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Mono Lake and the Evolving Public Trust in Western Water

by

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Articles

MONO LAKE AND THE EVOLVING PUBLIC TRUST IN WESTERN WATER

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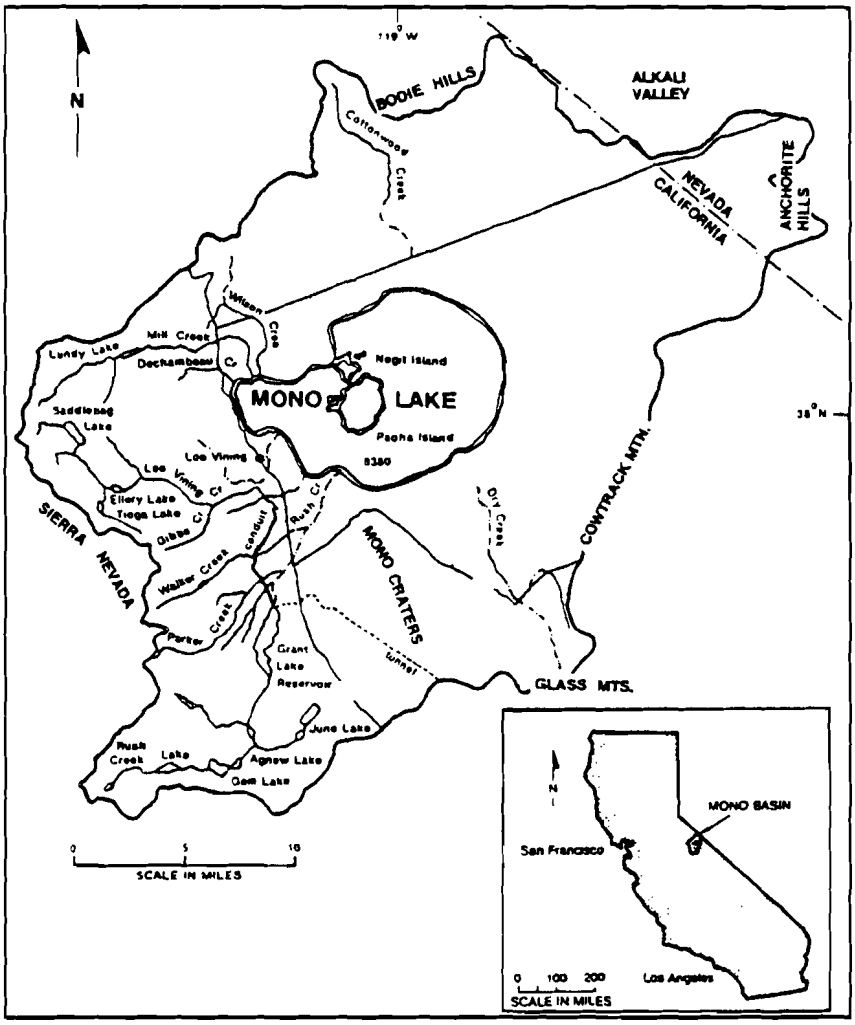

MAP OF MONO LAKE

INTRODUCTION

It has now been more than a dozen years since the California Supreme Court's decision in *National Audubon Society v. Superior Court (Mono Lake)*.[1] *Mono Lake* was a truly remarkable decision; by any measure, the opinion ranks in the top ten of American environmental law decisions.[2] In *Mono Lake*, the California Supreme Court, in just a few pages, thoroughly modernized California water law. Because of its scarcity and its importance to so many other resource uses, water is the most important natural resource in the American West.[3] Unfortunately, Western water use is largely governed by an archaic rule of temporal priority, the prior appropriation doctrine.[4]

Because prior appropriation allocates superior rights to the oldest uses, it promotes deadhand control of this generation's most vital natural resource—a water law analog of a perpetuity. The *Mono Lake* decision refused to allow decisions made by past generations to shackle allocations of water resources by this generation. The California Supreme Court's invocation of the public trust doctrine to temper prior appropriation principles might therefore be thought of as the water law equivalent of the rule against perpetuities.[5]

The public trust doctrine, as interpreted by the *Mono Lake* court, means that the state has the ability and responsibility to supervise water uses according to *both* yesterday's traditions and today's values. After *Mono Lake*, the former can no longer overwhelm the latter. Instead, the state must consider and accommodate both.[6] Both the proponents and opponents of *Mono Lake* have misunderstood this accommodation principle.[7] Thus, more than a decade later, it is worth reconsidering the *Mono Lake* decision and its effect, real and potential, on the reallocation of Western water resources.

Section I of this paper offers a brief review of the context which gave rise to the *Mono Lake* decision. Section II examines the California Supreme

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1. 658 P.2d 709 (Cal.), *cert. denied sub nom.* Los Angeles Dep't of Water & Power v. National Audubon Soc'y, 464 U.S. 977 (1983).

2. While no "top ten" list of leading environmental law cases exists, Professor Rodgers has compiled "top twenty-five" lists of leading articles and books. *See* WILLIAM H. RODGERS, JR., HORNBOOK ON ENVIRONMENTAL LAW 46–53 (2d ed. 1994). For an apocryphal accounting of leading Supreme Court environmental decisions, see Oliver A. Houck, *The Secret Opinions of the United States Supreme Court on Leading Cases in Environmental Law, Never Before Published!*, 65 U. COLO. L. REV. 459 (1994).

3. *See* GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 363 (3d ed. 1993).

4. *See* Charles F. Wilkinson, *Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine*, 24 LAND & WATER L. REV. 1 (1989); *see generally* 2 WATER AND WATER RIGHTS §§ 11–17 (Robert E. Beck ed., 1991). On the shortcomings of allocating water on a first-in-time basis, see Eric T. Freyfogle, *Water Justice*, 1986 U. ILL. L. REV. 481, 492–99 (1986).

5. The rule against perpetuities acts to promote the free alienability of land by prohibiting self-perpetuating conveyances. *See generally* RICHARD R. POWELL, POWELL ON REAL PROPERTY, chs. 71–73 (1995).

6. *See infra* notes 46–49 and accompanying text.

7. *See, e.g.*, Scott W. Reed, *Fish Gotta Swim: Establishing Legal Rights to Instream Flows through the Endangered Species Act and the Public Trust Doctrine*, 28 IDAHO L. REV. 645, 664–65 (1992) (interpreting public trust doctrine to give priority to sea gulls over urban drinking water users); *cf.* James L. Huffman, *A Fish Out of Water: The Public Trust in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989) (arguing that the public trust doctrine violates the Federal Constitution's takings clause by frustrating reasonable expectations of property owners).

Court's ruling and its effect on Mono Lake itself. Section III turns to the *Mono Lake* decision's legacy; here, we identify the six principles for which the case stands and which give it lasting importance beyond its context and well beyond the boundaries of the state of California. Section IV then examines some of the more recent progeny of *Mono Lake*, both in California and in other Western states. Although a half dozen Western states now recognize the public trust in water, no state other than California has embraced all tenets of the *Mono Lake* doctrine. We believe this is because the accommodation principle at the heart of *Mono Lake* is not widely understood. Therefore, section V concludes with an elaboration of the accommodation principle because *Mono Lake*'s public trust precepts may have greater influence on Western water law in the future than they have had in the past.

I. BACKGROUND

A. The Mono Lake Ecosystem

Mono Lake is now a symbol, perhaps the preeminent one, of the modern struggle over the use of Western water. Lying on the east slope of the high Sierra in eastern California—some 190 miles east of San Francisco and some 300 miles north of Los Angeles—the lake is situated in a closed hydrologic basin, walled in by the Sierra on the west and Great Basin ranges on the north, east, and south. (*See* map *supra* at 702.) Mono Lake is thus a "terminal" lake because all surface runoff and groundwater seepage terminate in the lake.[8]

At approximately one-half million years old, Mono Lake is one of the oldest lakes in North America. Because of its terminal nature, it is highly saline,[9] presently two-and-a-half times more saline than the Pacific Ocean.[10] But unlike most saline lakes which are shallow and fluctuate widely in salinity, area, and depth, Mono Lake is large and deep, with fewer variations in salinity.[11] Its age, depth, and salinity make it of particular scientific value; it is especially useful for global warming and radioactive waste disposal studies.[12]

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8. MONO BASIN ECOSYSTEM STUDY COMM'N, NAT'L RESEARCH COUNCIL, THE MONO BASIN ECOSYSTEM: EFFECT OF CHANGING LAKE LEVEL 12–13 (1987) [hereinafter NATIONAL RESEARCH COUNCIL].

9. *Id.* at 15.

10. *Id.* at 1, 14. The Los Angeles Department of Water and Power, in a 1987 study, estimated that 285 million tons of minerals are dissolved in Mono Lake. Jones & Stokes Associates, *Draft Environmental Impact Report for the Review of Mono Basin Water Rights of the City of Los Angeles* 3B–9 (California State Water Resources Board, 1993) [hereinafter *Mono Basin EIR*].

11. NATIONAL RESEARCH COUNCIL, *supra* note 8, at 16. The final EIR incorporates the draft EIR without its revision or republication. Jones & Stokes Associates, *Final Environmental Impact Report for the Review of Mono Basin Water Rights of the City of Los Angeles* 1–1 (California State Water Resources Board, 1994).

12. NATIONAL RESEARCH COUNCIL, *supra* note 8, at 18–19:

> [Mono Lake] is far older than the many lakes formed within the past 15,000 years as the last continental glaciers retreated. The large quantity of carbonate dissolved in Mono Lake has prolonged the attainment of equilibrium with carbon–14 produced by the atmospheric testing of nuclear weapons and has provided an excellent opportunity to examine gas exchange between the atmosphere and lakes. Such studies have a bearing on the extent of global warming to be expected from carbon dioxide increases associated with the burning of fossil fuels. Recent measurements showing that radionuclides can be many times more soluble in

Mono Lake's salinity (approximately 92 grams per liter in 1988) also makes it an ideal habitat for brine shrimp and alkali flies, which feed on algae suspended in the lake's waters or attached to the lake bottom.[13] The brine shrimp and flies are the principal food source for about one million migratory birds annually. The most notable of the bird species are some 50,000 California gulls, comprising that species' second largest colony, and 750,000 eared grebes, making up about thirty percent of the North American population.[14]

B. The Diversions

The Los Angeles Department of Water and Power (DWP) began diverting water from four of the five fresh water tributary streams that feed Mono Lake in 1941.[15] Over a forty-five year period between 1941 and 1985, diversions averaged 68,100 acre-feet per year.[16] But the DWP diversions increased to 90,000 acre-feet per year in 1969, consisting of approximately seventeen percent of the city of Los Angeles' water supply,[17] so that by 1970 Los Angeles was diverting nearly all of the water in the lake's major tributaries.[18] As a consequence of these diversions, the lake level—which in 1940, was at an elevation of 6,417—dropped forty-five feet by late 1981, to 6,372 feet.[19] This reduced the volume of the lake by more than one-half (from 4.5 to 2.2 million acre-feet) and doubled its salinity level (from roughly 50 to 100 grams per liter).[20]

The DWP's increased diversions beginning in 1969 may be traced to the spectacular loss that California suffered before the United States Supreme Court in the Colorado River litigation of the 1950s and 1960s.[21] In 1963, the Supreme Court ruled, in *Arizona v. California*, that the upriver states of Arizona and Nevada were entitled to some three million acre-feet of Colorado River water,[22] much of which California had been diverting or planned to divert.[23] A year later, the Court confirmed these allocations,[24] and California began to search for additional water supplies. The largest user in the state, the DWP, had

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Mono Lake than in marine or fresh waters may have important implications for radioactive waste disposal in these environments.

13. Daniel Botkin et al., *The Future of Mono Lake: Report of the Community and Organization Research Institute "Blue Ribbon Panel" for the Legislature of the State of California* 6 (Univ. of Calif. Water Resources Center, 1988).

14. *Id.* Other important Mono Lake bird species include about 80,000 Wilson's phalaropes (10% of the world's population); 60,000 red-necked phalaropes (2% to 3% of the Western Hemisphere population); small numbers of Caspian terns; and some 380 snowy plovers (about 11% of the California population). *Id.* at 6–8.

15. The five major Mono Basin streams are Rush, Lee Vining, Walker, Parker, and Mill Creeks, whose mean natural runoff of 150,000 acre-feet per year represents approximately 75% to 85% of the total surface and subsurface inflows to Mono Lake. The DWP diverted water from all but Mill Creek. About three-quarters of the 150,000 acre-feet comes from the two largest streams, Rush and Lee Vining. NATIONAL RESEARCH COUNCIL, *supra* note 8, at 29.

16. NATIONAL RESEARCH COUNCIL, *supra* note 8, at 8.

17. NATIONAL RESEARCH COUNCIL, *supra* note 8, at 8.

18. *Mono Basin EIR*, *supra* note 10, at S–1.

19. Botkin et al., *supra* note 13, at 1.

20. Botkin et al., *supra* note 13, at 1.

21. *See* Charles J. Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 37–46 (1966).

22. Arizona v. California, 373 U.S. 546, 565 (1963).

23. *See* Meyers, *supra* note 21, at 41.

24. Arizona v. California, 376 U.S. 340 (1964).

one apparently ready source of increased supplies in the mountain streams that feed Mono Lake.

The DWP had acquired water rights to divert virtually all of four of the five principal feeder streams to Mono Lake in 1940, over a generation before the Supreme Court's decision.[25] However, the DWP had neither the capacity nor the need to divert the entire flow of these streams. Instead, the agency contented itself with an aqueduct carrying roughly half the capacity of that which the DWP was entitled to under its state water right.[26] The result in *Arizona v. California* prompted the DWP to expand its capacity, and it completed construction of a second aqueduct in 1970.[27] By 1979, Mono Basin water constituted nearly twenty percent of the City of Los Angeles' water supply.[28]

The increased DWP diversions caused rapid depletion of the level of Mono Lake. By the early 1970s, the declining lake levels transformed Negit Island, a major breeding area for the California gulls, into a peninsula and exposed the gulls to predation by coyotes.[29] This exposure caught the attention of the environmental community, and a number of organizations, led by the National Audubon Society and the Mono Lake Committee, filed suit in 1979 to restrain the DWP's diversions.[30] The environmentalists claimed that continued DWP diversions in disregard of the effects on the lake and its environment violated California's public trust doctrine.[31] After considerable procedural maneuvering,[32] the California Supreme Court handed down its landmark decision in February 1983.

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25. National Audubon Soc'y v. Superior Court (*Mono Lake*), 658 P.2d 709, 711 (Cal.), *cert. denied*, 464 U.S. 977 (1983).

26. *See id.*

27. *Id.*

28. *See* Brian E. Gray, *The Modern Era in California Water Law*, 45 HASTINGS L.J. 249, 263 (1994).

29. Botkin et al., *supra* note 13, at 3.

30. The DWP anticipated that, over the course of the next 80–100 years the lake level would drop an additional 43 feet. By then the lake would be 56% smaller on surface and 42% shallower than it was in 1940. Environmentalists expected even worse; plaintiffs estimated that in 50 years the lake would drop 50 feet and be about 20% of its original size. *See Mono Lake*, 658 P.2d at 715.

31. The environmentalists had four separate concerns. In addition to the concern over the exposure of bird habitat to predators through the creation of land bridges, they were concerned over the loss of 25 square miles of the lake, the ensuing increased salinity which threatened the lake's food chain, and the exposure of some 18,000 acres of lakebed composed of fine alkali silt which, when windblown, constituted a hazard to both human and animal respiratory systems. *See* Gray, *supra* note 28, at 264.

32. The environmental groups first filed suit against the DWP on May 21, 1979. *Mono Lake*, 658 P.2d at 716–17. The DWP then cross-complained against more than 100 others claiming water rights in the Mono Basin, including the federal government. The DWP's position was that if its water rights were burdened by the public trust, then so were the water rights of all other claimants, including the federal government, so that in effect a basin-wide adjudication was necessary. The federal government then removed the case to the federal District Court for the Eastern District of California, which invoked the abstention doctrine and remanded the case to the state court for resolution of the unresolved state law issues regarding the public trust doctrine. *See* Harrison C. Dunning, *The Public Trust Doctrine and Western Water Law: Discord or Harmony?*, 30 ROCKY MTN. MIN. L. INST. § 17.05[3], at 17–28 (1984). *See also* National Audubon Soc'y v. Dep't of Water, 858 F.2d 1409, 1411–12 (9th Cir. 1988) (recounting the procedural maneuvering and concluding that the plaintiffs could raise no federal common law nuisance claims for air or water pollution).

II. THE DECISION

Justice Broussard's opinion for the court upheld the environmentalists' claims that the public trust doctrine applied to the DWP's diversions. Because the diversions were located on nonnavigable waters, this ruling expanded the scope of the doctrine beyond the confines of navigable waters;[33] that is, those waters which flow over state-owned submerged lands. Further, the court applied the trust doctrine to water diversions[34] and, in the process, transformed what some may have thought to be a peculiar rule governing tideland conveyances and public access into a fundamental principle of water law. This expanded scope of the public trust was the consequence of the court's adoption of a broad-ranging "affects" test, under which the trust doctrine burdens all activities adversely affecting the state's trust resources.[35] Thus, water diversions on nonnavigable tributaries are subject to trust restraints if they injure navigable waters, the state's trust resources.[36]

From a water law perspective, perhaps the most significant aspect of the *Mono Lake* decision was the court's determination that the state lacked authority to convey vested rights that were harmful to trust resources. According to the court, all property rights in water remain subject to the public's paramount interest.[37] The state may grant nonvested water rights that harm trust uses, but all such usufructs remain subject to revocation.[38] More important, the state, as trustee, must exercise continuous supervision to ensure that the trust values are continuously considered, and that trust uses are not needlessly destroyed.[39] In this "continuous supervisory role" over the state's navigable waters, the state may modify or revoke previously granted (but nonvested) water rights where necessary to accommodate trust uses.[40] As Professor Gray has observed, *Mono Lake* authorizes the state, acting either through the courts or the state water board to modify existing water rights to ensure that water use "keep[s] pace with contemporary economic needs and public values."[41]

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33. *Mono Lake*, 658 P.2d at 721. For background on the public trust doctrine in California, see Harrison C. Dunning, *The Significance of California's Public Trust Easement for California Water Rights Law*, 14 U.C. DAVIS L. REV. 357, 362–72, 378–95 (1980). For a 50-state overview, see DAVID C. SLADE ET AL., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK (1990); a more recent survey, which collects many of the numerous articles written on the public trust doctrine, is Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence? The Impact of* Lucas v. South Carolina Coastal Council *on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1, 36–54 (1995).

34. *Mono Lake*, 658 P.2d at 721.

35. *Id.* at 728.

36. *Id.* at 721.

37. *Id.* at 727.

38. *Id.* at 728.

39. *Id.*

40. *Id.* This is true even where allocation decisions included public trust review. *Id.*

41. Gray, *supra* note 28, at 266. Gray has argued that although the *Mono Lake* court did not ground its holding on the California Constitution's doctrine of reasonable use (CAL. CONST. art. X, § 2), the case is nevertheless a landmark in reasonable use jurisprudence, since the court emphasized that "[a]ll uses of water, including public trust uses, must now conform to the standard of reasonable use." *Mono Lake*, 658 P.2d at 725. Gray concluded that the California doctrine of reasonable use enables the state to modify consumptive water rights "whenever public values change from a utilitarian interest to preservationist interest in the water resource." Gray, *supra* note 28, at 266.

While the California Supreme Court denied the existence of vested rights harmful to the trust, it did not apply the rule of the tidelands trust doctrine cases that barred the alienability of title.[42] Instead, recognizing that the prosperity and habitability of much of the state depended upon water diversions harmful to trust purposes, the court authorized the state to grant nonvested rights inconsistent with the trust, but only after considering and weighing diversionary benefits and trust damages.[43] The court ordered the state water board to ensure that no water diversions needlessly destroy trust values; according to Justice Broussard's opinion, the trust doctrine required the state to avoid or minimize harm to trust uses "so far as feasible."[44] In order to fulfill this feasibility standard, the state had to study trust uses in light of current knowledge and needs and avoid unnecessary damage to trust resources.[45]

To make the diversions from the Mono Lake tributaries consonant with the public trust doctrine, the court ordered the state water board to reconsider water allocation in the Mono Lake Basin and undertake "an objective study" of the effect of the DWP's diversions on trust resources.[46] This actually would be the first evaluation of the effect of these diversions, since the state originally granted the DWP's water rights without study under the mistaken impression that it had no discretion to deny the diversions.[47] The goal of this study, the court made clear, was to seek an accommodation of both diversionary uses and public trust values.[48] Thus, the public trust doctrine is more than an affirmation of the state's power to use public property for public purposes; it is also a declaration of the state's duty to protect the people's common heritage in water by reconciling diversionary uses and trust values wherever feasible.[49]

III. THE LEGACY

The *Mono Lake* decision made six large contributions to public property law. These contributions make *Mono Lake* a case that every student of property jurisprudence should study.[50]

A. Expanded Geographic Scope of the Trust

The most obvious contribution of *Mono Lake* is its extension of the trust doctrine beyond navigable waters to reach nonnavigable tributaries that affect navigable waters.[51] Even more important than reaching nonnavigable tributaries was the court's ruling that the trust encumbered water diversions.[52]

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42. *See* City of Berkeley v. Superior Court, 606 P.2d 362 (Cal. 1980); Marks v. Whitney, 491 P.2d 374 (Cal. 1971); People v. California Fish Co., 138 P. 79 (Cal. 1913).
43. *Mono Lake*, 658 P.2d at 712.
44. *Id.*
45. *Id.*
46. *Id. See infra* notes 113–45 and accompanying text.
47. *Mono Lake*, 658 P.2d at 728.
48. *Id.* at 712.
49. *Id.* at 724.
50. *See* Harrison C. Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 ENVTL. L. 515, 524–25 (1989) (arguing that *Mono Lake* should be included in the first-year Property course).
51. *Mono Lake*, 658 P.2d at 721. *Cf.* Golden Feather Community Ass'n v. Thermalito Irrigation Dist., 257 Cal. Rptr. 836 (Cal. Ct. App. 1989), discussed *infra* notes 191–96 and accompanying text (refusal to extend public trust to nonnavigable waters not affecting navigable waters).
52. *Mono Lake*, 658 P.2d at 721.

The latter expansion elevated the public trust doctrine from an arcane public right to use tidelands and lands submerged beneath navigable waters to a doctrine with the potential of modernizing Western water law.[53]

B. Purpose of the Trust

A second important aspect of *Mono Lake* is the court's declaration that the purpose of the public trust doctrine was coincident with changing public needs.[54] That is, public trust purposes, like wills, are ambulatory[55]—they change with the felt necessities of the current generation. On this point, the *Mono Lake* court simply reinforced prior California public trust law. Over a decade earlier, in *Marks v. Whitney*, the California Supreme Court had added ecological and recreational purposes to the traditional triad of public trust uses of commerce, fishing, and navigation.[56] These expanded trust purposes make the California doctrine a vehicle for *in situ* protection of resources, in addition to the traditional trust remedy of public access.[57] That this protection is not absolute and has not reached all the logical trust resources[58] does not undermine the significance of this expansion of the public right.

C. Nonvested Nature of Water Rights

A third important aspect of *Mono Lake* is that it makes clear that water rights that affect public trust resources are inherently nonvested property interests; that is, they are revocable by the state.[59] And when revoked, private parties have no claim for just compensation under the takings clause of the Constitution.[60] The latter follows from the former because, as Professor Sax has observed, the Supreme Court has employed a definitional view of property, meaning that if one's rights are defined as contingent at the outset, they cannot later ripen into vested rights protected by the Fifth Amendment's Just

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53. *See generally* Helen Ingram & Cy R. Oggins, *The Public Trust Doctrine and Community Values in Water*, 32 NAT. RESOURCES J. 515 (1992); Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C. DAVIS L. REV. 223 (1980); Jan S. Stevens, *The Public Trust and In-Stream Uses*, 19 ENVTL. L. 605 (1989).

54. *Mono Lake*, 658 P.2d at 729.

55. "So essential a feature of a will is revocability that the insertion...of a clause [in the will] providing that it is not to be revoked has no effect in preventing revocation....This revocable quality of the will is what is usually meant when it is said that the will is ambulatory." WILLIAM J. BOWE ET AL., PAGE ON THE LAW OF WILLS § 5.17, at 208 (1960).

56. Marks v. Whitney, 491 P.2d 374 (Cal. 1971).

57. *See* 4 WATER AND WATER RIGHTS, *supra* note 4, §§ 30.02(e), 33.02.

58. *See, e.g.*, Eric T. Freyfogle, *Ownership and Ecology*, 43 CASE W. RES. L. REV. 1269 (1993); Ralph W. Johnson, *Water Pollution and the Public Trust Doctrine*, 19 ENVTL. L. 485 (1989); Mary Kyle McCurdy, *Public Trust Protection for Wetlands*, 19 ENVTL. L. 683 (1989); Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723 (1989); Alison Rieser, *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory*, 15 HARV. ENVTL. L. REV. 393 (1991).

59. National Audubon Soc'y v. Superior Court (*Mono Lake*), 658 P.2d 709, 712, 723, 729, 732 (Cal.) (vested rights do not bar reconsideration of allocation of water resources), *cert. denied*, 464 U.S. 977 (1983).

60. U.S. CONST. amend. V; amend XIV, § 1.

Compensation Clause.[61] This is true of public land grazing rights[62] as well as Mississippi[63] and Washington[64] tidelands, and water rights in California are surely no different.[65] The *Mono Lake* court referred to water rights as nonvested usufructs,[66] a view the California Supreme Court has held with respect to permitted uses in trust resources since *Boone v. Kingsbury* in 1928.[67]

Actually, the inherently nonvested nature of water rights is no special quirk of California water law. Private rights in Western water have always been contingent. Western states uniformly prohibit water rights holders from wasting water[68] and confine the scope of their right to water that can be used for beneficial uses.[69] They also generally impose significant restraints on the alienation of water rights in an effort to protect the reliance of third parties on return flows.[70] *Mono Lake* thus only reinforces the fact that water rights have always been contingent and heavily regulated.

But because *Mono Lake* imbeds these principles in the state's common law, the case may have added significance in the wake of recent United States Supreme Court takings clause doctrine. In *Lucas v. South Carolina Coastal Council*, the Court ruled that state common law property rules define what is constitutionally compensable under the takings clause.[71] Under *Lucas*, then, because the common law of public trust doctrine (as well as by the state's legislation prohibiting waste and restricting water to beneficial uses[72]) makes all

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61. *See* Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473, 481–82 (1989); Joseph L. Sax, *Rights That "Inhere in the Title Itself": The Impact of the Lucas Case on Western Water Law*, 26 LOY. L.A. L. REV. 943, 944 (1993) [hereinafter Sax, *Rights*].

62. United States v. Fuller, 409 U.S. 488 (1973) (no compensable taking where grazing permit has increased value of ranch and is then withdrawn).

63. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) (since Mississippi case law consistently recognized state title to all lands subject to ebb and flow of the tide, even if not under navigable waters, there were no legitimate private property expectations in those lands). *Phillips* affirmed that the geographic reach of the public trust doctrine was a function of state law. However, the case of the public trust doctrine—in its application to traditionally navigable waters—may well be federal. *See infra* notes 93–98 and accompanying text (discussing statehood acts).

64. Orion Corp. v. Washington, 747 P.2d 1085 (Wash. 1987), *cert. denied*, 486 U.S. 1022 (1988) (no compensable taking for denial of a dredge or fill permit because tidelands were subject to the public trust doctrine).

65. National Audubon Soc'y v. Superior Court (*Mono Lake*), 658 P.2d 709, 723, 724 (Cal.), *cert. denied*, 464 U.S. 977 (1983), *citing* People v. California Fish Co., 138 P. 79 (Cal. 1913); City of Berkeley v. Superior Court, 606 P.2d 362 (Cal. 1980). *See also* Gray, *supra* note 28, at 253–66, discussing *Mono Lake* as a logical outgrowth of Joslin v. Marin Mun. Water Dist., 429 P.2d 889 (Cal. 1967) (interpreting the California Constitution's doctrine of reasonable use to allow the state to declare an outmoded use unreasonable and to reallocate the water to a new, more socially valued use).

66. *Mono Lake*, 658 P.2d at 712.

67. Boone v. Kingsbury, 273 P. 797 (Cal. 1928) (right to erect oil derricks on trust lands subject to revocation for interference with public trust).

68. *See* 2 WATER AND WATER RIGHTS, *supra* note 4, § 12.03(c)(2), at 107. *See, e.g.*, CAL. CONST. art. X, § 2.

69. 2 WATER AND WATER RIGHTS, *supra* note 4, § 12.03(c)(2), at 106–16.

70. The so-called "no-injury" rule which restricts any transfer which would harm another water right holder hampers water rights transfers. 2 WATER AND WATER RIGHTS, *supra* note 4, § 16.02(b), at 277–90; *see also* George A. Gould, *Water Rights Transfers and Third-Party Effects*, 23 LAND & WATER L. REV. 1, 13–18 (1988).

71. 112 S. Ct. 2886, 2901 (1992). *See* Sax, *Rights*, *supra* note 61; *Colloquium on Lucas*, 23 ENVTL. L. 869 (1993).

72. CAL. WATER CODE § 100 (West 1971 & Supp. 1993); CAL. CONST. art. X, § 2.

California water rights contingent, there can by definition be no compensable taking when the state reallocates water to serve trust uses.[73]

D. The State's Continuous Supervisory Duty

A fourth important aspect of *Mono Lake* is the court's recognition of the state's continuous supervisory duty. The *Mono Lake* court ruled that because of the importance of water diversions to California's economy, the state may grant nonvested uses that harm the public trust, but only under certain conditions. First, the state must consider trust values, balancing them against the benefit of water diversions.[74] Second, the state must avoid needless destruction of trust resources whenever feasible.[75] This two-part test is a means to ensure that the state does not allow substantial impairment of trust uses, a trust concept that goes back to the Supreme Court's *Illinois Central Railroad* decision of a century ago.[76]

The *Mono Lake* court's directive to the state to continuously supervise trust values and consider less damaging diversionary alternatives makes the public trust doctrine in California seem like the kind of obligation that the California Environmental Quality Act (CEQA) imposes on state and local agencies.[77] But CEQA applies only to new projects;[78] the public trust doctrine's continuous supervisory duty applies to all water diversions that harm trust resources. Moreover, the trust doctrine establishes substantive standards that impose limits on ecological degradation. In contrast, CEQA's duties are largely procedural. Under CEQA analysis, the feasibility standard is aimed at ensuring that a proposed project remains feasible despite environmental requirements; under public trust analysis, feasibility serves to limit not the type of environmental mitigation, but rather the amount of environmental damages sustained by trust resources.[79]

The feasibility standard inherent in the state's continuous supervisory role is the bottom line of public trust law. This standard anticipates accommodation of trust purposes and existing uses. The trust doctrine seeks coexistence, not defeasance. In this respect, implementation of the doctrine

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73. *See also* Stevens v. Cannon Beach, 835 P.2d 940, 942 (Or. Ct. App. 1992) (no taking for denying a beach development because the right to develop Oregon beaches was never a private right under Oregon law), *aff'd*, 854 P.2d 449 (Or. 1993), *cert. denied*, 114 S. Ct. 1332 (1994).

74. National Audubon Soc'y v. Superior Court (*Mono Lake*), 658 P.2d 709, 712 (Cal.), *cert. denied*, 464 U.S. 977 (1983).

75. *Id.* at 712, 728.

76. "[T]he abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake...is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public." Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452–53 (1892).

77. Under CEQA, CAL. PUB. RES. CODE §§ 21,000–21,194 (West 1986 & Supp. 1995), officials must study potentially significant environmental effects of a proposed project and choose less damaging alternatives where possible. CAL. PUB. RES. CODE § 21,002 (West 1986). *See also* Amy L. Glad, Casenote, Laurel Heights Improvement Association of San Francisco, Inc. v. Regents of the University of California: *The Lucas Court's First Look at CEQA*, 22 PAC. L.J. 289, 290 (1991).

78. *See* Nacimiento Regional Water Mgmt. Advisory Comm. v. Monterey Water Resources Agency, 19 Cal. Rptr. 2d 1 (Cal. Ct. App. 1993) (ongoing projects exempt from CEQA).

79. *See* Cynthia L. Koehler, *Water Rights and the Public Trust Doctrine: Resolution of the Mono Lake Controversy*, 22 ECOLOGY L.Q. (forthcoming Oct. 1995).

resembles implementation of federal reserved water rights which courts apply with "sensitivity" to the effects on current water rights holders.[80] Coupled with the ambulatory nature of trust purposes—the need to consider contemporary economic needs, information, and public values in resolving conflicts between trust resources and existing uses—and the nonvested nature of water rights,[81] the feasibility standard means that consumptive water users have the burden to minimize their diversion's effects on trust property. Because of its continuous supervisory role, the state must periodically ascertain what trust uses require.

Ultimately, the feasibility standard means that trust uses must be accommodated eventually; it means that public rights must be fulfilled.[82] But the feasibility standard also means that not all trust uses must be satisfied in the short run, and that fulfilling trust purposes without destabilizing existing users is the overarching goal of the public trust doctrine. Failure to understand the central role of the feasibility standard has caused public trust opponents to unnecessarily react against the trust doctrine, viewing the doctrine as a destabilizing force in Western water law.[83]

E. Public Standing

A fifth important aspect of *Mono Lake* is an overlooked consequence of the public trust doctrine: its implicit grant of public access to the courts to enforce the doctrine. For a doctrine whose overarching principles might be thought of as public access to trust resources and to decision makers who allocate those resources,[84] public access to the courts to ensure enforcement requires no great intellectual leap. In fact, public standing to enforce trust purposes predates the *Mono Lake* decision, being first articulated in California in the 1971 *Marks v. Whitney* case.[85]

However, public standing to enforce the trust has particular importance in the water rights context. First, it overcomes whatever standing and burden of proof problems a member of the public might encounter in seeking to enforce the anti-waste and beneficial use requirements of state water law. Members of

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80. United States v. New Mexico, 438 U.S. 696, 718 (1978) (Powell, J., dissenting in part); United States v. City & County of Denver, 656 P.2d 1, 19–20 (Colo. 1982); *In re* General Adjudication of Big Horn River System, 753 P.2d 76, 111–12 (Wyo. 1988), *aff'd on other grounds* by an equally divided Court, 492 U.S. 406 (1989).

81. *See supra* notes 59–73 and accompanying text.

82. *See* Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist., No. 425955 (Alameda County Super. Ct., Jan. 2, 1990) (statement of decision in the Lower American River adjudication), discussed *infra* notes 180–90 and accompanying text, where the court stated that the public trust "occupies an exalted position in any judicial or administrative determination of water resource allocation." *Id.* at 27. Although the court ruled that diversionary uses and public trust uses must be balanced to determine whether the "fullest beneficial use of water" has been achieved, as required by Article X, § 2 of the California Constitution, *Mono Lake* required a court to go beyond this balancing to ensure against needless harm to public trust uses and, where the harm is significant, "fullest beneficial use of water may be precluded as a violation of the public trust." *Id.*

83. *See, e.g.*, Huffman, *supra* note 7.

84. *See* Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 578–79 (1989).

85. Marks v. Whitney, 491 P.2d 374, 381 (Cal. 1971). *See also* Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist., 605 P.2d 1 (Cal. 1980) (public interest organization permitted to sue to enjoin allegedly unreasonable uses of water).

the public have seldom enforced these requirements,[86] a legacy of the anachronistic concept that water allocation is a private law matter. The trust doctrine makes it clear that water allocation is, in fact, an issue of the greatest public significance.

Second, universal public standing to enforce the trust makes clear that the trust confines, as well as enables, state water regulators; that is, the trust doctrine is not only a grant of authority to continuously supervise and periodically reallocate water uses, but also an obligation to do so.[87] And this obligation is one that the public may enforce in court.

F. Origin of the Trust

The sixth lasting contribution of *Mono Lake* is the court's determination that the trust doctrine in California law was of common law origin.[88] This, of course, gives the trust doctrine the same wellspring as the prior appropriation doctrine,[89] although all Western states have subsequently codified the public trust.[90] The trust doctrine's common law origins can, in fact, be traced back to medieval England and ultimately to Roman law.[91] Consequently, there are sound historical and conceptual reasons for grounding the public trust in common law. However, the doctrine's common law roots may help to explain its rather slow evolution in Western water circles.[92] Many courts may view recognition of the trust doctrine in Western water law to constitute unwarranted judicial activism.

In reality, there are other legitimate sources of the trust doctrine, three of which bear mentioning. The doctrine's source may be in individual acts of state admission to the Union. As Professor Wilkinson has pointed out, those acts of Congress implicitly conveyed to the states title to the submerged lands beneath their navigable waters.[93] It requires no great conceptual difficulty to see that this remarkable real estate conveyance came with some strings attached;

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86. *See, e.g.*, George W. Pring & Karen A. Tomb, *License to Waste: Legal Barrier to Conservation and Efficient Use of Water in the West*, 25 ROCKY MTN. MIN. L. INST. 25-1 (1979); Steven J. Shupe, *Waste in Western Water Law: A Blueprint for Change*, 61 OR. L. REV. 483 (1982).

87. National Audubon Soc'y v. Superior Court (*Mono Lake*), 658 P.2d 709, 728 (Cal.), *cert. denied*, 464 U.S. 977 (1983).

> Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. 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.

Id.

88. *Id.* at 718.

89. Irwin v. Phillips, 5 Cal. 140 (Cal. 1855).

90. *See* 2 WATER AND WATER RIGHTS, *supra* note 4, § 12.01, at 83–90.

91. *Mono Lake*, 658 P.2d at 718–19. *See* Dunning, *supra* note 32, at 419; Ingram & Oggins, *supra* note 53, at 519–21; Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970); Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 198 (1980); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 429 (1989).

92. *See infra* part V.

93. Wilkinson, *supra* note 91, at 442–48. *See* Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845).

while the states were granted title to these lands, the title was encumbered with a trust obligation that they use the lands for trust purposes.[94] This interpretation of the doctrine's origins would make the doctrine a federal one and would help to reconcile some vintage Supreme Court cases, including the *Illinois Central Railroad* case.[95]

Under this view, the scope of the federal public trust doctrine would be limited to those lands to which the states receive title upon admission. States like California which have expanded the doctrine to include nonnavigable tributaries might do so as a consequence of state law, but the federal scope of the trust doctrine would be the minimum.[96] No state could deny the trust doctrine altogether, absent a change in federal law.

Another source of the state public trust doctrine may be in state constitutions, most of which declare that water and other resources belong to the public or must be used for public uses.[97] A few states have recognized that

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94. *See* Wilkinson, *supra* note 91, at 450–53.

95. Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892). Although the Court "did not address the question whether the fiduciary obligation...arises from state or federal law[,] [m]uch in the opinion suggests that [it] thought of the obligation as one binding on all the states with regard to their sovereign lands." *See* 4 WATER AND WATER RIGHTS, *supra* note 4, § 30.02(b)(1), at 42.

96. Wilkinson, *supra* note 91, at 464.

97. The following state constitutional provisions expressly declare that water (and sometimes other resources) belongs to the public: ALASKA CONST. art. VIII, § 3 (reserving fish, wildlife, and waters that occur in their natural state "to the people for common use"). *See also* ALASKA CONST. art. VIII, § 4 (declaring a sustained yield principle for fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the state), § 13 (calling for a prior appropriation system of water rights limited to state's purposes and to the general reservation of fish and wildlife), § 14 (guaranteeing free access to waters), § 15 (prohibiting exclusive rights or special privileges for fisheries). Other express state constitutional provisions include: COLO. CONST. art. XVI, § 5 (declaring waters of all natural streams to be public property, dedicated to public use, subject to appropriation); MONT. CONST. art. IX, § 3, cl. 3 (declaring "surface, underground, flood, and atmospheric" waters to be property of state subject to appropriation for beneficial use). *See also* MONT. CONST. art. II, § 3 (including right to a "clean and healthful environment" as an inalienable individual right). Further express provisions are: N.M. CONST. art. XVI, § 2 (declaring unappropriated water as belonging to the public); N.D. CONST. art. XI, § 3 (water shall remain state property for mining, irrigating, and manufacturing purposes); WYO. CONST. art. VIII, § 1 (declaring water to be the property of the state).

Other states use constitutional language that implies state ownership of waters. *See* CAL. CONST. art. X, § 2 (reasonable and beneficial use is in the public interest), § 4 (prohibiting obstructions of public access to navigable waters), § 5 (declaring appropriation to be a public use subject to regulation); *see generally* Ivanhoe Irrigation Dist. v. All Parties & Persons, 306 P.2d 824 (Cal. 1957) (while state does not own water in that it may exclude beneficial use rights, state has an equitable title that resides in the water users of the state), *rev'd on other grounds*, 357 U.S. 275 (1958). For other state constitutional language implying state ownership of waters, see IDAHO CONST. art. XV, § 1 (declaring use of waters to be a public use); NEB. CONST. art. XV, § 4 (declaring domestic and irrigation use of water to be a "natural want"), § 5 (dedicating use of water to the people for beneficial use), § 6 (allowing for denial of right to divert unappropriated waters "when such denial is demanded by the public interest"); TEX. CONST. art. 16, § 59(a) (phrasing natural resource conservation and development policy in possessory language implying state ownership of "its" waters); *see generally* Lower Colo. River Auth. v. Texas Dep't of Water Resources, 638 S.W.2d 557, 562 (Tex. Ct. App. 1982) ("[s]tate water is a public trust and the State is under a constitutional duty to conserve the water as a precious resource"), *rev'd on other grounds*, 689 S.W.2d 873 (Tex. 1984). *See also* Oregon Admission Act of Feb. 14, 1859, § 2 (declaring "rivers and waters, and all navigable waters" of the state to be "common highways and forever free").

Professor Grant recently reviewed a handful of cases in Wyoming, Colorado, and Montana interpreting those states' constitutional provisions declaring water to be public

these declarations, in effect, constitutionalize the public trust doctrine within their borders.[98] It may be that some state courts are able to see the origins of the public trust in their state constitutions more readily than they are to see it as a common law concept, or as a consequence of the state's act of admission.

Finally, in some states the trust doctrine may be a part of the state's water code.[99] Such an interpretation would give the trust doctrine a state statutory basis rather than a federal or common law grounding. Some state statutes may, in effect, codify common law principles which would preserve the essentially nonvested nature of water rights. However, where the trust doctrine is merely a statutory construct, it likely would make contingent only those rights acquired after the date of the statutory enactment.[100]

The *Mono Lake* court's determination of the common law origins of the trust doctrine has considerable historical and conceptual support. Litigants, state officials, and jurists should be aware, however, that the common law is only one of at least four sources of the trust doctrine, at least with respect to Western water. Recognition of these possibilities may foster more widespread acceptance of the doctrine in the future.

IV. THE AFTERMATH

The *Mono Lake* decision did not lead to an immediate halt of the DWP's diversions. The plaintiffs spent the next five years in an unsuccessful attempt to retain federal court jurisdiction over the issue of what lake level the public trust required.[101] Meanwhile, a series of suits were filed between 1984 and 1986 seeking to maintain flows in the Mono Basin tributary streams and a rescission of the DWP's permits for failing to comply with flow requirements of the California Fish and Game Code.[102] These efforts eventually produced a judicial injunction preventing DWP diversions in late 1989.[103] Finally, five years later, in September 1994, the state water board, after compiling an extensive environmental impact report and conducting an evidentiary hearing, issued an

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property, but noted that all "concerned issues other than limiting appropriations to protect public trust uses." Douglas Grant, *Western Water and the Public Trust Doctrine: Some Realism About the Takings Issue*, 27 ARIZ. ST. L.J. 423, 465 (1995).

98. *See, e.g.*, CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1120–21 (Alaska 1988); United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n, 247 N.W.2d 457, 463 (N.D. 1976).

99. For a recent example of legislative codification of the public trust doctrine, see the following provisions of the Oregon Water Code, all enacted in 1987: OR. REV. STAT. § 537.332(2) (1987) (defining an "in-stream water right" as a right "held in trust by the Water Resources Department for the benefit of the people of the State of Oregon to maintain water in-stream for public use"); *Id.* § 537.334(2) (1987) (declaring that instream water rights "shall not diminish the public's rights in the ownership and control of the waters of this state or the public trust therein"); *Id.* § 537.455(5)(8) (1987) (definition of "public use" includes uses "protected by the public trust").

100. *But see* discussion of California Trout, Inc. v. State Water Resources Control Bd., 255 Cal. Rptr. 184, 194 (Cal. Ct. App. 1989), *infra* note 107 (holding that California Fish and Game Code § 5946 applies to DWP licenses at issue even though they were based upon permits issued prior to effective date of § 5946).

101. *See* F. Bruce Dodge, *A Field Guide to the Mono Lake Litigation (1978–95)*, at 2 *in* ABA Section on Natural Resources, Energy, and Environmental Law, 13TH ANNUAL WATER LAW CONFERENCE (Feb. 2–3, 1995) (plaintiff's attorney conceding that the effort to retain federal court jurisdiction was "foolish").

102. *Id.*

103. *Id.*

order that amended the DWP's water licenses to restrict diversions in order to raise the level of Mono Lake and setting flow requirements for the tributary streams.[104] Amazingly, no one filed suit challenging this decision. This section explains these developments.

A. The Tributary Stream Litigation

The year after the California Supreme Court's decision, efforts began to restrict DWP diversions under provisions of the California Fish and Game Code requiring licenses to appropriate water to be conditioned on maintaining sufficient water flows to keep fish downstream of diversions in good condition.[105] A year later, in 1985, the Mono Lake Committee and California Trout filed suits seeking to rescind the DWP's water licenses because the licenses failed to comply with the Fish and Game Code.[106] These efforts culminated in a 1989 decision by the Court of Appeals which directed the state water board to amend DWP's licenses to comply with the Code.[107] After the superior court gave the water board and the DWP three years to comply with the Code pending completion of studies, the court of appeals issued a second decision that specified language to be added as a condition of the licenses,[108] directed the superior court to set interim flow requirements, and assigned the task of formulating long-term flows to the water board.[109] The water board amended the licenses accordingly in April 1990.[110]

After the first decision of the court of appeals, the El Dorado County Superior Court, on December 6, 1989, imposed a preliminary injunction blocking DWP diversions until the level of Mono Lake reached 6,377 feet.[111] That decision effectively ended Mono Basin diversions, since the lake was, and

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104. *Id.*

105. Both Dahlgren v. City of Los Angeles, filed in 1984, and Mono Lake Comm. v. Dep't of Water & Power, filed in 1986, sought a judicial determination of tributary flows necessary to comply with §§ 5937 and 5946 of the California Fish and Game Code. *See* Thomas W. Birmingham, *Mono Lake: A Retrospective* 1 (outline contained in the ABA's Section on Natural Resources, Energy and Environmental Law, 13TH ANNUAL WATER LAW CONFERENCE (Feb. 2–3, 1995)).

California Fish and Game Code § 5946 requires that "[n]o...license to appropriate water [in portions of Mono and Inyo Counties] shall be issued...after September 9, 1953, unless conditioned upon full compliance with Section 5937." Section 5937 commands that "[t]he owner of any dam shall 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."

106. *See* Birmingham, *supra* note 105, at 1.

107. California Trout v. State Water Resources Control Bd., 255 Cal. Rptr. 184, 191–94 (Cal. Ct. App. 1989) (*Cal Trout I*). The court ruled that § 5946 of the Fish and Game Code applied to the DWP licenses even though they were based on permits issued prior to the effective date of the Code provision. *Id.* at 194.

108. California Trout, Inc. v. Superior Court, 266 Cal. Rptr. 788, 803–04 (Cal. Ct. App. 1990) (*Cal Trout II*).

> In accordance with the requirements of Fish and Game Code section 5946, this license is conditioned upon full compliance with section 5937 of the Fish and Game Code. The licensee shall release sufficient water into the streams from its dams to reestablish and maintain the fisheries which existed in them prior to its diversion of water.

Id.

109. *Id.*

110. *See* California State Water Resources Control Board, *Mono Lake Basin, Water Right Decision 1631*, at 9 (Sept. 28, 1994) [hereinafter *Decision 1631*].

111. *Id.*

has remained, below that level. On June 14, 1990, the superior court entered a preliminary injunction establishing interim flows for the tributary streams.[112]

B. The State Water Board Decision

To set a long-term level for Mono Lake and flow requirements for the tributaries, the state water board released a three-volume, 1,400-page draft environmental impact report in May 1993.[113] In October 1993, the water board began a forty-three day evidentiary hearing that included testimony from more than 125 witnesses and over 1,000 exhibits.[114] On September 28, 1994, the board issued water right decision 1631, amending the DWP's licenses to establish fish flows in the tributary streams and requiring the raising of Mono Lake's level about fifteen feet.[115]

1. Tributary Flows

Fulfilling the Court of Appeals directive,[116] the water board first set tributary flows at levels necessary to reestablish and maintain the fisheries which existed in the streams prior to the initiation of DWP diversions in 1941.[117] The board established a schedule of minimum flows for each creek in wet, dry, and normal water years.[118] Except for Rush Creek, the board mostly adopted flows recommended by the California Department of Fish and Game.[119] On Rush Creek, the largest Mono Lake tributary, Fish and Game employed different criteria to recommend flow levels, and the board determined that it was more appropriate to use the criteria used at the other

112. *See id.* An order of July 26, 1990 amended the flow rates. *Id.* at 10. Also, beginning in 1990, the court ordered the DWP to pay for stream restoration work on the two major tributary streams, Rush and Lee Vining Creeks, including stream channel repairs, tree planting, and monitoring of restoration efforts. The DWP has unsuccessfully resisted these restoration directives, maintaining in a March 1993 motion that "nothing in *Cal Trout II* mandates going beyond restoration of the stream flows if that itself would restore the creeks and their fisheries," and asserting that "natural processes" would restore denuded riparian habitats. *Mono Basin EIR*, *supra* note 10, at 5–9, 5–13.

113. *Mono Basin EIR*, *supra* note 10.

114. *See* Birmingham, *supra* note 105, at 2–3; *Decision 1631*, at 14–15.

115. *Decision 1631*. For a discussion of the water board's decision as an example of ecosystem management, see Harrison C. Dunning, *The End of the Mono Lake Basin Water War: Ecosystem Management, Fish and Fairness to a Water Supplier*, CAL. WATER REP., Nov. 1994, at 27, 30.

116. *See supra* note 108 and accompanying text.

117. The water board determined: (1) that Lee Vining Creek had a good brown trout fishery prior to 1941; (2) Walker and Parker Creeks had limited trout fisheries degraded by grazing and irrigation prior to 1941; and (3) Rush Creek had a predominately self-sustaining brown trout fishery with some rainbow trout, although grazing and irrigation in upper Rush Creek had "degraded the habitat considerably." *Decision 1631*, at 22, 39, 46, 57.

118. *Id.* at 33 (Lee Vining Creek), 41–42 (Walker Creek), 48–49 (Parker Creek), 69 (Rush Creek).

119. *See* Birmingham, *supra* note 105, at 4.

large tributary stream, Lee Vining Creek.[120] This produced considerably lower required flows on Rush Creek than the fishery department recommended.[121]

In addition to fishery flows, the water board approved channel maintenance and flushing flows on all tributaries in order to establish stream channels and restore riparian ecosystems. These high spring flows vary from one to thirty days, depending on the creek and the hydrologic year.[122] The board also ordered restoration measures on all tributaries, including an immediate halt to grazing in riparian areas, to be coordinated under restoration plans that will be approved by the board.[123]

2. Restoration of Lake Levels

Preserving and restoring Mono Lake was, of course, the motivation for the original *Mono Lake* suit. The water board concluded that the specified tributary flows would cause the water level to rise fifteen feet, to approximately 6,390 feet, within twenty-nine to forty-four years, depending on future hydrology.[124] However, the board's goal for the lake level was driven by air quality concerns: in order to comply with federal air quality standards, the board concluded that an average lake level of 6,392 feet would be necessary to submerge a significant portion of exposed lakebed sediments to reduce the blowing of particulates to applicable limits.[125] According to the board, this lake level will also protect public trust resources by providing nesting habitat for California gulls and other migratory birds,[126] sustain the long-term productivity of brine shrimp and fly populations,[127] maintain public access to the lake's tufa towers,[128] comply with water quality standards,[129] and enhance scenic qualities of the lake's resources.[130]

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120. *Decision 1631*, at 62–63. The variation was due to the presence of Grant Reservoir on Rush Creek, which afforded the opportunity to capture runoff to meet dry-year habitat requirements. However, the water board evidently thought that "in view of the limited role which release of stored water from Grant Lake would play in meeting [the Department of Fish and Game's] revised flow recommendations," it was more appropriate to use the same criteria applied to Lee Vining Creek, which was based on a percentage of available habitat. *Id.* at 62–63.

121. For example, in dry years the water board's flows of 31 cubic feet per second (cfs) for May through August were actually lower than DWP's revised flow recommendations (which ranged from 35 to 40 cfs). *Id.* at 60.

122. *Id.* at 34 (Lee Vining Creek), 42 (Walker Creek), 49 (Parker Creek), 70 (Rush Creek). Channel flows were recently rejected as federal reserved water rights for streams in national forests in Colorado. *See* In the Matter of Reserved Water Rights in the Platte River, Nos. W–8439–76 (Colo. Water Div. 1, Feb. 12, 1993) discussed in 4 WATER AND WATER RIGHTS, *supra* note 4, § 37.03(a)(1) (Supp. 1994).

123. *Decision 1631*, at 37–38 (Lee Vining Creek), 45–46 (Walker Creek), 52–53 (Parker Creek), 74–76 (Rush Creek).

124. *Id.* at 154. The spring 1994 lake level was approximately 6,375 feet. *Id.* at 5.

125. *Id.* at 132, 154.

126. The board concluded that a lake level of at least 6,384 feet would protect the gulls from coyote access to Negit Island and other nesting habitat on islets, and a level of at least 6,390 would completely inundate the land bridge between Negit Island and the shore, which had been a motivating force in the filing of the *Mono Lake* case (see *supra* notes 29–31 and accompanying text). *Decision 1631*, at 106. *See also id.* at 107–20 (effects of rising lake levels on other wildlife).

127. *Id.* at 82. The brine shrimp and brine fly are the major food sources for Mono Lake's large bird populations. *Id.* at 77.

128. Tufa towers are mineral deposits found in alkaline bodies of water; the water board concluded that Mono Lake's towers are "unique and distinctive." *Id.* at 136. The state established the Mono Lake Tufa Reserve in 1982, which recognizes that the tufa and associated

To reach these lake level goals, the board established detailed water diversion criteria. These criteria prohibit all diversions until tributary flow requirements are satisfied and until the lake level reaches 6,377, two feet higher than the 1994 level.[131] Between 6,377 and 6,380 feet, the DWP will be allowed to divert up to 4,500 acre-feet per year, about five percent of the amount the DWP diverted annually prior to the 1989 injunction.[132] Between 6,380 feet and 6,391 feet, the DWP may divert 16,000 feet per year.[133] If Mono Lake does not reach 6,391 within twenty years, the water board promised to hold a hearing to reconsider these diversion criteria.[134]

After the lake reaches 6,391 feet, the DWP may divert all water in excess of that required to meet the prescribed tributary flows, except that if the lake level then declines below 6,391, DWP diversions will be limited to 10,000 acre-feet per year.[135] And all diversions would be prohibited if the lake falls below 6,388 feet.[136] The water board's models suggested that these diversion criteria would enable the lake to reach the goal of 6,392 feet within thirty years, maintain that average during the next fifty years, and remain above 6,390 feet about ninety percent of the time.[137]

3. Costs

The water board estimated that the diversion restrictions would limit the DWP's exports to around 12,300 acre-feet during the next twenty years, about fifteen percent of pre-injunction diversions.[138] Once the 6,391 feet lake level is reached, average DWP Mono Basin diversions would increase to 30,800 acre-feet, still just thirty-seven percent of pre-1989 diversions.[139]

The water board concluded, however, that the restrictions would not produce water shortages in Los Angeles because replacement water would be available from a variety of sources, including local groundwater, water

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sand structures of Mono Lake are a valuable geologic and scientific resource and should be preserved. *Id.* at 133–34, *citing* CAL. PUB. RES. CODE § 5019.65. The board concluded a lake level of 6,405 feet, which would be necessary to restore all waterfowl habitat, would be inconsistent with preserving public access to the most frequently visited tufa sites. *Id.* at 154–55.

129. The board concluded that compliance with water quality standards for salinity would require a lake elevation of at least 6,386 feet. *Id.* at 153–54. The board also designated Mono Lake as an "Outstanding Natural Resource Water" having exceptional ecological significance, which will trigger the most stringent antidegradation protection under the Clean Water Act. *Id.* at 150–52, *citing* 40 C.F.R. § 131.12(a)(3).

130. *Decision 1631*, at 149.

131. *Id.* at 156. *See supra* note 124.

132. *Decision 1631*. From 1974 to 1989, the DWP diverted an average of 83,000 acre-feet per year from the Mono Basin. *Id.* at 6.

133. *Id.* at 157.

134. *Id.*

135. *Id.* Prescribed tributary flows must be satisfied prior to any diversions, however. *Id.*

136. *Id.*

137. *Id.* at 158. The board noted the inherent limitations of computer modeling, however, and acknowledged that an extended series of dry years could require adjustment to the diversion criteria. *Id.* at 159.

138. *Id.* at 164.

139. *Id.* at 164. After the 6,391 foot level is reached, about 43,700 acre-feet of water will remain in the Mono Basin that would otherwise have been diverted, about 8,500 for non-fishery public trust resource protection, the remainder for fish flows. *Id.*

conservation, water reclamation and recycling, and other sources.[140] Annual costs of replacement water and lost revenues from foregone hydropower were estimated at $36.3 million over the next twenty years, and $23.5 million after the lake reaches its prescribed lake level.[141] About eighty percent of the long-term costs will be due to fishery flows.[142] The water board did not consider these economic costs to make infeasible protection of public trust resources.[143] Likewise, the board considered non-economic adverse impacts associated with rising lake levels and fishery flows, including loss of sand tufa formations, submergence of certain wetlands, and reduced flows in the upper Owens River to be overridden by restoration of public trust resources.[144]

The water board concluded that its 1994 decision satisfied the *Mono Lake* decision's directive to take "a new and objective look at the water resources of the Mono Basin" and asserted that it had fulfilled the court's mandate to protect public trust resources "where feasible."[145] Evidently, the board had in fact done so, for, remarkably, no suit challenged the board's decision.

V. THE PROGENY

The *Mono Lake* decision's effects have not been confined to the Mono Basin. Its most prominent progeny was a ruling of the California Court of Appeals which helped to revolutionize water flows in the Sacramento-San Joaquin Delta. But the application of the public trust doctrine to water rights has not been confined to California. Its effects have been most evident in Idaho, although courts in North Dakota and Washington have also applied public trust principles in water-rights cases.[146] Courts in Montana and Alaska and the Oregon legislature have also recognized the public trust in water,[147] although no cases in those states have applied the doctrine to water rights. And recent adoptions of the public trust in submerged lands in Utah and Arizona may signal that those states will soon recognize the public trust in water.[148]

A. California: Implementing the Mono Lake Doctrine

The Supreme Court of California has not considered the application of the public trust to water since its *Mono Lake* decision, but the California Court of Appeals has handed down two notable decisions, and at least one trial court has employed public trust principles to affect water rights.[149] A dozen years after the Supreme Court's decision, the trust doctrine seems to be an entrenched feature of California water law, working substantial changes to water flows not

140. *Id.* at 165–70. For criticism that the board inflated the cost of replacement water by simply adopting the DWP's predictions about the amount of water it would need, see Koehler, *supra* note 79.
141. *Decision 1631*, at 180.
142. *Id.*
143. *Id.* at 178. On the feasibility standard, see *supra* notes 75–83 and accompanying text.
144. *Decision 1631*, at 180–86.
145. *Id.* at 196, *citing Mono Lake*, 658 P.2d at 732.
146. *See infra* notes 207–24 (Idaho), 201–06 (North Dakota), 225–43 (Washington).
147. *See infra* notes 244–48 (Montana), 252–55 (Alaska), 256–58 (Oregon).
148. *See infra* notes 260–65 (Utah), 266–71 (Arizona).
149. *See infra* notes 151–96 and accompanying text.

only in the Mono Lake Basin but also in Sacramento-San Joaquin Delta and the American River.[150]

1. The Delta Water Decision

The hub of California's massive water transport system, the Sacramento-San Joaquin Delta is also one of the nation's most important estuaries for fish and wildlife production.[151] In a 1986 case called perhaps "the single most important water resources decision in the history of California" by a leading commentator,[152] the Court of Appeals upheld the state water board's authority to modify the water rights issued to the state's two large water transport projects, the federal Central Valley Project[153] and the State Water Project.[154] In 1978, the water board set new water quality standards for salinity control and fish and wildlife protection in the Delta and modified the projects' water permits accordingly.[155] The Bureau of Reclamation and a variety of other water users challenged the board's authority to require increased water releases to the Delta and, consequently, reduced water exports.

The trial court upheld the board's authority to impose new water quality standards but rejected the standards because the board failed to make factual findings supporting its decision.[156] The Court of Appeals affirmed the board's authority to set water quality standards that would impair existing water rights, relying in important part on the public trust doctrine.[157] But the appeals court reversed the water board's standards because they were based only on what could be achieved by changing the operation of the two large water transfer projects, rather than on what could be achieved by all water users affecting water quality in the Delta.[158]

The *Delta Water* case effectively married the California Constitution's doctrine of reasonable beneficial use to the public trust doctrine. According to the court, "water rights are limited and uncertain...no water rights are inviolable; all water rights are subject to governmental regulation...no one has

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150. *See infra* notes 151–90 and accompanying text.

151. Over 40% of California's total annual runoff passes through the Delta. The Delta consists of 738,000 acres, 48,000 of which are surface waterways. Users divert up to two-thirds of the Delta's natural inflow in an average year. *The End of California Water Policy Gridlock*, THE BAY WATCHER (Save San Francisco Bay Association, Oakland, Cal.), Jan. 1994, at 5.

152. Gray, *supra* note 28, at 267.

153. The Central Valley Project, the largest water appropriator in the state, is a system of reservoirs and water distribution facilities operated by the U.S. Bureau of Reclamation with a water supply capacity of about 9.45 million acre-feet per year, 98% of which goes to agricultural uses. *See* Gray, *supra* note 28, at 250 n.3.

154. The State Water Project, the second largest water appropriator in the state, is operated by the California Department of Water Resources with a supply capacity of 2.3 million acre-feet per year. *See* Gray, *supra* note 28, at 250 n.4.

155. *See* United States v. State Water Resources Control Bd., 227 Cal. Rptr. 161, 165–66 (Cal. Ct. App. 1986) [hereinafter *Delta Water*].

156. *See id.* at 175, 177, 200–01.

157. *See id.* at 171, 201. For a thorough discussion of the case, see Ronald B. Robie, *The Delta Water Decisions: The Quiet Revolution in California Water Rights*, 19 PAC. L.J. 1111 (1988).

158. 227 Cal. Rptr. at 180–81. The court ruled that "[the board's] approach...was seriously flawed by equating its water quality planning function with [the] protection of existing water rights." *Id.* at 179.

a vested right to use water in a matter harmful to the state's waters."[159] Thus, the water board had the authority to modify the permits issued to the water projects on grounds that their use and diversion had become unreasonable.[160] According to the court, the board retained authority to "alter the historic rule of 'first in time, first in right' by imposing permit conditions which give a higher priority to more preferred beneficial use even though later in time."[161] The public trust doctrine was the justification for board's setting of water quality standards for nonconsumptive, instream uses and authorized continuous state supervision over appropriators to protect fish and also wildlife.[162] The water board's obligation was "not to protect water rights but to provide reasonable protection of beneficial uses.'"[163]

The *Delta Water* court thus freed the state water board from the water allocation decisions of the past. While echoing the *Mono Lake* court's call for an accommodation between water transports and instream protection,[164] the Court of Appeals made clear that water diverters had no reasonable expectation of a certain quantity of water.[165] The union of the appropriation system and the public trust doctrine meant that the property right in water was correlative, a function of changing circumstances and social values;[166] water diverters have no right to a fixed quantity of water, only a reasonable beneficial use that accommodates trust uses where feasible.

Delta Water also began to answer one of the questions left open by *Mono Lake*: how to apportion the burden of accommodating trust uses. The court clearly rejected the option of imposing the burden exclusively on junior appropriators in favor of spreading the burden among all appropriators.[167] In effect, the court eschewed the temporal priority of prior appropriation for an apparently fairer system of accommodation, which resembles a kind of equitable apportionment.[168]

In May of 1991, five years after the Court of Appeals decision, the water board promulgated water quality standards as part of its water quality control plan for salinity in the Delta estuary.[169] However, the U.S. Environmental Protection Agency rejected several of the criteria in the plan under its Clean Water Act authority.[170] A year later, the board issued a draft water rights decision that would have changed operations of the Central Valley and State Water Projects to benefit fish while reducing water exports by .8 million acre-

159. *Id.* at 170–71.
160. *Id.* at 187.
161. *Id.* at 189.
162. *Id.* at 201.
163. *Id.* at 197.
164. *Id. Cf.* note 48 and accompanying text.
165. 227 Cal. Rptr. at 199.
166. *Id.* at 187: "[W]hat is a reasonable use of water depends on the circumstances of each case...." (*citing* Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist., 161 Cal. Rptr. 466, 471 (Cal. 1980)). *See also supra* note 41 and accompanying text.
167. *See supra* note 158 and accompanying text.
168. *See* 4 WATER AND WATER RIGHTS, *supra* note 4, § 33.02, at 105.
169. California State Water Resources Control Board, Water Right Order 91–15: Water Quality Control Plan for Salinity for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (May 1991).
170. Under § 303(c)(4) of the Clean Water Act, 33 U.S.C. § 1313(c)(4) (1988), the EPA may promulgate federal water quality standards after disapproving state standards or whenever a revised or new standard is necessary to meet the requirements of the Act.

feet to 1.9 million acre-feet per year, depending on hydrologic conditions.[171] Although the governor ordered the board to rescind the draft decision,[172] it helped form the basis of a draft rule of the U.S. Environmental Protection Agency which would have set federal water quality standards for the estuary.[173] The draft federal rule would have required between .75 million acre-feet and 1.8 million acre-feet of additional water for instream uses.[174]

After protracted negotiations, in December 1994, the federal and state governments agreed that (1) EPA would promulgate final water quality standards; (2) the state would revise its water quality plan and launch water rights proceedings to allocate responsibility for meeting the new standards in 1995; and (3) if EPA determines that the state plan meets the requirements of the Clean Water Act, it will withdraw the federal standards.[175] The final federal rule required less water than the draft rule would, an estimated .4 to 1.1 million acre-feet of additional water for instream uses.[176] The rule emphasized project operational changes and limits on water exports that vary by month in order to reduce the amount of total water dedicated instream.[177] In addition, water users agreed to contribute ten million dollars a year for three years to pay for the cost of screening pumps and other operational changes to protect fish.[178] To gain the state's support for the rule, the federal government agreed to avoid new Endangered Species Act listings, to not promulgate critical habitat for the delta smelt, and promised that any additional water for fish and wildlife would be purchased, not required by regulation.[179]

2. The American River Decision

The public trust doctrine also influenced the trial court in the *American River* case, an unreported, unappealed decision of the Alameda County Superior Court which imposed limitations on a planned diversion from the American River by the East Bay Municipal Utility District ("MUD").[180] Environmental groups and Sacramento County filed suit challenging the 150,000 acre-foot diversion, claiming it would diminish flows on the lower American River, harming instream uses.[181] Unlike *Mono Lake* or *Delta Water*, both of which involved existing water diversions, the *American River* case concerned the application of the public trust doctrine to a new diversion.

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171. California State Water Resources Control Board, *Draft Water Right Decision 1630: San Francisco Bay/Sacramento-San Joaquin Delta Estuary* 85 (Dec. 1992).

172. *See* Gray, *supra* note 28, at 251 n.12 (*citing* letter from Gov. Pete Wilson to John Caffrey, Acting Chair of the California State Water Resources Control Board, *reprinted in* 3 CAL. WATER L. & POL'Y REP. 152 (1993)).

173. Gray, *supra* note 28, at 251.

174. *Federal Agencies Propose Water Rules to Protect San Francisco Bay Estuary*, 24 ENVTL. L. RPTR. 1547 (1993).

175. *See* 60 Fed. Reg. 4664 (1995).

176. *Water Resources/Water Quality*, WESTERN STATES WATER, Dec. 30, 1994, at 1, 2.

177. *Id.*; John H. Cushman, Jr., *U.S. and California Sign Water Accord*, N.Y. TIMES, Dec. 16, 1994, at A24.

178. *Water Resources/Water Quality, supra* note 176, at 2.

179. *Water Resources/Water Quality, supra* note 176, at 2.

180. Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist., No. 425955 (Alameda County Super. Ct., Jan. 2, 1990).

181. The history of the litigation, which includes two California Supreme Court decisions, is detailed in Stuart L. Somach, *The American River Decision: Balancing Instream Protections*

In its January 1990 decision, the court employed the trust doctrine to impose a "physical solution" which the court construed to mean avoiding waste of water while at the same time not unreasonably and adversely affecting vested property rights.[182] The court interpreted the *Mono Lake* court's feasibility doctrine[183] to require accommodation of both public trust and diversionary uses where possible.[184] Therefore, it refused to ban the East Bay MUD's diversion and instead imposed a series of instream flow requirements overseen by a special master appointed by the court.[185]

The *American River* case confirms that the public trust doctrine authorizes the state to amend water rights as necessary to ensure that public trust uses are reasonably protected. The court stated that the public trust "occupies an exalted position in any judicial or administrative determination of water resource allocation."[186] The court noted that the state's "reasonable beneficial use" doctrine implicitly required balancing, but that the public trust doctrine required more: "Having determined the fullest beneficial use of water, the court must still be cautious to avoid needless harm to public trust values. And if the harm to those values becomes significant, then the fullest beneficial use of water may be precluded as a violation of the public trust."[187] Thus, where public trust and diversionary uses cannot both be accommodated, the court ruled that the former have priority.

In a larger sense, the *American River* case provides a lesson in how to obtain the ecological information necessary to fashion the requisite accommodation between diversionary and trust uses. The court ordered all parties to cooperate on the development and implementation of scientific studies overseen by the court's special master and a scientific advisory committee.[188] These studies have produced some surprising results, focusing attention away from simple empirical relationships between river flows and fish populations and toward the effects of flow fluctuations on salmon smoltification and invertebrate fauna on which salmon smolt feed.[189] According to Professor Sax, this search for the best scientific data available is an essential prerequisite to fulfilling the accommodation principle central to the modern public trust doctrine:

> what the public trust really demands...[is] an ecological perspective on the resource. One needs to begin to see rivers differently, to recognize that it is not just a matter of adjusting flows or counting numbers in a population.

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with Other Competing Beneficial Uses, 1 RIVERS 251, 255–57 (1990); *see also* Jan S. Stevens, *The Public Trust and In-Stream Uses*, 19 ENVTL. L. 605, 614–20 (1989).

182. *See* Somach, *supra* note 181, at 258. *See generally* Harrison C. Dunning, *The "Physical Solution" in Western Water Law*, 57 U. COLO. L. REV. 445 (1986).

183. *See supra* notes 75–82 and accompanying text.

184. *See* Somach, *supra* note 181, at 258.

185. *See* Somach, *supra* note 181, at 259–60. These flows were approximately double the flows previously required by the state water board. *See* Joseph L. Sax, *Bringing an Ecological Perspective to Natural Resources Law: Fulfilling the Promise of the Public Trust Doctrine, in* NATURAL RESOURCES POLICY AND LAW 148, 155 (Lawrence J. MacDonnell & Sarah F. Bates eds., 1993) [hereinafter Sax, *Ecological Perspective*].

186. Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist., No. 425955, slip op. at 30 (Alameda County Super. Ct., Jan. 2, 1990).

187. *Id.*

188. *See* Sax, *Ecological Perspective*, *supra* note 185, at 155–56.

189. *See* Sax, *Ecological Perspective*, *supra* note 185, at 158–59.

...

> Accommodating both use and natural functions means movement toward elaborate and highly technical managerial regimes. In places like the American River, and other nonwilderness settings, the issue is not "leaving things alone," either in the pure preservationist sense or in any economic laissez faire sense. Using Bill McKibben's metaphor of "the end of nature," one might say that the places where resource-environment controversies are focused are no longer natural places that simply need to be left to their own devices. They are highly manipulated places which, if any natural processes or natural features are to be maintained or restored, call for sophisticated ecological knowledge and sophisticated management.[190]

3. The Concow Reservoir Case

The Court of Appeals imposed some limits on the geographical scope of the public trust doctrine in *Golden Feather Community Ass'n v. Thermalito Irrigation Dist.*,[191] a case involving operations at Concow Dam and Reservoir. The plaintiffs sought to employ the public trust doctrine to require the owners of the dam to maintain reservoir levels for fishing and recreational activities, but the court refused to apply the public trust to an artificial body of water which was stipulated to be a nonnavigable water.[192] The court concluded that the public trust could not force the irrigation districts owning the dam to continue their diversions that fed the reservoir but cease their use of water in order to maintain the water level.[193]

The court ruled that the scope of the trust doctrine is linked to navigability, since the basis of the doctrine is access to and use of navigable waters.[194] Moreover, the court concluded that nonnavigable artificial waters are not subject to the trust because the public could claim no common rights to the reservoir which predated the dam owners' title.[195] Although there is some reason to question the precedential value of this case, since it is quite likely that the reservoir—as well as most other reservoirs—was in fact a navigable water under California law,[196] the decision does indicate that waters which have no effect on navigable waters will not be subject to the public trust doctrine in California.

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190. *See* Sax, *Ecological Perspective*, *supra* note 185, at 158–59.

191. 257 Cal. Rptr. 836 (Cal. Ct. App. 1989).

192. *Id.* at 841–42.

193. *Id.* at 840–43.

194. *Id.* at 841: "There is substantial reason to conclude that the public trust doctrine does not extend to nonnavigable streams to the extent they do not affect navigable waters."

195. *Id.* at 842: "The people had no common rights of navigation and fishery in the Concow reservoir which predated defendants' title (or that of their predecessors in interest) since the reservoir itself did not predate that title."

196. Plaintiffs stipulated that the reservoir was nonnavigable, although it was probably navigable: after publication of the original opinion, the Attorney General's Office and the State Water Resources Control Board wrote the court that it was likely that the reservoir was navigable because "a waterway need only be usable for pleasure boating to be considered navigable for purposes of the public trust doctrine." *Id.* at 839 n.2 (citation omitted).

4. State Water Board Decisions

Under *Mono Lake*, the state water board shares concurrent jurisdiction over public trust issues.[197] Moreover, the board has an affirmative fiduciary duty to consider public trust values "and to preserve, so far as consistent with the public interest, the uses protected by the trust."[198] A complete account of the effect of the *Mono Lake* doctrine in California therefore would require an investigation of state water board decisions;[199] such an investigation has been conducted by Gregory Weber in a study to be published roughly contemporaneously with this article.[200]

B. North Dakota: The Trust as a Water Planning Requirement

Although California has the most highly developed public trust doctrine, it was not the first state to apply the doctrine to water diversions. Nearly a decade before the *Mono Lake* decision, the North Dakota Supreme Court interpreted constitutional and statutory declarations of the public nature of North Dakota streams to impose on the state a public trust duty to evaluate the short- and long-term environmental and socioeconomic effects of major water diversions.[201] Thus, in *United Plainsmen Ass'n v. North Dakota State Water Conservation Commission*, the court ruled that the trust doctrine prevented the state from granting water rights to coal plants in the absence of comprehensive planning.[202]

Because the North Dakota Supreme Court saw the public trust doctrine as a vehicle to impose environmental planning responsibilities on the state to evaluate the effects of major water diversions,[203] *United Plainsmen* is the forerunner of the *Mono Lake* court's recognition of the state's continuous supervisory duty.[204] However, since no North Dakota case has applied the public trust doctrine to existing water rights, the reach of the North Dakota doctrine may be prospective only. Moreover, there seems to be no recognition in the state for instream flows.[205] Thus, the public trust in North Dakota looks very much like a common law National Environmental Policy Act, requiring

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197. National Audubon Soc'y v. Superior Court (*Mono Lake*), 658 P.2d 709, 729–32 (Cal.), *cert. denied*, 464 U.S. 977 (1983).

198. *Id.* at 728.

199. For a sampling of some water board decisions, see Gregory S. Weber, *The Role of Environmental Law in the California Water Allocation and Use System: An Overview*, 25 PAC. L.J. 907, 924 n.104 (1994).

200. *See* Gregory S. Weber, *Articulating the Public Trust: Text, Near-Text, Context*, 27 ARIZ. ST. L.J. (forthcoming 1995).

201. United Plainsmen Ass'n v. North Dakota Water Conservation Comm'n, 247 N.W.2d 457, 463 (N.D. 1976).

202. *Id.* at 463–64. *See* 4 WATER AND WATER RIGHTS, *supra* note 4, § 33.02, at 102–03; Don Negaard, Note, *The Public Trust Doctrine in North Dakota*, 54 N.D. L. REV. 565 (1978).

203. *See* 247 N.W.2d at 462:

> The Public Trust Doctrine requires, at a minimum, a determination of the potential effect of the allocation of water on the present water supply and future water needs of this State. This necessarily involves planning responsibility. The development and implementation of some short- and long-term planning capability is essential....

204. *See supra* notes 74–83 and accompanying text.

205. *See* 6 WATER AND WATER RIGHTS, *supra* note 4, at 558 (Supp. 1994).

evidence of rational decisionmaking but not any particular substantive results.[206]

C. Idaho: Eliminating the Trust from Basin Adjudications?

The *Mono Lake* decision's most prominent progeny can be found, somewhat surprisingly, in Idaho.[207] Within six months of the final *Mono Lake* opinion, the Idaho Supreme Court, in *Kootenai Environmental Alliance v. Panhandle Yacht Club*, applied the public trust doctrine to a state lease of five acres of submerged lands in Lake Coeur d'Alene for a sailboat marina.[208] Like the *Mono Lake* court, the *Kootenai* court interpreted the trust doctrine to require the state to do a comprehensive environmental review of proposed development affecting public trust uses.[209] Relying expressly on *Mono Lake*, the court adopted what it called "the California rule," while noting that "[t]he public trust doctrine takes precedent even over vested water rights."[210]

Two years later, the Idaho Supreme Court applied the public trust doctrine to a water right application in *Shokal v. Dunn*.[211] Interpreting the meaning of "local public interest" under a new Idaho statute governing issuance of new water rights, the court concluded that this criterion is part of the "larger

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206. *Cf. supra* notes 77–78 and accompanying text (analogizing the public trust doctrine and CEQA). A subsequent North Dakota case applied the public trust doctrine to the issuance of permits to drain wetlands and found that the doctrine was satisfied by an administrative record that: (1) analyzed the effect of the permits on the wetlands; (2) included protection for some wetlands and mitigation measures for others; and (3) subjected the drainage project to future regulation where necessary to protect the public interest. *In re* Stone Creek Channel Improvements, 424 N.W.2d 894, 902–03 (N.D. 1988).

207. *See generally* Scott W. Reed, *The Public Trust Doctrine in Idaho*, 19 ENVTL. L. 655 (1989). The epigraph to Reed's article quotes Professor Joseph Sax, the academic godfather of the modern public trust doctrine, *see* Sax, *supra* note 91, as saying, "I did not think Idaho would be one of the first states to adopt the public trust doctrine." *Id.* at 655.

208. Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085 (Idaho 1983). The *Kootenai* Decision was foreshadowed by Southern Idaho Fish & Game Ass'n v. Picabo Livestock, Inc., 528 P.2d 1295, 1296–98 (Idaho 1974), where the Idaho Supreme Court affirmed a trial court ruling refusing to allow a rancher to exclude fishermen from a trout stream, relying on constitutional and statutory provisions declaring water to be owned by the state and concluding that the public had an easement for recreational purposes over navigable waters in the state.

209. The *Kootenai* court wrote:

> In making such a determination the Court will examine, among other things, such factors as the degree of effect of the project on public trust uses, navigation, fishing, recreation and commerce; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with the existing impediments to full use of the public trust resource, i.e., in this instance the proportion of the lake taken up by the docks, mooring or other impediments; the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited, i.e., commerce, navigation, fishing or recreation; and the degree to which the broad public uses are set aside in favor of the more limited or private ones.

Kootenai Envtl. Alliance, 671 P.2d at 1092–93.

210. *Id.* at 1094. The court added,

> [g]rants, even if purporting to be in fee simple, are given subject to the trust and to action by the state necessary to fulfill its trust responsibilities. Grants to individuals of public trust resources will be construed as given subject to the public trust doctrine unless the legislature explicitly provides otherwise.

Id.

211. 707 P.2d 441 (Idaho 1985). *See* Reed, *supra* note 207, at 661–65, for a detailed discussion of the background of the *Shokal* case.

doctrine" of the public trust, as articulated in *Kootenai*.[212] Unlike the California Supreme Court's emphasis on the common law origins of the trust,[213] the Idaho court drew on state statutes, including the state's minimum streamflow law, to support its conclusion that "any grant to use the state's water is 'subject to the trust and to action by the State necessary to fulfill its trust responsibilities.'"[214] These responsibilities, according to the Idaho Supreme Court, include "property values, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality."[215] The Idaho court concluded that the role of the judiciary is to "take a close look" at water rights decisions and "not act merely as a rubber stamp for agency or legislative action."[216] Although *Shokal* involved a new water right application, the language in *Kootenai* indicated that the trust doctrine in Idaho also burdens existing water rights.[217]

In a perplexing recent decision, the Idaho Supreme Court limited the utility of the public trust doctrine by ruling that the doctrine did not apply in a water rights adjudication.[218] In *Idaho Conservation League v. State of Idaho*, conservation groups appealed a district court's decision disclaiming jurisdiction to consider the public trust doctrine in the Snake River adjudication because it was not a water right defined in the Idaho Code.[219] The Supreme Court agreed with the district court, concluding—over two strong dissents—that "[t]he public trust doctrine does not create an element of a water right to be determined by the adjudication," and asserting that *Shokal v. Dunn* did not actually apply the public trust doctrine to a water appropriation.[220]

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212. 707 P.2d at 447 n.2.

213. *See supra* notes 88–92 and accompanying text.

214. 707 P.2d at 447 n.2. The court relied on statutory provisions concerning the "local public interest" (IDAHO CODE § 42–203A (Supp. 1995)) and minimum flows (IDAHO CODE § 42–1501 (1990)), and also referred to state policies of encouraging conserving, discouraging waste, and meeting water quality standards. *Id.* at 448–52.

215. 707 P.2d at 447 n.2 (relying on *Kootenai Envtl. Alliance*, 671 P.2d at 1095, but adding "property values" to the list of trust responsibilities).

216. 707 P.2d at 447 n.2 (relying on *Kootenai Envtl. Alliance*, 671 P.2d at 1092). For elaboration on the public trust doctrine as the "hard look" doctrine, see Blumm, *supra* note 84, at 589–94.

217. *See supra* text accompanying note 210.

218. Idaho Conservation League, Inc. v. State of Idaho, No. 21144, 1994 WL 330626 (Idaho July 8, 1994).

219. *See id.* at *2.

220. *Id.* at *3. The court stated that: "[T]he public trust doctrine has never been expanded in scope in...Idaho beyond its pre-constitution application to the beds of navigable waters below the natural high water mark. It has never been applied in the context of water appropriation by case law or statute." *Id.* at *3. The court noted that Article XV of the Idaho Constitution is the bedrock of Idaho water law, and that the Idaho Water Code stems from Article XV. The court concluded that the legislature in the Water Code did not extend "the application of the common law public trust doctrine to the context of water appropriation." *Id.*

The crucial third vote for the majority was provided by a state district court judge sitting *pro tempore*, as one of the members of the court was absent. 27 WATER L. NEWSL. No. 2 (Rocky Mt. Min. L. Found., 1994) at 1–2. Both dissenters would have applied the public trust doctrine to the Snake River adjudication. Justice Bistline rejected the majority's ruling that the public trust doctrine did not apply until some time after the adjudication because the doctrine represents an "ongoing easement" for the public that dates to statehood; he also challenged the majority's conclusion that *Shokal* did not apply the public trust doctrine to water rights, explaining his own concurrence in that case. Idaho Conservation League, Inc. v. State of Idaho, No. 21144, 1994 WL 330626, at *8–9 (Idaho July 8, 1994) (Bistline, J., dissenting). Justice Johnson examined several cases, including *Shokal*, which, he concluded, "provide irrefutable authority that this Court has applied the public trust doctrine in the context of water appropriation." *Id.* at *12 (Johnson, J., dissenting).

The Idaho Supreme Court did not expressly discard the doctrine, however. It merely held that the conservation groups' claim was not "ripe," concluding that "[t]he public trust doctrine is not implicated until an appropriated right is being exercised."[221] The court assured the conservation groups that they could "assert a public trust doctrine claim in the proper forum at the proper time."[222] The confusing result is that the public trust apparently may be asserted against an individual water right but not in a comprehensive adjudication determining water rights throughout a river system. Thus, the public trust doctrine in Idaho may be reduced to a defensive measure, unable to prospectively protect instream uses when water rights are adjudicated basinwide.

The Idaho Supreme Court's conclusion that public trust considerations are not ripe in a basinwide adjudication has no conceptual foundation, for as one of the dissents pointed out, the doctrine's origins are Idaho's statehood,[223] long before most of the appropriation rights being determined in the Snake River adjudication. If public trust considerations can be deferred until after appropriation rights are adjudicated, Idaho will have relegated the public trust to a second class status, inconsistent with the temporal priority that is the hallmark of the prior appropriation doctrine. The court has an opportunity to clarify this issue, as it recently accepted hearing in the case.[224]

D. Washington: Confining the Trust's Scope to Navigable Waters?

Washington has a longstanding public trust jurisprudence,[225] but the Washington Supreme Court recently refused to extend the scope of the public trust doctrine beyond navigable waters. In *Rettkowski v. Department of Ecology*, the Department of Ecology (Ecology) issued cease and desist orders prohibiting irrigators from making additional groundwater appropriations that were having a progressively harmful effect on the flow of Sinking Creek, an aptly named nonnavigable creek used to water cattle.[226] The court held that Ecology lacked the statutory authority under the state's water code to conduct an extrajudicial adjudication of water rights.[227] Since the water code

221. Idaho Conservation League, Inc. v. State of Idaho, No. 21144, 1994 WL 330626, at *4 (Idaho July 8, 1994).

222. *Id.*

223. *Id.* at *10 (Bistline, J., dissenting).

224. Idaho Conservation League, Inc. v. State of Idaho, No. 21144 (Idaho Jan. 9, 1995) (*rehearing granted*).

225. The history of the public trust doctrine in Washington dates to the early years of this century. *See* F. Lorraine Bodi, *The Public Trust Doctrine in Washington*, 19 ENVTL. L. 645, 646 (1989). *See generally* Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521 (1992). The leading recent cases are Caminiti v. Boyle, 732 P.2d 989, 994–97 (Wash. 1987) (public trust doctrine "always existed" in Washington, but state law authorizing shoreline owners to construct docks not inconsistent with public trust because state relinquished "relatively little control" and docks did not substantially become public uses), *cert. denied*, 484 U.S. 1008 (1988); Orion Corp. v. Washington, 747 P.2d 1062, 1073 (Wash. 1987) (state denial of tidelands fills not a constitutional taking due to public trust doctrine), *cert. denied*, 486 U.S. 1022 (1988).

226. Rettkowski v. State, 858 P.2d 232, 236 (Wash. 1993).

227. *Id.* at 237.

specifically granted authority to adjudicate water rights to superior courts, the court concluded that the agency's orders were *ultra vires*.[228]

The court declined to employ the public trust doctrine as authority for nonstatutory regulation of water by the state agency, although it acknowledged that the public trust extends to waters,[229] noted that the doctrine has always existed in the state,[230] and observed that it was "partially encapsulated" in the state's constitution.[231] The court found three impediments to its use in the Sinking Creek dispute. First, the court could find no previous Washington cases extending the geographic scope of the doctrine to include nonnavigable streams or groundwater.[232] Second, the court complained that Ecology had no statutory authority to assume the state's public trust responsibilities.[233] Third, the court reasoned that even if the doctrine created an affirmative duty for Ecology to protect and preserve the state's waters, it supplied no guidance as to how Ecology is to protect those waters.[234] Because such direction is found only in the water code—which the court determined did not authorize Ecology to establish and prioritize water rights without a judicial adjudication—the public trust doctrine could not justify Ecology's cease and desist orders.[235]

Two dissenting justices concluded the trust doctrine authorized Ecology's regulatory actions and argued that the doctrine should not be restricted to navigable waters.[236] The dissent contended that the "navigability requirement is not inherent in the doctrine and should be abandoned."[237] Quoting from the Supreme Court's decision in *Phillips Petroleum Co. v. Mississippi*, where the Court ruled that the geographic scope of the public trust was not limited to navigable waters but could include waters subject to the ebb and flow of the tide, the dissent concluded:

> '[T]he States have interests in lands beneath tidal waters which have nothing to do with navigation.' These interests include 'bathing, swimming, recreation, fishing and mineral development.' The Court stated that [i]t would be odd to acknowledge such diverse uses of public

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228. *Id.* at 237, 240, *citing* R.I.W. § 90.03. The court framed the issue as "Ecology's specific ability to establish and prioritize water rights unilaterally, without a general adjudication, to the detriment of other water users." *Id.* at 239.

229. *Id.* at 239: "The doctrine prohibits the State from disposing of its interests in the waters of the state in such a way that the public's right of access is substantially impaired, unless the action promotes the overall interests of the public."

230. *Id.*, *citing* Caminiti v. Bayle, 732 P.2d 989 (Wash. 1987), *cert. denied*, 484 U.S. 1008 (1988).

231. *Id.* at 239, *citing* WASH. CONST. art. 17, § 1 (state asserts ownership to "the beds and shores of all navigable waters").

232. *Id.* at 239. The court claimed that it was not deciding the scope of the public trust doctrine in the *Rettkowski* case. *Id.* at n.5.

233. *Id.*

234. *Id. See* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 710 (1986) ("the public trust doctrine provides no ready framework for the assignment of lawmaking authority").

235. Rettkowski v. State, 858 P.2d 232, 239–40 (Wash. 1993). The court noted the importance of judicial involvement because of the complicated nature of inquiry into whether particular water rights are in fact vested rights. *Id.* at 237.

236. The dissent cited several state court decisions, including *Mono Lake*, which "have recognized the erosion of navigability and commercial interests as requirements for application of the public trust doctrine." *Id.* at 243–44 (Guy, J., dissenting).

237. *Id.* at 243.

> trust tidelands, and then suggest that the sole measure of the expanse of such lands is the navigability of the waters over them.[238]

Observing that in some jurisdictions "navigability" can simply mean that a boat can float on the waterway,[239] Justice Guy argued that restricting the doctrine to navigability was artificial, concluding that, "the public trust doctrine requires the protection and perpetuation of natural resources."[240] Nevertheless, these arguments failed to convince the majority that the public trust doctrine authorized the Department of Ecology to conduct a nonstatutory adjudication of water rights.[241] Because the majority disclaimed any intent to establish the scope of the trust doctrine,[242] it may still be possible for subsequent Washington cases to move beyond the confines of navigable waters, or at least embrace the *Mono Lake* court's scope of all waters affecting navigable waters.[243]

E. Montana, Alaska, and Oregon: Other Western States Recognizing the Public Trust in Water

At least three other Western states have recognized that the public trust doctrine applies to water as well as submerged lands. These states have not yet examined the effect of the doctrine on appropriation law, however. Thus it remains unclear how many of the six elements of the *Mono Lake* doctrine these states will adopt.

Montana is a promising state for applying the public trust to water diversions, because the state has married the public trust doctrine with the Montana constitutional provision declaring "[a]ll surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."[244] In the *Montana Coalition for Stream Access* cases, the Montana Supreme Court extended the public trust doctrine to both navigable and nonnavigable waters, concluding that ownership of the submerged lands was not relevant to the scope of the public trust in water.[245]

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238. *Id.* at 243–44, *quoting* Phillips Petoleum Co. v. Mississippi, 484 U.S. 469, 476, 482 (1988).

239. *See, e.g., supra* note 196.

240. Justice Guy quoted from Joseph L. Sax, *Liberating the Public Trust Doctrine From Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 188–89 (1980):

> "The central idea of the public trust is preventing the destabilizing disappointment of expectations held in common but without formal recognition such as title." In other words the public trust doctrine requires the protection and perpetuation of natural resources. This functions to prevent social crises that otherwise would arise due to the sudden depletion of those natural resources necessary for the stable functioning of society. In short, at its most basic level, the scope of the public trust doctrine is defined by the public's needs in those natural resources necessary for social stability.

Rettkowski v. State, 858 P.2d 232, 244 (Wash. 1993).

241. The court noted that "[t]he resolution of this case turns on a fundamental rule of administrative law—an agency may do only that which it is authorized to do by the Legislature." *Id.* at 236. *See also supra* notes 228, 233 and accompanying text.

242. *See supra* note 232. Part of the reason for the confusion over whether the court was or was not fixing the scope of the public trust doctrine was due to the fact that the public trust doctrine was a kind of eleventh hour argument in the case, not even raised by the state in its initial Supreme Court briefs. *See* 858 P.2d at 239.

243. *See supra* notes 33–36 and accompanying text.

244. MONT. CONST. art. IX, § 3(3).

245. Montana Coalition For Stream Access, Inc. v. Curran, 682 P.2d 163, 170 (Mont. 1984) ("the question is whether the waters owned by the State under the Constitution are

Thus, the public's right of access to all the streams in the state susceptible for recreational use could not be denied by private owners of submerged lands.[246] The public even has portage rights on private property where necessary to avoid waterway barriers, although it has no right to cross private property to obtain recreational access.[247] Like California, North Dakota and Idaho, the Montana public trust clearly applies to all of the state's waters. But no Montana court has interpreted the public trust to impose limits on new appropriations of water nor questioned whether private diversionary rights are vested in nature.[248]

Two Western states that have yet to explicitly embrace the public trust doctrine nevertheless recognize public rights in water very similar to the access right the public trust has produced in Montana. A half century ago, the New Mexico Supreme Court ruled that that state's constitutional declaration of the public nature of water gave the public fishing access to a nonnavigable water, despite the fact that the bed of the water was owned privately.[249] Similarly, more than thirty years ago, the Wyoming Supreme Court relied on the state's constitutional claim of public ownership of water to conclude that the public

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susceptible to recreational use by the public"); Montana Coalition for Stream Access, Inc. v. Hildreth, 684 P.2d 1088, 1092 (Mont. 1984) ("the question of title to the underlying bed is immaterial in determining navigability for recreational use of State-owned waters"). For discussions of these cases, see Deborah B. Schmidt, *The Public Trust Doctrine in Montana: Conflict at the Headwaters*, 19 ENVTL. L. 675 (1989); John E. Thorsen et al., *Forging New Rights in Montana's Waters*, 6 PUB. LAND L. REV. 1 (1985).

246. *Curran*, 682 P.2d at 170 ("The capability of use of the waters for recreational purposes determines their availability for recreational use by the public. Streambed ownership by a private party is irrelevant. If the waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people. The Constitution and the public trust doctrine do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters").

247. *Id.* at 172; *Hildreth*, 684 P.2d at 1094. Moreover, the state may not constitutionally authorize camping, big game hunting, and duck blind construction on privately-owned streambeds because the public right is "only such use as is necessary to utilization of the water itself." Galt v. Montana Dep't of Fish, Wildlife & Parks, 731 P.2d 912, 915 (Mont. 1987) (holding that the "use of the bed and banks must be of minimal impact").

248. In *Curran*, the court mentioned that a landowner had no right to exclude the public from use of a river, except for that part of the water appropriated for irrigation purposes. *Curran*, 682 P.2d at 170. One reason for the lack of recent development of Montana public trust law is the uncertainty created by the state's ongoing statewide adjudication of water rights. Until that process is complete, it will be difficult to reallocate water rights. Another reason is the Montana Supreme Court's decision in what is known as the "Bean Lake" case, where the court ruled that no appropriation rights existed for non-diversionary purposes prior to 1973. *In re* Adjudication of the Dearborn Drainage Area, 766 P.2d 228 (Mont. 1988).

Despite the lack of recent public trust law, the Montana Legislature has enacted several recent statutes that likely would be defended on public trust grounds if they were challenged. *See, e.g.*, MONT. CODE ANN. § 85-2-316 (1993) (authorizing federal and state agencies to reserve waters for instream purposes), *id.* § 85-2-311(3) (1993) (requiring public interest and environmental quality to be considered in water right applications greater than 5.5 cubic feet per second or 4,000 acre-feet). Also, in 1995, the Montana Legislature adopted a program authorizing leasing of water rights for instream flow purposes. *See* Steven Doherty, *"Whiskey is for Drinkin'!" 1995 Montana Water Legislation*, I BIG RIVER NEWS No. 4, at 5 (Northwest Water Law and Policy Project, Portland, OR 1995) (discussing HB 472). Information in this footnote was supplied in a letter from Steven R. Brown, an attorney with Garlington, Lohn & Robinson, Missoula, Montana, to the authors (May 3, 1995) (on file with the authors).

249. State *ex rel.* State Game Comm'r v. Red River Valley, 182 P.2d 421 (N.M. 1945). *See id.* at 428, where the court expressly rejected the idea that the state's ownership of water was merely a surrogate for allocating water under the prior appropriation doctrine.

had an easement to float on nonnavigable waters of that state.[250] These longstanding precedents recognizing the public's right to nondiversionary uses of water, regardless of the ownership of the underlying riverbeds, make New Mexico and Wyoming states that may recognize the public trust in water in the future.[251]

Alaska is another state with a public trust doctrine in water that has yet to apply the doctrine to restrain diversionary cases. The state's public trust is constitutionally grounded,[252] expressly extends to fish and wildlife as well as water,[253] and restricts private property owners from excluding public trust access.[254] However, no case has attempted to balance the public trust with another constitutional call for a prior appropriation system of water rights subject to a "general reservation of fish and wildlife."[255]

Oregon also likely has a public trust in water. The state has a long history of public trust protection of tide and submerged lands.[256] One pronouncement of the Oregon Supreme Court indicated a willingness to interpret a tidelands regulatory scheme to incorporate the public trust doctrine despite a lack of trust language in the state.[257] The Oregon Water Code, on the other hand, contains express public trust language.[258] It is quite conceivable that an Oregon court would conclude that these provisions reflected a longstanding public trust in water.

F. Utah and Arizona: Recent Converts to the Public Trust Doctrine

Other Western states have yet to consider the applicability of the public trust doctrine to water diversions. But two have recently recognized that the

250. Day v. Armstrong, 362 P.2d 137, 145 (Wyo. 1961) (noting that the state's title is "one of trust for the benefit of the people").

251. If they do adopt the public trust in water, New Mexico and Wyoming would follow the path charted by Idaho, which first recognized a public recreational easement before embracing the public trust doctrine some years later. *See supra* note 208.

252. Owsichek v. Alaska Guide Licensing & Control Bd., 763 P.2d 488, 494 (Alaska 1988) (construing the state's "common use" clause, ALASKA CONST. art. VIII, § 3—which declares that fish, wildlife and waters in their natural state are reserved to the people for common use—to codify the public trust doctrine).

253. *Id.*

254. CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1121 (Alaska 1988) (tidelands patentees cannot exclude members of the public from exercising public trust fishing rights). *See also* Hayes v. A.J. Assocs., Inc., 846 P.2d 131, 133 (Alaska 1993) (filled tidelands may remain subject to public trust requirements, but a private mining operation is not a public trust use).

255. ALASKA CONST. art. VIII, § 11.

256. The history of the public trust doctrine in Oregon, now over a century old, is traced in Michael B. Huston & Beverly Jane Ard, *The Public Trust Doctrine in Oregon*, 19 ENVTL. L. 623 (1989); *see also* Cheyenne Chapman, Comment, *Regulating Fills in Estuaries: The Public Trust Doctrine in Oregon*, 61 OR. L. REV. 523 (1982).

257. Morse v. Oregon Div. of State Lands, 590 P.2d 709, 714 (Or. 1979) (interpreting the public trust doctrine to require a finding of public need prior to issuance of fill permits under the state's fish and removal law). This language of the Oregon fill and removal statute at the time of the *Morse* case is reprinted in Huston & Ard, *supra* note 256, at 638–39 n.65. *See also* 1000 Friends of Oregon v. Div. of State Lands, 611 P.2d 1177 (Or. Ct. App. 1980) (reversing the issuance of a fill permit because of a lack of finding of public need for the fill).

258. OR. REV. STAT. § 537.332(2) (1987) (defining an instream water right as "held in trust by the Water Resources Department for the benefit of the people of Oregon to maintain water in-stream for public use"); *id.* § 537.334(2) (1987) (declaring that instream water rights "shall not diminish the public's rights in the ownership and control of the waters of this state or the public trust therein"); *id.* § 537.455(5)(f) (1987) (defining "public use" to include uses "protected by the public trust").

public trust doctrine governs the use of their submerged lands. In these states, it would require no great conceptual leap for a court to conclude that the doctrine applies no less to the overlying water than it does to the underlying land, especially given universal declaration of state ownership of water in Western state constitutions.[259]

Both Utah and Arizona have recently affirmed the public trust as burdening state lands beneath navigable waters, joining a more longstanding recognition in Oregon and Washington. In *Colman v. Utah State Land Board*,[260] the Utah Supreme Court recognized the doctrine in a case involving a lease of the bed of the Great Salt Lake, although it rejected the state's attempt to insulate itself from a constitutional compensation claim.[261] The court noted that a lakebed lease can be granted consistent with the trust if the state can do so without impairing the public interest. In addition, the court concluded that a lessee whose lease satisfied the trust doctrine could maintain a constitutional compensation claim against a state project damaging the lease.[262] Thus, in Utah, unlike California,[263] it seems to be possible to have vested private interests in trust resources.[264] Whether the trust doctrine in Utah extends beyond lands submerged beneath navigable waters to the water itself due to the state's declaration in its water code that "[a]ll waters in this state, whether above or under the ground are hereby declared to be the property of the public..."[265] remains uncertain.

Arizona also recently joined the ranks of Western public trust doctrine states, when the Arizona Court of Appeals concluded in *Arizona Center for Law in the Public Interest v. Hassell*, that the doctrine prohibited the state legislature from relinquishing the state's interest in lands submerged beneath the state's navigable rivers.[266] Relying on the Supreme Court's decision in *Illinois Central Railroad*, the Idaho Supreme Court's decision in *Kootenai*

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259. *See supra* note 97.

260. 795 P.2d 622 (Utah 1990).

261. The lakebed lease was for an underwater brine canal associated with a mining operation. After severe flooding of the Great Salt Lake in 1984, the Utah Legislature authorized breaching of the causeway traversing the lake to prevent further flood damage. Colman alleged that the breaching would further damage his canal. The state claimed that the public trust authorized revocation of the lease without compensation, and the trial judge agreed. *Id.* at 623–24, 635–36.

262. The court interpreted *Illinois Central Railroad* to authorize a state to grant private rights in navigable waters if it may do so without affecting the public interest in what remains and concluded that the state must be arguing that it originally acted without authority in granting the lease:

> The State has already exercised its power under the public trust in leasing the canal on the bed of the lake to Colman. Now, the State wishes to revoke that grant without compensation to Colman. The State maintains that it can do so since it holds the waters of the lake under the public trust. In taking such a position, the State essentially argues that it originally acted without authority in granting the lease to Colman.

Id. at 635.

263. *See supra* notes 59–73 and accompanying text.

264. *See* 795 P.2d at 636: "there is nothing to show that Colman's canal impaired the public interest in any way at the time the State granted him the right to conduct his operation."

265. UTAH CODE ANN. § 73-1-1 (1989).

266. 172 Ariz. 356, 837 P.2d 158 (Ariz. Ct. App. 1991).

Environmental Alliance, and the state constitution,[267] the court concluded that judicial review of legislative dispositions of trust resources was essential:

> Just as private trustees are judicially accountable to their beneficiaries for disposition of the *res*, so the legislative and executive branches are judicially accountable for their dispositions of the public trust. The beneficiaries of public trust are not just present generations but those to come. The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable *res*.[268]

Moreover, the court ruled that "any public trust dispensation must also satisfy the state's special obligation to maintain the trust for the use and enjoyment of present and future generations."[269] Consequently, since the legislature made no attempt to assess the value of the lands relinquished for public trust uses, the court invalidated the state's attempt at wholesale alienation.[270] *Hassel* constitutes perhaps the leading recent example of the public trust as a limit on legislative dispositions.[271]

VI. CONCLUSION

The public trust in water now extends to at least a half dozen Western states—California, North Dakota, Idaho, Washington, Montana, and Alaska—and probably to Oregon as well. New Mexico and Wyoming have longstanding public access rights to both navigable and nonnavigable waters which could ripen into recognition of the public trust in water.[272] Other Western states with recent interpretations of the trust doctrine, like Utah and Arizona, have yet to elevate the doctrine from submerged lands to the overlying waters. But none of these states has rejected that application.[273]

Only California has embraced all six basic tenets of the public trust in water, as articulated by the *Mono Lake* court: (1) enlarging the geographic

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267. *I.* at 366–69, 837 P.2d at 168–71, citing *Illinois Central Railroad*, 146 U.S. at 453; *Kootenai Envtl. Alliance*, 671 P.2d 1085, 1088, 1092, 1095 (1983); and the "gift clause" of the Arizona Constitution, ARIZ. CONST. art. IX, § 7 ("Neither the State, nor any county, city, town, or municipality, or other subdivision of the State shall ever...make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation....").

268. 172 Ariz. at 367, 837 P.2d at 169.

269. *Id.* at 368, 837 P.2d at 170.

270. *Id.* at 370–71, 837 P.2d at 172–73. The legislature subsequently established the Arizona Navigable Stream Adjudication Commission to take evidence and report on a river's navigability to the legislature which is to make a determination based on the Commission's report. A legislative finding of navigability authorizes the Land Department to assert public ownership of the streambed under the public trust doctrine. *See* 6 WATER AND WATER RIGHTS, *supra* note 4, at 208–09 (Supp. 1994) (discussing HB 2589, a 1994 statute).

271. *See also* Lake Michigan Fed'n v. U.S. Army Corps of Eng'rs, 742 F. Supp. 441 (N.D. Ill. 1990) (invalidating a legislative disposition of 18 acres of Lake Michigan submerged lands to a private university for a landfill); People *ex rel.* Scott v. Chicago Park Dist., 360 N.E.2d 773, 780–81 (Ill. 1976) (invalidating a legislative grant of 194 acres of Lake Michigan submerged lands to U.S. Steel because the purpose of the grant was to benefit a private interest).

272. *See supra* notes 249–51 and accompanying text.

273. However, Colorado has considered and rejected the public trust in water. People v. Emmert, 597 P.2d 1025 (Colo. 1979) (state constitutional provision declaring water to be public property subject to appropriation was intended to protect diversions for mining and irrigation, not to grant a public right of recreation). Kansas also rejected the application of the public trust doctrine to nonnavigable waters. State *ex rel.* Meek v. Hays, 785 P.2d 1356 (Kan. 1990) (public has no right to use nonnavigable waters overlying private lands for recreational purposes with the consent of landowners). Nevada has yet to recognize the public trust doctrine. 6 WATER AND WATER RIGHTS, *supra* note 4, at 501 (Supp. 1994).

scope of the doctrine beyond lands beneath navigable waters to include both navigable waters and streams affecting navigable waters; (2) expanding the purpose of the trust to meet changing public needs; (3) clarifying that water rights are inherently nonvested in nature; (4) articulating the state's continuous duty to supervise diversionary and trust uses and to produce an accommodation between them wherever feasible; (5) granting the public standing to enforce the trust in court; and (6) fixing the origin of the trust in the common law.[274] Not surprisingly, the only reallocations of water have occurred in California. There is little question that the *Delta Water* decision had a greater effect on California water flows than the *Mono Lake* decision.[275] However, in neither case did the courts have the final word on water reallocations. Instead, the effect of the court decisions was to empower the state water board to adjust water rights to accommodate both diversionary and public trust uses where feasible. In both instances, the state water board determined that this feasibility principle required substantial increases in instream flows.[276] The trial court in the *American River* case reached a similar conclusion, while also devising an innovative research program to develop the best available scientific information.[277] But in none of these decisions were diversionary rights ignored: diversions were curtailed only to the extent necessary to accommodate trust uses.

The accommodation principle inherent in the public trust in water is the doctrine's chief contribution to natural resources law. This principle substitutes adjustment, accommodation, and compromise for the "all or nothing" results dictated by the prior appropriation's unfeigning reliance on temporal priority. As Professor Sax has illustrated, in this respect the public trust doctrine has much more in common with modern pollution control regulation, which recognizes the legitimacy of industrial uses as well as the need to attain air and water quality standards, than with the rigidities of prior appropriation.[278]

Fulfilling the trust's accommodation principle will require much more sophisticated information about the ecological needs of trust resources and the effects of water diversions on those needs.[279] Both the California courts and the state water board have demonstrated the capability to develop this information.[280] Moreover, the Clinton Administration's commitment to ecosystem management of public lands, which is predicated on watershed protection, should produce an additional reservoir of science on the needs of natural systems.[281] There is in short some cause for optimism that the ecological information requisite to implementing the trust doctrine's accommodation principle can be developed.

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274. *See supra* notes 50–100 and accompanying text.
275. *See supra* note 152 and accompanying text.
276. *See supra* notes 113–45 (*Mono Lake*) and 169–73 (*Delta Water*) and accompanying text.
277. *See supra* notes 188–90 and accompanying text.
278. Sax, *Ecological Perspective, supra* note 185, at 150.
279. Sax, *Ecological Perspective, supra* note 185, at 150–51, 159–60.
280. *See supra* notes 105–45, 180–90 and accompanying text.
281. *See* U.S. DEPTS. OF AGRICULTURE & INTERIOR, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT AND RECORD OF DECISION ON MANAGEMENT OF HABITAT FOR LATE-SUCCESSIONAL AND OLD-GROWTH FOREST RELATED SPECIES WITHIN THE RANGE OF THE NORTHERN SPOTTED OWL (1994).

Whether the availability of more sophisticated ecological information will influence Western state water allocation remains an uncertain proposition. Although six Western states seem to recognize the public trust in water, none other than California has fully embraced *Mono Lake*'s precepts. The other states have split over the origins of the doctrine; three—Idaho, Washington, and Oregon,[282]—following the *Mono Lake* view of its common law origins, while the other three—North Dakota, Montana, and Alaska—find the trust in their state constitutions.[283] Only Idaho has suggested that the trust may apply to existing water rights.[284] But that state has not only yet to suggest that the trust doctrine makes appropriation rights nonvested in nature, the Idaho Supreme Court recently ruled that the public trust is inapplicable to a basinwide adjudication, the procedure which fixes the relative security of competing water rights holders.[285] If the public trust in water outside of California does not authorize adjustments in water rights based on today's values and information, the *Mono Lake* legacy may not extend beyond California's borders. In fact, the most recent public trust opinions adopting *Mono Lake's* principles are found in dissents in Idaho and Washington.[286]

It is true that there are means available other than the public trust doctrine to modernize Western water law, although those alternatives are useful mainly in terms of new water diversions.[287] But the public trust doctrine's deep historical roots and its conceptual coherence make it an extremely promising vehicle to moderate the excesses of the prior appropriation doctrine.[288] Courts like the Washington Supreme Court in *Rettkowski*, which are disinclined to apply the trust doctrine because of a perceived lack of standards,[289] have not carefully examined *Mono Lake* and its aftermath. *Mono Lake's* accommodation principle is one which courts and administrators have shown they can implement in a manner sensitive to both trust resources and diversionary uses.[290] The public trust in water has not been characterized by standardless judicial reallocations of water, but instead by a grant of authority to

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282. Kootenai Envtl. Alliance v. Panhandle Yacht Club, 671 P.2d 1085 (Idaho 1983); Morse v. Oregon Div. of State Lands, 590 P.2d 709, 711–12 (Or. 1979); Rettkowski v. State, 858 P.2d 232, 239 (Wash. 1993).

283. Owsiehek v. Alaska Guide Licensing & Control Bd., 763 P.2d 488, 494 (Alaska 1988) (ALASKA CONST. art. VIII, § 3); Galt v. Montana Dep't of Fish, Wildlife & Parks, 731 P.2d 912, 913 (Mont. 1987) (MONT. CONST. art IX, § 3(3)); United Plainsmen Ass'n v. North Dakota Water Conservation Comm'n, 247 N.W.2d 457, 461 (N.D. 1976) (N.D. CONST. art. X, § 3).

284. *See supra* note 210 and accompanying text.

285. *See supra* notes 218–24 and accompanying text.

286. *See supra* notes 220, 223 (Idaho), 236–40 (Washington) and accompanying text.

287. For example, the South Dakota Supreme Court recently affirmed the state water board's granting of two water rights to the federal government for a national wildlife refuge, determining that water for wetlands was a beneficial use. The court concluded that this *in situ* use was in fact a current use despite the lack of diversion and reflected legitimate "changes in the society's recognition of new uses of our resources." *In re* Water Right Claim No. 1927–2, 524 N.W.2d 855 (S.D. 1994). And in Colorado, a state which has rejected the public trust in water (*see supra* note 264), environmental groups are urging the Colorado Supreme Court to interpret that state's "beneficial use" requirement to enable courts to consider the environmental effects of proposed diversions. *See* Board of County Comm'rs v. United States, Case No. 92SA68, Opening Brief of High County Citizens' Alliance *et al.* (Colo. S. Ct. June 6, 1994).

288. On those excesses, see Freyfogle, *supra* note 4, at 492–99; Wilkinson, *supra* note 4, at 12–19.

289. *See supra* note 234 and accompanying text.

290. *See supra* notes 101–90 and accompanying text.

administrators to maximize both appropriation rights and trust resources, which, after all, antedate any appropriation rights. If more courts recognized and applied the accommodation principle at the core of the *Mono Lake* doctrine, the public trust could transform Western water law into a flexible doctrine capable of meeting both the consumptive and instream needs of the twenty-first century.