Protecting California's Rivers: Confluence of Science, Policy and Law

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Applying the Public Trust Doctrine to River Protection

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The public trust is an ancient doctrine, stemming from Roman law. The Institutes of Justinian state that "by natural law, these things are common property of all: air, running water, the sea, and with it the shores of the sea." In medieval England this notion was picked up and turned into a declaration that the shores of the sea are common to all and inalienable. The concept was adopted in the United States. As early as 1821, a New Jersey court held that the state could not convey into private ownership the public lands covered by tidal waters, and that any grant purporting to do so was void. These waters are vested in the sovereign state, the court held, not for its own use, but for the use of its citizens for "passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products..." Arnold v. Mundy, 6 N.J.L. 1 (1821). Although the legislature may build dams, locks and bridges in the general interest of improving navigation, the court stated, "they may not consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right." That, said the Chief Justice, would be a grievance "which never could be long borne by a free people." Id at 78.

The public trust, like the ten commandments, has traditionally been phrased in terms of prohibition: "Thou shalt not abdicate the State's control over its navigable waters." More recently, however, this hoary common law creature, with roots in the civil laws of the Roman emperors, the English monarchs and the Spanish kings, has emerged from its long submerged home to impose new protections for the environment and new duties on governmental agencies.

1. The trust applies to all navigable streams.

Historically, the trust protected largely commercial purposes related to commercially navigable waters. It was characterized in terms of "commerce, navigation and fishery." In recent years, however, courts in California and elsewhere began to acknowledge that the doctrine was not "burdened with an outmoded classification favoring one mode of utilization over another." Trust rights were not limited to commercially navigable streams, but applied also to streams capable of use by small boats, for such purposes as bathing and swimming, fishing, hunting and general recreational purposes, as well as preservation for ecological study. Marks v. Whitney, 6 Cal.3d 251 (1971); Baker v. Mack, 19 Cal.App.3d 1040 (1971).

At the same time, they recognized the logic of extending the trust to the *tributaries* of

navigable streams, for taking the water from these feeder streams would inevitably impact the trust resources below them. National Audubon Society v. Superior Court, 33 Cal.3d 419 (1983); see Johnson, Public Trust Protection of Lake and Stream Levels, 14 U.C. Davis L. Rev. 233 (1981).

2. The trust applies to ecological preservation.

In Marks v. Whitney, the California Supreme Court noted: "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 the tidelands–a use encompassed within the tideland 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." Of course the courts have long recognized that the trust extends equally to non-tidal inland waters. State v. Superior Court (Lyon) 29 Cal.3d 210 (1981).

3. The trust has crawled out of the depth and applies to wetland areas.

Once out of the perpetual depths, the trust has moved to the high water line and beyond on our lakes and rivers. As public trust uses were recognized as encompassing picnicking, fishing and other kinds of recreation, it became clear that these uses were protected to the high water marks of lakes and rivers, even if these areas were temporarily dry. Thus in an informal opinion in 1992, then Attorney General Dan Lungren advised that they could e exercised even on dry portions of the South Fork of the A The American River. Letter to Hon. David Knowles, Op. No. 92-206 (June 15, 1992). And the Montana courts have recognized a wide range of upland activities permissible under the public trust doctrine. Montana Coalition v. Curran, 682 P.2d 163 (Mt. 1984).

Once it was acknowledged that the public trust protected aquatic ecology as well as navigation, courts began to comprehend the connection between the waters and the wetlands. In Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972), the Wisconsin Supreme Court upheld building restrictions on the adjacent foreshore because "the State of Wisconsin under the public trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters. The active public trust duty of the State...in respect to navigable waters requires the state not only to promote navigation but also to protect and preserve these waters for fishing, recreation, and scenic beauty...Lands adjacent to or near navigable waters exist in a special relationship to the state. They ...are subject to the state public trust powers (citation)...The shoreline zoning ordinance preserves nature, the environment, and natural resources as they were created and to which the people have a present right." Id at 771. See, also, Graham v. Estuary Properties, Inc. 399 S02d. 1374, (Fla. 1981)(no absolute right to change natural character of land).

4. The trust goes underground.

Once logic held sway and the trust was applied to tributaries of recreationally navigable waters, it seemed logical to apply it as well to groundwater supplying those waters and their accompanying trust uses. The Supreme Court of Hawaii had no trouble doing so in Waiahole decision in 2000. 94 Hawaii 97, 9 P.3d 409 (2000); see Symposium, Managing Hawaii's Public Trust Doctrine, 24 U. of Hawaii L. Rev. 1 (2001). It rejected the "surface-ground dichotomy" as an "artificial distinction neither recognized by the ancient system nor borne out in the present practical realities of this state." Id, 9 P.3d at 447.

California is almost alone in failing to regulate groundwater by permit. However the courts have protected surface streams against ground water pumping in private litigation, and the Attorney General has the power to institute litigation to control groundwater use on the ground that it constitutes waste, unreasonable use or method of use or violates the public trust. See Sax, We Don't Do Groundwater: A Morsel of California Legal History, 6 U. of Denver Water Law Rev. 269, 309, 3113-314 (2003).

5. The trust applies to artificially enlarged waters.

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Few lakes and rivers in California have escaped the improvements wrought by dams and levees. Few are in their natural state. Recognizing the reality of the situation, courts have invariably held that the additional areas artificially inundated are subject to the trust just as was the original bed as it existed at California' statehood. State v. Superior Court (Fogerty) 29 Cal.3d 240 (1981); Big Bear Lake, created by a 1911 impoundment, was assumed to be navigable and thus a trust water, but the court declined to modify diversions because a responsible government body had weighed the competing uses. Big Bear Municipal Water Dist. v. Bear Valley Mutual Water Co., 207 Cal.App.3d 363 (1989) But another appellate court reached a different conclusion in Golden Feather Community Ass'n. v. Thermalito Irrigation Dist., 199 Cal.App.3d 402 (1988) (no duty to maintain levels for fish in wholly non-navigable, artificial reservoir).

6. The trust applies to ferae naturae.

Wild creatures are protected by the trust. "[I]t is well settled that wild animals are not the private property of those whose land they occupy but are instead a sort of common property whose control and regulation are to be exercised 'as a trust for the benefit of the people.'" Mountain States Legal Foundation v. Hodel, 799 F.2d 1423 (10th Cir. 1986) quoting Geer v. Connecticut, 161 U.S. 519, 528-529 (1896), *overruled on other grounds,* Hughes v. Oklahoma, 441 U.S. 322 (1970); see Ex parte Maier, ; People v. Truckee Lumber Co.

7. The trust imposes duties on government.

In the historic Mono Lake decision, the California Supreme Court applied a rule previously suggested by a number of other courts: The trust is not merely a passive doctrine, but there is an "affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." "Unnecessary and unjustified harm to trust interests" should be avoided. National Audubon Society v. Superior Court, 33 Cal.3d 419, 446-447 (1983), cert. denied 454 U.S. 977 (1983). See United Plainsmen v. North Dakota Water Conservation Com'n., 247 N.W.2d 457 (N.D. 1976).

The California court made it clear, however, that the test to be applied in water rights is not as stringent as that applicable to attempted alienation of the beds of navigable waters. It acknowledged that the Legislature may "as a matter of current and historical necessity...authorize the diversion of water to distant parts of the state, even though unavoidable harm to trust sues at the source stream may result." Id 33 Cal.3d at 446.

This distinction proved crucial in EDF v. EBMUD, Alameda County Superior Court No. 425955, in which Judge Richard Hodge rejected the argument that EBMUD should be required to choose a different diversion point on the Sacramento River because it would be a feasible means of avoiding alleged harms to trust values in the Lower American. Construing Audubon as a direction "to balance and accommodate all legitimate competing interests in a body of water," he concluded that imposition of a physical solution limiting EBMUD's withdrawals would adequately protect trust values while accommodating EBMUD's long deferred contract rights and concerns over water quality. The Hodge decision struggles with Audubon's direction to take the public trust into account and protect public trust uses consistently with the "fullest beneficial use" provisions of Article X, section 2 of the California Constitut9ion, and concludes that such reconciliation does not require "precise adjudication" in this case because both interests can be accommodated by limitation of diversions.

Thus it is still unsettled whether the application of the public trust to water rights imposes an additional mandate or merely a "hard look." However the Audubon court expressly rejected a sate argument that the constitutional reasonable and beneficial use provisions had "subsumed" the public trust, and the State Water Resources Control Board has adopted regulations providing for its application in water rights proceedings.

8. The trust may be implemented by statute.

Since the Legislature is the ultimate trustee for the people, it can appropriately implement the trust by statute, and has done so in a number of cases. For instance, Fish and Game Code sections 5937 and 5946, requiring respectively that fish below dams be kept in good condition, and mandating that East Sierra water permits be so conditioned, was held by the Court of Appeal to be "a specific legislative rule concerning the public trust." California Trout, Inc. v. State Water Resources Control Board, 207 Cal.App.3d 585, 630-631 (1989).

Judge Karlton of the federal district court held some years ago that section 5937 applied to releases from Friant Dam that impacted fish in the San Joaquin River. And Judge Hodge in his EDF decision agreed with the State Department of Fish and Game that Public Resources Code section 5093.50, stating the state's policy under the Wild and Scenic Rivers Act, was " a directive to preserve public trust values and thus a codification of the State's public trust authority." Statement of Decision 44.

Will we reach the stage where courts will hold that a statute "subsumed" the trust and adherence to it is adequate compliance with trust responsibilities? Recently the State Water Resources Control Board found that compliance with Water Code section 1736, permitting approval of a long-term transfer if the Board finds the transfer will not result in substantial injury to any legal user of water and will not unreasonably affect fish, wildlife, or other instream beneficial uses. Accordingly, the Board concluded, it was not necessary to make specific public trust determinations on application of the public trust doctrine to a long term transfer of water from the Imperial Irrigation District to San Diego, and its effects on the Salmon Sea.

9. <u>The public trust paves the way to the waters.</u>

In New Jersey particularly, the courts have been ready to make the public trust a ground for mandating public access over municipally owned lands to the beaches. As a New Jersey judge observed: "[T]o say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine." <u>Matthews v. Bay Head Improvement. Assn.</u>, 471 A.2d 355, 364 (N.J. 1983), cert. denied, 469 U.S. 821 (1984)[1].

California has maintained the traditional view that there is no right of passage over private lands to the waters. <u>Bolsa Land Co. v. Burdick</u>, 151 Cal. 254 (1907). Most courts have upheld portage as an incident of navigation, and a number have provided for public use of the foreshore (the dry sand area above high tide line) to fish, draw nets and the like. Moore & Moore, Fisheries 96 (1903). Massachusetts has taken the opposite view, <u>Opinion of the Justices</u>, 313 N.E.2d 561 (Ma. 1974); cf. Note, Waters and Watercourses–Right of Public Passage Along Great Lakes Beaches, 31 MICH. L. REV. 1134, 1138-1142 (1933).

However consistent with the ancient maxim that there is more than one way to skin a cat, California acknowledges the common law doctrine of implied dedication to provide access to the waters over routes long permitted by the landowner, <u>Gion v. City of Santa Cruz,</u> 2 Cal.3d 29 (1970) and a number of statutes require public access as a condition of

[1] The beach is traditionally divided into three separate areas. The area from the sea to the ordinary highwater mark is known as the foreshore or tideland, form the ordinary highwater mark to the vegetation of debris line is known as the dry sand area, and landward from the vegetation line is considered private upland. Slade, Putting the Public Trust Doctrine to Work xxxix-xl. (1990).

developing land. E.g., Public Resources Code sections 30530-30214; Government Code sections 66478.1 et seq; see Kern River Public Access Committee v. City of Bakersfield, 170 Cal.App.3d 1205 (1985).

The California holdings have been influenced by its constitutional provision instructing the legislature to assure that frontage and tidal lands of all navigable waters remain open and accessible to its residents[2]. In People v. El Dorado County, 96 Cal.App.3d 403 (1979), this provision added a constitutional dimension to the right to navigate. In Lane v. City of Redondo Beach, 49 Cal.App.3d 251 (1975) it guided a decision prohibiting the vacating of a city street that would have destroyed public access to the beach. And in Dietz v. King, 2 Cal.3d 29 (1970), the companion case to Gion, the California court noted the "strong policy expressed in the constitutions and statues of this state of encouraging public use of shoreline recreational areas," and said these provisions "clearly indicate we should encourage public use of shoreline areas whenever that can be done consistently with the federal constitution."

Recently, principle of access was applied to overflights of trust lands. Ken Adelman, a successful retiree, undertook to photograph California's entire coastline from his helicopter and post images free on the web. The more than 12,000 images he posted are on www.californiacoastline.org. According to newspaper accounts, the project documented illegal sea walls, sewage outflows, erosion and masses of new development. It also depicted Barbra Streisand's hilltop Malibu estate. Streisand filed a lawsuit demanding that the photo depicting her house be removed, along with the caption reading "Streisand Estate, Malibu." Noting the public interest in the California shorezone and the minimal nature of the alleged invasion of privacy, Los Angeles judge Allan J. Goodman ruled against her.

10. The trust is available to any member of the public.

The public trust doctrine avoids the irksome and sometimes disastrous struggles over standing available in actions under other statutes and doctrines. The Marks v. Whitney decision made it clear that it is available any member of the general public, because it involves a right to which any member of the public is entitled.

11. The federal government is subject to the trust, or is it?

Generally the federal government has resisted efforts to impose the public trust on it. The influential District of Columbia circuit declined to consider the question in District of Columbia v. Air Florida, Inc., 750 F.2d 1077 (D.C. Cir. 1984). However a federal district

[2] Cal Const. Art X, sec. 4 provides in part: [N]o individual, partnership or corporation...shall be permitted to exclude the right of way to such water whenever it is required for any public purpose...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 always be attainable for the people thereof."

court in California suggested that a trust-like duty lay with the Department of the Interior to protect national parklands from adjacent activities. Sierra Club v. Dept. of the Interior, 376 F.Supp. 90 (N.D. Cal); Sierra Club v. Andrus, 487 F.Supp. 443 . Cf. Alabama v. Texas, 347 U.S. 272, 273 (1954): "The United States holds [such] resources...in trust for its citizens in one sense, but not in the sense that a private trustee holds for [a beneficiary]. The responsibility of Congress is to utilize the assets that come into its hands as sovereign in the way that it decides is best for the future of the nation."

A recent article eloquently argues for application of the public trust doctrine in the exclusive economic zone. Jarman, The Public Trust Doctrine in the Exclusive Economic Zone, 65 Oregon L. Rev. 1 (1986). If, as courts have consistently stated, the trust is an inherent attribute of sovereignty, the United States as the only sovereign out there would seem to be subject to it.

Conclusion

Justice Holmes many years ago sustained the rights of a state to prohibit diversions from a river against the admitted property rights of a water company, saying:

> Few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. The public interest is omnipresent wherever there is a state, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots...The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health. Hudson County Water Co. v. McCarter, 209 U.S. 349, 356 (1908).