

Center for Biological Diversity, Inc. v. FPL Group, Inc.: Encouraging Wind Energy Production While Protecting the Public Trust

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INTRODUCTION

As the United States seeks alternative energy technologies to reduce our dependence on fossil fuels, our focus has turned to the renewable sources of energy, such as wind, water, geothermal, and solar technologies. The development of multiple sources of energy is imperative for our nation's future development and stability. Energy generated by wind power has many advantages over traditional power generation methods. By replacing energy that releases carbon dioxide with wind energy, the effects of global warming will be reduced. Even considering our enormous rate of energy consumption, the limitless supply of wind power makes wind energy a sustainable source of power, unlike natural gas and petroleum. Wind energy is also generated domestically, which lessens our dependence and simplifies our relationship with foreign governments. Wind energy has been touted as a partial solution to our national recession because an emerging green energy industry will create stable, high-paying jobs while preserving national resources.

While the generation of wind energy is associated with mostly positive changes, there have been resulting environmental impacts and unanticipated costs. Wind energy generation is hampered by high costs related to difficulty in transporting energy and the turbines can be very loud and considered eyesores. One of the biggest challenges to newly proposed wind farms is the migratory birds that are killed or injured by the turbines.¹ Certain species of birds are protected under numerous treaties and federal statutes, such as the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act and the Endangered Species Act.² Even an accidental killing of a protected bird may be a violation of these laws.³ This note will explore the conflicts that arise in developing wind energy while striving to protect the migratory birds that are part of the public trust property.

I. THE INCREASED IMPORTANCE OF WIND ENERGY PRODUCTION

Wind energy currently supplies about two percent of California's total electricity,⁴ and according to the Global Wind Energy Council, the United States is already the largest global producer of wind energy.⁵ But wind energy

¹ Girard P. Miller, *Developers See Green and Neighbors See Red: A Survey of Incentives and Mandates for the Development of Alternative Energy and the Unfolding Challenges*, 3 TEX. J. OIL, GAS & ENERGY L. 117,143 (2008).

² Adam M. Dinnell and Adam J. Russ, *The Legal Hurdles to Developing Wind Power as an Alternative Energy Source in the United States: Creative and Comparative Solutions*, 27 NW. J. INT'L L. & BUS. 535, 556-561 (2007).

³ *Id.*

⁴ Overview of Wind Energy in California, <http://www.energy.ca.gov/wind/overview.html> (last visited Apr. 25, 2009).

⁵ Todd White and Rachel Graham, *U.S. Takes Global Lead in Wind Power, Passes Germany*, Feb. 2, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a5qyeN9A6LIY> (last

production and technology are still in their infancy and the United States, as well as countries all over the world, is planning to further develop its wind energy capabilities. The wind energy industry is on the verge of receiving a huge cash infusion due to the passage of President Obama's stimulus bill, the American Recovery and Reinvestment Act of 2009.⁶ The Recovery Act provides for \$6 billion in loans for renewable power generation, \$2.5 billion for energy efficiency and renewable energy research, and an additional \$500 million to train workers for careers in energy efficiency and renewable energy.⁷

Numerous tax credits are also included in the Recovery Act for individuals and corporations.⁸ Developers of wind energy facilities may qualify for a 30 percent production tax credit or a 30 percent investment tax credit which is also available to homeowners who make residential wind improvements to their homes.⁹ Considering these financial incentives, the number of wind farms is likely to boom. The Department of Energy has already studied the feasibility of the US producing 20 percent of its energy needs from wind power by 2030.¹⁰

II. A RECENT CHALLENGE TO COMPETING INTERESTS IN THE PUBLIC TRUST

With their increasing numbers, wind farms have been the subject of several lawsuits in recent years. In *Center for Biological Diversity, Inc. v. FPL Group, Inc.*, an action was filed against FPL Group, a corporation that operated a number of wind turbines located in California's Altamont Pass.¹¹ Although the wind turbines had been approved through a lengthy process including environmental review, the Center for Biological Diversity ("CBD") felt that the FPL Group's use of first-generation turbines resulted in an unnecessarily high avian mortality.¹² The older turbines produced less energy and more turbines were needed to produce the same amount of energy as a newer turbine.¹³ The increased number of turbines in use resulted in greater numbers of killed birds. CBD brought suit under a common law claim for destruction of public trust natural resources.¹⁴ CBD argued that the wind turbines at the Altamont Pass were responsible for killing and injuring an estimated tens of thousands of

visited Apr. 25, 2009).

⁶ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5.

⁷ *Economic Stimulus Bill Pumps Billions Into Energy Improvements: News Briefs*, 29 ENERGY DESIGN UPDATE 9, 9-10 (Mar. 2009).

⁸ Gregory H. Smith and Jarrett B. Duncan, *Renewable energy incentives abound in recovery act*, N.H. BUS. REV., Mar. 13, 2009.

⁹ *Id.*

¹⁰ US Department of Energy, Energy Efficiency and Renewable Energy, 20% Wind Energy by 2030, http://www1.eere.energy.gov/windandhydro/wind_2030.html (last visited Apr. 30, 2009).

¹¹ *Center for Biological Diversity, Inc. v. FPL Group, Inc.*, 166 Cal.App.4th 1349, 1354 (2008).

¹² *Id.* at 1355-1357.

¹³ *Id.* at 1355.

¹⁴ *Center for Biological Diversity, Inc. v. FPL Group, Inc.*, WL 3543514 at 2 (2006).

birds.¹⁵ The trial court dismissed the action against the FPL Group and found “no statutory or common law authority supports a cause of action by a private party for any violation of the public trust doctrine arising from the destruction of wild animals.”¹⁶

Historically, the public trust doctrine protected the common use of water and waterways for navigation, commerce, and fishing.¹⁷ It prevented the government from selling tidelands and harbors to corporations and required the government to preserve these natural resources for the benefit of the people.¹⁸ As a common law doctrine, the extent of the public trust doctrine and the public’s role in enforcing the public trust rights had not been clearly laid out in regards to undomesticated birds and wildlife.

On appeal, the court addressed whether birds and wildlife are within the scope of the public trust doctrine and the public’s role in enforcing public trust rights.¹⁹ The Court of Appeal found that California’s public trust doctrine clearly covered the protection of wildlife and birds.²⁰ The trial court’s implication that wild animals were not protected under the public trust doctrine, as waterways and tidelands were, was refuted with numerous examples of courts recognizing wildlife to be part of the public trust property.²¹ Further evidence of the importance of preserving and protecting the public’s natural resources was found in the many state and federal statutes enacted to protect them.²² After the court determined that wildlife could be protected as part of the public trust, the issue of standing to enforce the protection of the public trust property was addressed.

III. THE PUBLIC HAS STANDING TO ENFORCE PUBLIC TRUST RIGHTS, BUT AGAINST WHOM?

In *National Audubon Society v. Superior Court*, the California Supreme Court stated that “any member of the general public has standing to raise a claim of harm to the public trust.”²³ While the public agencies are considered the trustee of the public trust over natural resources, the public retains the right to bring claims if the trustee does not carry out its duties.²⁴ The Court confirmed the

¹⁵ *Center for Biological Diversity*[II], 166 Cal.App.4th at 1355.

¹⁶ *Center for Biological Diversity*[I], WL 3543514 at 6.

¹⁷ *Center for Biological Diversity* [II], 166 Cal.App.4th at 1360.

¹⁸ *See City of Berkeley v. Superior Court*, 26 Cal.3d 515 (1980); III. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

¹⁹ *Center for Biological Diversity* [III], 166 Cal.App.4th at 1349.

²⁰ *Id.* at 1363. Wind turbines for the creation of wind energy are just beginning to emerge as a sustainable, clean form of energy. Green energy is poised for a big expansion over the coming years.

²¹ *Id.* at 1360-1364.

²² *Id.* at 1363.

²³ *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 431 (1983).

²⁴ *Center for Biological Diversity*[II], 166 Cal.App.4th at 1366.

important principle that the public does has the standing to enforce public trust property but severely limited this right by requiring all such claims to be brought against the trustee of the public rights, the public agency.²⁵ Individuals cannot bring claims against private parties for the destruction of public trust rights. The rationale behind requiring the governmental agency, acting as the trustee for the public's natural resources, to bring claims for breach of the public trust is for the court to be able to rely on the expertise of the agency.²⁶ If the agency is not involved in the litigation, then court must invest time to acquire the knowledge and skills to effectively evaluate the claim.²⁷ Mandating that the agency bring the suit allows the court to rely on the agency's expertise. The Court considered CBD's claim an attempt to bypass the agency's expertise.²⁸ Even though the Court found CBD had standing to enforce the public trust, the claim was filed against an improper party and was subsequently dismissed.²⁹

IV. THE GOVERNMENT MUST BALANCE COMPETING PUBLIC INTERESTS

The Court noted the strong public interest in allowing for the development of energy through the harnessing of wind power.³⁰ This litigation pitted wind energy production against public trust concerns for the killing of wildlife, which placed the Court in a difficult position. The Court seemed mindful of the importance of developing clean, renewable energy sources. On the other hand, the public certainly has an interest in preserving wildlife and this interest has been codified in numerous federal and state statutes. Ultimately, the issue became a question of degree that was best left to agency expertise and the political process.

The Court did take judicial notice of the many proceedings conducted by the Alameda County Board of Supervisors before issuing permits to the owners and operators of the turbines.³¹ Additional conditions to mitigate avian mortality were required for the FPL Group to obtain their conditional use permits.³² The Court acknowledged the steps that the public authorities took to address the problem of aviary mortality. Ultimately, CBD must bring a claim against Alameda County or the administrative agencies involved with granting the conditional use permits.

²⁵ *Id.* at 1367.

²⁶ *Id.* at 1368.

²⁷ *Id.* at 1368.

²⁸ *Id.*

²⁹ *Center for Biological Diversity[III]*, 166 Cal.App.4th at 1349.

³⁰ *Id.* at 1369.

³¹ *Id.* at 1356, 1357.

³² *Id.* at 1357.

V. BALANCING WIND ENERGY PRODUCTION WHILE PREVENTING THE
DESTRUCTION OF WILDLIFE

California's public trust doctrine has been interpreted broadly to encompass wildlife and birds. It is a useful tool for the protection of our natural resources, but is subject to serious limitations. The public may only bring claims of breach of the public trust against the governmental agency entrusted with protecting those resources. The primary complaint of the plaintiffs, that by operating the wind turbines the FPL Group engaged in an illegal taking of raptors and birds protected by federal and state statutes, was not resolved by the court. Under the public trust doctrine, the public's only recourse against destruction of the public trust is with the public agencies that have the duty to maintain and preserve those resources.

The importance of developing renewable energy sources for the future cannot be overstated. Green energy is poised for a big expansion over the coming years. One positive aspect of the litigation is increased attention and scientific studies which may provide greater understanding of avian mortality from wind turbines. Increased knowledge about how birds are harmed by the wind turbines and improved wind turbine technology may lead to greater protection of the birds while still allowing wind energy to develop into a significant source of power for the future.