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OFFICE OF THE SECRETARY
FEDERAL MARITIME COMMISSION

Docket No. 09-08

SSA TERMINALS, LLC
AND
SSA TERMINALS (OAKLAND), LLC

COMPLAINANTS

v

THE CITY OAKLAND, ACTING BY AND
THROUGH ITS BOARD OF PORT
COMMISSIONERS

RESPONDENT

BRIEF AMICUS CURIAE OF THE ATTORNEY
GENERAL OF THE STATE OF CALIFORNIA

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INTRODUCTION

The State of California (“State” or “California”) has granted its sovereign tide and submerged lands to eighty-one counties, municipalities, and special districts throughout California to be developed for statewide purposes consistent with the public trust for commerce, navigation, and fisheries, as local conditions dictate. Based upon local needs and geography, local grantees have preserved these granted lands as open space and wildlife habitat, developed them as small-boat marinas, or built them out as commercial fishing harbors. A very few, like the Port of Oakland (“Port”), have been fashioned into huge international cargo facilities that are the engines for California’s economic well-being.

Two things, however, unite all of the sovereign land grants the California Legislature has made. First, the lands granted, and the revenues that those public trust lands generate, remain subject to the State Legislature’s ultimate authority. The Legislature can amend or even revoke any grant of its sovereign lands and return the land, and the revenue the land generates, to direct State management. Second, the local grantees of state sovereign lands are bound to use the lands and the revenues generated therefrom only for purposes that confer a statewide benefit and that are consistent with the public trust. California law strictly prohibits local grantees from using revenue generated from granted sovereign lands for “municipal” purposes such as storm drains, libraries, or convention facilities.

The Federal Maritime Commission has requested that the California Attorney General submit a brief *amicus curiae* “on the issues of state law raised in the pleadings,

including, but not limited to, the effect of the Port's status under California law as a tidelands trustee and the effect of the Port Revenue Fund." This brief will discuss the unique nature of the lands the State granted to the City of Oakland ("City"), and which the Port now manages, including the history of the state grants to the City, the frequent State amendment of those grants, the State's retained authority over the granted lands, and state-law limitations on how the Port may use the lands and the revenues generated therefrom.

I. THE LANDS GRANTED TO THE CITY OF OAKLAND REMAIN CALIFORNIA'S SOVEREIGN LANDS.

The rule under which California and the other forty-nine states claim title to the lands beneath their navigable waters is one basic to the American constitutional system. It is based on the premise that "when the Revolution took place the people of each state became themselves sovereign" (*Pollard's Lessee v. Hagan*, 44 U.S. 212, 235 (1845)), and "all rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the national government by the Constitution of the United States." (*Shively v. Bowlby*, 152 U.S. 1, 15 (1893).) Thus, "the shores of navigable waters, and the soils under them, were not granted under the Constitution to the United States, but were reserved to the states respectively." (*Pollard's Lessee, supra*, 44 U.S. at 230.)

When California entered the Union on September 9, 1850, pursuant to the equal-footing doctrine, it acquired the rights in the beds of its navigable waters to the same extent as those held by the original thirteen States. (*Oregon ex rel. State Land*

Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 373-374 (1977).) California received title to these tidelands, submerged lands, and beds of navigable lakes and rivers within its borders subject to the public trust for commerce, navigation, fisheries and other recognized uses (hereafter referred to generally as “the public trust”)¹. (*Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 15-16 (1935); *People v. California Fish Co.*, 166 Cal. 576, 584, 138 P. 79, 82 (1913).)

Lands subject to the public trust are of a unique character. (*Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452-453 (1892).) With its roots in Roman Law, the public trust doctrine establishes that California holds its “sovereign lands” in trust for public purposes, traditionally delineated in terms of commerce, navigation and fisheries. (*City of Berkeley v. Superior Court*, 26 Cal.3d 515, 521, 606 P.2d 362, 364-365 (1980).) However, the permissible range of uses is much broader, including the right to hunt, bathe or swim, and the right to preserve these lands in their natural state. (*Ibid.*)

California’s power to control, regulate and use its navigable waterways and the lands lying beneath them, when acting within the terms of the public trust, is absolute. (*Marks v. Whitney*, 6 Cal.3d 251, 260; 491 P.2d 374 (1971) citing *California Fish, supra; Colberg, Inc. v. State of California, ex rel. Dept. of Pub. Wks.*, 67 Cal.2d 408, 416-417; 432 (1967).) The mere act of filling and reclaiming these lands, after California’s admission to the Union, and after it acquired ownership of them, does not alter their

¹ Tidelands are those lands lying between the lines of mean high tide and mean low tide. Submerged lands are those lands lying waterward of the line of mean low tide. (*City of Long Beach v. Mansell*, 3 Cal.3d 462, 478, n. 13, 476 P.2d 423, 434 (1970).)

character as state sovereign lands. (*City of Long Beach v. Mansell*, 3 Cal.3d 462, 479; 476 P.2d 423, 435 (1970).²)

II. CALIFORNIA RETAINS SOVEREIGN AUTHORITY OVER THE LANDS GRANTED TO THE CITY OF OAKLAND FOR THE PORT.

A. The Legislature Has Continually Exercised Its Authority Over the Grant to the City.

The California Legislature in 1911 made the initial grant to the City, which resulted in the construction of the current Port. Chapter 657 of the California Statutes of 1911 granted to the City “all right, title and interest of the State of California held by said state by virtue of its sovereignty in and to all tide lands and submerged lands whether filled or unfilled” within the City’s boundaries. (Cal. Stats. 1911, ch. 657, § 1.) The Legislature specified that the City was to use the granted lands to establish a harbor and associated structures and uses. The Legislature also mandated that the City could not convey the lands, but that it could grant leases to private parties for limited terms. (*Id.*, § 1(a).) The grant and any leases the City granted were limited to “purposes consistent with the trusts upon which said lands are held by the State of California, and with the requirements of commerce or navigation at said harbor.” (*Ibid.*) In other words, the Legislature burdened the City’s title and right to use the granted lands with the restriction that the City’s use of the lands be consistent with the public trust for commerce, navigation and fisheries.

² Portions of the sovereign lands that constitute the present Port have been filled and reclaimed in the process of constructing the harbor facilities.

The City established the Port of Oakland in 1927, and it vested control of Port property, including the land the State had granted, in a seven member Board of Port Commissioners that the Oakland City Council appoints. The Port deposits all revenue that it generates into a special fund in the city treasury designated as the Port Revenue Fund.

In the century since the original grant to the City of the land on which the Port operates, the Legislature has amended the City's grant 23 times.³ Amendments to the grant include, but are not limited to: (1) extending the maximum term for leases of Port property to 50 years (Cal. Stats. 1917, ch. 59, § 1(a)); (2) again extending the maximum term for leases of Port property to 66 years (Cal. Stats. 1981, ch. 1016, § 4); (3) allowing the City to transfer land subject to the original grant to the California Toll Bridge Authority for use for the San Francisco-Oakland Bay Bridge (Cal. Stats. 1937, ch. 96, § 2); (4) reservation in the State of all minerals underlying the Port's land, including oil and gas (Cal. Stats. 1937, ch. 343, § 1(e)); (5) reservation in the State of the ability to use any of the granted lands for state highway purposes without compensation to the City (Cal. Stats. 1937, ch. 908, § 2); (6) permission for the City to grant Port land to the California National Guard (Cal. Stats. 1939, ch. 143); (7) expansion of the grant to allow for the

³ Cal. Stats. 1911, ch. 657; Cal. Stats. 1917, ch. 59; Cal. Stats. 1919, ch. 516; Cal. Stats. 1923, ch. 174; Cal. Stats. 1931, ch. 621; Cal. Stats. 1937, ch. 45; Cal. Stats. 1937, ch. 96; Cal. Stats. 1937, ch. 343; Cal. Stats. 1937, ch. 908; Cal. Stats. 1939, ch. 143; Cal. Stats. 1939, ch. 146; Cal. Stats. 1939, ch. 147; Cal. Stats. 1941, ch. 720; Cal. Stats. 1943, ch. 607; Cal. Stats. 1953, ch. 658; Cal. Stats. 1955, ch. 1028; Cal. Stats. 1957, ch. 709; Cal. Stats. 1960, ch. 15; Cal. Stats. 1961, ch. 931; Cal. Stats. 1965, ch. 1737; Cal. Stats. 1981, ch. 1016; Cal. Stats. 1986, ch. 1415; Cal. Stats. 2004, ch. 542.

construction of Oakland International Airport (Cal. Stats. 1955, ch. 1028); (8) modification of the grant to allow for the construction of sports stadiums (Cal. Stats. 1960, ch. 15); and (9) permission for the City, with prior approval from the California State Lands Commission,⁴ to exchange granted land for other property useful for public trust purposes to facilitate the toxic remediation and renewal of a dilapidated portion of the Oakland waterfront. (Cal. Stats. 2004, ch. 542.) This list of state amendments to the Legislative grant to the City is by no means comprehensive, but it does indicate the Legislature’s continuing involvement in and authority over the Port’s uses of the trust lands.

While the State’s grant to the City is couched in terms normally used for a grant in fee simple—“all right, title, and interest”—in fact, the State’s grants of its sovereign public trust lands to municipalities are in trust, with the municipality acting as a trustee for the State. Under California public trust law, municipal grantees of public trust property “assume the same burdens and [are] subject to the same regulations that appertain to other trustees of such trusts.” (*City of Long Beach v. Morse*, 31 Cal.2d 254, 257, 188 P.2d 17, 19-20 (1947).) This means that while grantees (such as the City in this case) hold title to the State’s sovereign property in fee simple, they do so *only for the purpose of carrying out the objects of the public trust*. (*Mallon v. City of Long Beach*, 44 Cal.2d 199, 208, 282 P.2d 481, 486-487 (1955); *Morse, supra*, 31 Cal.2d at 258, 188 P.2d

⁴ The State Lands Commission is the state agency to which the Legislature has delegated the day-to-day supervisory powers over California’s sovereign public trust lands. (California Pub. Resources Code, § 6301.)

at 20.) Therefore, the Port's authority in its role as trustee of the State's sovereign public trust lands is to act by and for the State in furtherance of statewide, public trust purposes. The Port does not, and must not, act in its capacity as a local entity in its uses of the granted lands; rather, it acts as a trustee of the State's sovereign public trust lands.

The United States Supreme Court and California courts have recognized States' retained powers as sovereign over the lands such as those California granted to the City. (See e.g. *Illinois Central, supra*, 146 U.S. at 453-454.) One California Court of Appeal has described California's continuing role with respect to its granted sovereign lands as follows:

Upon grant to a municipality subject to the public trust, and accompanied by a delegation of the right to improve the harbor and exercise control over harbor facilities, the lands are not placed entirely beyond the supervision of the state, but it may, and indeed has a duty to, continue to protect the public interests.

(*City of Coronado v. San Diego Unified Port District*, 227 Cal.App.2d. 455, 473-474, 38 Cal.Rptr. 834, 844 (1964).)

As the ultimate trustee of the public trust, the California Legislature can at any time alter, amend, or entirely revoke a grant of sovereign lands. (*People ex rel S.F. Bay etc. Com. v. Town of Emeryville*, 69 Cal.2d 533, 549, 466 P.2d 790, 800 (1968); *Mallon, supra*, 44 Cal.2d at 208-209; 282 P.2d at 487.) In *Mallon*, the California Supreme Court disposed of the City of Long Beach's argument that the State's grant in fee simple of sovereign public trust lands gave the City rights in the property that were beyond the power of the Legislature:

Even if a conveyance, such as the one to the city of Long Beach in the present case, from the state to a municipal corporation is considered as a contract between the city and

the state or as creating property interests in the city, the state acting through the Legislature has the power to alter contractual or property rights acquired by the municipal corporation from the state for governmental purposes.

(*Mallon, supra*, 44 Cal.2d at 209, 282 P.2d at 486-487.)

In 2010, the California Legislature affirmed the State's control over public trust lands granted to municipalities by adding section 6009 to the California Public Resources Code. The Legislature found that "[t]idelands . . . granted by the Legislature . . . remain subject to the public trust, and remain subject to the oversight authority of the state by and through the State Lands Commission." (California Pub. Resources Code, § 6009, subd. (c).) Further, the Legislature emphasized that municipal grantees must manage their lands for statewide public trust purposes and not for local or municipal purposes:

Grantees are required to manage the State's tidelands and submerged lands consistent with the terms and obligations of their grants and the public trust, without subjugation of statewide interests, concerns, or benefits. . . .

(California Pub. Resources Code, 6009, subd. (d).) The Legislature also noted that its findings in this statute were declaratory of existing law. (Cal. Stats. 2010, ch. 330, § 4.)

Through the years the California Legislature has repeatedly asserted its role as the ultimate trustee of its sovereign public trust lands, including assertion of its power to modify the powers and limitations contained in the City's grant, as set forth above. The State's many amendments to the initial grant of the land on which the Port operates demonstrate two things. First, the State retains the authority as the sovereign to amend and modify the estate held by the City and managed by the Port. Although granted to the City, the lands remain under the Legislature's ultimate control. Second, California's

control is not just theoretical. Again and again the State Legislature has asserted its authority to change the terms of the grant such as enlarging the uses to which the lands can be made and requiring that the City transfer— without compensation—portions of the City's granted lands to other entities for alternate state-wide public trust purposes such as streets and highways. The lands consisting of the Port of Oakland remain under Port management purely at the sufferance of the California State Legislature.

B. The Legislature Has the Authority to Terminate the Public Trust in the Port Revenue Fund.

As discussed above, California's Legislature retains ultimate control over the granted lands constituting the Port. In addition to the power to alter or revoke the grant itself, the Legislature retains the power to terminate the public trust in all or a portion of Port Revenue Fund, resulting in all or a portion of that fund reverting to the State treasury. As is outlined in the Port's motion to dismiss at pages 6 through 9, the Port segregates all of the revenue generated from the state-granted lands into a special Port Revenue Fund. The money in the Port Revenue Fund is impressed with the public trust because the lands that generated those funds are so impressed. (*Morse supra*, 31 Cal.2d at 257-258, 188 P.2d at 20.)

Under California trust law, the revocation of a trust results in the reversion of the trust assets to the settler—here the State. (*Mallon, supra*, 44 Cal.2d at 208-209, 282 P.2d at 486-487 [Legislature's freeing of public trust from portion of revenue from trust lands results in transfer of money so freed to the state treasury].) However, until the Legislature acts to revoke the grant, or to revoke the public trust over the Port Revenue

Fund, the Port Revenue Fund, and all liability for Port-incurred debts, resides with the Port.

III. CALIFORNIA'S ADDITIONAL RETAINED POWERS OVER THE SOVEREIGN LANDS GRANTED TO THE CITY AND MANAGED BY THE PORT.

California does not need legislative action to assert its authority over the trust lands granted to the City. California has the power, acting through proper officers and agencies, to invoke judicial intervention to compel performance of specific grant and public trust provisions, to enjoin a breach thereof, or to compel a grantee to redress a breach. (E.g. *State of California ex rel. State Lands Comm'n. v. County of Orange*, 134 Cal.App.3d 20, 184 Cal.Rptr. 423 (1982) [affirming State Lands Commission authority to bring an action against Orange County to halt spending of money generated from public trust lands for purely municipal purposes].) Unlike California cities generally, the Port may not use its state-granted lands for non-trust uses nor may it spend the Port Revenue Fund for non-trust purposes—and especially not for traditionally municipal purposes. (*Morse, supra*, 31 Cal.2d at 258, 188 P.2d at 20.) Thus, the California Supreme Court determined in *Mallon, supra*, that the City of Long Beach's attempt to spend revenue derived from its granted trust lands for storm drains, a city incinerator, a public library, a public hospital, public parks, a fire alarm system, and other purely municipal purposes was a violation of the trust under which Long Beach received the granted lands from the State. (*Mallon, supra*, 44 Cal.2d at 488-489, 282 P.2d. at 211-212.)

The California state agency that administers the State's sovereign public lands is the State Lands Commission. The State Lands Commission consists of the Lieutenant

Governor and Controller, both state-wide elected constitutional officers, and the Director of the Department of Finance, a member of the Governor's cabinet. The Legislature has delegated to the State Lands Commission "exclusive jurisdiction over all ungranted tidelands and submerged lands owned by the State, and of the beds of navigable rivers, streams, lakes, bays, estuaries, inlets, and straits, including tidelands and submerged lands or any interest therein . . ." (Cal. Pub. Res. Code, §§ 6101; 6301.) In addition to directly managing the State's ungranted sovereign lands, the State Lands Commission is the trustee of and has supervisory rights over sovereign lands that the State has granted to municipalities. (Cal. Pub. Res. Code, § 6301 ["All jurisdiction and authority remaining in the State as to tidelands and submerged lands as to which grants have been or may be made is vested in the Commission."] see also *Graf v. San Diego Unified Port Dist.*, 7 Cal.App.4th 1224, 1231 fn. 9, 9 Cal.Rptr.2d 530 (1992) [State Lands Commission exercises oversight authority over Port District's administration of public trust lands granted to it].)

The Port is required to maintain records pursuant to accepted accounting principles and to submit a detailed accounting of trust revenues to the State Lands Commission each year. (Cal. Pub. Res. Code, § 6306, subd. (a), (c).) This accounting allows the State Lands Commission to fulfill its legislative charge and audit the Port Revenue Fund to determine whether the Port is properly spending its trust-generated revenue and is properly accounting for that spending. Thus, the State Lands Commission functions as the Legislature's day-to-day eyes and ears with respect to oversight of granted sovereign, public trust lands. The Commission's staff is in frequent contact with

the Port to discuss the Port's leasing practices, its expenditures from the Port Revenue Fund, and countless other matter regarding the Port's operation on the state-granted public trust lands.

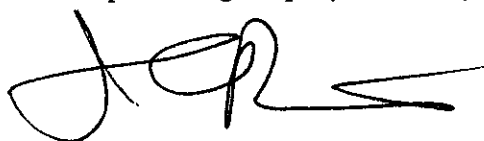
CONCLUSION

In sum, pursuant to California law, the California Legislature retains the ultimate authority over the sovereign public trust lands that it granted to the City and that the Port administers. The Legislature at any time may amend or even revoke its grant to the City of those lands, and the Legislature may take the revenue existing in the Port Revenue Fund if the Port is not using those funds for statewide, public trust purposes. On a day-to-day basis, the State Lands Commission monitors the Port to ensure that the Port is using the granted lands, and the revenues generated from those lands, only for purposes consistent with the public trust. If the Port were to act in a manner inconsistent with its duties as a trustee of the State's sovereign property, as has occurred at other ports in California, the State Lands Commission retains the authority to compel the Port with to comply with accepted public trust principles.

Dated: September 2, 2011

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'J. Rusconi', with a long horizontal flourish extending to the right.

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CERTIFICATE OF SERVICE

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September 2, 2011

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RE: *SSA Terminals, Inc., et al. v. Port of Oakland, et al.*
Federal Maritime Commission Docket No. 09-08.

Dear Ms. Gregory:

This is to certify that the undersigned, Joseph C. Rusconi, California State Bar Number 78814, is admitted to the practice of law in the State of California and is a member in good standing with The State Bar of California.

Sincerely,

A handwritten signature in black ink, appearing to read "JRUSCONI", written over a horizontal line.

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