

ANDREW JONES  
MARY JO LANZAFAME  
ASSISTANT CITY ATTORNEYS

GEORGE F. SCHAEFER  
DEPUTY CITY ATTORNEY

OFFICE OF  
**THE CITY ATTORNEY**  
CITY OF SAN DIEGO

**JAN I. GOLDSMITH**  
CITY ATTORNEY

CIVIL DIVISION  
1200 THIRD AVENUE, SUITE 1620  
SAN DIEGO, CALIFORNIA 92101-4178  
TELEPHONE (619) 236-6220  
FAX (619) 236-7215

February 9, 2009

REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

IMPARTIAL ANALYSIS OF LEGISLATIVE AUTHORITY  
TO AMEND THE 1931 TIDELANDS TRUST

**INTRODUCTION**

On January 27, 2009, the City Council voted in closed session to consider in open session a proposal to support state legislation to amend the 1931 Tidelands Trust, Stats. 1931, Ch. 937 ("Trust"). The City is the trustee of the Children's Pool under the terms of the Trust.

In the case of *Valerie O'Sullivan v. City of San Diego*, case number GIC 826918, the San Diego Superior Court ruled the legislative intent in creating the Trust was that the Children's Pool was to be "used exclusively for a public park and children's pool." The Superior Court stated in its decision of August 26, 2005: "Recognizing that a bathing pool for children existed on the land when the Trust was created and that the land was situated adjacent to a public park, and would be an extension of same, the legislative intent was clear. The entrusted land *shall* be used *exclusively* for a public park which includes a children's pool, and that the purpose of that use shall be recreational." The Superior Court also stated in its decision that the terms of the Trust do not authorize the Children's Pool to be used as a habitat, marine sanctuary, zoo or seal watching facility.

In accordance with Council's directive, the City Attorney's Office has prepared a proposed resolution for the Council's consideration in open session on February 17, 2009. The proposed resolution requests that the California Legislature amend the Trust to permit the City, in its role as trustee, to have discretion to permit marine mammals to inhabit the Children's Pool. Furthermore, the proposed resolution calls for an amendment to the Trust to also allow the City discretion to preserve the marine mammals' habitat at the Children's Pool. This report discusses the legal authority for the Legislature to amend the Trust to allow for such additional public uses.

## BACKGROUND

California acquired title to the navigable waterways and tidelands by virtue of its sovereignty when it was admitted to the union in 1850. *Marks v. Whitney*, 6 Cal. 3d 251, 258 n.5 (1971), citing *Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 15-16 (1935). Tidelands are defined as those lands lying between the lines of mean, high and low tide covered and uncovered successfully by the ebb and flow of the tides. *Id.* at 257-258, citing *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 478 n.13 (1970). The State holds tidelands in trust for public purposes; moreover, the power of the State to control, regulate and utilize its navigable waterways and the lands lying between them, when acting within the terms of the trust, is absolute except as limited by the federal government. *Id.* at 258, n.5, citing *City of Long Beach*, 3 Cal. 3d at 482; *Id.* at 208, citing *People v. California Fish Co.* 166 Cal. 576, 597 (1913) and *Colberg, Inc. v. State of California ex rel. Dept. Pub. Wks.*, 67 Cal. 2d 408, 416-422 (1967).

The traditional purposes for which the State holds tidelands in trust are navigation, commerce and fisheries. *Id.* at 258 n.5, citing *City of Long Beach*, 3 Cal.3d at 482. The origins of the doctrine that the public holds the rights to tidelands for fishing, commerce and navigation originated with Roman law. *Graf v. San Diego Unified Port District*, 7 Cal. App. 4th 1224, 1229 n.5 (1992), citing *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 521 (1980). The State, as trustee, may delegate its authority to manage and control public use of tidelands to another governmental entity. *Id.* at 1229, citing *City of Long Beach v. Lisenby*, 175 Cal. 575, 579 (1917).

In establishing the 1931 Tidelands Trust, Stats. 1931, Ch. 937, the Legislature delegated to the City of San Diego the State's authority to manage and control public use of Children's Pool Beach. The 1931 Tidelands Trust legislation states the following:

Section 1. There is hereby granted to the city of San Diego, county of San Diego, all the right, title and interest of the State of California, held by said state by virtue of its sovereignty, in and to all that portion of the tide and submerged lands bordering upon and situated below the ordinary high water mark of the Pacific ocean . . . to be forever held by said city of San Diego and its successors in trust for the uses and purposes and upon the express conditions following, to wit:

(a) That said lands shall be devoted exclusively to public park, bathing pool for children, parkway, highway, playground and recreational purposes, and to such other uses as may be incident to, or convenient for the full enjoyment of, such purposes;

(b) The absolute right to fish in the waters of the Pacific Ocean over said tidelands or submerged lands, with the right of convenient access to said waters over said lands for said purpose is hereby reserved to the people of the State of California.

### **THE LEGISLATURE HAS THE AUTHORITY TO MODIFY THE TRUST'S TERMS**

The United States Supreme Court in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892) held that the State holds tidelands in trust for its citizens and its ownership and control can be delegated but never relinquished completely. The Court stated:

The state can no more abdicate its trust over property in which the whole people are interested ... than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes.... Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the state can be resumed at any time.

146 U.S. at 453.

Application of this principle can be found in the case of *Mallon v. City of Long Beach*, 44 Cal. 2d 199 (1955). The Legislature conveyed tide and submerged lands containing oil and gas to the City of Long Beach in fee simple subject to the express condition that tidelands be "devoted exclusively to the improvement of commerce, navigation, and fisheries for the benefit of all the people of the state." Later the Legislature passed a statute that permitted income derived from the sale of oil and gas to be used for non-trust purposes. In rejecting a challenge to this statutory modification of the public trust, the California Supreme Court held that it is well established that "[t]he trust in which tide and submerged lands are held does not prevent the state from reclaiming tide and submerged lands from the sea where it can be done without prejudice to the public right of navigation and applying them to other purposes and uses." *Id.* at 206.

The *Mallon* court held that the Legislature has the power to repeal statutory trusts, upon which the property to the trust would revert to the state. The California Supreme Court reasoned that the title that the state possessed passes to a city trustee only for the purpose of the trust; therefore, should that purpose become extinct, the title reverts back to the state as a matter of law. *Id.* at 208. More importantly, the *Mallon* court recognized that not only does the Legislature have the power to revoke a public trust, it also has the power to modify the public trust or alter contractual or property rights acquired by the municipality from the State. *Id.* at 209.

The other major case on this issue of modification of trusts is *City of Coronado v. The San Diego Unified Port District*, 227 Cal. App. 2d 455 (1964). The appellate court in that case found that the Legislature had the power to revoke a municipality's grant in trust through legislation. Based on the *Mallon* decision, the appellate court held that the Legislature has the purpose to alter, amend or revoke a public trust for the benefit of the general public. "Logically, there is no cogent reason why, in order to enhance the public welfare, the state should not be entitled or legally able to alter or extinguish the interest of a political or corporate subdivision in any grant made by the state to it, not in fee simple but in trust for the benefit of the public in general." *Id.* at 472.

The appellate court in *San Diego Unified Port District* noted that the trust in that case provided that the tidelands would be "forever held" by the City of Coronado and there was no express reservation of the power to revoke the trust. The appellate court concluded that the Legislature could nevertheless alter, amend or revoke the trust applying traditional trust principles. Just as the trustor and beneficiaries acting together may alter, amend, or revoke a private trust, so can the State, as trustor representing the trust beneficiaries, alter, amend or revoke a public trust. *Id.* at 475.

The proposed legislative amendment is consistent with the legal obligation of a trustee of public lands. In the recent case of *Center for Biological Diversity, Inc. v. FPL Group, Inc.*, 166 Cal. App. 4th 1349, 1363 (2008), the appellate court held that protection of undomesticated wildlife is a trustee's obligation under the public trust doctrine. Preservation of the marine mammals' habitat at the Children's Pool serves to not only enhance the recreational opportunities of the public to view and enjoy the marine mammals, but it also serves to protect the marine mammals.

### CONCLUSION

The Legislature granted to the City "all the right, title and interest of the State of California" in the tidelands at the Children's Pool and did not expressly reserve the right to modify or revoke the Trust. The Legislature nevertheless has the power to modify the Trust to change the uses of the Trust in a manner consistent with the public trust doctrine. The proposed legislative amendment to the Trust is consistent with the original purpose of the trust that there be a public park at the Children's Pool that is a source of recreation for children.

JAN I. GOLDSMITH, City Attorney

By:



George F. Schaefer  
Deputy City Attorney