cal.App.4th at 573.)[3] The second issue—whether SLC properly found that sand

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[2] SLC asserts that its action was quasi-legislative. (MPA at 4 [citing *County of Orange v. Heim* (1973) 30 Cal.App.3d 694, 718-19].) In *Heim*, the court stated that the State's power to choose between two trust uses is a legislative act. (*Id*. at 715.) Baykeeper agrees that if sand mining is a trust use, SLC has discretion to prefer it over other trust uses, but SLC's power to administer the trust is "absolute" only when it acts "within the terms of the trust" (i.e., choosing between trust uses). (*See Zack's, Inc. v. City of Sausalito* (2008) 165 Cal.App.4th 1163, 1191-93.) Here, SLC is not choosing between trust uses, but rather is determining whether sand mining is a trust use and, if not, whether it may authorize sand mining in any case. These questions are not up to the discretion of SLC, but are dictated by the public trust doctrine and statute (*see* Pub. Res. Code §§ 6890, 6900). This action is akin to granting a zoning variance; in both cases, the agency may only authorize the activity if certain requirements are met. (*See Topanga*, 11 Cal.3d at 511-12.) The appropriate review in these cases is abuse of discretion. (*Id*. at 515.)

[3] SLC's interpretation of the public trust doctrine in this case is not due deference because it is neither a formal interpretation, such as a regulation or longstanding policy, nor does the interpretation require any technical expertise

mining will not impair public trust uses—must be supported by substantial evidence in the record. (*Topanga,* 11 Cal.3d at 511-12; *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 675.)[4]

ARGUMENT

SLC's hastily compiled public trust analysis fails in two distinct ways to comply with the Writ's instruction to "conduct a public trust analysis and reconsider the leases in light of the common law public trust doctrine consistent with this Court's Judgment and the First District Court of Appeal's November 18, 2015 decision." (Writ, ¶ 1.) First, SLC unlawfully defined sand mining as a public trust use, specifically as waterborne commerce and navigation, in a manner inconsistent with and directly contradicting the Court of Appeal's decision and decades of public trust case law. Second, SLC failed to support with substantial evidence its determination that the mining authorized by the leases would not impair trust resources and uses. In fact, the record shows that the unsustainable sand mining levels approved by SLC will impair coastal beaches. Thus, SLC abused its discretion and failed to comply with the Writ when it reapproved the leases.

I. SLC Erred as a Matter of Law When It Defined Sand Mining as a Public Trust Use.

While defending its finding that sand mining is a public trust use, SLC incorrectly argues that it has complete discretion to define public trust uses. (Joint Memorandum of Points and Authorities in Support of Motion to Discharge Peremptory Writ of Mandate ("MPA") at 7.) Whether or not an activity is a public trust use is not a matter of agency discretion, but a matter of law. (*See National Audubon*, 33 Cal.3d at 434-35; *Baykeeper*, 242 Cal.App.4th at 232.) "[C]ourts should look with considerable skepticism upon *any* governmental conduct which is calculated . . . to subject public uses to the self-interest of private parties." (*Zack's,* 165 Cal.App.4th at 1177 [internal quotation omitted].) "[B]y its very essence, a public trust use facilitates public access,

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held by SLC. (*See Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10-13; *compare Ross v. Cal. Coastal Com.* (2011) 199 Cal.App.4th 900, 938 (deferred to agency's interpretation of its own regulation.)

[4] Even if the Court agrees with SLC that this action is quasi-legislative, SLC's factual determinations must be supported by substantial evidence. (*See SN Sands Corp. v. City and County of San Francisco* (2008) 167 Cal.App.4th 185, 191; *Heim*, 30 Cal.App.3d at 723.)

public enjoyment, or public use of trust land." (*Baykeeper*, 242 Cal.App.4th at 236.) The leases subject trust property to use by private parties, an action that is inherently not a public trust use.

The Court of Appeal explicitly rejected SLC's overly broad definitions of navigation and waterborne commerce. Yet, when it reapproved the leases, SLC recycled these unlawful definitions. The previously rejected definitions cannot justify SLC's improper determination that private sand mining is a trust use. Indeed, courts considering natural resource extraction, similar to sand mining, have uniformly analyzed these activities as non-public trust uses. (*See Baykeeper*, 242 Cal.App.4th at 236-37.) Further, the Legislature has ordered SLC to consider mineral extraction on submerged lands as a non-trust use. (*See* Pub. Res. Code § 6900.) Finally, SLC's arguments regarding the benefits of sand mining are irrelevant. Public trust uses are specific actions related to the public's use of trust resources; they are not merely activities that confer a public benefit. (*See Baykeeper,* 242 Cal.App.4th at 235; *National Audubon*, 33 Cal.3d at 440-41.)

A. Sand Mining Does Not Fit into the Common Law Definition of Navigation or Waterborne Commerce.

SLC incorrectly determined that, because tugs and barges are used in the operation, sand mining is "navigation" and, thus, a trust use. (SAR 32.) This is the same reductionist argument SLC made and was rejected by the Court of Appeal. (*Baykeeper,* 242 Cal.App.4th at 238 [this argument "highlights the flawed definition of a public trust use which runs throughout the SLC's arguments."].) SLC cannot credibly claim that the purpose of sand mining is to navigate the waterway or that the activity facilitates public navigation, like, for instance, a public maintenance dredging project. The use of a tug and barge is merely ancillary to the sand mining activity; such collateral use does not render the whole mining operation navigation. SLC's interpretation of navigation would eliminate any limits to the definition of trust uses; any activity that uses a vessel or water-related infrastructure would suffice. The Court of Appeal has already rejected such a broad interpretation: "[t]he trust doctrine protects and promotes *public uses*, including commerce and navigation. It cannot justify the private use of public property on the basis that the private party engaged in a water dependent activity for its own private commercial purpose." (*Id*.)

SLC's conclusion that sand mining is waterborne commerce is similarly flawed. Instead of looking to the Court of Appeal decision or applicable case law for guidance, SLC created its own definition of waterborne commerce, defining it as "the exchange or buying and selling of commodities on a large scale involving transportation by water from place to place." (SAR 31.) First, the sand mining activities do not appear to fit into SLC's own definition. The sand is a commercial product, but it is not being "transported" by water; it is being extracted from water. Second, assuming sand mining fits under SLC's definition, this interpretation would deem any commercial activity with some connection to water a trust use, an argument the Court of Appeal again explicitly rejected. (*Baykeeper*, 242 Cal.App.4th at 238 (["SLC's broad concept of a public trust use as encompassing any private activities that benefit commerce is unsupported by case law . . .."].) Courts have consistently limited the meaning of waterborne commerce to commercial activities that promote and support the *public's* interest in the trust resource, such as "wharves or docks and other structures in aid of commerce." (*Citizens,* 202 Cal.App.4th at 571 [internal quotation omitted].) Such commercial activities, unlike private sand mining, promote the public's access to and use of the waterway and are thus, trust uses.

SLC, relying heavily on *Colberg, Inc. v. State ex rel. Dept. of Public Works* (1967) 67 Cal.2d 408, posits it has virtually unfettered discretion to determine essentially any water-related activity is a trust use. (*See* MPA at 6.) *Colberg* was an eminent domain case, in which the court considered whether the State must compensate shipyard owners when it built a highway bridge over a waterway that cut off upstream access to large ships. (*Colberg*, 67 Cal.2d at 411-13.) The court recognized that modes of commercial transportation had shifted, but that traditional travel via ship and modern travel via highway both used the waterway for public navigation, a trust use. (*Id*. at 421-22.) The court merely reaffirmed that the State may choose to prioritize one trust use over another (i.e., favoring navigation via highway over navigation via ship); it did not authorize the State to define trust uses at will. (*Id*. at 420; *see National Audubon*, 33 Cal.3d at 439, n. 21 [rejecting similarly broad reading of *Colberg*].)

SLC does not have unlimited discretion to define the public trust uses of navigation and

waterborne commerce; rather, it must determine whether sand mining falls under the trust uses established by almost a century of case law. The sand mining activities – by promoting only private use of a public resource – are not a public trust use.

B. Courts Have Universally Analyzed Natural Resource Extraction from Trust Property as Non-Public Trust Uses.

SLC asserts that "courts have long recognized that the production of mineral resources for commercial purposes—including oil, gas, and subsurface minerals—is a public trust use." (MPA at 6.) Again, the Court of Appeal disagreed with SLC's position. (*See Baykeeper*, 242 Cal.App.4th at 236-37.) In fact, California courts have uniformly analyzed resource extraction as a non-trust use, despite an inherent connectivity to water. (*See, e.g., People v. Gold Run Ditch & Mining Co*. (1884) 66 Cal. 138, 151-52 [gold mining analyzed as non-trust use]; *National Audubon,* 33 Cal.3d at 438, 445-48 [water diversions held to be non-trust use]; *Boone v. Kingsbury* (1928) 206 Cal. 148,183 (*Boone*) [oil wells analyzed as non-trust use]. These decisions focused on whether the extractive activity impaired public trust uses, the second step of the *Illinois Central* test.

The Court of Appeal specifically rejected SLC's misreading of *Boone*. (*Baykeeper*, 242 Cal.App.4th at 236-37.) While *Boone* extols the benefits of oil and gas production, nowhere does it make an explicit finding that such activities, or mineral extraction more generally, constitute trust uses. (*See Boone,* 206 Cal. at 181-82; *Baykeeper,* 242 Cal.App.4th at 237 ["[*Boone*] did not actually characterize any private mining activity as a public use of trust property, but instead affirmed a legislative determination that the highly regulated private mining activities authorized by the challenged statute did not interfere with the public trust."].) In other words, *Boone* focused on whether the oil drilling would impair trust uses, the second step in the *Illinois Central* test. As the Court of Appeal concisely stated, "the authority [SLC] cites only reinforces the distinction between a public trust use and a private use which is deemed valid because it does not interfere with the purposes of the public trust doctrine." (*Id*.) The other cases considering extractive activities cited above followed *Boone's* precedent and analyzed the activity as a non-trust use.

Perhaps the clearest articulation of the principle that natural resource extraction is not a

public trust use was made by the Alaska Supreme Court. In *Hayes v. A.J. Associates, Inc.* (1993) 846 P.2d 131, the court specifically rejected the contention that mining on tidelands was a public trust use. (*Id.* at 131-33.) Relying on California law, the court held that "even the most expansive interpretation of the scope of public trust easements would not include private mining enterprises." (*Id*. at 133 [citing *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971)].)

In short, mineral extraction on trust lands is not a public trust use, and as such, courts have analyzed these non-trust uses under the second prong of *Illinois Central* to determine whether the activity impairs or interferes with trust resources and uses.

C. The Legislature Has Determined Mining on Sovereign Lands Is a Non-Trust Use.

Even if the categorization of trust uses is a legislative decision, the Legislature has already defined resource extraction on submerged lands, other than oil and gas drilling, as a non-trust use. The Public Resources Code limits SLC's authority to approve mining leases to those that do "not interfere with the trust upon which such lands are held or substantially impair the public rights to navigation and fishing." (Pub. Res. Code § 6900; *see also id.* § 6895.) Since only non-trust uses are prohibited from impairing trust uses, these provisions establish the Legislature's intent to classify sand mining as a non-trust use. (*See Colberg,* 67 Cal.2d at 419; *National Audubon*, 33 Cal.3d at 440.) Therefore, the Legislature has spoken directly to this issue, and SLC does not have the discretion to go against Legislative intent and determine that sand mining is a trust use.

D. The Fact that Sand Mining May Confer a Public Benefit Does Not Render It a Public Trust Use.

SLC attempts to justify its unlawful determination that sand mining is a public trust use by noting that sand mining confers public benefits. (MPA at 7-8.) However, the Supreme Court has clearly stated that not all activities that confer public benefits are public trust uses. (*See National Audubon,* 33 Cal.3d at 440-41.) "[T]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands . . .." (*Id*. at 441.) If any activity that conferred a public benefit was considered a public trust use, "in practical effect the

doctrine would impose no restrictions on the state's ability to allocate trust property." (*Id.* at 440.) The Court then held that diverting water from Mono Lake for public drinking water supplies, a use that undeniably provides a public benefit, was *not* a public trust use. (*Id*. at 440-41, 445-48.)

The Court of Appeal applied this holding from *National Audubon*, when it rejected SLC's contention that sand mining was a public trust use because it "serves a public need." (*Baykeeper*, 242 Cal.App.4th at 235.) "[A] use does not qualify as a trust use simply because it might confer a public benefit." (*Id*.) Thus, whether mined sand may be used for public infrastructure or habitat restoration is irrelevant for purposes of evaluating whether sand mining is a public trust use. Even if it did have some bearing, it is important to note that nothing in SLC's approval requires the Real Party to sell or use the mined sand for public projects.

II. SLC's Conclusion that Sand Mining Will Not Impair Coastal Beaches Is Not Supported by Substantial Evidence.

In addition to erroneously finding that private sand mining is a public trust use, SLC improperly found that sand mining will not interfere with or impair public trust uses. (*See* SAR 43.) In determining that the leases will not interfere with sediment transport and coastal morphology, SLC relied on a consultant report that blatantly misinterprets the scientific studies upon which it purports to rely. (*See* SAR 39-41.) Because SLC's conclusion relies on evidence that is clearly erroneous, it is not supported by substantial evidence. (*See San Franciscans Upholding the Downtown Plan,* 102 Cal.App.4th at 675.)

The extensive scientific evidence in the record shows that (a) significant erosion at Ocean Beach correlates to reduced sediment within the Bay; (b) sand mining is one of the primary anthropogenic causes of reduced sediment within the Bay; and (c) thus, sand mining is a major cause of coastal erosion. Since certification of the Final Environmental Impact Report ("FEIR"), additional studies compiled in a special volume of Marine Geology published in 2013 have made these conclusions even more certain. (*See* SAR 2100-2425 ("2013 Studies").)

SLC does not dispute that erosion at Ocean Beach is occurring at alarming rates. Yet even when faced with a growing scientific consensus to the contrary, SLC continues to assert that sand

mining has "no or negligible impacts to coastal erosion." (*See* SAR 40-41.) The report prepared by SLC's consultant, Coast and Harbor Engineering ("CHE") during the reapproval process (*see* SAR 1951-82 ("Fenical Report")), purports to address new studies, but merely reiterates the report prepared for the FEIR (*see* AR 918-79). SLC further attempts to avoid reassessing its analysis by asserting that the Court of Appeal has already decided this issue when it upheld the FEIR. (MPA at 11.) In fact, the Court of Appeal determined that SLC never analyzed whether sand mining impaired public trust resources. (*Baykeeper*, 242 Cal.App.4th at 240-43.)[5] Moreover, SLC has an ongoing duty to evaluate the harm to trust resources from permitted activities. (*See National Audubon*, 33 Cal.3d at 447 ["the public trust imposes a duty of continuing supervision over the taking and use of [trust resources]"].) SLC may not dismiss the overwhelming new evidence to blindly conclude that sand mining does not impair trust resources.

SLC relies on the Fenical Report as the basis for its decision, but the report consistently misreads or ignores the relevant scientific evidence. First, for example, the Fenical Report relies heavily on a finding that the mining areas are not naturally replenished with sand, and thus, "the mining areas are not likely to capture sand and induce deficits in other areas (including the Bar and Ocean Beach) . . .." (SAR 1972.) The finding that mining areas are not naturally replenished is based on USGS bathymetric analysis from 1997 and 2008, that showed the holes caused by mining in the Central Bay did not significantly refill with sand during that period. (*Id.*) However, in early 2014, USGS updated its 2008 bathymetric analysis, finding that not only had the mining holes refilled between 2008 and 2014, but there was accretion, or build-up of sand, within the lease areas. (SAR 1642.) The period from 1997 to 2008 represented a period of peak mining activity, during which time 13.5 million cubic yards of sand was mined from the Central Bay (1.35 million cubic yards per year on average). (*Id.*) In contrast, from 2008 to 2014, only 2.2

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[5] Further, SLC does not provide any authority that the CEQA standard and public trust standard are the same. CEQA requires analysis of "significant environmental effects." (Pub. Res. Code § 21002.) The public trust doctrine requires a determination whether public trust uses are "substantially impaired." (*Illinois Central*, 146 U.S. at 435.) SLC's kneejerk application of statutorily defined CEQA standards (MPA at 9) ignores the Court of Appeal's conclusion that the FEIR alone was insufficient to support SLC's public trust analysis (*Baykeeper*, 242 Cal.App.4th at 240-43).

million cubic yards of sand was mined (approximately 0.4 million cubic yards per year), which equals a 71% reduction in extraction rates. (*Id*.) The only difference between the 1997-2008 and 2008-2014 study was the rate of mining. Thus, the most logical reason the mining holes did not refill during the 1997-2008 period is due to the high rate of mining during that period, rather than anything about the transport patterns themselves. In short, the 2014 bathymetric analysis shows that sand does refill the mining holes in periods of reduced mining, indicating that the holes not only have the potential to, but do in fact, capture sand and may induce deficits in other areas, such as Ocean Beach. Thus, one of the major rationales cited for the Fenical Report's conclusion that sand mining would have no impact on coastal erosion has proven to be incorrect. Neither the Fenical Report nor SLC even mentions this updated 2014 evidence.

Second, although purporting to rely on the 2013 Studies, the Fenical Report flatly contradicts those studies when it concludes that sand in the Central Bay lease areas would not make its way to Ocean Beach. (*See* SAR 1958 ["direct transport" from the Central Bay to the Bar to Ocean Beach "does not appear to be occurring."].) In fact, the 2013 Studies conclude that "[d]espite some relatively minor local conflicts, [all methodologies] indicate that the regional-scale net sediment transport direction is seaward," (i.e., from the Bay), "toward the mouth of San Francisco Bay and the open-coast beaches." (SAR 2188; *see also* SAR 2283 [finding that sand on south coast beaches is primarily from the Bay], 2299 ["[b]each-sized sand in the Central Bay, the Golden Gate, the ebb-tidal delta and southern open coast is strongly geochemically linked"].) Also, several papers from the 2013 Studies demonstrated that the primary source of the sand-sized sediment that feeds the Bar and the beaches south of the Golden Gate, (i.e., Ocean Beach), is sediment that flows through the lease areas. (SAR 2188.) In short, the Fenical Report's conclusion that sand from the lease areas would not reach Ocean Beach is unsupported by evidence.

Finally, the Fenical Report ultimately concludes that no impacts to the coast will result from the leases because it finds that "[a]ll studies by a variety of experts suggest that the Bar evolution and related coastal erosion (included [sic] erosion at South Ocean Beach) are controlled by much larger-scale and long-term processes than sand mining." (SAR 1972.) This statement is

patently false.[6] Prior to the FEIR's certification, researchers had concluded that the removal of sand from the Central Bay "is likely to limit the sand supply to adjacent, open-coast beaches." (AR 3381; *see also* AR 9801, 26052 [finding that erosion will likely continue due to the mining of 1 million cubic meters of sand per year on average].) Since the FEIR, the evidence linking sand mining to coastal erosion has continued to mount.

The 2013 Studies show that sand mining contributes to the erosion of beaches, especially when the sand is removed from seaward transport pathways. (SAR 2188; *see also* SAR 2262.) Indeed, because of sand mining's direct contribution to coastal erosion, USGS scientist Dr. Patrick Barnard, in one of the 2013 Studies, specifically addressed the leases at issue here and offered specific ways to minimize the impacts:

> *[T]o minimize the impacts of aggregate mining in west-central San Francisco Bay on the coastal sediment supply, lease sites could be targeted in areas of net sediment transport convergence such as the area of accretion in Pt. Knox Shoal (northern section of PRC709 North) and the three zones of convergence in the lease site to the south (PRC7779 West). At the very least, mining should be focused along bayward-directed sediment transport pathways, such as PRC2036 in Point Knox Shoal, where ongoing heavy mining has resulted in significant local erosion . . . but does not appear to directly impact sediment supply to the mouth of San Francisco Bay. Conversely,* ***mining along distinct seaward-directed pathways, such as the southern section of west-central San Francisco Bay (PRC709 South and PRC7780 South) would directly limit the supply of sediment to the open coast.***

(SAR 2190 [emphasis added].) In short, the leading scientist studying this issue found that these specific sand mining leases impact coastal erosion and recommended that SLC take specific steps to reduce the impacts that these leases would have on coastal beaches–namely, he recommended reducing mining along seaward sediment transport pathways. The Fenical Report does not acknowledge these conclusions. Nor does SLC take any action to mitigate impacts to coastal trust resources as a result of these conclusions. (*National Audubon,* 33 Cal.3d at 446 [SLC must "protect public trust uses whenever feasible"]; *compare Carstens v. Cal. Coastal Com.* (1986)

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[6] SLC failed to consult with USGS scientist Dr. Patrick Barnard, the leading researcher on this issue, despite his availability. (SAR 494.) Dr. Barnard staunchly disagreed with the Fenical Report's interpretation of his studies. (*Id.*)

182 Cal.App.3d 277, 288, 291 [upholding non-trust use of public trust resources because the agency required measures to mitigate impacts to trust uses].)

A review of the record shows that the Fenical Report's, and thus SLC's, conclusion that sand mining is not impairing coastal beaches (SAR 1972) is unsupported and directly contradicted by the evidence. As shown above, the consensus of scientists studying Ocean Beach erosion and sediment transport in the Bay is that sand mining is a principal anthropogenic factor contributing to coastal erosion. As a result, those scientists have suggested specific modifications to the leases to reduce those impacts. SLC has either ignored or mischaracterized this scientific evidence. Thus, SLC abused its discretion because its decision was not supported by substantial evidence and it did not proceed in the manner required by law.

III. SLC's Action Was Prejudicial Error.

As explained above, both of SLC's findings supporting the lease reapproval were unlawful. However, if the Court finds that sand mining is not a trust use but upholds SLC's finding that sand mining will not impair trust uses, the Court should still deny the Join Motion to Discharge the Peremptory Writ of Mandate. SLC's approval of the leases was based on both findings, and it is impossible to discern whether SLC would have approved the leases, if it had found that sand mining was not a trust use. The case law is clear that an agency's public trust determination must be conducted transparently and reflected in the record. (*See Zack's*, 165 Cal.App.4th at 1188-89.) Thus, an unlawful finding that sand mining was a trust use is prejudicial.

CONCLUSION

For the reasons stated above, Baykeeper respectfully asks the Court to deny the Motion to Discharge the Peremptory Writ of Mandate and to order SLC to fully comply with the Writ.

Respectfully Submitted,

DATED: January 30, 2017

SAN FRANCISCO BAYKEEPER

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the action. My business address is 1736 Franklin Street, Suite 800, Oakland, CA 94612.

On January 30, 2017, I served the following document(s), **OPPOSITION TO MOTION TO DISCHARGE PEREMPTORY WRIT OF MANDATE**, on the following parties or attorney for parties, as shown below:

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X BY EMAIL: Per agreement between the parties, I caused each document to be sent by email to the following persons or their representative listed above.

○ **BY FACSIMILE**: I caused each such document to be sent by facsimile to the following persons or their representative listed above.

○ **BY FIRST CLASS MAIL**: I am readily familiar with this business's practice of collecting and processing correspondence for mailing with the U.S. Postal Service. On the date written above, following ordinary business practices, I delivered to the U.S. Postal Service the attached document in a sealed envelope, with postage fully prepaid, addressed as shown above.

I declare under the penalty of perjury that the foregoing is true and correct and that this declaration was executed at Oakland, California on January 30, 2017.