INVENTING THE PUBLIC TRUST DOCTRINE:

California Water Law and the Mono Lake Controversy

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These selections from Randal Orton's Ph.D. dissertation (Environmental Science and Engineering, University of California, Los Angeles, 1992) are presented here as part of a diverse group of previously unpublished dissertations chosen for inclusion in this volume of *California Legal History* (vol. 16, 2021) to give wider exposure to earlier research that remains valuable for the study of California's legal history. The complete work is available at https://dissexpress.proquest.com/search.html.

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PREFACE

A great university harbors many educational philosophies, some of which allow students to seriously overextend themselves. In this particular case, the Graduate Division allowed me to pursue doctorates in both Biology and Environmental Science and Engineering for much longer than I would ever have thought possible. The early goal of this extended multidisciplinary exercise was to provide a broad and deep overview, by case study, of the environmental movement, in particular its presence in science, law, and political advocacy. The end product is a dissertation on what is, in essence, the legal and moral basis for an emerging and very powerful political class. Their agenda is addressed to a controversy that increasingly faces citizens today; how shall we regulate society, what rules are both needed and just, and who shall have the authority to make them?

Most biologists who get outdoors occasionally have some familiarity with natural resource law, especially statutory laws such as the Endangered Species Act, the National Environmental Policy Act (NEPA), and the California Environmental Quality Act (CEQA). However, the Public Trust Doctrine is neither statutory law nor even a reasonably well-defined body of case law. I think I am the first to reduce it to an acronym, but this is solely because the need is great in a document of any length. That other

authors have not is, I think, some indication of an unconscious understanding that acronyms suggest rather more institutionalization than is true of the Public Trust Doctrine.

However, this situation is changing fast. As I write this, another symposium on the PTD is scheduled for May 7 [1992], sponsored by the State Lands Commission. This is interesting because several authors have recently suggested that public land management is not quite ready for the PTD. An expanded, institutionalized PTD has also found support in the California Attorney General's Office, the California Department of Fish and Game, and the State Water Resources Control Board.

In retrospect, I was not prepared to find a live, statewide political movement in my research. Nor did I realize that I had until I was deeply involved in it. This realization came about at a time when I believed that the legal aspects of the Mono Lake controversy could be dealt with quickly, and without much original thought. When this proved not to be the case, naivete rescued me from despair; I simply attributed my difficulties to insufficient legal coursework. However, with time, I realized that the problem lay not with the curricula of my law classes, but more with the nature of "Public Trust" advocacy itself, wherein an attempt has been made, under apparent compelling need, to legislate, *sensu lato*, what cannot easily be legislated *sensu stricto*.

I doubt that most authors will agree anytime soon on what defines the proper scope of the Public Trust Doctrine, or even Public Trust adjudication. In this regard, this dissertation does not and cannot purport to definitively circumscribe the Public Trust Doctrine. This is primarily because the PTD differs from state to state, but also because the doctrine remains in a state of flux, particularly in California. I think I have provided enough of a geographic and historical overview of the Doctrine to enable a reader to grasp its character, but I cannot guarantee that readers will agree with the conceptual boundaries I have placed around the subject. However, I have tried to be very broad in this regard, and I hope that most of these readers will find too much included within the fabric of the Public Trust Doctrine, rather than finding that I have omitted a particular thread of the doctrine.

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Chapter 1

THE PUBLIC TRUST DOCTRINE AND THE REFORMATION OF CALIFORNIA WATER LAW:

Overview of Critical Issues

The Invention of the Public Trust Doctrine is about the modification of water rights in the state of California, and the doctrine that serves as its legal and moral basis. It is about law, politics, and science, because these are the tools that were used to invent the Public Trust Doctrine in a water rights context. It is about a reduction in water rights for a city of 3.5 million people, because that is what the Doctrine found necessary. It is about the reform of California water law, because this is what the use of the Doctrine could not avoid. And finally, and perhaps most importantly, it is about the evolution of the Public Trust Doctrine beyond California water law, because it is my conviction that this is what the Public Trust Doctrine is poised to do.

The literature is replete with descriptions of the Public Trust Doctrine, but the literature is mainly notable for its failure to converge on a single definition or definitive principle. This is an odd finding for a doctrine capable of sustaining a constitutional challenge,[1] particularly given the

[1] Illinois Central Railroad v. Illinois. 146 U.S. 387 (1892). Often cited as the "lodestar" in Public Trust litigation (Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, *Michigan Law Review* 68 (1970): 489), this case involved a large grant of Chicago waterfront to the Illinois Central Railroad

scrutiny that any legal doctrine must endure when it threatens established water rights.

The reasons for this state of affairs provide a good introduction to the origins of the Public Trust Doctrine. From its recognition by the Supreme Court in *Illinois Central Railroad v. Illinois*,[2] the Public Trust Doctrine has continually evolved through court decisions, and these decisions have often changed the Doctrine's scope and content. Also, in the United States, the Doctrine is primarily a creation of state jurisprudence, and the courts of each state have developed their own version of the Public Trust Doctrine to meet the needs that statutory law could not.

Each state's version of the Public Trust Doctrine differs on such basic issues as the permissible uses of Public Trust resources, which resources are clothed in Public Trust protections, what remedies are available when the Trust is violated, what conditions must be met in abridging the Trust, and what constraints limit the accommodation of competing public interests. In my opinion, the level of development found in each state reflects the status of the environmental crisis that is imminent, or appears to be so.

In California, Public Trust litigation has realized the state's reputation for legal innovation. Landmark state Supreme Court decisions in 1970 (*Marks v. Whitney*[3]) and 1983 (*National Audubon Society v. Superior Court*[4]) significantly expanded the scope of the Public Trust Doctrine beyond the limits set by previous courts in any state. Further, in *Marks v. Whitney*, the court asserted that the Doctrine was "sufficiently flexible to encompass changing public needs," thereby ensuring that any future definition of the Public Trust Doctrine would be as labile as the public interest itself.

The Court's ruling in *National Audubon* demonstrated that the stage for reform set in *Marks* would indeed be played. In this decision, the Court found the public's interest in Mono Lake sufficient to revise water rights

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through an act of the Illinois State Legislature. The legislature subsequently sought to revoke the grant without compensating the railroad, citing its constitutionally based sovereign authority over navigable waters and their submerged beds. The railroad contested the revocation on the grounds that it violated the due process clause of the Constitution. The Supreme Court ruled in favor of the state.

[2] *Id.*

[3] 6 Cal. 3d 251 (1970).

[4] 3 Cal. 3d 419 (1983).

that the city of Los Angeles had depended on for over seventy-five years. Justice Broussard's introduction in this decision clearly recognized the precedent set with respect to both the Public Trust Doctrine and California water law:

> This case brings together for the first time two systems of legal thought: the appropriative water rights system which since the days of the gold rush has dominated California water law, and the public trust doctrine which, after evolving as a shield for the protection of tidelands, now extends its protective scope to navigable lakes. Ever since we first recognized that the public trust protects environmental and recreational values . . . the two systems of legal thought have been on a collision course.

Perhaps the best evidence of the political impact of these rulings is found in *Putting the Public Trust Doctrine to Work*, a survey of the status of the Public Trust Doctrine in thirty-one states and territorial possessions.[5] In this study, attorneys general and administrative agencies were asked to characterize the nature and the direction of the Public Trust Doctrine in their states, and to describe its impact on resource management issues. The results were provocative; what emerges is a record of nascent but similar actions by these agencies, their staff and supervisors, to effect broad reforms under the authority of the precedents set by the California judiciary. The relatively modest assertions of sovereign authority found in earlier Public Trust lawsuits have been replaced with a tool of unprecedented potential to reform the state's stewardship of its water resources.

In 1988, a hearing convened by the state Assembly introduced the Public Trust Doctrine as one of the most critical developments in California water law since the creation of the appropriative rights system.[6] This hearing was specifically convened to address the precedent set by the Supreme Court's decision in *National Audubon Society v. Superior Court*. However,

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[5] David C. Slade et al., *Putting the Public Trust Doctrine to Work: The Application of the Public Trust Doctrine to the Management of Lands, Waters, and Living Resources of the Coastal States* (Connecticut Department of Environmental Protection, Coastal Resources Management Division, 1990).

[6] California Legislature, Assembly Committee on Water, Parks and Wildlife, "Public Trust Doctrine Application to Water Rights" (November 21, 1988), Jim Costa, Chair.

legislation[7] intended to provide statutory guidelines for the application of the Public Trust Doctrine to California water rights went no further than subcommittee review. As of 1992, the impact and the scope of the Doctrine's application to existing water rights in California was very uncertain, due in part to the state's continuing effort to relicense the rights originally revisited by the Supreme Court in *National Audubon*.

*The Invention of the Public trust Doctrin*e reviews the Supreme Court's decision in *National Audubon* and examines the controversy that precipitated it. It places the state's original allocation decision in an historical context, and reviews the environmental problems this decision caused. It also considers the reasons why the Court in *National Audubon* found the Public Trust Doctrine necessary to resolve them. This research will find that, more than a legal doctrine, the Public Trust emerges as a *political* doctrine, a tool of political advocacy that is capable of reforming the laws and regulations that water agencies — and governments — must abide by.

Central to this finding is the study of the origins of the Public Trust Doctrine provided in Chapter 2. Several of the Doctrine's most important elements are found in the laws of earlier societies, and more than one American jurist has cited this history in support of an important ruling. In reviewing this history, we will discover a thread of public activism that has repeatedly, and successfully, challenged the authority of previous sovereigns in their stewardship of natural resources. In effect, we will find that the Public Trust Doctrine has survived governments.

Nor has this survival been passive. This research will find that the Doctrine has served to reform and, occasionally, to contract sovereign authority over the natural resources that earlier societies found most useful. Once this perspective is understood, those early elements of the Public Trust Doctrine found in the Roman Institutes of Justinian, the Spanish Plan of Pitic, and the common laws of medieval England reveal themselves as concessions of sovereign authority, concessions that were either imposed by political forces, or offered in exchange for some service to the state.

To an important degree, the historical issues found in earlier Public Trust controversies have repeated themselves in the Mono Lake controversy, the subject of Chapter 3. This controversy can be traced to an error

[7] Assembly Bill 4439.

in water allocation in 1940, and it eventually led to the California Supreme Court's affirmation of the Public Trust Doctrine's earliest precept: that no government has an ultimate authority to disenfranchise its citizens from their inheritance of natural resources.

This affirmation comes at a time when government agencies are rapidly investing themselves with an *administrative* authority for the Public Trust Doctrine. Implicit in these efforts is the idea that the terms of the Public Trust Doctrine are purely a matter of implementing the authority created by judicial opinion. Through this process, the Public Trust Doctrine appears as merely one more set of environmental regulations promulgated under the authority of legislative edict.

If this were true, this dissertation could have restricted its attention to the scientific and political issues associated with the application of the Public Trust Doctrine to the city's water rights. The dissertation would be no more nor less than an analysis of the necessity and the adequacy of environmental review for a CEQA[8] project, albeit a very controversial one.

However, the Public Trust Doctrine springs from no act of Congress, which on one occasion has squarely rejected the Public Trust Doctrine, and the investiture of authority sought by administrative agencies is proceeding with relatively little attention from those agencies of American government most directly responsible for translating the public will into law. However, it is an investiture whose goals seem unimpeachable, because they are clearly, unmistakably popular.

These are uncomfortable statements in a democracy, but they bear important implications for the Public Trust Doctrine in the United States. The contests of sovereign authority, so prevalent in the Doctrine's historical use, have reemerged in an American context. However, in contrast to the outcome of earlier societies, the American case history reveals a steady growth of sovereign authority, with each judicial ruling incrementally expanding the scope of the Doctrine.

This research explores some of the reasons for this uniquely American direction that the Public Trust Doctrine has taken. Some of these reasons will find their origins in the physical character of the American frontier, wherein the rules and precedents of European doctrine proved awkward

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[8] California Environmental Quality Act.

or unjust. Other reasons will be traced to the absence of government itself, wherein the public will found little opposition from sovereign interests. Most significantly, however, we will find that the form of American government, which so persistently substituted democracy for minority rule, had the odd result of investing the government with unprecedented stewardship over natural resources.

Ultimately, we will find that the adversarial character of the Public Trust Doctrine, so definitive in its historical development, has faltered. In *National Audubon Society v. Superior Court*, the fight between citizen and state is very brief. The fight, in fact, did not last beyond the Court's opinion, which simply, and brilliantly, incorporated the Doctrine into California water law.

Nonetheless, this reconciliation leaves many questions unanswered. The actual allocation of Mono Basin water must still be made, and it is not at all clear what consequences will follow either a reduction of the water supply of Los Angeles, or the continued diversion of water from Mono Lake. In Chapters 3 and 4, this research will examine some of the scientific, legal, and public policy issues associated with the Mono Lake controversy (Chapter 3) and its resolution by the State Water Resources Control Board (Chapter 4). It will also investigate the quasi-democratic nature of the decision-making process created by the Court, exploring in particular its potential for scientific, political and legal abuses.

Ultimately, we will explore the impact of the Mono Lake controversy on the Public Trust Doctrine itself. In Chapter 5, this exploration takes a step back from the immediate problems found in the controversy, and reexamines the common thread that seems to run through the literature and the historical record of the Public Trust Doctrine. From its assertion of civil rights in Roman law, to its presence in England as a source of early parliamentary annoyance for the king, the Public Trust Doctrine marks reforms in the terms of the social contract. In the United States, the Doctrine repeatedly emerges amidst the most heated and stubborn civil disputes; it justified the government when the early New York subways arrived in the basements of angry storefront owners; it transferred property rights from titled landowners to squatters in nineteenth-century San Francisco; it provided coastal access for Californians in 1970. In every case, the Public Trust Doctrine served one public interest to the detriment of others.

More than implementing the public interest, we will find that the Doctrine *defines* the public interest.

It is this use that requires an explanation of the Public Trust Doctrine. We must ask if there is some general principle, beyond contemporary public needs, that allows a legal theory — an "it" — to adjudicate between competing interests. For, absent a general principle, an "it," we must then ask "who?" In whom does the authority of the Public Trust Doctrine vest, and who shall decide what is in the public interest?

Several authors have proposed a general principle for the Public Trust Doctrine. In Chapter 2, I have provided my own. However, it would be pure hubris to suppose that all readers will find these principles all that general after all. This underscores the nature of the Public Trust Doctrine as an exercise in political advocacy. In the Mono Lake controversy, *political* advocacy has become environmental advocacy. Separate elements emerge: environmentalism as a *political* endeavor, a matter of advertising one's assertions; environmentalism as a *scientific* endeavor, ensuring that one's assertions withstand objective scrutiny; environmentalism as a *legal* endeavor, ensuring that one has the power to effect reforms (insofar as the rule of law prevails).

With the Superior Court's decision to delegate the initial allocatory decision to the State Water Resources Control Board,[9] the locus of Public Trust authority shifted from the courts to a state administrative agency. Thus, from its initial filing in May of 1979 to its arrival at the State Board in August of 1989, the *National Audubon* lawsuit transformed the PTD from a legal theory to a legal requirement in the administration of water rights. Further, after a relatively short period of stasis, it appears that the SWRCB will indeed act on the precedents set in the Mono Lake controversy. In May 1992, the SWRCB released a Notice of Public Hearing to consider "interim water rights actions *pursuant to Water code Sections 100 and 275 and the Public Trust Doctrine* to protect the San Francisco Bay/Sacramento–San Joaquin Delta Estuary" (emphasis added). Under *Future Actions and*

[9] A significant feature of the Court's decision in *National Audubon* was their refusal to rule on the main issue, the proper allocation of Mono Basin water, and the Court's finding that the legitimacy of the PTD was codified "in part" in the California Water Code. The Superior Court's delegation to the State Water Resources Control Board was partly a logical consequence of these features of the *Audubon* decision.

Authorities, the Water Board parenthetically provided the complete lineage of its authority under the PTD: "See National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419, 189 Cal. Rptr. 346."

In addition to its penetration of the State Water Resources Control Board, the emergence of a powerful regulatory agent of indeterminate scope has attracted the attention of the California Legislature, which held a hearing in November, 1988, to collect the opinions of utilities, environmental groups, water law attorneys, and state agencies on the nature of the PTD and its applicability to water rights.[10] The PTD has also developed on a parallel track in the area of coastal zone management, and, here too, the PTD has attracted the attention of a very broad coalition of proactive state administrative agencies and the offices of state attorneys general.[11]

These events herald the assimilation of the PTD into existing government. In this regard, it is unclear whether the government's "rediscovery" and incorporation of the PTD into water rights administration will require any change in existing administrative rules and practices. One of the remarkable features of the judiciary's conveyance of the PTD to the State Board is that it supplied little additional definition to the PTD itself. The essence of the "administrative rule" imposed by *National Audubon* is that the state must "take such [Public Trust] uses into account in allocating water resources."[12] How might this "accounting" be made?

To date, the State Board's relicensing of Mono Basin exports does not provide a clear indication of how the SWRCB will proceed in the "post-*Audubon*" era. As of early 1992, beyond rhetorical references to the PTD, the specifics of the State Board's relicensing of the city's water rights in the Mono Basin were indistinguishable from the CEQA process it follows for

10 Assemblyman Jim Costa, Chair.

11 Slade et al., *Putting the Public Trust Doctrine to Work*. Additionally, Felix Smith, a policy spokesperson for the State Department of Fish and Game, issued a recent statement (Appendix A) on his department's position with respect to the trusteeship responsibilities associated with the PTD. It provides a detailed declaration of the specific duties adopted by the department to implement this trusteeship. While not necessarily engendered with the force of law, this policy statement nonetheless reflects the willingness of state administrative agencies to embrace the PTD as a source of expanded authority over natural resources.

12 *National Audubon*, 33 Cal. 3d at 452.

any controversial project.[13] In my opinion, absent any substantive definition of the PTD from the State Board staff, the substance of the PTD in a water rights context could be set in a *de facto* fashion by the methods, choices, and preferences of the scientists and technical consultants involved in the State Board CEQA process. Indeed, one of the difficult tasks facing the State Board is evaluating the credibility and utility of a decade of research conducted in an adversarial arena.

In this regard, the perspective offered in this research is that of a scientist who has participated directly in the scientific, legal, and administrative arenas that contain the Mono Lake controversy. It is a perspective that takes issue with many of the truths established by court precedent (Chapter 3), and critiques the process by which some of the unanswered questions in the Mono Lake controversy will be resolved (Chapter 4).

However, it is a perspective that also recognizes a deeper merit to the Public Trust Doctrine. The Mono Lake controversy is a microcosm of the global environmental problems that have appeared in recent years. The parallels are striking: a resource allocation decision, driven by the public interest, emerges decades later as an apparently imminent threat to the native ecosystem. The only solution that law can support is to revisit the original allocatory decision, suspending in the process the sovereign authority that was used to provide and ensure the allocation in the first place. In both cases, the value of a legal doctrine that can transcend sovereign authority is evident. The question, though, is who shall decide when it should?

In this regard, both the destination and the overt motive for this research is an argument for a broader consideration of the Public Trust Doctrine by the public it purports to serve. It is my conviction that the Public Trust Doctrine is poised to effect significant reforms in the management of California's water resources, and it is vital that the public, the legislature, and water agencies understand that these reforms will accommodate virtually any level of public participation. If there is any duty incumbent on a democratic government, it is to ensure that this level is very broad indeed.

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[13] This particular relicensing effort is the first time that the State Board has had to explicitly address the PTD, and the Superior Court's delegation to the Board was conditioned on the Court's final review of the Board's performance and final decision.

Conclusion:

THE PUBLIC TRUST DOCTRINE AS SOCIAL CONTRACT

The threads of the PTD found in the Institutes of Justinian refer to things subject to varying degrees of human control; the air, the sea, running waters, and access to fishing grounds.[1] For the Roman citizen of 500 A.D., the inclusion of the air and the sea in this list may have seemed the product of either hubris or ambition. However, over millennia, the natural elements addressed by the Institutes of Justinian have become increasingly subject to human control and impacts. As we approach the twenty-first century, the original fifth-century list seems incomplete.[2] For

[1] Many authors trace the roots of the PTD to Roman law in general, and the Justinian code in particular. For examples, see Molly Selvin, *This Tender and Delicate Business: The Public Trust Doctrine in American Law and Economic Policy, 1789–1920* (New York: Garland, 1987); Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," *Michigan Law Review* 68 (1970): 471–566 and "Liberating the Public Trust Doctrine from Its Historical Shackles," *UC Davis Law Review* 14 (1980): 185–94; or John Franklin Smith, "The Public Trust Doctrine and *National Audubon Society v. Superior Court*: A Hard Case Makes Bad Law or the Consistent Evolution of California Water Rights," *Glendale Law Review* 6 (1984): 201–25.

[2] Contemporary questions of global warming and ozone loss come to mind here, although a modern list could also embrace DNA, the electromagnetic spectrum, and near-earth space as things that are common to humanity, potentially subject to a Public Trust, and potentially in need of regulation.

example, how could the Roman lawmakers have foreseen the coining of the Dutch word, "impoldering," which refers to the destruction of inland seas by landfill? The Dutch effort to provide living space rendered obsolete an entire class of sailing vessel, while inventing three entirely new types of ships whose purpose is to lay what is, in effect, artificial sea bottom.

Some legal commentators have argued that these coda in Roman common law reflect only an attempt to classify the natural world, and should not be identified as an early effort to realize environmental law.[3] Other authors have argued that this history, regardless of its intent, is not particularly relevant to modern formulations of the PTD.[4] In my opinion, both of these criticisms deflect the reader away from the essence of the PTD as a fundamental feature of the social contract between citizen and state.

A Public Trust suit brings before the court an argument that the state has breached a contract of sorts. Implicit in the act of bringing such a suit is the affirmation that the state exercises an inalienable dominion over water resources. However, it also implies that the state cannot do whatever it wants with these resources. Rather, the state's authority is contingent on its adherence to the public interest.[5] This result may be derived from a number of sources, including the PTD,[6] constitutional language,[7] or the general rationale for government found in various theories of social contract.[8] This contingency does not imply that a lapse by the state alienates it from the resource, and it would be foolish to contend that such a lapse invalidates the state itself. However, the trust in which the state holds public resources does imply some constraints.

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[3] Several references for this idea are provided by Jan G. Laitos, *Natural Resource Law: Cases and Materials* (St. Paul: West Publishing, 1985).

[4] For an example of this argument see Harrison C. Dunning, "The Significance of California's Public Trust Easement for California Water Rights Law," *UC Davis Law Review* 14 (1980): 357–98.

[5] *Illinois Central R.R.*

[6] *Id.*

[7] Preamble.

[8] Thomas Hobbes, *Leviathan* (1651); Immanuel Kant, *Metaphysics of Morals* (1797); John Locke, *Treatise of civil government* [1689] *and A letter concerning toleration* [1690], ed. by Charles L. Sherman (New York: D. Appleton–Century, 1937); Rousseau, *The Social Contract* (1762).

Previous authors have struggled (somewhat unsuccessfully, in my opinion), to identify those constraints, finding their substance elusive, immaterial, or in a constant state of flux. In this regard, the reader may recall the state Supreme Court's language in *Marks* and *National Audubon*, wherein the Court referred to the "flexibility" of the PTD and its ability to encompass changing public needs.

We may detect in these observations the presence of an active relationship between citizen and state with respect to the allocation and management of natural resources. A "chain of custody" for natural resources illustrates the potential loci of these "feedback loops," and highlights some of the structural features of sovereign authority. What is clear from the diagram is that the PTD can potentially apply to virtually any level of government, a result that follows from its basic attachment to the legitimacy of sovereign authority over natural resources.

To date, Public Trust lawsuits have avoided pitting coequal branches of government against each other, although the City argued that this situation was present in *National Audubon*. The court in that case answered this charge by holding that it did not dictate any particular allocation of Mono Basin water. Rather, it left this decision to an unspecified "responsible body,"[9] eventually being the State Water Resources Control Board. It is noteworthy that the SWRCB did not challenge the Court's revisitation of the Board's earlier water rights decision. That is, the SWRCB avoided an intra-sovereign conflict. Equally noteworthy is the specific manner in which the Court reconciled the potentially conflicting sources of public will, being the 1940 Water Code and the emergent PTD.[10]

However, in language important to the issue at hand, the Court found that its reconciliation of these two sources of sovereign authority does

> not render the judicially fashioned public trust doctrine superfluous. Aside from the possibility that statutory protections can be repealed, the non-codified public trust doctrine remains important both to confirm the state's sovereign supervision and to

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9 *National Audubon*, 33 Cal. 3d at 447.

10 By reference to the Water Code's requirement that all water allocatory decisions must be "in the best public interest," the Court found the PTD to "codify in part the duty of the Water Board to consider public trust uses of stream water." *National Audubon,* 33 Cal. 3d at 446 n.27.

> require consideration of public trust uses in cases filed directly in the courts without prior proceedings before the board.[11]

From the court's promotion of the PTD as a remedy for legislatively repealed protections, it follows that future courts would have to construct their opinions very carefully to avoid the appearance of a conflict with the public will. Further, the Court's language implies an investiture of political power in the judiciary that would likely be hotly contested by the legislature, if not other members of the judiciary itself.[12]

Regardless of one's position on this issue, two questions come to mind. First, assuming the judiciary is correct in its assumption, via *National Audubon*, of a penultimate role as public trustee, what remedy is available should the Court eventually decide against a plaintiff? Under such conditions, should a plaintiff accept that the PTD is completely contained within the state, or can the contest be carried further? Secondly, what serves as a basis for the legitimacy of a PTD that exists independent of the courts or the government itself?

Most legal commentators would likely view a PTD existing independent of formal state institutions as more of a political than a legal doctrine. This view, while probably correct, does not necessarily deprive the PTD of its force, or even the major part of it. In this regard, we may return to the Doctrine's roots in Roman law, in particular the concept of jus gentium, translated as the law of nations or, more accurately, the law applicable to the citizens of nations other than Rome.

The relevance of such a legal construct is plain for one who rejects the legitimacy of a governing body, particularly when that body continues to enjoy majority support. However, it is equally relevant *within* the framework of existing institutions; the concept of political self-determination, promoted forcefully by the current political administration, supplies a contemporary example of a *jus gentium*.

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[11] *Id.*

[12] We may note in this regard that higher courts have not addressed the constitutional questions implicit in the *Audubon* Court's language. In *Illinois Central R.R. v. Illinois*, the U.S. Supreme Court found only that the legislature could not sever its title in a manner that prevented it from subsequently exercising its will for the public good. The Supreme Court was supported in its ruling by the state itself. That is, even this landmark Public Trust suit did not pit the PTD against the legislative will.

What remains to be answered is the political forum where these issues might be settled, the scope of the debate, and the content of an extra-governmental PTD. With respect to the first question, we may note that common law is notorious for geographic inconsistencies, and whereas higher courts may defer to local custom, the invocation of a "public trust" for water resources could have far-reaching regional impacts. In this situation, democratic principles should dictate a fairly general assay of the public will.

With respect to the second question, presumably the scope of reform would be guided by the standard against which the violation of the trust appeared. That is, the state's mismanagement of the trust could not be detected without some reasonably clear standard of performance. Most importantly, this standard must be independent of the particular form of government found in the state. If not, then the state would be not only the administrator and guardian of the trust, but also the author of its terms and its standards for performance.

The matter of content returns us to the central problem of natural resource allocation and management. In this regard, very few commentators have proposed a particular substantive principle for the PTD, in the manner of a *jus naturale*, for example.[13] Rather, advocates have promoted the PTD as a *procedural* tool,[14] whereby the allocation of public resources

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[13] Sax (1970) is a notable exception. As noted by Smith (1984):

> Sax used conceptual terms to define the purpose of the PTD to be prevention of the destabilizing disappointment of expectations, not formally recognized, yet held in common by a community. He asserted that the PTD would be used to help reduce the tensions derived from the destabilization of an expectation whether it be in expectation of private property ownership, or, the expectations of the public for a ready water supply and the protection of our ecological system. The obligation of the decision making trustee under the PTD is to insulate those expectations which support social, economic and ecological systems from avoidable disruption (p. 224).

Of course, in the context of *National Audubon*, this interpretation of the purpose of the PTD is problematic, since the social and economic disruption attending the revocation of a fifty-year-old water right must be weighed against ecological disruption. We may note, however, that this was precisely the problem addressed by the *Audubon* Court.

[14] Smith (1984) notes that, whereas "the case-by-case expansion of the Public Trust Doctrine by the courts in California has left the scope and purpose of the Public Trust Doctrine poorly defined," the procedural aspects of the PTD in the context of California water rights were clarified by the California Supreme Court in *National Audubon v. Superior Court*.

is brought under greater scrutiny by the public,[15] by state agencies such as the state Fish and Game Department[16] and the Office of the Attorney General,[17] or by the courts.[18] There is no shortage of volunteers for the position of Public Trustee.

Regardless, it is probable that, had the State Water Board been aware of the eventual outcome of its decision in 1940 (both in its legal and ecological consequences), it would have responded differently. In 1989, the City itself adopted an explicit policy of limiting its diversions to the degree necessary to avoid adverse impacts to the Mono Lake ecosystem. However, it is important to recognize that many[19] of the impacts that drive the current controversy were not anticipated in 1940. For example, impacts on California gulls, arguably the centerpiece of the plaintiff's position in *National Audubon*, were not mentioned by the individuals who protested the Water Board's decision in 1940.

This observation underscores the central dilemma in natural resource management, and one which any *jus naturale* must address: Assuming an allocation decision is found to be equitable at the time it is made, how should the state respond to the unforeseen consequences of its decisions? In the public's view, what responsibility does the state have for its decision-making? Or, in more contemporary terms, what is the government's liability for damages to the public weal?

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[15] Sax (1970).

[16] Robert Baiocchi, "Use It or Lose It: California Fish and Game Code Section 5937 and Instream Fishery Resources," *UC Davis Law Review* 14 (1980): 431–60.

[17] Slade et al., *Putting the Public Trust Doctrine to Work*.

[18] Sax (1970); Martha Guy, "The Public Trust Doctrine and California Water Law: National Audubon Society v. Department of Water and Power," *Hastings Law Journal* 33 (1982): 653–81.

[19] Though not all. Impacts on air quality and recreation were raised during *City of Los Angeles v. Nina B. Aitken*, Superior Court Tuolumne County, No. 5092 (1934), and aesthetic and recreational impacts were raised before the Water Board in 1940 (Div. Water Resources Declaration 7055, 8042 and 8043, April 11, 1940 at 26). In a letter to the City and the State Fish and Game Commission, Eldon Vestal, an employee of the Fish and Game Department, cited the impacts of stream diversion on the fishes that had been introduced into the streams for decades in the previous century (LADWP Records).

The search for such standards of performance provides an intersection for science and the social contract.[20] Does the existing social contract imply citizen consent to every technological dependency authorized by government? In democratic systems of government, what are the rights of minorities who are identified by the loss of a resource, either directly or as the unanticipated result of an allocation decision made by the sovereign as trustee? In his introduction to social contract theory, Lessnoff distinguishes between consent and agreement, noting that "there is more to contract theory than mere consent. Consent can be a unilateral act: contract is bilateral or multilateral. One may consent to an existing state of affairs: one contracts with another contracting party or parties, in order to bring about a new state of affairs."[21]

One can argue that the "bringing about of a new state of affairs" is attended more by scientific than political advances. Further, scientific advances under Lessnoff's view of contract theory emerge and are often applied with minimal contact to democratic processes. In fact, Lessnoff viewed science's relative insulation from democratic controls as itself an expression of the existing social contract.[22]

However, too much emphasis on the virtues of science can raise alternative issues of its adverse impacts. In this regard, perhaps the critical issue concerns the rate at which these adverse impacts manifest themselves. As we have seen in the Mono Lake controversy, the impacts of decision-making can accumulate over a long period of time without public awareness, to emerge suddenly, and in a manner that challenges existing means of redress, adaptation, and reform.

Substantial concerns have been voiced by scientists and environmental advocates that the incidence of such impacts will increase. Global warming, to cite a current popular concern, is either a ploy of political activists, a natural and unavoidable phenomenon, or a consequence of our own reliance on fossil and extant organic fuels. From nuclear power to ozone chemistry to drift gill nets, the number of environmental issues seemingly

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[20] It also underscores the increasingly important role played by science and scientists in the governance of resource use.

[21] Michael H. Lessnoff, *Social Contract Theory* (New York: New York University Press, 1990), 3–4.

[22] This association is primarily derived from rights of free speech.

multiplies geometrically. Most importantly, like the Mono Lake controversy, nearly all of them involve rights vested in various sovereigns, and promise dire and immediate consequences if these rights are not curtailed in some way.

In this regard, the Court's use of the PTD in *National Audubon* is an act of reform that might be construed as an adjustment not only to water law, but to the social contract itself. In terms of political mechanism, it purports to represent the public will, and thus implies a democratic process. In a constitutional context, it is a mechanism that makes no statement about the precedent it sets for existing democratic institutions. Most importantly, it highlights that the PTD is an agent of change,[23] a fact not often appreciated in environmental controversies.

Buchanan comes closer than most authors to the practical questions inherent to social contract theories. This is, perhaps, the result of his preoccupation with what he terms, "continuing contract," or post-constitutional contract. This area of social contract theory is not as concerned with explanations for society and government as it is with the practical needs expressed in social reform. However, even here, Buchanan almost states the case against a realistic contract theory too well. He writes of his "temptation" to accept the idea that social structure merely exists, and that "there is relatively little point in trying to understand or to develop a contractual metaphor for its emergence that would offer assistance in finding criteria for social change."[24]

He supports this contention by reference to economics, a field that he notes has not resolved "major analytical complexities,"[25] even though it is concerned only with exchange processes, which can be considered a subset of the social contract.

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[23] In Public Trust adjudication, there is often the sense that the PTD is conservatory in character, and that the point of a Public Trust lawsuit is to correct a deviant use of natural resources. In this sense, one can argue that the purpose of the PTD is limited to changing the "state of affairs" only insofar as it returns the status quo to an earlier, more legitimate condition. However, it is only prudent to treat any change in government or natural resource allocation as nothing more than simple reallocation, i.e., change.

[24] James M. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan* (Chicago: University of Chicago Press: 1975), 53.

[25] *Id.*

It is easy to become frustrated with social contract theory, particularly when one attempts to relate it to the PTD. Although the idea of a "social contract" is nearly irresistible, even its component parts resist analysis. Buchanan is clearly, and eloquently, aware of the subject's important pitfalls.[26] He does not purport to supply a theory of social contract that is completely free of presupposition, but he does endeavor to render it free of all but the most basic requirements. Buchanan requires only "rational, self-interested behavior" in his theory, a position that contrasts starkly with earlier writers such as Hobbes and Pufendorf,[27] who argued that self-interest in a state of nature led to consequences that are considered to be the antithesis of social behavior, such as universal warfare. In fact, Buchanan purports to not require the principle that "all are equal in the state of nature," a principle that is common to most social contract theories in one form or another.[28]

The challenge, then, posed by the Public Trust Doctrine is to identify exactly what it is that we wish the state to hold in trust for us. After *National Audubon*, responsibility for the future has returned to the public will, and we should be very careful in determining what it is that we wish to preserve. We should also be very quick about it. With very few exceptions, we may presume that a central feature of our will is our own survival. Without making any statement of what threats impend, we can be reasonably certain that their recognition will leave us little time to respond.

Like the Mono Lake controversy, many of these threats might require, or seem to require, the sacrifice of earlier sovereign commitments. Here, perhaps the only guidance available is that we adopt another meaning for the phrase "public trust:" that the concerns voiced both by advocates and

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26 For example, where he notes that the basic problem of contract theory is to "explain and to understand the relationships among individuals, and between individuals and the government," he immediately raises the issue of normative standards, and admits that "the temptation to introduce normative statement becomes extremely strong at this level of discourse." Explanation itself presupposes the existence of mutually agreed-upon standards of adequacy, proof, and expectation — in short, a social contract of sorts.

27 Hobbes, *Leviathan* (1651); Samuel Pufendorf, *De Jure Naturae et Gentium* [1688], trans. by C. H. and W. A. Oldfather as *On the Law of Nature and Nations* (Oxford: Clarendon Press, 1934).

28 See in particular John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), for a clear exposition of this principle.

their critics are sincere, and are not derived from narrow interests. Hopefully, we will proceed in a world whose benefits warrant dangers no worse than their predecessors.

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