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California's Groundwater: A Legally Neglected Resource

*Jan Stevens**

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I. Introduction

Water has always been a problem for California. The blessing of a Mediterranean climate carries with it the burden of supplying a burgeoning population from seasonal rains that fall in areas where extra freshwater is needed the least and are transported, at great expense, to areas where it is needed the most. Historically, massive engineering projects have attempted to supply these needs with canals and dams. But we are running out of rivers to dam and money to spend. It is time to explore alternatives. One of the most feasible and most neglected alternatives lies right under our feet. Effective management of California's groundwater could make a major contribution to solving the State's persistent water deficits.

In 2009, the California Legislature revisited state water management. As state policy, it established the improvement of water conveyances and the expansion of statewide water storage.¹ It set forth a mandate for planning for California's strategic Delta, through which so much of the State's water passes. The Legislature also reaffirmed the allied doctrines of reasonable use and public trust as the foundations of California water policy.²

Groundwater has long been the neglected stepchild in California's complex system of water rights. Even though it has become increasingly important as the State's consumption grows along with its population, the Legislature and the regulatory agencies assigned the task of applying the constitutional and common law mandates of reasonable use and public trust have been restrained in exercising their powers. However, a number of recent studies decrying the inability of regulations and regulators to cope realistically with these issues have focused new attention on the anomalies

1. CAL. WATER CODE § 85020(f) (West).

2. *Id.* at § 85023 (West).

of present law.³ Additionally, pending litigation over the Scott River in Northern California's Siskiyou County⁴ provides a vehicle for reexamination of this neglected and oft-mismanaged resource.

II. Water: The Commons and the Usufructuary Right

The nature of water and the law has plagued generations of commentators, and still periodically arises to puzzle the courts. The 18th century authority Blackstone stated that "water is a movable wandering thing, and must of necessity continue in common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein . . ."⁵ Unlike "Blackacre," water cannot be held in fee simple, to the exclusion of others. It has a frustrating way of evaporating into the sky, or escaping into the earth, for reuse in entirely different forms and places. As a Colorado judge said:

Each drop of water which for the moment, is part of a stream, is part of the whole earth. It may at any time evaporate and become part of a cloud. It may be snow in winter, hailing in spring, rain in summer, and part of a juicy melon in fall. To apply to stream water medieval concepts derived from attempts to define unlimited fee simple title defies both reason and legal history.⁶

His observation applies equally to groundwater, and California's constitutional and trust protections apply equally to it as well.

The uses of water extend well beyond agricultural irrigation and domestic consumption. An Eden-like variety of plants, mammals and fish depend on it for their continued existence and evolution. A myriad of provisions in California's Constitution and state and federal statutes impose priorities and duties on its use, and common law trust and nuisance strictures inhibit it.

3. M. RHEAD ENION, UNDER WATER: MONITORING AND REGULATING GROUNDWATER IN CALIFORNIA, PRITZKER BRIEF NO. 1 (JULY, 2011); ELLEN HANAK, et al., PUBLIC POLICY INSTITUTE OF CALIFORNIA, MANAGING CALIFORNIA'S WATER: FROM CONFLICT TO RECONCILIATION (2011).

4. *Env'tl. Law Found. et al. v. Cal. State Water Res. Control Bd.*, No. 34-2010-80000538 (Cal. Super. Ct. 2010).

5. 2 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 14, 18, cited in A. Rossman, M. Steele, *Forging the New Water Law: Pub. Regulation of "Proprietary" Groundwater Rights*, 33 HASTINGS L.J. 903 (1982).

6. *People v. Emmert*, 597, P.2d 1025, 1032-33 (Colo. 1979) (Carrigan, J., dissenting).

Unlike fast lands,⁷ water is a common resource, subject to the common interest. Ownerless in the traditional sense, its legal status has roots in ancient Roman law that was carried forth in civil law, expressed in the *Los Siete Partidas* of Alfonso the Wise and the Napoleonic Code.⁸ Although property rights can exist in water, they are commonly described as usufructory;⁹ in other words they only confer the right to the use of water, subject to strict limits imposed by the State Constitution, statute, and the public trust doctrine.

The waste and unreasonable use of water has been proscribed since California's Constitution was amended in 1928 to declare that all rights in water are limited to reasonable beneficial uses,¹⁰ and the courts have consistently held that these provisions apply to groundwater as well as other waters of the state.¹¹ In 1983, the panoply of public interest protections was extended further. The public trust doctrine, heretofore applied to protect public rights in the lands submerged by tides in navigable lakes and streams, was held to apply to diversions from the *tributaries* of navigable streams, at least to the extent that such diversions affected the navigable waters they fed.¹² Thus, California's highest court held, all such uses are subject to the state's continuing duty of supervision and may be modified when changing circumstances call for it under the doctrines of reasonable use and public trust.¹³ As an appellate court subsequently stated, "the concept that 'water use entitlements are clearly and permanently defined,' and are 'neutral [and] rule-driven,' is a pretense to be

7. "Land that is above the high-water mark and that, when flooded by a government project, is subjected to a governmental taking. Owners of fast lands are entitled to just compensation for the taking." BLACK'S LAW DICTIONARY 955 (9th ed. 2009).

8. Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Env'tl. Right*, 14 U.C. DAVIS L.REV. 195, 196-97 (1980); Joseph L. Sax, *The Public Trust Doctrine in Natural Resources. Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970).

9. Cal. Water Code section 102 states that all water is the property of the people of the State, subject to appropriation. (West); *see also*, *Eddy v. Simpson*, 3 Cal. 249, 252 (1853) (explaining usufructuary nature of water rights).

10. CAL. CONST. art. X, § 2.

11. *Peabody v. City of Vallejo*, 2 Cal. 2d 351, 367 (1935).

12. *Phillips Petroleum v. State of Miss.*, 484 U.S. 469 (1988); *Shively v. Bowlby*, 152 U.S. 1, 11 (1894).

13. *Nat'l Audubon Soc'y v. Super. Ct.*, 33 Cal. 3d 419 (1983).

discarded. It is a fundamental truth . . . that ‘everything is in the process of changing or becoming’ in water law.”¹⁴

III. Groundwater is Uniquely Unregulated

There is little doubt in the real world that groundwater is related to surface water. The runoff from rains and snow often penetrate the ground. Wells extracting water from the earth may affect the flow of surface streams. Nevertheless, California case law stubbornly adheres to an outmoded and initially mistaken notion that groundwater is somehow different, and the statutory permit scheme works on that assumption. Accordingly, while surface waters are subject to extensive regulation to ensure their beneficial use, to prevent waste, and to safeguard public trust values, groundwater is consumed largely at the pleasure of an overlying owner. One authoritative law review article characterized the current state of law as “the right to pump as much water as possible until one is sued.”¹⁵

IV. Dividing the Waters by Legal Fictions

“One hesitates to plead for reforms in the name of common sense . . . for we belong to a profession that prides itself on not throwing chaos lightly to the winds.”¹⁶ California law sets forth three categories for water: surface water, percolating groundwater, and subterranean streams flowing through known and definite channels.¹⁷ Only groundwater remains largely exempt from the state regulatory scheme.¹⁸ This is not due to lack of perception on the part of responsible entities. As early as 1913, the California Water Commission, the body whose recommendations led to California’s permit system, stated that well considered statute laws should govern groundwater, but concluded the subject was “so vast that . . . [it had] neither the time nor

14. *Imperial Irrigation Dist. v. State Water Res. Control Bd.*, 225 Cal. App. 3d 548, 573 (1990) (quoting Eric T. Freyfogle, *Context and Accommodations in Modern Property Law*, 41 STAN. L. REV. 1529, 1546-1547 (1989)).

15. Eris L. Garner, Michelle Ouelette, Richard L. Sheraff, Jr., *Institutional Reforms in Cal. Groundwater Law*, 25 PAC. L.J. 1021, 1022 (1994).

16. ROGER J. TRAYNOR, COMMENT ON THE COURTS AND LAWMAKING, in LEGAL INSTITUTIONS TODAY AND TOMORROW 48, 56 (Monrad G. Paulsen ed. 1959).

17. See CAL. WATER CODE § 1200 (West); JOSEPH L. SAX, STATE WATER RES. CONTROL BD., NO. 0-076-300-0, REVIEW OF THE LAWS ESTABLISHING THE SWRCB’S PERMITTING AUTHORITY OVER APPROPRIATIONS OF GROUNDWATER CLASSIFIED AS SUBTERRANEAN STREAMS AND THE SWRCB’S IMPLEMENTATION OF THOSE LAWS, (Jan. 19, 2002).

18. See ROBERT E. BECK & EDWARD W. CLYDE, WATERS AND WATER RIGHTS: VOL. 5 SECTIONS 400-459, at 419 (Robert E. Clark ed. 1972).

the funds necessary to make a satisfactory investigation of it.”¹⁹ In 1957, the authors of the state water plan urged that the “effective administration of the development and utilization of ground water resources . . . will become mandatory as full water development is approached.”²⁰ The National Water Commission similarly concluded that the treatment of surface and ground water should be integrated.²¹ However, in 1961 the Assembly Water Committee set the theme for decades of future regulation, or lack of it. It stated “[w]ater agencies expressed a strong desire to solve their problems themselves and to manage ground water basins locally. The committee agrees that local management is desirable and . . . provides simplified solutions to many of the ground water basin management problems.”²²

This policy showed itself when the next major effort at reform arose. In 1977, Governor Jerry Brown created a commission to review California water rights law.²³ The commission found that “California’s groundwater is usually available to any pumper, public or private, who wants to extract it, regardless of the impact of extraction on neighboring groundwater pumpers or on the general community.”²⁴ It recommended new statewide legislation calling for management at the local level,²⁵ restricted to areas with long-term overdraft, subsidence or water quality problems.²⁶ In those areas local management authorities would be empowered to invoke adjudications to define rights and control exports.²⁷ Local authorities would be empowered to control the use of groundwater storage space in accordance with conjunctive use of ground and surface waters.²⁸ If they failed to act or to meet specified standards, the State Water Resources Control Board (“SWRCB”) would designate a groundwater authority, which would develop

19. CONSERVATION COMM’N OF THE STATE OF CAL., REPORT OF THE CONSERVATION COMMISSION OF THE STATE OF CALIFORNIA 31 (1913).

20. CAL. DEP’T OF WATER RES. DIV. OF RES. PLANNING, BULLETIN NO. 3: THE CALIFORNIA WATER PLAN 221 (1957).

21. NWC, WATER POLICIES FOR THE FUTURE: FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES 233 (1973).

22. ASSEMBLY INTERIM COMMITTEE. ON WATER, CALIFORNIA. ASSEMBLY, ASSEMBLY INTERIM COMMITTEE. REPORTS VOL. 26 NO. 4: GROUNDWATER PROBLEMS IN CALIFORNIA 46 (1962).

23. JERRY BROWN, EXEC. DEP’T OF THE STATE OF CAL., EXECUTIVE ORDER NO. B-26-77 (1977).

24. GOVERNOR’S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, FINAL REPORT 136 (1978).

25. *Id.* at 165-166.

26. *Id.* at 166.

27. *Id.* at 167-168.

28. *Id.* at 169.

and implement a management program, including registration and licensing of all groundwater extraction.²⁹ The plan was stillborn. When these proposals were presented to the legislature, they failed in committee.³⁰

Today, the propensity to prefer local solutions remains alive and well. In April 2011, the Association of California Water Agencies (“ACWA”) published a groundwater study summarizing local efforts at groundwater management, which by then, were not inconsiderable if uneven, and strongly argued against another layer of regulation.³¹ However, groundwater management remains a problem. In 2009, The Department of Water Resources (“DWR”) found that each year, on average, there was a 2 million acre feet overdraft from groundwater basins.³² The Legislature found the problems were getting worse, largely because California is the last western state without any state groundwater management—and has very little information about the condition of the state’s groundwater basins. An analysis of Senate Bill 229 concluded:

Excessive pumping has led to substantial subsidence, as much as 55 feet in some areas. Recently . . . on the west side of the San Joaquin Valley, where allocations of Delta water from the federal Central Valley Project were minimal, farmers responded by pumping more groundwater. Reports then surfaced that the State Water Project’s canal, which passes through the area on its way to Southern California, may suffer cracks because of the high level of pumping and resultant sloping of the ground under the canal.³³

29. *Id.* at 190-193.

30. The Los Angeles Times reported the bills were opposed by those “who are against any semblance of state supervision on the use of underground water supplies.” Rossmann & M. Steel, *Forging the New Water Law: Public Regulation of “Proprietary” Water Rights*, 33 HASTINGS L. J. 903, 928-29, n.152 (1982); see J. Stevens, *Instream Uses Twenty-Five Years Later: Incremental Progress or Revolving Door?* 36 MCGEORGE L. REV. 393 (2005) (describing the history of the groundwater proposals).

31. DANIELLE BLACET, TIM PARKER, & DAVIS ALADJEM, ASSOCIATION OF CALIFORNIA WATER AGENCIES, *SUSTAINABILITY FROM THE GROUND UP: GROUND-WATER MANAGEMENT IN CALIFORNIA* (2011).

32. DEP’T OF WATER RES., CALIFORNIA WATER PLAN HIGHLIGHTS 7 (2009) (“[o]verdraft is characterized by groundwater levels that decline over a period of years and never fully recover, even in wet years.”).

33. PROPOSED CONFERENCE REP. NO. 1, SENATE BILL 229, ASSEMBLY WATER, PARKS & WILDLIFE COMMITTEE (Sept. 9, 2009) available at <http://leg.info.legislature.ca.gov/faces/billtextclient.xhtml>.

Nine years ago the State Water Resources Control Board, charged with implementing California's water rights and water quality laws, commissioned Professor Joseph Sax of Berkeley Law to make a comprehensive study of the laws governing the Board's permitting authority. He concluded that the tests in place for distinguishing groundwater (exempt from permitting) and other forms of water (subject to permit or direct regulation and public trust review) are unsupportable and inconsistent with the constitutional mandate that all the waters of the state be put to reasonable and beneficial use and not wasted.³⁴ His report was politely received and filed without further action.³⁵ Since then, several other studies have concluded that logic and necessity call for the integrated treatment of ground and surface water.³⁶ They have all gone unheeded.

The problem is exacerbated by the fact that, according to a 2007 report commissioned by Governor Schwarzenegger, the SWRCB has issued permits to divert water from the Sacramento San Joaquin Delta to less than a third of those currently assumed to be diverting. The Delta Vision Plan developed from that study states California must develop and use comprehensive information on the local, regional and statewide availability, quality, use and management of groundwater and surface water resources to help improve opportunities for regional self-sufficiency.³⁷ A statewide monitoring program was then proposed, requiring local groundwater managers to notify the Department of Water Resources as to what entity would monitor groundwater elevations. In the absence of a local monitoring program, the Department could monitor elevations in critical basins, assessing a fee on well owners to recover costs.³⁸ A version of this proposal was adopted, expressing legislative intent that "all groundwater basins and subbasins be regularly and systematically monitored locally and the resulting groundwater information be made readily and widely available."³⁹

34. SAX, *supra* note 17. Professor Sax's conclusions, while disregarded by the water board, found their way into a law review article. Joseph L. Sax, *We Don't Do Groundwater: A Morsel of Legal History*, 6 U. DENV. WATER L. REV. 269 (2003). This progression brings to mind Mark Twain's admonition against getting into disputes with anyone (an editor in Twain's case, a professor in Sax's) who has access to ink by the barrel.

35. *Id.*

36. *E.g.*, HANAK, *supra* note 3; CALIFORNIA LEGISLATIVE ANALYST'S OFFICE, CALIFORNIA'S WATER: AN LAO PRIMER 69-70 (2008).

37. GOVERNOR'S DELTA BLUE RIBBON TASK FORCE, STATE OF CALIFORNIA RESERVE AGENCY, DELTA VISION: OUR VISION FOR THE CALIFORNIA DELTA (2008).

38. S.B. 229, PROPOSED CONFERENCE REPORT NO. 1 (2009), *supra* note 33.

39. CAL. WATER CODE § 10920 (West).

V. Judicial and Legislative Approaches

Despite a tradition of reluctance, excesses arising from the wild west nature of groundwater mining have led to some responses from courts and the Legislature. It became clear early in California's history that unlimited pumping, without regard to its effects on neighbors or the environment, could not be tolerated. A number of judicially created doctrines were fashioned to curb its abuse. At the same time, the legislature has acted to improve monitoring, by authorizing groundwater management mechanisms for agriculture as well as urban uses, to ensure the collection of data on its extraction and to head off developments lacking an adequate water supply. In addition, a wide range of financial measures has been enacted to coax local entities to take specified measures.⁴⁰ Whether this mixture of hortatory measures, data gathering, financial inducement and planning mandates will meet the demands of the Constitution and public trust doctrine remains to be seen.

A. The Courts Deal with the Problem

Under the English common law rule adopted by California in 1850, an overlying landowner had an unlimited right to extract groundwater water without regard to its effect on his neighbors.⁴¹ The legal distinction between groundwater (essentially unregulated) and surface water subject to appropriation (regulated by permit) arose originally in California case law.⁴² It is now based on California Water Code sections 1200-1201, defining water subject to appropriation as "[a]ll water flowing in any natural channel" except for water needed for use on riparian land or otherwise appropriated. Such waters are limited to "surface water, and to subterranean streams flowing through known and definite channels."⁴³ These waters are defined as follows by the SWRCB to determine its permitting authority:

1. Is there a subsurface channel?
2. Does the channel have relatively impermeable bed and banks?
3. Is its course known or capable of being known by reasonable inference?
4. Is groundwater flowing in the channel?⁴⁴

40. E.g., BLACET, *supra* note 31, at 19-20.

41. Hanson v. McCue, 42 Cal. 303 (1871); Lux v. Haggin, 69 Cal. 255 (1886); *see also* SAX, *supra* note 17, at 14-26 (discussing related California cases).

42. SAX, *supra* note 17, at 14.

43. CAL. WATER CODE. § 1200 (West).

44. N. Gualala Water Co. v. State Water Res. Control Bd., 139 Cal. App. 4th 1577, 1585-86 (2006); SAX, *supra* note 17, at 5-10.

This test, based on the recommendations of the Water Commission in 1913, came from the California Supreme Court's opinion in *Los Angeles v. Pomeroy*,⁴⁵ which held that underflow of the Los Angeles River should be considered part of the stream for purposes of the city's pueblo water rights.⁴⁶ However the assumption of absolute ownership in *Pomeroy* was rejected only four years later in *Katz v. Wilkenshaw*⁴⁷ in which the court essentially held that an overlying landowner pumping groundwater must respect the rights of others affected.⁴⁸ Six years later the court reemphasized the point, stating "[t]here is no rational ground for any distinction between . . . percolating waters and the waters in the gravels immediately beneath and directly supporting the surface flow, and no reason for applying a different rule to the two classes . . . if, indeed, the two classes can be distinguished at all."⁴⁹

A series of decisions reflect this approach, limiting the absolute nature of the common law rule:

Correlative Rights. In the 1903 *Katz v. Wilkenshaw* decision the state's supreme court rejected the English common law rule permitting overlying landowners to extract water without consideration of the effects on their neighbors.⁵⁰ Holding that a reasonable use test should apply, the court held that overlying landowners have "correlative rights" to a reasonable amount of water applied to reasonable and beneficial uses.⁵¹ Where the supply is insufficient for all, each is to receive a "fair and just proportion."⁵² Additionally, any water surplus to the needs of these landowners could be appropriated by others.⁵³ This early effort by the court to impose some degree of reasonableness on groundwater extraction gained new life when, in 1928, the State Constitution was amended to impose the reasonable and beneficial use test on all the waters of the state. This provision applies to

45. 124 Cal. 597 (1899) *writ of error dis. sub. nom.*

46. See *SAX*, *supra* note 17, at 14-20.

47. 141 Cal. 116 (1903).

48. Justice Lucien Shaw, author of the opinion, later stated that *Katz* "establishes a rule with respect to waters percolating in the soil, which makes it to a large extent immaterial whether the waters in this land were or were not part of an underground stream, provided...that their extraction from the ground diminished to that extent, or to some substantial extent, the waters flowing in the stream." *McClintock v. Hudson*, 141 Cal. 275, 281 (1903); see also *SAX*, *supra* note 17, at 21-23.

49. *Hudson v. Dailey*, 156 Cal. 617, 628 (1909).

50. 141 Cal. 116, 150 (1903).

51. *Id.* at 136.

52. *Id.*

53. *City of San Bernardino v. City of Riverside*, 186 Cal. 7, 15 (1921); see generally *Katz v. Wilkenshaw*, 141 Cal. 116 (1903).

groundwater, thus furnishing a basis for regulating its pumping not yet fully realized.⁵⁴

Non-Overlying Uses. Where there is a surplus of groundwater, courts have held that the surplus may be used by appropriators on more distant lands, subject to the priorities of prior appropriations.⁵⁵ However, the courts have zealously protected the rights of overlying owners by holding that their prospective uses may not be limited in disregard of such rights.⁵⁶ Nevertheless, the California Supreme Court recently noted that “at least in theory” a landowner’s future overlying uses could be reduced to prevent “unreasonable or wasteful usage.”⁵⁷

Prescription. Prescriptive rights may be acquired by an appropriative taking of water that is not surplus if the use is “actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for the statutory period of five years, and under claim of right.”⁵⁸

The Nuisance Doctrine. It prohibits the use of water so as to damage another’s property or that of the public at large. California courts have been willing to apply the nuisance doctrine to protect the State’s water for many years. In 1884 the Supreme Court applied it to enjoin upstream hydraulic miners from letting their debris fill the banks of the Sacramento River, causing flooding and destroying its navigability.⁵⁹ Once again the rationale of *National Audubon* should apply: whether a public trust water is impaired by the deposit of debris or the diversion of its waters.⁶⁰ The same rationale applies when the State’s interest in fisheries is violated by water diversions or pollution.⁶¹

Basin Wide Adjudication. The courts may determine the rights of all overlying landowners within a particular basin and in the process designate

54. *Peabody v. City of Vallejo*, 2 Cal. 2d 351, at 366-67 (1935).

55. *See Katz v. Wilkenshaw*, 141 Cal. at 135-36; *see also City of Los Angeles v. City of San Bernardino*, 14 Cal. 3d 199, 277-78 (1975); *see generally*, WELLS A. HUTCHINS, *THE CALIFORNIA LAW OF WATER RIGHTS* 431, 436-41 (1956).

56. *City of Barstow v. Mojave Water Agency*, 23 Cal. 4th 1234 (2000).

57. *Id.* at 1249 n. 13.

58. *City of Pasadena v. City of Alhambra*, 33 Cal. 2d 908, 926-27 (1949).

59. *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138 (1884); *see also People ex. rel. v. Russ*, 132 Cal. 102 (1901) (finding obstruction in slough adjoining navigable stream).

60. *Nat’l Audubon Soc’y v. Super. Ct.*, 33 Cal. 3d 419, 436-37 (1983); Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C. DAVIS L.REV. 233, 257-258 (1980).

61. *People v. Glenn Colusa Irrigation Dist.*, 127 Cal. App. 30, 34-35, 38 (1932) (finding that an unscreened diversion was killing fish).

the Water Board to act as referee.⁶² And the Board itself may institute a basin wide adjudication to prevent the destruction or irreparable injury to groundwater resources.⁶³ However, the Supreme Court has held that the priorities of water right holders in the basin must be respected. Thus, overdraft of a groundwater basin per se would not justify a rearrangement of priorities. A priority-based allocation could be changed only where the pumper's individual use of water was shown to be unreasonable or wasteful.⁶⁴ Because of its expense and complexity the adjudication is not a favored remedy.

The Public Trust Doctrine. The states hold the beds and banks of their navigable waters in trust for their people, historically for purposes of commerce, navigation and fisheries. This doctrine has been characterized as an inherent attribute of state sovereignty.⁶⁵ It limits the purposes for which these trust resources may be used, and severely restrains the power of states to dispose of them or use them for non-trust purposes.⁶⁶

Historically, the public trust had been limited to commercially navigable waterways but over the past two centuries a convergence of legal developments led to its application to water and water rights:

1. The public trust was applied to protect navigable waters from impairment by upstream acts such as hydraulic mining resulting in the deposits of debris impairing their usefulness for trust purposes.⁶⁷ Then over a hundred years later, the California Supreme Court concluded that if upstream activities resulting in harm to trust waters by virtue of

62. CAL. WATER CODE §§ 2000, 2001 (West); see *City of Barstow v. Mojave Water Agency*, 23 Cal. 4th 1224 (2000); see also E. Garner and J. Willis, *Right Back Where We Started From; The Last Twenty-Five Years of Groundwater Law in California*, 36 MCGEORGE L. REV. 413 (2005).

63. CAL. WATER CODE § 2100 (West).

64. *City of Barstow v. Mojave Water Agency*, 23 Cal. 4th 1224 (2000).

65. *Oregon ex rel State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Pollard v. Hagen*, 44 U.S. 212 (1845); *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842). The public trust is commonly traced back to Roman law. The Justinian code states that certain things such as "the air, the running water, the sea and consequently the shores of the sea" were incapable of private ownership. THE INSTITUTES OF JUSTINIAN 2.2.2 (T.Cooper trans. ed. 1841).

66. See generally, J. Stevens, *The Public Trust*, *supra* note 8.

67. *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138 (1884); *People ex. rel. v. Russ*, 132 Cal. 102 (1901) (damming sloughs affected navigable river).

deposits of sediment should be prohibited, so should *diversions* having equally detrimental effects.⁶⁸

2. Protected trust purposes were extended to wildlife, recreation and recreation. In the 19th century, the trust was mainly applied to commerce, navigation and fisheries. But in 1971, the California court held that:

In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. [citation]There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.⁶⁹

3. The trust was held to encompass non-tidal waters. For many years it was contended that the public trust extended only to tidal waters because the English common law rule was so limited. However the California court, in accord with others, held such a restriction made no sense in the vast non-tidal waters of this country and therefore California's extensive lakes and rivers enjoyed its protection.⁷⁰

In the *National Audubon* case, the California Supreme Court dealt with what it saw as a "collision course" between water rights law and the public trust.⁷¹ At issue were diversions of water from tributaries of Mono Lake by Los Angeles under long held water rights permits. Admittedly, these diversions were drawing down the Lake's waters. By 1970 diversions by Los Angeles had caused the lake level to drop 45 feet, reducing its volume by more than one half and doubling its salinity level. The traditional water rights system could provide no relief. Although protests had been made in

68. "If the public trust doctrine applies to constrain *fills* which destroy navigation and other public trust uses in navigable waters, it should equally apply to constrain the *extraction* of water that destroys navigation and other public interests. Both actions result in the same damage to the public interest." *Nat'l Audubon Society v. Super. Ct.*, 33 Cal. 3d 419, 436-37 (1983) (emphasis added).

69. *Marks v. Whitney*, 6 Cal.3d 251, 259-260 (1971).

70. *Ill. Central R.R. Co. v. Ill.*, 146 U.S. 387 (1892); *State v. Super. Ct. (Lyon)*, 29 Cal. 3d 210 (1981); *State v. Super. Ct. (Fogerty)*, 29 Cal. 3d 240 (1981).

71. *Nat'l Audubon*, *supra* note 60, at 425.

the 1940's that the city's diversions would harm fishery and other trust resources, the state water board had concluded that it was powerless to take such factors into consideration.⁷²

In 1979, a group of environmental plaintiffs filed an action alleging that the city's diversions were damaging public trust resources including wildlife, esthetic and recreational values in the basin. The court agreed and made a number of important rulings significant to state water rights in general:

1. The public trust applies to diversions from non-navigable tributaries to navigable water bodies when they impair trust values in the navigable waters.

2. The holders of water rights hold them subject to the public trust, and can assert no vested right to use them in a manner harmful to the trust.

3. The state as sovereign has continuing supervisory control over its navigable waters. This principle prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the trust.

4. The public trust imposes a duty of continuing supervision over the taking and use of appropriated water; a duty that includes the power to reconsider water allocations previously made, and to evaluate their effect on trust values.

5. The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources and to protect public trust values whenever feasible.⁷³

In applying the public trust doctrine, the court invoked a panoply of protections developed through the years in dealing with the states' duties as trustees:

a) *Public Trust Resources are Inalienable*. In a decision twice described by the California court as the "primary authority" in the trust field,⁷⁴ the U.S. Supreme Court held that the Illinois legislature lacked the power to make an irrevocable grant of the submerged lands on the Chicago waterfront, stating "[t]he state can no more abdicate its trust over property in which the whole

72. *Id.* at 428; *see also* THE PUBLIC TRUST DOCTRINE—INSTREAM FLOWS AND RESOURCES, CALIFORNIA WATER POLICY CENTER (1980) (*published in* THE PUBLIC TRUST AND THE WATERS OF THE AMERICAN WEST: YESTERDAY, TODAY AND TOMORROW, LEWIS AND CLARK COLLEGE (1988)).

73. *Nat'l Audubon*, *supra* note 60, at 437, 445-446; *see generally*, H.C. Dunning, *The Significance of California's Public Trust Easement for California Water Rights Law*, 14 U.C. DAVIS L. REV. 357 (1980).

74. *Nat'l Audubon*, *supra* note 60, at 437 (*quoting* *City of Berkeley v. Super. Ct.*, 26 Cal. 3d 515, 521 (1980)).

people are interested than it can abdicate its police powers in the administration of government and the preservation of peace.”⁷⁵

The rationale for this was put eloquently by an Oregon court:

Because the trust is for the public benefit, the State’s trustee obligation is commonly described as the protection of specified public usages, *e.g.*, navigation, fishery and, in more recent cases, recreation. The severe restriction upon the power of the State as trustee to modify water resources is predicated not only upon the importance of the public use of such waters and lands but upon the exhaustible and irreplaceable nature of the resources and its fundamental importance to our society and to our environment. These resources, after all, can only be spent once. Therefore, the law has historically and consistently recognized that rivers and estuaries once destroyed or diminished may never be restored to the public and, accordingly, has required the highest degree of protection from the public trustee.⁷⁶

In *National Audubon*, however the court held that the trust protecting the state’s trust waters from diversions under established water rights provided more qualified protection, stating that the “Legislature may as a matter of current and historical necessity . . . authorize the diversion of water

75. Ill. Central R.R. Co. v. Ill., 146 U.S. 387 (1892). An even earlier New Jersey decision disapproved the transfer of tidelands into private ownership. The property in such waters, the court held, was “vested in the sovereign, but . . . vested in him not for his own use, but for the use of the citizen, that is, for his direct and immediate enjoyment. The legislature may not, the court stated, “consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right.” That, the state’s Chief Justice said, would be a grievance, “which never could be long borne by a free people.” *Arnold v. Mundy*, 6 N.J.L. 1 (N.J. 1821). This principle is rooted in medieval law. The medieval scholar Henry Bracton rephrases Roman law, customarily cited as the basis for the trust, in terms of natural law: “By natural law, these are common to all: running water, the air, the sea, and the shores of the sea.” He went on to say that such things that “relate to the public good cannot be given over or transferred..to another person, or separated from the Crown.” 2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 39-40 (S. Thorne trans. 1968).

76. *Morse v. Oregon Div. of State Lands*, 581 P.2d 520 (1978), *aff’d* 590 P.2d 709 (1970).

to distant parts of the state, even though unavoidable harm to trust uses at the source stream may result.”⁷⁷

b) *The Public Trust Invokes a Rule of Statutory Construction Favoring the Retention and Protection of Trust Resources.* Assuming that groundwater, like all the other state’s waters, is held in trust for the people of California, statutes purporting to abandon that trust are strictly construed to retain its protection where reasonably possible. Intent to abandon the trust must be clearly expressed or necessarily implied.⁷⁸ There is no indication in the statutory definition of groundwater or the permitting statutes that the legislature intended to extinguish the public trust in groundwater. In 1957 California’s highest court held that the people of California were the equitable owners of its water and that “the state may not therefore lawfully dispossess itself of the title to such water and may not surrender its control in any way inconsistent with the administration of the *trust* in which the title is held.”⁷⁹ No effort has been made by the legislature to reverse or modify this holding if indeed such legislation would be constitutional.⁸⁰

c) *Public Trust Actions May be Brought by Any Person.* The bugaboo of standing is not available to restrain public trust actions. Any citizen may bring such an action.⁸¹

d) *The Public Trust Applies to Wildlife, Non-Tidal Waters, and Waters Artificially Enlarged.* The public trust is a pervasive and multi-faceted doctrine. Initially applicable to the tidelands, then to the beds and banks of non-tidal navigable lakes and rivers,⁸² it was applied to diversions of waters affecting those water bodies by *National Audubon*, and to fish and game at an early

77. *Nat’l Audubon*, *supra* note 60, at 446.

78. *See generally*, *City of Berkeley v. Super. Ct.*, 26 Cal. 3d 515 (1980); *People v. Cal. Fish Co.*, 166 Cal. 576 (1913).

79. *Ivanhoe Irrig. Dist. v. All Parties*, 47 Cal. 2d 597, 625-626 (1957) (emphasis added), *rev’d* on other grounds, 357 U.S. 275 (1958); *but see* *Ivanhoe Irrig. Dist. v. All Persons*, 53 Cal. 2d 692 (1960) (describing trust language as dicta).

80. *See* *Ill. Central R.R. Co. v. Ill.*, 146 U.S. 387 (1892); *see also*, *San Carlos Apache Tribe v. Super. Ct.*, 972 P.2d 179 (Ariz. 1999) (finding Legislature lacks power to extinguish trust in waters).

81. *Marks v. Whitney*, 6 Cal.3d 251 (1971); *Env’tl Defense Fund, Inc. v. East Bay Mun. Util. Dist.* 26 Cal. 3d 183 (1980) (holding public interest organization may sue to enjoin unreasonable use of water as well as enforce trust).

82. *State v. Super. Ct. (Lyon)*, 29 Cal. 3d 210 (1981); *State v. Super. Ct. (Fogerty)*, 29 Cal. 3d 240 (1981).

stage of its history.⁸³ It has been applied to artificially enlarged waters,⁸⁴ and to streams only navigable for recreational purposes.⁸⁵ In recent years it has been applied to the dry sand areas of beaches,⁸⁶ and it has been used as the rationale for wetlands regulation.⁸⁷

VI. The Legislature Weighs In

True to the 1962 recommendations of the Assembly Water Committee, the legislature has given local entities the most opportunities for groundwater regulation.⁸⁸ Even though proposals for statewide regulation have been rejected, a number of them have responded with local schemes.⁸⁹ In addition, data collection has steadily increased. In 2009, a special session of the Legislature reaffirmed Governor Schwarzenegger's goal of a 20% reduction in water consumption by 2020, established mandatory monitoring and required agricultural suppliers to adopt water management plans. These and preexisting measures are summarized below:

A. Monitoring

Effective groundwater monitoring is a necessary prerequisite to relief under either private or public action. It was set as a state goal in 2009, although authority existed for a number of entities before that.⁹⁰ The 2009

83. *People v. Truckee Lumber Co.*, 116 Cal. 397 (1897); *see People v. Harbor Hut Rest.*, 147 Cal. App. 3d 1151 (1983) (“The ‘dominant theme’ of this state’s obligation as trustee (of its fisheries) is its duty to exercise continued supervision of the trust to prevent parties from using the trust in a harmful manner”); *see also Geer v. Connecticut*, 161 U.S. 519, 528-29 (1896), overruled on other grounds; *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

84. *Fogerty v. State*, 187 Cal. App. 3d 224 (1986); *PG&E v. Super. Ct. (Shasta Cnty.)*, 145 Cal. App. 3d 253 (1983); *Wilbour v. Gallagher*, 462 P.2d 232 (Wis. 1969).

85. *E.g.*, *People ex rel Baker v. Mack*, 19 Cal. App. 3d 1040 (1971); *Nat’l Audubon Society v. Super. Ct.*, 33 Cal. 3d 419, 435 n. 17 (1983). Of course, the obligations imposed by the trust may differ as its application does. *See Nat’l Audubon*, 33 Cal. 3d at 446.

86. *Matthews v. Bay Head Improv. Ass’n.*, 471 A.2d 355 (N.J. 1984), *cert. denied*, 469 U.S. 821 (1984).

87. *Just v. Marinette Cnty.*, 201 N.W.2d 761 (Wis. 1972).

88. “Many water management decisions can best be made at a local or regional level.” CAL. WATER CODE, § 380(e) (West).

89. *See BLACET*, *supra* note 31 at 13.

90. CAL. WATER CODE §§ 10780, 10753.7 (West).

legislation brought statewide mandatory groundwater monitoring to California for the first time. California Water Code section 10920 was enacted, stating that all groundwater elevations should be regularly and systematically monitored locally, and the results be “readily and widely” available.” The Department of Water Resources (DWR) is to exercise an advisory role and is empowered to step in to find suitable local entities to do the job if none readily volunteer. Absent any willing local agencies, DWR may identify state and federal wells capable of providing sufficient information. If that information is insufficient the Department may conduct monitoring itself.⁹¹

B. Empowerment and Planning

Major urban water suppliers must adopt and periodically update a water management plan identifying and quantifying existing and planned sources of water in five-year increments, 20 years out. If groundwater is identified as an existing or planned source of water, detailed information is required.⁹²

Legislation passed in 2009 calls for a 20% reduction in consumption and management “consistent with efficiency planning and implementation standards for both urban and agricultural suppliers.”⁹³

In addition a number of general laws grant local agencies limited authority over groundwater. Thus groundwater replenishment districts and municipal water districts may institute proceedings to adjudicate water rights⁹⁴ and water conservation districts may litigate water rights and require registration and monitoring of wells in order to impose groundwater use

91. CAL. WATER CODE §§ 10932, 10934 (West); The Department of Water Resources may as a last resort engage in monitoring itself but it may not enter private property without the owner’s consent, require the submission of information, or impose fees for its work. CAL. WATER CODE §§ 10933.5, 10934 (West). The restrictions on entry and submission of information apply as well to other entities . *Id.* at § 10934. For a discussion of the new requirements see Ronald Robie, *see* CAL. LEGISLATURE PASSES WATER BILL PACKAGE, XLIII WATER LAW NEWSLETTER (Rocky Mtn. Mineral Law Found. 2010); *see also*, Enion, *supra* note 3, at 13.

92. CAL. WATER CODE §§ 10620, 10631 (West).

93. *Id.* at § 10608.4 (West).

94. CAL. WATER CODE §§ 60222, 60230, 71757, 74641 (West).

charges.⁹⁵ In addition, uncodified special acts may grant groundwater regulation powers.⁹⁶

The state constitution empowers cities or counties to enact and enforce “all police, sanitary and other ordinances not in conflict with general laws.”⁹⁷ In *Baldwin v. County of Tehama*⁹⁸ the appellate court held that this provision authorized counties to place limits on the extraction of groundwater for export. In addition, land use powers and general plan provisions provide opportunities for more extensive groundwater planning.

C. Financial Inducements

The grant or withholding of state loans or grants can be used to induce compliance with state standards. This device has been invoked to require urban and agricultural suppliers to comply with specific conservation standards.⁹⁹

D. Local Water Purveyors

California Water Code sections 10750-10753.9 authorize local agencies providing water service to adopt groundwater management plans. However, no such plan may be adopted if landowners holding more than 50% of the assessed valuation in the service area object. Additionally, the area subject to the plan may not be eligible if it is already subject to groundwater management “pursuant to other provisions of law or a court order, judgment, or decree.”¹⁰⁰ Finally, no limits can be imposed on groundwater extraction unless the agency determines, after study that groundwater replenishment or other sources of supply are insufficient or infeasible.¹⁰¹

95. *Id.* at §§ 74641, 75540-75642 (West).

96. *E.g.*, The Sacramento County Water Agency Act, Stats. 1985, ch. 848, Deering’s Wat.-Uncod, Acts, Act 6730(a) 342 (1970).

97. CAL. CONST. art. XI, § 7.

98. 31 Cal.App.4th 166 (1994).

99. *E.g.*, CAL. WATER CODE § 10608.56 (West); *see also id.* at §§ 7900 *et seq.*, 10795, 79000, 79500 *et seq.* (West); *see* BLACET, *supra* note 31, at 30.

100. CAL. WATER CODE § 10753 (West).

101. *Id.* at § 10753.8(c) (West).

E. Agricultural Water Suppliers

Agriculture, consuming 84% of the state's water, has not avoided scrutiny.¹⁰² The Agricultural Water Management Planning Act, enacted in 2009, reaffirms legislative intent that the "conservation of water shall be pursued actively to protect both the people . . . and the state's water resources," and that "conservation of agricultural water supplies shall be an important criterion in public decisions with regard to water."¹⁰³ Recent legislation declares the legislature's intent that both urban and agricultural water suppliers be subject to a number of water use efficiency, planning, and implementation standards.¹⁰⁴ It requires them to prepare agricultural water management plans and achieve conservation goals meeting specified standards.¹⁰⁵ Suppliers providing more than 50,000 acre-feet annually for agricultural purposes must report on matters relating to water management and conservation practices. All agricultural water suppliers must adopt an agricultural water management plan.¹⁰⁶ Such plans must recognize fish, wildlife and other environmental values and recreational uses.¹⁰⁷

F. Endangered Species Acts

Otherwise lawful diversions may be restricted under the state or federal endangered species acts.¹⁰⁸

G. Public Ownership

Diversions of water causing injury to fisheries may be enjoined as a violation of the people's interest.¹⁰⁹

102. Nevertheless, some experts remain unsatisfied with current planning efforts; E.g., Peter H. Gleick, *Report Wrongly Excuses Farms From Helping Solve Water Woes*, SAC. BEE, Mar. 6, 2011, at E5 (potential for agricultural water savings 10-15% or more).

103. CAL. WATER CODE § 10802 (West).

104. *Id.* at § 10608.4 (West).

105. *Id.* at §§ 10802, 10826 (West).

106. CAL. WATER CODE § 10820(a).

107. CAL. WATER CODE § 10826 (West).

108. *U.S. v. Glenn-Colusa Irr. Dist.*, 788 F. Supp. 1126, 1134 (E.D. Cal. 1992); *Dep't of Fish & Game v. Anderson-Cottonwood Irrigation Dist.*, 8 Cal. App. 4th 1554, 1568-69 (1992); Sandra K. Dunn, *Endangered Species Over Water Resources Development: The California Experience*, 25 PAC. L.J. 1107 (1984).

109. *People v. Glenn-Colusa Irrigation Dist.*, 127 Cal. App. 30 (1932).

H. Federal Reserved Rights

When the federal government sets aside lands for specific purposes, the law implies that sufficient water to accomplish the primary purpose of the reservation has been reserved as well.¹¹⁰ This “*Winters doctrine*” applies to groundwater withdrawals. In *Cappaert v. United States*,¹¹¹ a national monument had been set aside to preserve a pond harboring the desert pupfish. Nearby farmers were pumping groundwater pursuant to established state water rights. Finding that the ground and surface waters were “physically interrelated as integral parts of the hydrologic cycle,”¹¹² the court held that the federal water rights, established as of the date of the reservation, trumped state rights and the farmers’ pumping should be curtailed.

I. Direct Enforcement

Article 10 section 2 of California’s Constitution subjects all of the State’s water to the reasonable and beneficial use standard and prohibits waste. It is self-executing by its own terms. Legislation implements this provision as well. Both the Department of Water Resources and the SWRCB are directed to take “all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.”¹¹³ Under this provision, the Board may file a civil action to contest the reasonableness of a use or diversion of water.¹¹⁴

In light of the holding in *California Trout*, that fish and game protective statutes are legislative expressions of the public trust prioritizing trust uses, it would seem that other such statutory expressions would also be available to challenge groundwater diversions that harm trust values. For instance Water Code section 275 is available to the water board to contest waste and unreasonable use. And the Attorney General has broad powers to bring environmental actions under her common law and statutory authority.¹¹⁵ The underutilized Sax report assumes the availability of relief under the

110. *Winters v. U.S.*, 207 U.S. 564 (1908).

111. 426 U.S. 128 (1976).

112. *Id.* at 142 (quoting C. CORKER, GROUNDWATER LAW, MANAGEMENT AND ADMINISTRATION, NAT’L WATER COMMISSION LEGAL STUDY NO. 6, xxiv (1971)).

113. CAL. WATER CODE § 275 (West).

114. *People v. Forni*, 54 Cal. App. 3d 743, 753 (1976).

115. CAL. GOV’T CODE §§ 12600-12612 (West).

constitutional reasonable use standard and Water Code section 100, which restates that standard in statute form.¹¹⁶

J. CEQA

The California Environmental Quality Act (CEQA) makes the long-term protection of the environment “the guiding criterion in public decisions.”¹¹⁷ It independently requires an evaluation of the environmental impacts of a wide variety of projects.¹¹⁸ It also limits the power of public entities to authorize environmentally harmful projects “when an economically feasible alternative is available.”¹¹⁹ Recently the California Supreme Court found an environmental impact report (“EIR”) insufficient in that it failed to identify long-term provisions for water-use development. The document failed to identify “clearly and coherently” how long term water needs would be met, the impacts of using identified sources (including groundwater) and how the impacts would be mitigated.¹²⁰

A good example of CEQA’s impact on water resources is the appellate court’s treatment of the city’s efforts to divert surface and groundwater from the Owens Valley to Los Angeles some 400 miles away. The Court of Appeals held that the project, which involved expanded groundwater pumping, required a full EIR.¹²¹ Ruling on a second effort of the city to do an acceptable EIR, the court compelled the city to recognize the integration of ground and surface waters under its control.¹²² A third attempt led the court to require the city to adopt a water conservation ordinance. “When the state’s water resources dwindle, the constitutional demands grow more

116. “Assuming that a substantive violation exists, there is no doubt that the Board, through the Attorney General, can institute litigation to control groundwater use that (1) constitutes waste or unreasonable use or method of use within the meaning of Article X, § 2 of the California Constitution and Water Code § 100; or that violates the public trust.” SAX, *supra* note 17, at 82 (footnotes omitted).

117. CAL. PUB. RES. CODE § 21001(d) (West).

118. *See e.g.*, *Protect the Historic Amador Waterways v. Amador Water Agency*, 116 Cal. App. 4th 1099 (2004); *Stanislaus Nat’l Heritage Project v. Cnty. of Stanislaus*, 48 Cal. App. 4th 182 (1996).

119. *See Cnty. of Inyo v. City of Los Angeles (Inyo III)*, 71 Cal. App. 3d 185, 193 (1977).

120. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4th 412 (2007).

121. *Cnty. of Inyo v. Yorty (Inyo I)*, 32 Cal. App. 2d 795, 815-16 (1973).

122. *Cnty. of Inyo v. City of Los Angeles (Inyo II)* 61 Cal. App. 3d 91 (1976).

stringent and compelling, to the end that scarcity and personal sacrifice be shared as widely as possible among the state's inhabitants."¹²³

K. Actions by the Attorney General

The Attorney General may bring an independent action to protect "the natural resources of the state from pollution, impairment, or destruction."¹²⁴ Indeed, standing to bring such actions exist independent of statute when diversions are injuring fishery resources of the State.¹²⁵

L. The Local Planning Process

Any city or county reviewing a project under the California Environmental Quality Act must identify any public water system supplying water to it and prepare an assessment of the system's total projected water supplies in normal, single dry and multiple dry years over a 20 year period. If the water supply includes groundwater, the assessment must review any relevant information in any applicable urban water management plan, and describe any groundwater basin constituting the source for the project.¹²⁶

Once the project reaches the stage of subdivision map approval, the adequacy of the water supply must be more specifically evaluated and the adequacy of water supplies be certified by the city or county with jurisdiction.¹²⁷

123. Rossmann, *supra* note 30, at n. 106 (quoting Preliminary Memorandum, *County of Inyo v. City of Los Angeles*, 3 Civ. 13886 (Mar. 24, 1977)). In another unsuccessful effort, the city's EIR included all groundwater extraction but excluded changes in surface diversions it was claimed would accompany the pumping. *Cnty. of Inyo v. City of Los Angeles (Inyo IV)*, 124 Cal. App. 3d 1, 6-8 (1981).

124. "Natural resource" is defined to include water, wildlife, aesthetic sites and "any other natural resource which, irrespective of ownership contributes, or in the future may contribute, to the health, safety, welfare, or enjoyment of a substantial number of persons, or to the substantial balance of an ecological community." CAL. GOV'T CODE § 12605 (West).

125. *See People v. Glenn-Colusa Irrigation Dist.*, 127 Cal. App. 30 (1932).

126. CAL. WATER CODE §§ 10631(b), 10910(f) (West).

127. CAL. GOVT. CODE § 66473.7 (West); *see also* *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Ranch Cordova*, 40 Cal. 4th 412 at 433-34 (2007) (explaining how CEQA is affected by these requirements).

M. Injunctive Action

California Water Code section 275 authorizes the Department of Water Resources and the State Water Board to take “all appropriate proceedings” to prevent waste on unreasonable use or diversion, method of use, or diversions before executive, legislative or judicial agencies.

VII. Statutes Revolving in Common Law Orbits

In an insightful essay, California Chief Justice Roger Traynor noted the challenge courts face in determining how “to synchronize the unguided missiles launched by legislatures with a going system of common law.”¹²⁸ His observations are particularly applicable in the context of water law where the principles of nuisance and public trust often are found in codified statutes. In *California Trout, Inc. v. State Water Resources Control Board*¹²⁹ the court construed a statute requiring that sufficient water be provided below dams to keep fish in good condition as a public trust rule defining the public interest in fisheries. Such a statute, the court held, was a legislative policy choice of the values served, to be upheld unless it was unreasonable.¹³⁰ As a result, the City of Los Angeles as dam owner could not assert the statute of limitations as a defense because “[a]n encroachment on the public trust interest . . . cannot ripen into a contrary right . . .”¹³¹ The public trust nature of a statute has other important ramifications. Since the trust is a preexisting interest in property held for the people, restrictions on its use are not subject to inverse condemnation claims.¹³²

Statutes may implement common law trust duties by spelling out the public trust obligation of the state to plan comprehensively for water use.¹³³ For instance, the Department of Water Resources is authorized to conduct investigations of the state’s water resources and formulate plans for their “control, conservation, protection, and utilization.”¹³⁴

128. Roger J. Traynor, *Statutes Revolving in Common Law Orbits*, 17 CATH. U. L. REV. 401, 402 (1968) (reprinted in *The Traynor Reader*, 38 HASTINGS L.J. 1, 156 (1987)).

129. 207 Cal. App. 3d 585 (1989).

130. *Id.*, at 625.

131. *Id.* at 631.

132. *Nat’l Audubon*, *supra* note 60, at 439-40 (1983); *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1009-10 (2002) (discussing lower court holding that private property with a public resource may be constrained without compensation).

133. *See* United Plainsmen v N.D. State Water Conservation Comm’n, 247 N.W.2d 457 (N.D. 1976).

134. CAL. WATER CODE § 12616 (West).

The *National Audubon* decision notes that the power of the Water Board “has steadily evolved from the narrow role of deciding priorities between competing appropriators to the charge of comprehensive planning and allocation of waters.”¹³⁵ It observed that the board could prohibit diversions by the owner of a prescriptive water right that refused to comply with water conservation measures *even though there was no license involved* which the board could revoke or condition.¹³⁶ The board powers, the court said, “rested on the legislative intent ‘to vest in the board expansive powers to safeguard the scarce water resources of the state.’”¹³⁷ Other statutory expressions may constitute public trust exercises as well. Most recently, California Water Code section 85023 gives new emphasis to the importance of these rules, and new support to their implementation. It states: “*The longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy . . .*”¹³⁸

There is a danger, however, that a statute may be construed as encompassing all of the trust values when it does not. For instance, in a proceeding involving the Salton Sea the SWRCB found it unnecessary to consider independent public trust arguments because California Water Code section 1736, providing that the board may approve long term transfers if the change “would not unreasonably affect fish, wildlife, or other instream beneficial uses,” covered the field.¹³⁹ Of course the public trust covers more than instream beneficial uses. Its protections extend to such things as the protection of lands “in their natural state, so they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds or marine life, and which favorably affect the scenery and climate of the area.”¹⁴⁰ The board’s reliance on the somewhat limited scope of section 1736 here would seem misguided.

In another curious twist, the California Supreme Court construed trust-like statutory declarations accompanied by restrictive language as indicating legislative intent that a particular trust application should be limited to the terms of the statute. It declined to entertain arguments that the common law trust in wildlife would be violated by certain logging practices on the ground that compliance with an express statutory scheme was sufficient. Statutes declaring state policy and conferring the duty to protect and conserve wildlife on the State Department of Fish and Game disavowed any

135. *Nat’l Audubon*, *supra* note 60, at 444.

136. *Id.* (emphasis added).

137. *Id.* (quoting *People v. Shirikow*, 26 Cal. 3d 301, 309 (1980)).

138. CAL. WATER CODE § 85023 (West) (emphasis added).

139. STATE WATER RES. CONTROL BD., STATE OF CAL., REVISED ORDER WR 2002-13 at 19, n. 5 (2002).

140. *Nat’l Audubon*, *supra* note 60, at 434-35.

attempt to regulate those resources except as specifically authorized by legislation, the court stated.¹⁴¹ This construction appears to be inconsistent with the court's earlier rejection of the suggestion that the statutory appropriative rights system had "subsumed" the public trust doctrine. At that time, in regards to statutes codifying the duty of the water board to consider public trust uses of stream water, the court stated:

These enactments do not render the judicially fashioned public trust doctrine superfluous. Aside from the possibility that statutory protections can be repealed, the noncodified public trust doctrine remains important both to confirm the state's sovereign supervision and to require consideration of public trust uses in cases filed directly in the courts without prior proceedings before the board.¹⁴²

This treatment of statutory provisions seems more consistent with the restrictions on alienability set forth in *Illinois Central* and California decisions noting the trust's base in constitutional law.¹⁴³

Although the legislature has the power to prioritize trust uses on behalf of the people,¹⁴⁴ legislative efforts to limit its scope have been frowned upon. *Illinois Central*, in which the U.S. Supreme Court held the Illinois legislature was powerless to extinguish the trust on Chicago's waterfront, is perhaps the leading example but many others exist. Thus in 1896 the Wisconsin court struck down legislation authorizing the draining of a lake, holding that "the state is powerless to divest itself of its trusteeship as to the submerged lands under navigable waters in this state," even for a purportedly public purpose.¹⁴⁵

The legislature has no more authority to emancipate itself from the obligation resting upon it which was assumed at the commencement of its statehood, to preserve for the benefit of all the people forever the enjoyment of the navigable waters within its boundaries, than it has to donate the school fund or the state capitol for a private purpose. It is supposed that this doctrine

141. *Env'tl. Prot. Info. Ctr. v. Cal. Dept. of Forestry*, 44 Cal. 4th 459, 515 (2008) (citing Cal. Fish & Game Code § 1801).

142. *Nat'l Audubon*, *supra* note 60, at 446 n. 27.

143. *E.g.*, *People ex. rel. v. El Dorado Cnty.*, 96 Cal. App. 3d 403 (1980).

144. *E.g.*, *Boone v. Kingsbury*, 206 Cal. 148 (1928); *see generally*, Stevens, *supra* note 8, at 223-25.

145. *Priewe v. Wis. State Land & Improvement Co.*, 79 N.W. 780, 781 (1899).

has been so firmly rooted in our jurisprudence as to be safe from any assault that can be made upon it.¹⁴⁶

In later years, the Arizona Supreme Court invalidated legislation purporting to abrogate the public trust with regard to water rights.¹⁴⁷ The public trust doctrine, the court held, is a “constitutional limitation on legislative power to give away resources held by the state in trust for its people.”¹⁴⁸ And the validity of Idaho legislation aimed at making the public trust inapplicable to water rights has been questioned by legal scholars.¹⁴⁹

VIII. The State Constitution and the Public Trust: Self-Executing Remedies

In California law, two powerful and as yet under-utilized doctrines have the potential to protect the state’s dwindling groundwater resource: 1) the constitutional mandates that water be put to reasonable and beneficial use, that waste be avoided and the people’s right of access to navigable waters be maintained, and 2) the public trust. They have the potential for remedial actions in cases in which, like Mono Lake, the Lower American River and Putah Creek, the ordinary regulatory scheme has failed, without imposing the formal extra layer of controls that has been anathema for local governments and legislators.

146. *Id.* at 781.

147. *San Carlos Apache Tribe v. Super. Ct.*, 972 P.2d 179 (Ariz. 1999); Sean E. O’Day, *San Carlos Apache Tribe v. Superior Court: Rejecting Legislative Favoritism in Water Right Allocations* 4 U. DENV. W. L. REV. 29, 63 (2000).

148. *San Carlos Apache Tribe*, 972 P.2d at 199 (Ariz. 1999).

149. M. Bloom, H. Dunning, S. Reed, *Renouncing the Public Trust Doctrine: An Assessment of the Validity of House Bill 794*, 24 ECOLOGY L. REV. 461 (1997). *See also*, J. Kearney, *Closing the Floodgates? Idaho’s Statutory Limitation on the Public Trust Doctrine*, 34 IDAHO L. REV. 91, 122-123 (1997) (contending legislature cannot abrogate trust because it is an attribute of sovereignty. A number of western state courts other than Arizona and California, have also held that the public trust has constitutional roots in provisions declaring the public interest in waters and natural resources); *see CWC Fisheries v. Bunker*, 755 P.2d 1115 (AK 1988); *In re Water Use Application (Waiahole Ditch)*, 9 P.3d 409 (Hawaii 2000); *Galt v. Mont. Dept. of Fish, Wildlife and Parks*, 731 P.2d 912 (Mont. 1987); *United Plainsmen Ass’n v. N.D. State Water Comm’n.*, 247 N.W. 2d 457 (N.D. 1976); *Rettkowski v. Dept. of Ecology*, 858 P.2d 232 (Wash. 1993).

A. The State Constitution

Paramount is the constitutional mandate that all uses of water are subject to the requirements of reasonable and beneficial use.¹⁵⁰ It applies to all the water of the state, including groundwater.¹⁵¹ The State's Supreme Court has declared that determining what constitutes a reasonable and beneficial use depends on each case, stating "such inquiry cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance. Paramount among [this determination is] the ever increasing need for conservation of water in this state."¹⁵² As Justice John Racanelli stated in an oft-cited opinion: "all water rights are subject to the overriding constitutional limitation that water use must be reasonable."¹⁵³ Additionally of course the provisions of Article 10 section 4 guaranteeing access to navigable waters provide further grounds for action against diverters whose actions deprive the people of those rights by drying up the waterways.¹⁵⁴

150. In 1928, the California Constitution was amended to require that all the state's water be put to reasonable and beneficial use: "It is hereby declared that because of conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in the State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water This section shall be self-executing, and the Legislature may also enact laws in furtherance of the policy in this section contained." CAL. CONST., art. X, § 2.

151. "All uses of water, including public trust uses, must now conform to the standard of reasonable use." Nat'l Audubon Soc'y v. Super. Ct., 33 Cal. 3d 419, 443 (1983); *see also* Peabody v. City of Vallejo, 2 Cal. 2d 351 (1935).

152. Joplin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 140 (1967).

153. U.S. v. St. Water Res. Control Bd., 182 Cal. App. 3d 82, 150 (1986); Ronald B. Robie, *The Delta Decision: The Quiet Revolution in Water Rights*, 19 PAC. L.J. 1111 (1988).

154. *See*, People *ex. rel.* v. El Dorado Cnty., 96 Cal. App. 3d 403 (1980); *see also* PG&E v. Super. Ct. Shasta Cnty., 145 Cal. App. 3d 253 (1983).

B. The California Constitution Provides Several Bases for Action

Article 10, section 2 is an exercise of state police power to protect the public interest in water.¹⁵⁵ And section 4 restates the public trust rights in navigable waters. The police power expressed in these provisions can be exercised in several different ways:

1. Directly

The California Constitution directly provides an action to enforce the reasonable use standard or to prevent waste or to enforce trust duties. Article 10, section 2 is self-executing by its own terms, and expressly permits the enactment of laws in furtherance of its policy. The legislature has defined the use of water for recreation and preservation of fish and wildlife resources as a beneficial use of water, and the appellate court has held that its determination must be upheld unless it is unreasonable.¹⁵⁶ Water Code section 275 authorizes the State Water Resources Control Board to take “all appropriate action” to prevent waste or unreasonable use, and Government Code section 12600 authorizes the Attorney General to bring actions independently to protect the environment. The courts have concurrent jurisdiction over public trust actions.¹⁵⁷ The California Supreme court construed the board’s powers broadly, stating in *National Audubon* that its power to act “has steadily evolved from the narrow role of deciding priorities between competing appropriators to the charge of comprehensive planning and allocation of values.”¹⁵⁸ In another case it upheld the board’s power to stop diversions even in the absence of a permit or license, based on legislative intent “to vest in the board expansive powers to safeguard the scarce water resources of the state.”¹⁵⁹

Article 10, section 4 provides an additional basis for protection. It provides in part:

No individual, partnership, or corporation, claiming or in possession of the frontage or title lands of a harbor, bay, inlet, estuary or other navigable water in this state, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such

155. *Gin Chow v. City of Santa Barbara*, 217 Cal. 673 (1933).

156. CAL. WATER CODE § 1243 (West); *Ca. Trout, Inc. v. State Water Res. Control Bd.*, 207 Cal. App. 3d 585 (1989).

157. *Nat’l Audubon*, *supra* note 60, 448-51 (1983).

158. *Id.* at 444.

159. *Id.* (quoting *People v. Shirokow*, 26 Cal. 3d 301, 309 (1980)).

water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this state shall be always obtainable for the people thereof.¹⁶⁰

Under the rationale of *National Audubon*, diversions affecting access to and navigation over navigable waters could violate this provision.

2. The Public Trust

The *National Audubon* decision integrated the reasonable use rule with the public trust doctrine and made it clear that even long continued uses are subject to modification if changing conditions call for it. It reaffirmed the power of the state to reexamine existing water uses to preserve sufficient water to protect public trust uses.¹⁶¹ Thus, two converging remedies, reconciled by the court, gave new focus and force to overriding objectives. Independently of the statutory water rights system, the court stated, “[t]he state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.”¹⁶²

C. Permit Conditions Can Implement the Constitutional and Trust Mandates

The State Water Board may impose stream flow requirements to protect fish and wildlife as conditions to water permits and licenses.¹⁶³ Of course this presupposes in the case of groundwater that the waters in question qualify as subterranean streams. The legislature has thus far declined to amend the permit statutes, and the Water Board has declined to extend its jurisdiction to them, despite the many arguments made to justify it.

Thus, under both the constitutional reasonable use rule and the public trust, the uses of water are subject to continuous scrutiny in light of changing conditions. If the public trust subjects diversions from the non-navigable tributaries of navigable waters to continuing scrutiny and possible modification in light of changing conditions, the same reasoning should

160. CAL. CONST. art. X, § 4 (emphasis added).

161. *Nat'l Audubon*, *supra* note 60, at 439-40.

162. *Id.* at 446.

163. CAL. WATER CODE § 1257.5 (West). The Board must consider stream flow requirements prepared by the Director of Fish and Game, who may also propose modifications of Board requirements.

apply to groundwater extractions having similar negative effects.¹⁶⁴ Indeed, the court has already treated the trust as applicable to riparian rights on federal reserved lands.¹⁶⁵ And it has linked the origins of the watery trust to the equal footing doctrine under which the later admitted states acquired their navigable waters subject to the same trust as the original colonies.¹⁶⁶ This decision suggests that the trust applies to *all* water rights. A recent decision from Hawaii's highest court reaches the same conclusion.¹⁶⁷

IX. Past and Present Trust Applications

In light of the sweeping compass and rationale of *National Audubon*, it seems likely that the public trust will apply to withdrawals of groundwater demonstrably affecting surface waters. This point may soon be clarified in the pending litigation over the Scott River. Meanwhile, several courts have successfully applied public trust and reasonable use rules.

A. Mono Lake

After the Supreme Court's *National Audubon* decision, the Mono Lake case went back to superior court, where El Dorado Superior Court Judge Terrence Finney held months long hearings over whether to enjoin the City of Los Angeles from diverting further water. He eventually issued a judgment setting interim levels for the lake and restraining the city from making withdrawals that would lower them pending a conclusive water rights proceeding by the water board.¹⁶⁸

B. The Lower American River

Proposed diversions by the East Bay Municipal Utility District (EBMUD) reached the Alameda County Superior Court after nearly 20 years of litigation. Judge Richard Hodge eventually imposed a physical solution, conditioning any withdrawals on standards designed to protect trust

164. *But see* Santa Theresa Citizens Action Grp. v. City of San Jose, 114 Cal. App. 4th 689, 709 (2003) (suggesting in dicta that the public trust has "no direct effect on groundwater resources.").

165. *State Water Res. Control Bd. v. U.S.*, 44 Cal. 3d 448, 472, n.16 (1988).

166. *Id.*

167. *In re Water Use Application (Waiahole Ditch)*, 9 P.3d 409 (Hawaii 2000).

168. *In the Matter of Mono Lake Water Rights Cases*, El Dorado Cnty. Super. Ct., Coordinated Proceeding Nos. 2284 and 2288 (Jun. 14, 1990 and Apr. 17, 1991).

values.¹⁶⁹ Judge Hodge's opinion disposed of a number of efforts to limit the trust

1. Whether the Legislature modified the trust in approving the Folsom South Canal, a diversion facility (it did not);
2. Whether the trust applies to water contractors not water rights holders (it does);
3. Whether a physical solution may be applied to restrict diversions (it may). The imposed flows conflict with public trust needs and reasonable use.¹⁷⁰

C. Putah Creek

A bitter dispute among water agencies, cities, and the University of California was adjudicated by Sacramento Superior Court Judge Richard Park, who imposed public trust standards on withdrawals. The Putah Creek case involved a standoff between urban and agricultural uses and concerns over what Judge Park described as a "treasure," home for birds, wildlife, fish and riparian vegetation.¹⁷¹ The court concluded that existing releases were insufficient to protect the creek's trust values or to keep fish in good condition as required by Fish and Game Code section 5937.¹⁷² In passing, he laid to rest the argument that in the context of water rights the public trust did not apply to rancho lands.¹⁷³ Judge Park laid to rest several issues:

1. Whether a water must be commercially navigable to receive trust protection. Here Judge Park's answer was "In my view present day issues ought not to be driven by such an archaic, if not arcane, principle having nothing whatsoever to do with the proper allocation of water."¹⁷⁴

2. Whether the diverters should be reimbursed for lost water. This argument is based on a traditional public trust principle: if the state exercises the trust to retake trust land occupied by others, the ousted occupants should be reimbursed for lawful improvements.¹⁷⁵ However this

169. *Envtl. Defense Fund, Inc. v. East Bay Mun. Util. Dist.*, Alameda Cnty. Super. Ct., No. 425955 (Jan. 2, 1990).

170. *Id.*

171. Reporter's Transcript of Judge's Ruling, Putah Creek Water Cases Judicial Council No. 2565 (Sacramento County Superior Court filed Apr. 8, 1996).

172. *Id.* at 3.

173. *Id.* at 13.

174. *Id.* at 19-20.

175. *Ill. Central R.R. Co. v. Ill.*, 146 U.S. 387, 455-56 (1892).

rule is inapplicable to modifications in water rights compelled by either trust or reasonable use principles.¹⁷⁶

D. Litigation Pending

Still pending litigation focuses on a major issue: the applicability of *National Audubon* to groundwater diversions affecting navigable streams:

Environmental and fishery organizations have brought suit against Siskiyou County alleging a failure to manage groundwater sources interconnected with the Scott River in a manner consistent with the public trust doctrine.¹⁷⁷ In 1980 the Scott River underwent a water rights adjudication in which the water board determined rights to water of the River's "stream system."¹⁷⁸ Although a stream system generally does not include groundwater, in this case it was found to include "groundwater supplies which are interconnected with the Scott River, but. . .not any other underground water supply."¹⁷⁹

Petitioners in the Scott River litigation claim that excess and unchecked extractions of groundwater interconnected with the Scott River is causing a decrease in the river flow, which in turn leads to diminishing fish populations.¹⁸⁰ They contend that "interconnected groundwater" that feeds into the Scott River is analogous to the water in the tributaries that fed Mono Lake in National Audubon Society and therefore the county has a duty to take the public trust doctrine into account when managing the use of this groundwater.¹⁸¹ They ask that the county be prohibited from issuing or renewing groundwater extraction permits or well drilling permits within the Scott River sub-basin "until such time as they are not in violation of their public trust duties."¹⁸²

X. Conclusion

California's dubious statutory distinctions between ground and surface waters have become more attenuated in light of new advances in measuring

176. *Nat'l Audubon*, *supra* note 60, at 440.

177. *Env'tl. Law Found. et al. v. Cal. State Water Res. Control Bd.*, No. 34-2010-80000538 (Cal. Super. Ct. 2010).

178. *Scott River Adjudication*, Decree No. 30662, Superior Court for Siskiyou County (Jan. 30, 1980).

179. *Id.*; *see also* CAL. WATER CODE §§ 2501, 2501.5 (West).

180. *Petition for Writ of Mandamus and Complaint*, Environmental Law Institute et al v. State Water Resources Control Board, Sacramento County Superior Court No. 34-2010-80000583 filed June 23, 2010.

181. *Id.* at 9.

182. *Id.* at 13.

their relationship.¹⁸³ Groundwater, like all the other waters of the state, is imbued with a state interest. Numerous declarations in constitution and statute define this interest. The California Constitution calls on the legislature to implement the requirement that water be reasonably used, and courts have made it clear that such enactments will be upheld so long as they are not “manifestly unreasonable.”¹⁸⁴ Nevertheless, the courts have on the whole been much readier to define and exercise this interest than has the Legislature.

National Audubon makes it clear that courts have concurrent jurisdiction over public trust actions, and the *Shirikow* decision permits reasonable use challenges without regard to the statutory permit system. It appears that the judiciary is in a valuable position to safeguard the public interest in those trust and reasonable use disputes that the specialized agencies were unable to cope with. The most significant post-*National Audubon* decisions were made by trial courts, and it is a tribute to the system that they were not appealed.¹⁸⁵

These examples suggest that concurrent jurisdiction works, and provides a remedy without extending the statutory jurisdiction of state agencies. Is it the final answer? Arguments can be made for the utilization of more expertise at the state level in such oft complex issues, and for a centralized administrative decision making progress to avoid the vagaries of individual jurists. But as the high court observed, water judgments cannot be made *in vacuo*. Each case must be decided in light of current circumstances and changing needs, in recognition that in water law everything is in the process of changing. “The time is long past for comprehensive groundwater regulation in California. The failure . . . to act will not make the problem disappear.”¹⁸⁶

183. “[E]ach new study that confirms the connection between water underground and water on the surface gives a little more ammunition to environmental groups, legislators and water lawyers who want to bring groundwater under unambiguous state control, as it is in every other state except Texas.” Felicity Barringer, Blog, *Psst...Groundwater and Surface Water Do Mix*, NY TIMES BLOG (Feb. 3, 2011), <http://green.blogs.nytimes.com/2011/02/03/psst-groundwater-and-surface-water-do-mix/>.

184. *In re Waters of Long Valley Creek System*, 25 Cal. 3d 339, 351-352 (1979); *Cal. Trout, Inc. v. St. Water Res. Control Bd.*, 207 Cal. App. 3d. 585, 625 (1989).

185. The Putah Creek case was appealed but settled before it was argued. *Settlement Reached in Long-running Putah Creek Water Dispute*, U.C. DAVIS NEWS (May 24, 2000), http://news.ucdavis.edu/search/news_detail.lasso?id=5115.

186. E. Garner, M. Ouelette, R. Sheraff, *Institutional Reform in California Groundwater Law*, 25 PAC. L.J. 1021-1022 (1994).

The public trust and the constitutional water mandates, integrated by *National Audubon*, may have the synergy to breathe new life into statutes of previously limited scope. Just as the Fish and Game Code provisions protecting fish were construed to be public trust exercises, provisions such as Water Code section 275 and Government Code section 12607 may be construed to authorize the Water Board and Attorney General to bring actions to implement the trust and the expressly self-executing reasonable use provisions of Article 10, section 2. The water board was established to “exercise the adjudicatory and regulatory functions of the state in the field of water resources.”¹⁸⁷ *National Audubon* holds that the Water Board must take trust interests into account in the planning and allocation of water resources. The Board’s jurisdiction in that regard is not limited to waters over which it has permit authority.¹⁸⁸ Notwithstanding permits, the courts have long protected surface stream rights against groundwater pumping and vice versa.¹⁸⁹

The road to management of groundwater as a trust resource has constitutional support. The related reasonable use and public access guarantees of Article 10 have been cited by the court as a basis for a public trust in waters.¹⁹⁰ Although the Legislature usually sets trust priorities, the California Constitution sets forth a choice made directly by the people who are beneficiaries of the trust. In the words of the Supreme Court’s construction of the allied provisions of Article 10, they “are binding upon every department of the state government, legislative, executive, and judicial All previous laws inconsistent therewith ceased to be effective upon the adoption thereof.”¹⁹¹ The Constitution sets forth an irrefutable mandate for the waters of the state.

The public interest at issue is inescapable. Justice Oliver Wendell Holmes stated:

Few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. The public interest is omni

187. CAL. WATER CODE § 174 (West).

188. See *Imperial Irrigation Dist. v. State Water Res. Control Bd.*, 225 Cal. App. 3d 548, 573 (1990) (holding that the Board has jurisdiction over unlicensed pre-1914 appropriations).

189. See *SAX*, *supra* note 17, at 87-89.

190. *People ex. rel. v. El Dorado Cnty.*, 96 Cal. App. 3d 403, 407 (1980).

191. *People v. Cal. Fish Co.*, 166 Cal. 576, 587-88 (1913).

present wherever there is a state, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.¹⁹²

The law permits, or perhaps mandates, active and integrated groundwater management. The basis for applying the public trust, to the impact on navigable waters by diversions from their sources, is as applicable to groundwater as it is to the surface tributaries of navigable streams. Whether the harm to fish, riparian habitat, and related resources taxed by dwindling streams is attributable to groundwater pumping or surface water diversions makes little difference to the innocent fish, trees, and vegetation dependent on these waters. If California's resounding constitutional, statutory, and common law guarantees are to be met, it will require the recognition that our water resources are related and must be so recognized.

192. Hudson Cnty. Water Co. v. McCarter, 209 U.S. 349 (1908).
