The Mono Lake Problem And The Public Trust Solution

The 1983 decision of the California Supreme Court in *National Audubon Society v. Superior Court of Alpine County*[1] brought a dramatic change to the state's water policy. The litigation involved an effort to save Mono Lake from being depleted due to diversion of water from the Mono Basin to Los Angeles. The court said that the public trust doctrine[2] protects navigable waters from harm caused by the diversion of nonnavigable tributaries,[3] and that the state "has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible."[4]

Following a brief look at the history of California water policy, this comment will examine the public trust doctrine in the United States and its application in California prior to *National Audubon*. Then the Mono Lake problem will be discussed, considering the history of the diversion of water from the Mono Basin, which has caused the present ecological crisis at the lake. Following a summary of the procedural history which led to the decision by the California Supreme Court, the court's analysis and holdings will be examined. Finally, this comment will consider the discussions which have been and are taking place in the legal community as a result of the court's decision.

A. *California Water Law and Policy*

Until the California Supreme Court recognized the public trust doctrine as a part of water law in California, the state had a dual system of water rights, recognizing both riparian rights and rights acquired by prior appropriation. Early settlers acquired water through riparian rights, but with the start of gold mining in 1848, the doctrine of prior appropriation came into being. The miners used the rule of "first in time, first in right," and the rule was then

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

2. The public trust doctrine, which will be discussed in section B of this comment, originally said that a state, in holding title to beds under its navigable waters, holds the lands in trust for the public.

3. *National Audubon*, 33 Cal. 3d at 437, 658 P.2d at 721, 189 Cal. Rptr. at 357.

4. *Id.* at 446, 658 P.2d at 728, 189 Cal. Rptr. at 364.

adopted in agriculture and in manufacturing. The right of prior appropriation was recognized by the courts in 1885,[5] and in 1872 the legislature passed a statute making it possible to acquire water rights by posting and recording a notice at the point of diversion and recording a copy in the office of the county recorder. However, in 1886, the California Supreme Court held that a riparian had a superior claim to water also claimed by one with rights under prior appropriation.[6]

In 1913, the legislature passed the Water Commission Act[7] which provided an orderly procedure for the appropriation of water, under the direction of a Water Board.[8] The statute declared that as a matter of state policy the general welfare required that water resources be put to the fullest beneficial use for which they are capable, and that the right to use water is limited to such water as may reasonably be required for such beneficial use. Thus, the only water which could be appropriated was water not otherwise appropriated and which would be used only for useful and beneficial purposes.

The question remained as to the relationship between the riparian and the prior appropriation doctrines. Did a downstream riparian have more rights than an upstream appropriator? In the case of *Herminghaus v. Southern California Edison*,[9] the California Supreme Court decided that as between a riparian user and an appropriator, the riparian rights not only take priority over those of the appropriator, but also that, unlike the appropriator, the riparian was not limited by the doctrine of reasonable use. In 1928, the *Herminghaus* decision was overturned by a constitutional amendment which prohibited the riparian from making an unreasonable use of or wasting water.[10] As a result of the amendment, all uses of water must meet the standard of reasonable use.

When it was first formed, the principal responsibility of the

5. Irwin v. Philips, 5 Cal. 140 (1855).

6. Lux v. Haggin, 69 Cal. 255, 10 P. 674 (1886).

7. 1913 Cal. Stat. 586.

8. The state agency which has been given the power to approve permits for appropriation of water has had several names over the years, but will be referred to in this comment as the "Water Board."

9. 200 Cal. 81, 252 P. 607 (1926), *cert. denied*, 275 U.S. 486 (1927).

10. The amendment read in part: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. . . ." This text is now part of article X, section 2 of the Constitution of the State of California.

Water Board was to approve permits for the appropriation of water. Over the years, the legislature expanded the power of the Water Board so that its role was no longer a purely ministerial one. In 1955 the Board was directed by the legislature to consider the relative benefit of all beneficial uses of water including "domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, mining and power purposes."[11] Decisions of the California Supreme Court have supported the expanded role of the Water Board. In *National Audubon*, the court noted that the function of the Board has changed from one of simply deciding priorities of appropriations to one which involves comprehensive planning and allocation of waters. The court observed that the original role of the Board, as envisioned by the 1913 Act, did not include the power or the duty to consider interests to be protected by the public trust.[12] As will be discussed in Section D of this comment, in *National Audubon*, the California Supreme Court indicated that the Water Board has the authority to consider the interests protected by the public trust when planning and making allocations.[13] We turn now to a discussion of the public trust doctrine to understand the impact of this directive.

B. *The Public Trust Doctrine*

Historically, the public trust doctrine has been used to preserve public control of the beds of navigable waters. Traditionally, public ownership was regarded as necessary to protect the public rights in navigation, commerce, and fishing.[14] More recently, courts have expanded the doctrine to include public interest in recreation, scientific study, and environmental protection.[15] "The trust is a dynamic, rather than static, concept and seems destined to expand with the development and recognition of new public uses."[16]

1. The Public Trust Doctrine in the United States

The public trust doctrine originated in Roman Law and became part of the English common law.[17] The doctrine is derived from a

11. CAL. WATER CODE § 1257 (West 1971).
12. *National Audubon* 33 Cal. 3d at 444, 658 P.2d at 726, 189 Cal. Rptr. at 363.
13. *See infra* note 102 and accompanying text.
14. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 196 (1980).
15. Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).
16. Walston, *The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy*, 22 SANTA CLARA L. REV. 63, 66 (1982).
17. *National Audubon* 33 Cal. 3d at 439, 658 P.2d at 718, 189 Cal. Rptr. at 355

sovereign's fiduciary obligation to protect certain uses of publicly-held land. At common law the doctrine applied only to tidal water, but in the United States it was applied to all navigable waterways. Under federal law, when a state was admitted to the union, the state was awarded ownership of the beds and held title *in trust* for the public's use.[18] We will see that if the title is granted to a citizen, it is subject to control by the state for public trust purposes.[19]

One of the early cases to consider the public trust doctrine in the United States came before the New Jersey Supreme Court in 1821. The dispute in *Arnold v. Mundy*[20] concerned an oyster bed which was part of a conveyance from the King of England. The conveyance had eventually led to Arnold's ownership, but was challenged by Mundy, who asserted the public's right to take the oysters. The Court ruled in favor of Mundy, giving what has been called "the first clear formulation of the modern public trust doctrine":[21]

> [B]y the law of nature, which is the only true foundation of all the social rights; . . . by the civil law, which formerly governed almost the whole civilized world, . . . by the common law of England, . . . the navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purpose of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products . . . are common to all the citizens, . . . the property, indeed, strictly speaking, is vested in the sovereign, but it is vested in him not for his own use, but for the use of the citizen, that is, for his direct and immediate enjoyment.[22]

Since upon admission to the union a state gains title to land subject to the public trust doctrine, the question is raised as to the alienability of such land. The issue was considered by the United States Supreme Court in the landmark case of *Illinois Central Railroad Co. v. Illinois*.[23] In 1886, the Illinois legislature granted submerged lands along Lake Michigan to the Illinois Central Railroad Company, a grant in fee simple. In 1890, upon reconsideration, the legislature revoked the grant. The revocation was upheld by the

18. Frank, *Forever Free: Navigability, Inland Waterways, and the Expanding Public Interest*, 16 U.C. DAVIS L. REV. 579, 583 (1983).

19. *See infra* note 27 and accompanying text.

20. 6 N.J.L. 1 (1821).

21. Dunning, *The Public Trust Doctrine and Western Water Law: Discord or Harmony?*, 30 ROCKY MT. MIN. L. INST., § 17.01, § 17.02, at 17-7 (1984).

22. *Arnold*, 6 N.J.L. at 76-77. This statement of the public trust doctrine not only lists the traditional uses of navigation, commerce, and fishing, but also leaves the door open for other purposes, including recreation and enjoyment.

23. 146 U.S. 387 (1892) [hereinafter *Illinois Central*].

United States Supreme Court. In a passage often cited in cases involving the public trust doctrine, the Court said:

> A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.[24]

Thus, the Court indicated that a grant by a state is revocable under the public trust doctrine, and that the delegation of trust responsibility may also be revoked.[25]

2. The Public Trust Doctrine in California

In 1913, the California Supreme Court decided *People v. California Fish Co.*,[26] a case concerning lands that had been conveyed to private parties pursuant to statutory authorization. Unlike *Illinois Central*, the state did not revoke the grant. The court held that while the grantees did hold title, they had *not* acquired absolute title. Rather, their ownership consisted of "the soil, subject to the easement of the public for the public uses of navigation and commerce, and to the right of the state, . . . to enter upon and possess, the same for the preservation and advancement of the public uses. . . ."[27]

In *Boone v. Kingsbury*,[28] the California Supreme Court decided a case involving the lease of land for oil drilling which had been au-

24. *Id.* at 453-54.

25. The Court in *Illinois Central*, 146 U.S. at 455, also said, "Undoubtedly there may be expenses incurred in improvements made under such a grant which the state ought to pay; but, be that as it may, the power to resume the trust whenever the State judges best is, we think, incontrovertible." Thus the Court leaves the door open for reimbursement by the state for private investments made in a grant which is later revoked.

26. 166 Cal. 576, 138 P. 79 (1913).

27. *Id.* at 599, 138 P. at 88.

28. 206 Cal. 148, 273 P. 797 (1928), *cert. denied*, 280 U.S. 517 (1929).

thorized by the legislature. The court upheld the lease, saying the derricks would not substantially interfere with the trust. However, it held that "the state may at any time remove [the] structures . . ., even though they have been erected with its license or consent, if it subsequently determines them to be purprestures or finds that they substantially interfere with navigation or commerce."[29]

More recently, in 1980, the court considered the grant of tidelands in San Francisco Bay, and whether these grants, made in 1870, conferred title free of trust. In writing for the court, Justice Mosk noted that *Illinois Central* was the seminal case on the scope of the public trust doctrine, and that it remains the primary authority.[30] "The [U.S. Supreme Court] declared that one legislature does not have the power to 'give away nor sell the discretion of its successors' to 'exercise the powers of the State' in the execution of the trust and that legislation 'which may be needed one day for the harbor may be different from the legislation that may be required at another day.' "[31] The court held that the titles in question were subject to the trust. However, the court said that it is possible for the state to make a grant by statute which is free of the public trust if such a grant is clearly expressed. "[S]tatutes purporting to abandon the public trust are to be strictly construed; the intent to abandon must be clearly expressed or necessarily implied; and if any interpretation of the statute is reasonably possible which would retain the public's interest in tidelands, the court must give the statute such an interpretation."[32]

Since the public trust doctrine applied to navigable waters, its application depended upon the definition of "navigable." Although at common law navigable waters were those subject to tides, in the United States waters were designated as navigable if they were "susceptible to the useful commercial purpose of carrying the products of the country."[33] This definition has been extended in many states to include waters used for recreational purposes.[34]

---

29. 206 Cal. at 192-93, 272 P. at 816. Following this statement, the Court cited *Illinois Central*, so one can infer that the state might be required to pay for removal of the structures. *See supra* note 25.

30. City of Berkeley v. Superior Court, 26 Cal. 3d 515, 521, 606 P.2d 362, 365, 162 Cal. Rptr. 327, 330 (1980), *cert. denied*, 449 U.S. 840 (1981).

31. *Id.* at 522, 606 P.2d at 365, 162 Cal. Rptr. at 330 (quoting *Illinois Central*, 146 U.S. at 460).

32. *Id.* at 528, 606 P.2d at 369, 162 Cal. Rptr. at 334.

33. People *ex rel.* Baker v. Mack, 19 Cal. App. 3d 1040, 1045, 197 Cal. Rptr. 448, 451 (1971).

34. *Id.* at 1046, 97 Cal. Rptr. at 451.

There was some question as to whether the public trust doctrine, which originally applied only to land under tidal water, would apply to land under any navigable waterway. For many years, the only cases before the California Supreme Court involving the public trust were disputes regarding coastal lands.[35] However, in 1981 the court considered two cases, *State of California v. Superior Court (Fogerty)*[36] and *State of California v. Superior Court (Lyon)*,[37] which involved disputes over the land between the high-water and the low-water marks of inland lakes and streams. The court rejected the state's view that it owned the land, but held that the land was subject to a public trust easement. The court said that the issue had been settled by the *Illinois Central* holding that the public trust turns upon navigability in fact rather than the existence of tides.[38] With these decisions, the California Supreme Court declared that *any* navigable water and the land beneath it is subject to the protection of the public trust doctrine.[39]

The California Supreme Court addressed the uses of the public trust in *Marks v. Whitney*,[40] a case involving a boundary line dispute of land next to tidelands. The court noted that, while public trust easements were traditionally defined in terms of navigation, commerce and fisheries, they "have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes."[41] The court then expanded the uses of the trust by saying:

> The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. . . . [O]ne 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

35. However, in People v. Gold Run Ditching and Mining Co., 66 Cal. 138, 4 P. 1152 (1884), the court decided that the public trust doctrine would not permit certain mining practices which would impair navigation in downstream rivers.

36. 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713, *cert. denied*, 454 U.S. 865 (1981).

37. 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696, *cert. denied*, 454 U.S. 865 (1981).

38. *Id.* at 227, 625 P.2d at 249, 172 Cal. Rptr. at 706.

39. Dunning, *supra* note 21, at 17-19.

40. 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

41. *Id.* at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796.

area.[42]

Thus, the purposes of the trust were extended far beyond the traditional ones of navigation, commerce, and fisheries.[43]

C. *The Mono Lake Problem*

We turn now to examine the specific environmental problem which led to the decision in *National Audubon*, and the legal problems and procedure which brought the matter to the California Supreme Court.

Mono Lake, the second largest lake contained within California, lies at the base of the Sierra Nevada Mountains just east of Yosemite National Park. In its natural state, the lake was fifteen miles long and ten miles wide and had a surface area of eighty-five square miles. Lying in a basin surrounded by mountains and extinct volcanic cones, the lake has no outlets. It is fed by water from rain and snow which fall on the lake's surface and melting snow from the Sierra Nevadas. There are two islands in Mono Lake which serve as nesting places for some species of birds and as stopping points for other species of migratory birds. Since the lake is highly saline it does not support a population of fish; however the lake does have brine shrimp which provide food for the birds. The lake is the home of ninety-five percent of the state's population of California gulls and twenty-five percent of the total species.[44]

In *City of Los Angeles v. Aitken*,[45] the court for the Third Appellate District of California quoted naturalist John Muir's description of the Mono Basin:

> This beauty . . . is of a still higher order, enticing us lovingly on through gentian meadows and groves of rustling aspen to Lake Mono, where, spirit-like, our happy stream vanishes. . . . Mountains, red, gray, and black, rise close at hand on the right, whitened around their bases with banks of enduring snow; on the left swells the huge red mass of Mount Gibbs, while in front the eye wanders down the shadowy cañon, and out on the warm plain of Mono, where the lake is seen gleaming like a burnished metallic disc, with clusters of lofty volcanic cones to the south of it.[46]

---

42. *Id.* at 259-60, 491 P.2d at 380, 98 Cal. Rptr. at 796.

43. In *National Audubon*, the court made it clear that this extension did not apply only to tidelands, but to all land which is subject to the public trust doctrine.

44. These facts regarding Mono Lake are from *National Audubon*, where the court used information found in a report from a task force on Mono Lake for the California Department of Water Resources and the U.S. Department of Interior.

45. 10 Cal. App. 2d 460, 52 P.2d 585 (1935).

46. *Id.* at 463, 52 P.2d at 586.

1. Rights of the City of Los Angeles to Water in the Mono Basin

As Los Angeles grew in the early part of this century, it was apparent that it would need much more water than could be found in the Los Angeles area. In 1913 a 233 mile aqueduct was constructed from Owens Valley to Los Angeles. Although this prompted protest of the farmers in Owens Valley, the city took virtually all of the water from the valley, completely draining Owens Lake.[47]

As Los Angeles continued to grow, the City searched for more water north of Owens Valley. Because the Mono Basin could be connected to the existing aqueduct system, the City purchased riparian rights incident to four tributaries of Mono Lake, Lee Vining, Walker, Parker and Rush Creeks. In 1940, the City applied to the Water Board for permits to appropriate the waters of the four streams.[48] Hearings were held at which local people protested that the City's proposed appropriations would lower the surface level of Mono Lake and thus impair its commercial, recreational and scenic uses.[49]

At the time that Los Angeles applied for the appropriative rights to the water from Mono Basin, the Water Board was empowered under the Water Code to reject an application "when in its judgment the proposed appropriation would not best conserve the public interest."[50] Section 1254 of the Water Code stated that it is "the established policy of this state that the use of water for domestic purposes is the highest use of water." Therefore, because Los Angeles was seeking water for domestic use when it applied for the use of the water from the tributaries, the Water Board claimed to have no choice but to grant the application, in spite of the harm that would be caused to Mono Lake.

> It is indeed unfortunate that the City's proposed development will result in decreasing the aesthetic advantages of Mono Basin but *there is apparently nothing that this office can do to prevent it.* The use to which the City proposes to put the water under its Applications . . . is defined by the Water Commission Act as the highest to which water may be applied. . . . This office therefore has *no alternative but to dismiss all protests based upon the possible lowering of the water level*

47. *National Audubon*, 33 Cal. 3d at 426-27, 658 P.2d at 713, 189 Cal. Rptr. at 350.

48. These streams are non-navigable and thus would not be subject to the public trust doctrine. *Id.* at 435, 658 P.2d at 719-20, 189 Cal. Rptr. at 356-57.

49. *Id.* at 427, 658 P.2d at 713, 189 Cal. Rptr. at 351.

50. CAL. WATER CODE § 1255 (West 1971). References in this comment are to current section numbers, although they have been changed since their adoption.

in Mono Lake and the effect that the diversion of water from these streams may have upon the aesthetic and recreational value of the Basin.[51] (emphasis added by the court in *National Audubon.*)

Thus, in 1940, the Water Board did not believe it had the authority to deny a permit for water to be used for domestic purposes, in order to protect public trust interests of Mono Lake. It seems likely that had the public trust issue been raised at that time, it would have been dismissed anyway, since the water being diverted came from non-navigable streams.

From 1940 to 1970, Los Angeles diverted water from the Mono Basin at a rate averaging 57,067 acre-feet of water per year, thus reducing the lake's surface level by an average of 1.1 feet per year.[52] At first, the waters of the Mono Basin were held in reserve because the aqueduct could not export all of the water to which Los Angeles had rights. The Water Board warned Los Angeles that its permits might be revoked since a water right gained by appropriation is subject to forfeiture if not used. Therefore, in 1963 the City began construction of a second aqueduct designed to take the full appropriations from the Mono Basin as well as more groundwater from the Owens Valley.[53] After the City completed the second aqueduct in 1970, the flow of water to Los Angeles from the basin was increased by about fifty percent, averaging 99,580 acre-feet per year. By 1980, the surface level of Mono Lake was forty-three feet below the prediversion level.[54]

During the early part of the 1980's, California experienced some relatively wet years, which helped to stabilize the lake's level. However, the 1986-87 rainfall was significantly below normal. Assuming Los Angeles takes all of the water for which it had received appropriative rights, further dry years could produce a return of rapidly dropping water levels at Mono Lake.

2. Ecological Impact on Mono Lake Resulting from the Loss of Water

During the *National Audubon* litigation, opposing parties could not agree on the effect that the diversion of water at the rate planned by Los Angeles would have on the basin. The Department

51. This quote from the decision of the Water Board appeared in *National Audubon*, 33 Cal. 3d at 428, 658 P.2d at 714, 189 Cal. Rptr. at 351.

52. *Id.*

53. *Public Trust in Appropriated Waters: California Supreme Court Decides Mono Lake Case*, 13 (Envtl. L. Inst.) 10,109, 10,110 (Apr. 1983).

54. *National Audubon*, 33 Cal. 3d at 429, 658 P.2d at 714, 189 Cal. Rptr. at 351.

of Water and Power of the City of Los Angeles[55] said the lake would stabilize at a point where the inflow from precipitation and nondiverted tributaries would equal the loss of water due to evaporation and seepage. They estimated that the lake would stabilize when it was fifty-six percent smaller in surface area and forty-two percent shallower than the prediversion size. The National Audubon Society[56] challenged this, alleging that the lake would be twenty percent of its natural volume within fifty years, and that it might never stabilize, drying up as Owens Lake did.[57]

Whether or not the lake would stabilize, the increase in salinity due to the decrease in volume of the lake would result in a severe impact on the environment. As a result of water diversions from the Mono Basin thus far, the salinity level of Mono Lake has increased "drastically."[58] There is evidence that if the salinity level is allowed to increase, it will destroy the local food chain by killing the lake's algae on which brine shrimp and brine flies feed.[59] There was a fifty percent reduction in the shrimp hatch for the spring of 1980 and a ninety-five percent reduction for the spring of 1981.[60] The Task Force on Mono Lake[61] reported that since the birds feed on the shrimp, it is "unlikely that any of Mono Lake's major bird species will persist at the lake if populations of invertebrates disappear."[62] The increasing salinity of the lake also requires birds to expend more energy to find fresh water, leaving little vitality for activities such as feeding and nesting.[63]

In addition, as the level of Mono Lake has dropped, an island which was a home for the birds became a peninsula connected with the surrounding land. This provided access for coyotes to reach the nesting places, and the number of nests on the former island has declined.[64]

---

55. Defendants in *National Audubon*.

56. The Society, together with the Mono Lake Committee and the California Trout Association were the plaintiffs in *National Audubon*.

57. *National Audubon*, 33 Cal. 3d at 429, 658 P.2d at 715, 189 Cal. Rptr. at 352.

58. *Id.*

59. In August, 1987, the National Academy of Sciences published a report, *The Mono Lake Ecosystem: Effects of Changing Lake Level*. The report concluded that severe changes in the ecological system can be expected if the lake level drops thirty to fifty feet from its current level.

60. *National Audubon*, 33 Cal. 3d at 430, 658 P.2d at 715, 189 Cal. Rptr. at 352.

61. *See supra* note 44.

62. *National Audubon*, 33 Cal. 3d at 430, 658 P.2d at 715, 189 Cal. Rptr. at 352 (quoting the Task Force Report).

63. *Id.* at 430 n.10, 658 P.2d at 715-16, 189 Cal. Rptr. at 352.

64. *Id.* at 430, 658 P.2d at 716, 189 Cal. Rptr. at 353.

Another result of the falling level of the lake has been that lake beds composed of very fine silt, which were formerly covered with water, are now dry, so that winds over these lake beds create dust storms. The composition of the airborne silt with high concentrations of minerals irritates mucous membranes and respiratory systems of humans as well as animals.[65]

The plaintiffs argued that the ecological effects should not be the only factors considered. Local commerce was affected since the depletion of shrimp, sold for use in fishing, threatened that industry. Also, the recreational and scenic value of the lake diminished as the water receded, leaving alkaline rings which detract from the beauty and make walking near the lake difficult.[66]

3. Legal Difficulties Faced In the Effort to Save Mono Lake

Prior to the California Supreme Court's decision in *National Audubon*, some believed that there was no legal way by which the diversion of water and its resulting ecological damage at Mono Lake could be stopped or reversed. The appropriative rights to the use of the waters of the tributaries had been granted to Los Angeles, and the importance of the domestic use to which the water went could not be minimized. According to the system of prior appropriation, the water was being diverted to Los Angeles quite justly.

On the other hand, the California Supreme Court had previously indicated that the public trust doctrine protected navigable waters from harm to the environment,[67] and Mono Lake, having been designated as a navigable waterway,[68] was therefore protected by the doctrine. However, the specific water being diverted came from non-navigable streams. There had yet to be an extension of the public trust doctrine to protect such waterways. If the courts decided that these non-navigable tributaries were protected by the public trust doctrine, what would this indicate about the status of water rights acquired through prior appropriation? The two doctrines of appropriation and public trust were on a "collision course."[69] The court described these two systems as meeting "in a unique and dramatic setting which highlights the clash of values. Mono Lake is a

65. *Id.* at 431, 658 P.2d at 716, 189 Cal. Rptr. at 353.

66. *Id.*

67. Marks v. Whitney, 6 Cal. 3d 251, 259-60, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971).

68. City of Los Angeles v. Aitken, 10 Cal. App. 2d 460, 466, 52 P.2d 585, 588 (1935).

69. *National Audubon*, 33 Cal. 3d at 425, 658 P.2d at 712, 189 Cal. Rptr. at 349.

scenic and ecological treasure of national significance, imperiled by continued diversions of water; yet, the need of Los Angeles for water is apparent, its reliance on rights granted by the board evident, and the cost of curtailing diversions substantial."[70]

4. Procedural History by which the Issue Came to the California Supreme Court

In May of 1972, the National Audubon Society brought legal action against the Department of Water and Power (DWP) seeking an injunction against further diversions which would violate the public trust. The action was brought in Mono County, site of the water diversions, but was transferred to Alpine County following a motion by the DWP for change of venue. DWP filed a cross-complaint against 117 individuals and entities who claimed water rights in Mono Basin. The United States, being one of the cross-defendants, removed the case to the District Court for the Eastern District of California.[71] Under the federal abstention doctrine,[72] the district court stayed its proceedings until it could have two issues resolved by California courts. The court asked: "1. What is the interrelationship of the public trust doctrine and the California water rights system, in the context of the right of the Los Angeles Department of Water and Power . . . to divert water from Mono Lake pursuant to permits and licenses issued under the California water rights system? . . . 2. Do the exhaustion principles applied in the water rights context apply to plaintiffs' action pending in the United States District Court for the Eastern District of California?"[73]

In response, plaintiffs filed a complaint for declaratory relief and the Alpine County Superior Court entered summary judgment against them.[74] The trial court held that the public trust doctrine was not independent of the state's system for determining water rights, rather it was integrated into the system by which Los Angeles had gained the water rights to the Mono Lake tributaries. Also, the court said that the plaintiffs would be required to exhaust their remedies before the Water Board under a public trust claim or under a claim to unreasonable or nonbeneficial use of appropriated

70. *Id.*

71. *Id.* at 431, 658 P.2d at 716-17, 189 Cal. Rptr. at 353.

72. Under the federal abstention doctrine, when a suit in federal court contains state law issues, the federal court may order a stay of proceedings, based on the notion that if the state issues are first decided, the entire controversy might be ended. Thus, the adjudication of the federal issues should be delayed pending the resolution of state issues.

73. *National Audubon*, 33 Cal. 3d at 432, 658 P.2d at 717, 189 Cal. Rptr. at 353-54.

74. *Id.* at 432-33, 658 P.2d at 717-18, 189 Cal. Rptr. at 354.

water.[75] Following this ruling, plaintiffs asked the California Supreme Court to review the summary judgment, and the court agreed to hear the case.

D. *National Audubon Society v. Superior Court of Alpine County*

When the Mono Lake litigation reached the California Supreme Court, the issues to be decided were: (1) whether the public trust doctrine functions independently of the California water rights system; and (2) whether plaintiffs must exhaust their remedies before the Water Board prior to bringing action in court. The court held that the state has a duty to consider the public trust when planning and allocating water resources.[76] Concluding that the water rights granted to the DWP were given "without any consideration of the impact upon the public trust,"[77] the court called for an objective study and reconsideration of the water rights in the Mono Basin. Secondly, the court also concluded that the Water Board and state courts have concurrent jurisdiction in disputes regarding water rights so that plaintiffs need not exhaust administrative remedies prior to bringing court action.[78] We now examine the court's specific analysis of the two issues.

1. Does the Public Trust Doctrine Function Independently of the California Water Rights System?

The court reviewed the status of the public trust doctrine in California, noting that, while the original purpose of the doctrine was limited to the protection of navigation, commerce and fisheries in navigable waters, application of the doctrine had been extended to include the use of the water for fishing, hunting, swimming, and other recreational purposes. Quoting *Marks v. Whitney*, the court said, "The public uses to which tidelands are subject are sufficiently flexible to encompass *changing public needs*."[79] (emphasis added.) The court quoted further:

> There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands

75. *Id.* at 432-33, 658 P.2d at 718, 189 Cal. Rptr. at 355.
76. *Id.* at 446, 658 P.2d at 728, 189 Cal. Rptr. at 364.
77. *Id.* at 426, 658 P.2d at 712, 189 Cal. Rptr. at 349.
78. *Id.* at 426, 658 P.2d at 713, 189 Cal. Rptr. at 349-50.
79. Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971), *quoted in National Audubon*, 33 Cal. 3d at 434, 658 P.2d at 719, 189 Cal. Rptr. at 356.

> 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.*[80] (emphasis added.)

Turning to the purpose of the doctrine, the court noted that while the public trust was originally limited to tidal waters, it had evolved to cover all navigable lakes and streams. Since Mono Lake is navigable, the beds, shores and waters of the lake are protected by the public trust. However, the application of the doctrine to nonnavigable tributaries of navigable waterways had not yet been addressed.[81]

The court then examined the holdings of two old cases dealing with nonnavigable waterways. In 1884, the court was confronted with a case involving the impairment of navigability in the American and Sacramento rivers due to mining near their nonnavigable tributaries. The defendants in *People v. Gold Run Ditching & Mining Co.*[82] were mining operators who had used water cannons to wash gold-bearing gravel from the hillsides. As a result of the process, 600,000 cubic yards of sand and gravel went into the north fork of the American River and washed downstream into the beds of both rivers. The court said that the dumping was "an unauthorized invasion of the rights of the public to its navigation. . . ."[83] In *People v. Gold Run*, the court also said that "The State holds the absolute right to all navigable waters and the soils under them.. . . The soil she holds as trustee of a public trust for the benefit of the people; and she may, by her legislature, grant it to an individual; but she cannot grant the rights of the people to the use of the navigable waters flowing over it. . ."[84] The importance of the public right to use navigable waters is emphasized by the fact that the court reached its decision in *People v. Gold Run* despite the possibility that the state's gold mining industry might thereby be destroyed.

The other case, in 1901, concerned diversion of water from the Salt River, a navigable waterway. The defendant in *People v.*

---

80. *Marks*, 6 Cal. 3d at 259-60, 491 P.2d at 380, 98 Cal. Rptr. at 796, *quoted in National Audubon*, 33 Cal. 3d at 434-35, 658 P.2d at 719, 189 Cal. Rptr. at 356.

81. The court did not mention the public trust doctrine in *People v. Gold Run Ditching and Mining Co. See infra* notes 82-84 and accompanying text.

82. People v. Gold Run Ditching and Mining Co., 66 Cal. 138, 4 P. 1152 (1884).

83. *Id.* at 147, 4 P. at 1156, *quoted in National Audubon*, 33 Cal. 3d at 436, 658 P.2d at 720, 189 Cal. Rptr. at 357.

84. *Id.* at 151-52, 4 P. at 1159.

Russ[85] had erected dams on sloughs (side channels or inlets) which flowed from the river. The dams had been erected to prevent water from flowing onto defendant's land, but the state brought action to abate the dams saying they were a public nuisance. A lower court had ruled for the defendant, citing the nonnavigability of the sloughs. The California Supreme Court reversed saying:

> Directly diverting waters in material quantities from a navigable stream may be enjoined as a public nuisance. *Neither may the waters of a navigable stream be diverted in substantial quantities by drawing from its tributaries.* . . . If the dams upon these sloughs result in the obstruction of Salt River as a navigable stream, they constitute a public nuisance.[86] (emphasis added.)

Even though neither of the two cases involved a diversion which resulted in impairment to navigation, the court said that the principles could apply where the diversions from a nonnavigable tributary impair the public trust in a downstream river or lake. In *National Audubon*, the court quoted Professor Johnson: "If the public trust doctrine applies to constrain *fills* which destroy navigation and other public trust uses in navigable waters, it should equally apply to constrain the *extraction* of water that destroys navigation and other public interests. Both actions result in the same damage to the public interest."[87] Consequently, the court concluded that the public trust doctrine protects navigable waters from the harm caused by the diversion of nonnavigable tributaries.[88]

The court elaborated on the duties and power of the state as trustee of the public trust. After reviewing its holdings in *People v. California Fish Co.*,[89] *Boone v. Kingsbury*,[90] and *City of Berkeley v. Superior Court*,[91] as well as the holding of the United States Supreme Court in *Illinois Central Railroad Co. v. Illinois*,[92] the court reiterated that when title is granted in land subject to the public trust, the conveyance is not made free of the trust. The state has the power as administrator of the public trust to revoke previously

85. People v. Russ, 132 Cal. 102, 64 P. 111 (1901).

86. *Id.* at 106, 64 P. at 112.

87. *National Audubon*, 33 Cal. 3d at 436-37, 658 P.2d at 720-21, 189 Cal. Rptr. at 357 (quoting Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C. DAVIS L. REV. 233, 257-58 (1980)). Johnson is Professor of Law, University of Washington.

88. *Id.* at 437, 658 P.2d at 721, 189 Cal. Rptr. at 357.

89. 166 Cal. 576, 138 P. 79 (1913).

90. 206 Cal. 148, 273 P. 797 (1928), *cert. denied*, 280 U.S. 517 (1929).

91. 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 449 U.S. 840 (1980).

92. 146 U.S. 387 (1892). *See supra* note 23-25 and accompanying text.

granted rights.[93] Further, the court quoted *People v. California Fish Co.*: "While the state may not 'retake the absolute title without compensation,' it may without such payment . . . take other actions to promote the public trust."[94] The state has an affirmative duty "to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."[95]

The defendants in *National Audubon* argued that the public trust doctrine had been subsumed into the appropriative rights system, and, "absorbed by that body of law, quietly disappeared."[96] The DWP argued that when the Water Board approved a permit, the water right became a vested right "in perpetuity to take water without concern for the consequences to the trust."[97] The court rejected this view, stating that since the state retains supervisory control over its navigable waters, no party may acquire "a vested right to appropriate water in a manner harmful to the interests protected by the public trust."[98] Since the Constitution of the State of California requires that all water be put to a reasonable and beneficial use,[99] a water right cannot be considered as vested in the sense that the right could never be taken away.[100]

The court recognized the need for some diversion of water for use in distant parts of the state. "Now that the economy and population centers of this state have developed in reliance upon appropriated water, it would be disingenuous to hold that such appropriations are and have always been improper to the extent that they harm public trust uses, and can be justified only upon theories of reliance or estoppel."[101] While the court recognized that there may be times when the state must approve appropriations de-

93. *National Audubon*, 33 Cal. 3d at 440, 658 P.2d at 723, 189 Cal. Rptr. at 360.

94. *Id.* at 439, 658 P.2d at 722, 189 Cal. Rptr. at 359 (quoting People v. California Fish Co., 166 Cal. 576, 599, 138 P. 79, 88 (1913)).

95. *Id.* at 441, 658 P.2d at 724, 189 Cal. Rptr. at 361.

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

97. *Id.*

98. *Id.*

99. *See supra* note 10.

100. In 1979, the California Supreme Court decided *In re* Waters of Long Valley Creek Stream System, 25 Cal. 3d 339, 599 P.2d 656, 158 Cal. Rptr. 350 (1979), a case which considered riparian rights. The court stated that since riparian rights may not be exercised in a manner inconsistent with the policy of article X, section 2 of the state Constitution (*see supra* note 9), "to the extent that a future riparian right may impair the promotion of reasonable and beneficial uses of state waters, it is inapt to view it as vested." *Id.* at 348 n.3, 599 P.2d at 661, 158 Cal. Rptr. at 355.

101. *National Audubon*, 33 Cal. 3d at 446, 658 P.2d at 728, 189 Cal. Rptr. at 364.

spite foreseeable harm to public trust interests, it has a duty of "continuing supervision over the taking and use of the appropriated water."[102] Accordingly, the state has the power to reconsider allocations decisions.

As for the diversion of water from Mono Lake's tributaries, the court noted that no one had studied the impact of the diversions from the Mono Basin. No one had weighed the needs of Los Angeles against those of the Mono Basin. In addition, it had yet to be determined whether Los Angeles could live with a smaller allocation from the basin. In fact, "DWP acquired rights to the entire flow in 1940 from a water board *which believed it lacked both the power and the duty* to protect the Mono Lake environment, and continues to exercise those rights in apparent disregard for the resulting damage to the scenery, ecology, and human uses of Mono Lake."[103] (emphasis added.)

Thus, in deciding the first issue, the court held that public trust interests must be considered when the state grants permits for water rights, and that there are no vested rights precluding a reconsideration which takes into account the impact of water diversion on the Mono Lake environment.[104]

2. Must Plaintiffs Exhaust Their Remedies Before the Water Board Before Bringing Action in Court?

The second issue concerned whether a party challenging water rights given to others may bring the matter in court prior to going before the Water Board. If the matter may be taken to either, the jurisdiction of the courts and the Water Board over such disputes is said to be concurrent. On motion for summary judgment, the trial court ruled that plaintiffs must exhaust their administrative remedies before the Water Board before bringing an action in court.

The California Supreme Court noted that a remedy could be sought from the Water Board either by challenging the unreasonableness or nonbeneficial use of appropriated water or by bringing an independent public trust claim. Thus, plaintiffs could claim that Los Angeles' use of the water being taken from the Mono Basin was unreasonable or they could bring the public trust claim pursuant to section 2501 of the Water Code, which states, "The board may determine, in the proceedings provided for in this chapter, all rights to

102. *Id.* at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365.
103. *Id.* at 447, 658 P.2d at 729, 189 Cal. Rptr. at 365.
104. *Id.* at 447-48, 658 P.2d at 729, 189 Cal. Rptr. at 365-66.

water of a stream system whether based upon appropriation, riparian right, or other basis of right."[105] Since plaintiffs had declined to challenge the reasonableness of the water's use, the remaining claim was one based on the public trust.

Section 2501, quoted in part above, refers to water rights as the basis for bringing the proceedings before the Water Board. The court said that it was unclear whether a claim based on public trust could be termed a water right. Also unclear was "whether a person asserting the interest of the public trust would be considered a 'claimant.' "[106] Based on the legislative intent to grant the Water Board broad and comprehensive authority, the court decided that the Board had jurisdiction to apply the authority. Therefore, plaintiffs did have a remedy before the Water Board.[107] The court next turned to the question of whether plaintiffs were required to exhaust this remedy before filing suit in court.

During the early years of the Water Board, it was a governmental agency of limited scope and power. Since it could only issue licenses for appropriation of water, any disputes regarding other types of water rights were taken to state courts. Some cases which could have been brought before the Water Board were instead decided by the courts. Thus, for many years, there was no question as to whether there was concurrent jurisdiction over water rights. With the growing authority of the Water Board, there was dispute as to whether this was still appropriate.

The court noted that the Water Board is composed of experts who have the knowledge and expertise to deal with the various intricacies of water law. However, the state courts have a long history in water dispute involvement. After considering legislation regarding determination of water rights, the court decided that it was the intent of the legislature that the courts should make use of the experience and expert knowledge of the board. Statutes which say that courts may refer cases to the Board for investigation[108] indicate the legislature anticipated that some cases would be filed originally in court.[109]

Thus, the California Supreme Court decided that the Water Board and the state courts have concurrent jurisdiction. If the nature and complexity of the issues are such that it would be appropri-

105. *Id.* at 448, 658 P.2d at 729, 189 Cal. Rptr. at 366.
106. *Id.* at 448, 658 P.2d at 729, 189 Cal. Rptr. at 366.
107. *Id.* at 449, 658 P.2d at 730, 189 Cal. Rptr. at 367.
108. *See, e.g.*, CAL. WATER CODE § 2000 (West 1971).
109. *National Audubon*, 33 Cal. 3d at 451, 658 P.2d at 731, 189 Cal. Rptr. at 368.

ate for the courts to refer the matter to the Water Board, they may do so.

In deciding the first issue of *National Audubon*, the court was unanimous in ruling that plaintiffs could rely on the public trust doctrine in seeking reconsideration of the allocation of waters in the Mono Basin. However, Justice Richardson dissented from the determination that plaintiffs did not need to exhaust administrative remedies before bringing court action. He believed that the system, whereby permits to appropriate water are approved by the Water Board composed of persons with special expertise and competence, suggests that litigation should first be addressed to the Board.[110]

E. *The Effect of the Mono Lake Decision in California Water Law*

In deciding *National Audubon*, the California Supreme Court only addressed the issues presented to it, and did not resolve the dispute between the environmentalists and the City of Los Angeles. The case was remanded for further decision, and the matter has not yet been resolved by the courts. The Supreme Court said that its objective was to resolve the "legal conundrum" presented by the two competing systems, the public trust doctrine and the appropriative water rights system. "We hope by integrating these two doctrines to clear away the legal barriers which have so far prevented either the Water Board or the courts from taking a new and objective look at the water resources of the Mono Basin."[111]

Since *National Audubon* was announced in 1983, the decision has been both praised and criticized by many commentators. Its supporters argue that the public trust doctrine provides a basis for the needed protection of the environment, which was difficult to assure under the doctrine of prior appropriation. The court also provided a method by which appropriative water rights could be reconsidered.[112]

It is understandable that a decision which has changed California Water Law has been criticized. Some critics see the changes as "revolutionary"[113] and "potentially devasting".[114] The concerns

110. *Id.* at 455, 658 P.2d at 734-35, 189 Cal. Rptr. at 371.

111. *Id.* at 452, 658 P.2d at 732, 189 Cal. Rptr. at 369.

112. C. Lee, Remarks at Mono Lake: Beyond the Public Trust Doctrine 75 (March 30-31, 1984) (UCLA Extension Public Policy Program) [hereinafter Public Policy Program].

113. A. Moskovitz, Remarks at Public Policy Program, *supra* note 112, at 78.

114. Note, National Audubon Society v. Superior Court: *A Watershed Case Inte-*

expressed can be divided into three categories: (1) those which foresee major legal problems ahead; (2) those regarding the less major difficulties of implementing the new policy; and (3) those which question the wisdom of using the public trust doctrine to address a problem such as that at Mono Lake. While there is obviously a good deal of overlap, this section will try to explore the perceived problems in each of the three categories.

1. Major Legal Problems To Be Faced

One of the major criticisms of *National Audubon* is that the case creates an unpredictability and insecurity with regard to water rights. One strength of the system of prior appropriation is that it provides certainty with regard to water rights. Someone who is granted a permit knows how much water can be used and can make long-range plans accordingly, investing in facilities in reliance on that water right. "The public trust doctrine is a major retreat from the previous goals of certainty and stability in water rights. It carries with it all of the evils of uncertainty so universally recognized—the inhibition of long-range planning and investment for development and use of waters, the inefficiency of redundant supplies or forgone uses, and recurrent, costly litigation."[115] As a result of the decision, any "final determination" of water rights by the Water Board will remain subject to revision at some later time. This uncertainty may work against the public interest by deterring those wanting to put water to a beneficial use.[116]

In response to the concern regarding the lack of stability in the granting of water rights, proponents of the decision point to the fact that water rights holders have adjusted to instability in the past. In 1928, the California Constitution was amended, making *all* users of water subject to the standard of reasonableness.[117] Prior to the amendment, riparian users were not required to meet the standard.[118] A user whose purposes were accepted in one period of time could have later found that the use was no longer considered reasonable, and the user would no longer have the water rights.

Water rights were taken away as a result of the United States

grating the Public Trust Doctrine and California Water Law, 5 J. ENERGY L. & POL'Y 121, 133 (1983).

115. Goldsmith & Calonne, *The California Public Trust Doctrine—Unsettled Law, Unsettled Rights*, CAL. REAL PROP. J. 13, 18 (Fall 1986).

116. Note, *supra* note 114, at 133.

117. *See supra* note 10 and accompanying text.

118. Herminghaus v. S. Cal. Edison Co., 200 Cal. 81, 252 P. 607 (1926), *cert. denied*, 275 U.S. 486 (1927).

Supreme Court's decision in *Winters v. United States.*[119] The case grew out of a dispute between Indians of the Fort Belknap Reservation in Montana and non-Indian settlers nearby. Homesteaders began to use the water from the Milk River before the Indians were granted the reservation. The Supreme Court held that when land was set aside for the Indians, the Indians gained a prior right to the water since the creation of the land carried with it the implication that there would be enough water to make the land useful.[120] Thus, by the *Winters* doctrine, appropriators who acquired water rights prior to the creation of the Indian Reservation lost their priority dating. The fear of losing water rights gave rise to concerns similar to those now being expressed regarding the incorporation of the public trust doctrine into California's system of water law.[121] Yet, in spite of the fears, accommodations were made.

Another major criticism of the decision concerns the question of who will bear the burden of providing sufficient water in the waterways to assure that public trust interests are protected. Three possible solutions have been suggested: "(1) The burden may be imposed on the particular user against whom the public trust complaint is drawn; (2) The burden may be allocated in some unspecified equitable manner among all existing water right holders on the stream; or (3) The burden may be apportioned according to traditional water right priorities. . ."[122]

Regardless of the chosen solution, there is another major question involved: "[H]ow far can you go in cutting back prior water rights under the [public] trust doctrine without incurring the so-called due process clause of the American Constitution."[123] If water rights are property rights and they are being taken away for public use, should not the state compensate the private party as indicated in the 5th Amendment of the United States Constitution? Some people believe compensation is required, while others point to the many instances in which people have lost water rights without compensation.[124] Courts have rejected the argument that eminent

119. 207 U.S. 564 (1908).

120. The same rationale has been used to reserve water rights when land is designated for a park, national forest, or other public use. *See* Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955).

121. H. Dunning, Remarks at Public Policy Program, *supra* note 112, at 87.

122. Goldsmith & Calonne, *supra* note 115, at 15.

123. C. Lee, Remarks at Public Policy Program, *supra* note 112, at 76.

124. For example, water rights have been lost because of the reserved rights of the government (*see supra* note 120), equitable apportionment in interstate litigation, the exercise of state police power by which the states regulate water rights, and pueblo rights which supercede appropriative water rights.

domain was the sole method of extinguishing private water rights. "[I]n many situations, eminent domain is too costly, too cumbersome, too time-consuming, and not required by the equities of the water rights holders. More importantly, . . . the needs of a community . . . may outweigh the needs of the appropriator."[125]

In *Illinois Central*, the United States Supreme Court noted that any grant subject to the public trust was revocable, but then said, "Undoubtedly there may be expenses incurred in improvements made under such a grant which the State ought to pay; . . ."[126] Perhaps the taking issue with the corresponding compensation for revoked water rights will not be decided until a water "takings" challenge is heard by the Court. The United States Supreme Court denied certiorari in the *National Audubon* case without comment. "One of the chief arguments that was made against it by the U.S. Solicitor General was that it was premature, that the diversion entitlements have not yet been reduced—they are vulnerable to reduction, but they haven't been reduced. That's a very important open question."[127] If water rights are eventually taken from a party pursuant to reallocation of water to protect a public interest, perhaps the Court will choose to decide the issue.

2. Difficulties in Implementation of the New Water Policy

As a result of *National Audubon*, California water law now incorporates the public trust doctrine into the riparian and prior appropriation systems. To what types of waters does the public trust doctrine apply? Does application of the public trust to protect scenic, recreational, and ecological values at Mono Lake, rather than navigation, indicate that the court is moving away from the traditional prerequisite of navigability for the application of the public trust doctrine? Perhaps this application of the doctrine is not new. The court decided in *Arnold v. Mundy* that interests protected by the public trust doctrine were not limited to navigation, commerce, and fishing.[128]

One commentator has suggested that "[a]ll existing water rights which adversely impact public trust values are now subject to reconsideration and modification by either an agency or a court in the

125. Johnson, *supra* note 87, at 236.

126. *Illinois Central*, 146 U.S. at 455 (*quoted in National Audubon*, 33 Cal. 3d at 438, 658 P.2d at 721, 189 Cal. Rptr. at 358).

127. A. Moskovitz, Remarks at Public Policy Program, *supra* note 112, at 81.

128. Arnold, 6 N.J.L. at 76-77; *supra* note 22 and accompanying text.

name of the public trust."[129] In particular, perhaps underground aquifers are protected by the doctrine even though they are not navigable waterways. This would follow from the fact that the doctrine was used with regard to tributaries of Mono Lake, even though they are nonnavigable waterways, based on the reasoning that the public trust doctrine protected the navigable waterway from diversion of the nonnavigable tributaries. Therefore, in situations where the pumping of groundwater may adversely affect navigable waterways, "it would appear easy enough to use the Mono Lake rationale to attack the pumping. This would occur, however, because public trust protection was being given to the navigable waterway, not to the aquifer."[130]

Application of the public trust doctrine will require a balancing of the interests of the public and the water users. Several commentators have criticized the court's holding because it does not give the standards to be used in the balancing process.[131] However, Professor Dunning points out that it would be very difficult to codify the standards appropriate for all regions and all situations. "To try to develop regulations that would be useful for Mono Lake and the Delta and San Francisco Bay and the San Joaquin River and possibly someday San Joaquin Valley groundwater is, . . . impossible."[132] It has also been asserted that the reason the court's decision lacks definitiveness is partially explained by the fact that the decision was merely a declaratory judgment on a general question posed by a federal court in the course of invoking the abstention doctrine.[133] In *National Audubon* the California Supreme Court answered the questions posed regarding jurisdiction and the relationship of the public trust doctrine to the state's water policy. These answers did not call for a decisions regarding standards to be used in balancing interests.

Even though the California Supreme Court did not give the standards for the balancing process to be used in determining water rights, the court suggested factors which should be considered in the allocation of the Mono Basin waters. "We recognize the substantial concerns voiced by Los Angeles—the city's need for water, its reliance upon the 1940 board decision, the cost both in terms of

129. Dunning, *supra* note 21, § 17.07[1], at 17-42.

130. *The Mono Lake Decision: Protecting a Common Heritage Resource from Death by Diversion*, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10,144, 10,150 (May 1983) [hereinafter *The Mono Lake Decision*].

131. Note, *supra* note 114, at 132.

132. H. Dunning, Remarks at Public Policy Program, *supra* note 112, at 94.

133. *The Mono Lake Decision*, *supra* note 130, at 10,147.

money and environmental impact of obtaining water elsewhere. Such concerns must enter into any allocation decision."[134] Critics point out that *National Audubon* threatens to cause a flood of litigation. However, Mr. Rossman[135] suggests that this may not be the case. He sees three phases of western water resources allocation. The first phase was the appropriation and development of resources, subject only to the constraint of prior appropriators. In the second phase, the police power surfaced, controlling and constraining the prior appropriation doctrine and reallocating the resources. In each of these two phases, questions of competing interests in water resources are resolved by the courts. The third phrase is marked by compromise and collaboration among the competing interests.[136] To those concerned about increasing litigation of water rights, Rossman's reply is, "[T]he environmental plaintiffs and the truculent City of Los Angeles might surprise us all by implementing a 'third phase collaboration resolution' of the dispute. . . . If nothing else, the costs of litigation and its attendant uncertainty may eventually convince both preservationists and developers that we share a common resource and a common duty to govern it with mutual respect for all its users."[137]

The resolution of the Mono Lake problem may indeed be decided through negotiation. That could mark the beginning of the third phase of western water resources allocation as identified by Rossman, in which water rights are established using compromise.

3. The Wisdom of Using the Public Trust Doctrine in This Case

Commentators have criticized use of the public trust doctrine to solve environmental and ecological problems both prior to *National Audubon*[138] and recently.[139] In a comment published a year before the *National Audubon* decision, Mr. Walston detailed the concerns of those opposed to using the public trust doctrine to solve environ-

134. *National Audubon*, 33 Cal. 3d at 447-48, 658 P.2d at 729, 189 Cal. Rptr. at 365-66.

135. Rossman was one of the attorneys for the plaintiffs in *National Audubon*. He served as special counsel to Inyo County for its water resource matters.

136. *Public Trust in Appropriated Waters: California Supreme Court Decides Mono Lake Case, supra* note 53, at 10,112.

137. *Id.*

138. Walston, *supra* note 16. Walston was Deputy Attorney General, Environmental Law Department, San Francisco, at the time he wrote this article.

139. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986).

mental problems. He said, "California's water rights systems provide a basis for resolving the tension between navigation and commerce which is beyond the scope of the public trust doctrine."[140] Walston contends that the public trust doctrine would not advance economic development, and that water rights decisions should be made by the legislature. "In a democratic society, the people, through their elected representatives, have the right to allocate their natural resources in any manner which protects or promotes the perceived public interest."[141] In fact, he sees no reason why the legislature cannot delegate such decisions to an administrative agency. Thus, there is no reason to assume that a water board could not make the appropriate decisions which would best serve the public interests, and the public trust values in particular.

In *National Audubon*, the California Supreme Court rejected the arguments presented by Walston. The court stated that the state's system of allocation by prior appropriation may be efficient, but that "an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests."[142] The court also emphasized the duty of the state to maintain continuing supervision of the taking and use of appropriative water.

This state duty has been recognized in other states as well. A 1985 comment[143] explores the concerns in Texas regarding the state's bays and estuaries. The bays and estuaries require fresh water flow in order to remove pollutants, bacteria, and viruses from the marshes, so that the water bodies can serve as nursery grounds for commercial fish of the Atlantic and Gulf coasts. In addition, without sufficient fresh water, the marshes will increase in salinity causing damage to the resident fish and shellfish.[144] The water has been diverted upstream for growing industries and population centers, an analogous situation to that faced by the California Supreme Court in *National Audubon*. The authors, after describing a system of water allocation strikingly similar to that of California, note that there is some support in Texas for the state exercising continuing jurisdiction under the public trust doctrine to interfere with established rights when changing public needs demand, and to reallocate

140. Walston, *supra* note 16, at 79.

141. *Id.* at 81.

142. *National Audubon*, 33 Cal. 3d at 446, 658 P.2d at 728, 189 Cal. Rptr. at 365.

143. Morrison & Dollahite, *The Public Trust Doctrine: Insuring the Needs of Texas Bays and Estuaries*, 37 BAYLOR L. REV. 365 (1985).

144. *Id.* at 367-69.

water resources.[145] The authors conclude: "It is imperative that localized economic pressures do not override the state's obligations as trustee to its people concerning their common heritage in the state's water. Neither inertia nor an anachronistic priority system ought to be allowed to frustrate Texas' responsible trusteeship of its water resources."[146]

On the other hand, in reviewing how other states have reacted to the *National Audubon* decision, Professor Lazarus[147] is very critical of the new resurgence of the public trust doctrine. Lazarus states that the doctrine rests on legal fictions and the purpose of the public trust doctrine has been to avoid judicially perceived limitations or consequences of existing rules of law. He says that "[n]otions of 'sovereign ownership' of certain natural resources" and the " 'dut[y] of the sovereign as trustee' " of resources are "judicially created shorthand methods" for justifying different treatment of governmental transactions that involve those resources.[148] He believes that nuisance law could be used to achieve the same results as cases which use the public trust doctrine.[149]

Lazarus also points to the state's increasing use of its police power which he believes provides for a more flexible way to protect natural resources. "With the emergence of this modern police power, the public trust doctrine retains little importance in promoting governmental authority to protect and maintain a healthy and bountiful natural environment. . . . Police power authority is well settled and requires no comparable judicial discovery of prior sovereign reservation."[150] He sees the public trust doctrine as "a relic of the past"[151] which should be discarded.

A weakness in Lazarus' argument is that administrative oversight is not fully effective when there are insufficient funds to staff those administrative agencies adequately. A vigorous common law doctrine is needed in an era of declining funds and, therefore, declining efforts of the government to protect public needs.[152]

Thus, we see that there is little agreement on the efficacy of the public trust doctrine in solving problems such as those of Mono

145. *Id.* at 408.
146. *Id.* at 420.
147. Lazarus is Associate Professor of Law, Indiana University.
148. Lazarus, *supra* note 139, at 656.
149. *Id.* at 656.
150. *Id.* at 674-75, 689.
151. *Id.* at 691.
152. Stevens, *Life, Liberty, and the Right to Navigate: Justice Mosk and the Public Trust*, 12 HASTINGS CONST. L.Q. 421 (1985).

Lake. The *National Audubon* decision of the California Supreme Court has ardent supporters as well as dissatisfied critics.

G. *Conclusion*

Like other western states, California water policy has recognized both riparian rights and rights acquired by prior appropriation. Under the prior appropriation system, once a permit was issued by the state's Water Board, a prior appropriator had rights to the water which were superior to all those later seeking rights to the same water. If the water was being used for a reasonable and beneficial purpose, the rights could not be challenged. Water was used to meet the needs of growing population, agriculture, and industry, and as a result, bodies of water were drained, wildlife was harmed, and entire ecological systems were threatened. Persons wishing to solve the problem found that the existing water policy did not provide a system by which the process could be changed.

The public trust doctrine has been recognized in the United States for many years, but until recently had been applied mostly to protect traditional uses—navigation, commerce, and fishing. However, in recent years the doctrine expanded to protect additional public trust interests. In 1971, the California Supreme Court stated that the application of the trust is flexible so as to meet changing public needs. Thus, the door was opened for the use of the public trust doctrine as a legal solution to water diversion problems. In *National Audubon*, the California Supreme Court ruled that the public trust doctrine protects navigable waters from harm caused by the diversion of the water in their non-navigable tributaries. Specifically, this decision required the state to reconsider the allocation of water from the Mono Basin for use in the City of Los Angeles. This reconsideration has not yet taken place, so the results are unknown. Perhaps the City will need to institute stringent conservation measures; perhaps it will seek alternative and undoubtedly more costly sources of water.

While the new application of the public trust doctrine has its critics, clearly the doctrine has become a vital aspect of water law in western states. Perhaps we will see efforts to apply the public trust doctrine to other modern problems, such as water quality and pollution of areas such as the Kesterson Wildlife Refuge. If the appropriation of water from upstream sources causes such problems in downstream areas, a recognition of the public trust interests involved may require a reconsideration of the original appropriation.

Many questions regarding the effect of *National Audubon* remain

unanswered; but at the same time, they present exciting challenges to the legal community for several years to come.

*Alice King**

* J.D. 1988, UCLA; Ph.D. (Mathematics) 1975, Claremont Graduate School; M.A. (Mathematics) 1965, U.C. Riverside; B.A. 1956 U.C. Riverside.