

LOCAL GOVERNMENTS NAVIGATING THE CALIFORNIA CONSTITUTION

**FEBRUARY 8, 2013
U.C. BERKELEY SCHOOL OF LAW
BERKELEY, CALIFORNIA**

WATER RIGHTS UNDER THE CALIFORNIA CONSTITUTION

**TARA L. MUELLER, DEPUTY ATTORNEY GENERAL¹
CALIFORNIA OFFICE OF THE ATTORNEY GENERAL
OAKLAND, CALIFORNIA**

¹ The views expressed herein are those of the author only and do not represent the views of the State of California, the California Attorney General, California Office of the Attorney General, the California State Water Resources Control Board or any other state agency or entity.

I. PROCESS FOR OBTAINING APPROPRIATIVE WATER RIGHTS IN CALIFORNIA

A. Appropriative Water Rights. Appropriative water rights in California are generally conferred by permit (and then by license, provided certain requirements are met), issued by the State Water Resources Control Board (State Water Board). See Cal. Water Code § 1200 *et seq.* Such rights are subject to a “comprehensive regulatory scheme . . . to safeguard the scarce resources of the state.” *People v. Shirokow*, 26 Cal.3d 301, 309 (1980).

B. Water Right Permit Process.

1. Permit application.

- a. Following enactment of the Water Commission Act of 1913, the exclusive means of acquiring an appropriative water right in California is to obtain a water right permit from the State Water Board. Cal. Water Code §§ 1200 *et seq.*, 1225.²
- b. The process is initiated by submitting an application to the State Water Board to appropriate previously unappropriated water and use it for a reasonable and beneficial purpose. Cal. Const., art. X, § 2; Cal. Water Code §§ 100, 1252. The permit application must set forth, *inter alia*, the nature and amount of the proposed use, the proposed point of diversion and place of use of the water, the location and description of the proposed diversion works, the time for commencing and completing construction of such works, and the time for complete application of the water to the proposed use. Cal. Water Code § 1260.

2. Factors for evaluating a permit application.

- a. In determining whether to grant a permit, the State Water Board must consider a number of factors, including “the relative benefit to be derived from . . . all beneficial uses of the water concerned, including, but not limited to, use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and

² Appropriative water rights acquired prior to December 19, 1914 (the effective date of the Water Commission Act) are not subject to the State Water Board permit process, but still are subject to the overriding constitutional and common law limitations that inhere in all water rights in California. See Section III below.

wildlife, recreational, mining and power purposes, and any uses specified to be protected in any relevant water quality control plan.” Cal. Water Code § 1257; see also §§ 1243.5, 1258.

- b. The Water Code specifically declares that the use of water for “preservation and enhancement of fish and wildlife resources is a beneficial use of water.” Cal. Water Code § 1243.
- c. The State Water Board must reject an application “when it its judgment the proposed appropriation would not best conserve the public interest.” Cal. Water Code § 1255. Note that this so-called “public interest” determination is distinct from the reasonable use requirement of article X, section 2 of the California Constitution and Water Code. (See Section III.D.)

3. **Permit issuance.**

- a. The State Water Board may subject appropriations to “such terms and conditions as in its judgment will best develop, conserve and utilize in the public interest, the water sought to be appropriated,” including terms and conditions necessary to protect water quality and fishery beneficial uses of water. Cal. Water Code §§ 1253, 1257. All appropriative right permits are taken subject to the conditions therein. *Id.*, § 1391.
- b. “Once an appropriative water right permit is issued, the permit holder has the right to take and use the water according to the terms of the permit,” subject to the ongoing restrictions and limitations imposed by the reasonable and beneficial use doctrine, public trust doctrine, and section 5937 of the Fish and Game Code (see Section III). *United States v. State Water Resources Control Board*, 182 Cal.App.3d 82, 102, 104-106 (1986); see also Cal. Water Code §§ 1381, 1455.
- c. A permit is effective only if the water is actually appropriated for a “useful and beneficial purpose” and is taken in conformity with Division 1 of the Water Code, section 100 *et seq.* (General State Powers Over Water). Cal. Water Code § 1390.
- d. The State Water Board “may reserve jurisdiction, in whole or in part, to amend, revise, supplement or delete terms and conditions in a permit.” Cal. Water Code § 1394.
- e. The State Water Board may revoke a permit if, *inter alia*, the water

is not “applied to a beneficial use as contemplated in the permit” and Division 1 of the Water Code and Board regulations. Cal. Water Code § 1410(a).

B. Inspection and Issuance of License.

1. Once construction of the project works is completed and the water is applied to beneficial use, the permittee must report the completion to the State Water Board, which must then perform an inspection of the project. Cal. Water Code §§ 1600, 1605.
2. If the State Water Board determines that the project works have been properly completed and that the water is being applied to a beneficial use in conformity with the permit, it may confirm the permit by issuing a water right license. Cal. Water Code § 1610.
3. Every license must be subject to terms and conditions under Division 1 of the Water Code, and must contain “the statement that any appropriator of water to whom a license is issued takes the license subject to the conditions therein expressed.” Cal. Water Code §§ 1626, 1628.
4. The State Water Board may revoke a license if it finds that the licensee has not put or has ceased to put the water to a useful and beneficial purpose or has not complied with any of the terms and conditions of the license. Cal. Water Code § 1675; see also § 1627.

II. FUNDAMENTAL BACKGROUND PRINCIPLES OF CALIFORNIA WATER LAW

A. In General: Water Rights are Highly Regulated, Limited and Uncertain.

1. As the United States Supreme Court stated long ago: “[r]ights, property and otherwise, which are absolute against all the world are certainly rare, and water rights are not among them.” *United States v. Willow River Power Co.*, 324 U.S. 499, 510 (1945). “Unlike real property rights, usufructuary water rights are limited and uncertain. The available supply of water is determined largely by natural forces.” *United States v. State Water Board*, 182 Cal.App.3d at 104; see also *People v. Murrison*, 101 Cal.App. 4th 349, 359 (2002). Furthermore, “no water rights are inviolable; all water rights are subject to governmental regulation.” *United States v. State Water Board*, 182 Cal.App.3d at 106; see also *Murrison*, 101 Cal.App.4th at 361-362.
2. An appropriative water right is not an unconditional, vested right to divert, use and store a specific quantity of water. *United States v. State Board*,

182 Cal.App.3d at 147 [“appropriated water rights are, by definition, conditional” and consequently an appropriative water right holder does not “have any reasonable expectation of certainty that the agreed quantity of water will be delivered”]. Rather, a water right is a right to appropriate up to a certain quantity of water, subject to numerous overriding and ongoing limitations and restrictions which inhere in the water right itself. These limitations apply even absent any specific terms and conditions in a water right permit or license, and even if the State Water Board has not acted to restrict the water right holder’s diversion, use and storage of water.

3. Water rights also are subject to an overriding public interest. See Cal. Water Code § 104 (enacted in 1921) [“the people of the State have a paramount interest in the use of all water of the State and . . . the State shall determine what water of the State . . . can be converted to public use or controlled for public protection”] and Cal. Water Code § 105 (enacted in 1925) [“protection of the public interest in the development of the water resources of the State is of vital concern to the people of the State and . . . the State shall determine in what way the water of the State . . . should be developed for the greatest public benefit”].

B. Water Rights are Usufructuary Rights Only -- The Corpus of the Water is Owned by the State.

1. Water rights are not possessory interests, but rather are rights of *use* only; there is no private property right in the corpus of the water itself. *Eddy v. Simpson*, 3 Cal. 249, 252-53 (1853); *Kidd v. Laird*, 15 Cal. 161, 180 (1860); Cal. Water Code §§ 102, 1001 (enacted in 1911 and 1913).
2. The corpus of the water is owned, controlled and regulated by the state as trustee for the benefit of the people of the state. Cal. Water Code § 102 (enacted 1911) [“[a]ll water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law”]; see also Cal. Const., art. X, § 5 (formerly XIV, § 1, originally codified in 1879) [“[t]he use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state”].
3. Corollary: because water rights are non-possessory rights to the use of the corpus of the water, unlike an owner of land, a water user has no right to exclude others from making use of the watercourse as well. *Stevinson Water Dist. v. Roduner*, 36 Cal.2d 264, 269-70 (1950).

C. A Water Right Holder Only Has A Right To Such Amount As Is Actually Put to Beneficial Use.

1. Because water rights in California confer only a right to the *use* of the water, but no ownership interest in the *corpus* of the water, “[a]n appropriative right is limited to the amount of water the appropriator can put to a reasonable beneficial use *and* has put to beneficial use.” *Murrison*, 101 Cal.App.4th at 363, emphasis in original. This has been the law in California since at least 1896. *Senior v. Anderson*, 115 Cal. 496, 503 (1896). Thus, “one making an appropriation of the waters of a stream acquires no title to the waters but only a right to their beneficial use and only to the extent that they are employed for that purpose.” *Hufford v. Dye*, 162 Cal. 147, 153 (1912).
2. Beneficial use is defined as “the quantity necessary to be taken from the source to supply that use at the place of use.” *Thayer v. Calif. Devel. Co.*, 164 Cal. 117, 137 (1912). “The taking of more would be a taking without right.” *Id.*; see also *Hufford*, 162 Cal. at 153-54 [“his appropriation or diversion of more than can be applied by him gives him no right to the excess and this is subject to appropriation by any other person who may use it for similar beneficial purposes”].
3. Correspondingly, “an appropriator is not entitled to the quantity of water actually diverted and taken into possession, if he uses only a portion of it, and . . . his right is limited to the amount he actually uses for a beneficial purpose. An appropriation of water . . . by means of a ditch is not measured by the capacity of the ditch through which the appropriation is made, but is limited to such quantity, not exceeding the capacity of the ditch, as the appropriator may put to a useful purpose, not by the amount which he took, not by the amount which he claimed . . . but it would be measured by the amount which he had been actually taking and applying to a beneficial use upon that land. . . . [T]he law only allows the appropriator the amount actually necessary for the useful or beneficial purpose to which he applies it and . . . the inquiry [is] therefore not what he had used, but how much was actually necessary.” *California Pastoral and Agric. Co. v. Madera Canal and Irrig. Co.*, 167 Cal. 78, 83 (1914); see also *Smith v. Hawkins*, 120 Cal. 86, 88 (1898); *Hufford*, 162 Cal. at 153. Thus, “the mere fact that the ditch was full or carried a certain quantity of water throughout the season is of no consequence, unless all of the water so carried was put to a beneficial use all of the time.” *Haight v. Costanich*, 184 Cal. 426, 436 (1920).
4. These principles are reflected in article X, section 2 of the California Constitution and the Water Code. See Cal. Const., art. X, § 2 and Cal.

Water Code § 100 [“[t]he right to the water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served”]; see also Cal. Water Code § 1202(c) [defining “unappropriated water” to include previously appropriated water “which has ceased to be put,” or which “is not or has not been in the process of being put,” “to the useful or beneficial purpose for which it was appropriated”]; § 1240 [“[t]he appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases”]; §§ 1390, 1627 [a water right permit or license “shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with this division but no longer”].

5. Storage of water is not in and of itself a beneficial use. In *Lindblom v. Round Valley Water Co.*, 178 Cal. 450 (1918), the California Supreme Court reversed a trial court’s entry of judgment in favor of the defendant owner of an upstream storage dam and reservoir and against the plaintiff downstream junior riparian landowner, who claimed that the upstream water user had improperly invaded its riparian water rights. The Court held that “[s]torage of water in a reservoir is not in itself a beneficial use” but rather “is a mere means to the end of applying the water to such use.” *Id.* at 456.

The Court reasoned that “an appropriator could hold, as against one subsequent in right, only the maximum quantity of water which he shall have devoted to a beneficial use” and that the defendant’s rights did “not extend to the impounding of water for the mere purpose of holding it in storage.” *Id.* Rather, the defendant was required to show that it had “applied to beneficial uses all of the water so impounded by its dam and reservoir,” which it had failed to do. *Id.* at 457; see also *Bazet v. Nugget Bar Placers, Inc.*, 211 Cal. 607, 618 (1931); Cal. Water Code § 1242 [“[t]he storing of water underground . . . constitutes a beneficial use of water if the water so stored is thereafter applied to the beneficial purposes for which the appropriation for storage was made”].

D. All Water Rights Are Subject to the Doctrine of Reasonable Use, Calif. Constitution, Article X, § 2.

1. **Overriding constitutional limitation.** Article X, section 2 of the California Constitution, which establishes the so-called “reasonable use doctrine” is “an overriding constitutional limitation” that is “superimposed on [the] basic principles defining water rights.” *United States v. State Water Board*, 182 Cal.App.3d at 105. This “paramount limitation” and

“cardinal principle of California water law,” first enacted in 1928, applies to all water rights in California. *Id.* at 105-106.

2. **Article X, section 2 provides in part:** “[t]he right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.” Cal. Const., art. X, § 2 (formerly Art. XIV, § 3, originally codified in 1928); see also Cal. Water Code § 100 (originally enacted 1913).
3. **Purpose:** the purpose of this constitutional provision “was to ensure that the state’s water resources would be ‘available for the constantly increasing needs of all of its people’.” *Central and West Basin Water Replenishment Dist. v. So. Calif. Water Co.*, 109 Cal.App.4th 891, 904 (2003).
4. **This language imposes five distinct limitations** on the exercise of all water rights in California: a) beneficial *purpose* of use (discussed in Section III.C above); b) reasonable *amount* of use (prohibition against waste and unreasonable use); c) reasonable *place or point* of diversion; d) reasonable *method or manner of diversion*; and e) reasonable *method or manner of use*.
5. **What constitutes reasonable use of water.**
 - a. What is a reasonable use depends entirely on the circumstances, and may change with changing economic, social and environmental values and needs. *Environmental Defense Fund v. East Bay Muni. Util. Dist.*, 26 Cal.3d 183, 194 (1980) [“[w]hat constitutes reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes”]; *Joslin*, 67 Cal.2d at 140 [“what is a reasonable use of water depends on the circumstances of each case, [and] such an inquiry cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance,” including the “[p]aramount . . . ever increasing need for the conservation of water in this state”]; *Peabody v. City of Vallejo*, 2 Cal.2d 351, 368 (1935) [what constitutes waste of water “depends upon the circumstances of each case and the time when waste is required to be prevented”].
 - b. Uses once reasonable may later become unreasonable due to their

adverse effects on other water users or the environment. See, e.g., *Town of Antioch v. Williams Irrig. Dist.*, 188 Cal. 451 (1922) [point of diversion became unreasonable in light of additional demands for consumptive uses of water]; *Imperial Irrig. Dist. v. State Water Res. Control Bd.*, 186 Cal.App.3d 1162 (1990) [exercise of pre-1914 appropriative water rights deemed unreasonable in light of flooding caused by wasteful water delivery and irrigation practices]; *United States v. State Board*, 182 Cal.App.3d at 129-130 [use of water is unreasonable to the extent it fails adequately to protect other beneficial uses and violates state water quality objectives].

- c. Application of the reasonable and beneficial use doctrine may require water users “to endure some inconvenience or to incur reasonable expenses.” *People v. Forni*, 54 Cal.App.3d 743, 751-752 (1976); see also *City of Rancho Santa Margarita v. Vail*, 11 Cal.2d 501, 561 (1938); *Waterford Irrig. Dist. v. Turlock Irrig. Dist.*, 50 Cal.App. 213, 221 (1920); *Peabody*, 2 Cal.2d at 376.

6. **There is no property interest in an unreasonable use of water.**

California courts have repeatedly held that there is no property interest in an unreasonable use or waste of water, and consequently there can be no taking. *California Pastoral*, 167 Cal. at 85-86 (1914); *Joerger v. Pacific Gas & Elec. Co.*, 207 Cal. 8, 22 (1929); *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, 703 (1933); *Peabody*, 2 Cal.2d at 369 (1935); *Joslin*, 67 Cal.2d at 144-45 (1967); *People v. Forni*, 54 Cal.App.3d at 753 (1976); *In re Waters of Long Valley Creek Stream Sys.*, 25 Cal.3d 339, 348, n.3 (1979); *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 426, 437, 440, 447, 452 (1983); *United States v. State Board*, 182 Cal.App.3d at 106; *Imperial Irrig. Dist v. State Water Resources Control Board*, 225 Cal.App.3d 548, 563 (1990); *Allegretti & Co. v. County of Imperial*, 138 Cal.App.4th 1261, 1279 (2006); *State Water Resources Control Board Cases*, 136 Cal.App.4th 674, 806 n. 54 (2006).

7. **Enforcement and application of the reasonable use doctrine.**

- a. Article X, section 2 is expressly declared to be “self-executing,” meaning that water rights must constantly be adjusted and exercised in a manner which meets its dictates. Cal. Const., art. X, § 2.
- b. All water rights are subject to the continuing authority of the State Water Board to prevent waste and unreasonable use. *United States v. State Water Board*, 182 Cal.App.3d at 129; Cal. Water Code §§

275, 1394, 1675.

- c. In addition, “the courts have concurrent jurisdiction with the legislatively established administrative agencies to enforce the self-executing provisions of article X, section 2,” *even if* the State Water Board has expressly retained jurisdiction over the matter. *Environmental Defense Fund.*, 26 Cal.3d at 200. “Private parties thus may seek court aid in the first instance to prevent unreasonable water use or unreasonable method of diversion.” *Id.*

8. **Conclusion.** Under the constitutional reasonable use doctrine, water users have no vested right to divert, store and use water where such diversion, storage and use would be unreasonable based on harm to instream beneficial uses, including fisheries – even if the State Water Board has previously authorized such use. Thus, water users may be required to divert less than the maximum quantities specified in their water right permits or licenses, to alter the method, place, manner or timing of their diversions, or to take other reasonable actions to protect these fisheries, and such requirement does not infringe upon any vested property rights.

E. All Water Rights Are Subject to the Public Trust Doctrine.

1. **General.** The public trust doctrine is a common law principle that has its roots in Roman common law. The public trust doctrine imposes “a further significant limitation on water rights” in California. *United States v. State Water Board*, 182 Cal.App.3d at 106.
2. **Early application of the public trust doctrine: tidelands and submerged lands and navigable waters overlying those lands.**
 - a. California courts acknowledged the common law public trust doctrine as early as 1854, recognizing its applicability to all of the state’s tidelands and submerged lands and navigable waters overlying those lands. *Eldridge v. Cowell*, 4 Cal. 80, 87 (1854) [the State “holds the complete sovereignty over her navigable bays and rivers, and . . . her ownership is . . . attributed to her for the purpose of preserving the public easement, or right of navigation”].
 - b. The doctrine originally applied to protect the public’s right to use the state’s tidelands and submerged lands *and* navigable waterways for purposes of commerce, navigation and fishing. *Ward v. Mulford*, 32 Cal. 365, 372 (1867); *People v. California Fish Co.*, 166 Cal. 576, 584, 589 (1913); *Colberg, Inc. v. State of Cal. Dept. of Pub. Works*, 67 Cal.2d 408, 417 (1967).

- c. This original branch of the public trust doctrine subsequently was expanded to include the preservation of tidelands and lands underlying other navigable waters “in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.” *Marks v. Whitney*, 6 Cal.3d 251, 259-260 (1971); *State of California v. Superior Court (Lyon)*, 29 Cal.3d 210, 231 (1981); see also *State of California v. Superior Court (Fogerty)*, 29 Cal.3d 240, 247 (1981).
- d. The State’s “power to control, regulate and utilize [its] waters within the terms of the trust is absolute except as limited by the paramount supervisory power of the federal government over navigable waters.” *Colberg*, 67 Cal.2d at 416; see also *People v. Gold Run Ditch and Mining Co.*, 66 Cal. 138, 151 (1884) [“the rights of the people in the navigable rivers of the State are paramount and controlling. The State holds the absolute right to all navigable waters and the soils under them . . . [which] she holds as a trustee of a public trust for the benefit of the people”].

3. **Application to appropriative water rights.**

- a. In *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983), the California Supreme Court held that the public trust doctrine applies directly to the state appropriative water rights system as well as to tidelands and submerged lands and overlying waters. The state “retains continuing supervisory control over its navigable waters and lands beneath those waters. This principle, fundamental to the concept of the public trust, applies to rights in flowing waters as well as to rights in tidelands and lakeshores.” *Id.* at 445. The public trust also applies to non-navigable tributaries whose diversion and extraction may impair the public trust values of navigable water bodies. *Id.* at 435-437.
 - (1) The “dominant theme” and “core” of the public trust doctrine is the state’s duty to exercise “continuous supervision and control over the navigable waters of the state and the lands underlying those waters,” as well as “continuing supervision over the taking and use of the appropriated water.” *Id.* at 425-426, 435, 445. The public trust “is more than an affirmation of state power to use public property for public purposes. It is an affirmation of

the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." *Id.* at 441.

- (2) In administering the trust, the state "has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect the public trust uses whenever feasible." *Id.* at 446. "In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs. The state accordingly has the inherent power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust. . . . No vested rights bar such reconsideration." *Id.* at 447.
- (3) The state also must act to prevent parties from using trust resources in a harmful manner. *Id.* at 437; see also *id.* at 426. In this regard, the state has a continuing duty to seek an accommodation between competing interests and "to preserve, so far as is consistent with the public interest, the uses protected by the trust." *Id.* at 447.

- b. In *United States v. State Water Board*, 182 Cal.App.3d 82, the First District California Court of Appeal rejected arguments by the United States that the State Water Board had no authority to modify an appropriative water right permit once issued and that imposition of new standards for fish and wildlife protection would impair the United States' claimed vested right to appropriate. The court reasoned that:

"[t]his issue is now clearly controlled by *National Audubon Society v. Superior Court* [citation omitted] In that case, the Supreme Court clarified the scope of the 'public trust doctrine' and held that the state as trustee of the public trust retains supervisory control over the state's waters such that no party has a vested right to appropriate water in a manner harmful to the interests protected by the public trust. . . . This landmark decision directly refutes the [United States'] contentions and firmly establishes that the state . . . has continuing jurisdiction over appropriation permits and is free to reexamine allocation decisions." *Id.* at 149-150.

Thus, the court concluded, in light of *National Audubon Society*, “the Board unquestionably possessed the legal authority under the public trust doctrine to exercise supervision over appropriators in order to protect fish and wildlife. That important role was not conditioned on a recital of authority. It exists as a matter of law itself.” *Id.* at 150.

- c. The Third District Court of Appeal more recently affirmed this conclusion in *State Water Resources Control Board Cases*, 136 Cal.App 4th 674, 806 n. 54 (2006) [noting that “the rights of an appropriator are always subject to the public trust doctrine”], citing *National Audubon Society*, 33 Cal.3d at 447.

4. **Public trust interest in fish and wildlife resources.**

- a. **General.** In California there is a separate, but related, branch of the public trust doctrine that protects fish and wildlife resources in and of themselves, independent of navigable waters.
- b. **Wild game.** *Ex Parte Maier*, 103 Cal. 476 (1894): “[t]he wild game within a State belongs to the people in their collective, sovereign capacity; it is not the subject of private ownership, except in so far as the people may elect to make it so, and they may, if they see fit, absolutely prohibit the taking of it . . . if deemed necessary for its protection or preservation, or the public good.” *Id.* at 483; see also *San Diego Archaeological Society, Inc. v. Compadres* (1978) 81 Cal.App.3d 923, 927 [wild game “has always been deemed to be owned by the people of the state in their sovereign capacity and is not owned privately except as determined by the people”].

c. **Wild fish.**

- (1) *People v. Truckee Lumber Co.*, 116 Cal. 397 (1897): “[t]he fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the state (*Ex Parte Maier*, 103 Cal. 476, 483) as in England it was in the king; and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign . . .” *Id.* at 399-400.
- (2) See also *People v. Monterey Fish Prods. Co.*, 195 Cal. 548,

563 (1925) [“[t]he title to and property in the fish within the waters of the state are vested in the state of California and held by it in trust for the people of the state”]; *People v. Stafford Packing Co.*, 193 Cal. 719, 726 (1924) [same]; *California Trout, Inc. v. State Water Resources Control Bd.*, 207 Cal.App.3d 585, 630 (1989) [“[w]ild fish have always been recognized as a species of property the general right and ownership of which is in the people of the state”]; *People v. Murrison*, 101 Cal.App.4th at 360 [“the State owns the fish in its streams in trust for the public”].

- (3) The public property interest in fish extends to *all* waters of the state, whether navigable or non-navigable, and whether flowing over public or private lands. Thus, “[t]o the extent that waters are the common passageway for fish, although flowing over lands entirely subject to private ownership, they are deemed for such purposes public waters, and subject to all laws of the state regulating the right of fishery.” *People v. Truckee Lumber*, 116 Cal. at 401.
- (4) The public property interest in fish explicitly limits private rights and requires that water rights holders exercise their rights in a manner not injurious to the public’s ownership of fishery resources. *Id.* at 401-402; *People v. Glenn-Colusa Irrig. Dist.*, 127 Cal.App. 30, 38 (1932).

d. All fish and wildlife.

- (1) The public trust in wild fish and game was later expanded to include all wildlife, not just wild fish and “game” species. See, e.g., *Betchart v. California Dept. of Fish and Game*, 158 Cal.App.3d 1104, 1106 (1984) [“California wildlife is publicly owned and is not held by owners of private land where wildlife is present”]; see also *People v. Harbor Hut Restaurant*, 148 Cal.App.3d 1151, 1154 (1984) [“the State of California holds title to its tidelands and wildlife in public trust for the benefit of the people”]; *Center for Biological Diversity v. FPL Group, Inc.*, 166 Cal.App.4th 1349, 1363 (2008) [“it is clear that the public trust doctrine encompasses the protection of undomesticated birds and wildlife”].
- (2) Like the navigable waters branch of the public trust doctrine, the fish and wildlife branch imposes an

affirmative duty upon the state “to preserve and protect wildlife.” *Betchart*, 158 Cal.App.3d at 1106.

5. **The public trust doctrine also is reflected in the California Constitution.**

- a. Art. X, § 4 (formerly art. XV, § 2, originally codified in 1879) [no individual, partnership or corporation claiming or possessing the frontage or tidal lands of any navigable water body is permitted to exclude the right of way to such water when it is needed for any public purpose, nor destroy or obstruct the free navigation of such water].
- b. Art. I, § 25 (codified in 1910) [“[t]he people shall have the right to fish upon and from the public lands of the State and the waters thereof . . . and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon”].

6. **There is no vested right to use water in a manner harmful to public trust resources.**

- a. *National Audubon Society*, 33 Cal.3d at 426, 437, 440, 445, 447, 452 [“parties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust” and the public trust doctrine “prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust” or from claiming “a vested right to bar recognition of the trust”].
- b. *United States v. State Water Board*, 182 Cal.App.3d at 106 [“no one has a vested right to use water in a manner harmful to the state’s waters”].
- c. *People v. Gold Run Ditch*, 66 Cal. at 151: “a legitimate private business, founded upon a local custom, may grow into a force to threaten the safety of the people, and destruction to public and private rights; and when it develops into that condition, the custom upon which it is founded becomes unreasonable, because dangerous to public and private rights, and cannot be invoked to justify the continuance of the business in an unlawful manner Accompanying the ownership of every species of property is a duty to so use it that it shall not abuse the rights of other recognized

owners [Civ. Code § 3479]. Upon that underlying principle, neither the State nor the Federal legislatures could . . . divest the people of the State of their rights in the navigable waters of the State for the use of private business, however extensive or long continued.”

7. **Enforcement and application of the public trust doctrine.**

- a. “[A]ny member of the general public . . . has standing to raise a claim of harm to the public trust” in water resources. *National Audubon Society*, 33 Cal.3d at 431, n. 11.
- b. Moreover, the state *and* federal courts have concurrent original jurisdiction with the State Water Board to limit the exercise of appropriative water rights through enforcement and application of the public trust doctrine, even if the State Water Board has previously issued a water right permit or license. *National Audubon Society*, 33 Cal.3d at 451.

8. **Conclusion.** While under *National Audubon*, the State Water Board may grant a *conditional privilege* to divert, use and store water in a manner that may harm or otherwise adversely affect public trust resources such as fisheries, such privilege may never ripen into a *vested right* to do so. Thus, under the public trust doctrine, water users may be required to leave additional water instream, to alter the method, manner and timing of their diversions, or take other reasonable actions in order to ensure that water diversion, storage and use does not adversely affect public trust resources, and such requirement does not affect any vested property right.

F. **All Water Rights Must Be Exercised So As To Avoid a Public Nuisance.**

1. **A nuisance is defined** as “anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or which unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, or bay, stream canal or basin.” Cal. Civ. Code § 3479 (enacted in 1873). As applied to water resources, California nuisance law is closely related to the public trust doctrine.
2. **Case law examples.**
 - a. *People v. Glenn-Colusa Irrig. Dist.*, 127 Cal. App. 30 (1932) [enjoining diversion from Sacramento River into unscreened canal]

as a public nuisance, on ground that it killed numerous salmon, trout, shad, bass and other fish].

- b. *People v. Russ*, 132 Cal. 102 (1901) [enjoining erection of dams across certain non-navigable tributaries to the Salt River as a public nuisance, because the dams' diversion of water in material quantities from the tributaries obstructed the public's free use of a navigable stream].
- c. *People v. Gold Run Ditch*, 66 Cal. 138 (1884) [enjoining hydraulic mining on non-navigable tributaries to the American and Sacramento Rivers, because the mining debris obstructed the public's free use of these navigable rivers].
- d. *People v. Truckee Lumber*, 116 Cal. 397 (1897) [enjoining sawmill from discharging sawdust and other deleterious substances into the Truckee River as a public nuisance, on ground that it interfered with the public's property interest in fisheries].
- e. *People v. K. Hovden Co.*, 215 Cal. 54 (1932) [enjoining operation of sardine cannery that used excess quantities of fish as a public nuisance that interfered with the public's property interest in fish].
- f. These holdings are based on the "well-established principle that every person shall so use and enjoy his own property, however absolute and unqualified his title, that his use of it shall not be injurious . . . to the rights of the public." *People v. Truckee Lumber*, 116 Cal. at 402.

G. All Dam Owners and Operators Must Comply With California Fish and Game Code Section 5937.

- 1. "The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam." Cal. Fish & Game Code § 5937. This section has been in effect in substantially the same terms since 1937, and has applied to the United States since 1945. See *id.*, §§ 5900, 5902.
- 2. Dam "owner" is defined to include "a district . . . owning, controlling or operating a dam or a pipe." Fish & Game Code § 5900(c).
- 3. Section 5937 is a legislative reflection and implementation of the common

law public trust doctrine. See *California Trout*, 207 Cal.App.3d at 631.

4. In *Natural Resources Defense Council v. Houston*, 146 F.3d 1118 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that there was no clear congressional directive in the federal Central Valley Project Improvement Act (CVPIA) that would preempt application of section 5937 to the United States' operation of Friant Dam, a component of the CVP, under section 8 of the 1902 Reclamation Act.

On remand, the district court held that section 5937 in fact applied to the United States' operation of Friant Dam, even though this requirement had not been expressly incorporated into the United States' water right permits for the project. *Natural Resources Defense Council v. Patterson*, 333 F. Supp.2d 906, 913-14 and 924-925 (E.D. Cal. 2004), citing *California Trout, Inc. v. Superior Court*, 218 Cal.App.3d 187, 210 (1990).

Furthermore, the court concluded that it had concurrent jurisdiction with the State Water Board to determine whether the operations of Friant Dam were in violation of section 5937, and that such operations in fact were in violation of that section because sufficient water was not being released downstream of Friant Dam to maintain historic fisheries. *NRDC v. Patterson*, 333 F.Supp.2d at 923-925.

5. Section 5937 thus applies to the operation of all dams in California, and establishes a kind of "statutory floor," or minimum instream flow requirement, to protect downstream fishery resources, irrespective of the terms and conditions of a license or permit. The additional requirements imposed by the reasonable use and public trust doctrines may impose further limitations and restrictions on the diversion, storage and use of water, depending upon the facts and circumstances of the case.