# APPLICATION OF THE PUBLIC TRUST

## THE PUBLIC TRUST AND IN-STREAM USES

BY
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*As a common-law doctrine, the public trust can prevent the continued destruction of public waters. This Article takes an historical overview of the doctrine as it applies to nonnavigable waters, focusing on the California cases involving Mono Lake and the Lower American River. The author concludes that public trust considerations were intertwined with the appropriative water rights system long before the 1983* Mono Lake *decision. Furthermore, the public trust doctrine will continue to impact future water decisions in California.*

### I. INTRODUCTION

States have multiple interests in regulating diversions from nonnavigable streams. Their ability to control the beneficial uses of water has long been recognized in the context of water rights. Often overlooked, however, is the applicability of other common-law rules. Most recently, the California Supreme Court's decision in *National Audubon Society v. Superior Court (Mono Lake)*[1] logically applied the public trust doctrine to diversions from the tributaries of a navigable lake. Application of the public trust to water users will raise a series of new issues. It will require the

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1. 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, *cert. denied*, 464 U.S. 977 (1983).

balancing of interests between the holders of water rights and the public for whom the trust is held and administered. This should come as no surprise to water users, however. The law of water rights developed in an era devoted to economic development and fixed on consumptive use. Although this law has lagged behind the field of land use regulation, the pressures of growing population and appreciation of in-stream values have led to both legislative and judicial restrictions on the unabated exercise of appropriative rights. There is nothing novel in the applicability of common-law doctrines such as the public trust to prevent the continued destruction of public waters.

## II. A HISTORICAL OVERVIEW: THE PUBLIC TRUST AND NONNAVIGABLE WATERS

It has been long established that the states hold their navigable waters in trust for commerce, navigation, and fisheries.[2] These categories, however, are not exclusive. The trust has been held to extend to recreational uses such as bathing, swimming, and sunbathing,[3] and to "environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area."[4]

### *A. The Public Trust Applied to Nonnavigable Waters*

The importance of maintaining the state's navigable waters for its people was expressed eloquently by the Oregon Court of Appeals:

> The severe restriction upon the power of the state as trustee to modify water resources is predicated not only upon the importance of the public use of such waters and lands, but upon the exhaustible and irreplaceable nature of the resources and its fundamental importance to our society and to our environment. These resources,

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2. Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892); Arnold v. Mundy, 6 N.J.L. 1 (1821).

3. Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 307, 294 A.2d 47, 54 (1972).

4. Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); *accord* Kootenai Envtl. Alliance v. Panhandle Yacht Club, 105 Idaho 622, 632-33, 671 P.2d 1085, 1095-96 (1983); Mayor & Mun. Council of Clifton v. Passaic Valley Water Comm'n, 224 N.J. Super. 53, 64, 539 A.2d 760, 765 (1987) (holding drinking waters subject to trust).

> after all, can only be spent once. Therefore, the law has historically and consistently recognized that rivers and estuaries once destroyed or diminished may never be restored to the public and, accordingly, has required the highest degree of protection from the public trustee.[5]

There is nothing new in the concept of applying legal safeguards to prevent the destruction of public trust uses by upstream activities, even though they might not be occurring in the navigable waters owned by the state. In an 1884 case, *People v. Gold Run Ditch & Mining Co.*,[6] the California Supreme Court upheld an injunction prohibiting upstream hydraulic mining that was polluting the American and Sacramento Rivers, silting their beds so as to cause destructive floods, and impairing navigation. In *Woodruff v. North Bloomfield Gravel Mining Co.*,[7] the famous parallel federal decision ending hydraulic mining in the Sierras, Judge Sawyer discussed the public trust interest in the states' waters and concluded that it precluded activities far upstream that could impair the trust in those waters by filling them with debris. The logic of this decision leads irrespectively to *Mono Lake*: If the trust may not be impaired by filling these waters with debris, it should not be impaired by diverting water from them either, if the effect is equally detrimental.

Seventeen years after *Woodruff*, the California Supreme Court held that the use of an upstream dam on a slough adjoining a navigable river could be restrained when its navigability is affected:

> Directly diverting waters in material quantities from a navigable stream may be enjoined as a public nuisance. Neither may the waters of a navigable stream be diverted in substantial quantities by drawing from its tributaries. . . . If the dams upon these sloughs result in the obstruction of Salt River as a navigable stream, they constitute a public nuisance.[8]

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5. Morse v. Oregon Div. of State Lands, 34 Or. App. 853, 860, 581 P.2d 520, 524 (1978), *aff'd*, 285 Or. 197, 590 P.2d 709 (1979).

6. 66 Cal. 138, 4 P. 1152 (1884).

7. 18 F. 753 (C.C.D. Cal. 1884).

8. People v. Russ, 132 Cal. 102, 106, 64 P. 111, 112 (1901). *See also* Wilbour v. Gallagher, 77 Wash. 2d 306, 462 P.2d 232 (1969), *cert. denied*, 400 U.S. 878 (1970) (a case characterized as a public trust holding although it speaks in nuisance terms). *See generally* Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C. DAVIS L. REV. 233 (1980).

### B. The Trust Unshackled From Sovereign Lands

Although historically associated with the states' sovereign ownership of navigable waters, the public interest in maintaining navigability and other trust values has extended to waters artificially raised above their natural level. This is consistent with the long-established rule that waterfront boundaries are ambulatory.[9] Thus, various courts have held that land submerged by the erection of a dam or levee system on a navigable lake becomes the property of the state as "trustee for the public," by virtue of prescriptive principles.[10] Indeed, the courts have had no difficulty in applying the trust to wholly artificial waters.[11]

Some early cases held that the riparian rights doctrine protects waterfront owners against damaging diversions.[12] In an often cited opinion, the Wisconsin Supreme Court held that the public trust not only justified, but required, shoreline protection of wetlands extending above the state's sovereign ownership, based on their interrelationship with navigable waters:[13]

> The state of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters. . . . The active public trust duty of the state of

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9. County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46 (1874).

10. State *ex rel.* Thompson v. Parker, 132 Ark. 316, 200 S.W. 1014 (1917); Fogerty v. State, 187 Cal. App. 3d 224, 231 Cal. Rptr. 810 (1986), *cert. denied*, 108 S. Ct. 81 (1987); City of Los Angeles v. Aitken, 10 Cal. App. 2d 460, 52 P.2d 585 (1935); State *ex rel.* O'Connor v. Sorensen, 222 Iowa 1248, 271 N.W. 234 (1937); Matcha v. Mattox, 711 S.W.2d 95 (Tex. App. 1986).

11. *E.g.*, Pacific Gas & Elec. Co. v. Superior Court, 145 Cal. App. 3d 253, 193 Cal. Rptr. 336 (1983); State v. Village of Lake Delton, 93 Wis. 2d 78, 286 N.W.2d 622 (1979). *See also* Swanson v. United States, 789 F.2d 1368 (9th Cir. 1986) (holding that the Corps of Engineers acquired jurisdiction over artificially submerged portions of Lake Pend Oreille). *But see* Golden Feather Community Ass'n v. Thermalito Irrigation Dist., 209 Cal. App. 3d 1276, 257 Cal. Rptr. 836 (1989) (holding the trust could not be used to require an appropriator from a nonnavigable stream to continue its diversion but forego use of the water in order to maintain an artificial reservoir for public recreational use). *See generally* H. FARNHAM, THE LAW OF WATERS AND WATER RIGHTS 272 (1904).

12. City of Los Angeles v. Aitken, 10 Cal. App. 2d 460, 52 P.2d 585 (1935); Martha Lake Water Co. No. 1 v. Nelson, 152 Wash. 53, 277 P. 382 (1929), *discussed in* Johnson, *supra* note 8, at 245-46. *See also* H. FARNHAM, *supra* note 11, at 137 ("[The riparian owner] cannot divert the water from the stream, nor consume it so as to defeat the possibility of navigation; nor can he place insuperable obstructions in the stream.").

13. Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

> Wisconsin in respect to navigable waters requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty.[14]

It is in this context that the public trust must be considered with respect to water rights. Rights in water, like rights in land, are subject to many limitations and qualifications. It is only natural that the public trust, like other legal doctrines of general applicability, should be available as a possible limitation on diversions upstream from waters it protected. Indeed, in *United Plainsmen Association v. North Dakota State Water Conservation Commission*,[15] the North Dakota Supreme Court anticipated the *Mono Lake* decision in holding that the public trust requires the state to consider the statewide impacts of water projects: "[T]he discretionary authority of state officials to allocate vital state resources is not without limit but is circumscribed by what has been called the Public Trust Doctrine."[16] The California Supreme Court's decision in *Mono Lake* harmonized the trust with water rights in a manner reasonable and consistent with prior opinions.

## III. *MONO LAKE*: THE TRUST MEETS APPROPRIATIVE RIGHTS

In *Mono Lake*, the doctrines of appropriative water rights and the public trust came into direct confrontation. The issue was the survival of Mono Lake, an ancient saline body of water at the base of the eastern slope of the Sierras. Mono Lake has been variously characterized both as "an area of unique aesthetic appeal and scientific interest,"[17] and as a "brine sink."[18] It supports a large population of shrimp that, in turn, feed vast numbers of nesting and migratory birds.[19]

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14. *Id.* at 16-18, 201 N.W.2d at 768.

15. 247 N.W.2d 457 (N.D. 1976).

16. *Id.* at 460.

17. MONO BASIN ECOSYSTEM STUDY COMMITTEE, THE MONO BASIN ECOSYSTEM: EFFECTS OF CHANGING LAKE LEVELS vii (1987) [hereinafter STUDY COMMITTEE].

18. Answer of Los Angeles Dep't of Water & Power, National Audubon Soc'y v. Los Angeles Dep't of Water & Power, Civ. No. 639 (Alpine County Super. Ct. (May 11, 1981).

19. For a good general description, see CALIFORNIA DEPARTMENT OF WATER RESOURCES, REPORT OF INTERAGENCY TASK FORCE ON MONO LAKE (1979) [hereinafter INTERAGENCY TASK FORCE]; STUDY COMMITTEE, *supra* note 17.

Mono Lake, which has no outlet, is fed by five freshwater streams. In 1940, the City of Los Angeles, through its Department of Water and Power (DWP), obtained a permit to appropriate virtually the entire flow of four of the streams. In 1970, a second diversion tunnel was completed for that purpose. As a result, the level of the lake began to drop approximately one foot per year, and its area was diminished by one-third. An island used by gulls for nesting became a peninsula, subject to the depredations of coyotes and other predators. The shores of the dwindling lake receded hundreds of feet, exposing large mud banks and eerie tufa towers.[20] The National Audubon Society then filed suit to enjoin the City's diversions, invoking the public trust doctrine.

After considerable maneuvering, the issue reached the California Supreme Court, which held that the public trust applied to DWP's diversions.[21] In making its analysis, the court stressed these basic principles:

1. The public trust imposes a duty of "continuing supervision" over the taking and use of appropriated water, a duty that includes the power to reconsider water allocations previously made, and to evaluate their effect on trust values. This principle "prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust."[22]

2. Nevertheless, the legislature, "[a]s a matter of current and historical necessity," may authorize the diversion of water to distant parts of the state, even though unavoidable harm to trust uses at the source stream may result.[23]

3. The state has an "affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." This duty requires the preservation, "so far as consistent with the public interest, [of] the uses protected by the trust."[24]

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20. INTERAGENCY TASK FORCE, *supra* note 19.

21. National Audubon Soc'y v. Superior Court (*Mono Lake*), 33 Cal. 3d 419, 430-33, 658 P.2d 709, 716-18, 189 Cal. Rptr. 346, 353-55, *cert. denied*, 464 U.S. 977 (1983).

22. *Id.* at 445, 658 P.2d at 727, 189 Cal. Rptr. at 364.

23. *Id.* at 446, 658 P.2d at 727-28, 189 Cal. Rptr. at 364.

24. *Id.* at 446-47, 658 P.2d at 728, 189 Cal. Rptr. at 364-65.

It is important to note that the court took pains to observe that the state's public trust duties with respect to water diversions are not necessarily the same duties it has as the steward of the tidelands and beds of navigable lakes and rivers. "Now that the economy and population centers of this state have developed in reliance upon appropriated water, it would be disingenuous to hold that such appropriations are and have always been improper to the extent that they harm public trust uses . . . ."[25] The court held that at the core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters.[26]

Subsequently, the public trust has been related to the "public interest" standard in a water rights proceeding in Idaho,[27] and in a number of California cases involving fisheries in Sierra Nevada streams.[28] In several cases, challenges by fishermen and environmental groups to diversions by the City of Los Angeles were based on both public trust grounds and on statutes that implemented trust objectives. Rush Creek, a tributary to Mono Lake, had long been dammed by the City of Los Angeles. A small flow, however, was permitted during a series of wet years, and a community of fish managed to survive in it. When the City began to close off the flow, suit was brought, based in part on California Fish and Game Code section 5937, which requires the owner of any dam to allow sufficient water to pass through a fishway, or otherwise permit enough flow over, around, or through the dam to protect fish life located below. Fish and Game Code section 5946 places teeth in this provision by requiring that no permit or license to appropriate water in the area involved should be granted after September 9, 1953, unless conditioned upon full compliance with section 5937. The superior court issued a preliminary injunc-

25. *Mono Lake*, 33 Cal. 3d at 446, 658 P.2d at 728, 189 Cal. Rptr. at 364.

26. *Id.* at 445-56, 658 P.2d at 727-28, 189 Cal. Rptr. at 364.

27. Shokal v. Dunn, 109 Idaho 330, 336 n.2, 707 P.2d 441, 447 n.2 (1985).

28. *E.g.*, Dahlgren v. City of Los Angeles, No. 8092 (Mono County Super. Ct. 1985); Mono Lake Comm. v. City of Los Angeles, No. 8608 (Mono County Super. Ct. Oct. 21, 1987). These cases were coordinated with *Mono Lake* in the Eldorado County Superior Court. Order of Coordination, Mono Lake Water Rights Cases & Mono Lake Water Rights Cases II, Judicial Council Coordination Proceedings, Nos. 2284 & 2288 (April 6, 1989); Amended Order Assigning Coordination Judge, Judicial Council Coordination Proceedings, No. 2284 (May 24, 1989).

tion directing the City to release minimum flows.[29] This case has since been held in abeyance, pending completion of a stream flow study by the State Fish and Game Department.

A similar injunction was issued in litigation involving Lee Vining Creek, another tributary of Mono Lake. There, the superior court held that the creek and its fish could reasonably be held to come under "an extended application of public trust considerations."[30] This case also has been held in abeyance pending completion of a study of adequate flows by the Fish and Game Department.

In another matter, fishermen's groups launched a challenge to the City of Los Angeles' right to divert water on the ground that the State Water Resources Control Board had not imposed the conditions required by section 5946. The trial court refused to order the Board to reconsider the City's water permits. The court of appeals issued a lengthy opinion reversing the trial court and holding that the Water Board had a continuing power and duty to impose the statutory conditions upon the City's permits.[31]

These cases illustrate that regulators greet expert studies with profound relief. In one case, anglers filed a petition with the Water Board against the Glenn Colusa Irrigation District alleging waste, unreasonable use of water, and trust violations resulting from the district's Sacramento River pumping program. The board dismissed the petition on the ground that a Fish and Game/Corps of Engineers study was underway.[32]

The rationale for application of the trust to these situations was supplied by Professor Ralph Johnson of the University of Washington Law School:

> The prior appropriation system of water law is clearly deficient in its capacity to resolve the legitimate conflicts between the public, which believes that it has a right to have waters left in place for navigation, fishery, environmental quality and other public trust

29. Dahlgren v. City of Los Angeles, No. 8092 (Mono County Super. Ct. 1985).

30. Memorandum of Decision, Mono Lake Comm. v. City of Los Angeles, No. 8608 (Mono County Super. Ct. Oct. 21, 1987).

31. California Trout, Inc. v. State Water Resources Control Bd., 207 Cal. App. 3d 585, 255 Cal. Rptr. 184 (1989).

32. State Water Resources Bd. Complaint File No. 11-3-1 (1988).

> uses, and appropriators who believe that they have a right to extract these same waters for irrigation, municipal and industrial purposes. The application of public trust principles to these conflicts will aid in focusing the debates on the proper issues and in drawing a line that is consistent with society's current and future needs and values.[33]

Furthermore, it is entirely reasonable to apply the public trust to protect fish in nonnavigable waters, although the City of Los Angeles vehemently disagreed in the litigation discussed above. The rationale of the *Mono Lake* holding was based on the state's "continuing supervisory control" over the public trust. Although the trust doctrine originally arose from the need to preserve navigable waterways, the state has long been held to have a trust interest, derived from common law, in its fish and other wild game.[34]

The state's interest in running waters likewise justifies requirements of the kind imposed by the California statutes. As the California Supreme Court stated in *Schaezlein v. Cabaniss*:

> The running waters of the state of California are public property. One who obstructs them obstructs them under license or permission from the state, but only upon such conditions as to their use as the state may impose. It is therefore permissible for the state to impose such conditions upon that use as it may see fit, and in this case the requirement was that the person so obstructing the water should build an appliance to permit the free running of the fish up the stream. Here was no interference with private property; here was merely a condition imposed by the state upon a private individual as to his use of property, the title to which, and the right of fishery in which, remained in the public.[35]

Arguably, this problem should have been solved within the appropriative water rights system.[36] In the context of the Mono Lake litigation, however, the appropriative system failed to provide any protection. As the court pointed out several times, the

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33. Johnson, *supra* note 8, at 266.

34. People v. Truckee Lumber Co., 116 Cal. 397, 48 P. 374 (1897) (extending trust protection to fish in nonnavigable waters); *see* Holyoke Co. v. Lyman, 82 U.S. (15 Wall.) 500, 514 (1872).

35. 135 Cal. 466, 470-71, 67 P. 755, 757 (1902).

36. *Cf.* Walston, *The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy*, 22 SANTA CLARA L. REV. 63 (1982).

state water rights board noted, in issuing permits to the Los Angeles Department of Water and Power (DWP), that it lacked jurisdiction to cope with the inevitable effects on lake levels.[37] Furthermore, the trust made it unnecessary to consider DWP's assertion that its water rights could not be reconsidered because as municipal uses, they were prima facie reasonable.[38] Finally, as the court observed, statutory water right protections can be repealed, in which case only the public trust would remain as a safeguard for in-stream values.[39] The appropriation doctrine, based as it is on the principle of consumptive use, needs substantial modification if it is to protect public trust values.

## IV. THE LOWER AMERICAN RIVER LITIGATION

The *Mono Lake* case mandated the consideration of public trust uses in water diversions made pursuant to permits. The Lower American River litigation presents a unique opportunity to carry out this responsibility.

### *A. Factual Background*

The Lower American River extends for approximately twenty-three miles from Folsom Dam in the northeast to the American River's confluence with the Sacramento River at the southwest. Although upstream hydraulic mining resulted in substantial silting of the river's bed and subsequent dredging caused disruption, its flood plain escaped development because of the seasonal floods that occurred until construction of the Folsom Dam began in 1954.[40]

As early as 1915, the City of Sacramento planned to establish a parkway along the river. In 1962, the parkway was formally adopted, with the objective of providing "unstructured water-enhanced recreation activities . . . appropriate in a natural environ-

37. National Audubon Soc'y v. Superior Court (*Mono Lake*), 33 Cal. 3d 419, 428, 448, 658 P.2d 709, 714, 729, 189 Cal. Rptr. 346, 351, 366, *cert. denied*, 464 U.S. 977 (1983).

38. *Id.* at 447 n.28, 658 P.2d at 728 n.28, 189 Cal. Rptr. at 365 n.28.

39. *Id.* at 446 n.27, 658 P.2d at 728 n.27, 189 Cal. Rptr. at 364 n.27.

40. Cal. State Water Resources Control Bd., Technical Report, Lower American River Court Reference 130 (June 1988) (Environmental Defense Fund v. East Bay Mun. Util. Dist.).

ment."[41] Development was to be minimal, and water flow to be maintained at "adequate levels to permanently sustain the integrity of the water quality, fisheries, waterway recreation, aesthetics riparian vegetation, wildlife, and other river-dependent features and activities of the Parkway."[42] The river's recreational importance enabled it to gain designation under both state and federal wild and scenic river statutes. Today, the parkway provides unique recreational benefits to thousands of people. Passing through a densely populated urban area, it contains some of the last vestiges of dense riparian forest. Steelhead, bass, sturgeon, and other game fish provide recreational opportunities, as does a bikepath passing down the length of the parkway. Rafting, canoeing, and kayaking are widely practiced, and in the summer months, people swim, wade, and picnic along the length of the river.[43]

The preservation of minimum flows in the Lower American River is, of course, essential to the continued health of vegetation and wildlife, and the many recreational uses of the waterway. The East Bay Municipal Utility District (EBMUD) threatened these flows with plans to draw 150,000 acre feet of water annually at the head of the river at Nimbus Dam, diverting water through the proposed Folsom South Canal to Contra Costa County.[44]

The Bureau of Reclamation, which operates Folsom and Nimbus Dams, sold this source of water under contract. EBMUD contended that the proposed use of the water constituted the most reasonable and beneficial use, and that it had a duty to obtain the best obtainable water for its domestic users.[45]

### *B. The Litigation Begins*

Shortly after the EBMUD/Bureau of Reclamation contract was entered into in 1970, the Environmental Defense Fund and Save the American River Association sued EBMUD over the

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41. SACRAMENTO COUNTY PLANNING & COMMUNITY DEV. DEP'T., AMERICAN RIVER PARKWAY PLAN § 1.2 (1985).

42. *Id.* § 3.1.

43. *See generally* Cal. State Water Resources Control Bd., Report of Referee, Lower American River Court Reference (June 1988) (Environmental Defense Fund v. East Bay Mun. Util. Dist.) [hereinafter Report of Referee].

44. *Id.*

45. *Id.*

threatened diversion. They alleged that carrying out the agreements would diminish flows on the Lower American River, injure recreational opportunities, increase salination, accelerate the destruction of a wild river, and pollute San Francisco Bay. In their complaint, plaintiffs observed that the water sought could be diverted just as economically from a point farther down river, and that such a diversion would not impair recreational uses of the Lower American. The County of Sacramento, as custodian of the parkway, intervened on behalf of the plaintiffs. After two trips to the California Supreme Court,[46] and one to the United States Supreme Court,[47] the parties found themselves back in trial court for review of the point of diversion issue. The trial court understandably decided to avail itself of the opportunity to refer a number of questions to the State Water Resources Control Board, the agency charged in California with the administration of water rights. By then the State Department of Fish and Game and the State Lands Commission had intervened on behalf of resource and public trust interests in the river, and the 1983 *Mono Lake* decision had come down.

This case presented a fine opportunity to implement and interpret *Mono Lake's* ruling that, in the context of water allocation, the public trust requires courts and agencies to protect trust values "so far as feasible." In its reference to the State Water Resources Board, the trial court asked:

> Are there feasible alternative points or methods of diversion or use of the waters of the American River which would provide for municipal and industrial use . . . while at the same time providing flows in the Lower American River reasonably required for fisheries, wildlife, recreation, navigation and other public trust uses and values in the river?[48]

The Board's response was that "complainants failed to demonstrate that any alternative is *as* feasible as EBMUD's proposed diversion."[49] It then recommended that EBMUD be al-

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46. Environmental Defense Fund v. East Bay Mun. Util. Dist., 20 Cal. 3d 327, 572 P.2d 1128, 142 Cal. Rptr. 904 (1977), *vacated and remanded*, 439 U.S. 811 (1978), *rev'd*, 26 Cal. 3d 183, 605 P.2d 1161, 161 Cal. Rptr. 466 (1980).

47. Environmental Defense Fund v. East Bay Mun. Util. Dist., 439 U.S. 811 (1978).

48. Report of Referee, *supra* note 43, at 32, app. A at 5.

49. *Id.* at 13 (emphasis added).

lowed to divert from the point complained of, subject to the imposition of minimum flows, and a new investigation of the water rights of other American River users.[50]

### C. *Pending Issues*

Although the Board report was not entirely responsive to the issue of feasible alternatives, it did reach some significant conclusions. Some of the issues presented to the Board, and its responses thereto, included:

1. Did the legislature modify the public trust in the American River when it approved the Folsom South Canal Project, the proposed diversion facility for American River water?

*Answer*: No. This conclusion is consistent with traditional trust law to the effect that any legislative grant abrogating the trust will be found only if it is express and made a part of a project furthering trust assets.[51]

2. Can the public trust be impressed upon artificial flows of water, made available solely by a federal reclamation project?

*Answer*: Probably. On this issue, EBMUD strongly contended that the trust does not authorize the state to compel the release of stored water to preserve artificial flows. The Board pointed out in its report that every project will doubtless affect public trust uses, and it would be unreasonable to conclude that conditions could not be imposed, under the trust theory, to safeguard such uses. Nevertheless, it also concluded that failure to join the Bureau of Reclamation in this proceeding mooted the issue.[52]

3. Can the public trust be applied against a water user that itself does not divert water, but instead purchases it from the holder of the basic water right?

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50. *Id.* at 22-30.

51. *Id.*; *see, e.g.*, City of Berkeley v. Superior Court, 26 Cal. 3d 515, 525, 606 P.2d 362, 367, 162 Cal. Rptr. 327, 332, *cert. denied*, 449 U.S. 840 (1980). This question is significant in view of the contention, as yet unanswered by the California Supreme Court, that the legislature may make an express appropriation having the effect of definitively allocating public trust water resources. *See* National Audubon Soc'y v. Superior Court (*Mono Lake*), 33 Cal. 3d 419, 445 n.24, 658 P.2d 709, 727 n.24, 189 Cal. Rptr. 346, 363 n.24, *cert. denied*, 464 U.S. 977 (1983).

52. INTERAGENCY TASK FORCE, *supra* note 19.

*Answer*: Yes. The Board concluded that application of the trust to contractors for water, as distinguished from holders of the water right, was appropriate.[53] As the Fish and Game Department's brief observed, there are cases, such as this one, in which the potential harm comes from the choice of the point of rediversion of water, rather than from its original diversion and impoundment.[54]

4. What is the effect of the designation of the Lower American River as a wild and scenic river under federal and state statutes?

*Answer*: None. The California Wild and Scenic Rivers Act prohibits the construction of any diversion facility on a designated stream. Here, the Board concluded that inasmuch as the proposed diversion would take place *above* the uppermost point of wild and scenic river designation, the Act would not affect it.[55] The federal Act,[56] the Board opined, did not prevent the Bureau from honoring existing contracts for the delivery of water or from entering into new ones, so long as recreational and anadromous fishery values of the river were not unreasonably diminished.[57]

Characterizing its recommended solution as a "close call,"[58] the Board conceded that a diversion downstream from the Sacramento River would provide "greater assurance of water deliveries and possibly lower cost."[59] Furthermore, by making recreational and ecological purposes available before the diversion, it would provide the most beneficial use of the water that would pass through the Lower American. Nonetheless, the Board recommended that the district be allowed to divert from the higher point, suggesting that the court retain jurisdiction pending a

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53. *Id.*

54. Brief for Intervenor, Cal. Dep't of Fish & Game, Environmental Defense Fund v. East Bay Mun. Util. Dist., 20 Cal. 3d 327, 572 P.2d 1128, 142 Cal. Rptr. 904 (1977), *vacated and remanded*, 439 U.S. 811 (1978), *rev'd*, 26 Cal. 3d 183, 605 P.2d 1, 161 Cal. Rptr. 466 (1980).

55. CAL. PUB. RESOURCES CODE §§ 5093.50-.69 (West 1984).

56. 16 U.S.C. §§ 1271-1287 (1982).

57. Report of Referee, *supra* note 43, at 20; Cal. State Water Resources Control Bd., Legal Report, Lower American River Court Reference 149 (June 1988) (Environmental Defense Fund v. East Bay Mun. Util. Dist.).

58. Report of Referee, *supra* note 43, at 17, 26.

59. *Id.* at 26.

Board study of all water rights on the Lower American.[60]

The Water Board was obviously concerned that the Bureau of Reclamation was not a party, and in its absence, a definitive solution dealing with impacts of diversions from the river would be difficult, if not impossible.[61] Accordingly, the Board recommended a physical solution imposing minimum flows, coupled with a new investigation of all water rights in the river, involving the Bureau, the City of Sacramento, and the county.[62] Meanwhile, the trial court judge who referred the matter to the Board retired. A new judge was assigned, and the case proceeded to hearing on the strenuous objections to the Board's report filed by various complainants. The principal concern of the state intervenors was the Board's reluctance to deal with the questions referred to it in the absence of all the water rights holders.

On June 14, 1989, the court issued a 139-page Preliminary Tentative Decision that, if made final, will have major ramifications on trust law. Consistent with *Mono Lake's* mandate, the court held that both the state reasonable use doctrine and the public trust required the imposition of a specific physical solution to protect sensitive trust values. The court characterized the physical solution as a "base line" against which future diversions or appropriations were to be measured.[63] The court indicated its intention to impose specific minimum flows and protect riparian, fishery, and recreational values, prohibiting any EBMUD diversions during periods when the minimum flows could not be met prohibiting EBMUD from diverting other than for its district uses, and banning sales of the water to third parties.[64]

Close behind the *Lower American River* case are proceedings over even more complex and controversial issues. Following up on an appellate court decision implementing *Mono Lake* and authorizing the re-examination of water permits on the basis of reasonable use and public trust considerations,[65] the Water Board is

60. *Id.* at 23.

61. *Id.* at 22-27.

62. Report of Referee, *supra* note 43, at 28-30.

63. Environmental Defense Fund v. East Bay Mun. Util. Dist., No. 425955 (Alameda County Super. Ct. June 14, 1989) (Preliminary Tentative Decision).

64. *Id.* at 138.

65. United States v. State Water Resources Control Bd., 182 Cal. App. 3d 82, 150-51, 227 Cal. Rptr. 161, 201-02 (1986).

holding protracted hearings on water uses in the Sacramento-San Joaquin Delta. In the final phase, enormous amounts of evidence have been introduced on the impact of water projects, water releases, and water exports.

## V. CONCLUSION

*Mono Lake* itself is far from over. Acting on National Audubon's request, the trial court has issued a temporary restraining order directing DWP to retain 50,000 acre feet of water within the basin.[66] The state has filed a motion for leave to file a cross-complaint to clarify the applicability of state constitutional beneficial use provisions to existing water permits, and Los Angeles DWP is offering its own cross-complaint alleging that any modification of its 1941 permits would effect an inverse condemnation of its water rights.

After five years, the *Mono Lake* decision has had no measurable effect on domestic water supplies. Rather, its effect has been to require that the public trust be considered within the appropriative water rights system as "part of an integrated system of water law,"[67] one preserving the state's continuing duty to protect public trust uses, and to take such uses into account in allocating water resources.

Little credence can be given to contentions that restrictions on water diversions are somehow compensable takings. The public nature of water is demonstrated in the initial decision expanding pueblo Indian rights to accommodate the growth of Los Angeles with no evident consideration of the affected rights of riparian owners.[68]

The trust in navigable waters exists under virtually every civilized system of law. It has long been identified as an attribute of sovereignty that cannot be divested so as to deprive the state of

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66. Minute Order, Mono Lake Water Rights Cases, Judicial Council Coordination Proceeding No. 2284 (El Dorado County Super. Ct. June 15, 1989).

67. 33 Cal. 3d 419, 452, 658 P.2d 709, 732, 189 Cal. Rptr. 346, 369, *cert. denied*, 464 U.S. 977 (1983).

68. Lux v. Haggin, 69 Cal. 255, 328-29, 10 P. 674, 714-15 (1886); *see* Selvin, *The Public Trust Doctrine in American Law and Economic Policy, 1789-1920*, 1980 WIS. L. REV. 1403, 1432-34.

the right to future regulation in the interest of its people.[69]

The marriage of water law and public trust law occurred long before the 1983 *Mono Lake* decision. As stated by one Idaho court, it "forms the outer boundaries of permissible government action with respect to public trust resources."[70]

69. Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452 (1892); People v. California Fish Co., 166 Cal. 576, 584, 138 P. 79, 82 (1913).

70. Kootenai Envtl. Alliance v. Panhandle Yacht Club, 105 Idaho 622, 632, 671 P.2d 1085, 1095 (1983).