



**THE  
PUBLIC TRUST  
DOCTRINE**

**Instream Flows  
and  
Resources**

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
FISH AND WILDLIFE SERVICE  
SACRAMENTO AREA OFFICE

THE PUBLIC TRUST DOCTRINE,  
INSTREAM FLOWS  
AND  
RESOURCES

A Discussion Paper

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NOTE TO READER:

The United States Fish and Wildlife Service has long been concerned about instream flows and the need to protect and manage them for fish, wildlife, recreational and esthetic values. The growing public awareness and critical nature of water and its availability dictate that both the managers and the users of water exercise their roles in the public interest. We believe that the Public Trust Doctrine, judiciously applied, can be an effective tool for maintenance of instream flows and the management of the biological and ecological resources associated with these flows.

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A handwritten signature in black ink, reading "William D. Sweeney". The signature is written in a cursive style with a large, prominent initial "W".

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Please note:

Source photos (pages 4, 7, 17, 21, 23 and 27) were of such poor quality they have not been included in the KRIS edition of this document.

## THE PUBLIC TRUST DOCTRINE--INSTREAM FLOWS AND RESOURCES

### Introduction

The struggle to maintain appropriate base flows and some free flowing streams has been waged primarily between those who wish to protect streams for their fish and wildlife, outdoor recreation and esthetic values, and those who would dam and/or divert most if not all waters for urban, industrial, power or irrigation purposes. Representatives of the people in State legislatures and in the Congress, with some exceptions, have voted for dams, for diverting water, for denuding streambanks and channelizing rivers, and have often helped water development agencies and local interests to reduce base flow recommendations made by those favoring stream maintenance.

The State Water Rights Board, the predecessor of today's State Water Resources Control Board, reflecting the narrow view of its responsibilities peculiar to the sentiments of those earlier days, acted as a water broker. That Board simply allocated water among private interests, and did not act in its stewardship role as a trustee of a finite biological resource. As a result, there is far less water than is needed flowing in streams, which is the basic environment for all our fish resources and many species of wildlife resources. Aquatic biologists and managers have worked long and hard attempting to compensate for the rapidly declining habitat, but they are reaching their limits. The recent California drought (1976-1977) brought near-catastrophe to many instream-dependent fish and wildlife resources.

It is the premise of this discussion paper that flows adequate for protecting stream ecosystems, including fish and wildlife resources, should be clearly recognized as a reasonable and beneficial use of water and should receive the highest degree of protection from the State as public trustee.

In California, the State Water Resources Control Board is responsible for administering water rights and for preventing waste or unreasonable use of the State's waters. The Board, as the adjudicator and allocator of the waters of the State, is responsible for protecting all the beneficial uses of the State's water resources. The State Board, assisted by other agencies including the California Department of Fish and Game, is the overall trustee responsible for protecting and conserving instream fish and wildlife resources dependent on adequate instream flows and for ensuring the viability and renewability of the State's entire aquatic system. Over the years, courts have broadened the scope of the Public Trust Doctrine to meet contemporary situations and changing public needs. The Public Trust Doctrine<sup>1</sup>, of all the concepts known to American law, seems to have the breadth and substantive content to be a viable tool to assist the Board in carrying out its responsibilities.

#### A FEDERAL ROLE IN WATER RESOURCES MANAGEMENT

Under the "commerce clause" of the United States Constitution, the Congress has the power to regulate interstate and foreign commerce on waters of the United States. Rivers, streams and lakes are navigable under the Federal definition which are in fact, used or susceptible to being used in their natural condition for purposes of trade and navigation. (See Daniel Ball, 19 L. ed at 1001).

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<sup>1</sup> For the leading article on this subject, see Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention 68 Mich. L. Rev. 473. (1970).

The Supreme Court has held that navigation is a function of commerce, and commerce on all navigable interstate waters is subject to regulation by the Congress. This regulation extends not only to vessels, but to dredging or excavating in such water and wetlands, construction, discharge of pollutants, flood control projects, and other measures to regulate streamflow. Even further, the Congress may regulate the flow of tributaries contributing to and sustaining the flow of navigable waters, because if tributary flows are seriously depleted, or the stream modified, downstream navigation might be impaired. It is also apparent that a stream need not be navigable throughout the year, or be navigable in all places, to meet the test of navigability. Thus, it would appear that most surface waters are subject to congressional regulation for navigational purposes.

The Public Trust Doctrine concerning inland waters and waterways and the broadened definition of navigability is an extension of case law from coastal waters and major tributaries. This is similar to the maturing cycle of anadromous fish. Anadromous fish, after spending their major growth period in coastal waters and the ocean, have a navigational capability and uncanny ability to return to their ancestral spawning grounds. However, either natural and man-caused low flows and or pollution can prevent these fish from reaching their spawning grounds. It seems reasonable that a test of navigability could rest on the use of a river or stream by fish. This is especially so if the fish are of national significance or are sold in interstate commerce. Therefore, the fact that a river or stream is used or has been used by salmon, steelhead, or trout should be adequate justification for it to be classified as navigable under the Federal and State test of navigability.

In the west, the States were carved from the public domain which the United States acquired by purchase or cession. The United States obtained all the interests to the fish, wildlife, lands, minerals, and water subject only to vested private rights granted at the time of acquisition. The United States became the trustee in behalf of the people. Since that time, private rights in land and water were created under the Territorial Law prior to statehood and then under State Law after statehood, all with the expressed consent of Congress. The States then became the trustee and administrator of water as well as the fish in the water. However, the Federal Government retained a proprietary interest sufficient to protect the water from further appropriation under State Law, and to reserve it for use in connection with uses and activities on Federal Reserve Lands.

#### State Role in Water Resources Management

For a detailed review of the State trustee role in water management and state-of-the-art understanding of some of the related legal aspects of instream water use, see Section II - The Nature of Property Rights in Water and Public Trust Doctrine in Staff paper No. 6, Legal Aspects of Instream Water Uses in California - by Anne J. Schneider -January 1978 - Governor's Commission to Review California Water Rights Law. This Staff paper documents that, in California, both water and fish in the water are public resources held by the State in its sovereign capacity for the benefit and in trust for its people.

## The Water Allocation Process and Instream Flows

In the early days of California, the process for obtaining water resources was simple. Rivers were picked off, one at a time, and their waters diverted to meet local economic needs. The riparian owners diverted water for mining, agricultural and household uses. As cities grew and agricultural demands increased, the stream nearest the water demand area went first. The large rivers at a distance went next and so on. While this was occurring, there was no allocation of water for instream uses. The reasons for this were simple. Dry lands needed water to produce crops. There seemed to be an endless supply of rivers from which to obtain the desired water. Little concern was expressed for local fish and wildlife resources in other parts of the State. Any public interest values at that time were limited to the traditional water uses such as irrigation, municipal and industrial supplies—probably because these uses were more easily translated into monetary terms than public values of instream flows and resources.

Appropriative rights for the use of surface waters have been subject to an application - permit - license system since 1914. The State Water Resources Control Board is the agency responsible for issuing, denying or modifying permits for appropriating water. Primarily the Board influences the maintenance of water for instream uses either through rejection of an application to appropriate water or through insertion of terms or conditions in water right entitlements. The conditions in a given entitlement may consist of: (1) specific numerical flow values in cubic feet per second to be bypassed at the diversion point during specified seasons (Standard Permit No. 60);

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The State Board and the Department of Water Resources estimate that of large average annual net water use, 36% is by permit system appropriators, 24% by ground water users, 13% by pre-1914 appropriators and 10% by riparian users. The remaining 17% of water use is Colorado River import under contract. Riparian rights have the highest priority, are never lost through non-use, and may be exercised at any time despite adverse impacts on the permitted water rights of others. Thus, it is possible that a new riparian use could develop at any time and eliminate water on which a substantial industrial or municipal investment had been based. State Water Resources Control Board in 1976-1977 - A Biennial Report March 1978.

or (2) in the event specific values have not been developed and where diversion involves a dam across a stream, a general requirement for the bypass of sufficient water to "keep in good condition any fish that may be planted or exist below the dam" (Standard Permit Term No. 69). Also included in the Board's existing set of standard permit terms are other ancillary instream use protection conditions: No. 60 (requiring adequate bypass measuring devices); and No. 63 (requiring screening of diversions to protect fishlife in appropriate cases). In instances where there is insufficient knowledge of the effects of an appropriation, the Board may include a reserve jurisdiction term in permits to appropriate water.

The primary authority for the Board's present practices is Water Code Sections 1243 and 1243.5. These sections direct the Board to take into account the amounts of water required for recreation, and preservation and enhancement of fish and wildlife resources, when determining the amount of water available for appropriation.

Sections 1243 and 1243.5 provide as follows:

1243. The use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water. In determining the amount of water available for appropriation for other beneficial uses, the board shall take into account, whenever it is in the public interest, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources.

The Board shall notify the Department of Fish and Game of any application for a permit to appropriate water. The Department of Fish and Game shall recommend the amounts of water, if any, required for the preservation and enhancement of fish and wildlife resources and shall report its findings to the Board.

This section shall not be construed to affect riparian rights.

1243.5. In determining the amount of water available for appropriation, the Board shall take into account, whenever it is in the public interest, the amounts of water needed to remain in the source for protection of beneficial uses, including any uses specified to be protected in any relevant water quality control plan established pursuant to Division 7 (commencing with Section 13000) of this Code.

This section shall not be construed to affect riparian rights.

The Department of Fish and Game has historically carried out its duty under Section 1243 by protesting water right applications and then either negotiating its protest through a bypass agreement with the applicant or, if agreement cannot be reached, by giving evidence of instream needs at a hearing on the protested application.

This practice has developed a record to support decisions regarding instream needs relative to each individual application whether by negotiated agreement or by hearing proceedings. However, there are no comprehensive stream-specific or reach-specific standards upon which to measure each request to appropriate water. The applicant is not required to show proof that instream resources can be protected. A protester has the burden of persuading either the applicant or the Board of the instream needs and the flows necessary to meet these needs. The Department of Fish and Game and others are saddled with this responsibility. This procedure is repeated for each water right application reviewed regardless of past records or protests. The Department of Fish and Game must win every protest, for to lose one protest will negate past wins and result in the loss of a stream, its associated resources and values with the loss or damages accumulating over time.

In water resource development the principle theory in the allocation of water among instream and offstream uses has been to weigh the relative values and needs of competing uses and by participating equally at the bargaining table, instream uses would share equally with other uses. This is poor thinking for it leads to the conclusion that fish, fisheries, ecosystem maintenance, resource renewability and water-associated recreation by participating equally at the bargaining table will also share equally in receiving water supplies.

Fish resources, maintenance of the instream ecosystem and their associated sport and commercial fisheries and allied industries have not fared well under the appropriative system, because water has not been provided or reserved for instream ecosystem maintenance and resource renewability equal to that allocated for out-of-stream uses. In fact, under the appropriative rights system, water in a stream can be and has been entirely diverted and the stream bed left virtually dry. The direct result is to degrade the instream ecosystem, reduce or destroy the industries associated with resources produced by streams. To make matters worse, there is nothing in the Water Code or the law that provides procedures for a person, acting in behalf of the people and instream resources, to reserve water or appropriate water for instream uses<sup>2</sup>. Presently, the Board has the power to reserve flows, but to date has not aggressively done so.

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<sup>2</sup> California Trout, Inc. vs. State Water Resources Control Board 90 Cal. App. 3d 816 The Appellate Court found that there must be physical control or actual diversion from the natural channel.

The Public Trust Doctrine, of all the concepts known to American law, seems to have the breadth and substantive content to make it a useful tool of general application for developing a comprehensive legal approach to resource management problems. If the doctrine is to be a satisfactory tool, it must meet three criteria. (1) it must contain some concept of a legal right in the general public; (2) it must be enforceable against the government; and (3) it must be capable of an interpretation consistent with contemporary concerns for environmental quality.<sup>3</sup> There is little question that instream flows, fish and other aquatic resources meet these criteria.

Over the years courts have broadened the scope of the Public Trust Doctrine to meet contemporary situations and changing public need. The California Supreme Court in Marks v. Whitney<sup>4</sup> helped redefine the scope of the State's interest in navigable waters and tidelands. It clarified that uses encompassed within the tidelands trust in addition to the traditional purposes of navigation, fishery and commerce include the preservation of those lands in their natural state as open space and as environments which provide food and habitat for birds and marine life and favorably influence the scenery of an area.

Since the definition of traditional uses is sufficiently flexible to meet changing public needs, it is reasonable that such uses can be just as broad when applied to streams and instream flows. Therefore, it can be asserted that for maximum public trust responsibilities the state's jurisdiction should include the stream channel to at least the ordinary high water mark in order for the State to properly plan and administer its water resources as well as its fish resources. This would be similar to the Public Trust in tidal areas. In addition, for the protection of the stream ecosystem, State jurisdiction should include the riparian corridor adjacent to the stream as well as the stream channel.

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<sup>3</sup> Sax. See Footnote 1.

<sup>4</sup> 6 Cal. 3d251,491 P. 2d, 347 Cal Rep 790 (1971)

The Public Trust Doctrine also requires a broader consideration of the "public interest" to meet contemporary needs. If the doctrine is forcefully applied to the allocation of water and water rights, it could result in the Board placing restrictions on water rights. For example, the State Board would not be able to approve appropriations of water which harm or degrade the public rights in fish and instream resources. As an extension of this, effective implementation of the Public Trust Doctrine could force the Board through its police powers to assign priorities among competing out-of-stream uses. In addition, water use by a riparian owner also could be restricted under the Public Trust Doctrine if the diversion of water from the stream adversely impacts fish resources. The Board's police powers should be available for enforcement action. The State Board, in acting as trustee should not only protect or preserve the trust, but should actually promote it as a part of its stewardship responsibilities.

The very nature and availability of water forces a new look at the private rights in water. The Wyoming Court in 1925 termed the right to use water "a permissive use of state property."<sup>5</sup> The Nebraska Court in 1912 determined that "the state then has such a proprietary interest in the running water of the streams and in the beneficial use thereof, that it may transfer a qualified ownership or the right to use thereof."<sup>6</sup>

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<sup>5</sup> Wyoming Hereford Ranch v. Hammond Packing Co., 33 Wyoming 14, 236 P. 764 (1925).

<sup>6</sup> Kirk V. State Board of Irrigation, 19 Nebraska 627, 134 N.W. 167 (1912)

Thus, water as a natural resource has long been treated as a distinctly different type of property than land. Real property is viewed as an object of private ownership subject to public restraint -- zoning, etc.--and was originally based on the idea of preventing damages to other private property. Water, on the other hand, is viewed as public property subject to private use.

Sax <sup>7</sup> in discussing natural resources and navigable waters indicated, although-it is irregularly perceived in legal doctrine, that certain uses of natural resources have a peculiarly public nature that makes their adaption to private ownership inappropriate. The best example Sax found was the rule of water law that one does not own a property right in water in the same way he owns his watch or his shoes, but that he owns only an usufruct--a use right. This is an interest that incorporates the needs of others. It is thus thought to be incumbent upon the government to regulate water uses for the general benefit of the community and to take into account the public nature and the physical quality of this natural resource.

In a sense, water is seldom freed of the public trust. It is allocated by the State for public and private purposes. This allocation is merely the transfer of a qualified ownership or the permission to use water for a reasonable and beneficial purpose. When the water returns to natural water courses after use, it must meet water quality standards to protect the public interest of the receiving waters.

Water is also apparently free in California. When one receives a water rights permit, one only pays a small application fee, and the costs to develop and transport the water. There is no direct payment or user fee collected by the State, the trustee of the water resource. There are no review or termination dates for these permits. In addition, barring a finding of waste or unreasonable use, the water rights permit seems to be forever. Such long term support for private use of

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<sup>7</sup> See Sax footnote ] at page 485

instream water prohibits the Board from ever accommodating new or modified public needs through the reallocation of resources. The acceptance of such a theory, that a water rights permit is forever, "seems to strike against the State's authority to regulate or administer resources to meet changing needs.

The principle that private interest in and use of navigable waters and tidelands is reviewable and subject to the public trust should be applied to the private interest and use of instream flows. For example: The court in *Marks v. Whitney*<sup>8</sup> reiterated the 1913 ruling of *People v. California Fish Company* that the patentee of tidelands owns only "the soil, subject to the easement of the public for the public uses of navigation and commerce, and to the right of the State, as administrator and controller of the public uses and the public trust thereof, to enter upon and possess the same for the preservation and advancement of the public uses and to make such change and improvements as may be deemed advisable for these purposes." If the principles of the *People v. California Fish Company* ruling are viewed relative to a holder of a water rights permit, the ruling would read "a water right holder only receives permission to use the water, subject to the easement of the public for the public uses of navigation, commerce, and fishery, and to the right of the state, as administrator and controller of these public uses and the public trust thereof, to use and possess the same for the preservation and advancement of the public uses and to make such change and improvements as may be deemed advisable for these purposes".

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<sup>8</sup> See Footnote 3

The common sense of this principle is that a permit to use tide-land is subject to the public trust, then such a permit issued by the State is nothing more than permission which is revocable. With this basic principle in mind, it then could be stated that the use of water by permit is nothing more than permission by the State, subject to the public trust. Therefore it can be asserted that there is an implied reserved jurisdiction clause and public restriction in all water rights permits issued by the board and its predecessors, when the water use, direct or indirectly, affects a navigable body of water, whether or not specifically stated in such permits. It is also logical that a diversion of water by a riparian owner is also subject to public trust restrictions.

The State Water Resources Control Board, has specifically reserved jurisdiction regarding the U.S. Water and Power Resources Service (formerly the U.S. Bureau of Reclamation) and California Department of Water Resources water rights permits for diverting Delta waters. When the circumstances surrounding grants or permission to use tidelands are applied to instream water, it seems most reasonable to assume that the Board, under its police powers of Sections 100 and 1394 of the California Water Code and its continuing authority and as the administrator and controller of the trust, has an implied reserved jurisdiction in all water rights permits issued. In addition, the Board also has the responsibility to review and amend all such water rights permits to provide, protect, or restore instream flows and to protect and promote the public trust in fish themselves as a natural resource.

The State Water Resources Control Board, as the allocator of water acting on behalf of all the people, has the responsibility and regulatory power to protect the viability and renewability of the stream ecosystem including fish, water-associated wildlife resources and water quality. It can exercise this power through the establishment and management of instream flows in a manner consistent with the intent of the Public Trust Doctrine.

The State Board has the obligation to protect and promote the public trust and public uses of water consistent with, but not limited to, navigation, fisheries, recreation, fish and wildlife, water quality and quantity, and aquatic ecosystem renewability maintenance. The severe restriction upon the power of the State as trustee to inordinately reduce instream flows is not only based upon the importance of the public use of water, but upon the exhaustible and irreplaceable nature of this complex resource and its fundamental importance to our society and to our total environment.

It must be recognized that rivers are an integral system from their headwaters to their mouths and that once destroyed or greatly diminished in an ecological sense may never be restored. Therefore they deserve the highest degree of protection from the State as the public trustee. The key case regarding the Public Trust Doctrine and the allocation of trust resources is Illinois Central RR v. Illinois, 146 U.S. 387 (1892). In that case, the United States Supreme Court said that while it may be reasonable for the State of Illinois to grant some of the Chicago waterfront and lands underlying Lake Michigan to the Illinois Central Railroad for purposes allied with the public trust, the wholesale giveaway of the Chicago waterfront and its submerged lands to a private railroad for seemingly private purposes was illegal. In short, the Court held that the State of Illinois did not have the authority to make wholesale grants of public resources held in trust. The Court relied on the Public Trust Doctrine to find a limitation on the State legislature.

In addition the Court held that "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instances of parcels mentioned for improvement of the navigation and use of the waters and when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police power in the administration of government and preservation of peace."  
Illinois Cent. Ry. Co. v. St. of Ill, 146 U.S. 452.

Based on this holding it can be argued that the State must allocate water in a manner consistent with the trust. It also seems reasonable that a court would hold that a water right holder or a riparian owner who depletes the flow of a stream or reduces the flow so as to make it unsuitable for fish life, navigation, recreation, scenic and ecological uses, which in turn adversely impacts industries or uses dependent on a stream and its resources, is as inconsistent with public trust protection as fencing off a navigable stream from the public<sup>9</sup>, filling tidelands,<sup>10</sup> or depositing debris in a river.<sup>11</sup>

All of this, and the principles of the Illinois Central case, suggests that the wholesale giveaway or the allocation of instream water which results in degraded aquatic resources or environments is unreasonable and therefore illegal. A logical extension of the Illinois Central case is that the State can only issue permits to appropriate water that do not abrogate its public trust responsibility, and that the water needed to protect fish and aquatic resources and ecosystems is not and never was transferable. The ability of agencies

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<sup>9</sup> People ex rel. Baker v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971)

<sup>10</sup> Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971)

<sup>11</sup> People v. Truckee Lumber Co., 116 Cal. 397 (1897)

to terminate the public trust and rights to small portions of public trust resources seems quite reasonable by itself, but it increases the possibility of loss or impairment of public rights. The public must be forever on guard against the incremental, as well as wholesale, termination of the public rights and trust responsibilities by the State.

It is generally understood that the State may not lawfully dispose of title to its trust resources, or otherwise surrender its control to such resources, i.e. water, in any way inconsistent with the administration of the trust. Therefore, it is reasonable to assume that the State can only issue rights to water which are not necessary for the fulfillment of its public trust responsibilities. If an existing water allocation has resulted in the degradation of the public trust in fish, it seems reasonable to assume that the use or diversion of water necessary to protect the public interest in fish and other aquatic resources was never allocated, for the State lacks power to allocate water in derogation from the public trust in fish. It is entirely reasonable that if the State invokes the Public Trust Doctrine to protect instream flows the rule of no compensation would apply. This is based on the theory that there can be no superior private ownership rights to instream water and, since the sovereign already owns the flow, private rights to the use of water are subject to the public rights, therefore no Fifth Amendment taking can occur. The growth of the no compensation rule has largely paralleled the growth of the navigation powers so that today it could extend to flows in nearly all streams.<sup>12</sup>

The State, as public trustee, should assume the posture and policy that instream water is to receive priority in all water use determinations. In addition, a certain level of the historic natural stream flows should be reserved for non-consumptive instream uses such as ecological and biological resource viability and renewability. This flow should be considered as inviolable, as a common thing owned by everyone, and not available for offstream use.

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<sup>12</sup> Federal Power in Western Waters: The Navigation Power and the Role of No Compensation. - E. H. Morreale, Natural Resources Journal, Vol. 3, May 1963.

For water resource development planning purposes and in recognition of California's need for water, the need to maintain instream resources and values, and the lack of finite data to protect instream resources and associated values, any allocation of water should be based on a nearly equal sharing of water between instream and out-of-stream uses. In a particular stream, however, flows greater than or less than 50 percent of the annual flow might be required for fish and ecosystem renewability. Some streams might require all the flow during some periods of the year, others may need less than 50 percent of the total runoff to protect instream values. After a critical review of the instream needs for ecosystem renewability, the water remaining could be allocated among instream and offstream beneficial uses by participating equally in the present system for allocating water. However, in streams or reaches of streams classified as Wild and Scenic Rivers all the flow would be needed. Exceptions to stream-specific or reach-specific standards could be made during emergencies to meet temporary health and safety requirements. To assess existing conditions an Environmental Impact Assessment should be undertaken to document, as best as possible, water use or allocation impacts.

Actions such as changing the point of diversion, place of use, modifying delivery regimes and schedules could be used to provide greater instream flows for fish management purposes. For example in the Tuolumne River, additional flow released from Hetchy-Hetchy Reservoir and flowing to the Delta would provide fish, wildlife, ecosystem renewability, and recreation associated benefits to both the Tuolumne and San Joaquin Rivers. A like amount of water could be picked up by either the U. S. Water and Power Resources Service's (formerly Bureau of Reclamation) Delta Mendota pump facilities or the California Aqueduct pump facilities for transfer to the City and County of San Francisco's water transfer facilities. Similar operational changes could be implemented with the Pardee-Camanche Reservoir

complex on the Mokelumne River. Water released would benefit the lower reach of the Mokelumne River and Delta, like amounts of water could be transferred to East Bay Municipal Utility District's facilities for its use.

Changing project operations from that authorized to improve instream flows-in such streams as the Trinity River where up to 90 percent of the natural flow is exported -seems quite reasonable in light of the broadening public interest and the Public Trust Doctrine. Protecting the public's vested rights and thereby restricting the diversion of water from streams tributary to Mono Lake also seems reasonable under the Public Trust Doctrine.

Until instream flows are protected under a concept of inviolability to preserve and promote the trust in fish and aquatic resources, and until the Public Trust Doctrine is recognized and implemented by the Legislature and the Executive Branch, there will be little real progress toward providing or protecting instream flows and associated resources.

#### IMPLEMENTATION OF THE PUBLIC TRUST DOCTRINE

Under the Public Trust Doctrine, resources in which the public has a special interest are held by the State subject to a duty not to impair the resource even if there is a private interest held. The Public Trust Doctrine provides a sound legal foundation to protect both fish and instream flows. This Doctrine should be adopted and implemented as a basic State policy and a long term declaration. The legislature should reaffirm its trust responsibilities that the people of the State have a right to the protection and improvement of all beneficial instream uses of water. The purpose here is to protect public resources and the public interest in these resources.

The State Water Resources Control Board acting in behalf of the State in the allocation of water, is the key agency responsible for instream flows and resources and therefore must protect instream (or instream associated) non-consumptive uses including recreation in the broadest context; the conservation and management of resident and migratory fish and wildlife resources; wilderness preservation; ecosystem maintenance; riparian habitat protection; preservation of educational, historic, scientific, aesthetic and scenic values. All these uses and values are common property of all the people including future generations.

The Board in exercising its trust responsibilities should develop stream-specific or reach-specific management plans that:

1. Reaffirm the public rights and trust responsibilities in the policy of the management program. This includes both preservation as well as promotion of the trust and public uses of the trust resources.
2. Provide for reasonable use of the trust resources consistent with the trust. Permits or licenses issued regarding allocation of water should contain a reserve jurisdiction clause, review dates and an expiration date. For example, the expiration date could be between 25 to not more than 40 years from the date of issue. Review date could be every 10 years from the issue date.
3. Curtail uses of water that adversely impact fish and eco system renewability. Compliance schedules should be developed for each situation reviewed. If the water use is considered a near wholesale giveaway or allocation, significant curtailment should occur at once with a like amount of water left in or released to the stream.

As part of all applications for water right allocation, the applicants should affirmatively prove that the proposed use will not adversely affect the resources dependent on instream flows and that the use of public water impacted by the project is consistent with the public trust. In addition, fish resource protection facilities based on state-of-the-art knowledge should be incorporated into all existing projects through the Board's implied reserved jurisdiction. The intent here is to ensure that all activities impacting instream flows and resources are consistent with good sound practices of resource conservation.

Agencies as well as members of the public, via private litigation, have an enforceable right and responsibility to protect the fundamental qualities of the public trust and to see that the trust is both protected as well as promoted. The use of the common law Public Trust Doctrine to protect instream flow uses would:

1. Place the responsibility not only in the regulators but all societal interests. Any citizen could seek redress in the courts for any alleged violations of this trust. The State should aggressively take action when the trust is violated.
2. Allow future generations to be included as beneficiaries of a trust. Placing instream uses under trust could be used to require extensive, public, long-range planning of resource use by private use as well as governmental interests. The establishment of the public as the beneficiary would result in a substantial decentralization of the enforcement powers.
3. Establish preservation of these natural resources as an important element of the public interest. Application of the trust approach would not require automatic payment to private interests.

4. 4. Expand and revitalize the necessary citizen involvement in the determination of the public interest in water use.

The State should aggressively endorse and implement the Public Trust Doctrine to ensure the highest degree of protection for instream water and to maintain and improve the viability and renewability of this ecological-biological resource.

The State as public trustee should consider the following when reviewing applications to appropriate water:

1. Does the proposed activity unreasonably interfere with the paramount policy of the State as public trustee to protect and preserve the uses of its water as a ecological-biological resource?
2. Is the proposed activity consistent with sound policies of resource conservation without interfering with public health and safety?
3. Does the proposed activity detract from the existing public resources and uses of such waters?
4. Is the proposed activity consistent with an accepted use and management plan for the basin, sub-basin or planning area?
5. Will the public resources be protected from the adverse effects of the proposed activity?
6. Without satisfactory answers to the above, the State as public trustee of water and associated resources cannot logically be responsive to the paramount issue—the public concern and public resources. In short the State Board as trustee must find that a proposed appropriation is consistent with their public trust responsibilities before issuing a permit to appropriate water.

## Summary and Conclusions

The protection, conservation and prudent use of the waters of the State are matters of great public concern and interest. The waters in our rivers and their estuaries, lakes and other bodies are important fish and wildlife habitats. They provide nursery and spawning areas for fish that support sport and commercial fisheries. They are avenues for transportation and places for public recreation. They serve domestic, agricultural and industrial use important to the well-being of the people of this State, and must serve these purposes for both this, and future generations.

Water is a public trust asset in California; therefore the Public Trust Doctrine imposes special responsibilities on the State for its care and stewardship. The Public Trust Doctrine constitutes the best practical and philosophical premise for establishing and protecting instream flows. In the past, the public's right to use water has been somewhat protected; however, this right has been subordinate to the rights of the appropriator. A member of the public has always had a right to make use of water while it is flowing in its natural channel, but an appropriator could make this right meaningless by diverting all or most of the water from its natural channel.

Application of the Public Trust Doctrine requires the recognition of a public right of use which deserves protection. It could be stated that the overriding interests of the public during the settlement and development of the State required that the waters of the State be initially directed towards establishing a self-sustaining economy capable of supporting the people of the State. However, this does not imply that public rights to instream uses had no recognized value, but merely suggests that a higher interest was thought to justify their impairment.

Today the Public Trust Doctrine, along with a public interest review, provides strong rationale for altering the emphasis of the appropriative system. As the number and quality of free-flowing streams decreases and as the population desiring instream resources and uses increases, the total value of the instream uses of the remaining streams is increasing tremendously. At the same time, public support for economic development through subsidy and exploitation of water resources is diminishing. Thus the present need for subsidized economic development cannot continue to justify further impairment of the remaining streams and associated resources.

The Public Trust Doctrine is evolving to protect public rights in a variety of recreational and aesthetic uses of public trust property which would not formerly have received protection under the traditional application of the Doctrine. Since critical public interest review was responsible for establishing the original scope of protection offered by the Public Trust Doctrine, there is no reason why newly-recognized critical public interests, such as instream flows and associated fish and wildlife resources and ecosystem renewability,<sup>13</sup> cannot now be included in this review.--

The people of this nation are living in an age of diminishing natural resources, increasing pressures on existing resources and increasing public concern over what to do about it. In the Illinois Central Case, the U.S. Supreme Court voided a wholesale giveaway of the Chicago waterfront by the Illinois Legislature to a private party for seemingly private uses. The Court relied on the Public Trust Doctrine to limit the Legislature. The Court enunciated the principal element of the case: that when government holds a resource that is available

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<sup>13</sup> Water Allocation in Utah - Protection of Instream Uses, Robert A. Kimsey - Utah Law Review -687-707, 1975.

for general public use, a court will carefully review any governmental attempt to alienate those resources to private parties or otherwise restrict public rights.

Past water right decisions have no doubt impacted public resources of such widely diverse areas as Mono Lake, Trinity River, Tuolumne River and the Sacramento-San Joaquin River Delta. The controversy and problems associated with such water rights may take years to resolve.

The Public Trust Doctrine has considerable force as an expression of the limits on the rights of government to dispose of, grant, or alienate vital natural resources owned by the State or in which the public has an interest or right of use.

The California State legislature should aggressively endorse and implement the Public Trust Doctrine to ensure the highest degree of protection for instream water and to maintain and improve the viability and renewability of this ecological resource. This should be a matter of legislative policy with the State's supervisory powers used to carry out the stewardship responsibilities.

In summary, it can be stated that:

1. In California, public rights exist in water and in fish and wildlife themselves, predicated upon public ownership of all such resources.
2. This trust in fish and wildlife can be expressed as a classic trust, with title in the people with the State as trustee.
3. The quality and quantity of the waters of lakes, rivers and streams are protected through the trust for all the people of the State.

4. The public right in fish and water must be safeguarded by the State as trustee.
5. In special circumstances, the Legislature may terminate public right to small portions of resources covered under the trust for purposes of promoting the overall purposes of the trust.
6. The public must be forever on guard against the incremental loss, as well as the wholesale termination, of the public rights and trust responsibilities.
7. Consumptive water rights have not yet been impaired by the assertion of the Public Trust Doctrine—but there is nothing in theory to prevent it.
8. The State, as public trustee, must assume the posture that instream water is a biological and ecological resource which has the highest priority and which will be considered inviolate.
9. A water right is permission to use a resource held in trust - not a transfer of ownership.
10. Effective implementation of the Public Trust Doctrine will force constraints in water rights allocation and probably force prioritizing of all offstream uses.
11. Water allocation should require nearly equal sharing of water between instream and out-of-stream uses.
12. A portion of the "inviolable" water could be available during ecological and biological emergencies or to meet health and safety needs of a community during emergency situations.
13. A policy of "inviolability" of instream flows must be a "beacon" ideology to protect water as an ecological-biological resource and to protect its viability for future generations of Californians.
14. Appropriators should be required to undertake all reasonable steps necessary to protect the trust corpus, especially the public rights to fish.

15. The State under its police powers as well as the Public Trust Doctrine has an implied reserved jurisdiction to review and amend permits to provide, protect or restore instream flows.
16. Riparian water rights are subject to the Public Trust Doctrine restrictions.
17. The Public Trust Doctrine can be applied to such a vitally needed resource as instream water because the public has a vital interest in its stewardship. The future of the Doctrine as a tool in environmental protection is largely dependent on the imagination and guidelines with which it is applied. To date, the courts have provided some of that leadership. Legislative and administrative leadership is now needed.

#### SUGGESTED READINGS

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