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# Protecting Public Trust Values in California's Waters: The Constitutional Alternative

*Jeffrey S. Silvyn\**

By the law of nature these things are common to mankind—the air, running water, the sea and consequently the shores of the sea.

INSTITUTES OF JUSTINIAN 2.1.1

[T]he state, as quasi-sovereign and representative of the interest of the public, has a standing in the court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners or the land most immediately concerned.

*People of the State of California v. United States*,  
180 F.2d 596, 600 (9th Cir.), *cert. denied*, 340 U.S. 826 (1950).

## I.

### INTRODUCTION

#### A. *Diminishing Water Resources*

The past five years of drought in California have dramatically emphasized the finite nature of water as a resource.<sup>1</sup> Even without the continuing problem of precipitation shortfalls, the rapidly expanding population<sup>2</sup> and loss of water sources to contamination<sup>3</sup> have strained the limits of supply.

In recent years there has been a growing effort to protect the broad public interests in natural resources. This has been especially true when such resources are subject to private uses in the short-

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\* J.D. 1992, University of California, Los Angeles; B.A. 1989, Johns Hopkins University. I wish to thank Richard Skinner and Kenneth Williams for sharing their insights into the public trust doctrine.

1. State deliveries of water to agricultural customers were cut in half in 1990 and 39 of California's 58 counties have implemented some level of water rationing. CALIFORNIA DEPT. OF WATER RESOURCES, CALIFORNIA'S CONTINUING DROUGHT 1 (Jan. 1991).

2. California experiences a population growth of nearly 750,000 per year. *Id.* at vii.

3. See Ralph W. Johnson, *Water Pollution and the Public Trust Doctrine*, 19 ENVTL. L. 485, 486 (1989) (describing nonpoint source pollution).

term, which may impair future public uses.<sup>4</sup> Increasing use of water from lakes and streams for urban consumption and agriculture may impair or even eliminate public enjoyment of boating, fishing, and wildlife. Diversions from Owens Lake, for example, have transformed it into a dry alkali flat, and diversions from Mono Lake have reduced its original surface area of eighty-five square miles by more than twenty-five square miles.<sup>5</sup>

### B. *The Public Trust Doctrine vs. the Public Use Right*

Legal commentators have devoted increasing attention to the public trust doctrine as a legal theory suitable to protect public interests in water and water-related resources.<sup>6</sup> Much of this commentary has focused on recent court decisions that have expanded the scope of the public trust doctrine. This comment contends that these decisions remain consistent with the notion of the public trust doctrine as a property interest. As such, the state may only apply the public trust doctrine where the state has some ownership interest in the water resource it seeks to protect.<sup>7</sup> This ownership interest depends on the condition of the waterway at the date of statehood rather than on its present characteristics.

While the public trust doctrine remains limited by its roots in property law, the California Constitution offers a more expansive protection of state water resources through the statutory right of public use.<sup>8</sup> This statute-based authority is called the "public use

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4. This concern has emerged with respect to the forests in Northern California, for example, as evidenced by the 1990 Proposition 130 and 138 ballot initiatives regarding forestry practices and the establishment of state parks.

5. *National Audubon Soc'y v. Superior Court (Mono Lake)*, 33 Cal. 3d 419, 427, 429, 658 P.2d 709, 713, 714, 189 Cal. Rptr. 346, 350, 351, cert. denied, 464 U.S. 977 (1983).

6. E.g., Mary Kyle McCurdy, *Public Trust Protection for Wetlands*, 19 ENVTL. L. 683 (1989); Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723 (1989).

7. Private citizens also have standing to assert claims for harm to the public trust. *National Audubon Soc'y v. Superior Court (Mono Lake)*, 33 Cal. 3d 419, 431 n.11, 658 P.2d 709, 716 n. 11, 189 Cal. Rptr. 346, 353 n.11, cert. denied, 464 U.S. 977 (1983); *Marks v. Whitney*, 6 Cal. 3d 251, 261-62, 491 P.2d 374, 381-82, 98 Cal. Rptr. 790, 797-98 (1971).

8. The California Constitution provides as follows:

No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.

right" throughout this comment. With the public use right the state or members of the public can protect certain waters because of the waters' utility to the public, regardless of any state property interest. Unlike the public trust doctrine, the applicability of the public use right depends on the current usability of a waterway and not its historical condition. As a result, the public use right allows the state to continue protecting public interests in water regardless of how conditions change.

Following a description of the two legal theories, this comment compares the scope and application of the public trust doctrine with the California public use right. The author distinguishes the public trust doctrine from the statutory public right to use waterways based on the relationship of the public trust doctrine to a property interest, and suggests that the public trust doctrine need not be stretched beyond its property law aspects in order to protect public interests in water resources. In states such as California, the public use right provides a more comprehensive legal framework for achieving this objective in any waters amenable to public use.

## II.

### THE PUBLIC TRUST DOCTRINE AS PROPERTY LAW

#### A. *The Historical Origins of The Public Trust Doctrine*

The protections offered by the public trust doctrine reveal the special significance of water resources.<sup>9</sup> In the United States, the public trust doctrine derives from English common law.<sup>10</sup> The English legal system evidences a preference for private ownership of natural resources but makes an exception for navigable waterways with the public trust doctrine.<sup>11</sup> The British monarch could not alienate all property interests in the land under such waterways, as

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CAL. CONST. art. X, § 4.

9. *State v. Superior Court (Fogerty)*, 29 Cal. 3d 240, 245-46, 625 P.2d 256, 259, 172 Cal. Rptr. 713, 716-17, cert. denied, 454 U.S. 865 (1981); Harrison C. Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 ENVTL. L. 515, 522-23 (1989); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 428-39 (1989). Wilkinson contends that waterways have played a key role in the development of the United States by providing inexpensive transportation for commerce and settlers as well as the military. In addition, the significance of water to Native Americans is revealed by their denial of a right to own water and their treatment of water as sacred.

10. For a thorough discussion of the English roots of the public trust doctrine see *Shively v. Bowlby*, 152 U.S. 1, 11-18 (1894); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

11. Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 196-97 (1980).

they were held by the crown in trust for the people.<sup>12</sup> The public trust doctrine as applied to the lands of the British monarch served to limit the fee simple and guarantee the public an easement for navigation and fishing over the navigable waters.<sup>13</sup>

### B. *The Property Interests Encompassed in the Public Trust Doctrine*

Treated as a property concept, the public trust doctrine entails two related property interests. In the modern context, the doctrine gives the state fee title to the beds of navigable waters and gives the public an easement in the water over the bed.<sup>14</sup> The state may convey title to the lands under navigable waters, but only if the grant furthers public interests or does not substantially impair them.<sup>15</sup> A state may, for example, grant lands for the construction of aids to navigation, such as piers, but may not grant an entire harbor to a private party.<sup>16</sup> Perhaps decisions like *Illinois Central R.R. v. Illinois* can best be understood as a recognition that certain natural resources have too much importance to the public at large to allow complete control by a private owner.

The California courts have held that the state may convey title to lands subject to the public trust doctrine but that the public maintains an easement over the water unless the grant promotes public trust goals.<sup>17</sup> Under federal law, the states as sovereigns hold title up to the high water mark.<sup>18</sup> A state may grant title to an upland owner down to the low water mark but the public trust easement continues to extend to the high water mark.<sup>19</sup> This easement allows

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12. Wilkinson, *supra* note 9, at 430-31.

13. McCurdy, *supra* note 6, at 686-87, n.18.

14. *Orion Corp. v. State*, 109 Wash. 2d 621, 638-42, 747 P.2d 1062, 1071-73 (1987), *cert. denied*, 486 U.S. 1022 (1988). For a discussion of the uses included in the public trust easement, see *infra* part III.

15. *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892) (called the "seminal case on the scope of the public trust doctrine" in *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 521, 606 P.2d 362, 365, 162 Cal. Rptr. 327, 330, *cert. denied*, 449 U.S. 840 (1980)).

16. *Illinois Central*, 146 U.S. at 453. *But see Morse v. Oregon Div. of State Lands (Morse III)*, 285 Or. 197, 590 P.2d 709 (1979) (finding the public trust doctrine not violated by filling of wetlands to extend a municipal airport runway since the project entails a public use of the land).

17. *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980); *People ex rel. Webb v. California Fish Co.*, 166 Cal. 576, 596-97, 138 P. 79, 87-88 (1913); *accord CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1118-19 (Alaska 1988).

18. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988).

19. *State v. Superior Court (Lyon)*, 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696, *cert. denied*, 454 U.S. 865 (1981). The court held that California received title to land

the state to preserve its control over the shorezone in order to protect the public trust values.<sup>20</sup> For example, the state could presumably place restrictions on development in the shorezone to protect public use of a beach that was uncovered at low tide by the adjacent public trust waters.<sup>21</sup>

The court in *State of California v. Superior Court (Fogerty)*, also determined that the public trust easement should extend to a current high water mark even though the artificial influence of a dam had significantly raised the natural level of the lake concerned.<sup>22</sup> The court reached this decision due to the extreme practical difficulties in establishing the natural level of a body of water which had been subject to artificial influences for over one hundred years.<sup>23</sup> From a legal perspective, the application of the easement to include lands under water due to artificial influences recognizes the flexible nature of a water boundary between owners. While the court applied the public trust doctrine to land not necessarily part of the original sovereign lands of the state, California law has long recognized a general rule that state title shifts in response to gradual shifts in waterways which serve as boundaries.<sup>24</sup>

In applying the *Lyon* and *Fogerty* decisions on remand to determine the high water mark of Lake Tahoe, the court of appeals relied on an alternative property concept of prescriptive easements.<sup>25</sup> The

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up to the high water mark of nontidal navigable lakes at statehood but had conveyed title to the land between the high and low water marks to riparian owners with the adoption of Civil Code § 830 in 1872. Despite the conveyance, the court found California retained a public trust easement over the land between the high and low water marks.

20. *State v. Superior Court (Fogerty)*, 29 Cal. 3d 240, 247, 625 P.2d 256, 260, 172 Cal. Rptr. 713, 717, *cert. denied*, 454 U.S. 865 (1981).

21. *See Lyon*, 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696, *cert. denied*, 454 U.S. 865 (1981); *Fogerty*, 29 Cal. 3d at 249, 625 P.2d at 261, 172 Cal. Rptr. at 718-19.

22. *Fogerty*, 29 Cal. 3d at 248-49, 625 P.2d at 261, 172 Cal. Rptr. at 718.

23. *Id.*

24. *City of Oakland v. Buteau*, 180 Cal. 83, 87, 179 P. 170, 172 (1919). This case involved a dispute over the boundary between the harbor which was owned by the city and property on the shore which was privately owned. The court noted that where a land boundary is set by running water or tidal water, the water line is a shifting boundary moving landward with erosion and waterward with accretion. *Accord* *State of California ex rel. State Lands Comm'n v. United States*, 805 F.2d 857 (9th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987) in which California claimed land exposed by the recession of Mono Lake where the federal government owned the upland. The court found that under federal law, gradual shifts in the waterline change the boundary but violent, visible changes do not. *See also* Jan S. Stevens, *The Public Trust and In-Stream Uses*, 19 ENVTL. L. 605, 608 (1989).

25. *Fogerty v. State*, 187 Cal. App. 3d 224, 230, 237-39, 231 Cal. Rptr. 810, 817-19 (1986), *cert. denied*, 484 U.S. 821 (1987). A prescriptive easement results after use of the property which is open, notorious, continuous, adverse, and uninterrupted for five

court held that the public trust easement extended to the highest water mark achieved for a consecutive five year period as required to establish a prescriptive easement.<sup>26</sup> Thus while the *Lyon* and *Fogerty* series of decisions applied the public trust easement to lands beyond the state fee title, those courts determined the scope of the easement according to traditional property rules. Those decisions continued to treat the public trust doctrine primarily as a property interest held by the public.

Nevertheless, modern applications of the trust doctrine such as *Lyon* and *Fogerty* have created some confusion as to precisely how to categorize the doctrine.<sup>27</sup> This confusion stems from the expansion of the values encompassed by the public trust doctrine and the application of that doctrine to lands not subject to sovereign ownership in order to protect natural resources.<sup>28</sup>

### III.

#### THE USES PROTECTED BY THE PUBLIC TRUST DOCTRINE AND THE PUBLIC USE RIGHT

##### A. *The Public Trust Doctrine*

Traditionally, public trust uses were limited to navigation, commerce, and fisheries.<sup>29</sup> Decisions by state courts, including those in California, have interpreted these uses to include the right to fish, hunt, bathe, swim, and use for general recreational purposes.<sup>30</sup> The California courts have been particularly expansive in their interpretation of the values protected by the public trust. In a case regard-

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years. Any party using property may obtain an easement for the use by prescription in contrast to the public trust easement which attaches to certain property which the state obtained as an aspect of sovereignty upon its formation.

26. *Id.* at 239-40, 231 Cal. Rptr. at 818-19.

27. James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989) (arguing that the trust should be considered property law while describing and criticizing the treatment of the public trust doctrine as trust law, state constitutional law, federal constitutional law, a justification for strict judicial scrutiny of certain legislative acts, and as a source of state police power).

28. *E.g.*, Clifton v. Passaic Valley Water Comm'n, 224 N.J. Super. 53, 539 A.2d 760, 765 (1987) (declaring drinking water a vital resource owned by the people and protected by the public trust doctrine without reference to sovereign lands).

29. *Marks v. Whitney*, 6 Cal. 3d 251, 259, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971); Richard M. Frank, *Forever Free: Navigability, Inland Waterways, and the Expanding Public Interest*, 16 U.C. DAVIS L. REV. 579, 606-07 (1983).

30. *Marks*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790; *Orion Corp. v. Washington*, 109 Wash. 2d 621, 640-41, 747 P.2d 1062, 1073 (1987), *cert. denied*, 486 U.S. 1022 (1988); *Menzer v. Village of Elkhart Lake*, 51 Wis. 2d 70, 82, 186 N.W. 2d 290, 296 (1971).

ing tidelands subject to the public trust, the California Supreme Court declared:

The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs . . . . There is a growing public recognition that one of the most important public uses of 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. It is not necessary here to define precisely all the public uses which encumber tidelands.<sup>31</sup>

With this decision, the court incorporated general ecological concerns into the public trust doctrine and left open the possibility of including additional uses in the future.

### B. *The Public Use Right*

The California Constitution provides for a public right of access to and use of the navigable waters of the state.<sup>32</sup> Several states have adopted statutory provisions which also guarantee public access to waters or declare navigable waters to be public property.<sup>33</sup> The California courts have adopted the broad range of public trust values for the constitutional right of public use.<sup>34</sup> In fact, the court of appeals in *Kern River Public Access Committee v. City of Bakersfield* adopted the language of the *Marks* opinion to assert the flexible nature of the public use right and to include ecological preservation among the protected uses.<sup>35</sup> The *Kern River* decision indicates that, like the public trust doctrine, the public use right should be interpreted in a liberal fashion to guarantee the public a broad range of uses in waterways.<sup>36</sup> While the public use right and the public trust

31. *Marks*, 6 Cal. 3d at 259-60, 491 P.2d at 380, 98 Cal. Rptr. at 796.

32. See *supra* note 8.

33. ALASKA STAT. §§ 38.05.127, 38.05.128, 38.05.965(12) (1989); ARIZ. REV. STAT. ANN. § 37-1104 (West Supp. 1991); IDAHO CODE § 36-1601 (1977); IOWA CODE § 106.69 (1989); LA. CIV. CODE ANN. arts. 450, 452 (West 1980); MONT. CODE ANN. § 23-2-302 (1988); UTAH CODE ANN. § 73-3-1 (1989); VT. STAT. ANN. tit. 10, § 4141 (1984); WISC. STAT. ANN. § 30.10 (West 1989); WYO. CONST. art. VIII, § 1.

34. *Kern River Pub. Access Comm. v. City of Bakersfield*, 170 Cal. App. 3d 1205, 1215-16, 217 Cal. Rptr. 125, 130-31 (1985) (prohibiting the city from approving development in a subdivision bordering a river until the developer dedicated an easement within the subdivision for public access to the river).

35. *Id.* at 1216 n.4, 217 Cal. Rptr. at 131 n.4 (citing *Marks v. Whitney*, 6 Cal. 3d 251, 259-60, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971)); see *supra* text accompanying note 31.

36. Even if the art. X, § 4 guarantee of public use and access to navigable waterways did not protect the right to fish, the California Constitution contains an explicit protec-

doctrine encompass the same set of public values in waterways, the public use right applies to many waters outside the reach of the public trust doctrine.

#### IV.

#### FACTORS DISTINGUISHING THE APPLICABILITY OF THE PUBLIC TRUST DOCTRINE AND THE PUBLIC USE RIGHT

##### A. *Limits on the Public Trust Doctrine from the Federal Navigability Test*

In the United States, the public trust doctrine provides the states with authority over lands underlying certain waters as an aspect of sovereignty.<sup>37</sup> The federal government held title to the lands under navigable waters outside the thirteen original states in trust for the future states to be received when they entered the Union.<sup>38</sup> This grant also included title to all lands under waters influenced by the tides regardless of navigability.<sup>39</sup> The states received title to the lands below the high water mark of navigable waters as determined by federal law.<sup>40</sup>

The federal standard for navigability for purposes of determining the lands which passed to the states under the public trust doctrine includes those waters which are susceptible of use for navigation and commerce in their natural condition.<sup>41</sup> Commercial uses may include transport of livestock or passenger excursions.<sup>42</sup> Navigability depends on the ability of the waterway to support commercial traffic and not on actual use.<sup>43</sup> A lake or river may satisfy the test even if there are occasional impediments to navigation or if the waterway is not navigable year round.<sup>44</sup> The standard does not re-

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tion for such a right by providing "The people shall have the right to fish upon and from the public lands of the State and *in the waters thereof* . . ." CAL. CONST. art. I, § 25 (emphasis added).

37. *Montana v. United States*, 450 U.S. 544, 551 (1981).

38. *United States v. Oregon*, 295 U.S. 1, 14 (1934).

39. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 477-81 (1988).

40. Even though the original federal grant included all the land below the high water mark, the states had the power to convey part of the grant to private riparian owners. Some states, for example, only assert title up to the low water mark. See *Shively v. Bowlby*, 152 U.S. 1, 18-26 (1894).

41. *Oregon*, 295 U.S. at 15; *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). For a more detailed analysis of the various federal navigability tests, see Frank, *supra* note 29.

42. *Utah v. United States*, 403 U.S. 9, 11-12 (1971).

43. *United States v. Utah*, 283 U.S. 64, 82 (1931).

44. *Id.* at 86-87.

quire that the waterway be passable by a particular type of boat as long as some sort of vessel useful for commerce may navigate.<sup>45</sup>

While this test relies in part on an evaluation of the suitability of the waterway for commerce, the test should not be confused with the one for purposes of determining congressional jurisdiction under the Commerce Clause.<sup>46</sup> For federal Commerce Clause purposes, rivers are navigable in law that are, in fact, used or susceptible of being used in their natural condition, or with reasonable improvements, for purposes of trade and commerce.<sup>47</sup> For determining title to the beds of waterways, the "commerce clause" test is applied to the stream, but considering only its natural condition at the time the state was admitted to the United States.<sup>48</sup>

B. *The State Power to Determine Which Waters Are Subject to the Public Use Right*

In contrast to the public trust doctrine, state statutory protection of the public right to use waters, like the provision contained in the California Constitution, is not limited by the federal test of navigability.<sup>49</sup> States may set their own definition of navigability for purposes of controlling the uses of water.<sup>50</sup> Where not in conflict with federal authority, states have exclusive control over water resources whether or not the waters are navigable under federal standards.<sup>51</sup>

In California the public use right in navigable waters extends to many waters not subject to the public trust doctrine. Essentially the

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45. *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926) (indicating steamboats, flatboats, and sailing vessels could all satisfy the test).

46. U.S. CONST. art. I, section 8, cl. 3 ("The Congress shall have the Power . . . [t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

47. *United States v. Appalachian Power Co.*, 311 U.S. 377, 406-09 (1940).

48. *Utah v. United States*, 403 U.S. 9, 10-11 (1971).

49. *Fox River Co. v. Railroad Comm'n*, 274 U.S. 651 (1927).

50. *Hitchings v. Del Rio Woods Recreation and Park Dist.*, 55 Cal. App. 3d 560, 567, 127 Cal. Rptr. 830, 834 (1976) (holding that a river which in its natural state is navigable in fact by recreational boats for nine months of the year is navigable in law); *People ex rel. Baker v. Mack*, 19 Cal. App. 3d 1040, 1051, 97 Cal. Rptr. 448, 454 (1971) (finding water that is navigable by small oar or motor-propelled craft is navigable in law).

51. *Mack*, 19 Cal. App. 3d at 1051, 97 Cal. Rptr. at 454; *Montana v. United States*, 450 U.S. 544, 551 (1981) (holding that Congress retains the power over navigable waterways to regulate commerce, to protect commercial use, and to convey lands under navigable waterways to perform international obligations or to promote foreign and interstate commerce). *Cf.* *United States v. Certain Parcels of Land Situated in the City of Valdez*, 666 F.2d 1236 (9th Cir. 1982) (holding that the United States need not pay compensation for land taken under a harbor as part of a project to build a Coast Guard safety station since the land was burdened with the federal navigational servitude).

public use right applies to all waterways which can be navigated by any type of craft including small pleasure boats.<sup>52</sup> “[M]embers of the public have the right to navigate and to exercise the incidents of navigation . . . at any point below the high water mark on waters of this state which are capable of being navigated by oar or motor-propelled small craft.”<sup>53</sup>

Under this type of analysis, a river qualifies as navigable even if only passable for part of the year or blocked by intermittent obstructions like rapids or sandbars.<sup>54</sup> In *Hitchings v. Del Rio Woods Recreation & Park Dist.*, a court of appeals declared a section of the Russian River in northern California navigable although the river “was virtually dry from August to October.”<sup>55</sup> The determinative factor was whether the river served as a useful recreational highway.<sup>56</sup>

The *Hitchings* court relied on a line of previous cases extending the public use right to waterways navigable for recreation, but not for commerce within the test used to determine state title under the public trust doctrine. In *Forestier v. Johnson*, for example, the court applied the public right of navigation to Fly’s Bay, a side channel to the Napa River which was covered by water and navigable by small boats only at high tide.<sup>57</sup> The public used the bay for hunting.<sup>58</sup> Arguably, the court merely applied the public trust doctrine since the trust includes tidelands.<sup>59</sup> However, the court determined that while hunting was not protected under the public trust doctrine, it was included in the public right of use.<sup>60</sup> Consequently, the public had a right to enter Fly’s Bay.<sup>61</sup>

The court in *Bohn v. Albertson* demonstrated the expansive applicability of the public use right.<sup>62</sup> In 1938 the San Joaquin River broke a levee and flooded property called Frank’s Tract which the public proceeded to use in large numbers for boating and fishing.<sup>63</sup>

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52. *People v. Sweetser*, 72 Cal. App. 3d 278, 283, 140 Cal. Rptr. 82, 85 (1977); *Bohn v. Albertson*, 107 Cal. App. 2d 738, 747, 238 P.2d 128, 135 (1951).

53. *Mack*, 19 Cal. App. 3d at 1050, 97 Cal. Rptr. at 454.

54. *Hitchings v. Del Rio Woods Recreation & Park Dist.*, 55 Cal. App. 3d 560, 570, 127 Cal. Rptr. 830, 836 (1976).

55. *Id.* at 566, 127 Cal. Rptr. at 833.

56. *Id.* at 570-71, 127 Cal. Rptr. at 837.

57. 164 Cal. 24, 27-28, 127 P. 156, 157-58 (1912).

58. *Id.* at 29, 127 P. at 158.

59. *See supra* note 39 and accompanying text.

60. 164 Cal. 24, 40, 127 P. 156, 162-63 (1912).

61. *Id.*

62. 107 Cal. App. 2d 738, 238 P.2d 128 (1951).

63. *Id.* at 739, 238 P.2d at 129.

The court declared that suitability for travel by pleasure and fishing boats provided a sufficient basis to establish navigability.<sup>64</sup> Consequently, the public had a right to fish and boat over the flooded Frank's Tract due to the presence of navigable waters.<sup>65</sup> Since the evaluation depends on the current navigability of a waterway, navigability can arise at any time after statehood.<sup>66</sup>

The public use right may adapt to the changing characteristics of a state's water resources while the public trust doctrine remains static. In *Golden Feather Community Ass'n v. Thermalito Irrigation Dist.*, for example, the court found that the plaintiffs could not use the public trust doctrine to prevent diversions from an artificial reservoir which might impair its use for recreation.<sup>67</sup> The public trust doctrine does not apply to artificial bodies of water.<sup>68</sup>

As the court suggested, the outcome might have been different had the plaintiffs used another legal theory.<sup>69</sup> If the reservoir were suitable for recreational boating, the public use right would apply.<sup>70</sup> Asserting this right, the *Golden Feather* plaintiffs could have prevented diversions from the reservoir that interfered with protected uses like fishing.<sup>71</sup> The public use right allows the state to protect many waters usable by the public which do not qualify for protection under the public trust doctrine.

This series of decisions extends the public use right over a vast area of water not encompassed within the public trust doctrine test of navigability. The cases indicate any body of water which becomes navigable for recreation may be added to those protected by the public use right. In contrast, the public trust doctrine can never extend beyond bodies of water navigable under the federal test or subject to tides at the time of statehood.

### C. *The Limited Applicability of The Public Trust Doctrine to Non-Navigable Waters*

In a controversial decision, the California Supreme Court apparently expanded the potential scope of the public trust doctrine.<sup>72</sup>

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64. *Id.* at 744, 747, 238 P.2d at 132-33, 134-35.

65. *Id.* at 749, 238 P.2d at 135.

66. *Bohn*, 107 Cal. App. 2d at 742, 238 P.2d at 132.

67. 209 Cal. App. 3d 1276, 1278, 257 Cal. Rptr. 836, 837 (1989).

68. *Id.* at 1285-86, 257 Cal. Rptr. at 842-43.

69. *Id.* at 1282, 257 Cal. Rptr. at 840.

70. *See supra*, notes 52-53 and accompanying text.

71. *See supra* part III.

72. *National Audubon Soc'y v. Superior Court (Mono Lake)*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, *cert. denied*, 464 U.S. 977 (1983); *accord*, *United*

The court indicated that the state could not sanction the diversion of non-navigable waters without considering the impacts on waters subject to the public trust.<sup>73</sup> Specifically, the court required that government agencies consider public trust values when making water allocation decisions and protect the public trust uses whenever feasible.<sup>74</sup> The court reached this decision while considering the diversion of non-navigable tributaries from Mono Lake, which was navigable and subject to the public trust.<sup>75</sup>

While the court found that the public trust doctrine applies to protect navigable waters from harm caused by diversion of non-navigable tributaries, the Court declined to decide whether the public trust protects trust uses in non-navigable streams.<sup>76</sup> Thus, the public trust extends beyond navigable waters to restrict uses in connected non-navigable waterways that might adversely affect public trust uses in navigable waters. However, the California courts have yet to decide whether the public trust doctrine could protect public uses in a non-navigable waterway when activities in the non-navigable water could not impact the uses in a navigable body of water.

If this remains the extent of *Mono Lake*, the decision seems less expansive than a first impression might suggest. The public trust doctrine represents a property interest held by the state. Like any other property owner, the state may abate nuisances to property interests caused by the harmful activities of adjacent landowners.<sup>77</sup> When analyzed in this fashion, *Mono Lake* represents a less dramatic application of the public trust doctrine than one might expect given the amount of interest generated by the case. Pending future litigation, the willingness of the courts to extend the public trust doctrine beyond navigable waters remains uncertain. For now, the public trust doctrine still does not safeguard public interests in non-

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Plainsmen Ass'n. v. North Dakota State Water Conservation Comm'n, 247 N.W.2d 457 (N.D. 1876).

73. *Mono Lake*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346.

74. *Mono Lake*, 33 Cal. 3d at 446-47, 658 P.2d at 728, 189 Cal. Rptr. at 364-65.

75. *Id.* at 425-26, 658 P.2d at 712, 189 Cal. Rptr. at 349.

76. "[W]e need not consider the question whether the public trust extends for some purposes—such as protection of fishing, environmental values, and recreational interests—to nonnavigable streams." *Id.* at 437 n.19, 658 P.2d at 721 n.19, 189 Cal. Rptr. at 357-58 n.19.

77. In this respect, *Mono Lake* represents a logical application of *People v. Gold Run Ditch and Mining Co.*, 66 Cal. 138, 4 P. 1150 (1884), which held that the state could abate as a nuisance mining activities which caused huge quantities of debris to enter the non-navigable American River and consequently impair navigation downstream in the Sacramento River which was subject to the public trust doctrine.

navigable waterways.<sup>78</sup>

D. *Applying The Public Use Right to Non-Navigable Waters*

The public use right applies to non-navigable waters in much the same fashion as the public trust doctrine. For over one hundred years the California courts have recognized the power of the state to control activities affecting non-navigable waters to protect the public right to use navigable waterways. In *People v. Truckee Lumber Co.*, the California Supreme Court applied the public use right and determined that a property owner could not harm fish located in a non-navigable stream.<sup>79</sup> The court held that the owner of a sawmill could not continue the practice of dumping waste into the Truckee River when the waste killed the fish.<sup>80</sup> While the Truckee River was not navigable, the power of the state to protect fish was not confined solely to navigable or public waters, but extended to all waters within the state.<sup>81</sup> The state's domain includes water passages entirely within private land through which fish pass on their way to or from public waters.<sup>82</sup>

Wild game, which includes fish, are owned by the people and subject to protection by the sovereign.<sup>83</sup> As a result, the state could prevent the dumping of waste into the Truckee River as a public nuisance since the river flowed from Lake Tahoe to Pyramid Lake, both of which were navigable.<sup>84</sup> The reasoning of this decision resembles the implication of *Mono Lake* that the state must have some influence over activities on property outside state control that impact waters subject to state authority. Without such a power the state cannot provide meaningful protection for those waters.

The court took a similarly comprehensive view of the property

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78. The court of appeals recently noted in *California Trout, Inc. v. State Water Resources Control Bd.*, 207 Cal. App. 3d 585, 629-30, 255 Cal. Rptr. 184, 211 (1989), that the public trust doctrine may not apply to protect the fish in a non-navigable stream, but that under *Truckee Lumber* (see *infra* text accompanying notes 79-84) the state has a trust interest in the fish even if the state has no property interest in the non-navigable stream.

79. 116 Cal. 397, 48 P. 374 (1897).

80. *Id.*

81. *Id.* at 400-01, 48 P. at 375.

82. *Id.*

83. *Id.* at 399-400, 48 P. at 374.

84. *Id.* at 401, 48 P. at 375. The holding in *Truckee Lumber* has largely been codified in the Fish and Game Code which prohibits depositing any substance or material deleterious to fish where it could pass into the waters of the state. CAL. FISH & GAME CODE § 5650(f) (West 1988); see also *People v. Weaver*, 147 Cal. App. 3d Supp. 23, 31, 197 Cal. Rptr. 521, 526 (1983).

subject to state jurisdiction to protect public use rights in *People v. Russ*.<sup>85</sup> Russ owned land bordered by the navigable Salt River.<sup>86</sup> Non-navigable sloughs crossed the land, and at high tide water from the ocean passed through the sloughs to the Salt River.<sup>87</sup> This water raised the level of the river and kept the outlet of the Salt and Eel Rivers navigable.<sup>88</sup> To facilitate reclamation, Russ dammed the sloughs, which lowered the level of the river outlets enough to impair navigation.<sup>89</sup>

The court based its decision solely on the effect of the dam, concluding that no legal difference existed between obstructing navigation by damming a navigable stream or its non-navigable tributary.<sup>90</sup> In either situation the court stated that the California constitutional provision guaranteeing public use and access to navigable waterways prohibited all artificial obstructions to navigation.<sup>91</sup> This series of decisions indicates that the public use right can serve to prevent activities that impair the public use of a navigable waterway regardless of whether the activity takes place in the navigable waterway.

Consider, for example, a development project on land that drains into a river which is subject to the public use right. The clearing of the land for construction increases erosion that leads to obstruction of the river and the death of fish that cannot survive in turbid water. Applying *Truckee River* and *Russ* to this hypothetical situation indicates that even though the project is located entirely on private land, the state or a member of the public could bring suit for an impairment of the public use right. Aggressive application of the public use right would require any party considering an act with a demonstrable impact on navigable waters to consider, and hopefully, mitigate that impact.

#### E. *The Public Trust Doctrine Limited by State Ownership Interests*

Even though states received the land under navigable waterways as "an incident of sovereignty"<sup>92</sup> upon attaining statehood, Con-

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85. 132 Cal. 102, 105-06, 64 P. 111, 112-13 (1901).

86. *Id.* at 103, 64 P. at 111.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 105-06, 64 P. at 112.

91. *Id.* at 106, 64 P. at 112. The court relied on the California Constitution art. XV, § 2 (1879), which in 1976 was changed to art. X, § 4.

92. *Montana v. United States*, 450 U.S. 544, 551 (1981).

gress had the power to convey such lands before statehood was actually granted.<sup>93</sup> Congress could also convey these lands in order to satisfy international obligations<sup>94</sup> such as those incurred by treaties.<sup>95</sup> Thus, Congress could extinguish a state's interest in property when required under the terms of a treaty.

These situations include confirmations of land grants in California received from the Mexican government by pre-statehood settlers.<sup>96</sup> In *Summa Corp. v. California*, for example, the Supreme Court faced a dispute over title to the Ballona Lagoon in Los Angeles.<sup>97</sup> California based its claim on its status as sovereign, while the private landowner based its claim on a chain of title derived from the patent proceedings established by the federal government.<sup>98</sup> The federal government began the proceedings pursuant to the Treaty of Guadalupe Hidalgo of 1848 that ended the war with Mexico and provided certain guarantees of title protection to those who held land grants from Mexico.<sup>99</sup> The patent proceedings began after California achieved statehood on September 9, 1850.<sup>100</sup> The Supreme Court determined that where California had failed to assert its property interests in these proceedings no public trust easement remained in the land.<sup>101</sup> The patent proceedings conclusively determined title to the grants notwithstanding sovereign rights like the public trust doctrine.<sup>102</sup>

This situation could also arise on certain Indian reservations that were formed before statehood and included the beds of rivers within the reservation boundaries.<sup>103</sup> Consistent with the interpretation of the public trust doctrine as a property rule, the state cannot assert the public trust easement where the state lacks a property interest in the bed of a navigable water.

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93. *Id.*

94. *Id.*

95. *Summa Corp. v. California*, 466 U.S. 198 (1984).

96. *Id.* Pursuant to the Treaty of Guadalupe Hidalgo in which Mexico ceded nearly all of what is now the southwestern United States, the federal government established a procedure to protect the property rights of those with grants from Mexico. Such grants encompassed over 10 million acres in California. *Id.*

97. *Id.* at 199-200.

98. *Id.*

99. *Id.* at 202-03.

100. *Id.*

101. *Id.*

102. *Id.* at 208-09.

103. See *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970). The state and two Indian tribes claimed title to a section of the Arkansas River. The Court held that the treaty between the tribes and the U.S. granted title to the Indians and thereby precluded the state claim since the treaty was prepared before Oklahoma became a state.

Recently, a federal district court determined that condemnation of property by the federal government terminates the state's public trust authority.<sup>104</sup> A condemnation proceeding "permits the United States to take *all* interests in the property."<sup>105</sup> This includes public trust easements held by the state.<sup>106</sup> Thus, in a variety of circumstances, a state has no public trust authority over land under certain navigable waters. This situation arises where the state never acquired ownership of the property as sovereign or where ownership has been extinguished.

#### F. *The Public Use Right Is Not Limited to Waters Subject to State Ownership*

Because the public use right depends on the usefulness of a waterway for recreation, the title to the bed of the waterway has no relevance in determining whether the public use right applies.<sup>107</sup> In a number of situations, the California courts have ruled that the public use right applies to privately owned property that did not fall within the scope of the public trust doctrine.<sup>108</sup>

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104. *United States v. 11.037 Acres of Land*, 685 F. Supp. 214 (N.D. Cal. 1988). *But see United States v. 1.58 Acres of Land*, 523 F. Supp. 120 (D. Mass. 1981). The court found that the condemnation of Boston waterfront property by the federal government for use as a Coast Guard facility could not extinguish the public trust easement over land below the low water mark. In addition, any future sale of the property to a private party would still be subject to the public trust easement. *Id.*

105. *United States v. 11.037 Acres of Land*, 685 F. Supp. at 216 (emphasis added).

106. *Id.* at 216-17.

107. *Forestier v. Johnson*, 164 Cal. 24, 39, 127 P. 156, 162 (1912); *People v. Sweetsner*, 72 Cal. App. 3d 278, 283, 140 Cal. Rptr. 82, 85 (1977); *People ex rel. Baker v. Mack*, 19 Cal. App. 3d 1040, 1050, 97 Cal. Rptr. 448, 454 (1971); *Bohn v. Albertson*, 107 Cal. App. 2d 738, 749, 238 P.2d 128, 135 (1951); *see also Montana Coalition for Stream Access v. Hildreth*, 211 Mont. 29, 684 P.2d 1088 (1984) (finding that any water suitable for recreational use may be so used regardless of title since Montana Constitution makes all water public), *rev'd in part*, *Gray v. City of Billings*, 213 Mont. 6, 689 P.2d 268 (1984) (regarding right to jury trial for legal claims).

The public use right also restricts regulation by state and local government which cannot prohibit access to navigable waters. *People ex rel. Younger v. County of El Dorado*, 96 Cal. App. 3d 403, 157 Cal. Rptr. 815 (1979). A county ordinance making it a misdemeanor to travel or swim on a 20 mile navigable section of the American River after the property owners complained of pollution and noise was invalid on its face as an absolute prohibition on public use.

The government may, however, impose reasonable restrictions on public use. *See, e.g., Powers v. County of Sonoma*, 222 Cal. App. 3d 339, 271 Cal. Rptr. 695 (1990) (allowing a county to prohibit operating of a business in a state-funded marina); *Graf v. San Diego Unified Port Dist.*, 205 Cal. App. 3d 1189, 252 Cal. Rptr. 889 (1988) (permitting a city to regulate where in a bay boats may anchor); *People v. Queene*, 190 Cal. App. 3d 826, 235 Cal. Rptr. 601 (1987) (upholding government limitations on commercial access to bay-side park docking facilities).

108. *See People ex rel. Baker v. Mack*, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448

In *Forestier v. Johnson*, Forestier claimed fee ownership of Fly's Bay while Johnson claimed a public right of navigation over the waterway on behalf of hunters who entered the waterway in small boats.<sup>109</sup> Forestier argued that the state had surrendered any public trust interest with the grant of the patent.<sup>110</sup> The court assumed that Forestier owned the soil under Fly's Bay but determined that regardless of whether the state retained any property interest under the public trust doctrine, the California constitution preserved the public right of access to the waterway.<sup>111</sup>

The court reached a similar conclusion in *Bohn v. Albertson*.<sup>112</sup> In 1938, the San Joaquin River broke a levee and flooded property called Frank's Tract which the public proceeded to use in large numbers for boating and fishing.<sup>113</sup> The owners acquiesced in the public uses until 1947 when Bohn filed suit to keep the public out.<sup>114</sup> The court determined that no public trust easement existed on the property since there was no navigable water over the land when the state conveyed the property.<sup>115</sup> Nevertheless, the court reasoned that the presence of navigable waters gave the public a right to use the water regardless of the ownership of the underlying soil.<sup>116</sup>

Based on these decisions, the state or members of the public may assert the incidents of the public use right almost wherever waters flow. Thus, the public use right can protect public interests in the many artificial lakes created by hydroelectric and irrigation projects

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(1971) in which the Plaintiff successfully used the public use right to enjoin the owner of riparian lands adjacent to the Fall River from obstructing navigation and fishing by placing booms, fences and low bridges across the river and from erecting fences that prevented access to the river. *Accord* Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984) (holding that the Montana Constitution provision guaranteeing public use of water makes title irrelevant for determining availability of water for recreational use).

109. 164 Cal. 24, 126 P. 156 (1912).

110. *Id.* at 29, 127 P. at 158.

111. *Id.* at 34, 127 P. at 160. The court relied on the California Constitution art. XV, § 2 (1879) which became art. X, § 4 in 1976. *See also supra* note 8.

112. 107 Cal. App. 2d 738, 238 P.2d 128 (1951).

113. *Id.* at 739, 238 P.2d at 129.

114. *Id.*

115. *Id.* at 741, 238 P.2d at 131.

116. *Id.* at 749, 238 P.2d at 135. The court conditioned the public use right with the right of the owner to reclaim the flooded land. *See also* Beach Colony II v. California Coastal Comm'n, 151 Cal. App. 3d 1107, 199 Cal. Rptr. 195 (1984). A landowner may restore lands flooded by avulsion subject to any reasonable conditions imposed by agencies with jurisdiction, such as the Coastal Commission, when restoration could intrude on protected coastal wetlands. *Id.*

that would not be subject to the public trust doctrine.<sup>117</sup> As long as a party can establish the recreational navigability of a body of water, all of the public use rights, including ecological protection, apply to the water and to activities that may adversely impact the water.

## V.

### CONCLUSION

To borrow an often used metaphor from property law, the public trust doctrine exists as one stick in the bundle of powers the state has to protect natural resources under its ownership. In the case of waterways navigable for commerce, the resource has so much value that we have given ownership to the states and burdened that ownership with an easement to ensure that the states can never act without considering the public interest in the resource.

While offering an effective legal tool for protecting the public interest in certain water-related resources, the use of the public trust doctrine should not cause the state or the public to overlook other legal doctrines with greater power. For example, the lack of state title to property to non-navigable waters or lands granted by the federal government before statehood should not prevent states from exercising sovereign power to protect the public use of natural resources.

The provision of the California Constitution discussed in this comment provides at least one legal framework for the state to act as steward of natural resources for the public.<sup>118</sup> The application of the public use right as a means to control any activity interfering with the public use of waters that are navigable under the recreational test truly allows the state to serve as "trustee of all waters for the benefit of the People of the State."<sup>119</sup> Just as important, the

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117. See *supra* notes 67-71 and accompanying text.

118. The police power of the state provides another, as illustrated by the numerous regulations concerning water. *E.g.*, CAL. FISH & GAME CODE § 1603 (West 1988) (making it unlawful substantially to divert or obstruct the natural flow or substantially to change the bank of any stream or lake or to use any material from the streambeds without a permit).

119. *People v. Weaver*, 147 Cal. App. 3d Supp. 23, 29, 197 Cal. Rptr. 521, 524 (1983) (citing *Ivanhoe Irrigation Dist. v. All Parties*, 47 Cal. 2d 597, 625, 306 P.2d 824, 840 (1957), *rev'd on other grounds sub nom.*, *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958)).

Although the state may condition the use of land, at some point regulation may act as a taking under the Fifth Amendment of the U.S. Constitution. *Agins v. Tiburon*, 447 U.S. 255 (1980). This situation could arise if a state were to promulgate regulations pursuant to the public use right. In California, at least, a property owner has some

public use right allows members of the public as well as the state to protect recreational and ecological uses from harmful activities occurring in the water.

The origins of the public use right in statute rather than in property law allow the application of the public use right to numerous situations not encompassed by the public trust. Because the public use right is not limited by the characteristics of a state's waters at the date of statehood, the right allows protection of public interests in water as the condition of the water changes and as new bodies of water are created. This power also extends to activities beyond the water which cause adverse impacts to its use. The public use right provides a means to protect the same types of public interests in water as the public trust doctrine, but can adapt to changing water conditions in the state as well as to changing public interests.

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notice that the use of property is conditioned by the public use right since it has been part of the state constitution since 1879 (public use right adopted as article 15, § 2 on May 7, 1879 and renumbered article 10, § 4 on June 8, 1976). A full discussion of the possibility of takings claims under the public use right remains beyond the scope of this comment.

