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The public trust doctrine provides for sovereign state interests in navigable waters. In National Audubon Society v. Superior Court, *the California Supreme Court held that the public trust doctrine, as applied in the water rights context, allows the state to reconsider past water allocation decisions, and requires a balancing of competing public and private needs in water. The decision properly recognizes that historic water uses may not be consistent with modern public needs. The decision, however, overlooks the natural congruency between public trust principles and water law principles for the water law has traditionally recognized that the state has a continuing sovereign interest in water. Courts and agencies should apply these principles in a way that protects important public uses in water without causing undue dislocation of existing water rights.*

In *National Audubon Society v. Superior Court*,[1] the California Supreme Court held that the public trust doctrine, which provides for sovereign state control of navigable waters, applies to water rights granted under state law. Applying the doctrine, the court held that the State of California may determine whether the City of Los Angeles has the right to continue diverting water from Mono Lake, a right that the city had acquired many years earlier by a permit issued under California's water law. Thus, *National Audubon Society* held that the state may reconsider

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1. 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

past water allocation decisions, even where the rights were granted long ago and have been long exercised. The decision has gained prominence, in part, as national attention has focused on Mono Lake as a resource.[2] Apart from its view of the resource, the decision raises significant, often difficult questions concerning the nature of public and private interests in water. Because of its potential impact on private water rights, it has generated considerable controversy.[3]

This article will briefly examine the nature of state and private interests in water addressed in *National Audubon Society.* The decision, it is submitted, properly holds that the states may reconsider past water allocation decisions. The decision, however, suffers from certain doctrinal infirmities in describing the relationship between public trust principles and water laws. The decision viewed these principles as distinct, potentially conflicting concepts that must be reconciled; indeed, the court regarded them as on a "collision course."[4] To the contrary, public trust principles, although not explicitly, are a traditional feature of the water law. Historically, water rights have been regarded as subject to state regulation and control, and these rights have never been considered beyond public scrutiny. Therefore, the public trust doctrine and water law have a natural congruency that is often overlooked, and that was overlooked in *National Audubon Society.*

NATURE OF THE PUBLIC TRUST DOCTRINE

The public trust doctrine is a developing principle of American jurisprudence, not yet fully articulated, that provides for sovereign state control of navigable waters and their underlying beds. No clear consensus has emerged concerning the exact nature and effect of the doctrine. It is a common law doctrine; it results from judicial innovation rather than legislative enactment. Also, it is a *state* common law doctrine; it has been developed by state courts to define the nature of public and private interests in water. The doctrine means, simply, what each state court says that it means. To date, no clear jurisprudential view has emerged as to its exact meaning.

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2. *See* Young, *The Troubled Waters of Mono Lake,* 160 NAT'L GEOGRAPHIC 504-25 (Oct. 1981); Chasan, *Mono Lake vs. Los Angeles: A Tug-of-War for Precious Water,* 11 SMITHSONIAN 42-51 (Feb. 1981).

3. The *National Audubon Society* decision has received much comment, both favorable and critical. *See* Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine,* 71 IOWA L. REV. 631 (1986); Dunning, *The Public Trust Doctrine and Western Water Law: Discord or Harmony?* 30 ROCKY MTN. MIN. L. INST. 17-1 (1984); Note, *The Fifth Amendment As a Limitation On The Public Trust Doctrine In Water Law,* 15 PAC. L.J. 1291 (1984); Note, National Audubon Society v. Superior Court: *The Expanding Public Trust Doctrine,* 14 ENVTL. L. REV. 617 (1984); Note, *Protecting the People's Waters: The California Supreme Court Recognizes Two Remedies to Safeguard Public Trust Interests In Water,* 59 WASH. L. REV. (1984); Note, *The Public Trust Doctrine Expansion and Integration: A Proposed Balancing Test,* 23 SANTA CLARA L. REV. 211 (1983); Jawetz, *The Public Trust Totem in Public Land Law: Ineffective—And Undesirable—Judicial Intervention,* 10 ECOLOGY L.Q. 455 (1982).

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

The most common definition of the public trust doctrine is that the state holds its navigable waters and underlying beds in trust for the public.[5] This trust responsibility authorizes, or perhaps requires, the state to protect certain public uses in water. These uses are generally defined as navigation, commerce, and fisheries.[6] Some modern cases have held that the doctrine includes myriad public uses, such as recreation, boating, and esthetics.[7] The theory of the doctrine, according to the Supreme Court's seminal decision in *Illinois Central Railroad Company v. Illinois,*[8] is that the state cannot alienate the public interest in water, or at least has the right to revoke any property grants that create an alienation. It is unclear whether the doctrine *restrains* state power, as in the first instance, or instead *augments* state power, as in the second. In either event, the doctrine holds that a private party cannot acquire a "vested" property right in navigable waters or underlying beds that is superior to the state's power to protect public uses in water.[9]

DEVELOPMENT OF THE PUBLIC TRUST DOCTRINE

The public trust doctrine, it is often said, traces its origins to Roman law. The Emperor Justinian, codifying Roman law in his Institutes, declared that water, like air, is incapable of private ownership; it belongs to everyone and therefore can be owned by no one.[10] This principle was carried forth and expanded in the English common law. In England, the Crown was recognized as having a sovereign interest in navigable waters that was paramount to the rights of private riparian landowners.[11] After the American Revolution, the Crown's sovereign interest in navigable waters was transferred to the original thirteen states.[12] Although the states surrendered to the federal government the power to regulate commerce in the navigable waters, the states otherwise retained their sovereign interests in the water. Under the equal footing doctrine, new states are admitted to statehood on an equal footing with other states, and thus acquire the same sovereign interest in navigable waters as that enjoyed

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5. *See e.g.,* Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452-61 (1892); California v. Superior Ct. of Lake County, 29 Cal. 3d 210, 218-21, 625 P.2d 229, 243-45, 172 Cal. Rptr. 696, 700-02 (1981); City of Berkeley v. Superior Ct. of Alameda County, 26 Cal. 3d 515, 521-25, 606 P.2d 362, 364-68, 162 Cal. Rptr. 327, 329-33 (1980); Marks v. Whitney, 6 Cal. 3d 251, 258-62, 491 P.2d 374, 378-81, 98 Cal. Rptr. 790, 794-98 (1971).

6. *E.g., Illinois Central,* 146 U.S. at 452-61; *City of Berkeley,* 26 Cal. 3d at 521, 606 P.2d at 364-65, 162 Cal. Rptr. at 330.

7. *E.g.,* Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P.2d 374, 379, 98 Cal. Rptr. 790, 795 (1971); Bohn v. Anderson, 107 Cal. App. 2d 738, 238 P.2d 128 (1951); Munninghoff v. Wisconsin Conservation Comm'n, 255 Wis. 252, 38 N.W.2d 712 (1949).

8. 146 U.S. at 387, 453 (1982).

9. *National Audubon Society,* 33 Cal. 3d at 445, 658 P.2d at 727, 189 Cal. Rptr. at 363-69.

10. INSTITUTES OF JUSTINIAN 2.1.1 (S. Scott trans. reprinted ed. 1973).

11. Shively v. Bowlby, 152 U.S. 1, 11-18 (1894); Martin v. Wadell, 41 U.S. (16 Pet.) 367, 410 (1842).

12. *Shively,* 152 U.S. at 25-31; Manchester v. Massachusetts, 139 U.S. 240, 259-62 (1891); *Wadell,* 41 U.S. (16 Pet.) at 410.

by the original thirteen states.[13] The federal government holds navigable waters in trust for the future state during the territorial period. It then discharges its trust responsibility by transferring its sovereignty to a newly created state.[14]

This historic principle, that the states retained or acquired sovereign interests in navigable waters, explains the relationship of federal and state power in our federal system in the area of water law. According to this relationship, the states have a paramount sovereign interest in water—indeed, the water "belongs" to the state in a kind of proprietary sense—but the federal government retains a sovereign power to regulate commerce and navigation in the waters. This principle does not, however, define the relationship of state power and private rights in water. The U.S. Supreme Court has held that, although a new state may acquire sovereign "ownership" of water under equal footing principles, it may surrender its "ownership" interest by allowing private landowners to acquire fee interests in lands underlying water.[15] Therefore, the relationship of state power and private rights must be determined by state law, of which the public trust doctrine is part.

The public trust doctrine, in its modern form, received its impetus in the U.S. Supreme Court's decision in *Illinois Central Railroad Co. v. Illinois*,[16] decided in 1892. There, the Illinois legislature granted a fee interest in the Chicago waterfront to a private railroad company. The legislature later revoked the grant, and the railroad company sued to regain its fee interest. The case originated in the Illinois courts, was removed to the federal courts, and eventually reached the U.S. Supreme Court. The Court, speaking through Chief Justice Field, upheld the action of the Illinois legislature. The Court ruled that Illinois acquired sovereign title to lands underlying navigable waters and that the lands were held in trust for certain public uses, specifically navigation, commerce, and fisheries. Therefore, it was held, the Illinois legislature could not alienate its trust responsibility to protect such uses, and if the legislature did in fact alienate its responsibility by granting a fee interest, it could revoke the fee grant.

Illinois Central raised many questions that were left unanswered. The decision did not make clear whether the original fee grant was invalid, or instead whether the legislature simply had the right to revoke it. The Court stated only that the grant, "if not absolutely void on its face, . . . [is] subject to revocation."[17] Thus, the decision does not make clear whether the public trust doctrine *limits* state power by precluding the creation of private rights that impair public uses, or instead *expands* state power by allowing the state to revoke such private rights.

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13. Barney v. Keokuk, 94 U.S. 324, 338 (1977); United States v. Texas, 339 U.S. 707, 716-17 (1950); *Shively*, 152 U.S. at 29-50; Hardin v. Jordan, 140 U.S. 371, 382-83 (1891); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 229 (1848).

14. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 373 (1977).

15. *Hardin*, 140 U.S. at 382-83; *Shively*, 152 U.S. at 29-50.

16. 146 U.S. 387 (1892).

17. *Id.* at 453.

Additionally, *Illinois Central* does not make clear whether the state's public trust power is an inherent power reserved by all states in our federal system, or instead is a power reserved by Illinois under Illinois law. If the former, the doctrine is apparently a federal common law doctrine, for it defines the inherent nature of state power in our federal system; if the latter, the doctrine is a state common law doctrine. If the doctrine is based on federal law, the state presumably cannot surrender its public trust authority, much like a state cannot fail to provide a republican form of government.[18] If, instead, the doctrine is based on state common law, the state might be able to surrender its public trust authority through changing judicial interpretation of common law principles.

The analysis in *Illinois Central* seemed to suggest that the public trust doctrine is a federal common law doctrine that applies to all states. The Court stated that "[t]he State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."[19] Thus, the Court suggested that the state's public trust power stands on the same footing as its police power, and the state police power would seem to be an inherent governmental power that cannot be relinquished in our federal system. Indeed, the Court did not cite any decisions of the Illinois state courts. Instead, it cited only its own decisions holding that the states acquire sovereign power over navigable waters under the equal footing doctrine.[20] The citation of these decisions implies that the state's public trust power is coterminous with its sovereign power under equal footing principles, which is based on federal law. If this is so, the states necessarily retain whatever powers they acquired under equal footing principles, and the outer limits of state public trust power are measured by the limits of state power under the equal footing doctrine.

Later, however, in *Appleby v. City of New York,*[21] the Supreme Court stated that *Illinois Central* was based on Illinois law, not federal law. Under *Appleby,* although the outer limits of state power are determined under equal footing principles, the inner public trust limits are defined by each state's common law. Today, the public trust doctrine is generally regarded as a state law doctrine, in that each state is free to define its own sovereign interests in water. The doctrine effectively defines private property rights, and each state is free to determine its own rules of property in our federal system.[22] If, however, a state purported to relinquish *all* public interests in water to the point that the state could no longer protect important commercial or navigation interests, as in *Illinois Central,* it is possible that the relinquishment would be held to be inconsistent with the inherent attributes of governmental power and hence invalid.

18. U.S. CONST. art. IV, § 4; Pacific States Tel. Co. v. Oregon, 223 U.S. 118 (1912); Kiernan v. Portland, 223 U.S. 151 (1912).

19. Illinois Central R.R. Co. v. Illinois, 146 U.S. at 453.

20. *Id.* at 456-59.

21. 271 U.S. 364 (1926).

22. *See supra* note 3 and accompanying text.

The Court in *Illinois Central*, under the circumstances of the case, might have reached the same result by applying the state police power rather than the public trust doctrine. Illinois' control of the Chicago waterfront was vital to the people of Illinois because it provided the major access to Lake Michigan, a major commercial link between Illinois and the outside world. Therefore, the Court might have held that Illinois had the right to revoke the fee grant or at least regulate the fee interest under its police power. *Illinois Central*, however, was decided in 1892, before the broad reach of the state police power was fully understood. The states' power to apply zoning restrictions against private property, for example, was not recognized until 1926, many years after *Illinois Central* was decided.[23]

More importantly, the police power authorizes state regulation of property rights but does not define the nature of the property right itself. In *Illinois Central*, on the other hand, the Court, perhaps recognizing the magnitude of state interests involved, held that the railroad company had no property rights at all, not that its rights were subject to regulation on a case-by-case basis. *Illinois Central* thus recognizes that the public has a unique interest in water, and that the public interest in water transcends, or at least is different than, the public interest in land or other activities within the scope of the police power. *Illinois Central* takes American water law beyond the limits of the police power to Justinian's maxim that water is a unique resource that belongs to all.

After *Illinois Central*, the California courts applied the public trust doctrine in determining whether, as in *Illinois Central*, the state can convey fee interests in lands underlying navigable waters.[24] The California courts held that the state has the right to convey fee interests, but that such fee interests are burdened by a public trust "easement." To soften the impact on private property rights, the California Supreme Court in *City of Berkeley v. Superior Court*,[25] although holding that the public trust doctrine invalidated fee interests granted under earlier legislative authority, held that its decision was not applicable to fee interests that had been thoroughly developed in reliance on the earlier authority.[26] More importantly, prior to *National Audubon Society* the public trust doctrine was

23. *See* Euclid v. Ambler Realty Co., 272 U.S. 305 (1926).

24. *See, e.g.*, California v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713 (1981); California v. Superior Court of Lake County, 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696 (1981); City of Berkeley v. Superior Ct., 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980); Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); City of Long Beach v. Mansell, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970).

25. 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980).

26. The court in *City of Berkeley* stated that:

> [T]he appropriate resolution is to balance the interests of the public in tidelands conveyed pursuant to the 1870 act against those of the landowners who hold property under these conveyances. In the harmonizing of these claims, the principle we apply is that the interests of the public are paramount in property that is still physically adaptable for trust uses, whereas the interests of the grantees and their successors should prevail insofar as the tidelands have been rendered substantially valueless for those purposes.

6 Cal. 3d at 534, 606 P.2d at 373, 162 Cal. Rptr. at 338.

generally applied in California, as in *City of Berkeley,* only to hold that the state has sovereign ownership of lands underlying navigable waters. The doctrine was not applied to determine whether the state has the right to regulate the use of water itself, much less to determine the validity of water rights granted by the state. The doctrine functioned primarily as a land title doctrine rather than a water rights doctrine.

State Power To Prefer Uses

Traditionally, the public trust doctrine provides that the state has sovereign control over navigable waters for the protection of specified public uses, but does not address the question whether some public uses are preferred over others.[27] The protected public uses, navigation, commerce and fisheries, are not always compatible. The use of waters for commerce, for example, may impair other uses, such as navigation and fisheries. Water diversions that harm instream uses may serve other important public uses, as where the diversions provide a water supply for a large city. In *Colberg, Inc. v. California* ex rel. *Department of Public Works,*[28] the California Supreme Court held that the state has broad power to choose among these potentially competing uses. The court upheld a legislative enactment authorizing construction of a bridge over navigable waters, even though the bridge impaired navigation in the waterway. In effect, the court held that the legislature could prefer "commerce," even though unconnected with the waterway, over "navigation." In more recent cases, however, the California Supreme Court has viewed the public trust doctrine primarily as a means to protect certain environmental uses in water, particularly instream uses.[29] In *National Audubon Society,* for example, the court held that the state has an "affirmative duty" to protect "public trust uses"—which the court appeared to equate with instream uses—"whenever feasible."[30] Thus, it is unclear whether the public trust doctrine is neutral concerning public uses or instead prefers instream uses over other uses.

This question, whether the public trust doctrine prefers some uses over others, raises significant questions concerning the legislative and judicial roles in applying and enforcing the public trust doctrine. If the doctrine is primarily neutral, the legislative branch presumably has complete authority to determine how the state's water resources are used. If the legislative branch has this authority, it presumably can delegate its authority to state water law agencies. If, on the other hand, the public trust doctrine prefers instream uses over other public uses, then the judicial branch presumably retains some authority to determine whether instream

27. National Audubon Society v. Superior Ct., 33 Cal. 3d 419, 439 n.21, 658 P.2d 722 n.21, 189 Cal. Rptr. 359 n.21; Colberg, Inc. v. California *ex rel.* Dep't of Pub. Works, 67 Cal. 2d 410, 432 P.2d 3, 62 Cal. Rptr. 401 (1967); Boone v. Kingsbury, 206 Cal. 148, 273 P. 797 (1928).

28. 67 Cal. 2d 410, 432 P.2d 3, 62 Cal. Rptr. 401 (1967).

29. *E.g.,* Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P.2d 374, 379-80, 98 Cal. Rptr. 790, 795-96 (1971).

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

uses are being adequately protected, regardless of whether the legislative branch has spoken. Thus, the legislative and judicial roles in applying the doctrine have never been adequately defined. The courts of different states may define these roles differently.

Nature of State Interest in Water

It is not clear whether the state interest under the public trust doctrine is essentially a proprietary or regulatory interest. That is, does the state have a paramount property right in water that transcends private water rights, somewhat in the nature of a public easement? Or, instead, does the state have a sovereign power to regulate water use, somewhat akin to the police power? The distinction is often not germane because, whether the state interest is proprietary or regulatory, the state has the right to limit private rights in water and thus such private rights are not truly "vested." The distinction may become germane, however, in determining whether the state, beyond having a right to limit private rights, also has an affirmative duty to protect public uses in water. If the state has an affirmative duty to protect public uses, its duty cannot be rationalized under the view that the state interest is purely proprietary.

The California Supreme Court's decisions appear to suggest that the state interest is both proprietary and regulatory. In *Marks v. Whitney,*[31] the court held that the public possesses an "easement" in navigable waters, which ensures public access to these waters. Under this view, the private landowner takes his title subject to a paramount public right to use navigable waters for public purposes. Similarly, in *People v. Gold Run Ditch & Mining Co.,*[32] the California Supreme Court held that a private party cannot place a dredging device in navigable waters that impairs navigation in the waterway. Thus, the private dredger's rights are subject to the public right of navigation. These decisions suggest that the state power in navigable waters is proprietary in the sense that private rights are subject to a paramount public right of access or navigation.

In *National Audubon Society,* on the other hand, the California Supreme Court held that the public trust doctrine, as applied in the water rights context, authorizes the state to regulate water uses, as these uses affect public uses in water. The court said that the state has an "affirmative obligation" to protect public uses in water.[33] If, as *National Audubon Society* holds, the state has a right and duty to protect public

31. 6 Cal. 3d 251, 259, 491 P. 2d 374, 380, 98 Cal. Rptr. 790 (1971); *see also* People v. California Fish Co., 166 Cal. 576, 584, 138 P. 79, 84 (1913).

32. 66 Cal. 138, 4 P. 1152 (1884). *See also* People v. Russ, 132 Cal. 102, 64 P. 111 (1901) (holding that diversions in nonnavigable waters that impair public trust uses in navigable waters are impermissible); Montana Coalition for Stream Access v. Curran, 682 P.2d 163 (Mont. 1984); Montana Coalition for Stream Access v. Hildreth, 684 P.2d 1088 (Mont. 1984).

Several recent state decisions have applied public trust protections to waters that are navigable for recreational purposes but not for historic title purposes. *E.g.,* People *ex rel.* Younger v. County of El Dorado, 96 Cal. 3d 403 (1979); Hitchings v. Del Rio Woods Recreation & Park Dist., 55 Cal. App. 3d 560 (1976); People *ex rel.* Baker v. Mack, 19 Cal. App. 3d 1040 (1971); Diana Shooting Club v. Husting, 145, 145 N.W. 816 (Wis. 1914).

33. *National Audubon Society,* 33 Cal. 3d at 446, 658 P.2d at 729, 189 Cal. Rptr. at 364.

uses, the public trust doctrine does more than simply create a paramount public property right in water; it also creates regulatory powers and obligations on behalf of the state. Under this view, the state interest is regulatory as well as proprietary. Indeed, the public trust doctrine, as its name implies, creates a state "trust" responsibility that cannot be measured in conventional property terms.

Analogy to State Police Power

Although the public trust doctrine may provide a basis for state regulation of water, it does not function similarly to other state regulatory doctrines, most notably the police power. The police power addresses a broader range of activity than the public trust doctrine. The police power limits all private rights and conduct that affect the public health, welfare and safety,[34] and the public trust doctrine limits only private rights in navigable waters. The public trust doctrine, it seems, is founded on the premise that the public has unique interests in water. From the ancient Mesopotamian and Egyptian civilizations to those of the twentieth century, water has provided a means for commerce and has sustained agriculture and industry. Civilizations have flourished where water has flowed. Although the scope of the public trust doctrine is narrower than that of the police power, the subject that it addresses, water, is uniquely important in the growth of civilization.

The public trust doctrine is unlike the police power in another respect. The police power assumes that a private property right exists, and authorizes the state to regulate it for certain public purposes. The public trust doctrine, on the other hand, defines the nature of the property right itself. In our federal system, state law defines property rights,[35] including rights in water.[36] The public trust doctrine, by creating a sovereign state interest in water, limits and thus defines the private right itself. It determines, in conjunction with other property doctrines, the "sticks" that belong to "the bundle of rights that are commonly characterized as property."[37] This is not to suggest that the state can achieve by definition of property what it cannot achieve by regulation. As will be explained later, it is possible that federal constitutional provisions that limit state regulation of property may also apply to state definition of property.[38] Whether or not such federal constitutional limitations apply, the public trust doctrine must be conceptually understood as a doctrine that defines property rather than regulates its use.

In addition, the public trust doctrine has a self-executing impact that the police power lacks. A private party, for example, could not seek to

34. *E.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Walls v. Midland Carbon Co., 254 U.S. 300 (1920); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

35. Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378 (1977); Davies Warehouse Co. v. Bowles, 321 U.S. 144, 155 (1944).

36. Fox River Paper Co. v. Railroad Comm'n, 274 U.S. 651 (1927); Kansas v. Colorado, 206 U.S. 46, 94 (1907); Hardin v. Jordan, 140 U.S. 371 (1891); Barney v. Keokuk, 94 U.S. 324 (1877).

37. Kaiser Aetna v. United States, 444 U.S. 164 (1979).

38. *See infra* note 59 and accompanying text.

enjoin a water diversion by arguing that the diversion violates the police power; he must ground his cause of action on some other theory. The police power becomes relevant only in measuring the validity of actions undertaken by state and local governments that limit private property or activity for public purposes. The public trust doctrine, however, of its own force, directly limits property uses that impair public uses in water, assuming that the state has not authorized the impairment. In *People v. Gold Run Ditch & Mining Co.*,[39] for instance, the California Supreme Court held that a private party could not dredge navigable waters in a way that impairs navigation, unless the dredging was authorized by the state itself. The prohibition applies whether or not it has been legislatively implemented.

Therefore, the public trust doctrine, of its own force, directly limits private rights in water—assuming that the state has not authorized such rights—and does not simply provide a basis for state regulation of such rights. The doctrine is more in the nature of a substantive sword that can be wielded by private litigants, not simply a shield available to state and local governments that act on behalf of public interests. The doctrine allows the judiciary directly to protect certain public uses in water, assuming that other branches of government have not spoken and selected among competing public uses.

Analogy to Federal Navigation Power

The public trust doctrine is analogous in many respects to the federal navigation power. Under the navigation power, which arises under the commerce clause of the constitution,[40] the federal government has the power to regulate and control navigation, and to take private property rights for navigation purposes without payment of compensation.[41] The public trust doctrine and the federal navigation power are similar in that both provide for sovereign control of navigable waters and therefore limit private rights in such waters. The two doctrines are dissimilar in that the former is a state law doctrine that defines sovereign state interests in water, and the latter is a federal law doctrine that defines sovereign federal interests. Under principles of federal supremacy, the former must yield to the latter in the event of a conflict.

The two doctrines are dissimilar in another, less obvious respect. According to a long line of Supreme Court authority, the federal navigation power authorizes Congress to legislate for the protection of federal navigation interests, but does not, in itself, prohibit obstructions in navigable

39. 66 Cal. 138, 4 P. 1152 (1884).

40. U.S. CONST. art. I, § 8, cl. 3.

41. United States v. Grand River Dam Auth., 363 U.S. 229, 231-33 (1960); United States v. Twin City Power Co., 350 U.S. 222, 226 (1956); United States v. Chandler-Dunbar Co., 229 U.S. 53 (1913); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899); Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1865); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

waters or otherwise protect navigation.[42] According to this line of authority, no federal common law prohibits obstructions in navigable waters, and the commerce clause, of its own force, does not prohibit such obstructions either. To fill the void created by this line of authority, Congress has generously adopted many measures to protect federal interests in waters, whether directly related to navigation or not. These measures include the Rivers and Harbors Act of 1899,[43] the Clean Water Act,[44] the Wild and Scenic Rivers Act,[45] and the Endangered Species Act.[46] Absent these congressional enactments, however, the federal navigation power does not affect private rights in water. As noted above, however, the public trust doctrine directly limits the private right. Thus, the federal navigation power, similarly to the state police power, lacks the self-executing effect of the public trust doctrine.

Summary

To briefly summarize, the public trust doctrine is a unique doctrine that stands by itself and has no direct precedent in law. It differs from traditional property doctrines, such as easements, because it has a strong regulatory component. It differs from traditional regulatory doctrines, such as the police power and the federal navigation power, because it directly limits the private property right rather than simply authorizes the state to regulate it. Indeed, under *National Audubon Society,* it imposes an affirmative regulatory obligation on the state. The blend of public and private interests in water seems to be unique in American jurisprudence. The attempt to draw analogies to other legal doctrines seems only to further obfuscate the public trust doctrine.

In the end, the public trust doctrine is less a monolithic principle of law than a determination by each state, under its own common law, of the proper balance between public and private interests in water. The doctrine, as recognized in California, appears to establish both a sovereign *dominium* and *imperium* in water.[47] The *dominium* protects certain public uses in water in the absence of affirmative state action. The *imperium* allows the state to affirmatively regulate private rights in water for public

42. Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888); Hamilton v. Vicksburg, S. & P. R.R., 119 U.S. 280 (1886); Cardwell v. American Bridge Co., 113 U.S. 205, 208-09 (1885); Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 724 (1868).

43. Act of March 3, 1899, ch. 425 (1899), § 9, 30 Stat. 1151 as amended Pub. L. No. 97-322. Title I, §107(b), 96 Stat. 1582 (1982) and Pub. L. No. 97-449, § 2(f), 96 Stat. 2440 (1982) (codified at 33 U.S.C. §§ 401-467e (1982)).

44. Pub. L. No. 92-500, § 2, 86 Stat. 816 (1972) as amended Pub. L. No. 95-217, §§ 5(a), 26(b), 91 Stat. 567 (1977) and Pub. L. No. 100-4, Title III, § 316(b), 101 Stat. 60 (1987) (codified as amended at 33 U.S.C. §§ 1251-1376 (1982)).

45. Pub. L. No. 90-542, § 1(b), 82 Stat. 906 (1968) (codified at 16 U.S.C. §§ 1271-1287 (1982)).

46. Pub. L. No. 93-205, § 2, 87 Stat. 884 (1973) as amended Pub. L. No. 96-159, § 1, 93 Stat. 1225 (1979) and Pub. L. No. 97-304, 89(a), 96 Stat. 1426 (1982) (codified at 16 U.S.C. §§ 1531-1543 (1982)).

47. As the late Professor Frank Trelease noted, state and federal "ownership" interests in water are different than private interests. Trelease, *Government Ownership and Trusteeship of Water,* 45 CAL. L. REV. 638, 649-50 (1957).

purposes. In fact, under *National Audubon Society,* the state has an affirmative obligation to do so. It is unclear, however, whether the state has complete authority to choose among competing public uses in water, or instead must prefer instream uses over other uses. In any event, the combination of the state *dominium* and *imperium* in water limits private property rights, and precludes such rights from being truly "vested" in a conventional sense except as against other property owners. As will be explained, the public trust doctrine, so viewed, is not as alien in the water rights context as has often been believed.

CONGRUENCY OF PUBLIC TRUST PRINCIPLES AND WATER LAW PRINCIPLES

Historically, the right to use water has been governed by familiar principles of water law, notably the riparian doctrine and the appropriation doctrine. The riparian doctrine, which originated in the English common law, recognized that a landowner, as an incident of his land ownership, had the right to use water contiguous to his land.[48] The appropriation doctrine, which originated as a custom among the early gold miners of the American West, held that a person had the right to divert water to "beneficial use" whether or not he was a landowner.[49] The appropriation doctrine and, to a lesser degree, the riparian doctrine have been codified in the water rights laws of most Western states. To a large extent, the doctrines are now governed by a common standard of use. In California, for example, the people adopted a constitutional amendment in 1928 providing that all water rights, whether riparian or appropriative, exist only to the extent that water is put to "reasonable and beneficial use."[50] The reasonable use standard is now the basic water law of California, and applies equally to riparian and appropriative rights.[51] California has adopted a permit system to administer the reasonable use standard in the appropriation context. To obtain a permit, an appropriator must satisfy California's water rights agency that his proposed use is "reasonable and beneficial" and in the "public interest."[52] Thus, water rights in California and elsewhere were generally thought to be governed by the reasonable use standard, not the public trust doctrine.

Although the public trust doctrine, in name, was not considered an aspect of water law, the doctrine in its underlying theory has been an his-

48. Lux v. Haggin, 69 Cal. 255, 390-91, 10 P. 674, 759-60 (1886); Herminghaus v. Southern Cal. Edison Co., 200 Cal. 81, 95, 252 P. 607, 613 (1926); 1 S. WIEL, WATER RIGHTS IN THE WESTERN STATES § 709, at 733-75 (1911); W. HUTCHINS, CALIFORNIA LAW OF WATER RIGHTS 40-41 (1956).

49. United States v. Gerlach Live Stock Co., 339 U.S. 725, 742-49 (1950); Jennison v. Kirk, 98 U.S. 453, 458-59 (1878); Environmental Defense Fund v. East Bay Mun. Util. Dist., 26 Cal. 3d 183, 195, 605 P.2d 1, 7, 161 Cal. Rptr. 466, 472 (1980); S. WIEL, *supra* note 48, at §§ 377-381, at 406-12.

50. CAL. CONST. art. X, § 2; Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.2d 5 (1933).

51. Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 138, 429 P.2d 889, 893, 60 Cal. Rptr. 377, 381 (1967); Peabody v. City of Vallejo, 2 Cal. 2d 351, 367, 40 P.2d 486, 498-99 (1935).

52. CAL. WATER CODE §§ 100, 1253, 1255, 1257 (West 1971); Environmental Defense Fund v. East Bay Mun. Util. Dist., 26 Cal. 3d 183, 195, 605 P.2d 1, 7, 161 Cal. Rptr. 406, 472 (1980).

toric feature of water law. In *Kansas v. Colorado*,[53] the Supreme Court held that the states' authority to adopt water rights laws within our federal system derives from equal footing principles, which provide that the states acquire sovereign power over navigable waters as an inherent attribute of their sovereignty.[54] The states' water rights authority, the Court reasoned, includes the right to determine whether the riparian or appropriation doctrine applies in each state.[55] By the same token, the Supreme Court in *Illinois Central* explained that the states' public trust authority also derives from equal footing principles.[56] Thus, the states' water rights authority and public trust authority derive from the same federal constitutional source. In other words, the equal footing doctrine is the ultimate source of state power over navigable waters, and this doctrine provides the foundation of the states' water rights authority and public trust authority. The common constitutional link suggests that the state's public trust authority may be relevant in measuring its water rights authority.

Since the states acquired a sovereign interest in water under equal footing principles, the states' interest in water has always been regarded as different than their interest in land. By the same token, the private landowner's interests in land and water have never been considered the same. Although the landowner could acquire an absolute fee interest in land, he was never thought to have a fee interest in water. Instead, the private water right has always been regarded as usufructuary rather than possessory. The landowner does not own the corpus of the water, but instead has a limited right to its use.[57] This does not mean that the state cannot create private property rights in water, or that such rights may not be subject to federal constitutional protections. The nature of such rights, however, and the scope of any federal constitutional protections, must be read against the backdrop of the states' sovereign interests in water that arise under equal footing principles.

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53. 206 U.S. 46, 94 (1907); *see also* California v. United States, 438 U.S. 645, 654-55 (1978); United States v. Rio Grande Dam & Irr. Dist., 174 U.S. 690, 704-06 (1899).

54. *See supra* note 13 and accompanying text.

55. Kansas v. Colorado, 206 U.S. at 94. Later, in California Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935), the Supreme Court held that the Desert Land Act of 1877 "severed" the water from the public domain lands in the Western region, and therefore that federal patentees acquiring land grants under federal law must acquire their water rights under state and local laws. Citing its earlier decision in *Kansas v. Colorado*, the Court stated that "since 'Congress cannot enforce either [the riparian or appropriation] rule upon any state,' . . . the full power of choice must remain with the state. The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation." 295 U.S. at 164. Therefore, the states' authority to adopt the riparian or appropriation doctrine derives from equal footing principles, as defined in *Kansas v. Colorado*, and is reaffirmed by the severance principles articulated in *California Oregon Power*.

56. 146 U.S. 387, 456-58 (1882). In support of the view that the state has sovereign interests in navigable waters, the Court cited the equal footing principles described in its earlier decisions in McCready v. Virginia, 94 U.S. 391 (1876); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1848); and Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).

57. Eddy v. Simpson, 3 Cal. 249, 252 (1853); Gould v. Eaton, 117 Cal. 539, 49 P. 577 (1897); 1 S. WIEL, *supra* note 48, at 13-21; 1 C. KINNEY, IRRIGATION AND WATER RIGHTS 769-73 (2d ed. 1912).

The Western states, in particular, have adopted constitutional and statutory provisions reaffirming their sovereign interests in water, thus indicating an intent not to relinquish the sovereign interests that derive from equal footing principles. Some states provide by constitutional or statutory enactments that water is the "property" of the people.[58] Others provide that water use is a "public use" subject to state regulation and control.[59] The former presupposes that the state has a paramount *proprietary* right in water, and the latter that the state has a paramount *regulatory* interest. In either case, these constitutional and statutory provisions reaffirm that the states have sovereign interests in water that are dissimilar from their interests in land. Although these provisions define the nature of state power in different ways, and fail to define the outer limits of state power, they make clear that state power exists in some form.

The states' sovereign interest in water in particular has been considered an inherent limitation of an *appropriative* right. Since its inception, the appropriation doctrine has been viewed as a recognition of "public ownership" of water.[60] The theory of the appropriation doctrine is that an appropriator, unlike a riparian, does not own land and therefore cannot "own" water.[61] Therefore, any usufructuary right the appropriator enjoys is granted by the sovereign, which retains the power to determine whether water is being put to "beneficial use." Although the limits of the state's power to determine "beneficial use" have never been determined, it is clear that this power enables the state, to some degree, to determine the social value of the use. Therefore, the "beneficial use" rule itself, which underlies the appropriative right, presupposes some measure of state regulatory control of the appropriative right.

Many states have assumed regulatory control over *riparian* rights, which were once thought to be "natural" property rights that were beyond state control. Some states, following Colorado's example, rejected the riparian doctrine altogether; a water user can acquire only an appropriative right and has no "property" rights in water.[62] Other states, following California's example, retained the riparian doctrine but also adopted the appropriation doctrine; under this view, a landowner does have a "property" right in water.[63] Even in California, however, the people adopted a con-

58. *See, e.g.*, CAL. WATER CODE § 102 (West 1971); COLO. CONST. art. XVI, § 5; IDAHO CODE § 42-101 (1977); TEX. REV. CIV. STAT. ANN. art. 7467 (Vernon 1954); WYO. CONST. art. VIII, § 1.

59. *See, e.g.*, CAL. CONST. art. X, § 5; MONT. CONST. art. III, § 5; WASH. CONST. art. XXI, § 1; *see* Allen v. Petrick, 29 Mont. 373, 377, 22 P. 451, 452 (1924).

60. Kansas v. Colorado, 206 U.S. 46, 95 (1907).

61. 1 S. WIEL, *supra* note 48, § 170, at 193-95; 1 C. KINNEY, *supra* note 57, §§ 450-453, 585, at 759-68, 1005.

62. S. WIEL, *supra* note 48, §§ 151-157, at 173-85; C. KINNEY, *supra* note 57, §§ 628-631, at 1099-105; Trelease, *Government Ownership and Trusteeship of Water*, 45 CALIF. L. REV. 638, 650 (1967); Note, *Federal-State Conflicts Over the Control of Western Waters*, 60 COLUM. L. REV. 967, 972-73 (1960).

63. 1 S. WIEL, *supra* note 48, §§ 167-187, at 185-228; C. KINNEY, *supra* note 57, §§ 632-635, at 1105-11.

stitutional amendment subjecting riparian rights to the same reasonable use standard that governs appropriative rights.[64] Thus, although California has not adopted a permit system for riparian rights comparable to that applicable to appropriative rights, California nonetheless subjects the riparian right to the same substantive standards that apply to the appropriative right. California's authority to apply the reasonable use standard to riparian rights presupposes that the state has sovereign regulatory control over such rights.

In summary, the states have unique sovereign interests in water that they do not have in land. The state interest, arising under equal footing principles, which is a federal law doctrine. The federal principle of equality is reaffirmed by state constitutional and statutory provisions asserting sovereign state interests in water. The state's sovereign interest in water is inherent in the nature of the appropriative right. It has also been applied to the riparian right. Thus, the public trust doctrine, which provides that the state has sovereign interest in water, is an historic feature of the water laws, although the doctrine has never been explicitly applied in this context.

In *Palmer v. Railroad Commission*,[65] decided in 1914, the California Supreme Court held that the state does *not* have "ownership" of water and therefore does not have regulatory authority over water rights. The court noted, correctly, that water rights are usufructuary rather than possessory.[66] The court also stated, correctly, that the water user's usufructuary right is a property interest, in that he has a reasonable expectation of continued use.[67] The court concluded wrongly, however, that because the water user has a property right in water, the state has no "property" right and therefore cannot regulate the private right.[68] The fact that a water user has a "property" right in water does not support the conclusion that the state cannot regulate the right. The state, for example, clearly can regulate property under the police power for the protection of certain public purposes. Indeed, California's constitutional amendment subjecting riparian rights to the reasonable use standard presupposes that the state has the right to regulate water rights. Therefore, although a water user may have a "property" interest in water, and although his interest may be subject to federal constitutional protections, the state has the right to define and regulate his property right to the extent that state law allows and that federal law does not prohibit.

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64. *See supra* note 50 and accompanying text; *see also In re* Waters of Long Valley Creek Stream System, 25 Cal. 3d 339, 605 P.2d 859, 162 Cal. Rptr. 30 (1979) (holding that State Water Resources Control Board, in a statutory water rights adjudication proceeding, can quantify and prioritize riparian rights that have not been exercised).

65. 167 Cal. 163, 138 P. 997 (1914).

66. 167 Cal. at 167-68, 138 P. at 999.

67. *Id.*

68. *Id.*

NATIONAL AUDUBON SOCIETY Decision

In *National Audubon Society v. Superior Court*,[69] the California Supreme Court considered for the first time whether the public trust doctrine, by name, applies in the water rights context. The City of Los Angeles had built an aqueduct that diverts water from Mono Lake tributaries to the city, where the water is used for domestic purposes. The city acquired water rights permits, and later licenses, under California's appropriation procedures. At the time that the permits were issued, California's permit-issuing agency lacked specific statutory authority to consider environmental values, and in fact did not consider such values in issuing the permits. The diversions provide Los Angeles with about seventeen percent of its water supply, but they also reduce the size of Mono Lake and cause environmental damage in and around the lake. The National Audubon Society brought an action to enjoin the city's diversions, arguing that the diversions violated public trust values—equated with environmental values—in and around the lake and hence were invalid *per se*. The city argued that the public trust doctrine cannot be invoked to challenge a water right granted under state law, and in any event that the city's water rights were "vested" and hence not subject to continuing state review.

The California Supreme Court adopted a middle ground. The court held that the doctrine could be used to directly challenge a water right granted under state law. The court, however, rejected the plaintiffs' argument that the diversions are unlawful *per se* because they violate public trust values. Instead, the court adopted a balancing test to determine the effect of the public trust doctrine in the water rights context. Under the balancing test, the city's domestic needs for water must be weighed against Mono Lake's environmental needs, and can be limited only if the balance tips in favor of the lake's needs.[70] Since the court held that the state can reconsider the city's water rights, albeit under the balancing test rather than the *per se* rule, the court rejected the city's argument that its water rights were "vested" and hence not subject to review.

National Audubon Society, in holding that the state can reconsider past water allocation decisions, properly recognizes that historic water uses may not always be consistent with modern public needs. As noted earlier, water is a unique resource vital to commerce, navigation, agriculture and the environment. In the arid West, once depicted by cartographers as the "Great American Desert," water is an especially important resource. It has been said that water is the West's "life blood."[71] In little more than a century, the West's economy has been transformed. Its economic base has shifted from mining to agriculture and, more recently, to industry. Cities have replaced deserts, creating water needs for people who inhabit them. In counter point, environmental values have gained new public awareness, and many of these values depend on water. As the West's economy and demography change, and as its environmental heri-

69. 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).
70. 33 Cal. at 446, 658 P.2d at 727, 189 Cal. Rptr. at 364.
71. Chow v. City of Santa Barbara, 217 Cal. 673, 702, 22 P.2d 5, 16 (1933).

tage gains fresh appreciation, the public needs in water change, and water resources should be accommodated to these changing needs. If the state can regulate property under its police power, a fortiori, it can regulate the resource that most affects its economic, demographic and environmental interests. The state's interest in regulating this resource is particularly compelling where, as in *National Audubon Society,* the water right was granted without consideration of its effect on environmental values.

National Audubon Society, to a significant degree, limits the intrusion of newly-expressed public trust principles upon California's long-established water law system. In earlier public trust cases, the court held that the public trust doctrine encumbers all private rights in lands underlying navigable water.[72] In *National Audubon Society,* however, the court held that the public trust doctrine functions differently in the water rights context than in other contexts. As applied in the water rights context, the public trust doctrine requires that the state balance competing economic needs and environmental values, and provides that the state may revoke or modify prior water rights only if such rights are outweighed by public needs in water. By adopting the balancing test, the court recognized that the plaintiffs' *per se* argument would potentially disrupt California's water supply system and invalidate many rights that have been long exercised in good faith and for important public purposes. In California, many public water agencies, serving important municipal and agricultural needs, depend on diversions that may have some impact on instream values in the source stream. The court properly recognized that it is too late in the day to turn California's economic clock backward, as the clock is driven by water diversions.

The court also rejected the plaintiffs' argument that, if the state can authorize impairment of instream values, the impairment can be authorized only by the legislature, not by the state water rights agency. According to the court, the water rights agency itself can balance competing economic needs and environmental values, and can authorize water diversions if, in the agency's judgment, the economic needs outweigh environmental values.[73] In Massachusetts, the courts have adopted the view that the legislature alone has the power to authorize impairment of instream values.[74] If the Massachusetts rule prevailed in California, the state water rights agency would have difficulty in carrying out its legislatively-mandated duties under the water laws. These water laws authorize the agency to grant appropriative water rights if, in the agency's judgment, the proposed water uses satisfy the reasonable use test and are in the "public interest."[75] The court in *National Audubon Society* properly rejected the Massachusetts rule.

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72. *See supra* note 31 and accompanying text.

73. *National Audubon Society,* 33 Cal. 3d at 446, 658 P.2d at 727, 189 Cal. Rptr. at 364 ("The Legislature, acting directly or through an authorized agency such as the Water Board," may authorize water diversions that "may unavoidably harm the trust uses at the source stream.")

74. Gould v. Greylock Reservation Comm'n, 350 Mass. 410, 215 N.E.2d 114 (1966).

75. *See supra* note 72 and accompanying text.

Nonetheless, *National Audubon Society* suffers from certain doctrinal infirmities and, similarly to *Illinois Central*, leaves some unanswered questions. The decision appeared to view the public trust doctrine as standing apart from, and as in conflict with, the water law. Indeed, in the court's mind, the two doctrines were on a "collision course."[76] In reconciling the doctrines, the court held that the "public trust doctrine" provides a separate remedy to challenge a water right granted under the water laws, and specifically declined to consider whether the plaintiffs might have had a remedy under the water laws themselves.[77] To be sure, the court avoided the "collision course" by interpreting the public trust doctrine as requiring a balancing of competing interests and values, which is not dissimilar from the approach required under the reasonable use test established in water law.

Even so, *National Audubon Society,* by viewing the doctrines as on a "collision course," overlooked the natural congruency of the doctrines. As noted earlier, public trust principles have always been part of the water laws, in that the water laws provide that the state has continuing sovereign control over water rights. In fact, both public trust principles and state water laws ultimately derive from the federal constitutional source of the equal footing doctrine. In light of the historic relationship between the public trust doctrine and state water laws, it is difficult to see how these two doctrines are on a "collision course." A collision would occur only if the public trust doctrine requires the state to make choices among competing public uses that are different than the choices required under the water laws. The court in *National Audubon Society,* however, citing its earlier decision in *Colberg, Inc. v. California* ex rel. *Department of Public Works,*[78] reaffirmed that the state has the right to make these choices under the public trust doctrine,[79] and did not suggest that these choices are any different than the choices mandated by the water laws. Further, the court, by failing to consider whether the plaintiffs had a remedy under the water laws, failed to define what choices are required under the water laws. The court's understanding of the relationship between public trust principles and the water laws was thus unclear. The court seemed to emphasize the differences rather than similarities between these doctrines, and overlooked their natural congruency.

The *National Audubon Society* analysis invites the possibility of a conflict between public trust principles and water law principles. If the public trust doctrine provides a separate remedy, it is presumably governed by a different standard than the reasonable use standard that constitutionally applies to all water rights in California. If the standards are different, then water rights may be subject to potentially conflicting standards. The court in *National Audubon Society* resolved the potential con-

76. 33 Cal. 3d at 425, 658 P.2d at 709, 189 Cal. Rptr. at 349 (1983).
77. 33 Cal. 3d at 447 n.28, 658 P.2d at 728 n.28, 189 Cal. Rptr. at 365 n.28.
78. 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967).
79. *National Audubon Society,* 33 Cal. 3d at 439 n.21, 440, 658 P.2d at 722 n.21, 723, 189 Cal. Rptr. at 359 n.21, 360 ("[T]he public trust doctrine does not prevent the state from choosing between trust uses . . . .").

flict by stating that "[a]ll uses of water, including public trust uses, must now conform to the standard of reasonable use."[80] This brief but significant passage suggests that, in the court's mind, the ultimate criteria for measuring a water right must be found in the reasonable use test—which derives from consititutional principles—rather than the public trust doctrine, which is based on common law. Thus, the court appeared to suggest that the public trust doctrine requires consideration of instream values, but that the constitutional test authorizes the state to balance these values against other public needs. This formulation, it is submitted, properly reconciles the public trust doctrine and the water laws, to the extent that reconciliation is needed. This formulation, however, appears inconsistent with other parts of the *National Audubon Society* decision that focus solely on public trust values in measuring Los Angeles' water right. In the end, the decision at times articulates a sound rationale for reconciling these historic doctrines, and other times articulates a less tenable rationale.[81]

The courts of other states have avoided the doctrinal infirmities of *National Audubon Society* in explaining the relationship between the doctrines. In *United Plainsman v. North Dakota State Water Commission,*[82] the North Dakota Supreme Court held that the state has an obligation to provide for long-range planning of water resources. The court stated that this result was supported both by North Dakota's water law and by the public trust doctrine. In *Shokal v. Dunn,*[83] the Idaho Supreme Court interpreted Idaho's "public interest" statute as authorizing the state's water rights agency to grant appropriative permits subject to the agency's continuing authority to determine at a future time whether the water should be allocated for other purposes. These decisions appear to use public trust principles to support and explain the state's water law, and thus weave public trust principles and water law principles into a tighter fabric than in *National Audubon Society.*

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80. 33 Cal. 3d at 443, 658 P.2d at 725, 189 Cal. Rptr. at 362. In a brief but illuminating footnote, the court acknowledged that California water laws codify "in part" the state's "obligation" to protect public trust uses. 33 Cal. at 446 n.27, 658 P.2d at 728 n.27, 189 Cal. Rptr. at 364 n.27. The water laws do not render the public trust doctrine "superfluous," the court stated, because it precludes legislative repeal of the public trust protections, "confirm[s] the state's sovereign supervision," and requires consideration of public trust uses in cases filed directly in the courts rather than before the water rights agency. *Id.*

81. In two decisions rendered subsequently to *National Audubon Society,* the California Courts of Appeal have held that the water laws, either by themselves or by incorporating public trust principles, authorize the state to exercise continuing regulatory jurisdiction over water rights. *See* United States v. State Water Resources Control Bd., 182 Cal. App. 3d 82, 227 Cal. Rptr. 161 (Cal. App. 1 Dist. 1986); Imperial Irrigation Dist. v. State Water Resources Control Bd., 186 Cal. App. 3d 1160, 231 Cal. Rptr. 283 (Cal. App. 4 Dist. 1986). These decisions seem to more accurately reflect the congruency between the water laws and public trust principles.

82. 247 N.W.2d 457, 462-63 (N.D. 1976).

83. 707 P.2d 441 (Idaho 1985); *see also* Montana Coalition for Stream Access, Inc. v. Hildreth, 684 P.2d 1088 (Mont. 1984); Montana Coalition for Stream Access, Inc. v. Curran, 682 P.2d 163 (Mont. 1984); Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1087-89 (Idaho 1983).

LIMITS OF STATE POWER

Perhaps the greatest difficulty in applying public trust principles in the water rights context is in determining the proper limits of state power to change existing water rights. It is easy enough to suggest that the state should have the right to reconsider water uses that no longer serve public needs. It is much more difficult to determine how far the state can go in reconsidering existing water uses. Once the state steps onto the public trust slope, the slope may become very slippery indeed.

In *National Audubon Society,* the California Supreme Court adopted a balancing test that, in effect, limits state power to revoke prior water rights. Under the balancing test, the state may modify private rights only if public needs outweigh private rights. The balancing test, however, does not tell lower courts or agencies how to balance these needs. It is difficult for a state court judge to "balance" fish against a city's water needs, especially where the judge has no experience in making such judgments. The balance of competing needs ultimately involves policy judgments rather than legal ones, and is more properly within the legislative rather than the judicial sphere. State legislative bodies should therefore adopt procedural mechanisms and substantive standards governing conflicts between competing water needs to the extent that they have not done so. In the absence of legislative guidance, the courts should adopt their own rules governing such conflicts. Some proposed rules will now be discussed, as well as some factors relevant to such conflicts.

Presumptions

One possible way to limit excessive state regulation of private rights would be to adopt a presumption that a water right, once granted and exercised, is valid in the absence of a preponderance of evidence to the contrary. Under this approach, the burden of proof would rest on those who challenge existing water rights on public trust grounds. Some have argued, however, that public trust values should be presumptively valid in the absence of persuasive evidence to the contrary, and thus that the burden should rest on the water user to establish the validity of his right. The difficulty with the latter approach is that it presumes that the state water rights process is invalid to the extent that the state has granted water rights that affect instream uses. The latter approach is untenable if a state water rights agency has already balanced public and private needs in granting the water right.

Ultimately, any presumptions relating to the balancing of competing needs should be developed by the legislative rather than judicial branch, because the legislative branch is the proper branch to balance economic needs and environmental values. It is possible that a statutory presumption will not greatly assist a water rights agency in trying to develop a practical, workable regime that accommodates all competing interests in an actual dispute, but such a presumption might provide a helpful starting point.

Administrative Role

One way to promote uniformity of public trust decisions would be to require that such decisions should be made in the first instance by the state agency that administers the water rights system. This result might be accomplished by legislation providing that a party challenging a water right must initiate his claim before the water rights agency. State water rights agencies generally have considerable expertise in balancing economic needs and environmental values. They are often called on to make such balances in considering water rights applications. California's water rights agency, for example, recently examined conflicting consumptive and instream needs in determining whether the U. S. Bureau of Reclamation has the right to divert water from the environmentally-sensitive San Francisco-San Joaquin Delta to agricultural users in central California.[84] Thus, state water agencies often have a statewide perspective and expertise that courts may lack. Greater uniformity in the decision-making process could be achieved if state water agencies initially balance public and private needs in water.

The Taking Clause

The state's power to limit private water rights may be constrained by the taking clause of the constitution, which prohibits the "taking" of property without payment of compensation. The taking clause is contained in the fifth amendment, and is made applicable to states under the fourteenth amendment.[85] The taking clause applies not only where the state condemns property, but also where the state excessively regulates property use under the police power.[86] On the other hand, a state may exercise its police power to regulate property use for public purposes, and no unconstitutional "taking" occurs under such circumstances.[87] In *Penn Central Transportation Co. v. New York City,*[88] the Supreme Court adopted a balancing test to distinguish between reasonable regulation and unconstitutional taking of property. The balancing test focuses on (1) the "economic impact of the regulation" on the property use, (2) the extent to which the regulation interferes with "distinct investment-backed expectations" of the property owner, and (3) the "character of the government action."[89]

If the taking clause applies to state water rights regulation, the Supreme Court would have authority to review the constitutional valid-

84. *See* United States v. State Water Resources Control Board, 182 Cal. App. 3d 82, 227 Cal. Rptr. 161 (Cal. App. 1 Dist. 1986); *see also* California v. Kleppe, 604 F.2d 1187, 1191 (9th Cir. 1982) (upholding conditions imposed by the State Water Resources Control Board in water appropriation permits issued to the U. S. Bureau of Reclamation relating to the New Melones Dam in California).

85. U.S. CONST. amends. V and XIV; *see* Chicago, B. & Q. R. R. Co. v. Chicago, 166 U.S. 226 (1897).

86. Kaiser Aetna v. United States, 444 U.S. 164, 178 (1979); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

87. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Walls v. Midland Carbon Co., 254 U.S. 300 (1920).

88. 438 U.S. 104 (1978).

89. 438 U.S. at 124.

ity of state decisions affecting private water rights. Under this authority, the Supreme Court presumably would apply the *Penn Central* balancing test to determine whether an unconstitutional taking has occurred, after the state has applied the *National Audubon Society* balancing test to determine whether the rights can be limited under state law.

It is not clear, however, whether the taking clause applies to state regulation of water rights. On the one hand, the clause applies when the state excessively restrains the use of "property." As noted earlier, a water right is a form of "property."[90] The right is usufructuary rather than possessory, in that the water user has the right to use water but does not "own" it. Even so, the water user's right to use water is a property interest because he has a reasonable expectation of continued use, subject to any sovereign state constraints that might apply. To the extent that his use consists of a property interest, it is within the ambit of the taking clause.

On the other hand, the Supreme Court has consistently held that state law defines "property" in our federal system.[91] It can be argued that, although a water user has a protected interest in water, the nature of his property right depends on state law; because the state has a superior interest in the water, the water user does not have a reasonable expectation of continued use within the purview of the taking clause. Under this view, when a state limits a water right, it is defining property rather than regulating it. It is not clear whether the Supreme Court would apply the *Penn Central* balancing test where the state re-defines property rather than regulates it. The Supreme Court has held in one line of cases, however, that the state cannot circumvent the taking clause by re-defining property rather than explicitly regulating it. State definitions of property rights, the Court has held, must rest on a "fair and substantial basis" so that there is "no evasion of constitutional principles."[92]

In another line of cases, the Supreme Court has held that state claims of "ownership" of natural resources, including water, cannot be used to circumvent the commerce clause. In *Hughes v. Oklahoma*,[93] the Court held that Oklahoma does not "own" its wildlife in a conventional sense, but instead has the right to regulate wildlife under its police power. The Court concluded that Oklahoma law, in restricting shipment of wildlife in interstate commerce, was subject to the constraints of the commerce clause, which prohibits states from imposing unreasonable burdens on interstate commerce. Similarly, in *Sporhase v. Nebraska*,[94] the Court held that

90. *E.g.*, Palmer v. Railroad Comm'n, 167 Cal. 163, 167-68, 138 P. 997, 999 (1914).

91. *See supra* notes 21-23 and accompanying text.

92. Demorest v. City Bank Farmers Trust Co., 321 U.S. 36 (1944); Broad River Power Co. v. South Carolina, 281 U.S. 537 (1930); Fox River Paper Co. v. Railroad Comm'n, 274 U.S. 651, 656-57 (1927).

93. 441 U.S. 322 (1979).

94. 458 U.S. 941 (1982). For a related article on this case in this issue *see* Trelease, Interstate Use of Water—"Sporhase v. El Paso, Pike & Vermejo," XXII LAND & WATER L. REV. 315 (1987).

Nebraska does not "own" its groundwater, and thus that Nebraska's groundwater regulations are subject to challenge under the commerce clause. In effect, the Court in *Hughes* and *Sporhase* held that state claims to "ownership" of natural resources, including water, cannot circumvent federal constitutional guarantees relating to interstate commerce. It is a small step to hold that state "ownership" claims in water cannot circumvent federal constitutional guarantees relating to private property. The Court, however, might possibly distinguish between interstate commerce and private property in considering the nature of state "ownership" of water. To date, the Court has not spoken.

CONCLUSION

The public trust doctrine, by whatever name, reflects an attempt by the courts to accommodate water resources with changing public needs. The West's water needs have greatly changed since the early miners diverted water to their mining claims, and since the early farmers diverted water to irrigate their crops. Since those early days, the West's economy has been transformed, its demography has changed, and its environmental heritage has assumed new importance. These developments, it is submitted, require a continuing accommodation of public and private interests in water. An infusion of public trust principles into water law seems inevitable, and indeed a fusion of sorts has always existed. Since a state's right to regulate private property in other contexts is beyond cavil, its right to regulate the resource, water, that most affects the public weal can hardly be gainsaid.

The most formidable obstacles in accommodating public trust and water law principles lie ahead. First, there is a need to provide a more tenable rationale than that appearing in *National Audubon Society*, which sometimes confuses and often overlooks the inherent compatibility of these principles. The greater difficulty, however, lies in actually balancing public and private needs in water in an actual controversy, and in developing guidelines that will enable courts and administrative agencies to make these balances. Such guidelines are necessary to provide for some measure of security and predictability to the holders of private water rights, as well as some uniformity in the decision-making process. The very nature of sovereign state interests in water precludes absolute certainty. Some guidance, however, is necessary to allow municipal and agricultural water agencies to have a reasonably predictable water supply and plan for future needs.

Ironically, the defenders of the public trust doctrine often argue that the doctrine will have a minimal impact on water rights. In their view, "the sky is not falling." Conversely, its opponents often argue that the effects will be sweeping and devastating. The unspoken consensus seems to be that the greater the dislocation of existing rights, the less tenable

the doctrine. Courts and agencies must apply the doctrine in a way that protects important public needs in water without causing undue dislocation of existing rights. This is the only way that the public trust doctrine, by whatever name, will become an accepted principle of American jurisprudence and live up to its promise.