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Articulating the Public Trust: Text, Near-Text and Context

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I. INTRODUCTION

In 1983, the California Supreme Court revolutionized western water law. In *National Audubon Society v. Superior Court*,¹ the court applied the public trust doctrine to the appropriation of water. Under that common law doctrine, states hold title to certain natural resources in trust for their citizens.² Long applicable to tidelands and other lands underlying navigable watercourses, the doctrine requires the state to consider and protect the public uses of the trust-bound resources.³ Prior to *National Audubon Society*, however, courts had not applied the doctrine to limit diversions of water from navigable watercourses. Applauded by environmentalists⁴ and criticized by appropriators,⁵ that decision potentially allowed the state to reallocate water from private consumptive uses to public instream uses. Private rights that diverters had long believed vested were now subject to reallocation by judicial or administrative fiat.⁶ Moreover, the court's

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1. 658 P.2d 709 (Cal. 1983).

2. See generally Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). For a recent discussion of the doctrine's common law origins, see Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 703, 735-38 (1995).

3. E.g., *National Audubon Soc'y*, 658 P.2d at 719 (discussing the doctrine's evolution from protection of tidelands to lands underlying navigable watercourses); *City of Berkeley v. Superior Ct.*, 606 P.2d 362, 372 (Cal. 1980) (discussing circumstances under which the state can divest itself of trust duties); *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (discussing trust-protected public uses of navigable watercourses).

4. See, e.g., Harrison C. Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 ENVTL. L. 515, 518 (1989); Jan S. Stevens, *The Public Trust and In-Stream Uses*, 19 ENVTL. L. 605, 609-14 (1989).

5. See, e.g., Clifford W. Schulz & Gregory S. Weber, *Changing Judicial Attitudes Towards Property Rights in California Water Resources: From Vested Rights to Utilitarian Reallocations*, 19 PAC. L.J. 1031, 1093-98, 1106-09 (1988); see also Harrison C. Dunning, *The End of the Mono Lake Basin Water War: Ecosystem Management, Fish and Fairness to a Water Supplier*, 5 CAL. WATER L. & POLICY REP. 27, 31 (Nov. 1994) (noting "cries of alarm from many water lawyers" over the apparently "unprecedented" attack on "the very underpinnings of our property system in water").

6. See generally Schulz & Weber, *supra* note 5, at 1099-1100 (discussing possible trust reallocations).

decision did not suggest that these involuntary reallocations for public uses triggered compensation for a “taking” under the state or federal constitutions.⁷

In the first dozen years of its existence, the marriage of the public trust doctrine and the western water rights system has produced few offspring. Outside of California, this marriage has been blessed in part by a half-dozen states.⁸ No other state, however, has yet gone as far as California in the trust’s application to existing water diversions.⁹ One recent study concluded that the reason that no other states have “fully embraced the *Mono Lake* precepts” is that “the accommodation principle at the heart of *Mono Lake* is not widely understood.”¹⁰

More striking than the doctrine’s slow evolution *outside* of California has been its slow evolution *within* California. In the first dozen years of existence, only a handful of California appellate decisions considered the doctrine at all.¹¹ Collectively, however, these decisions added almost nothing of substance to the doctrine. Important legal questions about the marriage of public trust and water diversion law left unaddressed by *National Audubon Society* remain unaddressed judicially even today.¹² Moreover, until quite recently, that case’s most prominent possibility remained completely unfulfilled. For the first dozen years after its announcement, the decision had not spawned a single reallocation of water from a consumptive to an instream use. In short, the doctrine’s promise remained largely inchoate and its message largely inarticulate.

Despite its virtual stagnation judicially, the doctrine has developed administratively. Over the past dozen years, the California State Water Resources Control Board (“State Water Board” or “Board”) has developed a sizable body of pronouncements about the intersection of the public trust doctrine and the law governing private rights to divert water. In these pronouncements, the Board has begun to articulate the trust’s meaning and

7. See *id.* at 1098 (stating “the entire tenor of [*National Audubon Society*] suggests that California would not compensate a public trust influenced reallocation”); Stevens, *supra* note 4, at 620 (stating “[l]ittle credence can be given to contentions that restrictions on water diversions are somehow compensable takings”) (footnote omitted). Cf. *National Audubon Soc’y*, 658 P.2d at 723, n.22 (merely determining that property is subject to the trust is not a taking).

8. See Blumm & Schwatz, *supra* note 2, 713-15.

9. *Id.* at 735-37.

10. See *id.* at 704, 737.

11. See *infra* notes 61-110 and accompanying text (discussing post-*National Audubon Society* public trust decisions involving water diversions).

12. See *infra* note 53.

its legal place in the western water allocation system.¹³ In short, it has begun to develop a body of legal *text* that diverters, environmentalists, attorneys, policy makers, and others can “read” to answer public trust questions and guide their future conduct. Moreover, even where it has been virtually silent about the legal implications of its actions, the Board’s *application* of trust doctrine to specific diversions has provided a rich *context* for understanding the Board’s view of the trust.¹⁴ These textual and contextual developments have culminated in two recent State Water Board decisions that have finally fulfilled *National Audubon Society’s* promise to reallocate water from existing appropriations to public trust-protected uses.¹⁵

As a result of the State Water Board’s decisions, at least at the administrative level, the doctrine has become much more articulate than in its bare announcement in *National Audubon Society*. While questions remain for administrative treatment, the Board has begun to develop a view of the doctrine that gives the Board the fullest possible power to allocate and reallocate surface water diversions.¹⁶ At the same time, the Board has placed practical limits on the ability of parties to invoke these broad powers.¹⁷ Finally, the Board has acknowledged the necessity of permitting continued diversions.¹⁸ In short, the State Water Board has largely articulated a vision of the accommodation of the public trust doctrine within the broader field of water resources law.

This accommodation highlights the doctrinal flexibility that is simultaneously the trust’s great strength and its biggest limitation. On the one hand, the Board’s decisions demonstrate the trust’s great adaptability to widely different water resource management problems. The trust can tailor a solution that balances the specific water needs of a given ecosystem and a particular set of diverters. On the other hand, this adaptability comes at the expense of predictability. Beyond a handful of jurisdictional principles and operational rules, few, if any, “per se” rules for striking a balance have

13. See *infra* notes 124-327 and accompanying text (discussing the Board’s “textual” development of the trust).

14. See *infra* notes 418-523 and accompanying text (discussing Board’s “contextual” development of the trust).

15. Cal. State Water Resources Control Bd., Water Right Order WR 95-4, 1995 WL 92133 (Feb. 16, 1995) [hereinafter Water Right Order WR 95-4], see *infra* notes 300-26 and accompanying text (Big Bear Creek); Cal. State Water Resources Control Bd., Water Right Decision D-1631 (Sept 28, 1994) [hereinafter Water Right Decision D-1631], see *infra* notes 221-99, 451-502 and accompanying text (Mono Lake Basin).

16. See *infra* notes 525-32 and accompanying text (discussing broad Board jurisdiction).

17. See *infra* notes 533-39 and accompanying text (discussing limits on ability to invoke Board jurisdiction).

18. See *infra* notes 540-45 and accompanying text (discussing approval of continued diversions).

emerged from the Board's trust decisions. Indeed, such rules will likely *never* emerge.¹⁹ Moreover, the process that produces well crafted, ecosystem management decisions is time-consuming, expensive, and fraught with technical uncertainty.

In any event, the State Water Board's vision of this accommodation of trust doctrine with the law governing surface diversions has not been tested judicially. Indeed, at the judicial level, the public trust remains an "existential" doctrine: its essence is principally its existence. The doctrine *might* compel judicially sanctioned water reallocations under some circumstances. This *potential* alone has transformed California water resources disputes. Nevertheless, the doctrine's promise remains largely inarticulate. Absent an *actual* judicial trust application, little is known about the doctrine's concrete impact. Many reasons may explain this continued lack of judicial development.²⁰ Whatever the explanation, at present, the gap between the doctrine's administrative articulation and its judicial inarticulation creates a tension from which some of the doctrine's power and mystique arises. Indeed, it is possible that an unwillingness by environmentalists or diverters to force appellate doctrinal articulation may explain the recent willingness of potential parties to accept trust-based decisions or settlements.²¹

This article examines the judicial, legislative, and administrative articulation of the public trust doctrine, as applied to diversions from surface watercourses in California, in the first dozen years after *National Audubon Society*. For convenience, it divides the legal developments into three constructs: "text," "context," and "near-text." "Textual" developments primarily include *explicit* judicial and administrative statements about the trust gleaned from concrete disputes involving diversions from California surface watercourses. "Contextual" developments look principally to *implicit* lessons gleaned from the judicial and administrative application of the trust. While the two constructs overlap, they are meant to recognize that legal meaning may emerge from both a decision maker's *statements* and its *conduct*. They are particularly useful in highlighting the doctrine's administrative articulation. Indeed, for whatever reason, the State Water Board has only expounded the trust's textual development reluctantly, while nevertheless applying it vigorously. Finally, "near-textual" developments

19. See *infra* notes 580-81 and accompanying text (discussing inevitability and implications of case-by-case analysis).

20. See *infra* notes 568-81 and accompanying text (discussing possible explanations for the doctrine's slow judicial development).

21. See *infra* notes 575-78 and accompanying text (discussing willingness of parties to accept well-crafted trust-based solutions).

address the peculiar circumstances that arose in the context of litigation involving trust issues on California's lower American River. As discussed below,²² in response to a judicial reference, the State Water Board issued its most exhaustive public trust legal discussion. The Board's report contains many useful statements about the trust. Nevertheless, the trial court's ultimate rejection of the Board's proposed solution to the trust problems clouds the report's value as a component of trust doctrine.

Part II of this article introduces the public trust doctrine and summarizes *National Audubon Society*.²³ Parts III through V trace the "textual" developments of the trust since *National Audubon Society*. Part III addresses judicial development,²⁴ Part IV addresses legislative development,²⁵ and Part V addresses administrative development.²⁶ In particular, the administrative developments discussion examines State Water Board trust statements in decisions involving new appropriations, water transfers, and existing appropriations. Part VI examines "near-textual" development in the lower American River litigation.²⁷ Part VII considers "contextual" developments,²⁸ focusing on two areas: 1) the water quality planning process for the San Francisco Bay and the Sacramento/San Joaquin River Delta Estuary; and 2) the Mono Lake Basin. Part VIII provides conclusions about the doctrine's post-*National Audubon Society* development and its overall impact on diversions from surface watercourses.²⁹ In particular, it: 1) summarizes the doctrine's administrative and judicial articulation; 2) considers several explanations for the doctrine's slow judicial development; and 3) suggests five concrete impacts.

The article concludes that California is well into the new era of trust-induced water reallocations. The State Water Board decisions sketch a vision of the trust that stretches its jurisdiction broadly, yet recognizes practical limits on that jurisdiction's exercise. This accommodation of trust and consumptive uses will greatly influence courts both in California and in other states that adopt the doctrine.

22. See *infra* notes 328-417 and accompanying text (discussing the lower American River public trust litigation).

23. See *infra* notes 30-60 and accompanying text.

24. See *infra* notes 61-112 and accompanying text.

25. See *infra* notes 114-23 and accompanying text.

26. See *infra* notes 124-327 and accompanying text.

27. See *infra* notes 328-417 and accompanying text.

28. See *infra* notes 418-523 and accompanying text.

29. See *infra* notes 525-618 and accompanying text.

II. NATIONAL AUDUBON SOCIETY & THE PUBLIC TRUST DOCTRINE

Prior to 1983, the public trust doctrine in California water law primarily addressed two matters. First, it determined public ownership of the beds underlying navigable waterways.³⁰ Second, it addressed public access to, and uses of, navigable waterways.³¹ In addition, a related public trust doctrine addressed the state's ownership of fish.³²

In its landmark 1983 decision in *National Audubon Society v. Superior Court*,³³ the California Supreme Court expanded the public trust doctrine to encompass the appropriation of water from surface watercourses.³⁴ The case

30. Case law established the extent of public ownership over the beds, shores, and waters of navigable watercourses. *E.g.*, *Colberg, Inc. v. State*, 432 P.2d 3, 8 (Cal. 1967). While the doctrine originated in tidelands, California and other jurisdictions early on extended it to navigable bodies of water. *National Audubon Soc'y v. Superior Ct.*, 658 P.2d 709, 719 (Cal. 1983); *see, e.g.*, *State v. Superior Ct. (Lyon)*, 625 P.2d 239, 248 (Cal. 1981) (trust extends up to the ordinary high water mark, even of an artificially elevated lake). It also addressed the circumstances in which the state could divest itself of the trust. *E.g.*, *City of Berkeley v. Superior Ct.*, 606 P.2d 362, 372 (Cal. 1980); *City of Long Beach v. Mansell*, 476 P.2d 423, 437 (Cal. 1970); *Boone v. Kingsbury*, 273 P. 797, 816 (Cal. 1929).

In *National Audubon Society*, the Court concluded that the doctrine arises as an incident of the state's sovereignty, not its ownership of state waters. 658 P.2d at 727.

31. Case law established that navigability required only suitability for pleasure boating. *People ex. rel. Baker v. Mack*, 97 Cal. Rptr. 448, 451 (Cal. Ct. App. 1971). It also determined when the public could obtain access over private lands. *Bohn v. Albertson*, 238 P.2d 128, 137 (Cal. Ct. App. 1951). It also addressed access to temporarily flooded lands. *Id.* Finally, it determined the uses to which the public maintained access. *E.g.*, *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (noting that the trust protected not only the traditional triad of fishing, navigation, and commerce, but also more contemporary uses for recreation, aesthetics, and preservation of lands in their natural state).

32. *See, e.g.*, *People v. Monterey Fish Prods. Co.*, 234 P. 398, 404 (Cal. 1925); *People v. Stafford Packing Co.*, 227 P. 485, 488 (Cal. 1924); *People v. California Fish Co.*, 138 P. 79, 82 (Cal. 1913); *People v. Truckee Lumber Co.*, 48 P. 374, 375 (Cal. 1897); *see also Golden Feather Community Ass'n v. Thermalito Irrigation Dist.*, 257 Cal. Rptr. 836, 840 (Cal. Ct. App. 1989) (discussing *Truckee Lumber*). This related public trust law flows from the state's ownership interest in the fish and wildlife of the state. *Golden Feather*, 257 Cal. Rptr. at 840. Unlike the state's public trust interest in water, the interest in fish does not depend on the navigability of the watercourse in which the fish live. *Id.*; *see also California Trout, Inc. v. State Water Resources Control Bd.*, 255 Cal. Rptr. 184, 211-12 (Cal. Ct. App. 1989) (noting that "a variety of public trust interest pertain[s] to non-navigable streams which sustain a fishery").

33. 658 P.2d 709 (Cal. 1983).

34. California recognizes two main classes of private rights to divert and use surface waters: riparian and appropriative rights. WELLS A. HUTCHINS, *THE CALIFORNIA LAW OF WATER RIGHTS* 40-55 (1956). For an overview of these two systems, see William R. Attwater & James Markle, *Overview of California Water Law*, 19 PAC. L.J. 957, 959-75 (1988). California also recognizes prescriptive and pueblo rights. *Id.* at 969. Adverse possession law underlies prescriptive rights. *Id.* Prescriptive rights, however, are unenforceable against the state. *People v. Shirokow*, 605 P.2d 859, 867 (Cal. 1980). Thus, they have little if any continuing vitality in California. Attwater & Markle, *supra*, at 969. Pueblo rights derive from Spanish and Mexican law. *Id.* Superior to all other rights, they allow a municipality formed under Mexican or Spanish law to "use the waters of sources that ran through the pueblo, both surface and underground, from their source to the sea." *Id.* Of these four classes of rights, the Mono Lake litigation involved only appropriative rights.

involved challenges by environmentalists to the City of Los Angeles' diversions from four tributaries of Mono Lake.³⁵ In its decision the court answered two questions.³⁶ First, did the doctrine apply to existing water appropriations?³⁷ Second, if the doctrine applied, did the superior court have original jurisdiction to apply it?³⁸ Ultimately, the court answered both questions affirmatively.³⁹

The court first addressed the doctrine's applicability to the existing appropriation of water from nonnavigable tributaries of a navigable watercourse.⁴⁰ The court affirmed the doctrine's extension to such tributaries, to the extent that diversions from the tributaries affect the navigable watercourse itself.⁴¹ The court then attempted to reconcile the appropriative rights system with the public trust doctrine.⁴²

The court outlined three principles to guide future courts and administrators in the accommodation of the two bodies of law.⁴³ First, it concluded that "[t]he state as sovereign retains continuing supervisory control over . . . rights in flowing waters . . . ; it prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust."⁴⁴ Second, the court concluded that "[a]s a matter of . . . necessity, the Legislature, acting . . . through . . . the

The California law of appropriative rights mirrors the prior appropriation doctrine prevalent throughout the western United States. *See generally* 2 WATERS AND WATER RIGHTS 83-124 (Robert E. Beck ed., 1991). To perfect an appropriation, a diverter must: 1) intend to apply water to an existing or contemplated beneficial use; 2) actually divert water from the natural channel; and 3) apply water diligently, i.e., within a reasonable time. HUTCHINS, *supra*, at 108. Prior to 1872, judicial decisions governed appropriative rights in California almost exclusively. Attwater & Markle, *supra*, at 966. Between 1872 and 1914, the California legislature created a statutory mechanism for obtaining appropriative rights. *Id.* Since 1914, appropriative rights have been obtained under a permit and license system now administered by the State Water Resources Control Board. *Id.* at 983; *see* CAL. WATER CODE §§ 1200-1851 (West 1971 & Supp. 1995).

35. Los Angeles diverted water from Lee Vining, Walker, Parker, and Rush Creeks. *National Audubon Soc'y*, 658 P.2d at 713.

36. The questions were posed by the United States District Court for the Eastern District of California, to which the United States, a cross-defendant in the original state action, had removed the case. *Id.* at 716-17. Under the federal abstention doctrine, the District Court stayed its action pending resolution of these two questions by the state courts in a separately filed declaratory relief action. *Id.* at 716-18.

37. *Id.* at 732; *see also id.* at 717.

38. *Id.* at 717; *see also id.* at 732.

39. *Id.* at 732.

40. *Id.* at 720.

41. *Id.* at 720-21. The court left open "whether the public trust extends for some purposes . . . to nonnavigable streams." *Id.* at 721 n.19.

42. *Id.* at 726-29.

43. *Id.* at 727-29.

44. *Id.* at 727.

Water Board . . . [can] grant usufructuary licenses that will permit an appropriator to take water . . . and use that water in a distant part of the state even though this taking does not promote, and may unavoidably harm, the trust uses at the source stream.”⁴⁵ Third, the court concluded 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 public trust uses whenever feasible.”⁴⁶ In summary, the court reiterated both the state’s continuing supervision over previously approved appropriations, and the state’s ability to reconsider “past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.”⁴⁷

Applying its principles to the case before it, the court noted that neither court nor agency had “ever determined the impact of diverting the entire flow of the Mono Lake tributaries into the Los Angeles Acqueduct [*sic*].”⁴⁸ The court outlined a two-step public trust review. First, a “responsible body” must balance the appropriator’s needs with the watershed’s needs to determine whether “the benefit gained is worth the price.”⁴⁹ Second, that body must determine “whether some lesser taking would better balance the diverse interests.”⁵⁰

After outlining the principles governing the marriage of the trust and the appropriative rights doctrine, the court considered the trial court’s original jurisdiction over trust matters. The court concluded that both the trial court and the State Water Board were “responsible bodies” with original jurisdiction to undertake the public trust review.⁵¹ Thus, a citizen need not—but could—first petition the Board before filing a trust action in court. In so ruling, the court allowed potential plaintiffs to forum shop. As a

45. *Id.* The court elaborated:

The population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values. . . . 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, and can be justified only upon theories of reliance or estoppel.

Id. at 727-28.

46. *Id.* at 728. The court elaborated: “the state must bear in mind its duty as trustee . . . to preserve, so far as consistent with the public interest, the uses protected by the trust.” *Id.*

47. *Id.*; see Blumm & Schwartz, *supra* note 2, at 735-36 (summarizing six aspects of trust development in California).

48. 658 P.2d at 728.

49. *Id.*

50. *Id.*

51. *Id.* at 729-32.

consequence, if parties invoked the court's original jurisdiction, they could bypass the Board's technical expertise and policy-making perspective.⁵²

While answering the two questions presented to it, *National Audubon Society* left unanswered virtually all of the questions about the details of the doctrine's applicability to new and existing water diversions. At least a dozen major questions have emerged. For example, one commentator raised questions about: 1) the existence, if any, of a preference for trust uses over other aspects of "public interest;" 2) the doctrine's applicability to stored water; 3) the impact of legislative approval of water projects; 4) the allocation of trust-ordered diversion cutbacks among multiple diverters on a watercourse; 5) the doctrine's applicability to "riparian corridors," and microscopic links in the food chain; and 6) the balance among competing trust uses.⁵³ Other commentators asked about: 1) the doctrine's applicability to water rights other than State Water Board approved appropriations; 2) the events that might trigger a reevaluation of a previous trust-based water allocation decision; and 3) the compensability, if any, of a trust-ordered reallocation of water rights.⁵⁴ Additional questions arise about the components of the required "accounting."⁵⁵ Still other questions arise about

52. In cases filed in superior court, the court may refer the matter to the State Water Board for an initial opinion. CAL. WATER CODE §§ 2000-2075 (West 1971 & Supp. 1995).

53. Arthur L. Littleworth, *The Public Trust vs. The Public Interest*, 19 PAC. L.J. 1201, 1207-22 (1988).

54. Schulz & Weber, *supra* note 5, at 1098, 1106-09.

55. For example, by asking whether "the benefit gained is worth the price," and by directing the decision makers to "take the public trust into account," the court imported cost-benefit language into its analysis. *National Audubon Soc'y*, 658 P.2d at 728. The court's use of such language thus invites discussion about the role of formal cost-benefit analysis in the "responsible body's" review. On the one hand, the court might have spoken only informally when it invited such an accounting. Under such a scenario, the court was only speaking of such an analysis in a non-technical, or popular sense. On the other hand, at the heart of the parties' dispute lies the fundamental question of "allocation of water resources in the public interest." *Id.* Economic considerations, even if not ultimately exhaustive of the public interest, would seem fundamental to that determination.

Assuming that the court intended the "responsible body" to at least attempt to quantify the costs and benefits of the various balances possible, the practical application of that "consideration" remains uncertain. Although the court articulated its balance in economic language, it gave no guidance as to the proper components of "benefits" and "cost." Even assuming agreement on the proper components for the "responsible body's" consideration, the court left unguided the quantification of "benefits" and "price." The quantification of natural resources values, particularly of ecosystems left in their natural state, is notoriously difficult. *See e.g.*, R. ABRAMS, Z. PLATER & W. GOLDFARB, ENVIRONMENTAL LAW & POLICY: NATURE, LAW & SOCIETY 54-57 (West 1992). In particular, many argue that traditional economic terms leave "wild" natural resources undervalued. *Id.* at 56-57, 63-66. Finally, the court gave no guidance on how to strike the balance. In particular, the court left unanswered questions about the roles of uncertainty and burdens of proof.

the degree of trial court deference to State Water Board trust decisions⁵⁶ and the Board's ability to apply the doctrine to existing water rights outside of a statutory adjudication.⁵⁷

A dozen years after *National Audubon Society*, these questions remain almost entirely unanswered by the courts.⁵⁸ For its part, the State Water Board has addressed at least partially most of the questions explicitly.⁵⁹ Moreover, as highlighted by two recent decisions,⁶⁰ the Board has finally begun to implement *National Audubon Society's* promise of a new era in water resources management. The remaining discussion outlines and assesses the post-*National Audubon Society* development of the public trust doctrine as applied to California surface water diversions.

III. TEXTUAL DEVELOPMENT SINCE *NATIONAL AUDUBON SOCIETY*: THE COURTS

A. California Courts

Since *National Audubon Society*, the California Supreme Court has only once addressed the public trust doctrine. *In re Water of Hallett Creek*⁶¹

56. In many instances, the courts will apply the more deferential "substantial evidence" standard to review Board determinations. See *Imperial Irrigation Dist. v. State Water Resources Control Bd.*, 275 Cal. Rptr. 250, 254 (Cal. Ct. App. 1990) ("substantial evidence" standard applies to appellate court's review of trial court's factual findings, but "independent judgment" standard applies to review of court's legal determinations); *Imperial Irrigation Dist. v. State Water Resources Control Bd.*, 231 Cal. Rptr. 283, 290 n.17 (Cal. Ct. App. 1986) (noting the Board's concession that "in this case" the trial court should apply the independent judgment standard); *Bank of Am. Nat'l Trust & Sav. Ass'n v. State Water Resources Control Bd.*, 116 Cal. Rptr. 770, 775 (Cal. Ct. App. 1974) (concluding that in some cases, the less deferential "independent judgment" standard might apply). Since the trial courts have independent, concurrent jurisdiction over public trust matters, where a trust matter arose first in a Board proceeding, the courts arguably might not defer to the prior Board trust determinations.

57. In *National Audubon Society*, the court found that Water Code § 2501 allowed the Board to apply the trust. 658 P.2d at 729-730. That section authorizes the Board to determine, in special proceedings, "all rights to water of a stream system whether based on appropriation, riparian right, or other basis of right." CAL. WATER CODE § 2501 (West 1971); cf. *In re Water of Hallett Creek*, 749 P.2d 324, 338 n.16 (Cal. 1988) (stating in dicta that the Board can apply the trust outside of statutory adjudications).

58. Gregory S. Weber, *The Role of Environmental Law in the California Water Allocation and Use System: An Overview*, 25 PAC. L.J. 907, 923 (1994) [hereinafter Weber, *Overview*].

59. See *infra* notes 124-326, 525-45 and accompanying text (summarizing Board additions to trust doctrine).

60. Water Right Order WR 95-4, *supra* note 15, at *9; see discussion *infra* notes 300-26 and accompanying text (Big Bear Creek); Water Right Decision D-1631, *supra* note 15, see discussion *infra* notes 221-99, 451-502 and accompanying text (Mono Lake Basin).

61. 749 P.2d 324 (Cal.), *cert. denied*, 488 U.S. 824 (1988).

involved a statutory adjudication⁶² of a stream system that flowed through lands partially owned by the United States. The United States claimed riparian rights on these reserved lands.⁶³ In its decision, the court concluded that the United States could assert riparian rights on these lands just like any other land owner.⁶⁴

In a footnote, the court addressed the State Water Board's concern that, outside of stream adjudications, the Board might lack sufficient oversight over such riparian rights. The court stated:

Contrary to the Board's suggestion, it is *not* powerless to assert the state's interest This court has . . . recognized the standing of . . . any member of the general public to raise a claim of harm to the public trust. Such claims may be brought in the courts or before the Board. . . . Thus, it is clear that the Board's and the state's interest . . . may be asserted, and adequately protected, by initiative of the state itself or of concerned citizens.⁶⁵

This footnote, although dicta, suggests two points. First, the trust doctrine applies to riparian rights. Second, the Board can apply the public trust doctrine to existing water rights without having to launch a cumbersome, time consuming, and potentially expensive statutory adjudication.⁶⁶

62. A "statutory adjudication" quantifies the rights of all water rights holders in a stream system. As such, it requires all such rights holders to join the proceeding and file claims to quantify their rights. See CAL. WATER CODE §§ 2500-2900 (West 1971 & Supp. 1995).

63. "'Reserved' lands are lands which have been removed from the public domain for some predetermined purpose, such as a national park, national forest, Indian reservation, or military reservation." *Hallet Creek*, 749 P.2d at 326 n.3.

64. *Id.* at 327.

65. *Id.* at 338 n.16 (emphasis in original).

66. See Cal. State Water Resources Control Bd., *Legal Report: Lower American River Court Reference* at 76 (June 1988) (discussing the limitations of proceeding by general stream adjudication) [hereinafter *Legal Report*].

The California Water Code allows the Board to initiate proceedings to prevent water waste or unreasonable water diversions or diversion methods. CAL. WATER CODE § 275 (West 1971). This statute implements the California Constitution's comparable proscription against wasteful or unreasonable water uses or diversion methods. CAL. CONST. art. X, § 2. It applies to all water uses in California, not only to state permitted appropriations. See *Imperial Irrigation Dist. v. State Water Resources Control Bd.*, 231 Cal. Rptr. 283, 289 (Cal. Ct. App. 1986) (applying § 275 to appropriative rights that preexisted the 1914 permit system). In many cases, the Board could find that a water diversion that unnecessarily harmed trust uses also violated the statutory and constitutional proscriptions against unreasonable water use. In *National Audubon Society*, however, the plaintiffs expressly disclaimed any charge that the city's diversions, though allegedly harmful to the trust-protected resources, were "unreasonable" within § 275. 658 P.2d 709, 729 (Cal. 1983).

In five published decisions, the California Court of Appeal has addressed the public trust doctrine's applicability to surface watercourse diversions.⁶⁷ In *United States v. State Water Resources Control Board* ("Delta Water Cases"),⁶⁸ the court found that the public trust doctrine supported the State Water Board's decision to implement water quality plans by readjusting water rights held by the large state and federal water projects.⁶⁹ The case also provides the strongest authority for the application of the public trust doctrine to federal reclamation projects.⁷⁰ Nevertheless, the court did not explicitly address the relationship between the federal Reclamation Act and

67. Other cases have involved the applicability of the trust doctrine to determine ownership of submerged lands. *E.g.*, *Carstens v. California Coastal Comm'n*, 227 Cal. Rptr. 135, 142-43 (Cal. Ct. App. 1986) (finding, in a tidelands case, that the Commission properly considered competing trust uses); *Fogerty v. State*, 231 Cal. Rptr. 810, 815-17 (Cal. Ct. App. 1986) (examining the extent of the public trust "easement" in the bed of a lake whose level was raised by an outlet dam); *Grupe v. California Coastal Comm'n*, 212 Cal. Rptr. 578, 593 (Cal. Ct. App. 1985) (noting, in tideland cases, the "extreme deference" courts accord state action designed to further trust purposes); *Amigos de Bolsa Chica, Inc. v. Signal Properties, Inc.*, 190 Cal. Rptr. 798, 808-09, (Cal. Ct. App. 1983) (finding no inconsistency between the trust doctrine and the statute of limitations for challenges to boundary and land exchange agreements), *hearing granted, appeal dismissed*, 236 Cal. Rptr. 151 (Cal. 1987). Other cases have involved statutory immunities from liability arising out of recreation on trust-encumbered properties. *Charpentier v. Von Geldern*, 236 Cal. Rptr. 233, 238-39 (Cal. Ct. App. 1987) (finding immunity where plaintiff trespassed on defendant's land in order to swim in abutting navigable waterway). *But see Pacific Gas & Elec. Co. v. Superior Ct.*, 193 Cal. Rptr. 336, 338-339 (Cal. Ct. App. 1983) (finding no immunity where boater hit power lines overhanging navigable waterway). None of these cases has presented any conflict between water diversions and the state's trust duties.

68. 227 Cal. Rptr. 161 (Cal. Ct. App. 1986).

69. *Id.* at 201-02.

70. Section 8 of the Reclamation Act authorizes the Bureau of Reclamation to obtain water rights for its projects pursuant to state law. 43 U.S.C. §§ 372, 383 (1988); *see* *Natural Resources Defense Council v. Patterson*, 791 F. Supp. 1425, 1428 n.2 (E.D. Cal. 1992). In *California v. United States*, the United States Supreme Court found that federal reclamation projects needed to comply with state water rights law unless application of state law was inconsistent with congressional directives. 438 U.S. 645, 674-75 (1978). To date, no court has formally considered the appropriateness of applying state public trust law to a federal reclamation project. A public trust claim was raised in *Natural Resources Defense Council v. Patterson. NRDC Adds Fishery Claims to Orange Cove Suit*, 2 CAL. WATER L. & POLICY REP. 12 (Oct. 1991). By the time the case reached summary judgment stage, however, that claim had been dropped. Telephone Interview with Scott Kuney, Esq., counsel for defendants (May 25, 1995); *cf. Natural Resources Defense Council*, 791 F. Supp. at 1427-28 (noting then-remaining statutory claims in case).

The Central Valley Project Improvement Act ("CVPIA") requires compliance with any State Water Board decision establishing permit and license conditions. Central Valley Project Improvement Act of 1992, Pub. L. No. 102-575, § 3406(b), 106 Stat. 4714 (1992). This section presumably requires CVPIA compliance with Board public trust decisions. By the time of the CVPIA's 1992 passage, the trust's general existence in California water law was well established. Moreover, Congress presumably was aware of two specific state applications of the trust to the federal Central Valley Project: the *Delta Water Cases* and the State Water Board's Water Rights Order 91-1. Memorandum from Andrew Sawyer, Esq., Staff Counsel, State Water Board, to Gregory Weber, at 4 (Aug. 8, 1995) (on file with author) [hereinafter Memo].

the state trust doctrine. Moreover, its brief trust discussion casts no light on trust details. On the record before it, the court could not address environmentalists' claims that the particular balance struck inadequately mitigated for the projects' environmental impacts.⁷¹

Two 1989 appellate decisions presented the next opportunities for doctrinal development. In *Golden Feather Community Ass'n v. Thermalito Irrigation District*,⁷² the California Court of Appeal addressed the doctrine's applicability to non-navigable watercourses that did not themselves affect navigable ones.⁷³ *Golden Feather* involved a challenge to water releases from the Concow reservoir.⁷⁴ Plaintiffs claimed that the releases reduced fishing, wildlife, and recreational opportunities at the drawn down reservoir. They asserted the public trust doctrine to compel the continued diversion of water for storage behind the dam.⁷⁵ Ultimately, the appellate court concluded that the public trust doctrine did not require "an authorized diverter of a nonnavigable stream to continue the diversion of water but forego the authorized uses thereof in order to maintain an artificial reservoir for the recreational . . . use of the public."⁷⁶

In reaching its conclusion, the appellate court highlighted the narrowness of its holding. First, it noted the parties' agreement that the relevant watercourse was *not* navigable.⁷⁷ Second, the court distinguished cases where longstanding use of certain artificial watercourses gave rise to private riparian rights.⁷⁸ Third, the court distinguished the public trust cases involving the state's power to protect fish from pollution of nonnavigable waters.⁷⁹

Ultimately, the threefold combination of the reservoir's conceded nonnavigability, its artificiality, and the lack of impact on a navigable

71. *Delta Water Cases*, 227 Cal. Rptr. at 202. The trial court had ruled on legal issues without considering "the lengthy administrative record." *Id.* at 175 n.7.

72. 257 Cal. Rptr. 836 (Cal. Ct. App. 1989).

73. In *National Audubon Society*, the California Supreme Court left the question open. 658 P.2d at 721 n.19.

74. 257 Cal. Rptr. at 838. Plaintiffs alleged that in both 1983 and 1984, defendants released 6,000 acre-feet of Concow Creek water impounded in Concow Reservoir behind Concow Dam. *Id.*

75. *Id.* at 838-39.

76. *Id.* at 840, 841-43.

77. *Id.* at 839. Thus, the court did not have to address the impact of the "pleasure boat test" for navigability. *Id.* at 839 n.2; *see supra* note 31 (noting test). The court concluded that "navigability is a factual question . . . [Thus] in resolving the dispute between the parties we are not free to disregard their concessions." *Id.*

78. *Id.* at 839-40; *see, e.g.,* *Chowchilla Farms v. Martin*, 25 P.2d 435, 441 (Cal. 1933).

79. *Golden Feather*, 257 Cal. Rptr. at 840 (distinguishing *People v. Truckee Lumber Co.*, 48 P. 374 (Cal. 1897)). The court also noted that plaintiffs had only sought public trust relief. *Id.* Thus, it stated that other legal theories might support relief against the defendant's reservoir operations. *Id.*

watercourse proved dispositive.⁸⁰ Citing *National Audubon Society*, the court acknowledged the state's authority "over properties which are not themselves within the public trust."⁸¹ Nevertheless, the state could only exercise such power "where it is necessary to protect public trust interests."⁸² The court elaborated: "this does not mean that such properties are deemed to be added to the public trust, nor that all incidents of the public trust are applicable to such properties."⁸³ Moreover, the court read decisional law as limiting the doctrine "to circumstances where the interest to be protected is a traditional public trust interest."⁸⁴ The court found no convincing argument for extending the doctrine to the nonnavigable, artificial watercourse before it.⁸⁵

The second 1989 opinion also involved an artificial impoundment of water. *Big Bear Municipal Water District v. Bear Valley Mutual Water Co.* ("*Big Bear Lake*")⁸⁶ involved a dispute between a water district organized to promote recreational uses of Big Bear Lake and an irrigation company which held senior rights to use lake water. Unlike *Golden Feather*, *Big Bear Lake* did not address the trust's applicability to artificial impoundments.⁸⁷ Instead, after assuming arguendo the doctrine's *general* applicability to such watercourses, the court found that the doctrine did not compel the *specific* application sought by the plaintiff water district.⁸⁸

Big Bear Lake involved the water district's attempt to modify a 1977 judgment between it and the irrigation company. In that judgment, the trial

80. *Id.* at 843. In reaching its conclusion, the court devoted substantial attention to traditional property law elements in the trust's pedigree. *Id.* at 840-42. Crucial to the court's analysis was the absence of a "chain of title" linking the beds of the artificial watercourse to the plaintiffs' alleged rights to use the watercourse. *Id.* at 842; *see supra* note 30 (noting trust's roots in title to submerged land). The court found that the trust's essence lay in "the people's right of common usage of navigable waters for navigation and fishing [that] predates the State's acquisition of title to navigable waters and the soils under them." 257 Cal. Rptr. at 842 (citing *People v. California Fish Co.*, 138 P. 79 (Cal. 1913)). It found that the people never had a preexisting right to use the reservoir site since the defendants created it *after* defendants had acquired title, a title thus unbridled with any trust interests. *See id.*

81. *Golden Feather*, 257 Cal. Rptr. at 842.

82. *Id.*

83. *Id.*

84. *Id.* at 843. According to *Golden Feather*, the traditional interest involved in *National Audubon Society* was the impact on Mono Lake itself, an unquestionably navigable watercourse. *Id.* Similarly, the court found that in *Truckee Lumber*, the impact involved the public's interest in the fish itself. *Id.*; *People v. Truckee Lumber Co.*, 48 P. 374 (Cal. 1897). *Golden Feather* concluded: "[n]either case purported to add the nonnavigable streams themselves to the public trust." 257 Cal. Rptr. at 843.

85. *Golden Feather*, 257 Cal. Rptr. at 843.

86. 254 Cal. Rptr. 757 (Cal. Ct. App. 1989).

87. *Id.* at 766-67.

88. *Id.* at 767.

court had imposed a physical solution on the parties.⁸⁹ To keep water within the lake for recreation and wildlife enhancement, the trial court had ordered the senior company to accept water purchased by the junior district and delivered to the senior “in lieu” of the company’s rights to draw lake water.⁹⁰ In the phase of the lawsuit that eventually reached the California Court of Appeal, the district had sought to require the irrigation company to adopt a conjunctive use plan to implement the earlier judgment.⁹¹ As one basis for imposition of that plan, the district proffered the public trust doctrine.⁹² The trial court, however, concluded that it lacked jurisdiction to impose the conjunctive use plan.⁹³

The California Court of Appeal affirmed. It distinguished *National Audubon Society* by noting that the 1977 judgment’s physical solution had expressly attempted to preserve trust-protected uses in the lake, even though it did not cite the trust by name.⁹⁴ In addition, it found that the district’s true challenge lay not with the manner of water delivery to the irrigation company, but in the company’s proposed change in water use.⁹⁵ Finally, the court found that the district had not presented *any* conjunctive use plan to the trial court, “much less a plan which would provide ‘additional’ protection for public trust uses of the lake.”⁹⁶ In conclusion, the court found that the trial court had not abdicated its trust responsibilities by refusing to adopt a conjunctive use plan.⁹⁷

Two decisions involving tributaries to Mono Lake present the only additional post-*National Audubon Society* California appellate public trust opinions. In *California Trout, Inc. v. State Water Resources Control Board* (“*Cal. Trout I*”),⁹⁸ the court considered the application of Fish and Game Code sections 5937 and 5946 to the City of Los Angeles’ licenses to divert

89. *Id.* at 760-61. Under the physical solution doctrine, the court may require senior appropriators to accept substitute water supplies or diversion methods in order to free water for junior appropriators. *See, e.g.,* *City of Lodi v. East Bay Mun. Util. Dist.*, 60 P.2d 439, 449 (Cal. 1936); *Peabody v. Vallejo*, 40 P.2d 486, 499 (Cal. 1935).

90. *Big Bear Lake*, 254 Cal. Rptr. at 760-61.

91. *Id.* at 762, 764-67. A conjunctive use plan involves the coordination of surface and groundwater supplies. *Id.* at 765 n.3.

92. *Id.* at 762, 766-67.

93. *Id.* at 763.

94. *See id.* at 767.

95. *Id.* The company planned to allow its shareholders to use water for domestic and municipal purposes, instead of its traditional agricultural uses. *Id.* at 761.

96. *Id.* at 767.

97. *Id.*

98. 255 Cal. Rptr. 184 (Cal. Ct. App. 1989). The appellate court issued this decision after granting a rehearing and vacating its prior opinion. *California Trout, Inc. v. State Water Resources Control Bd.*, 247 Cal. Rptr. 259 (Cal. Ct. App. 1988).

water from the Mono Lake tributaries.⁹⁹ The bulk of the court's decision focused on the application of those two statutes.¹⁰⁰ Nevertheless, while considering the State Water Board's argument that the challenge was untimely, the court addressed the statutes' relationship to the common-law public trust doctrine.¹⁰¹

The court concluded that section 5946 was "a specific legislative rule concerning the public trust."¹⁰² As such, "no private right in derogation of that rule can be founded upon the running of a statute of limitations."¹⁰³ Moreover, because section 5946 was a state statute that addressed the relationship between trust-protected and consumptive uses, the State Water Board could not ignore the particular balance struck by the legislature.¹⁰⁴ Finally, the court concluded that legislative articulation of this rule supported the Board's power to issue a remedy.

In *California Trout, Inc. v. Superior Court* ("Cal. Trout II"),¹⁰⁵ the same court that had decided *Cal. Trout I* addressed the State Water Board's failures both to include the statutory conditions in the City's licenses and to order the City to release or bypass sufficient flows to meet the statutory requirements.¹⁰⁶ While concluding that the Board had to act promptly to fulfill the *Cal. Trout I* mandate, the court glossed briefly on its earlier public trust discussion.¹⁰⁷ In addition, it concluded that the Board's separate, post-*National Audubon Society* proceedings to address Mono Lake's level posed no obstacle to the prompt implementation of section 5946.¹⁰⁸ Under the circumstances, and on the record before it, the court found that flows released or bypassed to satisfy section 5946 would ineluctably benefit the

99. *Cal. Trout I*, 255 Cal. Rptr. at 186. Section 5946 requires the State Water Board to condition water licenses issued for portions of Mono and Inyo Counties after a certain date "upon full compliance with § 5937." CAL. FISH & GAME CODE § 5946 (West 1984). Section 5937, in turn, requires the owner of a dam to "allow sufficient water at all times . . . to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam." *Id.* § 5937.

100. *Cal. Trout I*, 255 Cal. Rptr. at 186-209.

101. *Id.* at 211-13.

102. *Id.* at 213.

103. *Id.* at 211.

104. *See id.* at 212-13; *cf. id.* at 207-08 (discussing validity of § 5946 as a legislative rule for interpreting the reasonable use doctrine). During its public trust discussion, the court compared the trust's scope over navigable and nonnavigable waterways. *Id.* at 211-12. It recognized that only the state's interest in the fish applied to the case before it. *Id.* at 212. Nevertheless, the court concluded that this interest was a sufficient "state 'property' interest" to prevent the operations of a statute of limitations. *Id.*

105. 266 Cal. Rptr. 788 (Cal. Ct. App. 1990).

106. *Id.* at 792-94.

107. *Id.* at 797 n.3 (noting that its prior decision had placed jurisdiction to enforce § 5946 "within the purview of the *Audubon* case.")

108. *Id.* at 798-99.

lake's "scenic beauty and ecological values."¹⁰⁹ Finally, the court reiterated that "the function of balancing of the public interest between contending uses ordinarily performed by the Water Board is not applicable because the balancing has already been accomplished by the Legislature."¹¹⁰

B. Non-California Courts

Persons interested in learning more about the public trust doctrine's application to water diversion will find virtually no doctrinal development in courts outside of California. To date, only a half dozen states have addressed the doctrine's applicability to surface water diversions.¹¹¹ These states' cases generally address only the broadest questions of the doctrine's applicability to the specific diversion before the court. No court outside of California has adopted the full extent of *National Audubon Society*, much less addressed the doctrinal issues left open after that case.¹¹²

IV. DOCTRINAL DEVELOPMENT SINCE *NATIONAL AUDUBON SOCIETY*: THE LEGISLATURE

Like the courts, the California Legislature has largely left the public trust doctrine untouched over the last dozen years. Direct legislative efforts to address public trust matters have been few. On the one hand, there have been no substantial efforts to overturn *National Audubon Society* or to exempt particular projects from the trust's reach.¹¹³ On the other hand, there have been no successful efforts to codify, clarify, or expand the doctrine. Two attempts to partially codify the doctrine failed.¹¹⁴ Another unsuccessful effort would have allowed the State Water Board to grant interim relief, akin to a preliminary injunction, in pending public trust

109. *Id.* at 799. The court elaborated: "In the case of the [tributary] streams, the natural flows were brought within the statutory recognition of public trust values in § 5946. Any releases at a level less than provided by the state of nature could not pose a conflict in these values." *Id.*

110. *Id.* at 802-03.

111. See Blumm & Schwartz, *supra* note 2, at 735-38.

112. *Id.*

113. Memo, *supra* note 70, at 4. In efforts to enact the CVPIA, federal water project contractors did try unsuccessfully to obtain federal legislation that would have preempted California water law. See *id.*

114. Both efforts failed to get out of committee. Telephone Interviews with Jan Stevens, Esq., Cal. Dept. of Justice (May 17, 1995) and Randy Kanause, Esq., former Director, State Water Board Office of Legislative and Public Affairs (May 15, 1995).

proceedings.¹¹⁵ Passing references to the doctrine pepper the statutes, but address only traditional issues involving title to tidelands.¹¹⁶

Equally spotty has been the legislature's indirect doctrinal development. In 1991, the legislature authorized private parties, upon State Water Board approval, to commit their water rights to protect wetlands or other instream beneficial uses.¹¹⁷ In several other statutes, it has addressed public trust matters, while doing little to clarify the doctrine's text. For example, the Salmon, Steelhead Trout, and Anadromous Fisheries Program Act ("Act")¹¹⁸ announced a state policy to "significantly increase the natural production of salmon and steelhead trout by the end of this century."¹¹⁹ It requires the Department of Fish and Game ("DFG") to establish programs to fulfill the statutory goals,¹²⁰ leaving to the DFG's discretion the program's details.¹²¹ The Act does nothing, however, to indicate how to implement these goals within the existing water appropriations system. Similar legislation authorizes the DFG to prepare additional fishery management plans.¹²² Nothing in that legislation, however, addresses how to accommodate fishery management and water diversions. Finally, in recent temporary permit and water transfer legislation, the legislature has directed the State Water Board to find that proposed transfers will have no "unreasonable effect upon fish, wildlife, or other instream beneficial uses."¹²³ Again, the legislature has implicitly delegated all of the details of the accommodation to the State Water Board.

115. Memo, *supra* note 70, at 4 (discussing S.B. 1900, as introduced, 1991-92 Reg. Sess. (Ca. 1991) (WL, 1991 CA S.B. 1990 (SN))).

116. *E.g.*, A.B. 3139, 1993-94 Reg. Sess., 1994 Cal. Leg. Serv. Ch. 728 (West) (disposing of certain trust-bound properties within the City of Newport Beach); S.B. 1183, 1991-92 Reg. Sess., 1991 Cal. Legis. Serv. Ch. 1143 (West) (disposing of certain trust-bound properties within the City and County of San Francisco).

117. *See* CAL. WATER CODE § 1707 (West Supp. 1995).

118. CAL. FISH & GAME CODE §§ 6901-6924 (West Supp. 1995).

119. *Id.* § 6902(a). The legislature quantified "significantly increase" by setting a goal to "double the current natural production of salmon and steelhead trout resources." *Id.* The statute announces two additional policies: 1) encouragement of public participation; and 2) elimination of unmitigated fish habitat destruction. *Id.* §§ 6902(b), (c).

120. *E.g.*, *id.* § 6920(a).

121. *See id.* § 6922 (outlining required program elements).

122. *E.g.*, *id.* § 7005 (establishing white sea bass fishery pilot management program and granting authority "to the extent funds are appropriated" to establish management plans for other "high priority marine fish species").

123. CAL. WATER CODE § 1425(b)(3) (West Supp. 1995) (allowing temporary permits); *see also* CAL. WATER CODE § 1435(c) (West Supp. 1995) (allowing temporary urgency changes). By implication, these two statutes allow the Water Board to approve temporary but *reasonable* effects upon fish, wildlife, and other instream beneficial uses.

V. TEXTUAL DEVELOPMENT SINCE *NATIONAL AUDUBON SOCIETY*: THE STATE WATER RESOURCES CONTROL BOARD

The principal developer of post-*National Audubon Society* public trust text has been the State Water Board. In a series of water rights orders and decisions over the last dozen years, the Board has addressed public trust matters in three areas: 1) new applications to appropriate water;¹²⁴ 2) temporary water transfers;¹²⁵ and 3) existing appropriations.¹²⁶ Through these orders and decisions, the Board has begun to shape the doctrine and integrate it into the California water rights system. Indeed, the Board's recent decision in the Mono Lake litigation has helped fulfill both the specific promise of the *National Audubon Society* case, as well as sketch out some of its more general contours. As a result, the Board is developing a vision of the trust that gives the Board the broadest jurisdiction over diversions, while limiting its application practically.¹²⁷

Nevertheless, for four reasons, the Board's contributions to the doctrine's textual development remain largely inchoate. First, most Board trust discussion has been terse.¹²⁸ Second, the Board failed to adopt potentially substantial doctrinal developments floated in staff proposals.¹²⁹ Third, despite substantial briefing by the parties before it, the Board has chosen frequently to answer trust questions indirectly.¹³⁰ Finally, to date, no appellate court has reviewed a trust-based Board decision. Moreover, the one trial decision on record suggests that courts will not necessarily defer wholly to the Board's trust determinations.¹³¹ Thus, while a review of State Water Board trust developments provides the best guide to the doctrine's current state, its scope still remains sketchy today, more than a dozen years after its initial extension to water diversions.

124. See *infra* notes 132-64 and accompanying text.

125. See *infra* notes 165-74 and accompanying text.

126. See *infra* notes 175-325 and accompanying text.

127. See *infra* notes 525-45 and accompanying text (summarizing Board's trust vision).

128. See, e.g., Cal. State Water Resources Control Bd., Water Right Order WR 91-01, 1991 WL 170934, at *1 (Jan. 10, 1991) [hereinafter Water Right Order WR 91-01]; see *infra* note 204 (simply stating that the order requiring releases from Shasta Reservoir was made pursuant to public trust authority). The most extensive Board trust decision is its legal report of referee. See *infra* notes 328-417 and accompanying text. That report, however, lacks even administrative precedence.

129. See *infra* notes 428-32 and accompanying text (discussing draft Water Right Decision D-1630).

130. See, e.g., *infra* notes 451-501 and accompanying text (discussing contextual development in Water Right Decision D-1631).

131. See *infra* notes 394-417.

A. New Applications of Water

Relatively soon after *National Audubon Society*, the State Water Board integrated the doctrine into its review of new appropriations.¹³² In a term imposed upon all new permits to appropriate water, the Board expressly subjects the permitted right to its continuing authority “to protect public trust uses.”¹³³ The standard term thus permanently reserves jurisdiction over new permittees’ diversions.¹³⁴

Beyond adding this permanent reservation of jurisdiction, *National Audubon Society*’s impact on new applications to appropriate water is unclear. Prior to that case, the legislature had already directed the State Water Board to consider many aspects of the trust in acting on new applications to appropriate water.¹³⁵ To the statutory litany of trust-related considerations, *National Audubon Society* adds at least three elements. First, it serves as a common law “floor.” If future legislatures repealed current statutes, the common law doctrine would still require the Board to consider the trust factors.¹³⁶ Second, the doctrine allows for common law expansion of the trust-related factors. The public trust doctrine’s adaptability to changing societal conditions is one of its hallmarks.¹³⁷ Finally, in the Board’s deliberations, the common law doctrine might give greater priority to trust-related concerns than the statutory directives.¹³⁸

132. CAL. CODE REGS. tit. 23, § 780(a) (1995). The Board added the public trust language in 1987. The Board also inserts the term when it grants “an extension of time to commence or to complete construction work or to apply the water to full beneficial use.” *Id.*

133. *Id.* That regulation allows the Board to impose “further limitations on the diversion and use of water by the permittee in order to protect public trust uses.” *Id.*

134. The Water Code authorizes the Board to reserve jurisdiction in only two circumstances: 1) if a trial operations period is necessary to determine the project’s impacts sufficiently; and 2) where a coordinated project is proposed, the Board may reserve jurisdiction on one component pending decisions on the other components. CAL. WATER CODE § 1394(a) (West Supp. 1995). In either circumstance, the Board can only reserve jurisdiction for a reasonably necessary period, and never after the issuance of a license. *Id.*

135. CAL. WATER CODE §§ 1242.5, 1243, 1243.5, 1253, 1255, 1257, 1258 (West 1971 & Supp. 1995); see *National Audubon Soc’y v. Superior Ct.*, 658 P.2d 709, 728 n.27 (Cal. 1983) (noting the post-1955 expansion of State Water Board authority to consider trust-related interests). See generally Weber, *Overview*, *supra* note 58, at 925-29 (summarizing the role played by the statutes in Board review of applications for new appropriations).

136. *National Audubon Soc’y*, 658 P.2d at 728 n.27.

137. See *id.* at 719 (discussing the doctrine’s judicially expanded scope).

138. See Weber, *Overview*, *supra* note 58, at 927 nn.120-21 (noting uncertainties over the State Water Board’s duties under California Water Code §§ 1243 and 1257 to “take into account” and “consider” specified trust-related values); cf. *National Audubon Soc’y*, 658 P.2d at 728 (state must not only “take the public trust into account . . . [but also] protect public trust uses whenever feasible”). If “feasible” means “practically possible,” then the common law doctrine would vitiate some of the discretion given by the legislature to the State Water Board. Cf. Littleworth, *supra* note 53, at 1207-12 (criticizing grant of priority to public trust matters over other public interest matters).

In five orders involving new appropriations of water, the State Water Board has fleshed out a few public trust details. In two decisions made within the first year after *National Audubon Society*, the Board addressed the relationship between the statutory considerations for new appropriations¹³⁹ and the trust doctrine. Scarcely four months after *National Audubon Society*, the Board considered a project to divert water from the Santa Margarita River. This stream flows directly into the Pacific Ocean near Camp Pendleton in Southern California. In an order approving an extension of time for the project, the Board refused to apply the doctrine to the river itself.¹⁴⁰ It found that the intermittent lower stream reaches made the river nonnavigable.¹⁴¹ As such, the Board found the public trust inapplicable to the stream system.¹⁴² In this instance, the Board believed its environmental review duties under the Water Code were broader than its duties under the trust doctrine.¹⁴³ Nevertheless, although the Board refused to apply the trust directly to the Santa Margarita River, it did apply the doctrine to the extent that sand deposition from the river arguably impacted recreational resources on the Pacific Ocean beaches at the river's mouth. It suggested that ongoing environmental studies might help the Board decide whether to order artificial sand replenishment in mitigation of any demonstrated impacts.¹⁴⁴

An early 1984 decision also demonstrated the relationship between the trust doctrine and some of the Water Code provisions. Tiny Brush Creek drains a watershed of sixteen square miles of Mendocino County before it flows into the Pacific Ocean. Citing potential harm to trust-protected uses, two of the three Brush Creek diverters requested the Board to conduct a statutory stream system adjudication¹⁴⁵ after a fourth person applied to divert. In a short order, the Board found the cumbersome statutory adjudication procedures unnecessary. Rather, since the only alleged threat to trust uses came from the application to appropriate, the Board believed the

139. See *supra* note 135 (noting the particular statutes).

140. Cal. State Water Resources Control Bd., Water Right Order WR 83-11, 1983 WL 17613, at *7 (June 16, 1983) [hereinafter Water Right Order WR 83-11].

141. *Id.* at *7.

142. *Id.* The Board's order did not suggest that any trust-protected fishery existed in the Santa Margarita River.

143. *Id.* It stated: "The Board must, however, consider all effects, including recreational and ecological effects, of the project on the river and its tributaries pursuant to the Board's public interest responsibility and to the Board's duty to prevent waste, unreasonable use, and unreasonable method of diversion of water (23 CAL. ADMIN. CODE, § 779; WATER CODE § 275.)." *Id.* at *11 n.1. As a result, the Board considered the project's impact on riparian vegetation and wildlife resources of the entire Santa Margarita River basin. *Id.* at *8.

144. *Id.* at *8.

145. See CAL. WATER CODE §§ 2500-2863 (West 1971 & Supp. 1995) (stream adjudications).

water right application proceedings would adequately address trust use protection.¹⁴⁶

A 1986 decision involving the Russian River in Mendocino County grounded the Board's authority to reserve water for instream flows in the trust doctrine.¹⁴⁷ This unsurprising conclusion countered a diverter's argument that the Board had not expressly reserved jurisdiction to require such instream flows in earlier decisions on the application. In addition, the Board rejected the applicant's argument that the doctrine did not apply to the extent that flow in the watercourse had been augmented by storage.¹⁴⁸

A 1987 decision involving the Santa Clara River considered a prior Board reservation of jurisdiction for fishery protection. In 1982, the Board had reserved jurisdiction to require instream flows to preserve a dwindling steelhead trout population. In adopting recommendations of the Department of Fish and Game ("DFG"), the Board demonstrated great caution before committing water to or away from trust-protected uses. A DFG study had showed that a reservation of 220 acre-feet per year, or roughly two percent of estimated project yield, would help restore the fishery. Nevertheless, the fishery was so greatly depleted already that the Board was reluctant to commit even this amount as a permanent bypass flow "until such time as it is demonstrated that a viable population of steelhead is present in the river following construction and operation of the project."¹⁴⁹

A 1989 decision involving the water quality planning process for the estuary encompassing the San Francisco Bay and the delta of the Sacramento and San Joaquin rivers highlighted the trust's inability to prompt quick solutions to complex problems.¹⁵⁰ In Water Right Order WR 89-4, the Board rejected environmentalists' call to impose emergency flow restrictions on major diverters.¹⁵¹ Petitioners had sought these flows to implement a withdrawn draft water quality plan. The Board concluded, however, that it

146. Cal. State Water Resources Control Bd., Water Right Order WR 84-1, 1984 WL 19048, at *1 (Jan. 19, 1984) [hereinafter Water Right Order WR 84-1].

147. Cal. State Water Resources Control Bd., Water Right Order WR 86-9, 1986 WL 25516, at *5 (July 3, 1986) [hereinafter Water Right Order WR 86-9].

148. *Id.* at *5-6. Citing both *National Audubon Society*, 658 P.2d 709 (Cal. 1983), and *State v. Superior Ct. (Fogerty)*, 625 P.2d 256 (Cal. 1981), the Board concluded that the public trust applies "to all navigable waterways; not just those that would exist without man's influence." Water Right Order WR 86-9, *supra* note 147, at *6.

149. Cal. State Water Resources Control Bd., Water Right Order WR 87-8, 1987 WL 54542, at *5-6 (Sept. 3, 1987) [hereinafter Water Right Order WR 87-8]. The Board gave the DFG seven years to make its demonstration. *Id.* at *6.

150. For additional discussion on the relationship of the trust to this water quality planning process, see *infra* notes 419-49 and accompanying text.

151. Cal. State Water Resources Control Bd., Water Right Order WR 89-4, 1989 WL 97117, at *1-3 (Apr. 5, 1989) [hereinafter Water Right Order WR 89-4].

was proceeding as expeditiously as possible to resolve the complicated water quality matters raised in the estuary. It concluded that the public trust doctrine could not force it to proceed any faster than it was already proceeding.¹⁵² In the Board's view, implementation of both the common law trust and the specific water quality planning process required time consuming, detailed evidentiary hearings.¹⁵³

Most recently, the Board noted its need for substantial evidence of harm before its imposition of flow bypasses. In particular, the Board considered the applicability of Fish and Game Code section 5937 to interim flows imposed pending further public trust studies. In Water Right Order WR 94-5, the Board had reserved jurisdiction over the Cachuma project in Santa Barbara County pending additional public trust studies.¹⁵⁴ As part of that order, the Board had set interim minimum bypass flows pursuant to a Memorandum of Understanding between project operators and the DFG. A group of sport fishers asked the Board to reconsider its order. Petitioners claimed that the interim flows did not meet section 5937's mandate to keep fish "in good condition."¹⁵⁵

In its order denying reconsideration, the Board discussed at some length the role of section 5937 in the Board's imposition of fishery protection conditions.¹⁵⁶ It agreed with *Cal. Trout I* that the statute "is a legislative expression of the public trust doctrine."¹⁵⁷ Nevertheless, it noted that section 5937 did not impose any duty upon *the Board*, outside of Mono and Inyo counties.¹⁵⁸ Rather, in the project before it, that statute only imposed a specific duty on the project *operator*.¹⁵⁹ While the Board noted its own policy to enforce section 5937, it concluded that it needed time to conduct

152. *Id.*

153. *Id.*

154. Cal. State Water Resources Control Bd., Water Right Order WR 94-5, 1994 WL 732876, at *1 (Nov. 17, 1994) [hereinafter Water Right Order WR 94-5]. One party to that proceeding has challenged the Board's determination, in part on public trust grounds. See *City of Lompoc v. State Water Resources Control Bd.*, No. 205386 (Cal. Super. Ct., Santa Barbara County filed Dec. 1994), discussed in *Petition Filed and Answered for Santa Ynez Diversions*, 5 CAL. WATER L. & POLICY REP. 165 (May 1995).

155. Cal. State Water Resources Control Bd., Water Right Order WR 95-2, 1995 WL 59086, at *1 (Feb. 1, 1995) [hereinafter Water Right Order WR 95-2].

156. *Id.* at *2-4. Given its normal reticence about trust doctrine, the Board's willingness to discuss § 5937 at such great lengths is surprising. It could have rejected the petition simply because it found that petitioners had failed to follow procedural requirements. *Id.* at *1-2 (noting improper service of petition); *2 n.2, *5 (noting failure to submit required points and authorities).

157. *Id.* at *3 (citing *California Trout, Inc. v. State Water Resources Control Bd.*, 255 Cal. Rptr. 184, 209, 212 (Cal. Ct. App. 1989)).

158. *Id.* at *2 n.3, *3-4.

159. *Id.*

the appropriate studies necessary to satisfy the possibly conflicting dictates of section 5937, the common law trust, and the state constitution's reasonable use provision.¹⁶⁰ Thus, it stated: "in the absence of a non-discretionary duty to apply Section 5937, however, the [Board] cannot set instream flows without first obtaining the information needed to evaluate the efficacy of instream flows for the maintenance of fish and the effect of such flows on project beneficiaries."¹⁶¹ The Board noted its lack of authority to issue temporary or preliminary injunctions to mandate interim flows.¹⁶² Finally, it refused to act on bare allegations of harm; rather, the Board emphasized its need for "substantial evidence" in a record to support any bypass order.¹⁶³ Given the petitioners' failure to "make the evidentiary showing necessary to support its request," the Board denied the petition.¹⁶⁴

B. Temporary Water Transfers

As with new applications to appropriate, statutes expressly direct the State Water Board to ensure that short and long term water changes or transfers will not unreasonably affect "fish, wildlife, [and] other instream beneficial uses."¹⁶⁵ Given this express statutory codification of the public trust, the common law doctrine probably adds very little additional protection.¹⁶⁶ Nevertheless, two decisions approving temporary water changes contain several trust nuggets.

In Water Right Order WR 89-20, the State Water Board approved a sale of water from the Yuba County Water Agency to the California Department

160. *Id.* at *3.

161. *Id.*

162. *Id.* at *4 (stating "[t]he Water Code does not authorize the [Board] to enter orders analogous to temporary or preliminary injunctions prior to an evidentiary hearing").

163. *Id.*

164. *Id.* at *5.

165. CAL. WATER CODE § 1435(b)(3) (West Supp. 1995) (temporary urgency changes), § 1725 (temporary changes), §§ 1735-36 (long term transfers).

166. One area where the common law doctrine may extend beyond the Water Code provisions involves two statutes that provide the general framework for changes in purpose or place of use, or place of diversion. Water Code §§ 1702 and 1706 authorize the Board to approve such changes if it finds that the changes will not injure others. *Id.* §§ 1702, 1706 (West 1971). It is unclear whether "others" includes public trust users, or only other private water rights holders. Weber, *Overview*, *supra* note 58, at 929. To the extent that these two statutes do not give public trust users standing to oppose a proposed change, the common law trust doctrine would fill that gap. *Cf.* Cal. State Water Resources Control Bd., Water Right Order WR 95-9, 1995 WL 418673, at *4 n.10 (June 22, 1995) [hereinafter Water Right Order WR 95-9] (interpreting "legal user," as used in Water Code § 1702 to include fish and wildlife). *But cf. id.* at *7 (disclaiming order's precedential value in future treated waste water change petitions). In context, this disclaimer is limited to future *treated waste water* changes; it should not preclude future reliance on the order's general interpretation of § 1702 in other transfer proceedings. Memo, *supra* note 70, at 5-6.

of Fish and Game (“DFG”).¹⁶⁷ The same group of sport fishers involved in the Cachuma dispute objected to the sale on public trust grounds. Apparently the group wanted the water dedicated by the water agency to trust purposes, instead of being sold to DFG to promote those same purposes. The State Water Board found nothing incongruous between the trust doctrine and a water purchase by DFG to promote trust uses. It concluded: “In certain circumstances, purchasing water may be the most effective means for DFG to protect the public trust resources with which [the group] is concerned.”¹⁶⁸

Two years later the State Water Board considered a similar temporary transfer between Yuba County Water Agency (“YCWA”) and Napa County.¹⁶⁹ The same group of sport fishers again objected to this transfer on public trust grounds. In particular, it raised two points. First, it claimed that the Board needed to consider more than just the proposed transfer’s marginal impact on the Yuba River fishery. Rather, it asked the Board to reassess the overall impact of YCWA’s entire diversions on the fishery.¹⁷⁰ Second, it objected to the Board’s delegation of approval of water transfers to a staff member.¹⁷¹ As part of this second objection, it demanded an opinion from the California Attorney General on the propriety of delegation of public trust duties from appointed officials to agency staff.¹⁷²

The State Water Board rejected both objections. It first found that the appropriate forum to review the entire range of Yuba River fishery problems

167. Cal. State Water Resources Control Bd., Water Right Order WR 89-20, 1989 WL 137274, at *3-4 (Sept. 21, 1989) [hereinafter Water Right Order 89-20]. Similar issues arose in an earlier order. Cal. State Water Resources Control Bd., Water Right Order WR 89-17, 1989 WL 137272, at *2-4 (Oct. 3, 1989) [hereinafter Water Right Order WR 89-17]; Memo, *supra* note 70, at 5-6.

168. Water Right Order WR 89-20, *supra* note 167, at *2. The Board concluded:
the fact that the water proposed for use in Grassland Water District is subject to the public trust and that DFG has certain responsibilities with respect to protecting fish and wildlife does not lead to the conclusion that it is improper for DFG to purchase water for the protection or enhancement of fish and wildlife.

Id.

169. Cal. State Water Resources Control Bd., Water Right Order WR 91-05, 1991 WL 170936, at *1 (July 18, 1991) [hereinafter Water Right Order WR 91-05].

170. Memo, *supra* note 70, at 5-6. The Board has addressed similar arguments in other decisions. *See, e.g.*, Water Right Order WR 89-20, *supra* note 167, at *2-3; Cal. State Water Resources Control Bd., Water Right Order WR 89-17, 1989 WL 98030, *13-14 (July 20, 1989).

171. The Board had delegated approval of water transfers to the Chief of its Division of Water Rights. *See, e.g.*, Cal. State Water Resources Control Bd., Resolution No. 95-36 (June 22, 1995) (current version).

172. Water Right Order WR 91-05, *supra* note 169, at *2.

was a separate, publicly noticed hearing.¹⁷³ Second, it found ample statutory authority to delegate its approval of water transfers.¹⁷⁴ Implicitly, the delegation included the duty to make the necessary public trust findings.

C. Existing Water Appropriations

Because it held that no one can acquire a vested right to harm public trust uses, *National Audubon Society's* biggest potential impact was on water rights that existed prior to 1983. Like the diversions at issue in that case, many diversions were permitted or licensed without adequate consideration of trust uses. Thus, both within the Mono Lake Basin and throughout all of California, the decision made possible the extensive reallocation of water from consumptive uses back to trust-protected uses.

Until recently, this potential remained inchoate. Indeed, the first decade after *National Audubon Society* saw virtually no reallocation of water for trust purposes.¹⁷⁵ Nevertheless, in reviewing several attempts to force trust-based reallocations of existing water rights, the State Water Board made several modest textual pronouncements. Moreover, in recent decisions involving the Mono Lake Basin¹⁷⁶ and Big Bear Lake,¹⁷⁷ the Board has imposed the first trust-based reallocations upon appropriative rights holders.

1. The First Decade

In Water Right Order WR 84-2, the State Water Board refused to reconsider its November 1983 Water Right Decision D-1594.¹⁷⁸ That decision involved the application of Standard Permit Term 80 to numerous

173. *Id.* at *3. The California Water Code required the Board to find that a temporary transfer would not "unreasonably affect fish, wildlife, or other instream beneficial uses." CAL. WATER CODE §§ 1725, 1727 (West Supp. 1995).

The State Water Board subsequently noticed and conducted such a hearing. Cal. State Water Resources Control Bd., Notice of Public Hearing (Sept. 12, 1991). To date, however, the Board has not issued its decision.

174. Water Right Order WR 91-05, *supra* note 169, at *4 (citing CAL. WATER CODE § 7 (West 1971)). In addition, the Board found statutory authority for its delegate to subdelegate the duties in the delegate's absence. *Id.*

175. Weber, *Overview*, *supra* note 58, at 924 & n.104. The one exception involved ordered releases from Shasta Reservoir. As discussed *infra*, notes 204, 206 and accompanying text, the Board cited the trust in passing to justify its orders.

176. Water Right Decision D-1631, *supra* note 15, at 194-96; see discussion *infra* notes 221-99, 451-502 and accompanying text (discussing decision).

177. Water Right Order WR 95-4, *supra* note 15, at *8, *23-25; see discussion *infra* notes 300-26, 515-523 and accompanying text (discussing order).

178. Cal. State Water Resources Control Bd., Water Right Order WR 84-2, 1984 WL 19050, at *5, (Feb. 1, 1984) (denying reconsideration of Water Right Decision D-1594 (Nov. 17, 1983)) [hereinafter Water Right Order WR 84-2].

diverters in and upstream of the Sacramento-San Joaquin River delta.¹⁷⁹ Based in part on the public trust doctrine, the Board had amended permit conditions and seasons of diversions. Several permittees objected to the reference to the public trust doctrine as support for the Board's amendments.¹⁸⁰ They argued that "protection of the public trust may also justify similar changes in non-Term 80 permits."¹⁸¹ The Board construed this as an argument "that all changes in the terms of conditions of appropriative water right entitlements due to certain public trust considerations must be made simultaneously or not at all."¹⁸² In effect, the objectors were arguing that the trust required the equivalent of a streamwide adjudication before any one diverter could be forced to bear trust-mandated water use changes. The Board rejected this argument as totally impractical.¹⁸³

In Water Right Order WR 84-12, the Board considered the impact of reductions in Imperial Irrigation District ("IID") diversions upon inflow into the Salton Sea. Created in 1906 by Colorado River flooding, the inland sea supports a limited fishery.¹⁸⁴ Huge amounts of irrigation runoff from IID diversions were flowing into the sea, flooding adjacent private lands. Reduction of this runoff by mandated conservation would reduce Salton Sea inflow, and increase salinity in the sea. The increased salinity would, in turn, harm the trust-protected fishery. The Board recognized the benefits of inflow on Salton Sea salinity.¹⁸⁵ Nevertheless, it found that, absent an expensive salinity control project, the sea was likely to become increasingly saline "unless ever greater amounts of freshwater 'are diverted into [it] resulting in an ever larger body of water."¹⁸⁶ Without deciding whether the public trust applied to the non-natural sea, the Board concluded that "the doctrine does not justify continued inundation of property to which no public trust easement attaches."¹⁸⁷

179. *Id.* Standard Permit Term 80 reserves jurisdiction for the Board to change the season of diversion "to conform to later findings . . . concerning availability of water and the protection of beneficial uses of water in the Sacramento-San Joaquin Delta and San Francisco Bay." Cal. State Water Resources Control Bd., Div. of Water Rights, *Standard Permit Terms* (Nov. 1, 1989).

180. Water Right Order WR 84-2, *supra* note 178, at *14.

181. *Id.*

182. *Id.* (footnote omitted).

183. It concluded: "As a practical matter, however, complex problems must be addressed in stages. Nothing in the *Audubon* decision requires the Board to initiate proceedings to exercise jurisdiction over every possible water right on public trust grounds." *Id.*

184. Cal. State Water Resources Control Bd., Water Right Order WR 84-12, 1984 WL 19071, at *4 (Sept. 20, 1984) [hereinafter Water Right Order WR 84-12].

185. *Id.* at n.1.

186. *Id.*

187. *Id.*

In a decision involving the Tule Lake reservoir system adjudication, the Board construed a 1945 agreement and a 1953 decree.¹⁸⁸ In the earlier agreement, water rights holders had established a minimum pool behind a reservoir. A portion of the pool was dedicated to carryover storage for irrigation and for fish and wildlife maintenance and enhancement. The adjudication addressed the successors to the rights established by the earlier agreement and the decree applying it. The Board concluded that the original reasons for the parties' agreement were not supported by "actual data."¹⁸⁹ Nevertheless, it found that public trust uses of the reservoir "are valid reasons to maintain the minimum pool at the established level."¹⁹⁰

Two 1989 decisions involving a stream wide adjudication on relatively small San Gregorio Creek presented the Board with two public trust issues involving bypass flows for fish and wildlife purposes. In the first decision, the Board considered an objection that the public trust values of the stream were de minimis.¹⁹¹ In particular, the objector "alleged that the fishery of San Gregorio Creek is of minor importance benefiting only a few local fishermen."¹⁹² The Board, however, noted that instream flows protect public trust uses beyond fisheries:

Even if the fishery is of only local significance in economic terms, this does not void the public trust responsibilities of the Board. Inclusion of the bypass terms helps protect the riparian vegetation as well as the wildlife and fisheries resources of the stream system. The proposed bypass terms consider the importance of, and strike a reasonable balance between, offstream and instream uses.¹⁹³

In a subsequent order on reconsideration, the Board concluded that unexercised future uses of water properly could be subjected to bypass flows set to protect trust uses.¹⁹⁴ To activate these future rights, the parties must show that their uses will not harm trust uses.¹⁹⁵

188. Cal. State Water Resources Control Bd., Water Right Order WR 85-15, 1985 WL 57863, at *2-3 (July 18, 1985) [hereinafter Water Right Order WR 85-15].

189. *Id.* at *10.

190. *Id.*

191. Cal. State Water Resources Control Bd., Water Right Order WR 89-7, 1989 WL 97129, at *30 (Apr. 20, 1989) [hereinafter Water Right Order WR 89-7].

192. *Id.*

193. *Id.*

194. Cal. State Water Resources Control Bd., Water Right Order WR 89-16, 1989 WL 98156, at *15 (July 20, 1989) [hereinafter Water Right Order WR 89-16]; *see also In re Waters of Long Valley Creek Stream Sys.*, 599 P.2d 656, 668-69 (Cal. 1979) (discussing subordination of unexercised riparian rights in statutory adjudications).

195. Water Right Order WR 89-16, *supra* note 194, at *15.

A 1990 decision under Fish and Game Code sections 5937 and 5946¹⁹⁶ addressed an important question left open by *National Audubon Society*. In Water Right Order WR 90-16 (“Order WR 90-16”), the Board ordered an irrigation district to satisfy those statutes¹⁹⁷ by making releases from storage at rates that occasionally exceeded the rate of natural inflow.¹⁹⁸ The Board based its order on the physical solution doctrine.¹⁹⁹ As discussed above,²⁰⁰ that doctrine attempts to maximize efficient water use. The Board elaborated:

In a particular case, there may be two ways of maintaining fish in good condition. One flow regime may require very high winter and spring flows but allow for very low summer flows, with flows never exceeding natural levels. Another flow regime may allow storage of large volumes, and moderate stream flows, in the winter and spring, with higher than natural flows in summer. Under the District’s interpretation, the Board would have to adopt the former flow regime, even if the latter provided equal protection for fish and allowed more water to be diverted and used for other purposes. Such an interpretation would be inconsistent with Article X, Section 2 of the Constitution.²⁰¹

Order WR 90-16 does not mention the common law public trust. Moreover, it grounds its physical solution decision not on the trust, but on the reasonable use provisions of the state constitution.²⁰² Nevertheless, to the extent that Fish and Game Code sections 5937 and 5946 represent legislative decisions articulating the public trust,²⁰³ Order WR 90-16 reflects the Board’s willingness to promote trust purposes by augmenting natural flows with dry-season withdrawals from storage.

196. Cal. State Water Resources Control Bd., Water Right Order WR 90-16, 1990 WL 263415, at *1-2 (Nov. 7, 1990) [hereinafter Water Right Order WR 90-16]; see Littleworth, *supra* note 53 and accompanying text (highlighting questions left open by the case).

197. Water Right Order WR 90-16, *supra* note 196, at *3; see *supra* note 99 (quoting the two provisions); see also *supra* notes 98-110 and accompanying text (discussing the two *Cal. Trout* opinions).

198. Water Right Order WR 90-16, *supra* note 196, at *3.

199. *Id.* at *3.

200. See *supra* note 89 (discussing physical solution doctrine).

201. Water Right Order WR 90-16, *supra* note 196, at *3 (footnote omitted).

202. *Id.* As such, in keeping with this article’s conventions, the decision could be considered “context.” Nevertheless, because this decision contains substantial discussion about the role of the physical solution doctrine in a case involving a statutory application of trust principles, and because it presages the Board’s decision in the Mono Lake Basin proceedings, the article discusses it here.

203. See *supra* notes 98-110, 154-64 and accompanying text (discussing the relationship between the public trust and §§ 5937, 5946).

Two 1991 decisions imposed the Board's first substantial common law trust-based restrictions on an existing major diverter. In Water Right Order WR 91-1 ("Order WR 91-1"), the Board affirmed flow restrictions upon the United States Bureau of Reclamation to protect downstream fisheries.²⁰⁴ The order required the Bureau to release cool water from its Shasta Dam to protect spawning salmon. Without discussion, the Board simply stated that it was issuing the order under its combined authority to enforce water quality control plans, public trust uses, and the reasonable use provisions of the California constitution.²⁰⁵

In a later order reaffirming Order WR 91-1, the State Water Board considered two trust-based challenges raised by its frequent antagonist, a group of sport fishers.²⁰⁶ The group first argued that Order WR 91-1 violated the trust because the Board had failed to prepare an Environmental Impact Report on the effects of its order.²⁰⁷ Second, the group claimed that the public trust doctrine required the Board to make specific findings to support its determination that its order furthered trust purposes.²⁰⁸ The Board easily rejected both challenges. It found its prior trust-based order exempt from the environmental review requirements as a regulatory action taken to enforce permit conditions and protect natural resources.²⁰⁹ Finally, it concluded that the public trust doctrine did not require any specific findings.²¹⁰

An additional 1991 decision addressed the State Water Board's allocation of staff resources in fulfillment of its public trust duties. In Water Right Order WR 91-6,²¹¹ the same group of sport fishers had raised a public trust claim involving Alameda Creek's declining fishery. Over many years, substantial modifications to this urban creek had created major fish migration barriers.²¹² Petitioners asked the Board to "take action" against seven water

204. Water Right Order WR 91-01, *supra* note 128, at *2 (amending Water Right Order WR 90-5).

205. *Id.* at *1. For a brief discussion of the roles of the water quality planning process and California Constitution Article X, § 2, see Weber, *Overview*, *supra* note 58, at 918-22, 947-53.

206. Cal. State Water Resources Control Bd., Water Right Order WR 91-3, 1991 WL 170932, at *1 (April 1, 1991) [hereinafter Water Right Order WR 91-3].

207. *Id.* at *2.

208. *Id.*

209. *Id.*; see CAL. CODE REGS. tit. 14, § 15307 (Barclays 1995) (categorical exemption for activities in protection of natural resources); CAL. CODE REGS. § 15321 (Barclays 1995) (enforcement actions).

210. Water Right Order WR 91-3, *supra* note 206, at *3.

211. Cal. State Water Resources Control Bd., Water Right Order WR 91-06, 1991 WL 302713, at *1 (Aug. 22, 1991) [hereinafter Water Right Order WR 91-06].

212. Memo, *supra* note 70, at 7.

agencies and all other water users in the watershed to restore the fishery.²¹³ Board staff initially advised the petitioners that “the statutory adjudication process would be a more appropriate method to address issues of the broad scope and complexity . . . raised in the complaint.”²¹⁴ Ultimately, the Board itself doubted that petitioners could make the necessary showing to initiate a statutory adjudication.²¹⁵ In addition, the Board rejected the appeal to initiate a public trust investigation. It noted that the California Department of Fish and Game had neither studied nor planned to study the creek.²¹⁶ Moreover, it found that petitioners had not provided “sufficient technical information to serve as the basis for setting instream flow requirements for fish protection.”²¹⁷ Lacking sufficient “off-the-shelf” information, the Board declined to pursue the matter. Citing its limited resources for protecting the public trust, the Board determined that the matter before it deserved no further attention.²¹⁸ In effect, the Board ruled that it had the ability to prioritize trust matters and that other matters had higher priorities.²¹⁹

2. Mono Lake Basin

In two decisions announced between September 1994 and February 1995, the State Water Board finally announced the initial trust-based reallocations

213. Water Right Order WR 91-06, *supra* note 211, at *1.

214. *Id.*

215. *Id.* at *3 n.a. The Water Code requires a finding that necessity and the public interest support initiation of a stream-wide adjudication. CAL. WATER CODE § 2525 (West 1971).

216. Water Right Order WR 91-06, *supra* note 211, at *1.

217. *Id.* at *1.

218. *Id.* at *2. The Board stated:

[A] State Board proceeding to address the issues raised in the complaint would require commitment of substantial resources from the engineering, environmental, and legal staffs. Currently, our limited enforcement resources available for fishery and public trust protection are directed primarily to: (a) watercourses where instream flow requirements previously have been set; (b) watercourses on which fishery studies have been conducted; or (c) instances involving protection of public trust resources of statewide significance. None of those criteria are met in this instance.

Id.; see also *Board Rejects Public Trust Complaint on Alameda Creek*, 2 CAL. WATER L. & POLICY REP. 31 (Nov. 1991) (citing *inter alia* limited powers and resources for protecting the public trust, the State Water Board dismissed the public trust complaint on Alameda Creek).

219. In addition, the Board noted that Alameda Creek is:

used as part of a ground water recharge/conjunctive use operation in an area which previously experienced a seawater intrusion problem. Thus, any program which would significantly alter the present method of operating the stream may require hydrogeologic studies and hydrology modeling of the various streams, reservoirs, and ground water storage areas in the watershed.

Water Right Order WR 91-06, *supra* note 211, at *2.

of existing water uses.²²⁰ In late September 1994, nearly a dozen years after the California Supreme Court issued its opinion in *National Audubon Society*, the State Water Board finally applied the public trust doctrine to reallocate Mono Lake Basin water.²²¹

After the decision in *National Audubon Society*, the State Water Board announced that it would review comprehensively the public trust issues in the Mono Lake Basin.²²² The Board did not begin to hear testimony until October 1993, over ten years after *National Audubon Society*.²²³ In the interim, five major developments occurred in the complicated litigation that had engendered the state Supreme Court opinion. First, the federal courts remanded all the state law issues to the state courts, and eventually dismissed the remaining federal issue.²²⁴ Second, in 1989, after hearing extensive testimony, the state trial court entered a preliminary injunction.²²⁵ The court enjoined the City of Los Angeles from any diversions from the lake's tributaries until the lake reached 6,377 feet above sea level. Given the recent dry years, the preliminary injunction has stopped entirely any diversions by the city.²²⁶ Third, the court consolidated the public trust case with the Fish and Game Code cases that led to the two *Cal. Trout* decisions.²²⁷ After consolidation, the trial court issued interim flow standards to comply with those two opinions.²²⁸ Fourth, in 1990, the trial court approved an interim habitat restoration agreement between the parties to the litigation.²²⁹ This has formed the basis for a partial physical solution

220. Water Right Order WR 95-4, *supra* note 15, at *8; see discussion *infra* notes 300-26 and accompanying text (Big Bear Creek); Water Right Decision D-1631, *supra* note 15; see discussion *infra* notes 221-99, 451-502 and accompanying text (Mono Lake Basin).

221. Water Right Decision D-1631, *supra* note 15, at *1. The state trial court had previously stayed the coordinated *Mono Lake* proceedings before it, pending completion of the State Water Board's review. *Id.* at *6.

222. See *Cal. Trout II*, 266 Cal. Rptr. 788, 792-93, 798-99 (Cal. Ct. App. 1990) (discussing the relationship between the State Water Board's comprehensive public trust review of the Mono Lake Basin, with the trial court proceedings in both the § 5937 actions and the public trust action).

223. *Hearings on Mono Basin Water Reallocation Begin*, 4 CAL. WATER L. & POLICY REP. 39 (Dec. 1993).

224. *National Audubon Soc'y v. Department of Water & Power*, 858 F.2d 1409, 1411-12, 1417-18 (9th Cir. 1988). The federal issues involved federal common law nuisance claims based on water and air pollution. *Id.* at 1418.

225. *Mono Lake Level Preliminary Injunction Motion Submitted to Court*, 1 CAL. WATER L. & POLICY REP. 116 (Mar. 1991).

226. See FRANK J. TRELEASE & GEORGE A. GOULD, WATER LAW 41-42 (4th ed. 1993 Supp.).

227. Water Right Decision D-1631, *supra* note 15, at *5.

228. *Id.*

229. See, e.g., Water Right Decision D-1631, *supra* note 15, at *21, *124; Closing Brief of the National Audubon Society & Mono Lake Committee at 61, Before the California State Water Resources Control Board, Review of the Mono Basin Water Rights of the City of Los Angeles (filed Mar. 21, 1994) [hereinafter *National Audubon Soc'y & Mono Lake Comm., Closing Brief*].

to some of the issues on the tributary streams. Finally, the trial court stayed further proceedings on the coordinated public trust and Fish and Game Code section 5937 actions pending completion of the State Water Board's review.²³⁰

Over a five month period beginning in late 1993, the Board held forty days of hearings on the public trust issues in the Mono Lake Basin.²³¹ Central to the parties' presentations was the Draft Environmental Impact Report ("DEIR") prepared for the Board by a consultant.²³² The DEIR evaluated the environmental impacts of seven different lake levels, ranging from an average of 6,355 feet above sea level to an average of approximately 6,425 feet.²³³ These two levels represented the lake level resulting from unrestricted diversions and completely terminated diversions, respectively.²³⁴ The DEIR considered these two endpoints, as well as five intermediate elevations, for their impact on sixteen groups of environmental factors.²³⁵

The DEIR recommended two environmentally superior alternatives, depending upon the adopted reference point for comparing the alternatives, as well as a preferred alternative that considered both environmental and resource utilization.²³⁶ As its principle point of reference, the DEIR used the 1989 year, representing the period immediately prior to issuance of the

230. Water Right Decision D-1631, *supra* note 15, at *6. The court "continued to exercise jurisdiction over interim relief questions pending [Board] amendment of the [city's] licenses." *Id.*

231. *Id.* at *9.

232. *Hearings on Mono Basin Water Reallocation Begin*, *supra* note 223, at 40.

233. JONES & STOKES ASSOCIATES, MONO BASIN ENVIRONMENTAL IMPACT REPORT, SUMMARY, S-4 to S-7 (Draft, May 1993) [hereinafter DEIR].

234. *Id.*

235. The intermediate elevations surveyed were: 1) 6,372 feet, the lake's historic low level, reached in 1981; 2) 6,377 feet, the level set by the preliminary injunction; 3) 6,383.5 feet, last reached in 1973, and the midpoint of the range recommended by the U.S. Forest Service in its Mono Basin National Forest Scenic Area Management Plan; 4) 6,390 feet, last reached in 1965, and the upper level recommended by the U.S. Forest Service; and 5) 6,410 feet, last reached in 1951, the midpoint between alternative number four and the no-diversion alternative. *Id.* All of the elevations represent average elevations around which the lake would fluctuate six to twenty feet, depending upon the water year. *Id.*

The DEIR investigated the impact of the different levels on: 1) water quality; 2) tributary riparian vegetation; 3) lake-fringing vegetation and aquatic habitats; 4) upper Owens River vegetation; 5) tributary streams' aquatic resources; 6) upper Owens River aquatic resources; 7) Grant Lake, Lake Crowley Reservoirs, and Middle Owens River aquatic resources; 8) Mono Lake alkali fly productivity; 9) Mono Lake brine shrimp productivity; 10) wildlife; 11) land use; 12) air quality; 13) visual resources; 14) recreation opportunity; 15) recreation use; and 16) cultural resources. *Id.* at Table S-1. In addition, it considered the different levels' impacts on: 1) water supply; 2) power supply; and 3) annual economic costs and benefits. *Id.*

236. *Id.* at S-11 to -12.

court's preliminary injunction.²³⁷ As its "environmentally preferred alternative" relative to that point of reference, the DEIR recommended maintaining the lake at an average elevation of 6,385.5 feet.²³⁸ Comparing the alternatives to prediversion 1941 conditions, however, the DEIR tentatively recommended an average elevation of 6,390 feet as an environmentally superior alternative.²³⁹ Considering both trust-protected values and water supply values, the DEIR recommended 6,385.5 feet as the preferred alternative.²⁴⁰

The parties' testimony and argument before the State Water Board raised over a dozen major public trust legal issues. These issues broke down into four main groups: 1) threshold issues; 2) balancing issues; 3) evidentiary issues; and 4) other issues.²⁴¹ A threshold issue central to the parties' dispute involved the choice of the reference point for both the DEIR and the public trust's application. The environmentalists uniformly insisted that prediversion 1941 conditions provided the appropriate reference point.²⁴²

237. *Id.* at S-7. At that time, the lake stood at elevation 6,376 feet, minimum streamflows in Rush and Lee Vining Creeks totaled nineteen and five cubic-feet-per-second, respectively, and no water was being released to Parker and Walker Creeks below the diversions. *Id.*

238. *Id.* at S-11; see also *Hearings on Mono Basin Water Reallocation Begin*, *supra* note 223, at 40. Under this alternative, the lake would fluctuate about six feet in elevation, between 6,389 and 6,378 feet. DEIR, *supra* note 233, at S-6. It would allow exports of about thirty-five percent of the Mono Basin inflow, or about 44,000 acre-feet per year. *Id.*

239. DEIR, *supra* note 233, at S-11. The draft based its assessment on the unmitigable cumulative impacts relative to prediversion conditions. *Id.* at S-11, Table S-4. The draft's tentativeness came from the difficulty in definitively establishing prediversion conditions. See *id.* at S-9 (noting that prediversion "conditions cannot be accurately described . . ."). While the DEIR acknowledged that the 6,410 feet alternative offered greater migratory duck habitat, it concluded that 6,410 feet required high stream flow levels whose damage to tributary fisheries might be unmitigable. *Id.* at S-11. It further acknowledged that, compared to the 6,383.5 level, the 6,390 foot alternative reduced dust storm occurrences and increased both brine shrimp productivity and migratory bird habitat. *Id.* at S-12.

240. *Id.*

241. In addition to these public trust issues, the parties also disputed: 1) the propriety of designation of the basin as an "outstanding national resource water;" and 2) some statutory questions arising under Fish and Game Code § 5937. *E.g.*, National Audubon Soc'y & Mono Lake Comm., Closing Brief, *supra* note 229, at 74-75 (discussing "outstanding national resource water" designation); Closing Brief of California Trout, Inc. at 15-16, Before the California State Water Resources Control Board, In the Matter of City of Los Angeles Water Right Licenses 10191 and 10192 for Diversion of Water From Streams Tributary to Mono Lake (filed Mar. 21, 1994) (discussing meaning of "fish" under § 5937) [hereinafter Cal. Trout, Inc., Closing Brief].

242. *E.g.*, National Audubon Soc'y & Mono Lake Comm., Closing Brief, *supra* note 229, at 4-5; Closing Brief of the California Department of Fish and Game at 2, Before the California State Water Resources Control Board, In the Matter of the Amendment of the City of Los Angeles' Water Right Licenses for Diversion of Water from Streams that Are Tributary to Mono Lake (filed Mar. 18, 1994) [hereinafter Cal. Dep't of Fish & Game, Closing Brief]; Cal. Trout, Inc., Closing Brief, *supra* note 241, at 17-18.

The city, however, believed that prediversion conditions were an inappropriate bench mark.²⁴³ From this issue arose a host of subsidiary issues, including the roles of habitat re-creation and prediversion habitat degradation in assessing responsibility for ecosystem changes.²⁴⁴

Collectively, five issues addressed the balance to be struck, both among trust uses and between trust and consumptive uses. First, the parties disputed the meaning of *National Audubon Society's* requirement that the State Water Board and courts "protect the public trust *whenever feasible*."²⁴⁵ Second, the parties disputed the appropriateness of giving a priority to public trust uses in any balancing between trust and non-trust-protected uses.²⁴⁶ Third, in keeping with the DEIR analysis, the parties debated the relative tradeoffs between trust-protected uses affected by different lake levels.²⁴⁷ Fourth, also in keeping with the DEIR, the parties debated the tradeoffs between trust and consumptive uses.²⁴⁸ Finally, the parties argued about the appropriateness of considering the impact on air quality within the public trust balancing.²⁴⁹

Three issues comprised the "evidentiary" issues before the State Water Board. First, the parties disputed the extent of evidence of pre-diversion conditions.²⁵⁰ Second, the parties argued the appropriateness of the

243. Closing Brief of the City of Los Angeles and the Department of Water and Power of the City of Los Angeles at 7, Before the California State Water Resources Control Board, Hearing Regarding Amendment of the City of Los Angeles' Water Right Licenses for Diversion of Water from Streams Tributary to Mono Lake (filed Mar. 21, 1994) [hereinafter Dep't of Water & Power, Closing Brief]; see also *id.* at 33-34 (focusing on the basin's current environmental value).

244. *E.g.*, Rebuttal Brief of the City of Los Angeles and the Department of Water and Power of the City of Los Angeles at 20, Before the California State Water Resources Control Board, Hearing Regarding Amendment of the City of Los Angeles' Water Right Licenses for Diversion of Water from Streams Tributary to Mono Lake (filed Apr. 29, 1994) (contrasting "habitat re-creation" with "fishery re-creation"); Cal. Trout, Inc., Closing Brief, *supra* note 241, at 17-21 (discussing pre-1941 habitat degradation from grazing and irrigation).

245. *National Audubon Soc'y, v. Superior Ct.*, 658 P.2d 709, 728 (Cal. 1983); see, *e.g.*, *National Audubon Soc'y & Mono Lake Comm.*, Closing Brief, *supra* note 229, at 3; Dep't of Water & Power, Closing Brief, *supra* note 243, at 6-7.

246. *E.g.*, Cal. Trout, Inc., Closing Brief, *supra* note 241, at 61.

247. For example, elevation 6405 feet, sought by the Mono Lake Commission in part to enhance migratory waterfowl habitat, would inundate some tufa formations. *National Audubon Soc'y & Mono Lake Comm.*, Closing Brief, *supra* note 229, at 17.

248. *E.g.*, *id.* at 57 (discussing economic testimony); DEIR, *supra* note 233, at Table S-1.

249. *E.g.*, Closing Brief of the California State Lands Commission and Department of Parks and Recreation at 19-24, Before the California State Water Resources Control Board, Regarding Amendment of the City of Los Angeles' Water Rights Licenses for Diversion of Water from Streams that are Tributary to Mono Lake (filed Mar. 18, 1994) [hereinafter Cal. State Lands Comm'n, Closing Brief].

250. The city argued that the evidence at best was anecdotal, and at worst, mere hearsay. Dep't of Water & Power, Closing Brief, *supra* note 243, at 8. The other parties strongly rejected these

extensive models introduced during the hearings.²⁵¹ Third, the parties contested the weight to be given to the Department of Fish and Game's testimony.²⁵²

Finally, four additional public trust issues arose. First, the parties devoted extensive attention to the requirements of Fish and Game Code section 5937 and its relationship to the public trust doctrine.²⁵³ Second, the city challenged the State Water Board's authority to require the release of minimum flows that exceed unimpaired natural flows.²⁵⁴ Third, several parties addressed the relationship of the public trust doctrine to the laws of

claims. *E.g.*, Reply Closing Brief of the National Audubon Society & Mono Lake Committee at 8, Before the California State Water Resources Control Board, Review of the Mono Basin Water Rights of the City of Los Angeles (filed Mar. 21, 1994) [hereinafter National Audubon Soc'y & Mono Lake Comm., Reply Brief]; Reply Brief of the California Department of Fish and Game at 8-9, Before the California State Water Resources Control Board, In the Matter of the Amendment of the City of Los Angeles' Water Right Licenses for Diversion of Water from Streams that Are Tributary to Mono Lake (filed Apr. 29, 1994) [hereinafter Cal. Dep't of Fish & Game, Reply Brief].

251. *E.g.*, Dep't of Water & Power, Closing Brief, *supra* note 243, at 13-15; National Audubon Soc'y & Mono Lake Comm., Reply Brief, *supra* note 250, at 10 n.7.

252. The Department of Fish and Game ("DFG") argued that its testimony deserved deference as the state agency with the most expertise in fishery issues. Cal. Dep't of Fish & Game, Reply Brief, *supra* note 250, at 8. The city, however, claimed that the DFG's use of non-staff consultants to prepare much of its testimony vitiated any claim for deference. Dep't of Water & Power, Closing Brief, *supra* note 243, at 11-13.

In addition, the State Lands Commission and the State Department of Parks & Recreation argued that the State Water Board should defer to their testimony as the expert state agencies for evaluating riparian values, scenic viewsheds, and recreational uses. Cal. State Lands Comm'n, Closing Brief, *supra* note 249, at 13.

253. *E.g.*, Cal. Dep't of Fish & Game, Closing Brief, *supra* note 242, at 5-8 (discussing indicia of "good condition" in a stream system); Cal. Dep't of Fish & Game, Reply Brief, *supra* note 250, at 11 ("good condition" means more than merely "self-reproducing" fish populations); Dep't of Water & Power, Closing Brief, *supra* note 243, at 49 (focusing on current environmental conditions in basin); Cal. Trout, Inc., Closing Brief, *supra* note 241, at 9 (concluding that "good condition" under § 5937 and the two Cal. Trout opinions means "prediversion" conditions in Mono Lake Basin).

254. *E.g.*, Cal. Dep't of Fish & Game, Reply Brief, *supra* note 250, at 19 (discussing the city's complaints that DFG flow recommendations would exceed natural, unimpaired flows and thus would require releases from storage).

reasonable use and nuisance.²⁵⁵ Finally, the parties argued extensively over the Board's authority to order offsite mitigation.²⁵⁶

On September 28, 1994, the State Water Board issued Water Right Decision D-1631 ("D-1631").²⁵⁷ In that decision, the Board amended the city's water right licenses to implement both the *Cal. Trout* and the *National Audubon Society* directives. Essentially adopting one of the environmentally preferred lake levels identified in the DEIR, the Board chose elevation 6,392 feet as its goal for the lake's long term average elevation.²⁵⁸

The impact of D-1631 upon the city's diversions is unmistakable. Prior to the *National Audubon Society* decision, the city had rights to divert as much as 147,700 acre-feet per year.²⁵⁹ Based on available supplies, the city diverted an average of 74,500 acre-feet per year.²⁶⁰ In D-1631, to meet fishery and other trust needs, the Board prohibited any water diversions while the lake was below 6,377 feet above sea level.²⁶¹ Depending upon anticipated runoff, the decision allows only very limited water diversions during the twenty year period the lake is expected to require to reach an elevation of 6,391 feet.²⁶² Once the lake reaches 6,391 feet, the city will be able to divert an average of 30,800 acre-feet per year.²⁶³ Thus, D-1631 reallocates roughly 43,700 acre-feet of water per year from consumptive

255. Dep't of Water & Power, Closing Brief, *supra* note 243, at 6-7, 49 (arguing that restrictions beyond the minimum needed to protect public trust values are wasteful under the California Constitution article X, § 2); Reply Brief of the California State Lands Commission and Department of Parks and Recreation at 6, Before the California State Water Resources Control Board, Regarding Amendment of the City of Los Angeles' Water Rights Licenses for Diversion of Water from Streams that are Tributary to Mono Lake (filed Apr. 29, 1994) (calling the city's argument a return to the pre-*National Audubon Society* water rights system) [hereinafter Cal. State Lands Comm'n, Reply Brief]; Cal. Dep't of Fish & Game, Reply Brief, *supra* note 250, at 5-6 (arguing that nuisance law supports claim to restore ecosystem to pre-1941 conditions).

256. *E.g.*, Cal. State Lands Comm'n, Closing Brief, *supra* note 249, at 54 (discussing rewatering of Mill Creek as partial mitigation for Mono Lake Basin degradation); National Audubon Soc'y & Mono Lake Comm., Closing Brief, *supra* note 229, at 73 (discussing State Water Board authority to order Mill Creek rewatering); Cal. Dep't of Fish & Game, Closing Brief, *supra* note 242, at 40-42 (addressing changes in Owens River management as partial offsite mitigation).

257. Water Right Decision D-1631, *supra* note 15, at 212.

258. *See, e.g., id.* at 195.

259. *Id.* at 6.

260. *Id.* at 163.

261. *Id.* at 195. This provision incorporated an identical provision in the trial court's temporary injunction. *Id.*

262. *Id.* at 202-03. The exact amount of the diversions depends upon the combination of lake elevation and anticipated runoff. Between elevations of 6,377 feet and 6,380 feet, the city can divert no more than 4,500 acre-feet per year. *Id.* at 202. Between elevations of 6,380 feet and 6,391 feet, the city can divert no more than 16,000 acre-feet per year. *Id.* at 202-03.

263. *Id.* at 164.

uses to fishery and other trust-protected uses. In the long term, D-1631 reduces the city's average Mono Lake Basin exports by nearly sixty percent.

Although D-1631 teaches much about the public trust in operation,²⁶⁴ it does so with scant textual development. Despite extensive legal briefing by the parties on the issues identified above,²⁶⁵ D-1631's explicit discussion of public trust law is slim.²⁶⁶ In three critical areas the decision adds specific public trust text. Nevertheless, even in these areas, the State Water Board purports only to apply provisions from prior judicial decisions. This portion of the article addresses these three textual developments. A later discussion addresses the extensive contextual lessons gleaned from the decision.²⁶⁷

The most important textual development arises from the Board's inclusion of air resources the ambit of trust protection. Continued lake reliction had exposed the lake bed soils.²⁶⁸ Wind-driven particulate from these soils violates federal air quality standards.²⁶⁹ Despite the city's objections to the Board's competence to address air resources matters, the Board set the lake level in part to help the basin meet air quality standards.²⁷⁰ The Board specifically rejected the city's argument that legislative delegation of primary regulatory responsibility for air matters to *other* state agencies required the State Water Board to "ignore existing or potential air quality impacts of water diversions."²⁷¹ The Board also rejected the city's argument that statutory restrictions on the applicable air agency's jurisdiction to regulate water diversions could "logically be interpreted as limiting the [Board's] established statutory authority over diversion and use of water."²⁷² Without

264. See *infra* notes 451-502 and accompanying text (discussing contextual development in Water Right Decision D-1631).

265. *Supra* notes 241-56 and accompanying text.

266. The "legal background" section of Water Right Decision D-1631 totals about six pages. Water Right Decision D-1631, *supra* note 15, at 7-12. Most of this discussion merely summarizes *National Audubon Society*, the two *Cal. Trout* decisions, and the Superior Court proceedings. *Id.* at 7-10. The decision devotes two pages to the "physical solution doctrine," and a "summary of legal framework governing amendment of Los Angeles' water right licenses." *Id.* at 10-11.

267. See *infra* notes 451-502 and accompanying text (discussing contextual development in Water Right Decision D-1631).

268. Water Right Decision D-1631, *supra* note 15, at 121-23.

269. *Id.* at 123-31.

270. *Id.* at 120-21. In particular, the city pointed to Health and Safety Code § 42316. Dep't of Water & Power, Closing Brief, *supra* note 243, at 8-9; CAL. HEALTH & SAFETY CODE § 42316 (West 1986). This Health and Safety section was adopted after *National Audubon Society*, and precludes the Great Basin Unified Air Pollution Control District from solving Mono Lake Basin air quality problems by limiting water diversions. CAL. HEALTH & SAFETY CODE § 42316 (West 1986). The city implied that this section represented legislative blessing to its diversions. See Dep't of Water & Power, Closing Brief, *supra* note 243, at 8-9.

271. Water Right Decision D-1631, *supra* note 15, at 121.

272. *Id.* (citing CAL. WATER CODE §§ 174, 1200 (West 1971)).

elaboration, the Board simply concluded that: “[i]t should be beyond dispute that, in a situation where diversion of water can lead to a violation of a public health based air quality standard, the protection of air quality should be considered in determining the conditions under which the water appropriation is allowed.”²⁷³

By including air quality within the ambit of trust considerations, the State Water Board highlighted the public trust’s ability to consider all the consequences of water diversion on an ecosystem.²⁷⁴ Although the concrete application of the water-based public trust to air resources represented a first, the Board claimed no novelty in its decision. Rather, it grounded its decision in *National Audubon Society* itself.²⁷⁵ In that case, the California Supreme Court briefly mentioned that Mono Lake Basin air purity was a trust-protected value.²⁷⁶ Thus, the Board purported to take trust law no further than the court itself. Moreover, even this modest textual echo apparently required additional support. Accordingly, the Board reinforced its public trust reference by implying that water diversion induced air quality reductions might independently violate state constitutional restrictions against unreasonable use or method of diversion.²⁷⁷

A second area of modest textual development comes from the application of the physical solution doctrine to trust-protected uses. As noted above,²⁷⁸ a “physical solution” attempts to accommodate competing water uses by requiring senior rights holders to accept changes in the time, place, or manner of receiving their water supplies, in order to free more water for junior appropriators. California courts seek physical solutions wherever possible in an attempt to meet the State’s “constitutional goal of promoting maximum beneficial use of the State’s water resources.”²⁷⁹

In D-1631, the Board developed a physical solution to free water for export while promoting in-basin wildlife. Prior to the 1960’s, Mono Lake served as an important stop-over site for hundreds of thousands of migratory birds that used the wetlands fringing the lake.²⁸⁰ Full restoration of lost waterfowl habitat would have required the Board to set the lake’s elevation at 6,405 feet.²⁸¹ Uncertain over the extent of the city’s responsibility for, and

273. *Id.*

274. *See* Dunning, *supra* note 5, at 30; *see also* Blumm & Schwartz, *supra* note 2, at 718-19 (noting role of air quality in driving overall trust balancing).

275. Water Right Decision D-1631, *supra* note 15, at 120-21.

276. *National Audubon Soc’y v. Superior Ct.*, 658 P.2d 709, 719 (Cal. 1983).

277. Water Right Decision D-1631, *supra* note 15, at 121 (citing CAL. CONST. art. X, § 2).

278. *Supra* note 89 (discussing physical solution doctrine).

279. Water Right Decision D-1631, *supra* note 15, at 10.

280. *Id.* at 114-15.

281. *Id.* at 118.

ability to reverse waterfowl decline at the lake,²⁸² the Board set a lake level that would “allow for restoration of some of the lost waterfowl habitat.”²⁸³ Pursuant to the physical solution doctrine, it then ordered the city to undertake waterfowl habitat restoration measures “to restore public trust uses while requiring a smaller commitment of water.”²⁸⁴

The Board’s unsurprising application of the physical solution doctrine to trust-protected uses merely made explicit a linkage implicit in earlier decisions. For example, the *Big Bear Lake* decision discussed above²⁸⁵ approved a pre-*National Audubon Society* physical solution addressed to trust-protected uses. Similarly, as the Board itself noted in D-1631,²⁸⁶ *Cal. Trout II* stated in a footnote that an “appropriator can be compelled as the price of continued appropriations to take reasonable steps to . . . [divert] in a manner that does not involve unreasonable use of water.”²⁸⁷ Indeed, in an earlier proceeding under Fish and Game Code sections 5937 and 5946, the Board used the physical solution doctrine to require a dam operator to release water from storage at rates exceeding the natural inflow at the time of the release.²⁸⁸ Finally, as discussed more fully below,²⁸⁹ the Board’s report in the American River litigation had itself anticipated this linkage.

The final area of textual “development” came from the Board’s discussion of the interrelation of Fish and Game Code section 5937 and the public trust. As described above,²⁹⁰ that statute requires the owner of a dam to release sufficient water to keep “in good condition” the fish which may exist below the dam.²⁹¹ As construed in the two *Cal. Trout* opinions,²⁹² the legislature required the State Water Board to condition Los Angeles’ Mono

282. The Board noted that “migratory duck populations [declined] across North America during the 1970s and 1980s.” *Id.* at 115. It found that “[r]estoration of pre-diversion waterfowl habitat would permit substantial increases in migratory waterfowl use at Mono Lake.” *Id.* at 117. Nevertheless, the Board concluded, “[t]he actual number of waterfowl which would use these restored habitats . . . is unknown and is dependent in part upon the restoration of other similarly degraded habitats in the interior portion of the Pacific flyway and annual fluctuations in waterfowl reproduction and populations.” *Id.*

283. *Id.* at 118.

284. *Id.* The Board found the record inadequate to determine the specific measures required. *Id.* Thus, it ordered the city to consult with the Department of Fish and Game and other parties to develop feasible projects consistent with Water Right Decision D-1631 criteria. *Id.* at 118-19.

285. *Supra* notes 86-96 and accompanying text.

286. Water Right Decision D-1631, *supra* note 15, at 11.

287. *California Trout, Inc. v. Superior Ct. (Cal. Trout II)*, 266 Cal. Rptr. 788, 801 n.6 (Cal. Ct. App. 1990).

288. *See* Water Right Order WR 90-16, *supra* note 196, at 8-9.

289. *See infra* notes 328-417 and accompanying text (discussing the American River litigation).

290. *Supra* note 99.

291. CAL. FISH & GAME CODE § 5937 (West 1984).

292. *Supra* notes 98-110 and accompanying text.

Lake Basin diversions upon full compliance with that section. Before the Board, the parties argued over the meaning of “in good condition.”²⁹³ In particular, they disputed whether the Board had to recreate the pre-diversion fishery, or whether sustenance of the existing fishery sufficed.

The Board concluded that in the Mono Lake Basin, “in good condition” required the Board to “reestablish and maintain the conditions that benefitted the fishery prior to [the city’s] diversions” of water.²⁹⁴ If applied to other dam owners in the state, the Board’s conclusion could have a profound effect. Nevertheless, the Board again muted its decision’s potential impact by finding that it was mandated by a prior court decision. Citing *Cal. Trout II*, the Board concluded that whatever section 5937 might mandate in other parts of the state, full compliance in the Mono Lake Basin obligated the Board to recreate the pre-diversion fishery.²⁹⁵

Beyond these three areas, the Board made only modest textual pronouncements. For example, in addressing the use of models, the Board made the unsurprising statement that flow based models “provide the best available tools for evaluating the particular conditions or effects analyzed by the respective models.”²⁹⁶ Thus, in a trust review, where models provide the best available tools, the Board has no problem basing its decision upon them.²⁹⁷ As another modest contribution to trust text, the Board discussed the differences between natural habitat restoration and artificial restoration measures. The Board observed: “restoration which occurs through natural processes is likely to be less dependent upon continued human intervention. In some situations, however, active intervention is necessary in order to

293. *E.g.*, Cal. Dep’t of Fish & Game, Closing Brief, *supra* note 242, at 5-8 (discussing indicia of “good condition” in a stream system); Cal. Dep’t of Fish & Game, Reply Brief, *supra* note 250, at 10-11 (“good condition” means more than merely “self-reproducing” fish populations); Dep’t of Water & Power, Closing Brief, *supra* note 243, at 49 (focusing on current environmental conditions in basin); Cal. Trout, Inc., Closing Brief, *supra* note 241, at 9, 17 (concluding that “good condition” under § 5937 and the two *Cal. Trout* opinions means “prediversion” conditions in Mono Lake Basin).

294. Water Right Decision D-1631, *supra* note 15, at 31.

295. *Id.* at 12 (citing *Cal. Trout II*, 266 Cal. Rptr. at 803-04); *see also* Water Right Order WR 95-2, *supra* note 155, at *4-5, (addressing the interrelationship of common law public trust with § 5937 outside of Mono and Inyo Counties and discussed *supra* notes 156-64 and accompanying text).

296. Water Right Decision D-1631, *supra* note 15, at 16.

297. *See also id.* at 132 (air quality models were uncertain predictors, but were the best available evidence at that time). In contrast, the Board was unwilling to base its recommendations on models it believed to be flawed or unduly limiting. *See, e.g., id.* at 170-71 (rejecting separate models offered by Los Angeles and the Natural Heritage Institute, respectively, to estimate the costs to Los Angeles of replacing Mono Lake Basin water).

restore conditions that benefitted the fishery"²⁹⁸ The decision does not elaborate upon the circumstances justifying active intervention.²⁹⁹

3. Bear Creek

The most recent State Water Board public trust decision contributed only modestly to trust text. In Water Right Order WR 95-4, the Board considered a complaint over the fishery in that portion of Bear Creek below Bear Valley Dam.³⁰⁰ Again, despite substantial legal briefing by the parties,³⁰¹ the Board's legal discussion was slim. Nevertheless, it made three additions to the public trust doctrine. Following the preceding discussion of the Board's recent Mono Lake decision, this section will address the two textual additions made in the Bear Creek order. A later section will address some of the broader contextual messages apparent in the order.³⁰²

First, the Board concluded that the prior judgment in *Big Bear Lake*³⁰³ did not bar its own reconsideration of the trust resources in the Creek.³⁰⁴ It based its decision primarily on its own absence as a party in the prior proceedings.³⁰⁵ In addition, the Board noted that the prior appellate opinion had simply found that the trial court had no *obligation* to reconsider the trial court's prior physical solution.³⁰⁶

298. *Id.* at 37.

299. In a related matter, the Board made one additional textual pronouncement. Under the California Environmental Quality Act ("CEQA"), the Board had to consider the environmental impacts of Water Right Decision D-1631. *Id.* at 12, 14 (citing CAL. PUB. RESOURCES CODE §§ 21000-21177 (West 1986 & Supp. 1995)). Where negative impacts cannot be mitigated feasibly, the Board must issue a statement of the reasons for proceeding with its decision. CAL. CODE REGS. tit. 14, § 15093 (Barclays 1995). The Board found that it was infeasible to require Los Angeles to mitigate for the loss of sand tufa. Water Right Decision D-1631, *supra* note 15, at 148 n.13. These formations of visual interest were otherwise trust-protected resources. *See id.* at 140-46. Nevertheless, because they were exposed to view only as a result of diversions made without initial consideration of the trust, and were being reinundated only as a result of the Board's decision, the Board did not hold Los Angeles accountable for their destruction. *Id.* at 148 n.13.

300. Water Right Order WR 95-4, *supra* note 15.

301. For example, the joint closing brief of the Big Bear Municipal Water District and City of Big Bear Lake totaled forty-six pages. Of these pages, approximately one third addressed legal issues. Joint Closing Brief of Big Bear Municipal Water District & the City of Big Bear Lake, at 10-18, 34-38, 44-46, Before the California State Water Resources Control Board (filed Jan. 18, 1994).

302. *See infra* notes 515-23 and accompanying text.

303. 254 Cal. Rptr. 757 (Cal. Ct. App. 1989), discussed *supra* notes 86-96 and accompanying text.

304. Water Right Order WR 95-4, *supra* note 15, at *8.

305. *Id.*

306. *Id.* at *25 n.4. It further noted that *Big Bear Lake* had not even decided *whether* the trust applied either to the lake or the creek. *Id.*

Second, and most importantly, the Board announced its willingness to apply both the common law trust and the legislative trust duties of Fish and Game Code section 5937 to rights that predated the institution of the permit system for appropriative rights.³⁰⁷ Such rights are commonly called “pre-1914 rights.”³⁰⁸ As authority for the extension of the common law trust to pre-1914 rights, the Board cited the California Supreme Court’s *Hallett Creek* footnote.³⁰⁹ In that note, the court attempted to assuage the State Water Board’s concerns that it lacked jurisdiction over federal riparian rights. The court mentioned that “any member of the general public [has standing] to raise a claim of harm to the public trust [and] [s]uch claims may be brought . . . before the Board.”³¹⁰ Like pre-1914 rights, the riparian rights at issue in *Hallett Creek* do not fall under the Board’s permitting authority.³¹¹ In the Board’s mind, the *Hallett Creek* footnote means that the public trust extends over all water rights in California, not just those over which the Board has authority to issue permits to appropriate water. Similarly, the Board found case support in *Cal. Trout I* for its extension of Fish and Game Code section 5937 to pre-1914 rights.³¹²

As for the trust’s *applicability* to Bear Creek, the Board’s citation of *Hallett Creek* is convenient, but it postpones a broader textual discussion. That footnote’s implication that the trust applies to riparian rights was only dicta. Moreover, that dicta applies only by analogy to pre-1914 rights, as nothing in *Hallett Creek* involved such rights. Of course, California Supreme Court dicta on an analogous point is at least persuasive authority. Given the dearth of California Supreme Court water law holdings in the last quarter century, dicta may be all that lower courts, agencies, and practitioners can use for guidance.³¹³ And ultimately, the dicta may presage a later judicial holding on point. Indeed, good arguments may well exist that no distinction should exist between the trust’s applicability to pre-1914

307. Water Right Order WR 95-4, *supra* note 15, at *8 (common law trust applies), *19 (§ 5937 applies).

308. See, e.g., Weber, *Overview*, *supra* note 58, at 911-12 & n.14 and accompanying text (describing self-initiation of appropriative water rights prior to 1914).

309. 749 P.2d 324, 337 n.16 (Cal. 1988); see *supra* note 61 and accompanying text (discussing *Hallett Creek* decision).

310. *Hallett Creek*, 749 P.2d at 337 n.16. (citations deleted).

311. Weber, *Overview*, *supra* note 58, at 911-12 & nn. 23-25 and accompanying text; cf. *Legal Report*, *supra* note 66, at 66 n.34 (noting “[w]hether the doctrine extends to pre-1914 appropriative rights and riparian rights is not expressly answered by *Audubon*”).

312. Water Right Order WR 95-4, *supra* note 15, at *19; *California Trout, Inc., v. State Water Resources Control Bd.*, 255 Cal. Rptr. 184, 195 (Cal. Ct. App. 1989) (noting that the Fish and Game Code § 5937 imposes a current obligation upon dam owners) (*Cal. Trout I*).

313. See, e.g., Weber, *Overview*, *supra* note 58, at 961 n.338 (listing seven California Supreme Court water rights cases since 1967).

appropriations, post-1914 appropriations, and riparian rights.³¹⁴ Nevertheless, such a result should only be reached after a fuller textual exposition. In particular, either the courts or the Board needs to develop more substantially the analogy's linchpin: the trust's application to riparian rights.³¹⁵

A stronger basis for the trust's *application* to Bear Creek appears later in the Board's decision. As noted by the Board, longstanding case law establishes a separate but related state trust interest in the state's fisheries.³¹⁶ Such case law would have applied to the fishery in Bear Creek. Indeed, the Board cited that law to distinguish *Golden Feather*³¹⁷, and avoided discussing the navigability of the relevant reaches of Bear Creek.³¹⁸ Thus, the *Hallett Creek* dicta was not necessary to support a general finding of the trust's applicability.

Thus, although the trust undoubtedly applies to Bear Creek at least through its fishery, the *Hallett Creek* footnote did help the Board answer a separate jurisdictional question. Even if the trust *applies* to a watercourse's fishery, the *Board* itself still needs jurisdiction to apply it. Absent such jurisdiction, only the courts could apply the common law doctrine. As noted above, *National Audubon Society* found such Board trust jurisdiction through a Water Code provision applicable to adjudications involving all water rights holders in a given watercourse. *Hallett Creek* also involved such a general stream adjudication. In that case, however, the court addressed the Board's concerns that it could only apply the trust to water rights that predated the permitting system through a general adjudication. In its footnote, the court stated its belief that the Board had ample authority to apply the trust to such rights outside of a general adjudication.

The *Hallett Creek* citation provides a convenient reference to support the Board's trust jurisdiction over pre-1914 and riparian rights. It also helps the Board postpone indefinitely a fuller discussion of its trust jurisdiction. In almost all cases, the Board could apply the trust, even to rights that predated the permit system, by proceeding under Water Code section 275 ("section 275"). That section requires the Board to "take all appropriate proceedings .

314. See, e.g., Memo, *supra* note 70, at 6-7 (arguing that "[i]t would be illogical to conclude that although [the Board] has authority over modern appropriations and riparians, it does not have authority over pre-1914 appropriators").

315. For a brief discussion of the trust's possible application to riparian rights, see the paragraph preceding note 549 *infra*.

316. Water Right Order WR 95-4, *supra* note 15, at *18-19; see *supra* note 32 and accompanying text (noting separate but related case law addressing fish).

317. 257 Cal. Rptr. 836 (Cal. Ct. App. 1989); see *supra* note 72 and accompanying text (discussing *Golden Feather*).

318. Water Right Order WR 95-4, *supra* note 15, at *18.

to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.”³¹⁹ In most cases, a water use or diversion method that unnecessarily harmed trust values would also be proscribable under section 275.³²⁰ Indeed, the Board has invoked this provision in numerous proceedings to protect public trust resources,³²¹ including Bear Creek itself.³²² Eventually, the relationship between section 275 and the trust, however, may require a broader discussion of Board trust jurisdiction. In particular, should the Board disclaim any willingness to proceed under section 275,³²³ the Board’s jurisdiction to apply the trust outside of a statutory adjudication will again be at issue. Such a disclaimer, however, appears quite unlikely.³²⁴

Finally, in the only additional textual development, the Board addressed an evidentiary matter. The parties had argued over the degree of deference that the State Water Board should give to the fishery recommendations of the California Department of Fish and Game (“DFG”).³²⁵ The Board concluded that while the DFG was “helpful,” and its recommendations deserved “great weight,” “[t]his does not mean that the [Board] must accept [DFG’s] judgment, but the weight of the evidence must overcome the weight of [DFG’s] evidence before the [Board] will reject it.”³²⁶ In effect, the Board put the burden of overcoming DFG’s recommendations on its challengers.³²⁷

319. That section provides: “The department [of water resources] and board shall take 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.” CAL. WATER CODE § 275 (West Supp. 1995). This provision applies even to rights that predate the permit system. See *People ex rel. State Water Resources Control Bd. v. Forni*, 126 Cal. Rptr. 851 (1976) (noting that the Board has jurisdiction to bring court proceedings to test reasonableness of riparian use).

320. See, e.g., Memo, *supra* note 70, at 3.

321. See, e.g., Cal. State Water Resources Control Bd., *In re Fishery Protection & Water Rights Issues of Lagunitas Creek*, draft Water Right Order at 13 (June 30, 1995) (citing Water Code § 275 as part of the Board’s “broad authority to establish minimum flows and take other measures needed for protection of fisheries and other public trust resources”) [hereinafter *In re Fishery Protection*].

322. Water Right Order WR 95-4, *supra* note 15, at *20-21.

323. The *National Audubon Society* plaintiffs expressly disclaimed any charge that the City of Los Angeles’ Mono Basin water diversions were unreasonable within the meaning of § 275. 658 P.2d at 729. By doing so, they apparently hoped to avoid a court finding that an unexhausted administrative remedy existed before the Board.

324. See Memo, *supra* note 70, at 3.

325. See Cal. Dep’t of Fish & Game, Closing Brief, *supra* note 242, at 4.

326. Water Right Order WR 95-4, *supra* note 15, at *19.

327. See *id.* The burden of overcoming the DFG proposals was apparently met where the Board staff proposed flow requirements that generally were much lower than sought by DFG. Cf. *In re Fishery Protection*, *supra* note 321, at 68, Fig. 8 (charting a comparison of proposed and existing flow standards during normal, wet, and dry years).

VI. "NEAR TEXT:" THE AMERICAN RIVER OPINIONS

Litigation over the East Bay Municipal Utility District's ("EBMUD") contract to take American River water out of the Bureau of Reclamation's Folsom South Canal spawned the most extensive post-*National Audubon Society* discussions of the public trust doctrine by the State Water Board and a state court.³²⁸ Environmentalists and the County of Sacramento sought to force EBMUD to divert its contractual entitlement downstream, below the confluence of the American and Sacramento Rivers.³²⁹ Such a lower diversion point would have increased the availability of instream flows in the lower American River for such trust-protected uses as recreation and fishery protection.³³⁰ EBMUD, however, resisted the change on the grounds that the Folsom South canal diversion point offered the highest quality drinking water, and the alternate diversion point risked exposing its customers to increased cancer risks.³³¹ Although originally brought in 1972 on other grounds,³³² the case did not reach trial until 1984.³³³ Accordingly, the post-*National Audubon Society* public trust doctrine framed many of the issues.

The litigation produced both a State Water Board opinion and a judicial decision. Shortly after trial began, the trial court referred the matter to the Board.³³⁴ After a series of hearings and a draft report, the Board issued its "Report of Referee" in June of 1988.³³⁵ As part of that Report, the Board

328. See generally Stuart L. Somach, *The American River Decision: Balancing Instream Protection With Other Competing Uses*, 1 RIVERS 251 (1990); Joseph L. Sax, *Bringing an Ecological Perspective to Natural Resources Law: Fulfilling the Promise of the Public Trust*, NATURAL RESOURCES POLICY AND LAW 148 (Lawrence J. MacDonnell & Sarah F. Bates, eds. 1993); Blumm & Schwartz, *supra* note 2, at 723-25.

329. Below the confluence of the Sacramento and American Rivers, the Sacramento enters the estuary known as the Delta of the Sacramento and San Joaquin Rivers. See Cal. Resources Agency, Dep't of Water Resources, *Delta Atlas* at 8 (Sacramento 1987). Environmentalists were urging EBMUD to divert its American River contract supplies from the Delta. See *Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist.*, No. 425955, at 17-20, 50 (Super. Ct. Alameda County, Cal. Jan. 2, 1990) [hereinafter *Lower American River*].

330. *Lower American River*, *supra* note 329, at 8-23.

331. Among other matters, EBMUD was concerned with potential water quality problems from Delta diversions. These included concerns over potential carcinogens formed by the treatment of Delta water with chlorine. *Id.* at 49-61.

332. Somach, *supra* note 328, at 255 (discussing procedural history).

333. To meet a state statutory requirement to bring a case to trial within a particular period measured from the filing of the suit, the trial court commenced trial on April 9, 1984, by placing one witness on the stand. *Lower American River*, *supra* note 329, at 21.

334. *Id.* The California Water Code authorizes such references. CAL. WATER CODE § 2000 (West 1971).

335. *Lower American River*, *supra* note 329, at 21-22; Cal. State Water Resources Control Bd., *Report of Referee—Lower American River Court Reference* (June 1988) [hereinafter *Referee's Report*].

included a nearly two hundred page "Legal Report."³³⁶ The Legal Report addressed twenty issues, including nine broad public trust matters.³³⁷ Ultimately, the Board concluded that there was little harm to trust uses from EBMUD's receipt of water at the Folsom South Canal site.³³⁸ After receiving the Board's report, the trial court held trial on the parties' exceptions to the Board's report.³³⁹ In January of 1990, the court issued its own 112 page statement of decision.³⁴⁰ Basing its decision on the public trust doctrine, the court crafted what it labeled "a physical solution."³⁴¹ Under that solution, the court allowed EBMUD to receive its contractual supplies at the Folsom South Canal site, but only when American River flows were high enough to satisfy the public trust uses in the lower American River.³⁴²

Both the State Water Board's Legal Report and the trial court's Statement of Decision alone would each represent the most extensive post-*National Audubon Society* discussion of the public trust doctrine. Ironically, however, neither produced any true trust "text." The Board issued its two reports only in its role as an expert advisor to the trial court. It is unclear what precedential value, if any, the reports have in future Board proceedings.³⁴³ Moreover, the trial court's rejection of the Board's ultimate conclusions³⁴⁴ clouds the entire report. As for the court's opinion, the parties' willingness to abide by the court's decision speaks well of the court's wisdom.³⁴⁵ Nevertheless, their failure to appeal leaves the statement of decision without any precedential effect in other watercourses. Finally, the absence of the

336. *Legal Report*, *supra* note 66.

337. *Id.* at app. a.; *see also infra* notes 348-93 and accompanying text (discussing the Board's review of trust issues).

338. *Referee's Report*, *supra* note 335, at 28.

339. *Lower American River*, *supra* note 329, at 23.

340. *Id.* at 112.

341. *Id.* at 97-100, 108-12.

342. *Id.*

343. Indeed, a brief survey of Board decisions finds that the Board itself does not generally refer to these reports. Search of WESTLAW, database CAENV-ADMIN, query ((lower +1 American +1 river) & date(aft 1/1/1988)) (June 8, 1995) (listing *In re* Application for Certification of the Sacramento Power Authority at Campbell Cogeneration Project, Order No. 91-1130-1, Docket No. 93-AFC-3, 1994 WL 792596 (Cal. Energy Res. Cons. Dev. Com. Nov. 30, 1994); *In Re* Application for Certification of the Sacramento Cogeneration Authority's Procter & Gamble Cogeneration Project, Docket No. 93-AFC-2, 1994 WL 792391 (Cal. Energy Res. Cons. Dev. Com. Nov. 16, 1994)).

344. *Lower American River*, *supra* note 329, at 22-33, 105-11.

345. *No Appeal Filed in Lower American River Case*, 1 CAL. WATER L. & POLICY REP. 13 (Oct. 1990).

Bureau of Reclamation from the litigation means that the decision did not even bind the actual diverter on the watercourse in question.³⁴⁶

Despite their limited precedential values, the two opinions represent important additions to public trust understanding. The American River litigation has been reported extensively in the legal literature, and held up as a model for the resolution of future conflicts between consumptive and trust uses.³⁴⁷ Accordingly, this article considers their contributions to trust doctrine as “near-text.” They represent extensive, reasoned legal analyses and applications of the trust doctrine to a concrete situation. While they have virtually no precedential value, there is much to be learned from their statements and applications of trust doctrine. As such, they form a convenient bridge between this article’s discussion of trust “text” and “context.”

A. *The State Water Board’s Legal Report*

In its Legal Report in the Lower American River court reference, the State Water Board addressed nine trust issues. Three initial issues involved the effect of prior legislative and administrative actions on the trust interests in the lower American River. The Board first considered whether the state legislature had removed trust protection from that stretch of the river by authorizing both the construction of Folsom Dam and its inclusion within the Central Valley Project.³⁴⁸ Longstanding trust law authorizes a legislative disposition of trust assets in limited circumstances.³⁴⁹ The Board easily found that the legislature’s mere authorization of Folsom Dam only

346. As the state court proceeding was not a general adjudication, sovereign immunity precluded the Bureau’s involuntary joinder. See McCarran Amendment, 43 U.S.C.A. § 666 (West 1986) (consenting to suit in state court in cases involving “the adjudication of rights to the use of water of a river system”). The Bureau’s absence from the proceedings greatly troubled the State Water Board. *Referee’s Report*, *supra* note 335, at 5-6. The Board repeatedly referred to the Bureau’s absence in discussing the limitations that “frustrate effective action in this matter.” *Legal Report*, *supra* note 66, at 77-78; see also *infra* notes 367-70 and accompanying text (discussing the impact of the Bureau’s absence).

347. See Somach, *supra* note 328, at 251-52; Blumm & Schwartz, *supra* note 2, at 724; Sax, *Ecological Perspective*, *supra* note 328, at 152, 160.

348. *Legal Report*, *supra* note 66, at 21-23, 26 (authorizing the Folsom Reservoir as part of the Central Valley Project’s “American River Development”); see also CAL. WATER CODE § 11265 (West 1992).

349. For example, the legislature may only convey title to tidelands free of the trust if necessary to further trust uses and if trust uses on the nonconveyed portions of the land are not harmed. *City of Berkeley v. Superior Ct.*, 606 P.2d 362, 366-67, 369, 373-74 (Cal. 1980). Further, the court has recognized that necessity might require legislative abrogation of the trust over water needed for appropriation, even if trust purposes are inevitably harmed. *National Audubon Soc’y v. Superior Ct.*, 658 P.2d 709, 727 (Cal. 1983).

abrogated trust interests to the extent necessary to construct the dam within the American River channel.³⁵⁰ Alternatively, the Board concluded that even if the authorization for the dam were construed as a legislative disposition of trust assets in the stretch of the river below the dam, such a disposition remained reviewable under the state constitution's requirement that water be put to its fullest beneficial use.³⁵¹

In addition to this purported legislative disposition of trust assets, the State Water Board considered the impact of its prior administrative determinations involving the American River.³⁵² In Water Right Decisions D-893 and D-1400, the Board required the Bureau of Reclamation to release certain flows into the American River below Folsom Dam.³⁵³ These flows were for fish and recreational uses. EBMUD argued that these requirements represented prior administrative public trust balancings.³⁵⁴ Accordingly, it argued that the environmentalists and county needed to show changed circumstances before triggering a review of the earlier flow requirements.³⁵⁵

The Board found that neither of its pre-*National Audubon Society* decisions was a proper basis for a complete public trust balancing.³⁵⁶ Along the way, it made three broad pronouncements. It first summarized *National Audubon Society*:

We understand *Audubon* to mean that public trust interests must be considered by the Board when allocating water and, when feasible, that harm to such interests shall be avoided or minimized. Further, when it is not feasible to avoid some harm to public trust interests, then the public interest requires that the relative value of public trust uses and assets must be considered along with other interests in the beneficial use of water.³⁵⁷

It then rejected suggestions that prior decisions addressing public trust uses were not true "public trust decision[s]" unless they considered "every aspect of public trust assets and values," and reached "other facilities on the river . . . or other persons."³⁵⁸ Foreshadowing an answer to a later issue,³⁵⁹

350. *Legal Report*, *supra* note 66, at 26-28. The Board noted that the dam's operation might enhance trust assets in the stretch of the river below it. *Id.* Accordingly, the Board found nothing inconsistent between the dam's existence and the maintenance of trust uses below it. *Id.*

351. *Id.* at 28-29.

352. *Id.* at 30-34.

353. *Id.* at 28-29.

354. *Id.* at 34-35.

355. *Id.* at 43.

356. *Id.* at 36-42.

357. *Id.* at 36-37.

358. *Id.* at 37.

the Board then noted both the changing nature of trust uses, and its inability, outside of general adjudications, to simultaneously consider all uses by all water users on a watercourse.³⁶⁰

Ultimately, while it found that its earlier Water Right Decision D-1400 “is something very like a public trust decision,”³⁶¹ it was based on assumptions no longer appropriate.³⁶² Moreover, again anticipating a later issue,³⁶³ it found that separate public trust considerations might arise from a water contractor’s proposed place or method of water delivery.³⁶⁴ For similar reasons, it found its earlier Water Right Decision D-893 “not relevant” to the trust issues presented by EBMUD’s proposed delivery place.³⁶⁵ By finding its two prior decisions irrelevant, the Board mooted discussion of the showing required to trigger a reevaluation of earlier trust determinations.³⁶⁶

Two procedural issues received Board attention. Indeed, a joinder question posed the most troubling issue of all for the Board. It repeatedly addressed the implications of proceeding without the actual water right holder. The Board concluded that if it were forced to consider all uses by all water rights holders, it could only proceed by general adjudication.³⁶⁷ Resource and time requirements for such adjudications, however, would force “the administration of water right law . . . to a standstill”³⁶⁸ Accordingly, for practical reasons, the Board found it could proceed in “[t]he absence of significant diverters from a proceeding in which consideration is given to public trust uses”³⁶⁹ Nevertheless, it concluded that the proceeding before it “cannot result in effective measures

359. See *infra* notes 367-70 and accompanying text (discussing the Board’s need to have joined as parties all rights holders whose diversions might affect trust assets).

360. *Legal Report*, *supra* note 66, at 38.

361. *Id.* at 37.

362. See *id.* at 39-40. In particular, Water Right Decision D-1400 contemplated the construction of the larger Auburn Dam upstream of Folsom Dam. *Id.* At present, however, Auburn Dam remains unconstructed. *Id.*

363. See *infra* notes 374-77 and accompanying text (discussing general applicability of the trust to persons who merely hold contracts to purchase water from an actual diverter).

364. *Legal Report*, *supra* note 66, at 40-41. The Board again suggested that the state constitutional prohibition against water waste might go beyond the public trust. *Id.* at 41.

365. *Id.* at 41-42.

366. *Id.* at 43.

367. *Id.* at 76.

368. *Id.*

369. *Id.*

to protect public trust uses because the Bureau is not a party to the proceeding.³⁷⁰

A second procedural issue involved the allocation of the burden of proof. The Board concluded that normal rules governing the burden applied.³⁷¹ In effect, the Board required the environmentalists and county to prove harm to trust-protected uses.³⁷² It found no policy considerations to shift the burden to EBMUD to prove the *absence* of harm to such uses.³⁷³

A last group of four “substantive” trust issues received substantial Board attention. First, the Board reviewed the trust’s applicability to a person who only held a contractual right to receive water obtained from the actual diverter.³⁷⁴ It noted that the differences between the diversions at issue in *National Audubon Society* and the diversions currently before it were “all differences in the ‘means’ by which a taking [of water] is accomplished and not the ‘effects’ the proposed takings may have.”³⁷⁵ By focusing on the practical effects of the manner of delivery, the Board found it appropriate to extend the trust doctrine to contractors.³⁷⁶ In particular, it noted that:

assuming that efforts were made to avoid or minimize harm to [trust] uses when an appropriative project was originally approved, further possibilities for avoidance or minimization of harm may become possible when consideration is given to the point at which a particular contractor may take delivery of the water from the project.³⁷⁷

370. *Id.* at 77. In the Board’s mind, the Bureau’s absence meant that “there is no assurance that the flow currently found in the river would be maintained even though EBMUD was prohibited from taking water via the Folsom-South Canal.” *Id.* In particular, the Board found no assurance that: 1) the Bureau will still release any water for EBMUD “at times or in amounts that will benefit instream uses”; 2) that the Bureau would not convey water to *other* contractors at the Folsom-South Canal in a way that would reduce the American River flows to the minimums permitted in Water Right Decision D-893; or 3) the Bureau would not supply water for delivery to EBMUD at the Delta from Shasta Reservoir, or would not use the American River minimum flow requirements to provide the water necessary for EBMUD, allowing multiple use of the water without augmenting flows. *Id.* at 78-79; *see also id.* at 53-54, 195-96 (repeating identical concerns); *Referee’s Report, supra* note 335, at 5-6 (repeating identical concerns).

371. *Legal Report, supra* note 66, at 167.

372. *Id.* at 173-85.

373. *Compare* Cal. State Water Resources Control Bd., Water Right Order WR 89-8, 1989 WL 97133, at 13-14 (Apr. 20, 1989) (suggesting that the public policies advanced by the public trust might shift the burden of proof in appropriate situations) [hereinafter Water Right Order WR 89-8]; *see also infra* notes 510-11 and accompanying text (discussing Water Right Order WR 89-8).

374. *Legal Report, supra* note 66, at 44-56.

375. *Id.* at 50.

376. *Id.* at 51-52.

377. *Id.* In the case before it, however, the absence of the actual water right holder—the Bureau of Reclamation—greatly frustrated the Board. *Id.* at 52-56; *see supra* notes 367-70 and accompanying text (discussing the effect of the Bureau’s absence).

Second, the Board addressed the trust's applicability to those portions of the American River flows that were artificially enhanced by releases from storage in Folsom Dam. It noted that several trust uses in the lower American River "are at levels that would be impossible but for the flow being provided from storage at Folsom Reservoir during the interim between construction and full beneficial use of the water."³⁷⁸ Accordingly, it noted the twin anomalies of requiring public dedications of water that would otherwise not be available and of finding a public property interest in "a res (stored water) that did not exist in a state of nature."³⁷⁹ The Board found possible answers to these anomalies in theories advanced by the environmentalists and the county.³⁸⁰ Nevertheless, it found that all such answers "require[d] the presence of a project owner/operator of the water right and diversion works in order to assure the release of stored water at rates exceeding natural flow during some seasons."³⁸¹ Accordingly, in the Board's view, the Bureau's absence in the instant case mooted this issue.³⁸²

Third, the Board considered the relationships between EBMUD's water quality concerns, the public trust doctrine, and the state constitutional prohibition against water waste. It found that "EBMUD's water quality needs should be balanced against the needs of instream and other beneficial uses in the lower American River."³⁸³ While the right to high quality water was not absolute, the degree of permissible degradation presented a question of "reasonableness" under the state constitution; the answer to that question turned on the relative amount and quality of available water.³⁸⁴

378. *Legal Report*, *supra* note 66, at 66.

379. *Id.* at 66-67.

380. *Id.* at 67. The complainants raised theories of "annual flow regime," "project as a whole," and "community reliance" upon long continued artificial conditions. *Id.* at 63-65, 67. Anticipating its later decision under Fish and Game Code § 5937 to order releases from storage in excess of natural inflow, the Board elaborated:

We doubt that the California Supreme Court intended that its mandate that the courts and this Board should attempt to avoid or minimize harm to trust interests should be read so narrowly as to preclude the imposition of conditions, such as seasonal flow enhancement from storage, that would tend to compensate for project effects harmful to trust resources. Nevertheless, even assuming we are correct in our conclusion that the doctrine may require stored water releases at rates exceeding natural flow during some seasons, such a condition would have to be imposed on the project owner/operator.

Id. at 68-69; *supra* notes 196-203 and accompanying text (discussing imposition of such a requirement under Fish and Game Code § 5937 in Water Right Order WR 90-16).

381. *Legal Report*, *supra* note 66, at 67.

382. *Id.* at 71-72.

383. *Id.* at 94.

384. *Id.* at 94-95, 99-103.

Finally, the Board considered the applicability of statutory area of origin provisions to reservations of water for public trust purposes. Such provisions generally aim to give residents of the area where water originates some priority in water allocation over downstream or export users.³⁸⁵ The county raised two potentially applicable area of origin statutes.³⁸⁶ The Board concluded that one provision did not apply at all.³⁸⁷ It concluded that the other provision could apply to allow reservation of water for trust purposes.³⁸⁸ Nevertheless, it could only operate against the Bureau of Reclamation, and required payment of compensation for flows augmented by the Bureau's facilities.³⁸⁹

Based on its legal and technical analyses, the Board ultimately concluded that the complainants had not demonstrated sufficient harm to public trust uses in the lower American River to preclude EBMUD from receiving its contractual entitlement at the Folsom South Canal.³⁹⁰ In addition, it found "infeasible" the proposed Delta points for receipt of EBMUD's entitlement.³⁹¹ As such, the Board recommended a "physical solution" that slightly modified criteria under Water Right Decision D-1400.³⁹² Finally, addressing its concerns over the Bureau's absence, the Board announced that

385. See generally Gregory S. Weber, *Forging a More Coherent Groundwater Policy in California: State and Federal Constitutional Law Challenges to Local Groundwater Export Restrictions*, 34 SANTA CLARA L. REV. 373, 426-29 (1994) (discussing California area of origin provisions).

386. *Legal Report*, *supra* note 66, at 104-06. These statutes included Water Code §§ 10505 and 11460. *Id.* Section 10505 prohibits the release or assignment of an application to appropriate filed by a state entity if it will "deprive the county in which the water covered by the application originates" of necessary water. *Id.* at 104 (quoting CAL. WATER CODE § 10505 (West 1992)).

Section 11460 provides that the operation of any unit of the Central Valley Project (CVP) shall not deprive the watershed of origin, or areas immediately adjacent thereto which can conveniently be served, of 'all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein.'

Legal Report, *supra* note 66, at 110 (quoting CAL. WATER CODE § 11460 (West 1992)).

387. *Legal Report*, *supra* note 66, at 108-09 (concluding that Sacramento County was not a county of origin for purposes of § 10505, since the water in the Folsom Dam fell as precipitation in other counties upstream of Sacramento).

388. *Id.* at 112.

389. *Id.* at 112-14.

390. *Referee's Report*, *supra* note 335, at 24, 28.

391. *Id.* at 24.

392. *Id.* at 23, 25. While not much different from the Water Right Decision D-1400 criteria (which applies to Auburn Dam), the Board's flow recommendations "were substantially different from the 'then-existing' criteria" for Folsom's operation under Water Right Decision D-893. See *Memo*, *supra* note 70, at 7. Although the Bureau of Reclamation had been honoring the Water Right Decision D-1400 criteria, those criteria had assumed the Auburn Dam's completion. *Referee's Report*, *supra* note 335, at 23-25. Since the dam was not constructed, the Water Right Decision D-1400 criteria did not bind the Bureau, and the lower flows set by Water Right Decision D-893 remained in effect.

it planned “to review the water rights of the City of Sacramento and the Bureau’s American River water rights” in an independent proceeding.³⁹³

B. *The Trial Court’s Opinion*

In its Statement of Decision, the trial court explicitly adopted three of the Board’s public trust statements.³⁹⁴ Others it either ignored or implicitly adopted.³⁹⁵ The court added several textual points of its own.³⁹⁶ It disagreed, however, with the Board’s ultimate conclusions. In particular, critical of several Board technical assumptions, the court found possible substantial harm to lower American River trust uses from EBMUD’s receipt of its entitlements.³⁹⁷ Finally, the trial court ordered a much more comprehensive “physical solution”³⁹⁸ because it was less concerned than the Board with the effectiveness of its decision in the Bureau’s absence.

Like the Board, the court found that legislative authorization of the Folsom Dam did not abrogate trust values in the lower American River.³⁹⁹ It also had no trouble applying the trust to artificial flows made available by the Bureau’s Folsom Dam.⁴⁰⁰ Finally, the Board agreed that EBMUD’s need for high quality water could be balanced against the need to keep water in the river for trust uses.⁴⁰¹

The court did not expressly allocate the burden of proof nor did it discuss the area of origin provisions. Neither did it gloss on its ability to proceed in the Bureau’s absence. Nevertheless, implicit in its very decision is a conclusion that its decision could be effective even in the Bureau’s absence.⁴⁰² Similarly, although the court did not directly address the applicability of the public trust to a water contractor such as EBMUD, the court’s entire discussion assumes such applicability.⁴⁰³ In addition, while the

393. *Referee’s Report*, *supra* note 335, at 28-30; see *State Board Considers Lower American River Workplan*, 1 CAL. WATER L. & POLICY REP. 38-39 (Nov. 1990).

394. See *infra* notes 399-401 and accompanying text.

395. See *infra* notes 402-04 and accompanying text.

396. See *infra* notes 405-17 and accompanying text.

397. See *Lower American River*, *supra* note 329, at 76-80, 96-97.

398. *Id.* at 97-99, 108-12.

399. *Lower American River*, *supra* note 329, at 39-41. The court also found that the extension of protections to the lower American River under the federal and state Wild and Scenic Rivers Acts did not fully dispose of trust assets. *Id.* at 41-46 (citing CAL. PUBLIC RESOURCES CODE §§ 5093.50, 5093.52-5093.56 (West 1984 & Supp. 1995); 16 U.S.C.A. § 1271 (West 1985 & Supp. 1995)).

400. *Id.* at 31-36.

401. *Id.* at 82.

402. See *id.* at 32 (court satisfied that there is enough water to meet the needs of both EBMUD and the beneficiaries of the American River public trust).

403. See also *id.* at 82 (stating “EBMUD is entitled to its validly obtained contract rights with the critical caveat that those rights may not unnecessarily harm or compromise public trust values.”).

court did not directly address the extent of the Board's prior public trust balancing in Water Right Decisions D-893 and D-1400, or the need to show changed circumstances, the court implicitly found that neither decision blocked its own evaluation of trust assets. Indeed, it specifically found that Water Right Decision D-1400 provided inadequate protection to several public trust uses.⁴⁰⁴

In two areas, the court added important public trust text. First, in discussing the balance between trust-protected uses and consumptive uses, the court addressed the relative priorities given each. The court rejected the environmentalists' argument that public trust uses deserved "first priority."⁴⁰⁵ Nevertheless, the court also rejected EBMUD's notion that trust-protected uses are just "another use," entitled to no special consideration.⁴⁰⁶ Rather, the court stated that trust uses "occupies an exalted position in any judicial or administrative determination of water resource allocation."⁴⁰⁷

Semantically, the court's notion that trust uses receive no priority but occupy an exalted position seems contradictory. Nevertheless, in context, the court appears to be rejecting a rigid trust-based priority, just as *National Audubon Society* rejected a rigid, private property based priority.⁴⁰⁸ Rather, the court reads *National Audubon Society* as mandating "comprehensive water resources planning."⁴⁰⁹ In its own decision, the court consciously employs its physical solution to accomplish this "comprehensive" planning effort for the water uses before it.⁴¹⁰

Second, in a narrower vein, the court glossed on *National Audubon Society's* call to protect public trust uses "where feasible." The court rejected a simplistic notion that EBMUD's mere physical ability to divert at the delta demonstrated "feasibility."⁴¹¹ Rather, the court concluded that the feasibility of protecting a particular public trust value required evaluation of both the costs and the impacts on public health and the environment.⁴¹²

404. *Id.* at 95-96 (Water Right Decision D-1400 provides inadequate spawning habitat for chinook salmon), 97 (greater knowledge about steelhead trout and shad required to protect these species); *see id.* at 99 (new flows set in part for recreational interests).

405. *Id.* at 24-25.

406. *See id.* at 24-26.

407. *See id.* at 27.

408. *See* National Audubon Soc'y v. Superior Ct., 658 P.2d 709, 724-25 (Cal. 1983).

409. *Lower American River*, *supra* note 329, at 25-26.

410. *Id.* at 99 (stating that "[t]he physical solution doctrine fits hand in glove with the requirements for comprehensive planning elucidated by *Audubon*").

411. *See id.* at 29 (rejecting the plaintiff's logic that the existence of feasible alternatives "forbids utilization of the Folsom-South Canal"), 105-07.

412. *Id.* at 29.

Finally, in one additional area the court's decision provides important *contextual* development. Although the court did not directly address the burden of proof, it did so implicitly in several ways. In canvassing the conflicting expert testimony before it that discussed potential health hazards to EBMUD customers from delta diversions, the court concluded that prudence required caution in the face of scientific uncertainty.⁴¹³ Accordingly, it opted to take the safer course and fashion a physical solution that preserved the district's ability to divert at Folsom-South.⁴¹⁴ Given similar uncertainty over the potential harm to trust uses from such diversions, the court took an equally cautious approach.⁴¹⁵ By adopting the flow recommendations of the California Department of Fish and Game, the court apparently set flow standards that provided, in the court's mind, a margin of safety for trust uses.⁴¹⁶ Similarly, it exercised additional caution by reserving jurisdiction over the case, while the parties cooperatively studied the full range of water resource management issues posed by the competing uses.⁴¹⁷

By adopting a risk-averse decision, the court allocated the burden of uncertainty. In effect, the court reversed *both* burdens of proof. It placed the burden of disproving harm to trust values on EBMUD, rather than placing the burden of proving harm on the challengers. In addition, it put the burden of disproving water quality concerns on the challengers, rather than the burden of proving harm on EBMUD. Convinced that there was sufficient water to fashion a physical solution to protect both concerns, the court then had its cake and ate it too.

VII. CONTEXTUAL DEVELOPMENTS

The Board has developed the public trust doctrine contextually in two ways. First, much can be learned about the trust by the way the Board applies the doctrine, even in circumstances where it has not elaborately explained the basis for its application.⁴¹⁸ Second, much can also be learned by comparing the arguments raised by parties in briefs to the Board with the conclusions implicitly reached by the Board in its decisions. In neither

413. *Id.* at 71-73.

414. *Id.* at 73.

415. *Id.* at 96 (stating "[h]ere again, the fact of uncertainty dictates what is intended as a safe and prudent course designed to protect public trust values.").

416. *Id.* at 95-97.

417. *Id.*

418. In this sense, all trust applications develop trust doctrine contextually. The following discussion abstracts the more significant contextual development.

instance is the doctrine advanced as fully as through a reasoned, “textual” explanation. Board conduct requires text to become articulate, without formal articulation, mere conduct lacks full coherence. In addition, past Board conduct is less of a predictor of future Board conduct when unconfined by explanation. Nevertheless, at the very least, Board conduct informs the doctrine by illustrating its application in a particular context.

To date, two controversies have provided the richest grounds for the contextual development of the trust: 1) the water quality planning and implementation process for the San Francisco Bay/Sacramento-San Joaquin Delta (“Bay-Delta planning process”); and 2) Mono Lake Basin. In addition, notable contextual development has occurred in several other matters.

A. *The Bay-Delta Process*

Few water controversies can rival the Bay-Delta planning process in hydrological, biological, economical, legal, and political complexity.⁴¹⁹ Since the 1986 decision in the *Delta Water Cases*, the public trust has lurked in the background of the lengthy process to set and implement water quality plans for the estuary.⁴²⁰ Although it has occasionally made a cameo appearance,⁴²¹ the common law trust doctrine has generally remained behind the scenes. Indeed, the current version of the Board’s water quality plan expressly mentions the trust only once.⁴²² Instead, specific statutes have overtly driven the process. These statutes include, of course, state and

419. For a description of the Bay/Delta estuary, its ecological and economical importance, and a history of the proceedings up to early 1995, see 60 Fed. Reg. 4664, 4664-67 (1995) (to be codified at 40 C.F.R. § 131), and California State Water Resources Control Board, Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary at 1-7 (draft May 1995) [hereinafter 1995 Bay/Delta Plan].

420. *United States v. State Water Resources Control Bd.*, 227 Cal. Rptr. 161 (Cal. Ct. App. 1986); see *supra* note 67 and accompanying text (discussing application of public trust to the enforcement of Bay/Delta water quality standards against appropriators).

421. *E.g.*, Water Right Order WR 91-01, *supra* note 128, at *1; see *supra* note 204 and accompanying text (discussing releases from Shasta Reservoir ordered pursuant to a combined Board authority to implement water quality control plans, protect public trust uses, and enforce the state constitution’s reasonable use provisions).

422. 1995 Bay/Delta Plan, *supra* note 419, at 7 (stating “[c]omponents in this plan will, when implemented: . . . (2) protect public trust resources”). The plan, however, contains ample discussion of such “trust resources” as fish and wildlife. *E.g.*, *id.* at 14-15, 33-41.

federal water quality planning legislation.⁴²³ In addition, they include the state and federal endangered species legislation.⁴²⁴

Because the common-law trust has remained largely out of sight in the Bay/Delta planning process to date, there has been no true textual development. Nevertheless, the trust remains available as perhaps the most potent Board tool for implementing its water quality plans. Moreover, the brief glimpses the Board has given of the trust's potential role in the process speak volumes about the trust's potential development as an enforcement tool.

The current Bay/Delta plan sets instream flow requirements designed to protect trust uses identified as beneficial uses within the plan.⁴²⁵ It does not, however, assign responsibility among diverters for meeting these flows.⁴²⁶ A strong hint of the role of the trust in allocating responsibility for these flow reductions comes from a draft water right decision, Water Right Decision D-1630 ("Decision D-1630"), designed to implement the 1991 Bay/Delta plan.⁴²⁷

In the fall of 1992, the State Water Board issued its draft Water Right Decision D-1630.⁴²⁸ It rested its proposed decision in large part upon the public trust doctrine.⁴²⁹ In the decision, the Board sought to provide "reasonable measures that will stop the decline and begin the recovery of public trust resources in the [Bay/Delta Estuary]."⁴³⁰ The controversial "reasonable measures" included the imposition of both flow restrictions and

423. For a brief description of these laws, see Weber, *Overview*, *supra* note 58, at 947-53 (discussing the California Fish and Game Code §§ 2050-2098 (West Supp. 1994) and 16 U.S.C.A. §§1531-1544 (West 1985 & Supp. 1993)).

424. For a brief description of the two acts and their impact on water rights, see Weber, *Overview*, *supra* note 58, at 939-43 (discussing the Porter-Cologne Act, Cal. Water Code § 13240 (West 1992) and the Clean Water Act, 33 U.S.C.A. § 1313 (West 1986 & Supp. 1993)).

425. 1995 Bay/Delta Plan, *supra* note 419, at 9.

426. Cal. State Water Resources Control Bd., Response to Comments, Appendix 2 to Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, at 6 (May 1995).

427. In keeping with the subtitle of this article, this unadopted *draft* decision might be called "pre-text."

428. Cal. State Water Resources Control Bd., Water Right Decision D-1630 (Draft Nov. 17, 1992) [hereinafter Water Right Decision D-1630 (Draft)].

429. *Id.* at 1, 6 n.1. In addition to the public trust doctrine, the State Water Board based its proposed decision on water quality statutes; the reasonable use requirements of the California Constitution article X, section 2; and "the public interest." *Id.* at 6 n.1.

430. *Id.* at 1.

environmental impact mitigation fees upon all major estuary and upstream diverters, regardless of seniority.⁴³¹

The draft explained the decision to apply the trust without regard to seniority: “[e]ach water right holder should be responsible for the effects caused by its own diversion. The responsibilities set forth in this order are set proportionally, according to the amount of water needed from each of the several watersheds that contribute to the estuary.”⁴³² It elaborated:

Cutting off diversions in the order of priority would allow a few water right holders to entirely escape their public trust obligations at the expense of many other diverters. Such a massive cutoff while leaving others to divert public trust water at will would not be in the public interest. Additionally, cutting off diversions in the order of priority up to a specified seniority level would not ensure that the foregone flows reached the Estuary. Absent bypass obligations, large senior water right holders downstream of a water right holder who was bypassing flows could divert the pulse flows.⁴³³

Had the State Water Board adopted a final version of the draft, it would have been the first major decision applying the public trust doctrine to existing appropriations. Quite possibly, it would have prompted judicial review of its interpretation of its powers. Particularly controversial were the imposition of environmental mitigation and monitoring fees, requirements for release

431. *Id.* at 1-2; see *State Board Issues Final Draft of Water Right Decision 1630*, 3 CAL. WATER L. & POLICY REP. 170, 170-71 (June 1993) (discussing the final version of the proposed decision). The draft did exempt small upstream diverters from trust imposed restrictions. It explained:

There would be little or no difference in the public trust responsibilities of these water rights if they were required to respond in their order of priority rather than in a group. When natural flows are present, there generally is enough for all water rights to divert at once, but natural flows diminish quickly when precipitation or snowmelt ceases, making natural flow available to only a very few rights. The quantity of water from intervening water rights is small and will not have a significant effect on the availability of water under this decision.

Water Right Decision D-1630 (Draft), *supra* note 428, at 104-05.

432. Water Right Decision D-1630 (Draft), *supra* note 428, at 105.

433. *Id.* at 105. The draft further explained that its decision to impose trust duties without regard to seniority had precedent. As support, it cited the State Water Board’s uniform application of earlier Bay/Delta restrictions on the state and federal projects regardless of the relative seniority of rights. *Id.* (citing Water Right Decision D-1485 that assigned the DWR and the USBR joint and several responsibility for meeting the water quality standards, notwithstanding the relative seniorities of their rights). *Cf. id.* (citing Water Right Decision D-1594 that established “different methods for determining water availability for small and large water right holders in the watersheds of the Estuary”).

from storage, and the decision to not allocate trust-related flow restrictions based solely upon priority of water rights.⁴³⁴

Before issuing its final order, however, the Board received a letter from Governor Wilson.⁴³⁵ In the letter, the Governor urged the Board to postpone further action until the federal agencies charged with implementation of the federal Endangered Species Act, "Club FED"⁴³⁶ imposed their own restrictions.⁴³⁷ Following the Governor's letter, the State Water Board declined to adopt its final version of Water Right Decision D-1630.⁴³⁸

Since the withdrawal of the draft Water Right Decision D-1630, much has changed in the Bay/Delta process. As anticipated, Club FED issued a Bay/Delta plan in December 1993.⁴³⁹ Although questions remained about the federal agencies' ability to enforce this plan,⁴⁴⁰ its impact on water uses was definite. To meet its habitat protection criteria, annual diversions would have had to have been reduced an average of 540,000 acre-feet; in critically dry years, the reductions would have totaled 1.1 million acre-feet.⁴⁴¹ In June 1994, prodded in part by the announcement of this federal plan, state, and federal resources agencies, collectively known as "CALFED", joined to develop a framework for achieving some consensus on the Bay/Delta process.⁴⁴² In December 1994, CALFED, joined by major urban,

434. *State Board Issues Final Draft of Water Right Decision 1630*, *supra* note 431, at 170-71 (discussing the final version of the proposed decision).

435. Letter from Pete Wilson, Governor of California, to John Caffrey, Member, State Water Resources Control Bd., 3 CAL. WATER L. & POLICY REP. 152 (May 1993); *see* Weber, *Overview*, *supra* note 58, at 967 n.357.

436. The Federal Environmental Directorate, usually called "Club FED," includes the United States Environmental Protection Agency, Fish and Wildlife Service, Bureau of Reclamation and the National Marine Fisheries Service. 60 Fed. Reg. at 4666.

Letter from Pete Wilson, *supra* note 435, at 152; *see also* Weber, *Overview*, *supra* note 58, at 967 n.357.

438. *See* Weber, *Overview*, *supra* note 58, at 964-67, 967 n.357 (discussing and criticizing the federalization of California water resources law).

439. 59 Fed. Reg. 810 (1994) (to be codified at 40 C.F.R. pt. 131) (proposed Jan. 6, 1994).

440. *See, e.g.*, Weber, *Overview*, *supra* note 58, at 951-53; *see also* 59 Fed. Reg. at 821-22 (discussing EPA authority to implement its proposed plan); 1995 Bay/Delta Plan, *supra* note 419, at 10-11 (also discussing EPA implementation authority).

441. 59 Fed. Reg. at 832; *see also* U.S. EPA Agrees to Finalize Standards for Water Quality in San Francisco Bay, 4 BNA CAL. ENVIR. RPTR. 254-55 (May 6, 1994) (summarizing the proposal).

442. *See* 1995 Bay/Delta Plan, *supra* note 419, at 6. Collectively, the state and federal agencies who signed the June 1994 "Framework Agreement" are known as "CALFED," and the agreement is also known as the "CALFED Agreement." *Id.* (citing 60 Fed. Reg. 4664 (1995)). The agreement:

identifies three areas where both State and federal interests and responsibilities are interrelated, and coordination and cooperation are particularly important: (1) formulation of water quality standards for the Estuary; (2) improved coordination of federal and State water project operations with regulatory requirements; and (3)

agricultural and environmental organizations, signed "Principles for Agreement on Bay-Delta Standards."⁴⁴³ That document "contains proposed Bay/Delta water quality objectives and outlines additional agreements regarding the federal Endangered Species Act."⁴⁴⁴ The State Water Board's 1995 Bay/Delta Plan is meant to be consistent with the Principles for Agreement.⁴⁴⁵

Implementation of the 1995 Bay/Delta Plan will require diversion reductions ranging from 400,000 acre-feet in normal rainfall years, to 1.1 million acre-feet in critically dry years.⁴⁴⁶ "This represents an export reduction ranging between 5 percent in wet years to 20 percent in critically dry years."⁴⁴⁷ The State Water Board has announced a water rights hearing to implement its plan.⁴⁴⁸ "The water right decision, which is anticipated before June 1998, will allocate responsibility for meeting the objectives among water rights holders in the Bay/Delta Estuary watershed"⁴⁴⁹ In that decision, the Board will have to decide what role seniority of rights might play in any diversion reductions necessary to implement the water quality plan. At least four alternatives exist: 1) virtually no role at all, as suggested by draft Water Right Decision D-1630; 2) some nondispositive role; 3) a dispositive role for some types of required flows or on some stream reaches; and 4) complete application of seniority principles. In theory, the public trust doctrine does not preclude the Board from allocating diversion reductions according to strict seniority. Nevertheless, an allocation that gave seniority little or no weight is probably more consistent with the

development of a long-term solution to fish and wildlife, water supply reliability, flood control, and water quality problems in the Bay-Delta Estuary.

Id. Under this Agreement, the federal EPA promulgated final water quality standards in December 1994. *Id.* (citing 60 Fed. Reg. 4664 (1995)).

443. Principles for Agreement on Bay-Delta Standards Between the State of California and the Federal Government (Dec. 15, 1994); see *Historic Agreement Reached on Standards to Protect Bay-Delta and Water Supplies*, 5 BNA CAL. ENVIR. RPTR. 77 (Jan. 13, 1995).

444. 1995 Bay/Delta Plan, *supra* note 419, at 7.

445. *Id.*

446. 5 BNA CAL. ENVIR. RPTR., *supra* note 443, at 77. The Board neither signed nor was active in the negotiations leading to the Principles for Agreement. Memo, *supra* note 70, at 7.

447. 5 BNA CAL. ENVIR. RPTR., *supra* note 443, at 77.

448. 1995 Bay/Delta Plan, *supra* note 419, at 27.

449. *Id.* The Board also announced that "[i]n appropriate cases, [it] will also use its Clean Water Act section 401 water quality certification authority." *Id.* That statute allows the State Water Board to require a federally permitted water project, such as a hydroelectric project, to meet state water quality objectives. *Id.* See generally Weber, *Overview*, *supra* note 58, at 953-55 (briefly discussing water quality certifications).

Board's broad vision of the trust's applicability to all water users, regardless of the type of right they possess.⁴⁵⁰

B. *The Mono Lake Basin Decision*

In addition to the specific textual developments identified above,⁴⁵¹ a review of the Board's decision well illustrates how the trust operates. The results the Board reached, particularly in comparison with points briefed by the parties, substantially enrich the public trust doctrine's context.

As noted above, the parties briefed over a dozen issues.⁴⁵² Also, the Board's decision provided legal text on four of those issues, plus an issue not directly raised in the briefs.⁴⁵³ Several issues, however, received no overt Board attention. For example, the Board did not directly address the meaning of "feasible" as used by *National Audubon Society* in ordering trust protection "to the extent feasible." Similarly, the Board did not directly address what priority, if any, should be given to trust uses. Additionally, the Board made no new pronouncements on either the general weight to be given to the California Department of Fish and Game's fishery testimony, the relationship of the trust to the laws of reasonable use, or the Board's authority to order offsite mitigation. Nevertheless, a review of the decision suggests the Board's implicit conclusions in each of these areas. Similarly, while the Board made no new general pronouncements about *how* to balance *between* trust and consumptive uses, or *how* to balance *among* trust uses affected differently by different lake or flow levels, its decision demonstrates several important factors.

Several implicit Board conclusions readily appear from the decision. For example, the Board likely did not discuss its authority to order offsite mitigation simply because it did not order the city to rewater Mill Creek as

450. See *infra* notes 525-32 and accompanying text (discussing the Board's vision of the trust's reach).

451. See *supra* notes 221-99 and accompanying text (discussing textual developments in Water Right Decision D-1631).

452. See *supra* notes 241-56 and accompanying text (identifying the issues addressed).

453. See *supra* notes 221-99 and accompanying text (discussing Board's textual additions). The three issues directly raised by the parties' briefs included: 1) use of pre-diversion conditions as the reference for compliance with Fish and Game Code § 5937 and the public trust; 2) the appropriateness of inclusion of air resources within the ambit of trust protection; 3) the appropriateness of models in trust analyses; and 4) the appropriateness of requiring releases from storage at rates that exceed then-occurring natural reservoir inflow. See *supra* notes 241-56 and accompanying text. The Board addressed this latter issue in the context of its physical solution discussion. Water Right Decision D-1631, *supra* note 15, at 10-11. In addition to these points, the Board added two points not directly raised by the parties: 1) the appropriateness of a physical solution to free water for consumptive uses; and 2) a recognition that natural processes have some advantages over artificial processes in trust-mandated habitat restoration. *Id.*

requested by environmentalists.⁴⁵⁴ While it did not describe the degree of deference it gave to the Department of Fish and Game testimony, its conclusions are consistent with the standard it announced a few months later in the Bear Creek order.⁴⁵⁵ Thus, although the Board used its own judgment in rejecting several recommendations and substituting its own, the Board adopted virtually all of the Department's recommendations.⁴⁵⁶

In addition, the Board searched for evidence of pre-diversion conditions in general, and pre-diversion habitat degradation in particular.⁴⁵⁷ The Board made no pronouncements on the weight it gave to evidence challenged by the City as merely "anecdotal." Nevertheless, the Board considered such evidence where it existed and discounted it where appropriate.⁴⁵⁸ Perhaps more importantly, the Board did not let the absence of unequivocal hard evidence about pre-diversion conditions preclude it from general conclusions about the basin's ability to support the trust resources. Thus, in setting stream flow rates, it focused on "limiting factors."⁴⁵⁹ In particular, where instream flows would be the only factor that would limit the fishery, the Board set stream flow rates based on the ability of the stream to provide nearly maximum *habitat*.⁴⁶⁰ In essence, the Board attempted to recreate the conditions that would restore the historically *potential* fishery.⁴⁶¹

454. It did order the city to both minimize fluctuations on the Upper Owens river, and to keep those flows below a ceiling. *Id.* at 207. Los Angeles and DFG are separately negotiating flow changes for the Owens gorge. Memo, *supra* note 70, at 8.

455. Water Right Order WR 95-4, *supra* note 15; see also *supra* notes 300-26 and accompanying text for discussion of the order. In that order, the Board gave the DFG the benefit of the doubt.

456. For example, the Board adopted most of the DFG's flow recommendations for Lee Vining and Rush Creeks. Water Right Decision D-1631, *supra* note 15, at 26, 34, 71. *Cf. id.* at 186-89 (rejecting the upper Owens River flow recommendations by both the DFG and the city). *But cf. In re Fishery Protection*, *supra* note 321, at 68, Fig. 8 (proposing flow requirements generally much lower than sought by the DFG).

457. Water Right Decision D-1631, *supra* note 15, at 21-22 (Lee Vining Creek fishery), 38-39 (Walker Creek fishery), 46 (Parker Creek fishery), 53-57 (Rush Creek fishery).

458. *Id.* at 22 (stating "no definitive evidence of [pre-1941 fishery]" in Lee Vining Creek existed), 38 (stating "very little information was presented" on Walker Creek pre-1941 fishery), 39 (stating pre-1941 Walker Creek "supported a limited trout fishery, the extent of which is unknown"), 57 (stating that pre-1941 Rush Creek had "a self-sustaining brown trout fishery with some rainbow trout present").

459. *Id.* at 15-19. In effect, the Board attempted to identify the various ecosystem elements that, at any given point in a stream system or fish's life cycle, would limit the ability of fish to thrive.

460. *Id.* at 27-29 (setting Lee Vining Creek flow rates to meet eighty to ninety percent of weighted usable area of habitat for all life stages of brown trout).

461. Conveniently, the Board found, with one exception, that the maximum weighted usable area ("WUA") for each of the targeted brown trout life stages was reached at a value *below* the highest simulated flow. *Id.* at 63. Thus, for each stream, at some point increased flow did *not* increase brown trout habitat. In effect, this meant that the Board could set flow levels that maximized fish habitat,

Similarly, the Board sought and found evidence of habitat degradation that had occurred prior to the commencement of the City's diversions.⁴⁶² While the Board recognized that such degradation had occurred,⁴⁶³ it apparently found that whatever occurred prior to the City's diversions paled in comparison to the effects of those diversions.⁴⁶⁴ In effect, given an inability to isolate the relative shares of culpability for pre- and post-diversion degradation, the Board held the City jointly and severally liable for all habitat degradation.

Nevertheless, the Board also concluded that "it is not realistic to expect full restoration of pre-1941 meadow and riparian areas."⁴⁶⁵ Indeed, the Board's reference to the possible reopening of specified stream side channels implies that it does not expect that *all* stream channels will be restored to the pre-1941 conditions.⁴⁶⁶ The Board's determination of the necessary stream and waterfowl habitat restoration efforts will come only after it has reviewed the City's required restoration plan.⁴⁶⁷

Much broader contextual lessons come from the Board's treatment of the balances between trust-protected and consumptive uses, and among trust-protected uses. Indeed, the heart of Water Right Decision D-1631 involves the balance between in-basin trust-protected uses and export uses for water and power. Although the Board made few pronouncements about *how* to conduct such a balance, its decision suggests several possible conclusions about that process.

First, two unsurprising evidentiary points emerge. On the one hand, where a party has put on little detailed evidence to support its particular recommendations, the Board will have little trouble dismissing its claims.

while knowing that some water would be potentially available for diversion. It thus did not have to determine the potential limits on Fish and Game Code § 5937 diversions.

The one exception occurred on Rush Creek. There, the Board found that the WUA for adult brown trout continued to rise as additional increments of water were added. *Id.* at 63-64. It discounted this circumstance by attributing it to the existence of an additional "return" channel in the creek that had not existed in 1941. *Id.*

462. *Id.* at 91 (summarizing pre-1941 land and water management practices on riparian and meadow areas in the basin).

463. *Id.* at 84-85 (summarizing pre-diversion degradation from diversions for local irrigation and pre-diversion impact of grazing on riparian vegetation).

464. *See id.* at 51 (noting that while pre-diversion degradation harmed riparian vegetation along Parker Creek, "the riparian corridor was more extensive than that which exists today"), 56-57 (noting that pre-diversion degradation along Rush Creek was not nearly as extensive as compared with post-diversion degradation), 85 (concluding that by 1941, "the long-term impact of grazing was localized and the riparian community was still intact and helped protect stream channels from erosion").

465. *Id.* at 91. I thank Daniel Frink, Esq., Staff Counsel, California State Water Resources Control Board, for suggesting the matters and wording of notes 465-67 and accompanying text.

466. *See id.* at 37, 74, 75.

467. *Id.* at 208-09.

Thus, the Board rejected the City of Los Angeles' Lee Vining and Rush Creek flushing flow recommendations because of the lack of detailed evidentiary support.⁴⁶⁸ On the other hand, where opposing parties agree on recommendations, the Board will have little trouble adopting the consensus as its own. Thus, the Board accepted the consensus flow recommendations for Walker and Parker Creeks.⁴⁶⁹

Second, and more importantly, in two areas the Board demonstrated a limited willingness to compare the marginal additional protections to trust uses with the marginal costs of reduced water exports from additional increments of trust-protection. For example, in setting the lake's level at 6,392 feet, the Board, at least temporarily, rejected calls for higher lake levels. Environmentalists had sought such higher levels to provide an increased habitat for migratory waterfowl.⁴⁷⁰ In effect, the Board found that the marginal potential gains to waterfowl were outweighed by the substantial decrease in the amount of water available for export.⁴⁷¹ Similarly, in setting wet-year flows for Lee Vining and Rush Creek, the Board at least briefly considered the marginal gain in fish habitat against the marginal cost in availability of water for export.⁴⁷²

In neither instance, however, did the Board base its decision solely on a comparison of marginal benefits and costs of competing lake or flow levels. For instance, the decision to set a lake level lower than necessary to maximize migratory bird habitat was influenced by a constellation of circumstances. These included the uncertainties that a sufficient number of birds would use the added habitat, the possibility of a physical solution, and the impact of the higher elevation on other trust-protected uses.⁴⁷³ Marginal reduction of export supplies formed only one star in this constellation.

468. *Id.* at 34 (Lee Vining Creek), 70-71 (Rush Creek).

469. *Id.* at 40 (Walker Creek), 47 (Parker Creek).

470. *Id.* at 115-17.

471. *Id.* at 118 (concluding that setting a lake level at elevation 6,405 feet to maximize migratory waterfowl habitat would be too high given the almost complete loss of water for consumptive uses from such an elevation).

472. *Id.* at 32 (Lee Vining Creek), 67-68 (Rush Creek). In rejecting DFG's call to provide Lee Vining Creek wet year flows sufficient to provide 100 percent of the weighted usable area ("WUA") habitat for adult brown trout, the Board stated: "[e]xamination of the flows associated with 90 percent and 100 percent of the maximum WUA for adult brown trout suggests that a significant flow increase is required to gain 10 percent in WUA." *Id.* at 32. Similarly, in rejecting DFG calls to provide Rush Creek wet year flows sufficient to provide 100 percent WUA for adult brown trout, the Board noted "the slow rate of increase of WUA for adults versus the quantity of flow required" *Id.* at 68.

473. *Id.* at 117 (noting declines in migratory bird population throughout the Pacific flyway), 118 (competing trust uses preclude setting elevation at 6,405 feet, but physical solution may provide additional habitat protection), 155 ("no single lake elevation . . . will maximize protection and accessibility to all public trust resources").

Moreover, its relative brightness in that constellation remains uncertain, but was probably rather dim.

Similarly, the flow levels set for Lee Vining and Rush Creeks were driven by the Board's conclusion that *Cal. Trout II* required restoration of the pre-1941 fishery.⁴⁷⁴ For example, it found that although the City's recommendations would have allowed sustenance of a fishery "at some level in Lee Vining Creek[,] . . . those flows would not be sufficient to reestablish and maintain the fishery that existed prior to [Los Angeles'] diversion of water."⁴⁷⁵ Thus, the Board generally rejected Los Angeles' arguments that lesser flows than recommended by DFG would meet the statutory mandate to keep fish "in good condition." In advocating such flows, the City had specifically asked the Board to set flow rates "where a significant increase in instream flow results in small increases in habitat."⁴⁷⁶ Given the strictures of *Cal. Trout II*, the Board apparently felt comfortable with comparing the marginal benefits and costs of increased flows only at the extreme. Thus, such an analysis only played a role in rejecting flows that would have increased habitat from ninety or ninety-five percent to one hundred percent of the usable stream segment area.⁴⁷⁷

Finally, the Board noted that a full marginal cost/benefit analysis would require an examination of "the economic benefits of protecting fishery and public trust resources in the Mono Lake Basin."⁴⁷⁸ Despite "[c]onsiderable information regarding these economic benefits" presented to it, the Board found that subject too "speculative."⁴⁷⁹ Instead, it confined its economic analysis largely to the ability of the City to bear the costs imposed by its decision.⁴⁸⁰

As for the balance among trust-protected uses, some trade-offs were inevitable given the Board's finding that no one water level would *maximize*

474. *See id.* at 32 (Lee Vining Creek flows set to "restore and maintain the fishery that existed . . . before [the city] began its Mono Basin diversions"), 33 ("the specified flows are needed to reestablish and maintain a fishery similar to that which existed in Lee Vining Creek prior to the export of water by [the city]").

475. *Id.* at 31.

476. *Id.* at 32; *see also id.* at 67 (the City's expert "testified that evaluation of the total WUA for each life stage should consider the point where the rapid increase in habitat begins to slow down and the continued increase of streamflow provides small increases in WUA for the particular life stage in question").

477. In addition to the marginal costs of such increased flows on water availability for export, higher wet year flows had possible negative impacts on spawning habitat. These impacts came from both from fish preferences as well as the potential to wash out spawning gravels. *See id.* at 30-31 (Lee Vining Creek), 66-67 (Rush Creek).

478. *Id.* at 176.

479. *Id.*

480. *Id.* at 176-77.

all trust-protected uses.⁴⁸¹ Thus, higher lake levels that might benefit one trust-protected use might harm another. In particular, the Board faced trade-offs among gull habitat on lake islands,⁴⁸² waterfowl habitat on lake-fringing wetlands,⁴⁸³ and tufa "habitat."⁴⁸⁴ Indeed, protection of tufa resources alone required evaluating trade-offs between land based tufa, water based tufa, and sand tufa.⁴⁸⁵

No single rule apparently guided the Board in its evaluation of these trade-offs. Rather, the Board seems to have drawn on as many available sources as possible in setting its overall lake level. Thus, for example, it considered public opinion surveys in evaluating the different impacts on tufa.⁴⁸⁶ It also relied in part on opinions of other expert agencies. These helped the State Water Board to find: 1) that the relicted lake bed offered only low habitat value; thus, it easily discounted the harm from re-inundation of this habitat;⁴⁸⁷ and 2) that elevation 6,390 feet best balanced the visual and recreational resources of the lake basin.⁴⁸⁸ In addition, the Board drew some conclusions based simply on its common-sense reading of the weights the competing trust-protected uses deserved. Thus, the Board discounted the value of preserving sand tufa from inundation, since the evidence suggested that such formations would likely erode within a relatively short period of time even if spared inundation.⁴⁸⁹ It refused to give much weight to the relative ease of viewing certain bird species at different locations at different lake levels.⁴⁹⁰ Additionally, it expressed a preference for long-term gull-habitat stability. As such, it opted to enhance habitat security on a rocky but dry island at the expense of habitat on an island with a water source that had the greater potential to erode from fluctuating lake levels.⁴⁹¹

481. *Id.* at 155.

482. Higher lake levels would erode current nesting sites on the Paoha islets, but make nesting sites on Negit island more secure from predator invasion. *Id.* at 106.

483. *Id.* at 117-18 (maximizing lake level for migratory waterfowl habitat would not best serve competing public trust uses).

484. "Tufa" towers are "conspicuous mineral deposits" prevalent along the lake shore. *Id.* at 3-5; see also *National Audubon Soc'y*, 658 P.2d at 711 (noting "[t]owers and spires of tufa on the north and south shores are matters of geological interest and a tourist attraction").

485. Water Right Decision D-1631, *supra* note 15, at 139-45, 180-81.

486. It found that viewers liked water based tufa better than land based tufa. *Id.* at 140-41. It found that viewers liked sand based tufa better than land based tufa but less than water based tufa. *Id.*

487. *Id.* at 112 (ample snowy plover habitat in alkali relicted bed would still exist at an elevation of 6,390 feet), 181-83.

488. *Id.* at 147-48.

489. *Id.* at 147.

490. *Id.* at 110 (for example, phalaropes).

491. *Id.* at 100-06.

Finally, the broadest contextual messages come from the Board's implicit handling of the "feasibility," "necessity," and "priority" issues. As noted above, *National Audubon Society* directs the Board "to protect the public trust *whenever feasible*."⁴⁹² At the same time, it authorizes the Board to permit trust-harming diversions *when necessary*.⁴⁹³ In discussing the "feasibility" of trust-protections and the "necessity" of trust-harming diversions, the parties disputed the priority, if any, to be given to trust uses. Again, the Board's Mono Lake Basin decision makes no explicit statement about any of these three points. Nevertheless, in its application of the trust to the dispute, the Board's decision implicitly speaks to all three points. Indeed, in the broadest sense, the Board's entire decision is addressed to demonstrating the limits of feasibility and necessity within the context of the Mono Lake Basin ecosystem and the needs of the City of Los Angeles.

The Board's decision provides substantial context for understanding three aspects of the "feasibility" of trust protection. First, the Board considered the technical feasibility of maximizing all trust uses. As discussed above, largely because some trust uses sprang into being only as a result of the diversion-induced lake reliction,⁴⁹⁴ the Board found itself unable to set a lake level that would maximize all trust-protections.⁴⁹⁵ Thus, circumstances tied the Board's hands and made complete trust-use protection technically "infeasible." Nevertheless, most of the trust-uses harmed by re-inundation were minor compared to the trust-protected uses furthered by rewatering the lake.

Second, in considering the feasibility of protecting these trust uses, the Board imposed substantial restrictions upon the City's diversions for water and power. The Board thus found that it was "feasible" to require the diverter to endure expenses of millions of dollars per year to substitute for water needed to remain in-basin to protect trust resources.⁴⁹⁶ Finally, the

492. *National Audubon Soc'y*, 658 P.2d at 728 (emphasis added).

493. *See id.* at 727-28.

494. Thus, for example, the lake reliction created more extensive snowy plover habitat than would have existed pre-diversion. Water Right Decision D-1631, *supra* note 15, at 112. Similarly, it exposed tufa that would not otherwise have been visible. *Id.* at 139-45, 180-81.

495. *Supra* notes 481-91 and accompanying text.

496. In the twenty year period while the lake reaches the 6,391 foot level, the City will have to pay an average of nearly \$36.3 million per year to obtain water and power to replace Mono Basin water. Water Right Decision D-1631, *supra* note 15, at 180. Just over half of this water must be released to meet the statutorily required fishery protection flows; the balance will satisfy the common law trust's requirements. *Id.*; *see also id.* at 171-72, 175 (discussing replacement water costs), 179 (discussing replacement power costs). After the twenty year period ends, the City will have to pay approximately \$23.5 million per year to replace Mono Basin water. *Id.* at 180. Of this, approximately twenty percent, or \$4.7 million per year represents water put off limits to diversion by the common law trust doctrine. *Id.*

Board found that the physical solution doctrine provided some protection to trust uses while freeing flows for potential export.⁴⁹⁷ Thus, “feasible” protection did not require dedication of flows if physical improvement might accomplish the same result.

In demonstrating the feasibility of protecting trust uses, the Board implicitly concluded that at least a portion of the City’s diversions were not “necessary.” In effect, “feasibility” and “necessity” are opposite sides of the same coin.⁴⁹⁸ In determining the necessity for the City’s diversions, the Board found that alternative water and power supplies existed for the supplies placed off-limits to export by its decision.⁴⁹⁹ It also found it feasible for Los Angeles to pursue alternative funding for these water and power purchases.⁵⁰⁰ Moreover, the Board reinforced this conclusion by noting that since 1989, the combination of prolonged drought and the trial court’s preliminary injunction meant that the City had exported *no* Mono Lake Basin water.⁵⁰¹ Nevertheless, the Board was unwilling to cut off export diversions entirely.

Finally, as for the “priority” to be given to trust uses, the Board’s decision demonstrates that such a priority exists, at least as a practical matter. The Board’s exhaustive catalogue of the information regarding the ecosystem and the current and historical impact of diversions, occupied the bulk of its attention.⁵⁰² In effect, by adopting the environmentally preferred lake level, and using prediversion conditions as a benchmark⁵⁰³ for its public

These funds are in addition to the expenditures necessary to study, construct, and monitor physical structures required to restore stream fisheries and lake migratory waterfowl habitat.

When spread among the City’s rate-payers, however, the per capita expenses will average only five to ten dollars per person annually. Dunning, *supra* note 5, at 31.

497. Water Right Decision D-1631, *supra* note 15, at 118.

498. *See id.* at 163 n.19 (stating “[i]n evaluating the feasibility of limiting Mono Basin diversions in order to protect public trust resources, the focus of the [Board’s] inquiry is on: (1) the overall supplies expected to be available to meet [the city]’s needs; and (2) the quantity of additional water which is needed for protection of public trust resources in the Mono Basin after fishery flows are provided”).

499. *Id.* at 176-80.

500. *Id.* at 166, 177.

501. *Id.* at 164, 171, 179.

502. As a very rough benchmark, the Board devoted fifty-six pages of its decision to tributary stream fishery resources, and seventy-two pages to discuss lake-level trust resources. *Id.* at 21-77 (tributary stream fisheries), 77-149 (lake-level trust resources). In comparison, it devoted only twenty-one pages to export uses by the city. *Id.* at 159-80.

503. The Board’s use of prediversion conditions as the *benchmark* for public trust analysis differs from its use of “existing” (1989) conditions as its *reference point* for the environmental review required under the California Environmental Quality Act (“CEQA”). CAL. PUB. RESOURCES CODE §§ 21000-21177 (West 1986 & Supp. 1995). Use of prediversion conditions for a CEQA reference point would have led to an anomaly. When viewed from the pre-1941 conditions, any lake level the Board set below the 1941 level would have had substantial *adverse* environmental effects—even if the Board set a

trust analysis, the Board gave trust protection a real, if not legally mandated, priority.

C. Other Developments

In addition to the Bay/Delta process and the Mono Lake Basin, notable contextual development has occurred in several other matters. Perhaps the most notable development occurred quite early. Indeed, the ink had barely dried on *National Audubon Society* before the Board applied it to uphold the near-complete destruction of natural trust-protected uses in the Stanislaus River behind New Melones Dam.⁵⁰⁴ In Water Right Order WR 83-3, the Board lifted storage restrictions it had placed in 1980 on the filling of New Melones.⁵⁰⁵ Those restrictions had prevented the filling of the reservoir behind the dam until the United States Bureau of Reclamation ("Bureau") had "firm commitments" for the water. After the imposition of the restrictions, however, flood fears prompted by heavy rains in 1983 led to a "temporary" filling of the reservoir.⁵⁰⁶ In the Board's opinion, this inundation scarred indelibly the extensive canyon behind the dam.⁵⁰⁷ Given this virtually indelible scarring and the need for repeated refilling to generate hydropower, the Board found that the future public trust uses of the canyon were completely outweighed by the need for power, consumption, and flood control.⁵⁰⁸

level substantially *higher* than the 1989 level. Use of the 1989 level thus helped distinguish the environmental effects of the city's diversions from the environmental effects of the changes required by Water Right Decision D-1630.

I again thank Daniel Frink for suggesting the ideas contained in this footnote. See Memo, *supra* note 70, at 8-9.

504. Cal. State Water Resources Control Bd., Water Right Order WR 83-3, 1983 WL 17602, at *13 (Mar. 3, 1983) [hereinafter Water Right Order WR 83-3]. Not all trust-uses were destroyed. Rather, flat water recreation would replace a notable whitewater rafting environment. Similarly, views of a fluctuating lake would replace views of a canyon and river. The change in trust uses, however, from natural to dammed canyon, had the effect of destroying most of the pre-existing trust uses, and replacing them with substantially different trust uses. Moreover, there were plenty of alternative *flatwater* recreation sites on the myriad other dams in Northern California; in contrast, there were very few alternative *whitewater* sites of comparable magnitude.

505. Water Right Order WR 83-3, *supra* note 504, at *1, *5.

506. *Id.* at *2-4.

507. The Board stated: "[I]t appears the canyon's natural beauty could seldom be restored successfully even if the Board did not allow full operation." *Id.* at *4.

508. The Board concluded: "[O]nce the reservoir has been filled the recreational and fishery values in the river canyon cannot realistically be restored by maintaining the provisions of [its earlier decision restricting filling.] Consequently, these values carry little weight when balanced against the value of full operation of the reservoir for power storage." *Id.* at *4; see also *id.* at *12 (concluding "as a result of this balancing . . . nonvested usufructuary rights to appropriate at New Melones, to the full capability of the project, should now be granted to [sic] permitted").

Three other decisions indirectly addressed evidentiary questions posed by the trust doctrine. A brief reference in a 1989 order suggested the potential relationship of the trust doctrine with the burden of proof in Board proceedings.⁵⁰⁹ The Board noted that normally, the “burden of proving each fact will be on the party whose case the fact supports.”⁵¹⁰ It noted, however, that public policy may shift the burden in appropriate cases. Without answering the matter definitively, it implied that the public trust doctrine might be one of the policies that could shift the burden.⁵¹¹

Two 1990 water rights proceedings implicitly addressed the relationship between the Department of Fish and Game (“DFG”) and the State Water Board in setting fishery protection measures. In Water Right Decision D-1627, the Board rejected a DFG proposal to conduct a new instream flow study on a longstanding project.⁵¹² The Board decision demonstrated that the DFG bore some burden before the Board would honor its flow recommendations. The Board noted that the DFG could not demonstrate either the original basis or the current inadequacy of its earlier flow recommendations. Moreover, the Board noted the DFG’s tardiness in requesting an additional study. In combination, the Board refused to defer to the DFG’s expertise.⁵¹³ Similarly, in Order 90-18, the Board treated as unreliable hearsay the DFG’s flow recommendations for the Walker River.⁵¹⁴

Finally, beyond its textual contributions discussed above,⁵¹⁵ the recent Bear Creek decision also develops the doctrine contextually. Following the *Mono Lake Basin* and the *Shasta Dam* orders, the *Bear Creek* decision forms the third and most recent trust-based decision to reallocate an existing water use.

The dispute involved a conflict between fish habitat below a dam and recreational uses of water in the reservoir behind the dam. In its decision, the Board demonstrated great caution before ordering flows that would have markedly impacted the lake’s recreational uses, but would have had only an uncertain benefit for the downstream fishery. Where all but the first fifteen

509. Water Right Order WR 89-8, *supra* note 373, at *13.

510. *Id.*

511. *Id.*; see *supra* text accompanying note 371 (discussing burden of proof). Cf. *Legal Report*, *supra* note 66, at 171-85 (finding that normal evidentiary burdens applied).

512. Cal. State Water Resources Control Bd., Water Right Decision D-1627, 1990 WL 264522, at *10 (Nov. 27, 1990).

513. *Id.*

514. Cal. State Water Resources Control Bd., Water Right Order WR 90-18, 1990 WL 264521, at *2-4 (Dec. 10, 1990). The Board based its decision on the DFG’s failure to present any witnesses or make its experts available for cross examination during the hearing. *Id.*

515. *Supra* notes 300-26 and accompanying text.

percent of the length of the stream below the dam was already an outstanding trout fishery, and that initial stream segment had uncertain fish habitat,⁵¹⁶ the Board refused to order most of the additional releases sought by a group of sport fishers to extend the fishery.⁵¹⁷

The decision's most important contextual lesson comes from a comparison of the instream flow rates proffered by the parties and imposed by the Board. At the time of the hearings, the dam operator was releasing only .1 cubic-feet per second ("cfs").⁵¹⁸ The petitioners, the same group of fishers who have appeared throughout this discussion, had sought releases of two cfs from the dam.⁵¹⁹ Thus, the fishers sought releases of twenty times the then-current releases. Ultimately, however, the Board ordered releases of only .3 cfs.⁵²⁰

The numbers involved offered something for both parties. In relative terms, both parties did well. From the petitioner's perspective, the Board tripled the then-existing minimum releases. From the dam operator's perspective, however, the Board only gave the petitioner slightly more than ten percent of petitioner's desired releases. In absolute terms, the dam operator fared much better than the petitioners. In most instances, the Board only required it to release an additional .2 cfs. The magnitude of the ordered releases, together with the care demonstrated by the Board in crafting its orders, should allay many dam operators' fears that the trust always will force wholesale reservoir depletion.

Beyond the scale of the Board's decision, the order provides three additional contextual lessons. First, the Board gave the recreational uses behind the dam substantial consideration, despite the competing interest of the trust-protected fishery.⁵²¹ Second, the Board refused to impose separate stream flushing flows where it found that reservoir operational criteria would

516. The United States Forest Service opined that the trout fishery, in part of the initial stretch "could be self-sustaining if higher flows were maintained in that reach." Water Right Order WR 95-4, *supra* note 15, at *12. Nevertheless, the Board concluded that, "[n]o evidence exists, however, to confirm this hypothesis." *Id.*

517. *See id.* at *11-13, *23-24.

518. *Id.* at *12.

519. *Id.* at *13. Such releases were roughly comparable to ten percent of the natural inflow above the dam. *Id.*

520. *Id.* at *20, *24. The Board also required specific instream flows measured below the confluence of a downstream tributary. *See id.* at *24. In most instances, these flows would be satisfied by the tributary inflow.

521. *Id.* at *17-18 (discussing lake recreational uses). The Board's order does not say whether or not the recreational uses in the lake either were "trust" uses. Memo, *supra* note 70, at 10. Rather, the Board simply considered them as "instream beneficial uses." *Id.*

lead to spills that would provide such flows indirectly.⁵²² Finally, the Board protected invertebrate habitat with instream flows.⁵²³

VIII. CONCLUSIONS

A. Doctrinal Development

In the first dozen years after *National Audubon Society*,⁵²⁴ the articulation of the public trust doctrine's impact on the California water rights system has proceeded at two very different paces. On the one hand, the State Water Board has slowly but steadily built up a body of trust-influenced decisions. In both its specific statements about the trust and in the results of the trust's application, the Board has well initiated its articulation of the doctrine. On the other hand, the appellate courts have added virtually nothing to the doctrine.

The above review of State Water Board trust decisions demonstrates that the Board takes a view of the doctrine that is simultaneously absolute and pragmatic. Five points sketch the Board's view of its nearly absolute powers under the doctrine. First, the doctrine apparently applies to virtually all surface watercourses.⁵²⁵ Thus, beyond traditional navigable watercourses,

522. *Id.* at *13.

523. *See id.* at *12-13. In so doing, the Board did not identify whether it was acting pursuant to Fish and Game Code § 5937 or the common-law public trust. Fish and Game Code § 45 defines "fish" to include "wild fish, mollusks, crustaceans, invertebrates, or amphibians . . ." CAL. FISH & GAME CODE § 45 (West 1984). The water rights holders had argued that the fishery immediately below the dam was "in good condition" within the meaning of § 5937 because there were crayfish and sculpin in that stream segment. Water Right Order WR 95-4, *supra* note 15, at *12.

In almost all circumstances, the result will be the same whether the Board proceeds under the common law trust or its legislative codification in § 5937. At least in theory, however, § 5937's mandatory phrasing suggests that less room exists under the statute for balancing [both] among trust uses and between trust and non-trust uses.

524. *National Audubon Soc'y v. Superior Ct.*, 658 P.2d 709, 720-21 (Cal. 1983).

525. Even in a case involving an intermittent, nonnavigable stream, the Board applied the trust to the extent that flows from that stream affected ocean beach sand deposition. Water Right Order WR 83-11, *supra* note 140, at *7-8 (regarding Santa Margarita river).

The doctrine's potential application to groundwater remains unclear. To the extent that particular surface watercourses and groundwater are hydraulically connected, groundwater pumping that affected a navigable body of water would seem to fit within the trust in the same way that diversions from nonnavigable surface tributaries might affect navigable watercourses. *See National Audubon Soc'y*, 658 P.2d at 720-21 (trust applies to diversions from nonnavigable tributaries that affect navigable watercourses); *see also Aerojet-General Corp. v. Superior Ct.*, 257 Cal. Rptr. 621, 629 (Cal. Ct. App. 1989) (concluding that, under public trust doctrine, allegations that groundwater contamination might affect the American River was "sufficient for standing to claim damages caused by environmental pollution"); *cf.* Cal. State Water Resources Control Bd., Water Right Order 95-10, 1995 WL 464902, at *10-11 (July 6, 1995) (in a case involving river underflow, thus not "groundwater" under California

and those diversions from nonnavigable tributaries that affect navigable watercourses, the Board has shown a willingness to apply the trust to artificial⁵²⁶ and artificially enhanced⁵²⁷ watercourses. Moreover, regardless of navigability, all the Board needs to invoke its trust jurisdiction is one fish in the subject watercourse.⁵²⁸ Second, the doctrine applies to all holders of rights to divert surface waters in California, without regard to the source or type of right. Thus, it applies to both pre-1914 and post-1914 appropriators, riparians, and contract users.⁵²⁹ Third, the doctrine allows the Board to

law, the Board protected riparian vegetation from the impacts of pumping); Gregory S. Weber, *Twenty-Years of Local Groundwater Export Legislation in California: Lessons from a Patchwork Quilt*, 34 NAT. RESOURCES J. 657, 677-78 & n.112 (1994) (noting lack of integration of laws governing surface and subsurface waters).

The application to groundwater extractions that either are not hydraulically connected with a surface watercourse or do not affect a navigable body of water is unclear. Such extractions might cause such adverse environmental effects as surface land subsidence and vegetation losses. On the one hand, if the trust requires at least some remote connection with a navigable surface watercourse, it simply should not apply to an aquifer that has no connection with such a watercourse. On the other hand, if hydraulic connection to a navigable watercourse is merely an accident of the doctrine's evolution, and the trust actually addresses broader societal concerns with the environmental consequences of water resources, hydraulic connectivity may be irrelevant.

526. See Water Right Order WR 95-4, *supra* note 15, at *17-18, 20 (discussing recreational uses in artificial Big Bear Lake); cf. Golden Feather Community Ass'n v. Thermalito Irrigation Dist., 257 Cal. Rptr. 836, 838-43 (Cal. Ct. App. 1989) (trust not applicable to concededly nonnavigable artificial impoundment).

Obviously aware of *Golden Feather*, the Board's *Bear Creek* decision does not say whether the recreational uses in the lake either were or were not "trust" uses. Memo, *supra* note 70, at 11. Rather, the Board simply considered them as "instream beneficial uses." *Id.* That is, at a minimum, they were trust-protected, recreational uses of *Bear Creek* water, even if they were not trust-protected uses of *Big Bear Lake*.

527. State v. Superior Court, 625 P.2d 239, 252 n.20 (Cal. 1981) (the trust extends to land submerged by artificially enhanced lake); State v. Superior Court, 625 P.2d 256 (Cal. 1981) (also noting the trust extension); see *Legal Report*, *supra* note 66, at 63-67 (mooting issue of the trust's applicability to artificially enhanced watercourses); Water Right Order WR 86-9, *supra* note 147, at *5 (the trust applies to Russian River flows augmented by releases from storage).

528. Water Right Order WR 95-4, *supra* note 15, at 18.

529. Water Right Decision D-1631, *supra* note 15, at 7-8 (applying the trust to post-1914 appropriative rights of the City of Los Angeles); Water Right Order WR 95-4, *supra* note 15, at *8-9 (both the common law trust and the Fish and Game Code § 5937 apply to pre-1914 rights); *Legal Report*, *supra* note 66, at 44-52 (the trust applies to water contractors); see also Water Right Order WR 95-4, *supra* note 15, at *8 (in dicta, citing *In re Water of Hallett Creek Stream Sys.*, 747 P.2d 324, 337 n.16 (Cal. 1988), implying that the trust applies to riparian rights); cf. Water Right Order WR 95-4, *supra* note 15, at *19 (the trust can supersede prior judgment's terms); Water Right Order WR 89-16, *supra* note 194, at *15 (in statutory adjudication, future riparian rights can be subordinated to public trust requirements); Water Right Order WR 85-15, *supra* note 188, at *10 (the trust can provide rationale to maintain prior settlement terms).

The Board has yet to apply the trust to prescriptive or pueblo rights. Because no one can obtain a prescriptive right against the state, the trust will undoubtedly apply if the trust also applied to the right taken by prescriptive use. See *People v. Shirokow*, 605 P.2d 859, 866 (Cal. 1980) (concluding that no prescriptive rights exist against the state). The impact of the trust on pueblo rights depends partially on

consider the impact of a water diversion on the entire ecosystem of the diversion point, not just traditional instream values. Thus, for example, the public trust doctrine includes air resources and wildlife habitat.⁵³⁰ Fourth, when combined with the physical solution doctrine, it authorizes the Board to impose extensive and expensive conditions upon existing and proposed appropriations. These may include purchases of alternative water supplies, construction of habitat improvements, and release of water from storage at rates greater than natural inflow.⁵³¹ Finally, the Board appears willing to allocate trust duties among all major diverters on a watercourse, regardless of the type or priority of their rights.⁵³² In short, in the Board's mind, the trust authorizes it to consider *all* impacts of virtually *all* diversions from surface watercourses, and apportion the duty to protect trust uses impacted by such diversions upon *all* diverters on the watercourse in question.

While the Board has sketched a virtually boundless reach for the trust, it simultaneously has limited the doctrine's application pragmatically. Most prominently, the Board has demonstrated an unwillingness to kowtow to the mere invocation of the trust. Rather, the Board has demonstrated that not all trust-protected resources are equal. Thus, it has prioritized the protection to be given among trust resources in a given ecosystem.⁵³³ Similarly, it has preserved its ability to prioritize the allocation of its own resources in reviewing trust-complaints on different ecosystems.⁵³⁴ Moreover, where ongoing proceedings under other authority will adequately address trust

the role of the trust in Mexican law and on the state's conduct in asserting sovereign interests inherited from Mexico under treaty. See *City of Los Angeles v. Venice Peninsula Properties*, 644 P.2d 792, 801 (Cal. 1982) (trust applied to Los Angeles lagoon), *rev'd sub nom. Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, 209 (1984).

530. Water Right Decision D-1631, *supra* note 15, at 123-31 (air resources); Water Right Order WR 89-7, *supra* note 191, at *30 (wildlife habitat important even if local fishery has minor economic value).

531. Water Right Decision D-1631, *supra* note 15, at 165-68 (alternate water supplies), 118, 204-09 (physical habitat improvements), 69 Table 13 n.1 (releases from storage); Water Right Order WR 90-16, *supra* note 196, at *3 (releases greater than natural inflow); see also *Big Bear Mun. Water Dist. v. Bear Valley Mut. Water Co.*, 254 Cal. Rptr. 757, 760-61 (Cal. Ct. App. 1989) (requiring delivery of alternate water supplies), discussed *supra* notes 86-96 and accompanying text.

532. Water Right Decision D-1630 (Draft), *supra* note 428, at 54-55, 57, 61-62, 103-04 (imposing, regardless of seniority, flow restrictions, attraction and pulse flow requirements, and fees for environmental mitigation and monitoring).

533. See Water Right Decision D-1631, *supra* note 15, at 106, 112, 117-18, 139-45, 147-48, 155 (discussing impact of different lake levels on different trust resources).

534. See Water Right Order WR 91-06, *supra* note 211, at *2. Arguably, this same prioritization explains some of the delay in deciding certain trust matters. The Board's need to spend substantial time on Mono Lake Basin and the Bay/Delta process has probably meant that decisions involving smaller stream systems, such as Lagunitas Creek and the lower Yuba River, have been delayed. See *infra* notes 579-86, 588 and accompanying text (discussing slow pace of Board trust decision making).

concerns, it will not institute separate “public trust” proceedings.⁵³⁵ Conversely, if broader proceedings are needed to address the full range of trust-considerations on a particular watercourse, the Board will not impose trust-restrictions haphazardly; instead, it will wait until it has completed its broader studies.⁵³⁶ In addition, the Board has placed specific evidentiary burdens on persons who would invoke the trust-doctrine. At the very least, such a party bears an initial burden of coming forward with specific evidence to demonstrate harm to trust uses and to sketch a less-harmful alternative accommodation of trust and consumptive uses.⁵³⁷ Finally, while the Board has preserved its flexibility to review a given diversion in the absence of all diverters on the watercourse in question,⁵³⁸ it has recognized the limits of its ability to enforce its decisions in such diverters’ absence.⁵³⁹

In addition to these practical limitations, the Board has made some accommodations with the needs to divert for consumptive uses. For example, while the Board has not attempted a full accounting of costs and benefits of various trust balances, it has acknowledged that it is inappropriate to dedicate huge amounts of water for little environmental gain.⁵⁴⁰ Conversely, if only small amounts of water are needed to bring relatively large environmental gains, the Board likely will require dedication of such flows.⁵⁴¹ Indeed, the Board has been careful not to force dedications of even

535. Water Right Order WR 84-1, *supra* note 146, at *1 (concluding that statutory procedures governing new appropriations of water were adequate to address public trust impacts allegedly caused by new diversion; as such, rejecting call for statutory stream adjudication), discussed *supra* note 146 and accompanying text.

536. See Water Right Order WR 91-5, *supra* note 169, at *5-6 (deferring full public trust analysis of lower Yuba River resources until a separately noticed proceeding), discussed *supra* note 169 and accompanying text; *cf.* Water Right Order WR 95-2, *supra* note 155, at *4-5 (refusing to order specific interim fishery flows sought by petitioners until fishery study had been completed); Water Right Order WR 89-4, *supra* note 151, at *1-3 (concluding that the Board cannot impose emergency flow restrictions to enforce 1989 draft Bay/Delta water quality control plan without substantial evidence in record).

537. See, e.g., Water Right Order WR 95-2, *supra* note 155, at *5 (noting inability of petitioner to make required evidentiary showing); Water Right Order WR 91-06, *supra* note 211, at *2 (same); see also Water Right Decision D-1631, *supra* note 15, at 34, 70-71 (finding city’s evidence insufficient); Water Right Decision D-1631, *supra* note 15, at 40, 47 (basing findings on evidentiary consensus).

538. See Water Right Order WR 84-2, *supra* note 178, at *14 (rejecting as impractical an argument requiring stream adjudication before application of the doctrine); see also *Legal Report*, *supra* note 66, at 76-77 (same).

539. *Legal Report*, *supra* note 66, at 53-55, 77-79, 195-96.

540. See Water Right Decision D-1631, *supra* note 15, at 32, 67, 118 (rejecting devotions of large flows for minor instream gains).

541. Water Right Order WR 87-8, *supra* note 149, at *5-6 (finding that dedication of two percent of project yield might save the fishery from extinction); see also Water Right Order WR 95-4, *supra*

small flows if such are unlikely to bring much ecological benefit. Thus, one early decision both cautiously reserved water for fishery protection and also cautiously refused to reserve that water permanently, in case the dwindling fishery died out entirely.⁵⁴² Moreover, the earliest trust-decision authorized virtually complete destruction of many trust uses to accommodate diversions for water and power production.⁵⁴³ While such near-complete destruction of trust values has never been followed, at the very least, it demonstrates that well-documented showings of “necessity” play a real role in trust decisions. Indeed, the recent *Mono Lake Basin* and *Bear Creek* decisions allowed substantial diversions to continue, despite impacts on trust-uses. Another decision approved a water purchase to protect trust uses.⁵⁴⁴ By implication, feasible trust protection does not necessarily require involuntary water transfers. Finally, the Board has recognized that the quality of water available to a diverter is as legitimate a concern as the quantity available.⁵⁴⁵

In summary, in the first dozen years since *National Audubon Society* directed it to consider and protect trust-protected uses where feasible, the State Water Board has articulated a vision of the public trust that gives it virtually unlimited jurisdiction over California watercourses. Nevertheless, while extending its jurisdictional reach, it has attempted to accommodate water development. While textual questions remain for the Board’s development,⁵⁴⁶ the principal elements of the Board’s trust vision are well in place.

note 15, at *12-13, 20 (rejecting call to increase reservoir releases from .1 cfs to 2 cfs to protect fishery in stream segment and raising required releases to .3 cfs instead).

542. Water Right Order WR 87-8, *supra* note 149, at *5-6 (finding that dedication of two percent of project yield might save fishery from extinction); *see also* Water Right Order WR 95-4, *supra* note 15, at *12-13, 20 (rejecting call to increase reservoir releases from .1 cfs to 2 cfs to protect fishery in stream segment and raising required releases to .3 cfs instead); *cf.* Water Right Order WR 84-12, *supra* note 184, at *11 n.1 (declining to allow continued wasteful inflow into Salton Sea to support fishery that would inevitably decline).

543. Water Right Order WR 83-3, *supra* note 504, at *4, *12.

544. Water Right Order WR 89-20, *supra* note 167, at *2 and accompanying text.

545. *Legal Report*, *supra* note 66, at 94-103.

546. Of the dozen doctrinal questions left unanswered by *National Audubon Society*, *see supra*, notes 30-60 and accompanying text, the Board has yet to address, in any way, only three: 1) the trust’s protection of microscopic food chain links; 2) the events that might trigger reevaluation of a previous trust-based water allocation decision; and 3) the degree of trial court deference to Board trust decisions. Even here, the Board has come close. For example, the Board’s decision in *Bear Creek* to protect invertebrates comes closest to treatment of the first issue. Similarly, *Bear Creek* at least addressed contextually a prior trust-based decision; the Board found that its absence as a party to the prior judicial determination supported its decision to conduct its own trust review. Also, the *Lower American River* reference addressed the impact of a prior Board decision that set instream flows. Finally, the absence of a Board decision about trial court deference to its findings is unsurprising; such a statement would most likely occur during litigation, not during a Board proceeding. Moreover, in a related context, the Board has conceded that, at least in some cases, the trial court should use its independent judgment to

On the other hand, the appellate courts—the only true makers of common law—have added almost nothing to the doctrine. The questions posed after *National Audubon Society* remain largely unanswered judicially.⁵⁴⁷ Indeed, of the dozen questions sketched above, the six published post-*National Audubon Society* California appellate opinions develop public trust text on only two points: 1) the applicability of the trust to water rights other than state permitted appropriations; and 2) the State Water Board's ability to apply the trust to existing water uses outside of statutory adjudications. Even here, the doctrinal developments are modest; both points come from dicta in a footnote. Two of the other ten unanswered questions are addressed contextually: 1) the scope of review of trust decisions; and 2) the circumstances necessary to trigger a reevaluation of a prior trust-based decision. These contextual lessons, however, are merely implicit in an easily distinguishable fact pattern. Beyond these four points, the judicial record is sparse.

*Hallett Creek*⁵⁴⁸ provides judicial text on two of the dozen questions left unanswered by *National Audubon Society*. First, it implied strongly that the doctrine applies beyond the state permitted appropriative rights at issue in the Mono Lake Basin litigation. Second, it suggested that the State Water Board could apply the doctrine to existing water rights without having to adjudicate every water right in an entire stream system.

As noted above, however, these two suggestions are dicta. Moreover, they are contained in a single footnote. While the conclusions they suggest are persuasive authority and may ultimately be sound, room remains for more substantial development of the issues they encompass. In particular, the trust's application to riparian rights demands a fuller accounting of the relationship of the sources and evolution of the riparian rights and public trust doctrines. No further evidence is needed than a comparison of the *Hallett Creek* footnote with *National Audubon Society* and *Hallett Creek* itself. The former decision took eighteen published pages to address the relationship between the trust and appropriative rights doctrines; the latter decision required over a dozen published pages to determine whether the

review Board decisions. *Imperial Irrigation Dist. v. State Water Resources Control Bd.*, 231 Cal. Rptr. 283, 290 n.17 (Cal. Ct. App. 1986).

Although not addressed anywhere else in this article, the Board's Lower American River "Legal Report" does mention briefly the Board's view that not all trust reallocations will constitute compensable "takings." *Legal Report*, *supra* note 66, at 57, 69-71.

547. See *supra* note 53 and accompanying text (highlighting unanswered questions raised by *National Audubon Society*).

548. *In re Water of Hallet Creek*, 749 P.2d 324 (Cal.), *cert. denied*, 488 U.S. 824 (1988); see discussion *supra* note 61 and accompanying text.

federal government held riparian rights on its reserved land. Surely, the potential marriage of the public trust and riparian rights doctrines deserves a more formal judicial blessing than dicta in a footnote.

*Delta Water Cases*⁵⁴⁹ principally reinforces the doctrine's *general* applicability to otherwise vested appropriative rights; the opinion says nothing about the doctrine's *specific* application. In addition, it supports the Board's ability to apply the trust to existing water rights without initiating a stream adjudication.⁵⁵⁰ Both *Golden Feather*⁵⁵¹ and *Big Bear Lake*⁵⁵² involved the doctrine's applicability to artificial watercourses but only *Golden Feather* answered the question directly. Moreover, the concession of lack of navigability in *Golden Feather*, coupled with the lack of pleaded or proved impact either upon fish or upon trust-protected uses in navigable watercourses, makes that case readily distinguishable.

Big Bear Lake might have directly developed text in two areas left open after *National Audubon Society*. The case presented questions involving both the scope of appellate review of a trial court public trust holding and the threshold for triggering a reevaluation of trust protections. The court's opinion, however, does not directly address either issue. Implicit in its holding, however, are four points. First, its holding is consistent with an abuse of discretion standard. The court nowhere indicated that it applied its independent judgment to the decision not to reopen on trust-grounds the pre-*National Audubon Society* physical solution imposed by the trial court. Second, not all allegations of changed circumstances will trigger a judicial duty to reconsider trust protection. Thus, the claim that the senior diverter changed its purpose of diversion did not compel a new trust balancing.⁵⁵³ Third, a party who seeks to trigger such a duty bears a substantial burden of demonstrating concretely how additional trust protections might occur.⁵⁵⁴ A party may not simply allege that feasible measures exist to provide trust protections.⁵⁵⁵ Finally, the court refused to elevate form over function. It considered the trial court's pre-*National Audubon Society* decision to be a

549. *United States v. State Water Resources Control Bd.*, 227 Cal. Rptr. 161, 201-02 (Cal. Ct. App. 1986), discussed *supra* note 68 and accompanying text.

550. *Id.* at 180 (holding that the Board need not conduct a statutory adjudication to set water quality standards). The Board had reserved jurisdiction to reopen the Bureau's water rights.

551. *Golden Feather*, 257 Cal. Rptr. 836, discussed *supra* note 72 and accompanying text.

552. *Big Bear Mun. Water Dist. v. Bear Valley Mut. Water Co.*, 254 Cal. Rptr. 757, 766-67 (Cal. Ct. App. 1989), discussed *supra* note 177 and accompanying text.

553. *See id.* at 761.

554. *Cf. id.* at 766 n.6 (finding that the District "did not make the requisite showing of [changed] conditions" sufficient to trigger modification of the judgment under the trial court's express reservation of equitable jurisdiction).

555. *See id.* at 767.

“trust decision,” even though that 1977 decision did not mention the trust per se. Rather, the 1977 decision was a “trust decision” because it considered and protected trust interests to the extent feasible. In combination, these four points provide some *contextual* development of standards both for reopening prior trust-based decisions and for governing judicial review of such decisions.

Nevertheless, these implicit developments also remain subject to easy distinction. In the first place, the appellate court assumed *arguendo* the trust’s applicability to an artificial reservoir.⁵⁵⁶ In addition, the attempted public trust reevaluation occurred only nine years after the prior evaluation. Moreover, the party seeking reevaluation presented no evidence to back up its allegations. Finally, the parties’ procedural posture also potentially limits the holding. The litigation arose in an attempt to modify a prior *judgment*, not just a prior trust consideration by a non-judicial body.

Lastly, the *Cal. Trout* opinions set up a two-step system for the evaluation of the public trust concerns in the Mono Lake Basin.⁵⁵⁷ The first step involved the water necessary to meet the conditions of Fish and Game Code sections 5946 and 5937. As the *Cal. Trout II* court indicated, the State Water Board simply had to determine the quantity of water needed to meet these statutes.⁵⁵⁸ In that determination, the Board was not to balance competing uses of water. Moreover, in fulfilling this first step, the court required the Board to restore the fisheries in issue to their pre-diversion condition. In the second step, the Board considered the common-law public trust concerns addressed in *National Audubon Society*. In this step, the “responsible body,” i.e., court or State Water Board, must “consider” and “protect public trust uses whenever feasible” before permitting diversions that harm trust resources.⁵⁵⁹ Nevertheless, the Board may ultimately approve such diversions if necessary.⁵⁶⁰

Although important for the Mono Lake Basin, the specific two-step process outlined by the *Cal. Trout* opinions applies only in Mono and Inyo counties in California.⁵⁶¹ Outside of those counties, section 5946 imposes no

556. *Id.* at 766-67.

557. *See Cal. Trout I*, 255 Cal. Rptr. 184, 211-13 (Cal. Ct. App. 1989) and *Cal. Trout II*, 266 Cal. Rptr. 788, 797-803 (Cal. Ct. App. 1990), both discussed *supra* notes 98-110 and accompanying text.

558. *Cal. Trout II*, 266 Cal. Rptr. at 802-03.

559. *National Audubon Soc’y v. Superior Ct.*, 658 P.2d 709, 728-29 (Cal. 1983).

560. *Id.* at 727 (noting “current and historical necessity” for some trust-harming diversions).

561. Since 1975, the State Water Board has conditioned new appropriations upon compliance with § 5937. *See CAL. CODE REGS.* tit. 23, § 782 (1995). The Board reads *Cal. Trout I* as implying that § 5937 “legislatively establishes that it is reasonable to release enough water below any dam to keep fish that exist below the dam in good condition.” Water Right Order WR 95-4, *supra* note 15, at *11.

duty on the State Water Board to condition water rights permits and licenses upon compliance with section 5937. Section 5937, in turn, imposes duties only on the dam owner or operator. Moreover, the court's direction to restore the fisheries to pre-diversion conditions may not apply uniformly throughout the state. The court never indicated whether that order resulted from section 5937, section 5946, or the cases' specific facts.⁵⁶² Thus, the full impact of *Cal. Trout* is limited geographically.

Nevertheless, by recognizing that section 5937 represents a legislative expression of the public trust, *Cal. Trout* effectively required the Board to consider that statute's applicability whenever the Board addresses public trust matters. Outside of Mono and Inyo counties, the absence of a mandatory duty may affect only the timing of the Board's discretionary consideration of the statute's requirements.⁵⁶³ Moreover, in most instances, public trust flows set by the Board will likely meet section 5937's requirements; in only rare circumstances will the Board set permanent trust flows that would be inadequate to comply with the statute.⁵⁶⁴

In summary, a dozen years after *National Audubon Society*, the courts have provided little textual or contextual development of the trust. As a result, the public trust doctrine still retains an existential aura about it: its essence is its existence, as barely articulated by *National Audubon Society*. We know the doctrine exists and *might* compel potentially massive water reallocations. Absent the doctrine's application by a court of law to a concrete situation, however, we simply know almost nothing about *when* these reallocations can occur. The doctrine's potential judicial articulation remains almost fully inchoate. In this virtually unbridled potential lies much of the doctrine's mystique and some of its power.

No single reason appears for the doctrine's slow judicial development. The shortest answer is simply a lack of cases raising ripe trust issues. Unlike the State Water Board, which can initiate public trust reviews on its own,⁵⁶⁵

Nevertheless, when applying § 5937 to existing appropriations outside Mono and Inyo counties, the Board has suggested that it has broader discretion in accommodating trust-harming diversions. Water Right Decision D-1631, *supra* note 15, at 163 n.19; *cf.* Water Right Order WR 95-2, *supra* note 155, at *10-11 (finding no mandatory duty to apply § 5937 outside of Mono and Inyo counties).

562. Memo, *supra* note 70, at 11.

563. For example, the Board may postpone consideration of the required fish flows until after conducting a full evidentiary hearing. See Water Right Order WR 95-2, *supra* note 155, at *1; *cf.* Memo, *supra* note 70, at 11.

564. Two such circumstances include the following: 1) the statutory flows violated the constitutional proscription against waste or unreasonable use or diversion methods; and 2) the flows were preempted by a specific congressional directive. Memo, *supra* note 70, at 11.

565. Decision D-1631 itself exemplifies a Board-initiated hearing. Water Right Decision D-1631, *supra* note 15, at 12-15; *cf.* *Hallett Creek*, 749 P.2d at 337 n.16 (noting Board powers to initiate water rights reviews).

the appellate courts can rule only when cases are put before them. This shortage of cases, however, begs the question: if *National Audubon Society* truly heralded a new era in western water law, why have there been so few judicial decisions construing that doctrine so far? In comparison, each of the three other major landmark events in California water law spawned a host of judicial applications in the first dozen years of their individual existences.⁵⁶⁶

566. The three biggest events in California water law were: 1) the 1855 adoption of the prior appropriation system, *Irwin v. Philips*, 5 Cal. 140 (1855); 2) the 1886 recognition that riparian rights remained, *Lux v. Haggin*, 10 P. 674 (1886); and 3) the 1927 enactment of the state constitutional prohibitions against waste and unreasonable use, CAL. CONST. art. X, § 2. See generally Weber, *Overview*, *supra* note 58, at 908-09, 913-22 (summarizing major periods in California water law). Each of these three events spawned additional judicial textual development in their first dozen years.

For example, in his initial discussion of appropriative rights, Hutchins cites ten California cases decided between 1855 and 1867 that further articulated the appropriative rights doctrine. HUTCHINS, *supra* note 34, at 44-48 (citing *Rupley v. Welch*, 23 Cal. 452, 455-57 (Cal. 1863); *Bear River & Auburn Water & Mining Co. v. New York Mining Co.*, 8 Cal. 327, 332-33 (Cal. 1857); *Crandall v. Woods*, 8 Cal. 136, 142 (Cal. 1857) (extending prior appropriation beyond miners to irrigators); *Hill v. Newman*, 5 Cal. 445, 446 (Cal. 1855); *Hoffman v. Stone*, 7 Cal. 46, 49 (Cal. 1857); *Leigh Co. v. Independent Ditch Co.*, 8 Cal. 323, 323 (Cal. 1857); *Conger v. Weaver*, 6 Cal. 548, 558-59 (Cal. 1856) (recognizing prior appropriator's right to diligently pursue completion of appropriation); *Hill v. King*, 8 Cal. 336, 338 (Cal. 1857); *Stiles v. Laird*, 5 Cal. 120, 122 (Cal. 1855) (recognizing priority of appropriation); *Tartar v. Spring Creek Water & Mining Co.*, 5 Cal. 395, 397-99 (Cal. 1855)). Others undoubtedly existed. See, e.g., *Butte Canal and Ditch Co. v. Vaughn*, 11 Cal. 143, 153-54 (Cal. 1858), cited in HUTCHINS, *supra* note 34, at 72 n.87.

Similarly, in the first dozen years after the announcement of the survival of riparianism, the courts decided 11 riparian rights cases that cited *Lux*. See *Charnock v. Higuerra*, 44 P. 171, 171-72 (Cal. 1896) (clarifying that the mode of diversion does not affect the riparian owners' rights to reasonable use of water for irrigation); *Hargrave v. Cook*, 41 P. 18, 19-20 (Cal. 1895); *Vernon Irrigation Co. v. City of Los Angeles*, 39 P. 762, 765-66 (Cal. 1895) (holding Los Angeles' right to divert as riparian owners superior to other riparian owners); *Modoc Land & Live-Stock Co. v. Booth*, 36 P. 431, 433 (Cal. 1894) (a riparian owner is not permitted to restrain diversion of water by upstream nonriparian owners when the amount diverted would not be used by a riparian owner, would not result in loss or injury to the riparian owner, but would be of great benefit to the party diverting the water); *Harris v. Harrison*, 29 P. 325, 326 (Cal. 1892) (holding a court of equity empowered to divide riparian property rights between competing riparian owners providing each owner with reasonable use); *Alta Land & Water Co. v. Hancock*, 24 P. 645, 647 (Cal. 1890) (extending riparian rights to all parts of property tract that have never been segregated from the acres which are appurtenant to the waterway); *Van Bibber v. Hilton*, 24 P. 308, 310 (Cal. 1890); *Heilbron v. 76 Land & Water Co.*, 22 P. 62, 64 (Cal. 1889); *Heilbron v. Last Chance Water Ditch Co.*, 17 P. 65, 67 (Cal. 1888); *Stanford v. Felt*, 16 P. 900 (Cal. 1886); *Swift v. Goodrich*, 11 P. 561, 562 (Cal. 1886).

Finally, in the first dozen years after the enactment of the 1928 constitutional amendment, the courts applied it in nine cases. See *Meridian v. City of San Francisco*, 90 P.2d 537, 547 (Cal. 1939); *Hillside Water Co. v. City of Los Angeles*, 76 P.2d 681, 684 (Cal. 1938); *Rancho Santa Margarita v. Vail*, 81 P.2d 533, 561-62 (Cal. 1938); *City of Lodi v. East Bay Mun. Util. Dist.*, 60 P.2d 439, 448-49 (Cal. 1936); *Crane v. Stevinson*, 54 P.2d 1100, 1103 (Cal. 1936); *Peabody v. City of Vallejo*, 40 P.2d 486, 498-99 (Cal. 1935) (holding that the rule of reasonableness required by article XIV § 3 applies to all water rights enjoyed or asserted in California); *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 45 P.2d 972, 985 (Cal. 1935); *Crum v. Mt. Shasta Power Corp.*, 30 P.2d 30, 36 (Cal. 1934); *Chow v. City of Santa Barbara*, 22 P.2d 5, 15-18 (Cal. 1933) (holding that the

Is there thus something unique about the trust doctrine that has retarded its judicial development?

Before considering this issue, one point deserves attention. Regardless of the reason for its slow judicial development, the Board's extended period to develop its view of the trust has given it the chance to develop a more coherent vision of the trust than likely would have emerged from the courts alone. Although *National Audubon Society* held that the courts and the State Water Board share concurrent original jurisdiction over trust matters,⁵⁶⁷ the complexities and interrelatedness of California water disputes make an initial Board consideration of a trust matter most appropriate. Indeed, the trial courts in both the Mono Lake litigation and the Lower American River litigation withheld their consideration of trust matters until the Board had first considered the disputes. In any given case, even where the trial court disagrees with the Board, the court's decision is most likely a better informed one as a result of the Board's prior participation. Similarly, when they eventually turn their attention to trust matters, the courts can benefit from the Board's vision of the trust.

Although it has fortuitous beneficial effects, this twelve year judicial hiatus in trust law development remains unexplained. Although no substitute for an empirical study, several explanations suggest themselves. First, the State Water Board's existence and contemporary importance may make unfair any comparisons of relative doctrinal development with other landmark events. Prior to 1914, all water law was judicial in California.⁵⁶⁸ Thus, any water dispute that required formal governmental resolution could only have been presented to a court. Even prior to the 1950's, the Board viewed its authority over water allocation decisions in much more limited terms.⁵⁶⁹ Given a limited or non-existent administrative agency, litigation necessarily would have been filed to address unanswered questions about a new doctrine. In contrast, as this article has demonstrated, through both its original jurisdiction and its role as a referee, the State Water Board has played the most prominent role in post-*National Audubon Society* public trust articulation.

Of course, although the State Water Board has an important role in trust articulation, the Board's actions remain subject to judicial review. Yet, none of the Board's decisions surveyed here have led to published appellate public

amendment is valid and the supreme law of the state requiring reasonable and beneficial use of water without interference with the beneficial uses of the water by other owners).

567. 658 P.2d at 729-32.

568. See Weber, *Overview*, *supra* note 58, at 910-13.

569. See Weber, *Overview*, *supra* note 58, at 926-27 (noting the Board's initial belief that it had limited jurisdiction to consider the "public interest" in approving appropriations).

trust decisions. Indeed, only the *Delta Water Cases* and *Cal. Trout II* have addressed public trust matters arising out of Board actions. In none of these cases, however, has the common law public trust doctrine played a substantial role in the court's decision.

The paucity of appellate review of Board public trust decisions again prompts a search for explanations.⁵⁷⁰ One simple answer might be that potential litigants have concluded that the Board has correctly read *National Audubon Society* as authorizing either the broad vision of the trust the Board has articulated or the specific application involved in a given case. A more sophisticated answer might be that likely judicial deference to the Board's trust articulation would preclude searching judicial review.⁵⁷¹ *National Audubon Society*, the *Delta Water Cases*, and the two *Cal. Trout* decisions, however, all demonstrate that appellate courts both can searchingly review Board decisions and reach opposite conclusions. The unpublished but well-known trial court decision in the Lower American River litigation also demonstrates a judicial willingness to differ from the Board in some trust-related issues. Thus, the Board's track record in court is far from perfect, and should not be a complete disincentive to litigate.

Another explanation might focus on the real-world impact of the Board's trust-based decisions. As for Board trust pronouncements on new appropriations, a potential litigant might have concluded that the Board's broad statutory authority over appropriations adequately subsumed the common law trust within it. In such cases, ample statutory authority would exist to support a Board decision, making a challenge to a common law trust pronouncement ultimately ineffective.⁵⁷² As for existing appropriations, the limited reallocations imposed to date might simply mean that the Board has

570. Under California law, to produce an appellate decision of the Board's actions, parties normally must have first sought trial court review of the Board's actions. See, e.g., CAL. WATER CODE § 1360 (West 1971) (requiring petition for writ of mandate in trial court to review Board action on application to appropriate). The paucity of appellate opinions likely stems from the paucity of trial court challenges. Again, this begs the question: Why so few trial court challenges?

571. See *Bank of America Nat'l Trust & Sav. Ass'n v. State Water Resources Control Bd.*, 116 Cal. Rptr. 770, 775 (Cal. Ct. App. 1974) (concluding that while, ordinarily, a reviewing court applies the deferential "substantial evidence" standard to review State Water Board decisions, the less-deferential "independent judgment" standard might apply occasionally); *Imperial Irrigation Dist. v. State Water Resources Control Bd.*, 275 Cal. Rptr. 250, 254 (Cal. Ct. App. 1990), cert. denied, 502 U.S. 857 (1991) (the "substantial evidence" standard applies to appellate review of trial court's factual findings, but the "independent judgment" standard applies to review of trial court's legal determinations); *Imperial Irrigation Dist. v. State Water Resources Control Bd.*, 231 Cal. Rptr. 283, 290 n.17 (Cal. Ct. App. 1986), cert. denied, 502 U.S. 857 (1991) (Board concedes that "in this case" the trial court should apply the independent judgment standard to review the Board's action.).

572. See *supra* notes 124-327 and accompanying text (discussing role and articulation of the trust in Board decisions on new appropriations).

not gored either enough or the right oxen with its trust pronouncements to spark a controversy that can endure long enough to produce an appellate trust decision. Additional support for this could be found in a comparison of the relative impacts of the common law trust and specific water statutes on water reallocations.⁵⁷³

The recent, real-world impact of the common law trust on major water diverters, however, belies this last suggestion. In the last four years, the Board has invoked the trust to require substantial changes in diversions by both the United States and the City of Los Angeles.⁵⁷⁴ Both of these well-heeled litigants ultimately accepted the Board's trust-based decision without pursuing the matter beyond the trial court.⁵⁷⁵ Similarly, EBMUD accepted a Board-influenced trial court trust-based decision without pursuing appellate review, despite substantial restrictions placed on its potential diversions.⁵⁷⁶ In addition, the state and federal water projects, along with major environmental groups, have accepted at least an interim settlement in the Bay/Delta process.⁵⁷⁷

These examples might just indicate that the particular parties involved, like many litigants, were ultimately willing to value peace and certainty above the certain expenses and uncertain results that litigation might produce. But even in such circumstances, the trust may have influenced the decision to accept the offered terms in two ways.

First, an optimistic view could focus on the role played by a broad, trust-inspired ecosystem review of a given water diversion. The Mono Lake Basin, Lower American River, and recent Bay/Delta process results all have

573. See *infra* notes 579-617 and accompanying text (discussing impact of specific statutes on recent reallocations).

574. Water Right Order WR 91-01, *supra* note 128, at *1 (modifying earlier order requiring releases from Bureau of Reclamation's Shasta Reservoir); Water Right Decision D-1631, *supra* note 15, at 176-80 (noting impacts of decision on city).

575. See Water Right Order WR 91-01, *supra* note 128, at *1-2 (noting settlement of trial court litigation challenging WR 90-5); Dunning, *supra* note 5, at 27 (noting Los Angeles' announcement "that it would not oppose Decision D-1631 in court").

576. *No Appeal Filed in Lower American River Case*, 1 CAL. WATER L. & POLICY REP. 13 (1990) (noting parties' decision not to appeal from trial court's decision). Each of these diverters were governmental agencies. Political considerations might well have influenced their decisions to accept trust-based restrictions on their diversions. To the extent that potential public agency litigants must pay attention to environmental constituencies, it will be a disincentive to seek judicial review. Because the largest diverters within the state are the federal and state projects, Weber, *Overview*, *supra* note 58, at 924-25, the controversies where the trust doctrine may have the largest possible impact may not produce trust-based decisions unless political sensitivities change.

577. Principles for Agreement on Bay-Delta Standards Between the State of California and the Federal Government at 3-7 (Dec. 15, 1994).

occurred as a result of such ecosystem reviews.⁵⁷⁸ At its most optimistic view, this could suggest that the trust is producing not *law*, but *results*. Perhaps there is a new willingness for parties to accept well-crafted decisions that protect enough trust assets, while still allowing substantial diversions. If so, then the lack of legal development is not a criticism of the trust so much as a neutral consequence of an adequate trust application.

It is too soon to speak of a golden age of cooperation among California's water players. Likely sooner than later, one party's "well-crafted" trust decision will be another party's trust nightmare come true.⁵⁷⁹ Since feasibility and necessity are but two sides of the same coin, a decision could easily strike a balance that appeared overly generous to one side.

Nevertheless, even where one party disagrees strongly with the balance offered it, the trust provides a second disincentive to pursue judicial review. Ironically, that disincentive stems from the doctrine's current *lack* of judicial development. As a result of its lack of judicial articulation, the trust's *potential* ability to dominate water reallocation decisions remains virtually unbounded. Between the potential and the actual, however, lies litigation. A reluctance to litigate may stem from a reluctance of both water developers and environmentalists to attempt to circumscribe the trust. Each risks the creation of adverse precedent. For each, then, the trust's lack of articulation may serve useful purposes. In particular, it may give each party some cover to help it forge agreement, if not initially, then in settlement of a dispute short of appellate review.

Like the current peace in the California water wars, the lack of judicial articulation of the trust is not likely to last long. More likely sooner than later, the possibility of a favorable appellate decision may well outweigh the combined risk of an unfavorable appellate decision and a known unfavorable Board or trial court decision. Nevertheless, during the time that the trust remains undeveloped judicially, its very inarticulateness speaks volumes about its power. Even if it has not yet judicially compelled a decision, it unmistakably influences the outcome of water resources disputes simply by its presence.

578. See Dunning, *supra* note 5, at 30 (discussing "Decision D-1631 as Ecosystem Management"); Sax, *supra* note 328, at 157-60 (Lower American River decision as "ecological perspective"); 1995 Bay/Delta Plan, *supra* note 419, at 4 (plan "provides a coordinated and comprehensive ecosystem approach").

579. Cf. *City of Lompoc v. State Water Resources Control Bd.*, No. 205386 (Cal. Super. Ct., Santa Barbara County filed Dec. 1994), discussed in *Petition Filed and Answered for Santa Ynez Diversions*, 5 CAL. WATER L. & POLICY REP. 165 (May 1995) (challenging Water Right Order WR 94-5, *supra* note 154, on public trust grounds).

One last area deserves some attention as a partial explanation for the lack of judicial trust development. The State Water Board's trust decisions suggest that, ultimately, there may be no "law" to develop. If true, this represents but an instance of the continued evolution of California water law from a property oriented, priority based system, to a context specific system that balances competing public and private needs.⁵⁸⁰ In this area, the trust is not unique, but shares a characteristic with its close relative, the California constitutional proscription against waste and unreasonable water use. Both doctrines trigger circumstance specific determinations. What is a reasonable use, for purposes of the constitutional doctrine, and what is an appropriate balance, for purposes of the trust, depend entirely on the circumstances of each case.⁵⁸¹ As each diversion presents different water use alternatives, and each ecosystem presents unique trust characteristics, the ultimate decision in a given case likely will depend on circumstances unique to that case.

As a result, once the courts address several basic questions, it is highly unlikely that they ever will develop "rules" for the trust's application, in the sense of statements that allow parties to predict the outcome of a dispute. Indeed, if the courts adopt as common law the five broad points apparently adopted by the Board, the Board's own recent decisions suggest how trust cases will develop. Lawyers and judges likely will address only two issues: 1) the existence of substantial evidence to support a particular trust decision; and 2) an occasional discussion of the propriety of factors to consider in the trust-balance.

In such a system, "law" in the sense of rules limiting private or governmental conduct will come largely from statute. Outside of statutes, nuances of common law will have little role to play in resolving water resources disputes. In addressing public trust disputes, whether in court or before the Board, attorneys will not spend significant time researching and arguing legal propositions. Rather, they will serve primarily to marshal evidence, help communicate the complicated science and economics that trust disputes engender, and act as oral advocates. Text will be largely replaced by context.

B. Doctrinal Impact

The trust doctrine's limited textual development makes an assessment of its impact difficult. In many ways, the footprints of the trust are all over California water law of the last dozen years. The trust has figured in several

580. See generally Schulz & Weber, *supra* note 5, at 1032-33 (summarizing trend).

581. See, e.g., *Joslin v. Marin Mun. Water Dist.*, 429 P.2d 889, 894 (Cal. 1967) (reasonableness depends on circumstances of case).

important disputes and countless minor disputes. Yet, until recently, only the Lower American River trial court decision gave any indication of the trust's concrete impact. Moreover, until the Board's recent *Mono Lake Basin* and *Bear Creek* decisions, the trust had not realized its potential to reallocate prior water decisions.

Nevertheless, after the first dozen years of its application to surface water diversions, several important lessons about the trust and its impact on water resources disputes can be gleaned. Initially, four impacts on the *process* of water resources dispute resolution readily appear. First, the much touted "ecosystem" focus has meant that both parties and the decision maker spend a long time to prepare and complete the process. For example, *Mono Lake Basin* involved forty days of hearings.⁵⁸² Moreover, these hearings did not begin until more than three years after the Board publicly began to identify the relevant issues.⁵⁸³ After the hearings, it took another seven months for the Board to reach its decision, and that deadline was implicitly set by the trial court.⁵⁸⁴ Indeed, without the pressure of a court-imposed deadline, the Board took fourteen months after the end of the hearings to reach its decision in the much simpler *Bear Creek* case.⁵⁸⁵ As of the date of this writing, it has taken over three years to issue a proposed decision in its trust review of Yuba River resources.⁵⁸⁶ Lengthy post-hearing delays also have followed in matters involving Lagunitas Creek and the lower Mokelumne River.⁵⁸⁷ Many reasons may explain the delays; moreover, water law disputes

582. Water Right Decision D-1631, *supra* note 15, at 15.

583. *Id.* at 13-15.

584. *See id.* at 10 (noting that the trial court's stay of the coordinated superior court proceedings was extended "until the earlier of September 1, 1994 or completion of this Board's proceedings").

585. *See* Water Right Order WR 95-4, *supra* note 15, at *1 (noting hearing ended Dec. 13, 1993). The *Bear Creek* hearings lasted only five days. *Id.*

586. The water agency and DFG both submitted their post-hearing closing briefs on August 25, 1992. Closing Brief of the Yuba County Water Agency at 81, Before the California State Water Resources Control Board, Hearing Regarding the California Department of Fish and Game's Lower Yuba River Fisheries Management Plan and a Complaint by the United Groups Against Yuba County Water Agency and Others Who Divert Water From the Lower Yuba River in Yuba County, (filed Aug. 25, 1992); Closing Arguments of the Department of Fish & Game, at 8, Before the California State Water Resources Control Board, *In re: Hearing on California Department of Fish and Game Lower Yuba River Fisheries Management Plan* (filed Aug. 25, 1992).

587. *See* Closing Brief of the Marin Municipal Water District at 13, Before the California State Water Resources Control Board, Regarding the Diversion of Water from Lagunitas Creek in Marin County (filed June 10, 1992) (considering Board's reserved jurisdiction to consider fishery needs in Lagunitas Creek); Closing Brief of the East Bay Municipal Utility District at 107, Mokelumne River Hearing (filed May 10, 1993).

In June 1995, the Board issued a proposed decision in the Lagunitas Creek matter. *In re Fishery Protection*, *supra* note 321. Following a request by the principal diverters, the Board postponed its hearing on the draft order until October 1995. Letter from Edward C. Anton, Chief, Division of Water Rights, State Water Resources Control Board, to Interested Parties (July 19, 1995).

generally present complicated matters,⁵⁸⁸ and lengthy disputes are well known in the water world in cases where no trust issues appear.⁵⁸⁹ Nevertheless, at the very least, the trust does nothing to simplify the water allocation process.

Second, the trust furthers the seemingly insatiable appetite of resource managers to understand the impacts of water diversions on complex ecosystem processes. Quenching that often admirable thirst requires ever more research and expert testimony. The research, of course, adds to the time and expense of the resource management process. Ideally, such research leads to a better understanding of the relevant ecosystem, and consensus among the experts about the effects of different policies. Indeed, consensus is often easily achieved on the need to fill gaps in the data base, although perhaps less easily achieved on the sufficiency or meaning of research results. At worst, however, the quest for knowledge can lead to unresolved conflict among the experts. That conflict, in turn, can lead to a stalemate that threatens the ecosystem during the time necessary to perform the additional studies needed to resolve the conflict.

An illustration of such conflict comes from the trial court's frustration in the Lower American River litigation: the experts could not agree on the harms associated with either the lower water quality present at the environmentalists' preferred alternative water delivery site or the state of the relevant fisheries.⁵⁹⁰ Such "battles of the experts" are by no means confined to the water wars. Even in water disputes, such conflicts arise in areas beyond the public trust. So, the trust bears no blame for creating such problems. Again, however, the trust does nothing to ameliorate the reliance on experts and their data bases; at the very least, it reinforces the tendencies already present among water resources managers.

A third process lesson emerges as a result of the length and complexity of trust-decisions: interim relief is critical to trust protection. Absent such relief, trust resources can diminish during the nearly interminable delays attributable to the gathering, digesting, and expert critiquing of technical information about an ecosystem. The Board, however, has only limited

588. See *Environmental Defense Fund v. East Bay Mun. Util. Dist.*, 572 P.2d 1128, 1137 (Cal. 1977) (stating "[t]he scope and technical complexity of issues concerning water resource management are unequalled by virtually any other type of activity presented to the courts").

589. For example, the EBMUD Lower American River litigation lasted 11 years before the public trust was even announced. See Somach, *supra* note 328, at 255 (noting original filing in 1972). The legendary dispute over the Colorado River has lasted since the 1920's. See Warren J. Abbott, *California Colorado River Issues*, 19 PAC. L.J. 1391, 1391, 1403-07, 1425-26 (1988).

590. See *Lower American River*, *supra* note 329, at 71-73 (water quality disputes summarized), 85-95 (fisheries disputes summarized).

powers to act quickly.⁵⁹¹ These limitations encourage resort to the trial courts for the receipt of a preliminary injunction. Such an injunction also helps demonstrate the lack of necessity for the continued diversions.

A fourth process lesson also flows naturally from the first two points: trust litigation is expensive. The Board's unwillingness to proceed on trust complaints without detailed factual allegations and proposed alternatives means that many trust complainants will have to bear the substantial initial costs of developing their cases. In contrast, the possibility of obtaining discovery from the water user may make litigation a marginally more attractive venue for trust matters.⁵⁹² Similarly, the inability of the Board to order attorneys' fees to a prevailing party also gives public trust challengers substantial incentive to file a lawsuit.⁵⁹³

A fifth lesson bridges the gap between the *process* and *result* of trust decision making: specific statutes that address specific trust uses can command much faster results than the common law trust. By eliminating the need to balance multiple factors, these statutes not only produce faster results, but also may give trust uses greater protection than provided by the common law trust. The Mono Lake and the Bay/Delta processes demonstrate the relative impacts of statutory and common law trust text.

In many respects, the lion's share of the results in the *Mono Lake Basin* litigation is attributable to Fish and Game Code sections 5937 and 5946.⁵⁹⁴ As construed in the two *Cal. Trout* opinions, those statutes instructed the Board both to give priority to fish in the feeder streams, and to restore the prediversion fishery.⁵⁹⁵ In the long run, the water bypassed to meet section 5937 accounts for eighty percent of the water reallocated from export to

591. See Water Right Order WR 95-2, *supra* note 155, at *7 (noting lack of power to issue preliminary injunction or temporary restraining order), discussed *supra* note 156 and accompanying text; cf. Water Right Order WR 89-4, *supra* note 151, at *1-3 (concluding that the Board cannot impose emergency flow restrictions to enforce 1989 draft Bay/Delta water quality control plan without substantial evidence in record), discussed *supra* text accompanying note 151.

592. Of course, "discovery" presupposes that the opposing party *has* some information to discover. In many cases, neither the plaintiff nor the defendant water user will have conducted the studies necessary to resolve the trust issues. See Memo, *supra* note 70, at 12. In contrast, if the Board believes that a trust complaint merits Board review, it will have its own staff study the matter. See *id.* Thus, unless the plaintiffs can also sue the Board or some other well-heeled public water resources agency that may already possess the necessary information, the benefits of having a Board staff report will likely outweigh any benefits from civil discovery.

593. California authorizes an award of attorneys' fees under its "private attorney general" statute. CAL. CIV. PROC. CODE § 1021.5 (West Supp. 1995).

594. CAL. FISH & GAME CODE §§ 5937, 5946 (West 1984).

595. See *supra* notes 98-110 and accompanying text (discussing *Cal. Trout I & II*); cf. Water Right Order WR 95-2, *supra* note 155, at *2-5 (discussing application of Fish and Game Code § 5937), discussed *supra* notes 156-64 and accompanying text.

inbasin uses; only twenty percent of the long term bypasses are directly attributable to the common law trust.⁵⁹⁶ Indeed, in the long run, the section 5937 flows themselves would have caused the lake to rise to an elevation of 6,390 feet.⁵⁹⁷ Thus, put crudely, the common law trust added only two feet to the lake's level. Even this additional increment might have been reached solely on the basis of statute, without any reference to the common law trust.⁵⁹⁸ Finally, pursuant to *Cal. Trout*, the plaintiffs have shifted much of their *Mono Lake Basin* litigation costs to the city.⁵⁹⁹

Similarly, the federal Endangered Species Act ("ESA") appears to have played a more pronounced role than the common law trust in the recent Bay/Delta process agreement to reallocate water from consumptive to instream uses. A case that arose upstream of the Bay/Delta estuary demonstrated the ESA's pronounced effect on longstanding water diversions. For over sixty years, the Glenn-Colusa Irrigation District ("GCID") and state fishery managers had wrangled over GCID's salmon-killing diversions from the Sacramento River.⁶⁰⁰ In particular, the parties fought for decades over the responsibility for installing an effective fish screen at the GCID pumps. The listing of the Sacramento River winter-run chinook salmon as a threatened species, however, prompted an almost immediate injunction against continued, inadequately screened GCID diversions.⁶⁰¹

The combined listings of the winter-run chinook salmon and the Delta smelt did much to drive the state and federal water projects to the bargaining table in the Bay/Delta process. The United States Bureau of Reclamation already had felt the effect of the ESA through the State Water Board's 1990 order to release Shasta Reservoir water.⁶⁰² Although the Board cited the

596. Water Right Decision D-1631, *supra* note 15, at 180.

597. According to the Board, the § 5937 fish flows would lead to a lake elevation of 6,390 within 29 to 44 years, depending upon future hydrology. Water Right Decision D-1631, *supra* note 15, at 154. Ultimately, the § 5937 flows would lead to a long term lake level of 6,388 to 6,390 feet under a repeat of the 50-year hydrology used by the models. *Id.*

598. For example, the Board concluded that "[i]ncreasing the water elevation of Mono Lake to an average level of 6,392 feet would provide a reasonable assurance of establishing compliance with the national ambient air quality standard for [fine particulate matter]." Water Right Decision D-1631, *supra* note 15, at 132. The Board found that the state constitutional provision against unreasonable use of water gave it sufficient authority to reduce water diversions that triggered unhealthy air. *Id.* at 121.

599. Memo, *supra* note 70, at 3.

600. See Gregory S. Weber, *The Endangered Species Act: New Weapon Enters Sixty-year Fish Fight*, 3 RIVERS 276, 277-78 (1993).

601. *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1135 (E.D. Cal. 1992). See generally Weber, *New Weapon*, *supra* note 600, at 281-82 (discussing speed of injunction).

602. See Water Right Order WR 91-1, *supra* note 128, at *1-3. The order required releases to protect Sacramento salmon runs generally, not just the winter run. Memo, *supra* note 70, at 12.

public trust as authority for its order, in context, at least a partial impetus for the order was the protection of listed salmon.⁶⁰³ The 1992 listing of the Delta smelt as a threatened species sent additional shock waves among the water exporter community.⁶⁰⁴ The late 1993 proposals to list the Sacramento splittail, in conjunction with Club FED's proposed Bay/Delta regulations, sparked the round of negotiations that culminated with the 1994 Principles of Agreement on the Bay/Delta process.⁶⁰⁵ Central to that Agreement were sections entitled "ESA Flexibility," and "Institutional Agreements—ESA."⁶⁰⁶ In those sections, the parties gave assurances that the export limits they had negotiated were designed to satisfy ESA needs for the three years of the agreement's duration. The agreement also included a promise that any additional water needed to satisfy unforeseen ESA needs would "be provided by the Federal government on a willing seller basis financed by Federal funds, not through additional regulatory re-allocations of water within the Bay-Delta."⁶⁰⁷

Nevertheless, even though the common law trust played second fiddle to statutes in these two cases, it is disingenuous to ignore its real effect on water reallocations, even if it is difficult to quantify that effect in acre-feet or cubic-feet-per-second. For nearly ten years, the Bay/Delta process has proceeded against the backdrop of the *Delta Water Cases*. That decision emphasized the water exporters' lack of vested rights to appropriate water in derogation of trust-protected uses. As such, the decision recognized the Board's ability to implement its statutory duties through the trust. Draft Board Decision D-1630 suggested ways that the Board might indeed exercise its trust duties.⁶⁰⁸ The Board's ultimate ability to use the trust to implement at least some of the flow restrictions necessitated by the water quality planning process undoubtedly occupied some place at the bargaining table, if only in the back of the negotiators' minds.

Much more apparent is the trust's role in the Mono Lake Basin reallocation. Initially, the trust provided the basis for the trial court's preliminary injunction.⁶⁰⁹ In practical effect, that injunction precluded all

603. See Memo, *supra* note 70, at 12.

604. See Weber, *Overview*, *supra* note 58, at 940 n.200 (noting potential impact of the Delta smelt listing).

605. See 60 Fed. Reg. 4664, 4666-67 n.6 (1995) (to be codified at 40 C.F.R. § 131).

606. Principles for Agreement on Bay-Delta Standards Between the State of California and the Federal Government at 3-4, 5-7 (Dec. 15, 1994).

607. *Id.* at 5.

608. Water Right Decision D-1630 (Draft), *supra* note 428.

609. Water Right Decision D-1631, *supra* note 15, at 9-10. The trial court issued two preliminary injunctions. The initial one, issued December 6, 1989, precluded the city from diverting

diversions for over five years while the Board conducted its basin review. Los Angeles' ability to survive without this water during the most sustained drought of the last sixty years weakened the city's claim to the "necessity" of such diversions. Moreover, even though the statutorily required stream flows effectively force much of the water reallocation, the common law trust ultimately still will require the city to bypass an average of 8,500 acre-feet per year.⁶¹⁰ This alone represents nearly 11.5 percent of the city's average unrestricted diversions.⁶¹¹ Moreover, in addition to the long-term average bypass requirement, the trust plays an important role in the timing of diversions otherwise allowed once the stream standards are met. First, the trust precludes the city from *any* diversions until the lake reaches elevation 6,377 feet.⁶¹² Thus, the trust maintains the restrictions imposed by the preliminary injunction. Second, it minimizes diversions until the lake reaches elevation 6,391 feet.⁶¹³ It restricts diversions after this elevation is initially reached whenever the lake level falls below 6,391 feet.⁶¹⁴ Finally, it will support the Board's decision to reopen the water rights decision if the lake fails to reach the 6,391 foot target within twenty years.⁶¹⁵

Further, this catalog of effects specifically traceable to the trust short changes its likely effect had Fish and Game Code section 5937 not been involved. Although the statute mandated a priority to fish in the tributary streams, the Board could easily have found that the common law trust gave identical or nearly as full protection to that resource. Similarly, while the *Cal. Trout* decisions told the Board that it *had* to recreate the prediversion fishery, the common law trust easily could have led to the same conclusion. Indeed, throughout its specific discussion of basin trust resources, the Board looked to prediversion conditions. It did find that the accommodation between trust protection and water diversion did not require a complete cessation of diversion, or the restoration of all prediversion conditions. Nevertheless, on a different showing,⁶¹⁶ or under different circumstances,

whenever Mono Lake was below elevation 6,377 feet. *Id.* at 9. The second injunction, entered June 14, 1990, set interim tributary stream flows to satisfy *Cal. Trout II*. *Id.* at 9-10.

610. *Id.* at 178-79.

611. *See id.* at 163 (average unrestricted diversions of 74,500 acre-feet per year) and 178-79 (trust required bypasses of average 8,500 acre-feet per year).

612. This elevation protects gull habitat on Negit Island. *Id.* at 156 n.14. It also provides a nine-foot elevation buffer above which additional shoreline damage will occur from the incision of the feeder stream channels into the lake. *Id.*

613. *Id.* at 156-57.

614. *Id.* at 157.

615. *Id.* at 158 n.15.

616. The environmental plaintiffs did not themselves urge a complete cessation of diversion. *See National Audubon Soc'y & Mono Lake Comm.*, Closing Brief, *supra* note 229, at 4.

nothing would preclude a finding that “feasible” trust protection supported the complete cessation of diversions.

In addition to these quantifiable effects on the reallocation of Mono Lake Basin water, the trust undoubtedly had major indirect effects on the ultimate decision. While section 5937’s stream protections may have driven a large part of the ultimate Board decision, the lake’s trust-protected resources focused the public’s attention.⁶¹⁷ The portrayal of the lake as a unique national resource undoubtedly helped sustain support for the environmentalists’ challenges throughout the long process leading up to the Board’s decision.

In summary, the era of public trust compelled water reallocations in California has commenced. To date, the trust has had an important, although non-exclusive, role to play in furthering such water reallocations. As many forces are combining to encourage such water reallocations,⁶¹⁸ the trust likely will continue to play such an important but non-exclusive role. Both directly and indirectly, the promise of *National Audubon Society* will continue to be fulfilled as courts and state agencies articulate the public trust in their water reallocation decisions.

617. As a resident of Northern California since the late 1970’s, the author can attest that environmentalists’ bumper stickers did not read “Enforce 5937” or “Save the Tributary Streams.” Rather, they simply stated: “Save Mono Lake.”

618. See Weber, *Overview*, *supra* note 58, at 967-68.