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The Public Trust vs. The Public Interest

Arthur L. Littleworth*

INTRODUCTION

There is no lack of legal writing on the public trust doctrine. Law reviews, treatises, and scholarly decisions chronicle the Roman and English common law origins of the doctrine, and its evolution through the courts of the United States.1 For the most part, however, the public trust doctrine developed as a real property concept, affecting only the private ownership of tidelands or other shoreline lands. Of course, the doctrine traditionally also protected public rights of navigation, commerce, and fishing in navigable waters, but did not preclude the use of stream flows for water supply purposes. Indeed, until National Audubon Society v. Superior Court,2 with possibly one exception,3 the public trust doctrine had no application to water

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3. United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n, 247 N.W.2d 457 (1976). This was not really a true water rights case. The case stands for the proposition that the public trust doctrine requires a state to develop a planning capability so
For at least two important policy reasons, the large body of property-based public trust law remains ill-suited to influence the allocation of California's water resources.

In the first place, there is an inherent conflict between the operation of California's vital water projects and the line of public trust cases requiring that any governmental action affecting trust resources must be consistent with the purposes of the trust. All of California's major water supply systems take water out of rivers, and further depend upon upstream dams that store high winter runoff and spring snowmelt for later release and use. Now, since protected public trust uses in California have been expanded to encompass recreational and environmental values, it is not possible for the state's large public water supply projects to operate without impacting instream conditions. Even if the total flow of water in any given stretch of river is not diminished by such projects, the timing of flows is altered. According to some environmental spokesmen, the reduction of spring flows when reservoirs generally are filled can be especially detrimental to fishery habitat.

The California Supreme Court in Audubon recognized the practical impossibility of applying these tidelands precedents in a water rights context. The court stated:

that water resources can be allocated in a manner consistent with the public interest. Thus, this is really more of an administrative law decision which requires that public trust principles be considered in the permit decision-making process. The present permit system in California already considers such issues.


5. Marks v. Whitney (1971) 6 Cal. 3d 251, 259, 491 P.2d 374, 98 Cal. Rptr. 790. In that case the court stated:

In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.

Id. at 259-60, 491 P.2d at 382, 98 Cal. Rptr. at 798 (emphasis added).

6. These projects include the State Water Project which operates the large Oroville Reservoir on the Feather River, a tributary of the Sacramento River; the Federal Central Valley Project which has large storage reservoirs on the Sacramento and San Joaquin Rivers; the East Bay Municipal Utility District which obtains its water supply from Pardee and Camanche Reservoirs on the Mokelumne River; the City of San Francisco which draws its water supply from the Tuolumne River in Yosemite; and the City of Los Angeles which takes water from the Owens River.

The... rule which evolved in tideland and lakeshore cases barring conveyance of rights free of the trust except to serve trust purposes cannot, however, apply without modification to flowing waters. The prosperity and habitability of much of this state requires the diversion of great quantities of water from its streams for purposes unconnected to any navigation, commerce, fishing, recreation, or ecological use relating to the source stream. The state must have the power to grant nonvested usufructuary rights to appropriate water even if diversions harm public trust uses.8

California’s present use of water already exceeds its developed supplies. Moreover, the state’s population is projected to increase by an additional 10.2 million people by the year 2010.9 The state as we know it could not exist if its major rivers were required to be returned to their natural condition, to flow unused to the sea.

A second reason for discounting trust law precedent stems from the basic purpose of the public trust doctrine. Historically, the doctrine has served to protect public rights against exclusive private ownership. But the water rights of California’s major water supply projects are themselves publicly owned and held for the benefit of the public. Like the public trust doctrine, these projects are designed to serve the public interest. The state Water Project is perhaps the best example.10 This vast water system is owned and operated by the State of California. It was authorized by the legislature in 1959, and approved by a statewide vote in 1960. Project water rights are held in the name of the state’s Department of Water Resources. The Project delivers water to thirty public agencies, serving water to 17 million Californians located in all regions of the state. Initial financing included a $1.75 billion bond issue which is fully serviced by payments from these thirty public agency contractors. Entitlements under these contracts total 4.2 million acre feet annually. However, the dependable yield of the Project is only 2.4 million acre feet because certain Delta transfer and conservation facilities originally planned have not yet been constructed. The Project currently operates under water rights granted in 1978 by the State Water Resources Control Board after eleven months of hearings.11

9. CAL. DEP’T. OF WATER RESOURCES BULL. 160-87 at 6. The present shortage of reliable water supplies is masked by the fact that 2 million acre feet annually of present water use is being met from long-term groundwater overdraft. Id. at 2.
10. The project is well described in Goodman v. County of Riverside, 140 Cal. App. 3d 900, 190 Cal. Rptr. 7 (1983).
11. State Water Resources Control Board [hereinafter S.W.R.C.B.], Decision 1485 (1978);
Yet in the name of the public trust doctrine, certain parties now seek to decrease substantially the amount of water that is presently available for diversion from the Delta by the State Water Project. Although, earlier, in granting the State Water Project’s water rights permits, the State Board found that the allocation of water would in the Board’s judgment “best develop, conserve, and utilize in the public interest the water sought to be appropriated.” Of course, in accord with current practice, the Board also reserved jurisdiction, entirely apart from the public trust doctrine, to modify the terms and conditions of the project permits for the protection of fish and wildlife. The present hearings are being held in part pursuant to that reservation of jurisdiction.

The niche reserved for this article is to examine more fully the various efforts that are now being made to apply the public trust doctrine as it has been integrated into water rights law by the Audubon decision. The place to begin is with Audubon itself.

THE AUDUBON CASE

The decision in Audubon was influenced by certain unique facts which should limit any radical impact on water rights in general. The Supreme Court allowed a direct appeal from the trial court decision, bypassing the Court of Appeal. Clearly, the Supreme Court believed that decisive action was immediately necessary to avert an ecological tragedy. Though the case came to the court without an evidentiary record, the court described Mono Lake as a “scenic and ecological treasure of national significance, imperiled by continued diversions of water.” It noted that Los Angeles continued to exercise

12. The State Water Resources Control Board is now conducting hearings on a Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. These proceedings are held pursuant to California Water Code section 13170, the Federal Clean Water Act section 303(e), and United States v. State Water Resources Control Bd., 182 Cal. App. 3d 82, 227 Cal. Rptr. 161 (1986). Later phases of the hearings may affect Decision 1485 and the water rights permits of the State Water Project and others. In these hearings, the Environmental Defense Fund and a coalition of other environmental groups, including the Sierra Club, have called for additional freshwater flows in the Delta of approximately 6 million acre feet annually. This is approximately equal to the combined annual diversions of the State Water Project and the Federal Central Valley Project from the Delta. Evidence in the hearings showed that actual freshwater outflow in the Delta during recent times have averaged about 23 million acre feet annually. See State Water Contractors Exhibit 260A, at 26 (on file at the Pacific Law Journal).
its rights "... in apparent disregard for the resulting damage to the scenery, ecology and human uses of Mono Lake."\(^\text{15}\)

The petition for alternative and peremptory writs of mandate to the Supreme Court contained a compelling explanation of alleged unusual and pressing problems surrounding Mono Lake. Petitioners argued that "... it is impossible to present this matter through the normal appellate process in adequate time to insure that irreparable harm will not occur to the Mono Basin environment."\(^\text{16}\)

Petitioners stated:

> [T]hat the events of last year, including a reduction by 85% to 95% in the brine shrimp hatch (upon which the millions of birds that come to the lake depend) and the death of 95% of the California Gull chicks hatched in the Mono Basin, indicate a substantial threat of imminent irreversible environmental damage.\(^\text{17}\)

Petitioners also argued the case from a national perspective:

Mono Lake is not only a major environmental resource of the State of California. It is a national treasure. The threat to Mono Lake has been the subject of increasing national interest. Attached hereto ... are copies of the cover story in Life Magazine on Mono Lake, plus a copy of the recent National Geographic article on the impact of the DWP diversions on Mono Lake.\(^\text{18}\)

The threat to Mono Lake, as well as circumstances surrounding the allocation of the water resource, were obviously unusual. Although, at the heart of the Court's decision lay the fact that no consideration at all had been given to Mono Lake when Los Angeles received its water rights permits. Despite the fact that Los Angeles had applied to divert "virtually the entire flow" of four of the five streams flowing into the lake, despite protests that were filed, and despite the acknowledged harm to public trust uses associated with the lake, the administrative board acting upon the application thought that it was required under the law as it then existed in 1940 to grant approval.\(^\text{19}\)

The Board stated at the time that it was "indeed unfortunate" that the application would result in decreasing the aesthetic advantages of the lake, but there was "nothing that this office can

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15. *Id.* at 449, 658 P.2d at 724, 189 Cal. Rptr. at 361.
17. *Id.* at 2. These facts appear in the opinion and seem to have been accepted by the court.
18. *Id.* at 18.
do to prevent it," and that it had no alternative but to dismiss the
protests.\textsuperscript{20} By 1979, the lake level had dropped by forty-three feet,
and its surface area had decreased from eighty-five to about sixty
square miles.\textsuperscript{21}

The Los Angeles permits, however, stand in sharp contrast to all
appropriative water rights granted shortly thereafter. In the 1950s,
the statutes governing the appropriation of water were amended to
require specific consideration of environmental values. Those statutes
now require the Board to "consider the relative benefit" to be derived
from all beneficial uses of the water, including the preservation and
enhancement of fish and wildlife, and recreational uses.\textsuperscript{22} The use of
water for recreation and the preservation and enhancement of fish
and wildlife resources is specifically declared to be a beneficial use
of water.\textsuperscript{23} In determining the amount of water available for con-
sumptive use appropriations, the Board must take into account,
"whenever it is in the public interest," the amounts of water required
for recreation and the preservation and enhancement of fish and
wildlife resources.\textsuperscript{24}

The Board must also take into account, "whenever it is in the
public interest," the amounts of water "needed to remain in the
source."\textsuperscript{25} Further, the Board has broad discretion to condition
appropriations upon such terms and conditions as will "best develop,
conserv[e], and utilize in the public interest the water sought to be
appropriated." Thus, for more than the last twenty-five years the
State Board has been guided by the "public interest" in allocating
waters of the state, taking into account instream public trust values
as well as the water needs of cities and farms.

The two largest water projects in the state, namely the State Water
Project and the Federal Central Valley Project, both received their
water rights permits under these more recent appropriation statutes.
Moreover, the State Board in recent times has been reserving jurisdic-
tion to modify water rights permits for the protection of fish and
wildlife purposes. Indeed, the present Bay-Delta hearings are in part
grounded upon this reservation of jurisdiction.\textsuperscript{26}

\begin{itemize}
\item[20.] \textit{Id.} at 428, 658 P.2d at 714, 189 Cal. Rptr. at 351.
\item[21.] \textit{Id.} at 429, 658 P.2d at 714, 189 Cal. Rptr. at 351.
\item[22.] \textsc{Cal. Water Code} \textsection 1257 (West 1985).
\item[23.] \textit{Id.} \textsection 1243, (West 1985).
\item[24.] \textit{Id.}
\item[25.] \textit{Id.} \textsection 1243.5 (West 1985).
\item[26.] United States v. State Water Resources Control Bd., 182 Cal. App. 3d 82, 127-29,
227 Cal. Rptr. 161, 185-87 (1986).
\end{itemize}
In *Audubon*, the Supreme Court wanted to force a reconsideration of Los Angeles' rights, which under water law were "vested" and thought to be virtually untouchable. The public trust doctrine became the vehicle for accomplishing that end. The court said that the "core" of the public trust doctrine is the state's authority as sovereign "to exercise a continuous supervision and control over the navigable waters of the state . . . ." Yet, for all more recent appropriations of water, this "continuous supervision and control" is built into the administrative process for allocating water use. Moreover, independent of such reserved permit jurisdiction, and also independent of the public trust doctrine, the courts have further indicated that the State Board has authority to review the appropriative use of water under Article 10, section 2 of the California Constitution, and Water Code section 275.

Nevertheless, *Audubon* states that these enactments do not make the public trust doctrine "superfluous." The court noted that the non-codified public trust doctrine provides protection in the event of any statutory repeal, and in cases filed directly in the courts without prior proceedings before the State Board. The issue for the future then becomes whether *Audubon* intended the public trust doctrine to do more than merely subject Los Angeles' and other older permits to current environmental review. Did the court in *Audubon* intend to change the substantive balance between consumptive and instream uses in the allocation of the state's waters?

**Balancing City, Farm and Environmental Needs for Water**

*Audubon* requires that instream needs be "taken into account" when allocating water for city and farm uses. That process of balancing between the need to take water from rivers for consumptive uses, and the need to leave it there, is now at issue in the Bay-Delta hearings. The environmentalists, however, seek a good deal more
than merely having public trust values weighed and considered in the allocation of water. They are going after a preference for such uses.

One environmental coalition, for example, argues that the Water Board must "adopt a demonstrable bias in favor of resource protection." They contend further that protection of trust resources must be afforded "greater weight" than other aspects of the "public interest;" that the Board must establish standards "which are sure to protect public trust uses;" and that California law now requires the Board to deny "environmentally destructive consumptive uses." They seek "levels of abundance" in fishery, estuaries, and wetlands resources that existed some forty years ago when California's population was under ten million, compared to about twenty-seven million now.

Linked to this claim of priority is the corollary contention that the burden of proof rests upon those that would take water from the stream system. Water users, it is said, must justify any diversions that would harm trust resources and, according to one party, are entitled only to those flows available after public trust uses "are first protected."

Despite the lack of evidence linking water diversions to actual environmental harm, or reduced diversions to environmental benefits, the environmental coalition concludes that the Board must establish standards which are "sure" to protect trust uses, "even in the absence of comprehensive data which ensures that such standards are necessary."

yet come to trial. More than five years, involving another appeal, have been consumed in trying to determine whether the substantive issues will be determined in the state or federal courts, or possibly referred to the State Water Resources Control Board. Meanwhile, parties are attempting to apply *Audubon* in the Bay-Delta hearings. Phase I of these proceedings, involving six months of evidentiary hearings, was completed in December 1987. The Board's immediate aim is to adopt a Water Quality Control Plan. See supra note 12 and accompanying text. There is some question whether the public trust doctrine properly applies at this point in the proceedings. Nonetheless, the briefs at least forecast the arguments that will have to be decided in the later water rights phase of the hearings.

33. This group of parties includes the Bay Institute of San Francisco, the National Audubon Society, the Sierra Club, the Bay Area Audubon Society, the California Native Plant Society, Citizens for a Better Environment, the Point Reyes Bird Observatory, and the Save San Francisco Bay Association. The California Department of Fish and Game also argues that fish and wildlife uses should have a "higher priority" than meeting export needs.


35. Id. at 78-79; DEP'T OF WATER RESOURCES BULL. 160-87, at 7.

36. Brief for the Contra Costa Water Agency, Phase I of the Bay/Delta Estuary Hearing, at 43. See also Closing Brief for the Environmental Defense Fund, Phase I of the Bay/Delta Estuary Hearing, at 25, 32; Bay Institute, supra note 34, at 16.

37. Bay Institute, supra note 34, at 81. One well-known commentator, however, takes an
However, the notion of having fixed priorities in the balancing process was rejected in *Audubon* itself. There, Los Angeles attempted to invoke Water Code section 106 which provides that "the use of water for domestic purposes is the highest use of water . . . ." But the court responded that this policy declaration had to be read in conjunction with other later enactments requiring "consideration" of instream uses. "Thus, neither domestic and municipal uses nor in-stream uses can claim an absolute priority."38

Also, the *Racanelli* decision39 implicitly rejects any priority for instream uses in the water allocation process. The court stated that the Water Board should establish beneficial use objectives that would provide "reasonable protection," consistent with "overall statewide interest," and considering "all competing demands for water."40 Nowhere in that lengthy opinion does the court suggest that consideration of trust uses should receive any preference over consumptive uses of water. Indeed, the court concluded simply that the Water Board's decision in the Bay-Delta hearings was "essentially a policy judgment requiring a balancing of the competing public interests . . . ."41

The primary thrust of *Audubon* was to bring the water rights of Los Angeles under the same kind of environmental review as California statutes require for more recent appropriations. The *Audubon* court consistently used the same language of the current statutes, namely, that public trust uses must be "considered" and "taken into account."42 The court's final answer to the question posed by the federal court was that the public trust doctrine, as part of an "integrated system of water law," imposed a "continuing duty on the state to take such uses into account in allocating water resources."43 That is all the court said. It did not intend to overturn statutory law by granting a preference to trust values. The public trust doctrine simply offered the means of reaching Los Angeles,

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38. *Audubon*, 33 Cal. 3d at 447 n.30, 658 P.2d at 729, Cal. Rptr. at 365 (emphasis added).
40. Id. at 116, 118, 227 Cal. Rptr. at 178, 179-80.
41. Id. at 130, 227 Cal. Rptr. at 188.
43. Id. at 452, 658 P.2d at 732, 189 Cal. Rptr. at 369 (emphasis added).
and all older appropriators in similar circumstances, and of assuring "continued supervision" over the exercise of water rights.44

Environmentalists often cite Audubon as holding that the state has a duty to "protect public trust uses whenever feasible."45 They generally omit, however, the court's further statement found in the same paragraph that the state as a matter of practical necessity "may have to approve appropriations despite foreseeable harm to public trust uses."46 Neglected also is the statement that California's population and economy "depend upon the appropriation of vast quantities of water for uses unrelated to instream trust values . . ." and that the Water Board has the power to grant permits to take water from a flowing stream for uses in distant parts of the state "even though this taking does not promote, and may unavoidably harm, the trust uses at the source stream."47

Those who would expand Audubon also single out the phrase that no one can assert a "vested right to use [water] rights in a manner harmful to the trust."48 Read in context, however, this statement relates only to the state's right of "continued supervision." It means that water rights are not "vested" so as to prevent later state review. It does not mean that public trust uses cannot be harmed. The preservation of trust uses in the allocation of water extends only "so far as consistent with the public interest."49 The public interest is the overriding standard that determines how the state's flowing waters will be allocated.

When Los Angeles' rights are actually reconsidered at the trial level, Audubon requires that the court or Water Board consider not only the trust values associated with Mono Lake, but also Los Angeles' need for water, its reliance upon the 1940 Board decision, and the cost both in terms of money and the environmental impact of obtaining water elsewhere.50 Therefore, at least these factors must go into the balancing process. Evidence in the Bay-Delta hearings

44. Id. at 437, 447, 452, 658 P.2d at 721, 728, 732, 189 Cal. Rptr. at 358, 365, 369.
45. Id. at 446, 658 P.2d at 728, 189 Cal. Rptr. at 364.
46. Id., 658 P.2d at 728, 189 Cal. Rptr. at 365.
47. Id., 658 P.2d at 727-28, 189 Cal. Rptr. at 364.
48. Id. at 437, 658 P.2d at 721, 189 Cal. Rptr. at 358.
49. Id. at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365.
50. Los Angeles currently receives some water diverted from the Delta and supplied through the State Water Project. The City's most likely alternate supply to Mono Basin water would be this Delta Water. Of course, in the Bay-Delta hearings, environmentalists contend that exports from the Delta must be substantially reduced from present levels in order to protect public trust values.
also points to a number of other considerations that should be weighed in balancing consumptive use and instream needs.

To begin with, the Water Board and the courts should look to reasonable management approaches that will lessen the conflict between instream and consumptive needs. This is likely to be a requirement of reasonable use under the constitution, and is the only practical option for meeting the needs of a growing population while still providing reasonable environmental protection. For city and agricultural uses, good management means conservation, reclamation, and the use of any available alternative supplies. But the concept also applies to instream demands. Public trust uses, like consumptive uses, are subject to the reasonable use provisions of the California Constitution.\footnote{1} For instream uses, consideration must be given to such non-flow measures as construction of facilities, habitat restoration, fish screens, hatchery and stocking operations, and fishing and hunting regulations. The Suisun Marsh Agreement\footnote{2} represents an excellent example of habitat protection accomplished through construction of physical facilities, while saving large quantities of water. Similarly, in the Bay-Delta hearings, most experts agreed that conditions for striped bass could be significantly improved by certain physical improvements within the Delta.\footnote{3}

Other factors that should be considered in the balancing process are: whether the trust protection being sought is consistent with the overall "statewide interest,"\footnote{4} or merely serves the pleasure of a few at the expense of vitally needed water supplies; whether restoration or enhancement of trust resources is at stake; whether flows are needed to prevent the permanent loss of a species or ecosystem; whether a species has the ability to accept periodic water shortages; whether there is reasonable assurance that any given amount of flow will, in fact, result in certain levels of fish and wildlife abundance; whether any decline in fish and wildlife results from lack of flow or from other causes; and whether flows are being sought to offset non-flow caused impacts such as pollution or overfishing. Finally, the

\footnote{1}{\textit{Audubon}, 33 Cal. 3d at 443, 658 P.2d at 725, 189 Cal. Rptr. at 362. \textit{Audubon} recognizes the need "to make efficient use of California's limited water resources." \textit{Id.} at 446, 658 P.2d at 727, 189 Cal. Rptr. at 364.}

\footnote{2}{This Agreement was entered into by the California Department of Fish and Game, the California Department of Water Resources, and the United States Bureau of Reclamation, and was approved by Congress in 1986. Pub. L. No. 99-546, Title II, 100 Stat. 3052 (1986).}

\footnote{3}{See, e.g., Exhibit 64 of the California Department of Fish and Game, Exhibit 64 Phase I of the Bay/Delta Estuary Hearing (January 1988) (on file at the \textit{Pacific Law Journal}).}

\footnote{4}{Racanelli, 182 Cal. App. 3d at 104, 227 Cal. Rptr. at 170.}
benefits of allocating water to fish and wildlife must be weighed against the harm (social, economic, and job losses) of not having sufficient water for domestic, industrial, and agricultural purposes. Conversely, the benefits of water devoted to city and farm uses must be considered against environmental harm.

DOES THE PUBLIC TRUST DOCTRINE APPLY TO STORED WATER?

Claims have also been made to expand the public trust doctrine to waters stored in upstream reservoirs. This issue is best illustrated in the current American River litigation. Folsom Dam is located on the American River, about twenty-three miles upstream from its confluence with the Sacramento River. The dam and reservoir (1,010,000 acre feet of storage capacity) were constructed in 1955 by the United States and are operated by the United States Bureau of Reclamation pursuant to permits issued by the State Water Resources Control Board. Before construction of Folsom, as in the case of most California rivers, flows were high in the winter and spring but extremely low in the late summer and fall. The Bureau now operates Folsom to provide minimum summer flows of 1500 cubic feet per second (cfs), except in drought years. Under natural conditions, August-October flows averaged only about 250 cfs. Reservoir operations, on the other hand, have reduced spring flows from an average peak of over 8000 cfs to between 5000 and 6000 cfs.

In the course of the reference proceedings, the California Department of Fish and Game laid claim to year-round flows downstream of Folsom Dam that would in essence appropriate the full yield of the reservoir, without payment. Indeed, in many years such releases would empty the reservoir, and the entire flow of the river would not be sufficient to meet the demands. Moreover, Fish and Game gave no consideration to the impact of their demands upon the extensive fishing, boating and recreation activities provided by Folsom

55. Environmental Defense Fund v. East Bay Mun. Util. Dist. (Alameda Superior Court No. 425 955) (referred to the State Water Resources Control Board pursuant to California Water Code Section 2000). A five volume Staff Report was issued in February, 1987. Two months of hearings were then conducted before a hearing panel of the Board itself. The Final Report of the Board is expected to be issued by early summer of 1988.
58. Id.
Reservoir itself. As the State Board Staff pointed out, there is a "direct trade-off" between releases to enhance downstream river flows and the "recreational uses made of the reservoir."\textsuperscript{60}

The Legal Report prepared by the Staff in the American River reference proceeding summarizes the arguments made by environmental interests to apply the public trust doctrine to stored water.\textsuperscript{61} They argued that the doctrine applies to a river's "entire annual flow regime and not just to those months in which an appropriator reduces flow below seasonal norms."\textsuperscript{62} They contended: "There is no reason to exempt stored water from the trust merely because it has been captured and released at a different time of the year. The capture and release of water does not mean the water should not be protected for trust purposes."\textsuperscript{63} They also argued that the natural flow regime could no longer be used as a benchmark to determine the public's rights in the river because it would be difficult to calculate and the restoration of the natural regime was impossible.\textsuperscript{64} Long maintained artificial streams, they said, may come to be regarded as having the attributes of natural streams. "Community reliance upon a long maintained artificial condition will effect a dedication to the benefit of the public that has through time become dependent upon the condition."\textsuperscript{65}

The Staff found that the issue was moot because the United States, as owner of Folsom Dam and Reservoir, was not a party to the case.\textsuperscript{66} The environmental arguments, said the Staff, "require the presence of a project owner/operator of the water right and diversion works in order to assure the release of stored water at rates exceeding natural flow during some seasons."\textsuperscript{67} The Staff did, however, question the conceptual basis for the environmental position, asking: "[H]ow can a common property interest occur in, or the public trust attach to, a res (stored water) that did not exist in a state of nature?"\textsuperscript{68}

The public trust doctrine is a limit on the power of the state, as a fiduciary, to convey away certain assets in which the public has

\textsuperscript{60. STAFF REPORT, supra note 57, at 4.}
\textsuperscript{61. LEGAL REPORT, Environmental Defense Fund v. East Bay Municipal Utility District (American River reference proceeding), at 52-68 (on file at the Pacific Law Journal).}
\textsuperscript{62. Id. at 59.}
\textsuperscript{63. Id.}
\textsuperscript{64. Id. at 60.}
\textsuperscript{65. Id.}
\textsuperscript{66. Id. at 52, 67.}
\textsuperscript{67. Id. at 62-3.}
\textsuperscript{68. Id. at 62.}
rights. It is not a grant of power over assets which the state never owned.

There is little doubt however that the state, acting under its police power and not under the public trust doctrine, can condition the storage of water upon certain releases to protect downstream fishery and environmental values. The Board did this in Decision 1400 with respect to a federal project, and in Decision 1485 with respect to the State Water Project, both without objection to its basic power to so regulate storage. Thus, if the trust doctrine requires only the same kind of consideration of environmental values already built into statutory water law, whether the public trust applies to stored water is not an issue of major significance. However, if the public trust doctrine should finally be construed to give environmental uses a preference over city and farm uses, then its potential application to stored water would be a serious issue.

The landmark case of *Marks v. Whitney* is useful in analyzing stored water issues. The *Marks* case involved an action to quiet title in a boundary dispute in which the defendant was an owner of tidelands. The plaintiff argued that defendant's asserted right to fill and develop these tidelands would cut off his right as a member of the public to the land and the navigable water that covered them. The court in *Marks* noted that traditionally the public trust doctrine had been applied to such rights as fishing, hunting, bathing, swimming, boating and general recreational purposes in the navigable waters of the state. However, the court expanded these traditional purposes of the public trust doctrine to include "the preservation of those lands [tidelands] in their natural state . . ." The court stated that the purpose of preserving tidelands in their "natural state" was "[s]o that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area."

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69. See *Cal. Water Code* § 1253 (West 1985) (the State Water Resources Control Board has the power to condition appropriations upon such terms and conditions "as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated").

70. It could still be of consequence to some older projects such as San Francisco's Hetch-Hetchy project that operates without a State permit, or other permitted projects in which the State Board did not retain jurisdiction.

71. 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

72. *Marks*, 6 Cal. 3d at 259, 491 P.2d at 380, 98 Cap. Rptr. at 796.

73. *Id.*

74. *Id.* at 259, 491 P.2d at 380, 98 Cal. Rptr. at 769.
A careful reading of the *Marks* decision makes it apparent that the California Supreme Court was expanding the public trust doctrine to preserve the natural state of a fragile and rapidly disappearing ecosystem. It had no intention of encompassing artificial conditions. By definition, artificial flows made possible by reservoir storage do not have the natural values that the *Marks* court sought to protect, and applying the public trust doctrine to them would not serve the purposes enunciated by the court. The narrow scope of the *Marks* expansion is apparent from the Supreme Court’s opinion twelve years later in *Audubon*. In using the *Marks* opinion to determine whether the purposes of the public trust applied to the preservation of Mono Lake, the court stated:

There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands—trust—is the preservation of those lands in their natural state. The principal values plaintiffs seek to protect are recreational and ecological—the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds. Under [*Marks*], it is clear that protection of these values is among the purposes of the public trust.

*Audubon*, like *Marks*, considered the public trust doctrine as a protection for natural resources.

Nevertheless, in two other confusing and controversial opinions, *Lyons* and *Fogerty*, the California Supreme Court seems to have applied the public trust doctrine to artificial waters. In *Fogerty*, where the court determined that the state retained a public trust easement in the Lake Tahoe shorezone, even though a dam had raised the lake level and inundated the natural shoreline, the doctrinal underpinnings are too confused to serve as a general model for extensions of the public trust. The court admitted there was no direct authority in California on the issue of extension of title due to artificial inundation, but gave several arguments for the extension. First, the court noted:

[The] monumental evidentiary problem which would be created by measuring the boundary line between public and private ownership

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76. *Id.* at 434-35, 658 P.2d at 719, 189 Cal. Rptr. at 356.
78. *Fogerty*, 29 Cal. 3d at 248, 625 P.2d at 261, 172 Cal. Rptr. at 718.
in accordance with the water level which existed prior to the construction of [the hundreds of dams in California] provides a convincing justification for accepting the current level of the lake as the appropriate standard.\textsuperscript{79}

Actually, it seems that a contrary holding would not have created any significant evidentiary problems. Artificial shore zones would be exclusively private, obviating any necessity of discovering the old, natural boundaries now wholly submerged. The possibility of having to pay compensation may have been the underlying factor in the court’s reasoning.\textsuperscript{80} If that were the case, the compensation issue could have been dealt with in the same manner as it was in \textit{Kaiser Aetna v. United States}, which is discussed below.\textsuperscript{81} In any event, the court’s rationale would seem limited to situations where originally there were lakes that have now had their levels raised. Obviously where there was formerly a river that has now been dammed, there would be no former lake level to determine.

Secondly, the court noted that the dam had been in existence for more than 100 years, "long past the period for the acquisition of prescriptive rights by the state in land in question."\textsuperscript{82} This rationale is also questionable because the State failed to meet the requirements for prescription. A continuous use requirement was not satisfied since prior to the court’s decision the public had no right to go on the private property. Nor was hostile use shown. Moreover, the impact of establishing prescription without adverse use runs contrary to public policy. Certainly, this holding discourages landowners from allowing public use of their property. California Civil Code section 10009 was specifically enacted to provide a "safe harbor" for public use of private property.

In \textit{Lyon}, a landowner sought to reclaim a piece of marshland that was located on the edge of a lake. The property was marshland and was regularly inundated by the lake during certain times of the year. The court held that this property was subject to the public trust since the public trust extended to the high water mark of the lake. This case is not really applicable to the present discussion since it applies to the use of land, not to the ownership or control of water.

The \textit{Fogerty} and \textit{Lyon} cases are aberrant from the typical artificial flow cases that arise under water law. A more likely precedent is

\begin{itemize}
\item \textsuperscript{79} \textit{Id.}
\item \textsuperscript{80} \textit{Id.} at 249, 625 P.2d at 261, 172 Cal. Rptr. at 719.
\item \textsuperscript{81} 444 U.S. 164 (1979). \textit{See infra} text at notes 87-89.
\item \textsuperscript{82} \textit{Fogerty}, 29 Cal. 3d at 248, 625 P.2d at 261, 172 Cal. Rptr. at 718.
\end{itemize}
found in the case of *Bohn v. Albertson*. In *Bohn*, due to a levee break, a landowner's property was flooded by the San Joaquin River. This caused the land to be accessible by boat from the San Joaquin River and thus it became a navigable waterway. The court ruled that as long as the water was navigable, the public had the right to boat or fish over the land. However, the landowners retained title to the underlying land and had the right to reclaim the land and exclude the public whenever they did so. Thus, the public only had a right to use the overlying waters until the landowner reclaimed the land, and could not require the water to be maintained for their use.

The holding in the *Bohn* case sets a healthy precedent for how California courts should treat flows originating from reservoir releases. Certainly those river flows are available for public trust uses, but the reservoir owner should not be required, as part of the public trust, to maintain flows that would not have existed except for the reservoir. To do so would be to appropriate the reservoir without compensation, and would perhaps be contrary to state legislative or congressional authorization.

A very recent decision has also rejected a direct effort to control reservoir levels through the public trust doctrine. In this case, the plaintiffs sought to prevent releases from Concow Reservoir that would lower reservoir levels and thus impair use of the reservoir for fishing and recreation. Of course, in the American River litigation and in the Bay-Delta hearings, the converse claim is being made: that stored water must be held and released later for the benefit of downstream fisheries and recreation, despite adverse impacts upon reservoir uses. In the Concow Reservoir case, the court found that neither Concow Creek nor the reservoir were navigable, and therefore the public trust doctrine had no application at all. It refused to extend the doctrine to "all waters within the state, whether navigable or not," and absent an impact on navigable waters. That was the basis for the decision. But the court said there was still "another reason" to deny relief under the public trust doctrine:

"We are concerned here with an artificial man-made body of water. It is a reservoir created by the defendants' authorized diversion of water for specific purposes. As we have noted, the very essence of the public trust doctrine is that the State of California acquired

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83. 109 Cal. App. 2d 738.
title as trustee to all of its navigable waterways and the lands lying beneath them upon its admission to the union and cannot divest itself of the trust obligation. The state has broad authority to regulate the diversion of water from natural watercourses, but there is no logical theory upon which we could hold that a public trust attaches to artificial waterways or reservoirs created to utilize an appropriative water right. In other words, the public trust doctrine empowers the state to forbid or limit diversions of water in order to protect the public trust in navigable waters. It does not, however, give the state the power to insist upon the diversion and yet at the same time empower it to preclude the usage of the appropriated waters in order to protect a previously nonexistent public right in artificial waterways.85

The court also rejected claims made under California Fish and Game Code section 5943, noting that “the right of the public to fish does not take precedence over public purposes which are incompatible with fishing.” Furthermore, various Fish and Game code sections86 “do not require dam owners to forego their own authorized uses of impounded water in order to enhance the fishing opportunities of the public.”

The United States Supreme Court case of Kaiser Aetna v. United States87 also strongly indicates that the public trust doctrine should not apply to artificial waters. This landmark decision grew out of a dispute over a natural lagoon in Hawaii. In its natural state the lagoon was not navigable. However, through dredging and filling operations by a developer, the pond was enlarged and deepened and a marina was constructed. These operations caused the marina to be connected to the ocean, thus making the lagoon a navigable waterway. The issue was then raised as to whether the public had acquired a right of access to the marina. The Supreme Court held that the public did not have an automatic right of access to the marina since it has “... never been held that the navigational servitude creates a blanket exception to the Takings Clause . . . .”88 The Court held that although the government could assure the public the right of free access to the marina under the commerce clause, this would constitute a taking and compensation would be required. The Court focused on the economic impact of governmental regulation and

85. Id. at 3263 (citations omitted).
86. CAL. FISH & GAME CODE §§ 5931, 5933, 5938, 5942 (West 1984).
88. Id. at 172.

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interference with reasonable investment-backed expectations. It characterized the issue as whether petitioners' improvements so altered the character of the lagoon that "it became subject to an overriding federal navigational servitude, thus converting into a public aquatic park that which petitioners had invested millions of dollars in improving on the assumption that it was a privately owned pond . . . ."89

Developers had improved the pond and built a navigable waterway that had led to the creation of a 22,000 person community. It was crucial to the existence of the development that the marina associated with the community remain private. To allow the public free access to the marina would have destroyed the purposes for which the development was built. Likewise, the storage reservoirs of the State Water Project and the federal Central Valley Project were authorized and built primarily to store water for later urban and agricultural use, to be paid for by such users. Flood control and incidental recreational benefits were financed by the public at large.

THE IMPACT OF LEGISLATIVE APPROVAL OF WATER PROJECTS

Another potential public trust issue concerns the legislative authorization of certain water projects. When the Legislature has directly authorized a water project involving the construction of reservoirs and the storage and diversion of water for consumptive uses, what impact does that action have on application of the public trust doctrine? The issue was first raised by one noted commentator90 writing some three years before Audubon. Relying on People v. California Fish Co.91 and City of Berkeley v. Superior Court,92 Professor Dunning noted that the legislature, in the exercise of its discretion as trustee, has the power under certain circumstances to dispose of property free of any public trust obligations. Under such circumstances, the legislative determination is "conclusive upon the courts."93 Of course, the legislative intention must be clearly expressed or necessarily implied, and will not be implied if any other inference is reasonably possible.94 Nonetheless, Professor Dunning indicated

89. Id. at 169.
91. 166 Cal. 576, 606 P.2d 362, 162 Cal. Rptr 327 (1913).
92. 26 Cal. 3d 515 (1980).
94. Id. at 597.
that the Central Valley Project might survive the scrutiny of California Fish. He writes that, from the specificity with which the legislature authorized the Central Valley Project, it is clear the legislature intended to make a modification in public trust uses, and that such a modification was justified by the overall beneficial impact of the project on trust uses.95

Perhaps an even better example is the State Water Project. It was conceived and approved with a specific yield of approximately 4 million acre feet annually in mind. This amount was arrived at after extensive studies of the future water needs of the state. Project facilities were designed and constructed to produce that yield, and contracts were entered into to supply a maximum entitlement of 4.2 million acre feet annually. The size of the project, the various facilities to be constructed, and its financing were all before the legislature and the voters when the project was approved in 1959-1960.96 However, specific water rights for the project were left to be issued by the State Water Resources Control Board in the usual course of its administration of water rights. In fact, construction of the vast project was well under way before the first water rights permits were issued.97

Under these circumstances, has the state made a disposition of trust assets that exempts the water supply of the State Water Project from any public trust obligations? There is no question about the power of the legislature to sanction one public trust use at the expense of another.98 That certainly can occur, for example, in the case of a major dam that may enhance navigation and recreation, but adversely impacts spawning habitat or the ability of fish to spawn upstream. However, not all public uses served by a water project are trust uses. In Audubon, the California Supreme Court specifically rejected the contention that the state can abrogate the public trust merely by authorizing a use inconsistent with the trust.99 Furthermore, the contention that all public uses are “trust uses” so there are no restrictions in the state’s ability to allocate trust property was also rejected.100

95. Dunning, supra note 90, at 391.
99. Audubon, 33 Cal. 3d at 439 n.21, 658 P.2d at 722-23 n.21, 189 Cal. Rptr. at 359 n.21.
100. Id. at 440, 658 P.2d at 723-24, 189 Cal. Rptr. at 360.
The real issue is whether the intended yield of the State Water Project, namely 4.2 million acre feet annually through even dry periods, is subject to reduction to provide water for public trust uses.\textsuperscript{101} Plaintiffs in \textit{Audubon} seemed to concede that water rights “expressly conferred by the legislature would not be limited by the public trust doctrine.”\textsuperscript{102} If that is true, certainly it can be argued that action by the Water Board should be nothing more, insofar as the public trust is concerned, than the administrative procedure for implementing the legislature’s direction. On the other hand, the various State Water Project contracts do not guarantee a yield equal to their aggregate entitlements. Each contract provides for the possibility of shortage. And each contract provides only that the state “shall make all reasonable efforts to perfect and protect water rights necessary . . . for the satisfaction of water supply commitments under this Contract.”\textsuperscript{103} However, this does not necessarily mean that the State Water Project should not be viewed as a direct expression of legislative intent. \textit{California Fish} states that legislative intent can be clearly expressed or \textit{necessarily implied}.\textsuperscript{104} A strong argument can be made that the approval of the State Water Project necessarily implies that its basic water supply should not be limited by the public trust doctrine. \textit{Audubon} does not deal specifically with this issue.

\textbf{Issues on the Horizon}

A number of other potential public trust issues have surfaced in the American River litigation and in the Bay-Delta hearings, but have yet to be seriously argued. They include: whether an impairment of public trust values can be pursued against a single diverter or whether all users affecting instream flows must be brought into the proceeding; if a single diverter is vulnerable, how will its appropriate share of the public trust obligation be determined; if all users must be included, whether public trust flows will be taken from each, or only from those with the most junior water rights; whether the doctrine applies only to uses associated with water in the stream, or also to environmental values located in a “riparian corridor;” whether the doctrine protects the food chain alone (e.g., phytoplankton) without

\begin{footnotes}
\item[101] The paradox is that the Water Board can to some extent control the yield of the Project through its regulatory powers. The public trust doctrine, except for older projects, may not give the Water Board as much authority as it already had by statute.
\item[102] \textit{Audubon}, 33 Cal. 3d at 445 n.24, 658 P.2d 727 n.24, 189 Cal. Rptr. at 363 n.24.
\item[103] Provision 16(b), Water Supply Contract with the California Department of Water Resources (on file at the \textit{Pacific Law Journal}).
\item[104] \textit{People v. California Fish Co.}, 166 Cal. 576, 597 (1913).
\end{footnotes}
showing any linkage to fish, birds or other wildlife; how conflicts among public trust uses are determined (e.g., high flows preferred by rafters may destroy fish spawning habitat or be unsafe for swimmers); whether new public trust uses created by project storage (e.g., reservoir fishing and boating) can be offset against downstream impacts; and whether the need to protect the quality of drinking water supplies by diverting upstream can be balanced against environmental impacts downstream. Of course, application of the public trust doctrine can also invoke a "taking" that requires compensation, but that issue is dealt with in detail elsewhere in this Journal.\textsuperscript{105}

Whether any of these potential problems will cause serious concern in the future administration of water rights law depends largely on how the major issues discussed earlier are finally decided.

CONCLUSION

Reviewing the \textit{Audubon} decision, Professor Dunning called it a "healthy development in California water rights law."\textsuperscript{106} But his appraisal rested on the assumption that such added instream protection "can be provided without seriously damaging appropriative or other private property rights in water."\textsuperscript{107} The Supreme Court itself rejected extreme views on both sides of the Mono Lake controversy: on the one hand that the rights of Los Angeles were completely exempt from environmental review, even though public trust impacts had never been considered; and on the other that the "public trust is antecedent to and thus limits all appropriative water rights."\textsuperscript{108} One view, said the court, would deny any duty to protect or even consider the values promoted by the public trust; while the other would "decry as a breach of trust, appropriations essential to the economic development of this state."\textsuperscript{109} Instead, the court sought to harmonize these opposing legal concepts, integrating both into a system of water law that would be "more responsive to the diverse needs and interests involved in the planning and allocation of water resources."\textsuperscript{110}


\textsuperscript{107} Id.

\textsuperscript{108} \textit{Audubon}, 33 Cal. 3d at 445, 658 P.2d at 727, 189 Cal. Rptr. at 363-64.

\textsuperscript{109} Id.

\textsuperscript{110} Id. at 445, 452, 658 P.2d at 727, 532, 189 Cal. Rptr. at 364, 369.
The *Audubon* court’s objective can indeed be achieved without undue disruption or destruction of the required degree of certainty in water rights, but only if the extreme views of the trust that are being pursued in the Bay-Delta hearings and the American River litigation are rejected. The public trust doctrine now assures, to the extent not already required by the water rights law, that environmental values will be fully considered on a continuing basis in the allocation of the state’s water supplies. The system can accommodate that balance but not a priority for instream uses. If the public interest of the state as a whole should be victimized by public trust overreaching, a reaction in the legislature or through the initiative process is more than likely.

111. The Supreme Court, as well as the Governor’s Commission that reviewed water rights law, have both recognized the need for certainty in the rights to use water. This need becomes even more important as increased emphasis is placed on possible transfers of water rights. See *In re Waters of Long Valley Creek Stream System* 25 Cal. 3d 339, 355, 599 P.2d 656, 665-66, 158 Cal. Rptr. 350, 359-60 (1979); *Final Report, Governor’s Commission to Review California Water Rights Law* (Dec. 1978).