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Water Law - Public Trust Doctrine

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WATER LAW—PUBLIC TRUST DOCTRINE

WATER LAW—PUBLIC TRUST DOCTRINE—The California Supreme Court holds that infringement of the values protected by the Public Trust Doctrine is a separate ground for challenging water appropriations, and that the continuing nature of the state's duty as trustee prevents the acquisition of a vested right to appropriations that injure navigation, commerce, and fisheries. *National Audubon Society v. Superior Court of Alpine County,* 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983), *cert. denied.*

STATEMENT OF THE CASE

Mono Lake is the second largest lake in California. Fed by five fresh water streams, the lake itself is saline. In 1941, the City of Los Angeles first began diverting water from Mono Lake's fresh water feeder streams. Since that time, the level of Mono Lake has dropped forty six vertical feet[1]. The volume of the lake has been cut in half and its surface area reduced by one third. Wild fowl population, particularly the California Gull and Wilson's Phalorope, has been seriously impacted.[2] The shrinking lake level has exposed previously safe nesting islands to predators.[3] The increased salinity[4] of the lake threatens the brine shrimp population on which the birds feed.[5] While the precise effect of continued diversions is contested,[6] there can be no doubt that Mono Lake's ecological balance

1. Information on the environmental and ecological consequences of Los Angeles' diversion on Mono Lake has been taken from: Young, *The Troubled Waters of Mono Lake,* NATIONAL GEOGRAPHIC 520 (Oct. 1981). Hoff, *The Legal Battle Over Mono Lake,* 2 CAL. LAW 28 (Jan. 1982).

2. 95% of California's gull population and 25% of the total species population nests at the Lake. Half of the world's Wilson Phalaropes breed at Mono Lake. CALIF. DEPT. WATER RESOURCES, REPORT OF THE INTERAGENCY TASK FORCE ON MONO LAKE 4 (Dec. 1969).

3. In 1978 more than 45,000 gulls nested at Negrit Island in Mono Lake. In 1979, the falling lake levels allowed coyotes to reach nesting areas. Only 12,500 gulls nested there last year. In 1981, 95% of hatched chicks did not survive to maturity. Hoff, *supra* note 1, at 30.

4. Mono Lake loses water by evaporation and seepage. Natural salts do not evaporate with the water. The saline level has in the past been balanced by the constant addition of fresh water from the Lake's feeder streams. Young, *supra* note 1.

5. Hoff, *supra* note 1, at 30.

6. For instance, the Department of Water and Power of the City of Los Angeles contends that in from 80 to 100 years, at current diversion levels, the Lake will stabilize with a surface area of 38 square miles (from a pre-diversion area of 90 square miles). This would mean a 56% smaller surface area and a 42% shallower lake. Plaintiffs contend that within 50 years the Lake will be at least 50 ft. shallower than it is now and will hold less than 20% of its natural volume. Plaintiffs also believe that the Lake may not stabilize at all, but will continue to diminish until only a dry salt bed remains. National Audubon Society v. Superior Court of Alpine County, 33 Cal. 3d 419, 430, 658 P.2d 709, 715, 189 Cal. Rptr. 346, 352 (1983) *cert. denied,* 104 S. Ct. 413 (1983). It is interesting to note that in an earlier case involving compensation for the riparian land owners around Mono Lake, Los Angeles' own experts conceded that the City's diversion, "will ultimately result in practically draining the lake of most of its water." City of Los Angeles v. Aitken, 10 Cal. App. 2d 460, ___, 52 P.2d 585, 587 (1935).

will be seriously compromised.[7] Additionally, the lake's value as a recreational and geological resource will be greatly diminished if Los Angeles pursues its present level of appropriations.

Los Angeles' diversions were begun pursuant to decrees issued by the State Water Board.[8] Virtually the entire flow of Mono Lake's feeder streams was granted to the City by a board which believed that it had no choice but to approve the application despite its harmful environmental consequences.[9] The primary reason for this belief was "the established policy of this state that the use of water for domestic purposes is the highest use of water."[10]

In 1979, concerned with the results of stepped up diversions,[11] the San Francisco-based Sierra Club and the Washington-based National Audubon Society[12] filed for injunctive and declaratory relief in the Superior Court of Mono County.[13] In January 1980, the defendant, Department of Water and Power of the City of Los Angeles [hereinafter referred to as the DWP], cross complained against 117 individuals and entities claiming water rights in the Mono Basin.[14] In February 1980, one cross defendant, the United States, removed the case to the Federal District Court for the Eastern District of California.[15]

Plaintiffs contended throughout that public rights in the waters of Mono Lake are protected by a public trust administered by the state. Plaintiffs claimed that the state's power under this public trust was independent of its power as administrator of the appropriate water rights system. Most importantly, the state's duty to protect public trust interests (navigation,

7. The diversions may constitute a threat to human health as well. Almost 20,000 acres of lake bed are now exposed to the air. These beds, composed of a very fine silt, contain a high concentration of alkali and other minerals which may cause respiratory problems when airborne. CALIF. DEPT. WATER RESOURCES, *supra* note 2, at 22.

8. Division of Wat. Resources Dec. 7053, 7055, 8042, 8043 (April 11, 1940).

9. *National Audubon,* 33 Cal. 3d at 439, n. 7, 658 P.2d at 714, 189 Cal. Rptr. at 351.

10. CAL. WATER CODE § 1254 (West 1971).

11. Los Angeles only completed the second aqueduct in 1970. Previously the diversions from Mono Lake's feeder streams had amounted to 57,067 acre ft. per year. Between 1970 and 1980, the City diverted an average of 99,580 acre-ft. per year from the Mono Basin, *National Audubon,* 33 Cal. 3d at 429–30, 658 P.2d at 714, 189 Cal. Rptr. at 351.

12. Any member of the public has standing to raise a claim of harm to the public trust. Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

13. National Audubon Society v. Department of Water and Power, Civ. No. 6429 (Superior Ct. Mono County, Cal. filed May 21, 1979). The Audubon Society asked the Court to limit the amount of water Los Angeles can take from the stream in the Mono Basin.

14. In cross-complaining, the DWP sought a basin-wide water rights adjudication which would fix the rights of all Mono Basin water users. Guy, *The Public Trust Doctrine and California Water Law: National Audubon Society v. Dept. of Water and Power,* 33 HASTINGS L.J. 654, 655, n. 9 (Jan. 1982).

15. National Audubon Society v. Department of Water and Power, Civ. No. 5-80-127 (E.D. Cal. removed Feb. 20, 1980).

commerce, and fisheries) required the state to limit diversions harmful to the preservation of these interests in Mono Lake.[16]

The DWP countered this argument by asserting that the Public Trust Doctrine has been "subsumed" into the appropriative water rights system. The DWP stood by their vested appropriative rights under the California Water Code, rights they claim must continue regardless of the consequences to trust interests.[17]

The Federal District Court stayed the action to allow the California state courts to rule on two issues of state law: the interrelationship of the Public Trust Doctrine and the California Water Rights System,[18] and the necessity for plaintiff to exhaust administrative remedies through the State Water Board before seeking a remedy in the court.

In a suit for declaratory judgment on these issues, the Alpine County Superior Court granted summary judgment to defendants, DWP.[19] Plaintiffs filed a Petition for Mandate with the California Supreme Court in November of 1981, requesting the Court to vacate the Order granting summary judgment.[20] The California Supreme Court agreed to hear arguments in the case.

The court held that the state, as sovereign, had an affirmative duty to consider the effect of diversions upon interests affected with the public trust and to protect those interests whenever feasible, that the state's power as administrator of the trust extended to revocation of previously granted rights, and that no one may acquire a vested right to appropriate water in a manner harmful to trust interests. The court also concluded that it was not necessary to plaintiffs to exhaust their administrative remedies before challenging a water appropriation in court.[21]

This note will set out a brief historical summary of the Public Trust Doctrine and the California Appropriative Water Rights System. The conflict between their competing claims and an analysis of the court's decision will follow, with a particular emphasis on the effect of the court's resolution on the notion of a vested water right in California.

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16. Guy, *supra* note 14, at 680.

17. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C. D. L. REV. 233, 238 (1980).

18. In other words, could Plaintiffs challenge Board issued permits and licenses to appropriate water as violative of the public trust held by the state, or were they limited to statutorily mandated challenges based on reasonable and beneficial use.

19. National Audubon Society v. Department of Water and Power, Civ. No. 639, slip op. at 1–2 (Super. Ct. Alpine County, Cal. Sept. 8, 1981).

20. National Audubon Society v. Department of Water and Power, Civ. No. 639 (Sup. Ct. Cal. filed Nov. 30, 1981).

21. *National Audubon* 33 Cal. 3d at 453, 65 P.2d at 732, 189 Cal. Rptr. at 369.

BACKGROUND

The Public Trust Doctrine

The Public Trust Doctrine is an ancient legal theory with its origins in Roman and English law. In the United States, it can be defined as the right of the individual state to regulate and control its navigable waters and the lands underlying them on behalf of its citizens' interests in certain public uses, namely navigation, commerce, and fisheries.[22] The necessity of public access to navigable waters and tide lands lies at the root of this doctrine.[23] Under the Doctrine, navigable waters and tide lands are seen as uniquely public resources which should never fall under the control of private interests.[24] Indeed, the ability of an individual to use public trust resources for navigation, commerce and fishing has been called an important indicia of a free society.[25]

The Public Trust Doctrine's English and Roman origins have influenced but not controlled the development in the United States.[26] Roman law posited a common ownership of navigable waters and tide lands.[27] In England, the ownership of tidal waters rested in the sovereign. The sovereign's grants of private rights of use of these lands and waters and the subsequent exclusion of the public from them threatened to cripple public navigation, commerce, and fishing.[28] In attempting to remedy this problem, the English common law courts adopted the public trust theory to reinstate public access to the sea. Public easements of use were guaranteed for navigation, fishing, and commerce.[29] These easements, while subject to parliamentary restraint and modification,[30] survived any private ownership of the shoreline or waters, including that of the king.[31]

The particular trust uses of navigation, commerce, and fishing are the

22. *See* Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892). A discussion of the Public Trust Doctrine, its origins and development in the United States can be found in Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention,* 68 MICH. L. REV. 471 (1970).

23. Guy, *supra* note 14, at 657.

24. Sax, *supra* note 23, at 484.

25. Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).

26. For instance, the Roman theory of common ownership precluded anyone, including the sovereign from asserting title to navigable waters and tidelands. Guy, *supra* note 14, at 657. Additionally English Public Trust protections applied only to tidal waters. Because of the existence of large rivers in the United States, suited to navigation, commerce and fishing, the public trust doctrine has been extended to non-tidal waters in this country. Burney v. Keokuk, 94 U.S. 324 (1876).

27. Guy, *supra* note 14, at 658 n. 27.

28. *Id.*

29. *Id.*

30. Sax, *supra* note 23, at 476.

31. "The king, by virtue of his proprietary interest, could grant the soil, so that it should become private property, but his grant was subject to the paramount right of public use of navigable waters, which he could neither destroy or abridge." People v. New York and Staten Island Ferry Co., 68 N.Y. 71, 76 (1877).

logical result of Roman and English dependence upon the sea. In incorporating the common law Public Trust Doctrine into United States law, early United States Supreme Court decisions also accepted navigation, commerce and fishing as public trust values to be protected. The Court extended the reach of the Doctrine to include the non-tidal rivers so vital to American trade and development.[32] Early American public trust decisions assert the sovereignty of individual states over navigable waters and the soils beneath them.[33] This sovereignty, inherited from the English sovereign[34] gave to the states the right to regulate, improve, and secure these waters and their underlying lands for the benefit of the citizenry.[35]

There was a controversy in the early cases as to the state's right to sell trust resources into private ownership.[36] In *City of Hoboken v. Penn. R.R. Co.*,[37] the United States Supreme Court held that state legislators could sell public trust lands free of all trust obligations. Some legislatures began to see their shorelines and tidelands as a quick route to state solvency.[38] By the end of the nineteenth century, the Court was forced to reevaluate state power to convey absolute title to trust resources. In 1892, the Court decided *Illinois Central R.R. v. Illinois*,[39] which remains the seminal public trust case in the United States.[40]

The Illinois legislature's absolute grant of Chicago's immensely valuable waterfront prompted the Supreme Court to set criteria for conveyances of trust resources. *Illinois Central* established the right of state legislatures to pass bare,[41] title to trust property while enjoining the legislature from ever abdicating their supervisory role over navigation, commerce and fishing in such properties.[42] Perhaps most importantly, *Illinois Central* established a judicial attitude toward legislative grants of trust

32. Barney v. Keokuk, 94 U.S. 324 (1876).

33. Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842).

34. Stockton v. Baltimore & N.Y.R. Co., 32 F. 9, 19 (D.N.J. 1887).

35. Gray v. Reclamation District, 174 Cal. 622, 163 P. 1024 (1917), *see* Shively v. Bowlby, 152 U.S. 1 (1894).

36. See discussion of early cases in dissenting opinion Illinois Central R.R. v. Illinois, 146 U.S. 387, 464 (1892) (Shiras, J., dissenting).

37. 124 U.S. 656 (1888).

38. *See* City of Berkeley v. Superior Court of Alameda County, 26 Cal. 3d 515, 531 n. 15, 606 P.2d 362, 370–71, 162 Cal. Rptr. 327, 335–36 (1980).

39. 146 U.S. 387 (1892).

40. In 1869, the Illinois Legislature granted the entire commercial waterfront of Chicago to the Illinois Central Railroad. The grant included all the land underlying Lake Michigan for one mile out from the shoreline and extending one mile in length along the central business district of Chicago. By 1873, the Legislature regretted their colossal give away and repealed the 1869 grant. The Supreme Court, in *Illinois Central*, upheld the Legislature's repeal, affirmed the State's ownership of the land, and concluded that the trust existing in the State, "cannot be relinquished by the transfer of the property." *Id.* at 453.

41. See discussion of the *jus privatum* and the *jus publicum* in *Illinois Central*, 146 U.S. at 458.

42. "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them under the use and control

properties. After *Illinois Central,* courts would look askance at any absolute relinquishment of public trust lands, at any exercise of trusteeship that restricted the rights of the public in trust properties or seemed to benefit a particular private group.[43]

Individual states, as trustees, have developed policies for the supervision of trust burdened resources. In California, the judicial and legislative pronouncements on the Public Trust Doctrine go back to the early days of statehood.[44] California assumed title to navigable waters and tidelands upon statehood in 1850.[45] The state legislature began almost immediately to sell enormous tracts of tidelands. These transfers purported to convey trust property (the tidelands) in fee simple absolute.[46]

The California Supreme Court early on acknowledged the state's ability to transfer absolute title to small parcels of trust lands when these conveyances specifically promoted trust interests.[47] Faced with the California legislature's massive divestiture of public trust lands, the California Supreme Court reiterated the principle of *Illinois Central.* The court made it clear that absent express legislative intent to convey tidelands for specific trust purposes,[48] a sale of tidelands might pass title to the soil, but, "it cannot be effective to give the patentee a right to destroy, obstruct or injuriously affect the public right of navigation."[49] Thus, while the court did not absolutely invalidate tideland transfers, it preserved a public easement for the trust purposes of navigation, commerce and fisheries.[50]

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of private parties, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." *Id.* at 453.

43. See Sax, *supra* note 22, at 490. *Illinois Central* did allow absolute conveyances of small parcels expressly designated for trust purposes (navigation, commerce and fishing) and of parcels which could be disposed of without impairment of trust values. *Id.* at 452.

44. *See e.g.,* Eldridge v. Cowell, 4 Cal. 80 (1854).

45. State v. Superior Court of Lake County, 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696 (1981).

46. City of Berkeley v. Superior Court of Alameda County, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980). The Court determined that tideland conveyances made pursuant to an 1870 statute did not pass into private ownership free of the public trust.

47. *Eldridge,* 4 Cal. at 87.

48. *E.g.,* "foundations for wharves, piers, docks and other structures in aid of commerce. . . ." *Illinois Central,* 146 U.S. at 452, *quoted in* People v. California Fish Co., 166 Cal. 575, ___, 138 P. 79, 83 (1913).

49. People v. California Fish, 166 Cal. at ___, 138 P. at 84. The Court here relied on an 1879 amendment to the California State Constitution which prohibited private holders "claiming or possessing the frontage of tidal lands of a harbor, bay, inlet . . . or other navigable water . . ." from attempting to "exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water." The Amendment further required a "liberal construction (of the provision) so that access to the navigable waters of this state shall be always attainable for the people thereof." CAL. CONST., art. XV, § 2,now encoded as art. X, §§ 3 & 4.

50. People v. California Fish, 166 Cal. at ___, 138 P. at 84.

The state in its role as trustee, would continue to oversee privately held trust resources for the benefit of all the people.[51]

Recent California decisions have expanded the definitions of navigation, commerce and fisheries.[52] Most importantly, the courts have allowed for the changing nature of trust uses.[53] These uses now encompass recreational, environmental and ecological values including, "preservation of those lands (tidelands) in their natural state. . . ."[54] Where the California trust cases generally concern lands underlying navigable waters, a recent California case has established that the public trust principles articulated in the tidelands cases apply equally to non tidal navigable waters.[55] The California Supreme Court has held that, under the principles set forth in *Illinois Central* and the California trust cases, the power of the state in administering the trust resource extends to revocation of previously granted rights and to enforcement of the trust against resources long thought free of the trust.[56] The state may choose between trust uses,[57] and has the power, "to destroy the navigability of certain waters for the benefit of others. . . ."[58]

The reach of the Doctrine and the trusteeship powers of the state have been well litigated in California. The focus on state power can be attributed to the particular posture of public trust cases. Typically, the private holder of a tideland grant would bring suit to have the grant declared free of any trust encumbrances.[59] In opposing this fee simple conveyance, the California courts have focused on the power of the state as trustee. *National Audubon v. Superior Court of Alpine County,* is an attempt to clarify the responsibilities of the state as administrator of the public trust. The

51. Grantees would hold tidelands subject to a public easement "and to the right of the State, as administrator and controller of these public uses and the public trust, . . . to enter upon and possess the same . . . and to make such improvements as may be deemed advisable for these purposes." *Id.* at ___, 138 P. at 88.

52. Public trust easements have been held to include the right to fish, hunt, bathe, swim and to use for boating and general recreational purposes, the navigable waters of the State. *City of Berkeley,* 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327. Bohn v. Albertson, 107 Cal. App. 2d 728, 238 P.2d 128 (1951).

53. Colberg, Inc. v. California, 67 Cal. 2d 408, ___, 432 P.2d 3, 12, 62 Cal. Rptr. 401, 410 (1967).

54. Marks v. Whitney, 6 Cal. 3d 251, 260, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971).

55. *Superior Court of Lake County,* 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696.

56. *City of Berkeley,* 26 Cal. 3d 515, 606 P.2d 362,162 Cal. Rptr. 327.

57. *Colberg, Inc.,* 67 Cal. 2d at ___, 432 P.2d at 10, 62 Cal. Rptr. at 408. In *Colberg,* the State of California decided to build a bridge which seriously affected the navigability of the Stockton Deep Water Channel. The Court upheld the State's right, as Trustee, to impair the navigation of the channel to achieve an improvement of commercial intercourse (the bridge) for the benefit of all the people.

58. *Gray,* 174 Cal. 622, 163 P. 1024.

59. *E.g., Superior Court of Lake County,* 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696; Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790.

state, after initial attempts at divestiture, finds itself exercising substantial control over enormously valuable resources. This control and how it should be exercised in the water rights context is the central question of *National Audubon*.

The California Appropriative Water Rights system

California water law developed independently of the Public Trust Doctrine. While the Public Trust Doctrine focused on the preservation of public rights in privately held property, the appropriative water right systems sought to protect the private water user so as to encourage maximum water usage and accompanying economic development.[60]

Made up of a mixture of riparian and appropriative rights, California water law is based upon reasonable and beneficial use.[61] In determining reasonableness, the State Water Board must balance competing beneficial uses and their impact upon the public welfare.[62] Reasonableness must necessarily be decided in relation to a particular set of circumstances and is subject to changes in those circumstances.[63] Along with the uses traditionally recognized as beneficial,[64] California statutorily recognizes the "use of water for recreation and preservation and enhancement of fish and wildlife resources" as a beneficial use.[65] The California Water Code also provides for preferred uses, according domestic[66] use the number one priority.[67] Additionally, state policy declares that the rights of municipalities to acquire and hold water rights for existing and future needs are to be protected to the fullest extent.[68]

The agency responsible for the determination of reasonable and beneficial use in the public interest is the California Water Resources and Control Board [hereinafter referred to as the Board]. The forerunner of this agency was created in 1913.[69] The early Board's responsibilities were limited to determining whether unappropriated water existed. Absent a

60. Guy, *supra* note 14, at 668.

61. CAL. CONST. art. XIV § 3. *See* People *ex rel.* State Water Resources Control Bd. v. Forni, 54 Cal. App. 3rd 743, 126 Cal. Rptr. 851 (1976).

62. CAL. WATER CODE §§ 1255, 1257 (West 1971).

63. Environmental Defense Fund v. East Bay Municipal Utility District, 26 Cal. 3d 183, 195, 605 P.2d 1, 6, 161 Cal. Rptr. 466, 471 (1980). Frederick Walston characteristizes the change in circumstances necessary to trigger a change in the Board's perception of "reasonable" as "vastly" changed circumstances. Walston, *The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy,* 22 SANTA CLARA L. REV. 63, 90–91 (1982).

64. Mining, agriculture, municipal use, domestic use, industrial use.

65. CAL. WATER CODE § 1243 (West Supp. 1984).

66. Domestic use includes "consumption for the sustenance of human beings, for household conveniences, and for the care of livestock." Prather v. Hoberg, 24 Cal. 2d 549, 562, 150 P.2d 405, 412 (1944).

67. CAL. WATER CODE § 106 (West 1971).

68. CAL. WATER CODE § 106.5 (West 1971).

69. Water Commission Act Stats. 1913, c. 586 at 1012.

competing appropriator, the granting of a permit to appropriate was an automatic act, requiring no exercise of discretion.[70] Since its formation and particularly since the mid 1950s, the discretionary authority of the Board has been greatly expanded.[71] In determining reasonable and beneficial use, the Board is required to take instream[72] values into consideration, as well as consumptive uses.[73] The Board has the power to deny or condition permits for appropriative uses which might interfere with the "public interest."[74]

Upon receipt of a permit from the Board, diversion, and application to beneficial use, a water right "vests" in the appropriator.[75] The use pattern of privately held water rights has reflected the state's changing economy.[76] The complex statutory scheme administered by the Board has supported and encouraged the private utilization of water resources which contributed to California's economic growth. While some public trust uses have been statutorily recognized, these uses have not been accorded the special character of trust uses.[77] Instead, like any other water use, they have taken their place in the beneficial and reasonable use balancing act.

The Public Trust Doctrine and the Appropriative Water Rights System: The Conflict

The Public Trust Doctrine, as it has been interpreted, affords far reaching protection to public rights of access to navigable waters for navigation,

70. Tulare Water Co. v. State Water Commission, 187 Cal. 533, 202 P. 874 (1921).

71. *See* CAL. WATER CODE §§ 1243, 1253, 1255, 1257 (West 1971 & Supp. 1984) *see also* Fullerton v. California State Resources Control Bd., 901 Cal. 3d 590, 153 Cal. Rptr. 518 (1979) and People v. Shirokow, 26 Cal. 3d 301, 605 P.2d 859, 162 Cal. Rptr. 30 (1980).

72. Instream water uses refer to uses which require that water not be diverted from its natural channels. Water use for fish, wildlife and recreation are examples of instream water uses. *See* Johnson, *supra* note 17, at 233.

73. CAL. WATER CODE §§ 1243, 1243.5, 1255 (West 1971 & Supp. 1984). However, the California State Water Resources Board has so far refused to grant a permit for an in-stream appropriation of water to provide minimum flow guarantees during low months to protect fish resources. *See Fullerton,* 90 Cal. 3d 590, 153 Cal. Rptr. 518.

74. CAL. WATER CODE §§ 1255, 1256 (West 1971). *See* Bank of America Nat'l. Trust & Sav. Assn. v. State Water Resources Control Bd., 42 Cal. App. 3d 198, 116 Cal. Rptr. 770 (1974).

75. Inyo Consolidated Water Co. v. Jess, 161 Cal. 516, 119 P. 934 (1911). A water right, once vested, is a species of real property and cannot be taken by the state without compensation. *See* Locke v. Yorba Irrigation Co., 35 Cal. 2d 205, 217 P.2d 425 (1950), City of Los Angeles v. Aitken, 10 Cal. App. 2d 460, 52 P.2d 585 (1935).

76. Walston, *supra* note 63, at 88.

77. For instance, the California Water Code recognizes recreation and preservation of fish as a beneficial use of water. Both of these water uses would come within the definition of public trust values. The State Water Code, however, merely recognizes them as beneficial uses of water. They are not entitled to the special protection accorded to uniquely public resources by the Public Trust Doctrine. *See* CAL. WATER CODE § 1243 (West Supp. 1984).

commerce and fishing. The state, as trustee, is charged with the duty to regulate and improve[78] these waters for all the people.

The underlying principle of California's water law, indeed of western water law, is maximum beneficial use.[79] The economic development of the entire region has been inextricably linked to water uses which often require diverting water from its natural channels.[80] These large scale diversions have a disastrous effect on protected trust interests.[81] Yet, appropriators claim a vested right to continue diversions which injure and destroy trust uses. California has recognized vested rights in diversions which injure and destroy trust uses. These vested rights can be revoked only upon a showing that the appropriator's use has become "unreasonable." the conflict between the public trust doctrine and the appropriative water rights system revolves around the question of how long any western state can continue to wear two hats, one as trustee and the other as administrator of maximum beneficial use.

National Audubon Society v. Superior Court of Alpine County

In *National Audubon,* The California Supreme Court examined the role of the Public Trust Doctrine in California's water rights system. The court affirmed the existence of a separate public trust challenge to allocative decisions. Reasonable and beneficial use will no longer be the only basis for protesting a Board granted license to divert.

After careful analysis of the judicial development of the Doctrine, the court refused to find that it had been "subsumed" into the appropriative water rights system.[82] The court also refused to find that the public trust was adequately served by the state's use of public property for public purposes.[83]

In *National Audubon,* the court spoke of the state's "affirmative duty"[84]

78. *Illinois Central,* 146 U.S. at 455–56.

79. F. TREALEASE, WATER LAW 4 (3d ed. 1979).

80. Walston, *supra* note 63, at 79.

81. "Thousands of rivers, streams and lakes in the West are dried up completely by appropriators each year with disastrous consequences for fish and other living things which depend on water for survival." Johnson, *supra* note 17, at 233, n. 2.

82. *National Audubon,* 33 Cal. 3d at 446, 658 P.2d at 727, 189 Cal. Rptr. at 363–64. The court's refusal was based on a recognition that, "both the public trust doctrine and the water rights system embody important precepts . . ." for an intelligent allocation of the State's water resources. *Id.* The court rejected the California Attorney General's concept of trust use as "public use." Thus, no irrevocable grant of a trust resource for the public purpose of increasing tax revenues, or some other public purpose unrelated to navigation, commerce and fishing, in the vicinity of the source stream, would be permissible under the doctrine. *Id.* at 441–42, 658 P.2d at 723–24, 189 Cal. Rptr. at 360.

83. *Id.* at 442, 658 P.2d at 724, 189 Cal. Rptr. at 360–61.

84. *Id.* at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365–65. The court found this affirmative duty existed within the California Water Code, and the California Environmental Quality Act. *See* CAL. WATER CODE §§ 1243, 1243.5, 1257 (West 1971 & Supp. 1984). CAL. PUB. RES. CODE § 21000–21176 et seq. (West 1977 & Supp. 1984).

to consider the public trust implications of allocation decisions affecting navigable waters.[85] Under *National Audubon,* the state not only has the duty to take trust uses into account when approving appropriations, but the power to revoke previously granted rights which may later interfere with interests protected by the trust.[86] In defining the state's powers and duties, the court relied upon the public easement theory developed in the tideland cases.[87] The court determined that the public easement existing in the state's navigable waters prevents the acquisition of a vested right to appropriations which harm trust values.[88] In so doing, the court set the stage for public trust challenges to all previously granted water rights.

After this bold assertion of the state's responsibility and power, the court departed from previous judicial trust interpretations. The rule developed in the tideland cases forebade the conveyance of trust resources free of trust considerations except in certain narrowly prescribed circumstances.[89] The *National Audubon* court's analysis of the Doctrine explicitly recognizes the state's responsibility to protect the trust resource, "surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."[90] The court, however, found itself unable to employ this interpretation of public trust protections without some "modification."[91] The court recognized that the current diversions from the tributaries of Mono Lake are harmful to trust uses.[92] Under the Doctrine, as previously interpreted, the state had a responsibility to protect navigation, commerce and fishing from the harmful effects of the activities of private individuals. Yet, the court could not ignore the historical imperatives underlying the appropriative water rights system. Faced with California's reliance on large scale diversion for her economic development,[93] the court constructed an equation in *National*

85. In *National Audubon,* the California Supreme Court took the logical step of applying the Public Trust Doctrine to non-navigable tributaries to navigable water bodies. The court reasoned that as the Doctrine had been used to constrain fills of non-navigable waters, it could also be used to constrain extractions from non-navigable tributaries which adversely affect navigation, commerce, and fishing in the navigable waters. *See* People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 4 P. 1152 (1884); People v. Russ, 132 Cal. 102, 64 P. 111 (1901).

86. *National Audubon,* 33 Cal. 3d at 448, 658 P.2d at 728, 189 Cal. Rptr. at 365.

87. *Id.* at 440, 658 P.2d at 722–23, 189 Cal. Rptr. at 359–60.

88. *Id.* at 446, 658 P.2d at 727, 189 Cal. Rptr. at 364. A grantee of a public trust resource may assert a vested right to the "servient estate (the right of use subject to the trust), . . ." *Id.* at 441, 658 P.2d at 723, 189 Cal. Rptr. at 360. As a corollary to this principle, under the public trust cases laid out by the court, the grantee of a public trust resource is not entitled to compensation when the state chooses to "enter upon and possess" the trust resource. *Id.* at 440–41, 658 P.2d at 722–723, 189 Cal. Rptr. at 360.

89. *See* Sax, *supra* note 22.

90. *National Audubon,* 33 Cal. 3d at 442, 658 P.2d at 724, 189 Cal. Rptr. at 361.

91. *Id.* at 427, 658 P.2d at 712, 189 Cal Rptr. at 349.

92. *Id.* at 425, 658 P.2d at 711, 189 Cal. Rptr. at 348.

93. *Id.* at 447, 658 P.2d at 727, 189 Cal. Rptr. at 364.

Audubon. The equation balances the "concerns"[94] of Los Angeles with the impact of diversions on Mono Lake. Private diversions which harm trust uses in navigable waters will be allowed when these harms are unavoidable.[95]

The court's imposition of the balancing test in the area of public trust protection for navigable waters is a departure from earlier trust cases. The state must now consider the effect of a diversion on trust resources and preserve "so far as consistent with the public interest" the uses protected by the trust.[96] Trust uses must be protected "whenever feasible."[97] The state may have to allow appropriations which do harm to trust values "[a]s a matter of practical necessity. . . ."[98] The legislature, acting independently, or through the Water Board, has the power to permit diversions from one part of the state to another that "[d]o not promote and may unavoidably harm . . . trust uses. . . ."[99] In the area of the state's navigable waters, *National Audubon,* sets a standard of public trust protection that is quite distinct from the standard set for tideland resources.

In *National Audubon,* the California Supreme Court strove to give the Public Trust Doctrine teeth in the water allocation process. The court holds that the state's authority under the Doctrine extends even to the revocation of previously granted rights. Yet, the court states that "historical necessity"[100] and present reliance on large scale diversions cannot be ignored. The situation of the individual appropriator must be weighed against the harm to trust resources.

It must be remembered, and the court plainly states, that the questions[101] answered in *National Audubon* do not determine the ultimate fate of Mono Lake.[102] Rather, the court in affirming public trust challenges to water diversions, offers the Board and the courts a basis for reexamination of the dilemma posed by Mono Lake.[103]

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94. *Id.* at 449, 658 P.2d at 729, 189 Cal. Rptr. at 365–66.
95. *Id.* at 447, 658 P.2d at 727, 189 Cal. Rptr. at 364.
96. *Id.* at 448, 658 P.2d at 728, 189 Cal. Rptr. at 365.
97. *Id.* at 447, 658 P.2d at 728, 189 Cal. Rptr. at 364.
98. *Id.* at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365.
99. *Id.* at 447, 658 P.2d at 727, 189 Cal. Rptr. at 364.
100. *Id.* at 446–47, 658 P.2d at 727, 189 Cal. Rptr. at 364.
101. In addressing itself to plaintiff's need to exhaust administrative remedies, the court found statutory and precedential authority existed for the concurrent jurisdiction of the courts and the State Water Board in water rights cases. *Id.* at 452, 658 P.2d at 731–32, 189 Cal. Rptr. at 368.
102. "Our objective is to resolve a legal connundrum in which two competing systems of thought—the public trust doctrine and the appropriative water rights system—existed independently of each other, espousing principles which seemingly suggested opposite results. *Id.* at 453, 658 P.2d at 732, 189 Cal. Rptr. at 369.
103. *Id.*

DISCUSSION

In considering the validity of a public trust challenge to water appropriations, the California Supreme Court made an exhaustive review of the principals of the Public Trust Doctrine and the appropriative water rights system. The court set out a detailed analysis of decisional history on both theories and considered the views of expert commentators. Though the eventual fate of Mono Lake is still undecided, the court's decision takes a strong stand on the increasingly serious conflict between public and private rights in water resources.

The court was presented with a clash of values in *National Audubon*. Mono Lake is a treasure of national significance. The lake is being destroyed by Los Angeles' diversions pursuant to state grants of water rights which did not consider ecological or recreational trust values. Los Angeles' need for water is apparent; her reliance great. In the end, it may be determined that the City's need outweighs the state's duty to preserve the lake for all of the people. Yet, whatever the consequences in the case of Mono Lake, the court has called into question the whole nature of a vested water right in California.

The court found the continuing nature of the state's authority to exercise control of trust resources to be the "dominant theme"[104] of the public trust cases. Thus, the state may not abdicate its supervisory responsibility over navigable waters.[105] Because of the state's continuing trusteeship, no absolute grant, even of a usufructory right, may be made in California's navigable water or non-navigable tributaries.[106] The court's reasoning here comports well with previous public trust decisions. *Illinois Central* prohibits any state relinquishment of control of the state's navigable waters.[107] The California trust cases hold that a public easement exists in all trust resources conveyed by the state into private hands.[108] The only exception to this rule is in those few instances where the resource becomes useless for trust purposes,[109] or where the conveyance is made expressly to promote trust goals.[110]

The California Water Rights System, while considering the changing nature of reasonable and beneficial use, acts to convey vested property

104. *Id.* at 438, 658 P.2d at 721, 189 Cal. Rptr. at 358.

105. *Id.* at 447–48, 658 P.2d at 728, 189 Cal. Rptr. at at 365.

106. *Id.* at 440–41, 658 P.2d at 723, 189 Cal. Rptr. at 360.

107. *See* note 42 *supra*.

108. *See, e.g.*, People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913); *City of Berkeley*, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327; *Colberg, Inc.*, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401.

109. *City of Berkeley*, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327. This exception would not apply to navigable waters which would not, generally, become useless for trust purposes.

110. *Id.* at 524, 606 P.2d at 366, 162 Cal. Rptr. at 331.

rights in water usage to private individuals.[111] Until *National Audubon,* these water rights were not held subject to the state's power to retake them for the protection of navigation, commerce and fisheries.[112] Thus, while the exigencies of the California water situation may require the granting of water rights which injure public trust uses, these grants are "non-vested usufructory rights,"[113] subject to revocation and reallocation.

The potential consequences of this decision on California water users are enormous. After *National Audubon,* any member of the public may challenge any surface water diversion as injurious to the public trust.[114] Water users whose diversions are presently depleting California's navigable lakes and streams have been put on notice. They may no longer ignore the effect of these diversions on public trust values. In addition to being held subject to beneficial and reasonable use, a water right is now held subject to a public trust easement. This easement allows the State Water Board to revoke a previously granted right which harms specific trust values.

The court's adherence to the easement theory, as developed in tideland cases, cannot be carried over completely in the water rights context.[115] Water resources do not lend themselves to simultaneous public and private use as do land resources. The state's right to enter upon and use tidelands for trust purposes does not necessarily foreclose the use of these lands for private purposes. Trust uses of water, generally involving the preservation of in-stream flows, are, however, inimical to diversionary water uses. An either/or situation is created. This aspect of water resources allocation, coupled with California's historical and present dependency on large scale diversions, forced the court to qualify some of its strong language. The feasibility of protecting public trust interests becomes part of the equation. Indeed, the state's responsibility toward administering the public trust resource becomes an equation, a balancing act, which must take Los Angeles' "concerns" into account.[116]

Certainly *National Audubon* does depart from earlier public trust decisions in this balancing approach. The element of discretion in the state's trusteeship has previously involved choosing between trust uses.[117] This discretion was a recognition of the potential for clashes between navi-

111. See discussion of California water rights system in text accompanying notes 60–81.

112. Only by a showing of unreasonable or non-beneficial use could a "vested" water right be revoked by the state.

113. *National Audubon,* 33 Cal. 3d at 427, 658 P.2d at 712, 189 Cal. Rptr. at 349.

114. Diversions injurious to the public trust sets up an extremely broad category. See text accompanying notes 52–54.

115. The court acknowledges the intrinsic differences in the resources. *National Audubon,* 33 Cal. 3d at 447, n. 26, 658 P.2d at 727, 189 Cal. Rptr. at 364.

116. *Id.* at 448–49, 658 P.2d at 729, 189 Cal. Rptr. at 365–66.

117. *Colberg, Inc.,* 67 Cal. 2d at ___, 432 P.2d at 12, 62 Cal. Rptr. at 410.

gational (including recreational and environmental concerns), and commercial trust values. The cases interpret this clash as a flexibility inherent in the doctrine.[118] The state is not to be "burdened with an outmoded classification favoring one method of utilization over another."[119] The reliance or need of the individual appropriator is not a navigational or commercial, or fishing related trust value. Consideration of the reliance of private water users by the State Water Board and the courts is an extension of the state's discretion in the public trust arena.

There is a glimmer of a precedent for the court's departure in *City of Berkeley v. Superior Court of Alameda County.*[120] In *City of Berkeley,* the California Supreme Court held that tidelands which had been rendered useless for trust purposes in reasonable reliance on a previous grant might pass to the individual holder free of the trust.[121] While this holding would not generally apply to water resources, the court's willingness to consider the situation of the individual holder of a trust resource may have influenced the *National Audubon* decision. Additionally, there is simply no logical way to avoid a balancing test when competing claims in water resources are in question. Economic and social considerations demand the continuance of large scale diversions for the foreseeable future. If a strict application of the Public Trust Doctrine bars Los Angeles from appropriating the water of Mono Lake, the City will have to look elsewhere for water. Other trust protected water resources will be threatened. The California Supreme Court is not yet willing to set a limit on the growth of urban centers dependent upon imported waters. Thus, an additional component has been added to the Doctrine as it is applied to diversions from surface waters. Considerations of Los Angeles' need will, to some degree, determine the degree of public trust protection afforded to Mono Lake.

It is tempting here to accuse the court of backpeddling on its affirmation of "the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protecttion only in rare cases when the abandonment . . . is consistent with the purposes of the trust."[122] In a sense, this is correct. *National Audubon* will be cited for the proposition that, at least in water resources, trust uses must be weighed against non-trust related uses. It is too early to say whether *National Audubon* will stand for its affirmation of the Public Trust Doctrine or for the escape clause the court creates in the Doctrine.

Ultimately, the court's decision upholds the Public Trust Doctrine as

118. Marks v. Whitney at 6 Cal. 3d at 260, 491 P.2d at 380, 98 Cal. Rptr. at 796.
119. *Colberg, Inc.* at 67 Cal. 2d at ___, 432 P.2d at 12, 62 Cal. Rptr. at 410.
120. 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980).
121. *Id.* at 535–36, 686 P.2d at 373, 162 Cal. Rptr. at 338.
122. *National Audubon,* 33 Cal. 3d at 442, 658 P.2d at 724, 189 Cal. Rptr. at 361.

a check to the appropriations system.[123] In the context of Mono Lake, the doctrine provides a basis for consideration of environmental factors. Yet, the protections afforded by the Public Trust Doctrine are not purely, nor even primarily, environmental protections. Navigation, commerce and fishery do not necessarily relate to conservation or preservation of the state's water resources. The trust, administered for the benefit of the people of the state, must be responsive to the needs and desires of those people.[124] In the latter part of the twentieth century, the use of the Public Trust Doctrine has reflected the public perception that trust resources must be protected from purely market place decisions.[125] Recent cases have expanded the concept of navigability to include recreation, environmental and ecological uses.[126] The Doctrine has been used in these cases to protect instream, non-consumptive water uses. This is not to say that the shape of the Doctrine cannot change as public perception changes. But for now, *National Audubon*'s use of the Doctrine to promote a reconsideration of the environmental impact of diversions on Mono Lake is in keeping with the judicial trend.[127]

Despite its expansion of the state's discretionary power, *National Audubon* is a positive signpost in the environmental struggle. The Public Trust Doctrine is not a paper tiger to be "considered" on the way to business as usual. *National Audubon* allows trust values to be harmed, but only when it is unavoidable.[128] Trust uses are to be protected whenever it is "feasible."[129] There is no vested right to an appropriation which harms trust values. Most importantly, the state is not confined to past allocation decisions, but has a continuing duty to administer the trust in light of changing public perceptions.[130] It is this reallocation power that may change the shape of the western water right.

National Audubon offers the California courts an opportunity to redirect the state's water policies. There will be a great deal of litigation on the meaning of the feasibility standards set by the court in *National Audubon*. The courts must now construct a definition of unavoidable harm in the myriad individual circumstances of the water appropriator. In fulfilling this task, the courts should reconsider the nature of "reasonable and

123. The court finds "that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests." *Id.* at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365.

124. Johnson, *supra* note 17, at 233–36.

125. *Id.* at 258.

126. See text accompanying notes 25–54. *See also* Johnson, *supra* note 17, at 241.

127. *See* Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. at 790 (1971); United Plainsmen Associates v. North Dakota State Water Conservation Commission, 247 N.W.2d 457 (N.D. 1976).

128. *National Audubon,* 33 Cal. 3d at 447, 658 P.2d at 727, 189 Cal. Rptr. at 364.

129. *Id.* at 447, 658 P.2d at 728, 189 Cal. Rptr. at 364.

130. *Id.* at 435, 658 P.2d at 719, 189 Cal. Rptr. at 356.

beneficial use." *National Audubon*'s greatest value may be in that it frames the essential question that now confronts the arid western states. If the continued growth and expansion of a desert city is a "reasonable and beneficial use" of water, at what point does the value of that growth make the destruction of trust protected waters unavoidable? If the court's balancing test is to have any meaning, the real "needs" of the individual appropriator must be defined. Once defined, these needs must be weighed against *National Audubon*'s affirmance of strong trust protection for "our common heritage." At the very least, *National Audubon* demands a strong conservation emphasis from large water users like Los Angeles. Diversions will continue, but every effort must be made to eliminate the harmful impact on in-place water uses. The state may reconsider past allocations where it becomes clear that these efforts are not being made. No one has the right to continue harming public trust uses when reasonable alternatives exist. Reasonable alternatives must begin to include a curtailment of growth consistent with the preservation of the state's navigable waters.

In *National Audubon,* the California Supreme Court was not being asked to rule upon the adequacy of the California appropriative water right system in the late twentieth century. The court can only answer the question posed: the interrelationship of the Public Trust Doctrine and the appropriative water rights system. The real question remains. For what purposes may Los Angeles drain Mono Lake? For green lawns or drinking water? For swimming pools or highly water consumptive industries? How much necessity does it take to kill a lake?

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