Effective Implementation of the Public Trust Doctrine in California Water Resources Decision-Making: A View From the Bench

Ronald B. Robie[*]

TABLE OF CONTENTS

Forty years ago, in his seminal law review article on the public trust doctrine, Professor Joseph L. Sax suggested that "citizens seeking to develop a comprehensive legal approach to resource management problems" could use the public trust doctrine to obtain "effective judicial intervention" where "legislative response and administrative action" had been inconsistent.[1]

 Associate Justice, California Court of Appeal, Third Appellate District. The views expressed are solely those of the author. The assistance of Matthew J. Smith, Esq., is gratefully acknowledged.

[1] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICH. L. REV. 471, 474 (1969-70).

Of course, water is one of the natural resources to which the public trust doctrine is, and always has been, particularly applicable.[2] And yet, it was not until ten years after Professor Sax published his article that Professor Ralph W. Johnson first predicted an impending "collision" between "[t]he public trust doctrine and the appropriative water rights system . . . in the West."[3] The imminence of that collision — in California at least — was due in no small part to the National Audubon Society's then-pending suit against the Department of Water and Power of the City of Los Angeles ("L.A. Water and Power") to limit diversions from the streams feeding Mono Lake.[4] That suit, which was a prime example of the sort of public interest litigation Professor Sax had advocated in his article, led to the California Supreme Court's seminal decision in *National Audubon*, in which the court announced that "[t]he state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect the public trust uses whenever feasible."[5]

Today, twenty-eight years after the decision in *National Audubon* and more than forty years after Professor Sax's article, what have we learned about the use of the public trust doctrine in water resources decision-making in California? Has it been an effective tool for obtaining judicial intervention in the decision-making process, as Professor Sax suggested it could be? And, more importantly, is judicial intervention the best way to effectuate and protect public trust values in the state's water resources?

Those are some of the questions I seek to answer in this Article. In post-*National Audubon* case law, we will explore how the public trust doctrine has been used in California's management of water resources.

---

[2] *See* Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 718-19 (Cal. 1983) (tracing the public trust doctrine to its origin in the principle of Roman law that " '[b]y the law of nature these things are common to mankind — the air, running water, the sea and consequently the shores of the sea' ").

[3] Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels,* 14 UC DAVIS L. REV. 233, 233 (1980-81). Appropriative water rights, which are "the most common water right[s] in the western United States," "are based on the mining principle of 'first in time, first in right.' 'The person who first appropriates water and puts it to a reasonable and beneficial use has a right superior to later appropriators. In water-short years, junior appropriators with low priorities may be barred from exercising their rights in order to satisfy the rights of earlier, senior appropriators.' " Ronald B. Robie, *The Delta Decisions — The Quiet Revolution in California Water Rights*, 19 PACIFIC L.J. 1111, 1114 (1988) (citing GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, APPROPRIATIVE RIGHTS IN CALIFORNIA 1-2 (STAFF PAPER NO. 1) (May 1977)).

[4] See Johnson, *supra* note 3, at 236-38.

[5] *Nat'l Audubon Soc'y*, 658 P.2d at 728.

In particular, we will examine how certain standards and rules that apply to the judicial branch limit the judiciary's ability to fulfill all of the expectations of environmentalists and the general public who seek to use the courts to achieve more than they have achieved in the legislative and administrative arenas. This examination leads to the conclusion that, while the courts provide an invaluable forum for protecting public trust values, the administrative arena, particularly before the State Water Resources Control Board, remains the front line in the eternal struggle to balance the public's insatiable appetite for water in California with the equally important interest in protecting the nonconsumptive uses embodied in the public trust.

I. THE PUBLIC TRUST DOCTRINE: AN OVERVIEW

The origins and dimensions of the public trust doctrine have been explored and expounded in detail elsewhere,[6] and an exhaustive repetition of that material here would be superfluous. Some brief background, however, will facilitate the analysis that follows.

The public trust doctrine has a venerable history in California case law. Within five years of statehood, the California Supreme Court declared that the state "holds the complete sovereignty over her navigable bays and rivers, and . . . her ownership is, by the law of nations, and the common and civil law, attributed to her for the purpose of preserving the public easement, or right of navigation."[7] While the scope of the public trust was "traditionally defined in terms of navigation, commerce and fisheries,"[8] the court explained that "[i]n administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another."[9] In *Marks v. Whitney*, a case involving application of the public trust to tidelands,[10] the court, without purporting to "define precisely all the public uses which encumber tidelands," noted the

> growing public recognition that one of the most important public uses of the tidelands — a use encompassed within the tidelands trust — is the preservation of those lands in their natural state, so that they may serve as ecological units for

[6] *See* Johnson, *supra* note 3, at 240-44; Sax, *supra* note 1, at 475-91.

[7] Eldridge v. Cowell, 4 Cal. 80, 87 (1854).

[8] Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971).

[9] *Id.*

[10] "Tidelands are properly those lands lying between the lines of mean high and low tide covered and uncovered successively by the ebb and flow thereof." *Id.* at 378-79 (citations omitted).

> scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.[11]

Thus, contemporaneous with Professor Sax's call to use the public trust doctrine as a tool for judicial intervention in the management of natural resources, California's highest court embraced "recreational and ecological" "values" within the doctrine.[12]

This expansion of the public trust doctrine to embrace recreational and ecological values, "to encompass changing public needs,"[13] is what set the doctrine on the "collision course" with "the appropriative water rights system" that Professor Johnson foretold.[14] For running water is like a cake — you cannot have it and consume it, too. Every drop of water farmers want to use to irrigate their crops, or thirsty citizens want to drink, is a drop of water that, if left in the stream from which it was taken, could serve recreational, environmental, and aesthetic purposes. Such was the conflict that gave rise to the decision in *National Audubon*, where environmentalists, concerned with the depredation of Mono Lake by the City of Los Angeles's appropriation of "virtually the entire flow of four of the five streams flowing into the lake,"[15] sought to employ the public trust doctrine as a basis for enjoining diversions from the lake's non-navigable tributaries that were detrimental to the navigable lake.[16]

In its watershed ruling in *National Audubon*, the California Supreme Court resolved the "collision" Professor Johnson foretold by announcing as follows:

> The public trust doctrine and the appropriative water rights system are parts of an integrated system of water law. The public trust doctrine serves the function in that integrated system of preserving the continuing sovereign power of the state to protect public trust uses, a power which precludes anyone from acquiring a vested right to harm the public trust, and imposes a continuing duty on the state to take such uses into account in allocating water resources.[17]

---

[11] *Id.* at 380.

[12] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 719 (Cal. 1983).

[13] *Marks*, 491 P.2d at 380.

[14] Johnson, *supra* note 3, at 233.

[15] *Nat'l Audubon Soc'y*, 658 P.2d at 711.

[16] *Id.* at 712.

[17] *Id.* at 732.

The court went on to explain that, while "the function of the [State] Water [Resources Control] Board has steadily evolved from the narrow role of deciding priorities between competing appropriators to the charge of comprehensive planning and allocation of waters,"[18] a "long line of decisions indicates that remedies before the Water Board are not exclusive, but that the courts have concurrent original jurisdiction."[19] By this holding, the court ensured that the public trust doctrine could serve as a tool for judicial intervention in water resources decisions in California, consistent with Professor Sax's vision. The question I now turn to is how that tool has been used since *National Audubon*.

II. THE COURTS AND THE PUBLIC TRUST DOCTRINE IN WATER CASES AFTER *NATIONAL AUDUBON*

A. The Court as Forum of First Resort

There are numerous ways a public trust issue can be brought before a California court. Sometimes the public trust doctrine is employed in litigation between private parties. For example, in *Marks v. Whitney*, the issue of the public trust arose in an otherwise garden-variety quiet title action between adjacent landowners to settle a boundary line dispute that happened to be over tidelands.[20] In *Charpentier v. Von Geldern*, on the other hand, the plaintiff in a tort action against a private landowner argued (unsuccessfully) that the public trust was a basis for defeating a recreational use immunity defense.[21]

More often, public trust arguments arise in cases against public entities. In some such cases, while public trust issues are involved, the plaintiffs' private interests are the motivating force behind the litigation. Thus, in *Colberg v. State ex rel. Department of Public Works*, the plaintiffs sought compensation for the taking or damaging of their private property due to the construction of bridges over the Upper Stockton Channel that were going to interfere with their shipyard businesses.[22] Although the plaintiffs could not "ground their claim" in the public trust,[23] public trust issues were vital to the Supreme Court's

[18] *Id.* at 726.

[19] *Id.* at 730.

[20] Marks v. Whitney, 491 P.2d 374, 377 (Cal. 1971).

[21] Charpentier v. Von Geldern, 236 Cal. Rptr. 233, 237 (Cal. Ct. App. 1987).

[22] Colberg v. State *ex rel.* Dep't of Pub. Works, 432 P.2d 3, 5-7 (Cal. 1967).

[23] The Supreme Court explained that this was so because "the right of navigation . . . is a public right from the abridgment of which plaintiffs will suffer no damage

conclusion that "whatever the scope of [the] plaintiffs' right of riparian access [to the channel] *as against other private persons*, that right must yield without compensation to a proper exercise of the power *of the state* over its navigable waters."[24]

At other times, and perhaps more often, the public trust doctrine is used in a manner more akin to what Professor Sax envisioned: as a tool in public interest litigation against public entities seeking to protect public trust values for the broader benefit of the citizenry. For example, in *Personal Watercraft Coalition v. Marin County Board of Supervisors*, "a number of entities and individuals that own, operate, and promote the use of personal watercraft," relying in part on the public trust doctrine, sought to invalidate a county ordinance banning the use of such watercraft on or within the county's territorial waters.[25]

While the foregoing cases illustrate a few of the ways in which public trust issues may arise in California courts, none of them deals directly with the intersection of the public trust doctrine and the appropriative water rights system, as *National Audubon* did. A case that did deal with that intersection was *Golden Feather Community Association v. Thermalito Irrigation District*.[26] There, members of the public relied (unsuccessfully) on the public trust doctrine in an attempt to compel water appropriators (irrigation districts) to maintain an artificial reservoir containing the diverted water of a non-navigable creek for fishing and recreational purposes.[27] This case illustrates the bounds of the public trust doctrine, as the appellate court concluded that "the public trust doctrine does not support the relief sought."[28] In the court's view, because the plaintiffs "concede[d] the waters at issue are nonnavigable and the reservoir is an artificial body of water," the plaintiffs were not "seek[ing] protection of a recognized public trust interest."[29]

A case after *National Audubon* in which the public trust doctrine was invoked *successfully* in obtaining judicial intervention in California water resources decision-making is *California Trout, Inc. v. State Water*

different in character from that to be suffered by the general public." *Id.* at 8.

[24] *Id.*

[25] Pers. Watercraft Coal. v. Marin Cnty. Bd. of Supervisors, 122 Cal. Rptr. 2d 425, 429-31, 436-37 (Cal. Ct. App. 2002).

[26] Golden Feather Cmty. Ass'n v. Thermalito Irrigation Dist., 257 Cal. Rptr. 836 (Cal. Ct. App. 1989).

[27] *Id.* at 837-38.

[28] *Id.* at 843.

[29] *Id.*

Resources Control Board.[30] There, environmental interests went to court to force the State Water Resources Control Board to rescind two licenses issued in 1974 allowing Los Angeles to divert water from four of the tributaries to Mono Lake by means of dams.[31] The plaintiffs' mandamus petitions were premised on the argument that the licenses were issued in violation of Fish and Game Code section 5946 because they did not require Los Angeles to leave sufficient water in the streams to keep the fish below the dams in good condition, as required by section 5937.[32] The Third District Court of Appeal recognized that in section 5946, the Legislature had "enacted a specific rule concerning the public trust interest in fisheries."[33] As a result of that enactment, Los Angeles could not assert the statute of limitations as a defense to the action because "[a]n encroachment on the public trust interest shielded by [section 5946] cannot ripen into a contrary right due to a lapse of any statute of limitations."[34]

California Trout illustrates how a court action can be used to force administrative action to protect public trust interests where the responsible administrative agency refuses to act. It also illustrates that a water right previously assumed to be vested by issuance of a license can be modified by application of the public trust. This type of action epitomizes what Professor Sax had in mind. However, the dearth of appellate decisions like *California Trout* suggests that resorting to the courts in the first instance is not the most effective way to advocate for the protection of public trust interests in the California water resources decision-making process. Because, as previously noted, the State Water Resources Control Board is charged with the "comprehensive planning and allocation of water resources" in California,[35] the opportunity to assert public trust interests may arise first in proceedings before the Board, in which the courts may become involved only later, and then only on a limited basis. It is to such cases that I now turn.

[30] Cal. Trout, Inc. v. State Water Res. Control Bd., 255 Cal. Rptr. 184, 211-13 (Cal. Ct. App. 1989).

[31] *Id.* at 186.

[32] *Id.*

[33] *Cal. Trout*, 55 Cal. Rptr. at 212.

[34] *Id.*

[35] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 730 (Cal. 1983).

B. The Court as Forum of Last Resort

As the California Supreme Court recently observed, "The State Water Resources Control Board . . . is responsible for the 'orderly and efficient administration of . . . water resources' and exercises 'adjudicatory and regulatory functions of the state' " in that area.[36] The Board was created in 1967 by the merger of two preexisting agencies — the State Water Rights Board and the State Water Quality Control Board — to create a single agency responsible for the administration of both water quality and water rights.[37]

Because it is the administrative agency with primary authority over the state's water resources, the Board's power to effect public trust values is unparalleled. In *National Audubon*, the Supreme Court affirmed the obligation of the Board "to take the public trust into account in the planning and allocation of water resources."[38] Simply put, in administering water rights, the Board must consider public trust values.

It is true that the Board's authority over water rights is somewhat limited because its permitting and licensing authority extends only to appropriative water rights acquired since 1914 and does not encompass riparian or pueblo rights at all.[39] This puts thirty-eight percent of currently held water rights beyond the Board's permitting and licensing power.[40] At the same time, however, that means sixty-two percent of currently held water rights are subject to the Board's permitting and licensing power. Perhaps most importantly, those water rights include those held by the operators of the state's two great water projects — the Central Valley Project (operated by the United

---

[36] Cal. Farm Bureau Fed'n v. State Water Res. Control Bd., 247 P.3d 112, 117 (Cal. 2011) (citing CAL. WATER CODE § 174 (2010)).

[37] *See* Robie, *supra* note 3, at 1123-24.

[38] *Nat'l Audubon Soc'y*, 658 P.2d at 728.

[39] *Cal. Farm Bureau Fed'n*, 247 P.3d at 117-18.

> A riparian right is an incident of the ownership of land which abuts a stream, lake or pond. . . . [A] riparian . . . has a right to the use of the natural flow of the stream in common with the equal and correlative rights of other riparians. . . . The right is not based on priority of use.

Robie, *supra* note 3, at 1113-14. " 'The pueblo water right . . . is the paramount right of an American city as successor of a Spanish or Mexican pueblo (municipality) to the use of water naturally occurring within the old pueblo limits for the use of the inhabitants of the city.' " *Cal. Farm Bureau Fed'n*, 247 P.2d at 119 n.8, (quoting WELLS A. HUTCHINS, THE CALIFORNIA LAW OF WATER RIGHTS 256 (1956)).

[40] *California Farm Bureau Fed'n*, 247 P.3d at 118.

States Bureau of Reclamation) and the State Water Project (operated by the Department of Water Resources).[41]

The Board's ability to affect and responsibility to protect public trust values extends far beyond the Board's exercise of its permitting and licensing power. For example, the Board has the power to determine "all rights to water of a stream system whether based upon appropriation, riparian right, or other basis of right" in a stream adjudication under Water Code section 2501.[42] Obviously, the Board must satisfy its obligation to take the public trust into account when it determines all rights to the water of a stream system.

Additionally, the Board is charged by statutory mandate with taking "all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state."[43] Essentially, this provision imposes on the Board a positive obligation to enforce the restrictions on the unreasonable use of water set forth in the California Constitution.[44] "All California water rights

[41] *See* State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d 189, 203-06 (Cal. Ct. App. 2006).

[42] CAL. WATER CODE § 2501 (Deering 2010)*; see also Nat'l Audubon Soc'y*, 658 P.2d at 729-30.

[43] CAL. WATER CODE § 275 (Deering 2010).

[44]

> It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

— surface and underground, riparian and appropriative — are subject to th[is] overriding 'reasonable use' limitation . . . ."[45] "Pursuant to [Water Code section 275], it has been held that the Board itself may bring a civil action to test the reasonableness of a riparian owner's use of water."[46] Also pursuant to its charge under Water Code section 275, the Board promulgates regulations that establish an administrative procedure for investigating and adjudicating allegations that water is being used unreasonably.[47]

An example of the Board exercising its broad authority over water in California to protect public trust values appears in its 2003 decision regarding fishery resources and water rights issues of the lower Yuba River.[48] In its decision, the Board addressed issues arising from a complaint by a coalition of fishery groups "that the instream flow requirements specified in Yuba County Water Agency's . . . water rights permits and the existing fish screening facilities d[id] not provide an adequate level of protection for fishery resources" in the river.[49] Ultimately, the Board decided that "application of the public trust doctrine" required the Board to revise the minimum instream flow requirements in the agency's permits, including requiring the water agency to "release . . . water from storage during some periods" to "protect fish and fish habitat in the lower Yuba River and [to] partially mitigate for the ongoing adverse effects of [two dams] and ongoing diversions of water under [the agency's] permits."[50]

The Board can also affect public trust values in court proceedings under its statutory power to serve as a "referee."[51] In a state court action to determine water rights, the court can use the Board as a "referee" on "any or all issues"[52] or to "investigat[e] . . . any or all of

CAL. CONST. art. X, § 2.

[45] Robie, *supra* note 3, at 1115.

[46] *In re* Water of Hallett Creek Stream Sys., 749 P.2d 324, 337 n.16 (Cal. 1988).

[47] CAL. CODE REGS. tit. 23, §§ 4000-07 (2011); *see also* People *ex rel.* State Water Res. Control Bd. v. Forni, 126 Cal. Rptr. 851, 853-57 (Cal. Ct. App. 1976) (approving State Water Resources Control Board's imposition of limits on Napa River riparian right holders by requiring them to provide water storage to retain their riparian rights to use of water for frost protection).

[48] *Fishery Resources and Water Right Issues of the Lower Yuba River Revised Decision 1644*, CAL. WATER RESOURCES CONTROL BD., 4, 31 (July 16, 2003), http://www.swrcb.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1644revised.pdf.

[49] *Id.* at 1-2.

[50] *Id.* at 4, 31.

[51] CAL. WATER CODE § 2000 (Deering 2010).

[52] *Id.*

the physical facts involved."[53] The Board can also serve as a "master or referee" in a federal court action to determine the rights to water either fully or partially within the state.[54]

All of the foregoing examples illustrate the power of the Board to address public trust issues in proceedings in which the Board exercises its authority over water rights. As will be further evident hereafter, however, the Board also has the power to address public trust issues when it exercises its authority over water quality.

As the primary administrative agency with regulatory authority over water in California, the Board has the greatest opportunity to make decisions regarding California water resources that effectuate and protect public trust values. Moreover, when the Board makes such decisions in proceedings before it, the power of the courts to alter those decisions is limited. Review of two appellate court decisions illustrates this point.

1. *United States v. State Water Resources Control Board*

Before the California Supreme Court's decision in *National Audubon*, the Board adopted a Water Quality Control Plan for the Sacramento-San Joaquin Delta and Suisun Marsh, along with Water Right Decision 1485:[55]

> In the Plan, the Board set new water quality standards to protect fish and wildlife and to protect agricultural, industrial and municipal uses of Delta waters. In the Decision, the Board modified the permits held by the U.S. Bureau [of Reclamation] and the [Department of Water Resources] to compel the projects to release enough water into the Delta or to reduce their exports from the Delta so as to maintain the water quality standards set in the Plan."[56]

The water quality plan and the water rights decision gave rise to "[n]o less than eight petitions for writ of mandate."[57] In its challenge, the Bureau of Reclamation "argued the Board had no authority to modify

[53] *Id.* § 2001.

[54] *Id.* § 2075.

[55] *See United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161, 165-66, 174-75 (Ct. App. 1986) (sometimes referred to as "Racanelli Decision" after its author, Presiding Justice John Racanelli); Robie, *supra* note 3, at 1129; *Water Right Decision 1485*, CAL. WATER RESOURCES CONTROL BD. (Aug. 1978), http://www.swrcb.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1450_d1499/wrd1485.pdf.

[56] *State Water Res. Control Bd.*, 227 Cal. Rptr. at 175.

[57] *Id.* at 175.

an appropriation permit once issued, and that the new standards for the protection of fish and wildlife w[ould] result in impairment of its vested appropriative rights."[58] The trial court rejected these arguments, "[b]ut . . . held the [water quality] standards invalid by reason of the Board's failure to identify its *source* of authority."[59]

The appellate court concluded that "[t]he [trial] court's ruling was erroneous" and "flawed in several respects."[60]

> First, the Board's promulgation of the water quality *standards* in the Plan was a quasi-legislative action for which findings of fact were not required. Secondly, the Board's obligation when setting such standards is to "establish such water quality objectives . . . as *in its judgment* will ensure the *reasonable* protection of beneficial uses . . . ." The objectives contained in the Plan for the protection of fish and wildlife were determined necessary by the Board to provide a reasonable level of protection. That determination must be upheld absent a review of the administrative record and a showing of arbitrary or capricious conduct. No such evidentiary review has been undertaken.[61]

The appellate court further concluded that to the extent "the trial court intended to invalidate the enforcement program contained in . . . the Decision rather than the standards contained in the Plan," there was "no requirement that findings be made to show the source of legal authority."[62]

The appellate court concluded that "[i]n the new light of *National Audubon*, the Board unquestionably possessed legal authority under the public trust doctrine to exercise supervision over appropriators in order to protect fish and wildlife. That important role was not conditioned on a recital of authority. It *exists* as a matter of law itself."[63] Thus, "the Board's evaluation process was . . . , in retrospect, a proper exercise of its public trust authority . . . ."[64]

---

[58] *Id.* at 200.

[59] *Id.*

[60] *Id.* at 201.

[61] *Id.* (citations omitted).

[62] *Id.*

[63] *Id.*

[64] *Id.* at 202.

a. Standard of Review Applied to the Board's Legislative Actions

The aspects of *United States v. State Water Resources Control Board* discussed above illustrate some of the institutional limitations on courts that circumscribe their power to alter Board decisions involving public trust values. Probably the most important limitation is the standard of review, which is particularly significant when — as with the Board's establishment of water quality objectives — an administrative agency has acted in a legislative capacity.[65] As the California Supreme Court has explained,

> The courts exercise limited review of legislative acts by administrative bodies out of deference to the separation of powers between the Legislature and the judiciary, to the legislative delegation of administrative authority to the agency, and to the presumed expertise of the agency within its scope of authority. Although administrative actions enjoy a presumption of regularity, this presumption does not immunize agency action from effective judicial review. A reviewing court will ask three questions: first, did the agency act within the scope of its delegated authority; second, did the agency employ fair procedures; and third, was the agency action reasonable. Under the third inquiry, a reviewing court will not substitute its independent policy judgment for that of the agency on the basis of an independent trial de novo. A court will uphold the agency action unless the action is arbitrary, capricious, or lacking in evidentiary support. A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.[66]

Thus, where the Board, in the exercise of the authority delegated to it by the Legislature over "the orderly and efficient administration of the water resources of the state,"[67] promulgates water quality objectives to protect public trust values, judicial review of whether those objectives provide enough protection for those values is circumscribed by the standard of review. As long as the Board employed fair procedures, the Board's objectives must be upheld

[65] *See id.* at 175-77.

[66] Cal. Hotel & Motel Ass'n v. Indus. Welfare Comm'n., 599 P.2d 31, 38 (Cal. 1979) (footnotes omitted).

[67] CAL. WATER CODE § 174 (Deering 2010).

unless those objectives can be deemed arbitrary, capricious, or lacking in evidentiary support. As the appellate court observed in *State Water Resources Control Board*, it is the Board's judgment as to whether the water quality objectives will ensure the reasonable protection of beneficial uses — including the instream uses encompassed in the public trust — that matters, and to which the courts must defer.[68]

b. Standard of Review Applied to the Board's Adjudicative Actions

The limitations imposed by the standard of review on a court when the court reviews the Board's performance of an adjudicatory rather than a legislative function — which it does in allocating water rights[69] — are hardly less restrictive. Review of a quasi-judicial decision "is governed by Code of Civil Procedure section 1094.5,"[70] which provides:

> The inquiry . . . shall extend to the questions whether the [administrative agency] has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the [administrative agency] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.[71]

Under these standards, "deferential latitude should be accorded to the Board's judgment involving valuable water resources," because, as with the Board's responsibilities with respect to water quality objectives, "the Legislature has conferred broad discretion upon the Board to impose terms and conditions upon appropriation permits which '*in its judgment* will best develop, conserve, and utilize in the public interest the water sought to be appropriated.' "[72]

In neither case — whether the Board is legislating water quality objectives or adjudicating appropriative water rights — does the court have the power of independent, *de novo* review of whether the Board's actions violate the public trust doctrine. As the body the Legislature has mandated to "exercise the adjudicatory and regulatory functions of

---

[68] *See State Water Res. Control Bd.*, 227 Cal. Rptr. at 201; *see also* CAL. WATER CODE §§ 13241, 13170 (Deering 2010).

[69] *State Water Res. Control Bd.*, 227 Cal. Rptr. at 176.

[70] *Id.*

[71] CAL. CIV. PROC. CODE § 1094.5(b) (Deering 2010).

[72] *State Water Res. Control Bd.*, 227 Cal. Rptr. at 176 (quoting CAL. WATER CODE § 1253 (Deering 2010)).

the state in the field of water resources,"[73] it is the Board to which the Legislature has delegated its primary power to administer the public trust with respect to the state's water resources.[74] When reviewing the Board's decisions, the deference mandated by the standard of review necessarily restricts the court's power to impose its own judgment as to the proper means of protecting public trust values or whether the protective methods the Board has established are sufficient.

Further limitations on the courts' power to alter Board decisions affecting public trust values are illustrated by a more recent appellate decision, to which I now turn.

2. *State Water Resources Control Board Cases*

As previously explained, in 1978 the State Water Resources Control Board adopted a Water Quality Control Plan for the Sacramento-San Joaquin Delta and Suisun Marsh that set new water quality standards to protect fish and wildlife and to protect agricultural, industrial and municipal uses of Delta waters.[75] At the same time, the Board modified the permits held by the Bureau of Reclamation and the Department of Water Resources to maintain the water quality standards set in the Plan.[76] In *State Water Resources Control Board*, the appellate court concluded that the procedure the Board followed in "combining the water quality and water rights functions in a single proceeding . . . was unwise" because "the Board compromised its important water quality role by defining its scope too narrowly in terms of enforceable water rights."[77] However, "[b]ecause the Board had already announced its 'intention to conduct hearings during 1986 to establish new and revised' water quality objectives, the appellate court determined that 'remand to the Board could serve no useful purpose.' "[78] Thus, instead of remanding the matter to the Board, the court simply concluded its opinion with its expressed expectation that "the renewed proceedings [would] be conducted in light of the principles and views expressed in [the] opinion."[79]

---

[73] CAL. WATER CODE § 174 (Deering 2010).

[74] *See* Cnty. of Orange v. Heim, 106 Cal. Rptr. 825, 837 (Cal. Ct. App. 1973) ("It is the Legislature that administers the trust.").

[75] *State Water Res. Control Bd.*, 227 Cal. Rptr. at 174-75.

[76] *Id.*

[77] *Id.* at 180.

[78] State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d 189, 209-10 (Cal. Ct. App. 2006) (quoting *State Water Res. Control Bd.*, 227 Cal. Rptr. at 181).

[79] *State Water Res. Control Bd.*, 227 Cal. Rptr. at 181.

The Board began proceedings to reexamine water quality objectives for the Delta in 1987.[80] Those proceedings eventually resulted in the 1995 Bay-Delta Water Quality Control Plan, which was in turn followed by a water rights proceeding that culminated in Water Rights Decision 1641, which was final in 2000.[81]

Numerous mandamus petitions were filed to challenge Decision 1641.[82] Ultimately, appellate review of the ensuing trial court decision on those coordinated petitions resulted in the appellate decision in *State Water Resources Control Board Cases*.[83] From that decision, we may discern several more of the standards and rules applicable to the courts that restrict their ability to alter administrative decisions by the State Water Resources Control Board affecting public trust values.

a. Substantial Evidence Review

The first limitation arises from the standard of review of the Board's quasi-adjudicative decisions. As noted above, the review for abuse of discretion includes review for whether the Board's findings are supported by the evidence.[84] Except in cases where the court is authorized by law to exercise its independent judgment on the evidence, review of administrative findings for evidentiary support is subject to the substantial evidence standard of review,[85] which has been described as "highly deferential."[86] What is significant is that a litigant challenging the Board's findings for lack of substantial evidentiary support can lose that challenge if the litigant does not properly present its challenge to the court, as illustrated by *State Water Resources Control Board Cases*.

[80] *State Water Res. Control Bd. Cases*, 39 Cal. Rptr. 3d at 210 (citing *Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*, CAL. WATER RESOURCES CONTROL BD., 5 (May 1995), http://www.swrcb.ca.gov/waterrights/water_issues/programs/bay_delta/wq_control_plans/1995wqcp/docs/1995wqcpb.pdf).

[81] *See id.* at 210-15.

[82] *Id.* at 224-25.

[83] *Id.* at 224-25.

[84] *See* CAL. CIV. PROC. CODE § 1094.5(b) (Deering 2011).

[85] *See State Water Res. Control Bd. Cases*, 39 Cal. Rptr. 3d at 226 (citing CAL. CIV. PROC. CODE § 1094.5(c)).

[86] Western States Petroleum Ass'n v. Superior Court, 888 P.2d 1268, 1274 (Cal. 1995); *see also* Ryan v. Cal. Interscholastic Fed'n - San Diego Section, 114 Cal. Rptr. 2d 798, 821 (Cal. Ct. App. 2001) (explaining that under the substantial evidence standard of review, "the court may reverse an administrative decision only if, based on the evidence before the administrative entity, a reasonable person could not have reached the conclusion reached by that agency").

The purpose of the water rights proceeding that led to Water Rights Decision 1641 was to implement the flow-dependent water quality objectives in the 1995 Plan.[87] In that proceeding, East Bay Municipal Utility District ("East Bay") "proposed [to the Board] that its responsibility to help meet those objectives be limited to the flow requirements established in the Mokelumne Agreement," which was "a settlement agreement [East Bay had previously entered into] with the United States Fish and Wildlife Service and the California Department of Fish and Game" "[i]n a proceeding before the Federal Energy Regulatory Commission."[88] The Board agreed and "amended East Bay['s] [appropriative] license and permit accordingly."[89]

In the trial court, "six parties with interest in the central Delta" — referred to as the Central Delta parties — "challenged the Board's action with respect to the Mokelumne Agreement" on the ground that "the Board's 'findings . . . [were] not supported by substantial evidence . . . .' "[90] After the trial court rejected this argument, the Central Delta parties raised it again on appeal.[91] The appellate court rejected the argument, not on its substance, but because the Central Delta parties "forfeited that challenge by offering a one-sided recitation of the evidence."[92] The appellate court explained that the Central Delta parties could not meet their burden of demonstrating that the Board's action was not grounded on a reasonable factual basis without presenting the court with all evidence relevant to the Board's action, "[b]ecause support for [the Board's] decision may lie in the evidence the appellants ignore."[93]

It is significant to note that "where the trial court does not exercise its independent judgment in reviewing an administrative decision, the trial court is exercising an essentially appellate function, and the trial court and appellate courts occupy identical positions with regard to the administrative record and the determination of whether the administrative decision is supported by substantial evidence."[94] This means that the same forfeiture rule applied by the appellate court in *State Water Resources Control Board Cases* could have been applied by

[87] *See State Water Res. Control Bd. Cases*, 39 Cal. Rptr. 3d at 200.

[88] *Id.* at 248.

[89] *Id.*

[90] *Id.* at 228-29, 248.

[91] *Id.* at 248-49.

[92] *Id.* at 249.

[93] *Id.* at 249-50.

[94] Carmel Valley View, Ltd. v. Bd. of Supervisors, 130 Cal. Rptr. 249, 251 (Cal. Ct. App. 1976).

the trial court in the first instance (assuming the same inadequate showing was made before that court). Thus, this limitation is not unique to appellate court review, but applies also to trial court review of Board decisions in an administrative mandamus proceeding.

Finally, it must be noted that, while the substantial evidence argument the Central Delta parties forfeited did not relate directly to the public trust, a public trust argument would be subject to the very same resolution under similar circumstances. Thus, even if the evidence in the administrative record is not sufficient to support a Board decision negatively affecting public trust values, the courts may refrain from intervening if the party seeking court review of that decision fails to properly present the point to the courts. This is so because where "the Legislature has entrusted the supervision and protection of [a] valuable resource of the state to [an administrative agency], [and] not to the courts," the agency:

> [M]ust be presumed to have a knowledge of the conditions which underlie and motivate its regulatory actions and unless it is demonstrated that those actions are not grounded upon any reasonable factual basis the courts should not interfere with the exercise of the discretion vested in it by the Legislature, nor lightly substitute their judgment for that of the [agency].[95]

b. Exhaustion of Administrative Remedies

Another principle that may limit court review of Board decisions affecting public trust values is the doctrine of exhaustion of administrative remedies. "In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act."[96] "The rule . . . is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of *stare decisis*, and binding upon all courts."[97]

The California Supreme Court touched on this doctrine in *National Audubon* in deciding that the courts have concurrent original jurisdiction with the State Water Resources Control Board "in suits to determine water rights."[98] Because of this concurrent jurisdiction, the

[95] Ferrante v. Fish & Game Comm'n, 175 P.2d 222, 227 (Cal. 1946).

[96] Abelleira v. Dist. Court of Appeal, 109 P.2d 942, 949 (Cal. 1941).

[97] *Id.* at 950.

[98] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 729-32 (Cal. 1983).

plaintiffs were not required to institute a proceeding before the Board seeking to enjoin L.A. Water and Power from continuing to divert water from the tributaries to Mono Lake before commencing a court action to achieve that goal, and thus in that sense they were not required to exhaust administrative remedies.[99]

In *State Water Resources Control Board Cases*, however, the appellate court was concerned with a different application of the exhaustion doctrine: namely, the requirement that when a party seeks to raise an argument before a reviewing court in challenging a decision of an administrative agency, that argument first must have been raised in the administrative proceedings.[100] On appeal, the Central Delta parties argued that an environmental impact report ("EIR") the Board had issued relating to the implementation of the 1995 Plan was insufficient because it did not include enough analysis of the impact of the San Joaquin River Agreement on return flows.[101] The court concluded that the Central Delta parties had adequately exhausted their administrative remedies regarding the sufficiency of the EIR on this basis, even though they "did not use the magic words 'the EIR is inadequate,' " because "they did bring to the Board's attention their position that the record before the Board did not contain an adequate analysis of the potential impact of the San Joaquin River Agreement on return flows."[102]

While the appellate court was specifically concerned with the statutory exhaustion requirement expressed in the California Environmental Quality Act[103] and was not considering a public trust issue in connection with that requirement, the same principles would apply under the common law exhaustion doctrine with respect to a public trust issue. Thus, a party seeking to raise a public trust issue in challenging a Board decision in court would have to demonstrate that the issue was raised in the administrative proceeding before the Board

[99] *See id.* at 731-32. The court's decision on this point was largely driven by the Legislature's enactment of the statutes (CAL. WATER CODE §§ 2000, 2001, 2075 (Deering 2010)) that authorize the State Water Resources Control Board to serve as a referee in court proceedings involving determination of water rights. *See id.* In the court's view, "[t]hese statutes necessarily imply [a legislative determination] that the superior court has concurrent original jurisdiction in suits to determine water rights, for a reference to the board as a referee or master would rarely if ever be appropriate in a case filed originally with the board." *Id.*

[100] *See State Water Res. Control Bd. Cases*, 39 Cal. Rptr. 3d at 282-86.

[101] *Id.* at 282.

[102] *Id.* at 285.

[103] *See* CAL. PUB. RES. CODE § 21177 (Deering 2010); *State Water Control Bd.* Cases, 39 Cal. Rptr. 3d at 282-83.

or else face the bar of failure to exhaust administrative remedies. Those seeking to ensure diligent enforcement of the public trust must air their views thoroughly before the Board, or risk losing their right to do so at all.

This point is most directly illustrated by another aspect of the decision in *State Water Resources Control Board Cases* that expressly addressed an argument under the public trust doctrine. Review of this aspect of the case demonstrates not only the importance of exhausting administrative remedies before the Board, but the importance of seeking those remedies as early as possible.

One of the water quality objectives the Board established in the 1995 Plan was "a narrative objective for the protection of salmon, which provided: 'Water quality conditions shall be maintained, together with [other] measures in the watershed, sufficient to achieve a doubling of natural production of chinook salmon from the average production of 1967-1991, consistent with the provisions of State and federal law.' "[104] In the program of implementation contained in the Plan, the Board noted:

> [I]n addition to the timely completion of a water rights proceeding to implement [the] river flow and operational requirements which will help protect salmon migration through the Bay-Delta Estuary, other measures may be necessary to achieve the objective of doubling . . . . Monitoring results will be considered in the ongoing review to evaluate achievement of this objective and the development of numeric objectives to replace it.[105]

In challenging Decision 1641 in the courts, the Audubon Society parties relied on *National Audubon* to argue that "the Board 'failed to comply with its duties under the public trust doctrine to protect the Bay-Delta's fishery resources 'whenever feasible' " because the Board failed to do more in the water rights proceeding to implement the narrative salmon protection objective than implement the flow objectives of the 1995 Plan.[106] The appellate court rejected this argument because feasibility was a matter for the Board to determine and because that determination was made in formulating the 1995

[104] *State Water Res. Control Bd. Cases*, 39 Cal. Rptr. 3d at 212 (citing 1995 Bay-Delta Plan, *supra* note 80, at 18 tbl.3).

[105] *Id.* at 214 (citing 1995 Bay-Delta Plan, *supra* note 80, at 28-29).

[106] *Id.* at 272 (citing Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 728).

Plan, not in the water rights proceeding to assign responsibility for meeting the flow-dependent objectives in the Plan.[107]

At least two lessons can be drawn from *State Water Resources Control Board Cases*. First, a challenge to an administrative decision based on the public trust must be raised at the earliest opportunity in proceedings before the administrative agency. Thus, the Audubon Society parties should have made their feasibility argument in the administrative proceeding during which the Board established the 1995 Plan by arguing then that the plan of implementation to meet the narrative salmon protection objective violated the public trust principles expressed in *National Audubon* because the Board was not doing all that was "feasible" to protect salmon.

Second, even when a public trust argument is made at the right time in an administrative proceeding before the Board, it is the *Board*, and not a later reviewing court, that is entrusted with the primary power of the state to protect public trust values. Absent proof that the Board acted arbitrarily or unreasonably in light of all the evidence before it, when the Board's decision is subjected to later judicial review, the courts will afford substantial deference to the Board's decision, presuming that the Board properly exercised "its discretion and judgment to balance all of the[] competing interests" involved in its decision.[108] Thus, where enforcement of the public trust arises first in proceedings before the Board, and the court is the forum of last resort, the court will grant the Board the deference commonly and traditionally accorded by a reviewing body where the applicable governing legal principles do not grant the power of independent review.

CONCLUSION

From this brief survey of California case law involving the public trust doctrine, particularly in the wake of *National Audubon*, we can discern that the courts can play the vital role Professor Sax envisioned: serving to enforce public trust values when an administrative body will not do so. More often, however, resort to the courts to protect the public trust in regard to decisions involving California's water resources will be circumscribed by traditional legal principles limiting court review of administrative decisions.

Under California law, the State Water Resources Control Board has primary authority for ensuring meaningful implementation of the

[107] *See id.* at 272-73.

[108] *Id.* at 272.

public trust and the protection of trust values in the area of water resources. Thus, effective implementation of the public trust doctrine must always begin in the proceedings the Board conducts to manage water quality and water rights throughout the state. This is a responsibility that the State Water Resources Control Board has not vigorously pursued. But, while the Board has not been as responsive or as protective of the trust as some people want, the limitations on the powers of the judiciary discussed in this article show that the Board has to be the first line of attack.

Moreover, because the parties fighting over water rights often believe public trust values have a negative impact on their interests and oppose consideration of public trust values, it is especially important for the Board to vigorously apply the public trust doctrine when it has an opportunity to do so. Regrettably, at the present it often falls to environmental interveners such as the National Audubon Society to participate in proceedings to keep pressure on the State Water Resources Control Board to fully incorporate the public trust in its decision-making in the first instance.[109] The Public Policy Institute of California recently suggested the establishment of an independent "public trust advocate, modeled after the Division of Ratepayer Advocates at the California Public Utility Commission . . . [which] would be responsible for evaluating major board proceedings for public trust implications and advocating for positions that promote the public trust."[110] This is an excellent suggestion. Such an advocate would serve an increasingly important role in ensuring the effective implementation of the public trust doctrine in California water resources decision-making in the years to come, as the fierce competition over the scarce water resources of the state only increases.

[109] This is not just a public trust issue. Unfortunately every day a large number of public interest organizations litigate against a myriad of governmental agencies that have failed to properly implement constitutional and statutory mandates.

[110] ELLEN HANAK ET AL., MANAGING CALIFORNIA'S WATER: FROM CONFLICT TO RECONCILIATION 369-70 (2011).