Litigation's Bounded Effectiveness and the Real Public Trust Doctrine: The Aftermath of the Mono Lake Case

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"In the long run, as Los Angeles drinks, the lake shrinks."

I. Introduction

Litigation obviously plays a significant role in environmental and natural resources policy. However, the effectiveness of environmental litigation—both as a means of resolving disputes and as a means of protecting the environment—is hotly debated. Setting aside questions about the legitimacy, fairness, and efficiency of litigation and judicial decisions in resolving environmental and natural resources conflicts, one can easily become overwhelmed with the single question of environmental liti-
gation's efficacy. For example, parties to environmental litigation often have conflicts and problems that are much larger and more multifaceted than the legal issues addressed in litigation. There is a growing awareness that forms of dispute resolution other than litigation may be needed to solve the parties' problems and resolve their complex mix of legal and non-legal conflicts, and that dispute resolution is often only a subset of problem solving. Furthermore, conflicts between parties to environmental litigation often persist long after the courts have "definitively" resolved the legal issues in the case. In many contexts, litigation may be dispute non-resolution. Both in the specific conflict in question and in other conflicts over similar environmental and natural resources issues, a judicial decision may have very little real impact on the parties' actions or may have only a "shadow" impact. The law in both theory and doctrine may not be the law in practice.

Speculation and grand theorizing about the effectiveness of environmental litigation adds little to the debate. Instead, empirical evidence is needed. Although scholars could undoubtedly design rigorous statistical studies to test the effectiveness of environmental litigation, such studies would arguably miss many of the nuances of the ways in which environmental litigation is effective, ineffective, and partially effective. Instead, case studies—qualitative empirical research—offer the rich details and complex interplay of factors needed to shape our understanding of environmental and natural resources litigation, even if case studies do not "prove" a thesis. We have chosen to examine the effectiveness of environmental litigation by conducting a study of one of the most famous environmental cases of the twentieth century, involving judicially imposed common law constraints on natural resources exploitation to protect the environment: National Audubon Society v. Superior Court. The case involved a conflict over Mono Lake, an unusual and ecologically valuable lake in Northern California, which was experiencing dropping lake levels and the resulting environmental harm due to more than forty years of diversions of water by Los Angeles for its water supply. The case pitted a powerful, growing urban area, protecting its long-standing, well-recognized rights to appropriate water from Mono Lake's feeder streams, against determined, creative environmentalists, who argued the public trust doctrine prevents the recognition of water rights that result in environmental harm.

Public trust is a common law doctrine that limits the power of state legislatures and their administrative agencies from conveying land


6. Arnold, Dispute Non-Resolution, supra note 5.


9. The works cited in note 8, supra, generally discuss both quantitative and qualitative empirical research and their comparative advantages and disadvantages. For further comparisons and research design methods, see JOHN W. CREWSSELL, RESEARCH DESIGN: QUALITATIVE AND QUANTITATIVE APPROACHES (1994); MICHAEL QUINN PATTON, QUALITATIVE EVALUATION AND RESEARCH METHODS, 2d ed. (1990); ROBERT K. YIN, CASE STUDY RESEARCH: DESIGN AND METHODS, 2d ed. (1994).

owned by the state lying under navigable waters to private parties.\(^{11}\) As a general rule, the states own the land under water present within its borders so long as the body of water meets the federal test of navigability.\(^{12}\) In The Daniel Ball, the United States Supreme Court articulated the federal test for navigability:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.\(^{13}\)

Lands under waters that meet the test for navigability must be held in trust for the public. In other words, they belong to the people of the state or, at a minimum, are conditioned on an easement for public purposes such as navigation, travel, fishing, and recreation.\(^{14}\)

The public trust responsibility is out of the reach of any legislative body to change and "[t]he sovereign power itself . . . cannot, consistently with the laws 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."\(^{15}\) California has long recognized the public trust, and for nearly 100 years has statutorily\(^{16}\) provided that the waters of the state are owned by the people of California.\(^{17}\)

On its face, the public trust doctrine seems at odds with the California system of appropriative water rights. At one end of the spectrum, the public trust doctrine facilitates preservation of public resources and promotes environmental values and the public interest over private control. In particular, the public trust doctrine favors instream uses of water. At the other end of the spectrum, sometimes referred to as the inverse of the public trust,\(^{18}\) the appropriative rights system rejects public water rights in favor of development and consumption of water by private parties, as the greatest good flows from private consumption.\(^{19}\) Essentially, the prior appropriation system endorses diverting water from its natural course so long as private parties put such diversions to beneficial use.\(^{20}\)

The California Supreme Court finally resolved the inevitable legal clash between these two systems in its 1983 decision in National Audubon Society v. Superior Court.\(^{21}\) In what has been considered by some experts to be among the top ten most important American environmental law decisions,\(^{22}\) the California Supreme Court did not choose one system over the other. Instead, the Court declared that the water law of California integrates both the public trust doctrine and the appropriative rights system and placed a substantive obligation on the State Water Resources Control Board to consider the impact of appropriation rights on public trust uses before allowing diversions and in reviewing diversions allowed without proper consideration of public trust values.\(^{23}\) Conceiving of its integration of the two doctrines as requiring that the Board to balance them, the Court did not establish any specific allocation of water for the Mono Basin, leaving the task for the State Water Resources Control Board.\(^{24}\)

\(^{11}\) JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 529 (3rd ed. 2000) [hereinafter SAX ET AL., WATER RESOURCES]. Joseph Sax wrote the seminal work on the application of the public trust doctrine to natural resources law. See Sax, Public Trust, supra note 3.

\(^{12}\) See Utah v. United States, 403 U.S. 9 (1971).

\(^{13}\) The Daniel Ball, 77 U.S. 557, 563 (1870).


\(^{15}\) Arnold v. Mundy, 6 N.I.L. 1, 78 (1821).

\(^{16}\) CAL. WATER CODE § 102 (West 1971).

\(^{17}\) Cynthia L. Koehler, Water Rights and the Public Trust Doctrine: Resolution of the Mono Lake Controversy, 22 ECOLOGY L. Q. 541, 546 (1995) (citing People v. Gold Run Ditch & Mining Co., 4 P. 1152, 1159 (Cal. 1884)).

\(^{18}\) Id. at 552.

\(^{19}\) Id.

\(^{20}\) Id.

\(^{21}\) Nat'l Audubon, 658 P.2d 709.


\(^{23}\) Nat'l Audubon, 658 P.2d at 712.

\(^{24}\) Id. at 732.
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The significance of the California Supreme Court not choosing one system over the other cannot be understated. If the Court had chosen only the public trust system, protecting ecological and aesthetic uses of Mono Lake,\(^\text{25}\) diversions supplying Los Angeles residents with water certainly would have been curtailed. Furthermore, settled expectations for long-standing water rights would have been thrown into chaos. Curtailment of the diversions still would have left Los Angeles with a need to find replacement water, potentially damaging other water resources within the State, and left all water appropriators statewide in a state of uncertainty over their rights. If, instead, the Court had held that public trust uses did not have to be considered, and only the appropriative rights system applied, damage to Mono Lake and other water resources in California would have continued. The public's interest in navigable waters would have meant little if appropriators could completely consume bodies of water for out-of-stream uses.

The Court set the stage for development of "the real public trust doctrine": the public trust doctrine in practice outside of judicial forums. The survival of the Mono Lake ecosystem required a judicial determination that the public trust doctrine limits (at least partially) prior appropriation water rights. However, no single court opinion—regardless of its legal landmark status—would ensure the viability and impact of public trust principles for Mono Lake or for other water systems in California. The public trust doctrine has taken on substantial meaning and value in the parties' post-decision actions. Environmentalists' persistent litigation, negotiation with the Los Angeles Department of Water and Power, education of the public, and creative problem-solving, as well as the cooperative responses of Los Angeles, has led to an effective resolution of the issue, or more broadly, an effective public trust doctrine. This resolution includes substantially reduced diversions of water from the Mono Basin, increased health of Mono Lake, and sufficient water supplies to support the rapidly growing Los Angeles metropolis without draining other water basins.

Part I of this case study discusses how the conflict between environmentalists and Los Angeles arose, and failed pre-litigation attempts at resolving the conflict. Part II describes the National Audubon litigation and the California Supreme Court's decision in the case. Part III explicates the aftermath of National Audubon, including subsequent litigation under the California Fish and Game Code, environmental activism and public education, negotiation, State Water Resources Control Board decision making, and ultimate agreement. This agreement resolved the conflict with a combination of reduced diversions from the Mono Lake tributaries and publicly funded reclamation and conservation programs.

Part IV of this case study contends that environmental litigation, such as public trust litigation, is characterized by "bounded effectiveness." Both litigation and judicial decisions applying the public trust doctrine to uses of natural resources are necessary but not sufficient to effectuate the values of the public trust. The "real" public trust doctrine exists in the aftermath of litigation: the parties' post-litigation actions that either resolve or do not resolve legal conflicts.

II. Pre-Litigation Background

A. Mono Lake

One of North America's oldest bodies of water, Mono Lake was formed a million years ago in a volcanic area, and is most widely known for its high salinity and limestone formations that resemble cactus along its shoreline.\(^\text{26}\) Located approximately 190 miles east of San Francisco and 300 miles north of Los Angeles,\(^\text{27}\) the lake sits near the eastern entrance to Yosemite National Park and is the...
second largest lake in California.\textsuperscript{28} Most of Mono Lake’s water supply has come from the Sierra Nevada snowmelt, although the lake receives some water from precipitation on its surface.\textsuperscript{29} The runoff from the snowmelt is carried to the west end of the lake via five freshwater streams: Mill, Lee Vining, Walker, Parker, and Rush Creeks.\textsuperscript{30}

Mono Lake is considered a terminal lake because surface runoff and groundwater seepage end in the lake, resulting in the high salinity.\textsuperscript{31} Mono Lake does not have fish due to its high salinity. However, it does sustain a sizeable population of brine shrimp.\textsuperscript{32} The shrimp population feeds a large number of nesting and migratory birds, making preservation of the population in the lake extremely important to species in various migration routes.\textsuperscript{33} In addition, the lake has natural islands that serve as protective habitat for a considerable breeding colony of California gulls because the water between the mainland and the island prevents predators such as coyotes from reaching the young.\textsuperscript{34} Finally, the unique scenery of towers and spires on the shores, which Ansel Adams depicted in his famous photographs, make Mono Lake a tourist attraction.\textsuperscript{35}

\section*{B. The Diversions}

In 1940, the Division of Water Resources,\textsuperscript{36} which was the predecessor to the State Water Rights Board and ultimately the State Water Resources Control Board (hereinafter “Water Board”), granted the City of Los Angeles Department of Water and Power (hereinafter “DWP”) a permit to appropriate almost the complete flow of four of the five streams that supply water into Mono Lake.\textsuperscript{37} Immediately after receiving appropriative rights to the four streams, DWP erected structures to divert approximately half of the flow of the four streams into DWP’s Owens Valley aqueduct.\textsuperscript{38} Then, in 1970, DWP constructed another diversion tunnel, resulting in the diversion of almost all of the flow of the four streams.\textsuperscript{39}

The diversions resulted in widespread negative impacts in and around the lake. The level of the lake dropped and the surface area of the lake went down by one-third.\textsuperscript{40} In fact, between 1940 and 1970, Los Angeles diverted an average of 57,067 acre-feet\textsuperscript{41} of water per year from the Mono Basin, resulting in the lake level dropping by an average of 1.1 feet per year.\textsuperscript{42} In

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\textsuperscript{28} Nat’l Audubon, 658 P.2d at 711.
\textsuperscript{29} Id.
\textsuperscript{30} Id.
\textsuperscript{31} Blumm & Schwartz, supra note 22.
\textsuperscript{32} Nat’l Audubon, 658 P.2d at 711.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} The California agency with authority to grant appropriative rights has gone through various name changes since its inception in 1913. Id. see also Arthur L. Littleworth & Eric L. Garner, California Water 113 (1995). Therefore, regardless of the specific name given to the agency at any given time, “Water Board” shall be used hereinafter to refer to the California agency with authority to grant such rights.
\textsuperscript{37} Nat’l Audubon, 658 P.2d at 711.
\textsuperscript{38} Id. DWP is responsible for the water supply for the City of Los Angeles. DWP recognized early in the twentieth century that the city’s needs would quickly surpass that which was available from local resources. Id. at 713. Thus, the city erected the Owens Valley aqueduct in 1913 to transport water 233 miles from the Owens River, through the Antelope-Mojave plateau, to the city. Id. Because Los Angeles expanded so quickly, the Owens River supply was strained, requiring DWP to locate another source. Id. The natural choice was the Mono Basin due to its proximity to the Owens River, allowing use of the aqueduct infrastructure already in existence, a very cost-effective way for the city to obtain water. Id. According to Duane Buccholz, the district engineer at the Bishop office of the Los Angeles Department of Water and Power in 1986, Mono Lake water is some of the cleanest and cheapest water in the state because the cost of the hundreds of miles of aqueducts were paid for years ago and it does not require the expensive process of pumping the water over mountain ranges. Crabbe, supra note 1. To this end, DWP purchased the riparian rights for Lee Vining, Walker, Parker, and Rush Creeks. In addition to those for Mono Lake. Nat’l Audubon, 658 P.2d at 713. Once these purchases were complete, Los Angeles applied to the Water Board for appropriative rights permits for the four streams in 1940. Id.
\textsuperscript{39} Nat’l Audubon, 658 P.2d at 711.
\textsuperscript{40} Id. at 711.
\textsuperscript{41} An acre-foot is the amount of water required to cover one acre of land one foot of water in depth. Crabbe, supra note 1. An acre-foot is approximately the amount used by five people living in a single-family home (with a small garden) in one year. Id.
\textsuperscript{42} Nat’l Audubon, 658 P.2d at 714. Between 1970 and 1980, following construction of a second aqueduct to increase flow by 50\%, Los Angeles diverted 99,580 on average per year from the Mono Basin. Id. Over the 40-year span from 1940 to 1980, the diversions caused Mono Lake to shrink from an area of 85 square miles to 60.3 square miles and its surface level dropped from 6,416 feet above sea level to 6,376 feet above sea level. Id.
addition to the physical effects on the lake, the chemical composition increased significantly in salinity.43

The California gull became particularly endangered by the decrease in lake level. Ninety-five percent of the state’s California gulls and twenty-five percent of all of the California gulls in existence nested at Mono Lake according to the 1979 California Department of Water Resources and United States Department of the Interior joint study Task Force Report.44 Additionally, one of two main islands that protect bird breeding grounds joined with the mainland because of the lake level drop, allowing predators access to the nesting grounds.45 Coyotes actually reached one of the popular breeding islands by 1979, immediately resulting in a significant decline in breeding nests.46 Significantly, in 1981, almost all of the infant birds did not survive to adulthood.47

By the time the parties reached litigation, the predicted, continued effects of the diversions were hotly contested. However, it seemed apparent that aesthetic and ecological assets of the lake were in danger.48

C. The Water Board’s Decision of 1940

Following Los Angeles’ application for appropriative rights permits in 1940, the Water Board held hearings at which interested parties asserted their belief that the appropriations would lower the surface level and harm various commercial and recreational uses of Mono Lake.49 The principal authority by which the Water Board could deny Los Angeles’ permit application was a 1921 amendment to the Water Commission Act of 1913, allowing the Water Board to deny a permit “when in its judgment the proposed appropriation would not best conserve the public interest.”50 The 1921 amendment also “declared to be the established policy of this state that the use of water for domestic purposes is the highest use of water.”51 The Water Board was to be directed by this policy that domestic purposes was the most important use of water.52

Because DWP wanted to divert the water for domestic purposes – for use by the population of Los Angeles – the Water Board granted the application. The Water Board believed it had no choice under the 1921 amendment, regardless of the damage to the public trust uses of Mono Lake.53 The Water Board made note of its belief that it had no choice under the law in its decision:

It is indeed unfortunate that the City’s proposed development will result in decreasing the aesthetic advantages of Mono Basin but there is apparently nothing that this office can do to prevent it. The use to which the City proposes to put the water under its Applications is defined by the Water Commission Act as the highest to which water may be applied and to make available unappropriated water for use by the City has . . . acquired the littoral and riparian rights on Mono Lake and its tributaries south of Mill Creek. This office therefore has no alternative but to dismiss all protests based upon the possible lowering of the water level in Mono Lake and the effect the diversion of water from these streams may have upon the Court notes that this was not the only basis upon which the Water Board could have rejected Los Angeles’ permit application: it could have done so on the theory that the stream waters were already had a beneficial use or that DWP’s proposal made an unreasonable use of water, violating article X, section 2 of the California Constitution. Nat’l Audubon, 658 P.2d at 714. Unfortunately, a bitter battle transpired for over half a century because the Water Board did not consider either of these theories upon which the permit could have been denied.

51. [Cal. Water Code § 1254 (West 1971)].
52. Id.
54. Division Water Resources Decision 7053, 7055, 8042 & 8043, at 26 (Apr. 11, 1940).
aesthetic and recreational value of the Basin.\textsuperscript{54}

The Water Board was mistaken in its belief. In theory, the Board could have denied Los Angeles' application on the basis of the previously discussed provision of the California Constitution. In \textit{National Audubon}, the California Supreme Court noted that the Board could have declared the feeder streams were already put to beneficial use or that DWP suggested an unreasonable use of the water, violating Article X, § 2 of the California Constitution.\textsuperscript{55}

The Water Board failed to reach a decision in the 1940s that could have avoided both continued harm to Mono Lake's ecosystem and continued conflict between Los Angeles and environmentalists, which ultimately led to litigation. By the time the National Audubon litigation began, the Water Board had known for approximately forty years that the diversions would damage the aesthetic, ecological, and recreational values of Mono Lake.

D. United States Supreme Court Decision in \textit{Arizona v. California} (1963)

The United States Supreme Court ruled in \textit{Arizona v. California} that Arizona and Nevada were entitled to three million acre feet of water from the Colorado River, a significant source of water for California.\textsuperscript{56} In 1964, the Supreme Court limited California's allocations,\textsuperscript{57} requiring California to resort to other sources of water. This decision led to the increased diversion from the Mono Lake feeder streams in 1969, as DWP, California's largest water user, increased its diversion to over 20,000 acre-feet per year.\textsuperscript{58} This new diversion amount represented approximately seventeen percent of Los Angeles' water supply.\textsuperscript{59} By 1979, the Mono Lake feeder streams supplied almost twenty percent of Los Angeles' water.\textsuperscript{60}

As a result of increased diversions from the Mono Basin following the U.S. Supreme Court decision in \textit{Arizona v. California}, the level of Mono Lake dropped rapidly.\textsuperscript{62} The increased diversions, making up for the loss of water from the Colorado River, resulted in exposure of the land bridge, which caught the attention of environmentalists.

E. The Mono Lake Committee and Environmental Activism

Environmentalists' concern for Mono Lake ultimately resulted in "Save Mono Lake," a public education campaign, which generated thousands of bumper stickers and an unexpected "rise of the environmental ethic and the force with which that ethic would be brought to bear."\textsuperscript{63} However, the campaign's enthusiasm and informed concern for Mono Lake began with a small group of scientists and environmentalists who became alarmed about the health of the lake and its ecosystem in the 1970s.

David Gaines, a Stanford-educated biologist, ornithologist, and ecologist spent a year doing research at Mono Lake in 1975 in conjunction with his teaching job at the University of California at Davis.\textsuperscript{64} In 1976 he quit his Davis teaching job and spent the next two years traveling throughout California, lecturing to Sierra Club and National Audubon Society chapters to stir interest in the damage done by Los Angeles to the lake that he loved.\textsuperscript{65}

In 1978, Gaines and his wife founded the Mono Lake Committee with a small group of people that were also passionate about the lake.\textsuperscript{66} They set up Committee headquarters in the small tourist town of Lee Vining, on the eastern entrance to Yosemite National Park and western shore of Mono Lake.\textsuperscript{67} They sold t-
shirts and distributed bumper stickers to residents of cities throughout the State, saying "Save Mono Lake." Gaines was pivotal in bringing together various environmental groups to file the National Audubon lawsuit and creating national recognition of the Los Angeles diversions.

F. Failed Proposals
Prior to filing the National Audubon lawsuit, the Mono Lake Committee proposed a wet year/dry year solution, allowing Los Angeles diversions during dry years, but prohibiting diversions in wet years when Los Angeles could obtain water from other sources. This proposal likely failed for two reasons. First, there were few scientific studies to support the environmentalists' belief that further diversions would irreparably damage Mono Lake. Much of what the environmentalists' suggested was considered conjecture. Second, the Water Board's decision in the 1940s left DWP with the impression that public interest groups could not challenge Los Angeles' water rights. The Mono Lake Committee and other environmental groups' activism also initiated creation of a State task force. In 1979, the task force issued a scheme for preserving the Mono Basin natural resources. However, Los Angeles did not implement the task force's plan, blaming high costs. Failure of this plan directly led to filing the National Audubon litigation.

III. The Mono Lake Litigation and Landmark Decision

A. Litigation
In 1979, the National Audubon Society, the Mono Lake Committee, and other environmentalists who observed the negative impacts, particularly the rapid decline in the level of Mono Lake, filed suit in Superior Court. They sought to enjoin diversions by DWP on the theory that the public trust doctrine protected the shores, bed, and waters of Mono Lake. DWP filed a motion for change of venue that was granted, transferring the case to Alpine County. In January 1980, DWP filed a cross complaint against over one hundred parties claiming water rights in the Mono Basin. The United States, one of the cross defendants, removed the case to the United States District Court for the Eastern District of California in February 1980.

Under the doctrine of federal abstention, the federal district court stayed its proceeding, and asked the California Superior Court to resolve two issues: whether there was a conflict between the appropriative water rights system and the public trust doctrine, and whether the plaintiffs had to exhaust their administrative remedies with the Water Board before filing suit in court.

Responding to the federal court's abstention order, the plaintiff environmentalists filed a complaint for declaratory relief in the Superior Court of Alpine County. In November 1981, the Superior Court entered summary judgment in favor of defendants on both issues, finding that the public trust doctrine did not provide a basis for plaintiffs to
challenge the diversions and that they did not exhaust the required administrative remedies.\textsuperscript{81} On the issue of the relationship between the public trust and appropriative water rights systems, the Superior Court found that the public trust is not a system that functions independently of the appropriative water rights system.\textsuperscript{82} Further, the Superior Court found that the "as regards the right of the City of Los Angeles to divert waters in the Mono Basin that the Public Trust Doctrine is subsumed in the water rights system of the state."\textsuperscript{83} As for the exhaustion of administrative remedies, plaintiffs needed to challenge the Mono Lake diversions under a public trust claim before the Water Board or a claim that the appropriated water was being put to an unreasonable or non-beneficial use.\textsuperscript{84}

Plaintiffs petitioned the California Supreme Court for a writ of mandate to review the Superior Court's decision.\textsuperscript{85} The California Supreme Court agreed to review the Superior Court's decision because of the significance of the issues at stake.\textsuperscript{86}

\textbf{B. The California Supreme Court Decision in National Audubon Society v. Superior Court}

\textbf{1. Applicability of the Public Trust Doctrine to Prior Appropriation Water Rights}

The California Supreme Court issued a peremptory writ of mandate ordering the Superior Court to vacate its judgment and enter a new judgment consistent with the Supreme Court's opinion.\textsuperscript{87} The Court stated that the "core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters."\textsuperscript{88} According to the Court, the State's sovereign authority applies to the Mono Lake feeder streams and prohibits an entity such as DWP or others from obtaining vested rights where it is evident that interests protected by public trust are harmed by the diversions.\textsuperscript{89}

In Marks v. Whitney, the California Supreme Court applied the public trust doctrine tideland and lakeshore waters, and determined that the public trust protections include ecological and recreational values, not merely commercial and transportation needs.\textsuperscript{90} The National Audubon Court adapted the Marks v. Whitney holding to flowing bodies of water.\textsuperscript{91} The public trust doctrine therefore protects the environmental values and ecologically vital instream uses of waters subject to diversion. Furthermore, the National Audubon Court held that the public trust doctrine applies to non-navigable waters, particularly Mono Lake's feeder streams that are non-navigable, to the extent that appropriations of non-navigable waters harm navigable waters, in this case Mono Lake itself.\textsuperscript{92}

The California Supreme Court noted that the realities of California are such that the State must have the power to allow water to be diverted; the diversions are necessary to the State's success and the ability of people to live in a state with widespread areas characterized by desert climate.\textsuperscript{93} Therefore, the Court said that the State must have the power to grant appropriated water rights even where public

\begin{itemize}
  \item \textsuperscript{81} Id.
  \item \textsuperscript{82} Id. at 718.
  \item \textsuperscript{83} Id.
  \item \textsuperscript{84} Id.
  \item \textsuperscript{85} Id.
  \item \textsuperscript{86} Id.
  \item \textsuperscript{87} Id. at 732-33.
  \item \textsuperscript{88} Id. at 713.
  \item \textsuperscript{89} Id.
  \item \textsuperscript{90} Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971). The Marks case is most widely known for its extension of the public trust "to encompass changing public needs." Sax et al., Water Resources, supra note 11, at 536 (citing Marks, 491 P.2d at 380).
  \item \textsuperscript{91} Nat'l Audubon, 658 P.2d at 712.
  \item \textsuperscript{92} Id. at 721.
  \item \textsuperscript{93} The Court noted such requirements were those not linked to navigation, commerce, recreation, and ecology. Id. at 712.
\end{itemize}
trust uses may be harmed. However, these rights must be non-vested. In addition, just because the rights can be granted does not mean that they may be granted without first considering the negative impacts on the public trust uses. In the instant case, the Water Board had declined to consider the public trust impacts of DWP's water diversions when approving DWP's appropriative rights. Because the Court believed lack of any such consideration could result in wasteful damage to the public trust uses, the Court stated “we believe that before the state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests. Thus, because no such consideration occurred, the Court required a study of the Mono Basin water rights and an assessment of the potential and means to integrate the public trust doctrine and the appropriative rights system.

2. The State’s Powers and Duties as Trustee

To arrive at its conclusion that at the heart of the public trust doctrine is the State’s authority as sovereign to supervise and manage its navigable waters, the National Audubon Court traced the history of public trust powers in California. The Court began by pointing out that in its review of public trust law, the "dominant theme is the state’s sovereign power and duty to exercise continued supervision over the trust." As a result, any parties who acquire rights in public trust property may not obtain a vested right and acquire the property subject to the public trust. Several significant cases set the doctrinal foundation for the National Audubon Court’s extension of the public trust doctrine to the appropriative water rights system. The United States Supreme Court decision in Illinois Central Railroad Company v. Illinois continues to be the principal authority for public trust law, recently acknowledged as such by the California Supreme Court in City of Berkeley v. Superior Court. In 1886, the Illinois Legislature granted the railroad almost the entire Lake Michigan waterfront in Chicago-1,000 acres of lands under water in fee simple. The Illinois Legislature desired to revoke the grant legislatively a few years later. The U.S. Supreme Court upheld this revocation on the basis that the lands under waters, which may be conveyed to private individuals to construct docks and other structures that further public trust purposes could be granted without being subject to the trust, but not all of the land could be so conveyed, as was done here. The problem with such a conveyance was that it would prohibit any future legislatures from defending the public’s interests. The Supreme Court declared:

A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them... than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated...
to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waterways, they cannot be placed entirely beyond the direction and control of the State.\footnote{99}

Thus, any grant of virtually all of the public trust lands related to a waterway is by its nature revocable by the State at any time.\footnote{100}

Although the grant is revocable by the state at any time, expenses that may have been incurred related to the improvements should be paid for by the state.\footnote{101} Nonetheless, land held in public trust may not be disposed of by the legislature except in cases where such grant actually improves the public interest in the parcel or where such is done without detriment to the lands subject to the trust.\footnote{102}

In 1913, the California Supreme Court first applied the Illinois Central decision in People v. California Fish Company.\footnote{113} In California Fish, under statutory authority, state commissioners granted title to approximately 80,000 acres of tidelands to private owners. The California Supreme Court enunciated that courts will carefully scrutinize a statute conveying public trust property to the point where the conveyance equates to an abandonment of the property; the court will determine if the abandonment was the legislature's intent.\footnote{114} The intent must be express or a necessarily inferred from the language of the statute.\footnote{115} If any reading of the statute does not harm or destroy a public trust interest, the statute should be given the non-destructive interpretation by the courts.\footnote{116}

Once the California Supreme Court applied these guiding principles, it determined that the grant was not made for purposes that benefited the public trust interests, and therefore, the recipients did not own absolute title to the property.\footnote{117} The property was subject to easements for navigation and commerce by the public. In addition the state possessed to come on to the property and make any improvements the State deemed necessary for the advancement of the public good.\footnote{118} Therefore, the State did not reacquire the property; instead, the grantees retained the property subject to the public trust.\footnote{119}

In Boone v. Kingsbury,\footnote{120} decided in 1928, the California Supreme Court had further occasion to apply the public trust doctrine. The California Legislature had given power to the Surveyor-General to lease public trust lands to drill for oil.\footnote{121} Applying guidance provided in Illinois Central, the California Supreme Court sustained the statute on the basis that the drilling derricks would not significantly impede the public trust.\footnote{122} However, any licenses granted under the statute continued to be subject to the trust, including the right of the State to remove the structures at any time upon finding of substantial interference with the trust.\footnote{123}

Finally, in City of Berkeley v. Superior Court,\footnote{124} the California Supreme Court considered whether Board of Tidelands deeds, executed under authorization by an 1870 act, transferred title free of the public trust.\footnote{125} Again, applying guidance from the previous cases, the Court held the grantees' title nevertheless remained subject to the public trust.\footnote{126} The Court's reasoning was two-fold: first the Legislature did
not clearly articulate its intention to permit conveyances free of the public trust, and second, the 1870 act and the conveyances pursuant to it did not further trust purposes.\textsuperscript{2}

The \textit{National Audubon} Court summarized all of the previous cases to indicate the enduring power of the State as manager of the public trust.\textsuperscript{7} The power even reaches to allow withdrawal of previously granted rights or the use of the trust on lands believed unencumbered by the trust.\textsuperscript{2} The public trust is "more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, [and] lakes . . . surrendering that right of protection . . . only when the abandonment of that right is consistent with the purposes of the trust.\textsuperscript{3}"

Thus, the public trust doctrine was well established in California when the Mono Lake litigation made its way to the courts.

\section{3. The California Water Rights System: Limiting and Regulating Usufructuary Interests}

Following its discussion of the history of public trust in California, the Supreme Court proceeded to a discussion of the California water rights system. The Court first noted that California cases do not speak of water ownership; instead, they speak only of the right to use water.\textsuperscript{131} Likewise, Water Code \textsection{102}\textsuperscript{132} states, "[a]ll water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law."\textsuperscript{133} In other words, property rights in water appropriations are usufructuary, not possessory, interests.

A significant defining feature of appropriation rights in \textit{National Audubon} was the California Constitution provision that declares the water policy for the State:

It is hereby declared that because of the 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 use 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 this 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.\textsuperscript{134} Therefore, all uses of water are inherently limited by a standard of reasonable use.\textsuperscript{135}

The constitutional amendment did not enlarge Water Board's authority. Statutes and case law, however, expanded the Water Board's power gradually over time to watch over the reasonable use of water.\textsuperscript{136} In 1955, the Legislature stated that the Water Board was to consider the benefits to be derived from beneficial uses of water including instream uses like the preservation of fish and wildlife and recreational uses.\textsuperscript{137} The Water Board was further authorized by the Legislature to make appropriations conditioned upon requirements that best serve the public interest.\textsuperscript{138} Subsequent Water Code provisions similarly made reference to the public interest and the Water Board's authorization to take the public interest in consideration.\textsuperscript{139}

\begin{itemize}
  \item \textsuperscript{127} Id.
  \item \textsuperscript{128} Nat'l Audubon, 658 P.2d at 723.
  \item \textsuperscript{129} Id.
  \item \textsuperscript{130} Id. at 724.
  \item \textsuperscript{131} Id.
  \item \textsuperscript{132} Cal. Water Code \textsection{102} (West 1971).
  \item \textsuperscript{133} Id.
  \item \textsuperscript{134} Cal. Const. art. X, \textsection{2}.
  \item \textsuperscript{135} Nat'l Audubon, 658 P.2d at 725.
  \item \textsuperscript{136} Id. at 726.
  \item \textsuperscript{137} Id.; Cal. Water Code \textsection{1257} (West 1971).
  \item \textsuperscript{138} Nat'l Audubon, 658 P.2d at 726.
  \item \textsuperscript{139} Id.; See Cal. Water Code \textsection{1243} (West 1971); Cal. Water Code \textsection{1243.5} (West 1971).
\end{itemize}
Case law likewise expanded the Water Board's powers. One of the expanded powers included the power to enjoin diversions by the owner of a prescriptive right who would not comply with conservation programs. Another case declared the power of the Water Board to grant an appropriation application a quasi-judicial act. Thus, implicitly by the California Constitution's limits on water rights, and explicitly by legal standards advanced by statutes and case law, the Water Board has obtained the duty to comprehensively plan and allocate the State's waters. The California Supreme Court stated that this progression affects the Water Board's public trust responsibilities. The Water Board has the power and function to balance public trust principles with appropriative rights, and to effectuate the public trust doctrine's values by regulating water rights.

4. Integration of the Two Systems
The public trust and appropriative rights systems each developed separately from the other with their own set of rules. The California Supreme Court declared itself unable to choose either position that subscribed to only one system or the other. The Court stated: "In our opinion, both the public trust doctrine and the water rights system embody important precepts which make the law more responsive to the diverse needs and interests involved in the planning and allocation of water resources. To embrace one system of thought and reject the other would lead to an unbalanced structure."

With these perspectives as a foundation, the Court reached three conclusions. First, the State as sovereign must manage its navigable waters and the lands lying underneath. Second, reality dictates that the Legislature or an authorized administrative body must have the power to grant licenses that allow an appropriator to use water even though such use may harm public trust uses. Third, the power to grant such licenses is conditioned on the positive duty of the State to consider the public trust in planning and allocation of water resources and to protect public trust uses whenever possible. In National Audubon, the Court ruled that the State -- and more specifically, the Water Board -- had not fulfilled its obligation contained in the Supreme Court's third conclusion: the duty of the State to consider the public trust in water allocation.

Therefore, the Court declared the California system of water rights an integration of both the public trust doctrine and appropriative rights. The Court stated that the plaintiffs could rely upon the public trust doctrine to request re-evaluation of the Mono Basin allocations.

5. Exhaustion of Administrative Remedies With the Water Board
The California Supreme Court next considered the second issue presented: whether the environmental plaintiffs were required first to exhaust their administrative remedies with the Water Board before seeking relief in court. The Court acknowledged the experience and proficiency of the Water Board for appropriative rights and public trust use issues, supporting a grant of primary jurisdiction to the Water Board. However, the Court also noted that under California precedent, the courts have concurrent jurisdiction with the Water Board for water rights disputes.

142. Nat'l Audubon, 698 P.2d at 726.
143. Id.
144. Id. at 727.
145. Id.
146. Id.
147. Id.
148. Id. at 728.
149. Id. at 732.
150. Id.
151. Id. at 729.
152. Id. at 713.
153. Id.
Furthermore, the California Legislature acknowledged such concurrent jurisdiction by implication by creating a system where the courts can ask the Water Board to act as referee of water rights controversies. Because of this procedural grant by the Legislature, the National Audubon Court held that courts may carry on using their concurrent jurisdiction. However, they should also not hesitate to ask the Water Board to referee cases where their particular knowledge would be especially helpful in resolving the conflict.

Because the courts and the Water Board possessed concurrent jurisdiction over the matter, the Court did not require the plaintiffs to exhaust their administrative remedies. However, the key to the eventual success of the public trust doctrine and its use by environmentalists to reduce diversions from the Mono Basin lies in the final words of the Court's opinion: "we do not dictate any particular allocation of water." This task was left for the Water Board.

IV. The Aftermath of National Audubon

A. The Supreme Court Decision: A Clever Catalyst for Compromise

The California Supreme Court did not mandate any particular water allocations in its National Audubon decision. The Court declared that the mere clarification of water rights in California was the first move forward in the ultimate solution for the Mono Basin dispute. Resolving the legal issues was the Court's primary objective. The Court hoped "by integrating these two doctrines . . . [it would] clear away the legal barriers which have so far prevented either the Water Board or the courts from taking a new and objective look at the water resources of the Mono Basin."

Thus, the Court communicated to the parties involved that they had the responsibility to seek creative and novel ways to solve the problem. The Court essentially acknowledged that the parties with such important interests at stake - on one hand the water supply for the City of Los Angeles, and on the other, the aesthetic and ecological preservation of an important water resource - were in the best position to come up with a solution. Courts are ill-suited by function, process, and expertise to achieve win-win compromises to conflicts having important non-legal dimensions. Removal of the legal barriers catalyzed the move from conflict to cooperation. Eventually, the parties reached a cooperative solution to the problem, but not until the conflict persisted for ten years after the National Audubon decision.

B. Continuing Litigation: The Feeder Streams Litigation

Following the National Audubon decision, environmental groups pursued a number of lawsuits with the dual purposes of water level and ecosystem preservation. This time they used a strategy assisted by a natural phenomenon. During wet winters in the 1980s, the dams overflowed and allowed previously absent trout to enter the Mono Lake feeder streams. The trout became the object of litigation to ensure continuing adequate water levels in the streams and therefore reduced diversions.

The litigation was brought under provisions of the California Fish and Game Code rather than the public trust doctrine. Section 5946 of the Fish and Game Code states that no water appropriation permit or license can be issued in either Mono or Inyo counties after September 8, 1953, unless the applicants comply with Fish and Game Code § 5937, adopted by a 1937 statute. Section 5937 requires dam operators to allow enough water to flow through, around, or over the dam to maintain the fish below the dam. Los Angeles com-

154. Id. 155. Id. 156. Id. 157. Id. at 732. 158. Id. 159. Id. 160. Id. 161. CAL. FISH & GAME CODE §§ 5937, 5946 (West 1998). 162. Id.
menced diversions of water from the Mono Basin in 1941 under an earlier-issued permit. However, DWP did not obtain licenses for the diversion facilities until 1974. 163

Between 1984 and 1986, environmental groups, including the Mono Lake Committee, the National Audubon Society, and California Trout, Inc, filed four lawsuits under Sections 5937 and 5946 concerning the instream flows of Rush, Lee Vining, Walker, and Parker Creeks, which are four of the five Mono Lake tributaries. 164 The plaintiffs contended that the Water Board, in issuing licenses to DWP in 1974, violated State laws requiring maintenance of minimum flows to protect the fish populations in the streams.

In 1984, the Mono County Superior Court issued a temporary restraining order requiring DWP to release 9 cubic feet per second (cfs) of water into Rush Creek, which became a preliminary injunction in 1985. In 1986, the Court issued a temporary restraining order compelling the release of 10 cfs into Lee Vining Creek, which was modified to become a 1987 preliminary injunction compelling a release of about 4 cfs.

In one of the lawsuits, California Trout, Inc. v. Superior Court (hereinafter “California Trout I”), the Sacramento County Superior Court denied the environmental groups’ petitions for writs of mandate to compel the Water Board to rescind DWP’s licenses under the Fish and Game Code provisions. 166 The California Court of Appeal, Third District, reversed the trial court. 167 The appellate court held that the Water Board was required to apply Sections 5937 and 5946 and, in so doing, modify DWP’s licenses to ensure minimum stream flows to support fish populations. 168 The court rejected arguments that DWP had vested water rights to which the Fish and Game Code provisions had been improperly applied retroactively and that fishery uses could not be favored over domestic uses. 169

On remand, the Superior Court mandated that DWP stabilize stream flows to maintain the fisheries, but allowed the Water Board three years to comply until it had completed environmental studies. The Superior Court denied interim relief to the environmentalists. On appeal (“California Trout II”), 170 the California Court of Appeal again reversed the trial court, directed the court to set interim flow releases for the four streams tributary to Mono Lake, and directed the Water Board to impose immediate conditions on DWP’s licenses to comply with California Trout I. 171

In essence, the successful curtailment of diversions that resulted from this litigation marked another shocking victory for the environmental groups. Another victory helped to lessen the perceived strength of DWP’s position. Again, DWP’s position had been created, at least in part, by the Water Board’s mistaken belief that it was powerless to limit the diversions.

C. Mono Lake Committee Activism and Endurance

The environmentalists’ persistent activism and efforts at both public education and problem solving were at least as critical to their success at saving Mono Lake as their legal victories were. The Mono Lake Committee, under the leadership of David Gaines, gradually came to exercise significant influence not only over the use of water in the Mono Basin but also over water usage in Southern California generally. 172 Gaines was pivotal in gaining state


164. The facts concerning this feeder stream litigation throughout this subsection come from three sources: LITTLEWORTH & GARNER, supra note 36, at 98-102; Crabbe, supra note 1; and Mono Basin Clearinghouse, Political and Legal Chronology, at http://www.monobasinresearch.org/timelines/polchr.htm (last visited Oct. 8, 2001).


166. Id. at 186.

167. Id. at 187, 213.

168. Id. at 191-98, 209-13.

169. Id. at 198-209.


171. Id. at 802-04.

172. Sauer, supra note 64.
reserve and national forest scenic area designation for the shore area surrounding Mono Lake in the early 1980s and national recognition of the Los Angeles diversions.\textsuperscript{173}

The Committee achieved public recognition of the Mono Lake problem primarily through the “Save Mono Lake” campaign. The campaign generated thousands of bumper stickers with the slogans “Save Mono Lake,” “Long Live Mono Lake,” “I Save Water For Mono Lake,” “Restore Mono Lake,” and “Mono Lake: It’s For the Birds.”\textsuperscript{174} This public education campaign included an information center and bookstore in Lee Vining, California, interpretive tours at Mono Lake, publications and a website, information presentations and slide shows for various groups, and both at-school and outdoor informational programs for Los Angeles area youth and children.\textsuperscript{175}

The public education campaign generated an unexpected “rise of the environmental ethic and the force with which that ethic would be brought to bear.”\textsuperscript{176} The Committee gained more than 20,000 members.\textsuperscript{177} Significantly, the public education campaign had a substantial impact on the attitudes of Southern California residents, the consumers of water diverted from the Mono Lake tributaries.

Tragically, in January 1988, both Gaines and his assistant were killed in a car accident five years after the California Supreme Court decision in \textit{National Audubon}.\textsuperscript{178} His successor, Martha Davis — a Stanford graduate with a master’s degree in forest science from Yale — proved to be a major force, continuing the work of the Committee’s founder.\textsuperscript{179} The Committee devoted attention not only to saving Mono Lake but also to seeking creative solutions to the growing demand for water in Southern California, out of concern that reduced diversions from Mono Lake merely would be replaced by harmful diversions from another equally important water basin.

At first, DWP tried to ignore the Mono Lake Committee with its highly educated leaders, graduate students, summer interns, and other activists.\textsuperscript{180} Just a month before Gaines’ death, in December 1987, DWP finally agreed to work with the Mono Lake Committee to reach a long-term preservation solution.\textsuperscript{181} Beginning in 1989, city officials publicly began to acknowledge the group’s strength and victories.\textsuperscript{182} DWP’s assistant general manager at that time, Duane Georgeson, said “they have been a well-organized, effective group for a long time . . . [t]hey’ve done a pretty good job mobilizing public opinion.”\textsuperscript{183}

\section*{D. Reframing and Negotiation}

For a long time, “DWP portrayed the fight as ‘win-lose’ — if Mono Lake won, L.A. would lose.”\textsuperscript{184} In May 1991 Martha Davis, executive director of the Mono Lake Committee, perceived that this attitude was changing. She believed a compromise could be reached that would make certain Los Angeles receives water it requires, while Mono Lake is preserved.\textsuperscript{185} The Mono Lake Committee wisely acknowledged early in the conflict that it would not be effective to argue whether Los Angeles had the rights to the water.\textsuperscript{186} The Committee instead focused on ways to achieve Mono Lake protection and protection of other water sources, while finding ways to address Southern California’s water needs.\textsuperscript{187}

\textsuperscript{173} Id.
\textsuperscript{174} Water Diversions at Mono Lake, at http://www.livinglakes.organization/mono/diversions.htm.
\textsuperscript{175} Id.
\textsuperscript{176} Koehler, supra note 17, at 564.
\textsuperscript{177} Water Diversions at Mono Lake, supra note 174.
\textsuperscript{178} Sauer, supra note 64.
\textsuperscript{179} Kevin Roderick, Selling a Lake; Tenacious Mono Backers Use Sophisticated Tactics to Beat DWP to its Knees, \textit{Los Angeles Times}, Sept. 24, 1989, at 3.
\textsuperscript{180} Id.
\textsuperscript{181} Sauer, supra note 64.
\textsuperscript{182} Roderick, supra note 179.
\textsuperscript{183} Id.
\textsuperscript{185} Id.
\textsuperscript{186} Roderick, supra note 179.
\textsuperscript{187} Id.
The previously discussed factors had a significant impact in moving the parties toward cooperation because they each chipped away at the strength of DWP's position. DWP previously seemed to have a stranglehold on the water rights, with other interested parties left without legal recourse. DWP appeared to have underestimated the potential for a loss in the National Audubon decision on the issue of whether the public trust doctrine applies to "well-settled" appropriative rights or the likelihood that the California Supreme Court would fashion a decision requiring negotiation and compromise. According to a well-informed Mono Basin water controversy follower, the National Audubon decision shocked many people including lawyers and water management personnel.188

DWP also failed to consider that the environmentalists would pursue other creative avenues of litigation - the feeder stream cases. Not only did the environmentalists pursue creative legal claims, but their claims were effective. The sheer activism and endurance by the Mono Lake Committee also played a significant role. Perhaps most surprising of all, the environmentalists greatly influenced public opinion, including the attitudes of DWP's customer, towards protecting Mono Lake.

A significant factor in motivating Los Angeles to consider conservation measures was a drought beginning in 1986.189 Another important factor in moving the parties toward cooperation was 1989 state legislation that conditionally set aside sixty million dollars to help pay for a substitute supply of water for Los Angeles.190 The legislation provided an incentive for cooperation. To qualify for the funds, Los Angeles was required to reach agreement with the Mono Lake Committee concerning the source of the substitute water.191 The legislation reflected the environmentalists' concerns about protecting other watersheds from excessive diversions that might substitute for the reductions in diversions from Mono Lake's tributaries. Furthermore, in 1992, Congress authorized federal funds for reclamation of 120,000 acre-feet of water to offset reduced diversions from Mono Lake.192

The available funding did not bring the parties into agreement quickly, however. The parties did not reach agreement until four years after the legislation was enacted. California Assemblyman Phillip Isenberg, a Democrat from Sacramento who co-authored the legislation, was quoted as saying "[f]rankly, I never expected it to take so long to give away this money."193 To help make the compromise happen, Governor Pete Wilson promised that the State of California would match twenty million dollars in funds beginning in the 1994-1995 fiscal year.194

Cooperation finally occurred after Los Angeles Councilwoman Ruth Galanter brokered the negotiations.195 Ms. Galanter described the negotiations as overcoming paranoia by two groups that distrusted and were openly hostile toward one another.196 Additionally, Los Angeles Mayor Richard Riordan replaced four DWP commissioners with new appointees that were eager to leave the past behind and cooperate.197 Thus, in addition to the other previously discussed factors, the passage of time and new faces at the negotiation table were important to a resolution of the conflict.

In December 1993, the parties finally reached agreement. Martha Davis, the

191. Id.
194. Id.
195. Id.
196. Id.
197. Id.

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Executive Director of the Mono Lake Committee called the agreement "the political equivalent of the Camp David accord." This agreement marked the first time Los Angeles voluntarily relinquished any of its water rights in favor of an alternate source. In 1997, the representatives of both DWP and the National Audubon Society signed a memorandum agreement for the construction of the water reclamation plant in the San Fernando Valley with an eventual capacity to recycle 35,000 acre-feet of water.

E. Water Board Decision 1631 (1994)

The agreement reached by DWP and the environmentalists facilitated a decision by the Water Board concerning the amount of water that DWP is entitled to divert from the Mono Basin. The decision was made eleven years after the California Supreme Court directed the Water Board to balance the public trust with DWP's water rights and determine the diversions permitted. Following forty-four days of hearings before the Water Board, the Board — by unanimous vote — required Los Angeles to significantly reduce diversions from the Mono Basin to no more than 12,000 acre-feet per year, graduated over time, until the Mono Lake water level rises sixteen feet. The Water Board decision allows an increase in diversions to 25,000 acre-feet per year once the water level rises by sixteen feet — a level that both sides predict will take between twenty-five and thirty years to occur.

The Water Board established minimum flow rates for each feeder stream for various yearly precipitation scenarios. The Water Board relied primarily on California Department of Fish and Game recommendations for the flow rates. The Water Board concluded that these feeder stream flows would cause Mono Lake to rise to roughly 6,390 feet. However, to comply with federal air quality standards, the Water Board set the required average lake level at 6,392 feet to reduce the blowing of particulates. This level was also chosen to protect public trust resources including the California gull and other migratory birds' nesting habitats, brine shrimp productivity, public access to the lake's tufta towers, compliance with water quality standards, and enhancement of the aesthetic values of the lake.

Furthermore, the Water Board supplemented Decision 1631 with an order in 1998 establishing stream and waterfowl habitat restoration plans pursuant to the parties' agreement. This 1998 order is designed to effectuate Decision 1631 with ecosystem restoration and monitoring measures, and effectively ends the courts' jurisdiction over the Mono Lake controversy.

Decision 1631 ended the fifteen-year battle the environmental groups launched to stop the negative impacts on Mono Lake when DWP indicated it would not appeal the Water Board's decision. Both the National

198. Id.
200. Cone, supra note 193.
201. Id.
204. Brazil, supra note 202.
207. Decision 1631 at 154.
208. Decision 1631 at 132, 154.
211. Brazil, supra note 202.
Audubon Society and the Mono Lake Committee were extremely pleased by the Water Board's decision. The National Audubon Society described the decision as "an environmental victory of lifetime proportions" and the Mono Lake Committee described it as "the breakthrough environmental decision on water," protecting Mono Lake and prompting Los Angeles to find local sources to replace the distant diversions.

F. Reclamation and Conservation Efforts

An important aspect of the compromise between DWP and the environmentalists was a major reclamation and conservation program. The program is designed to replace reduced diversions from Mono Lake with reduced demand for water appropriations, instead of diversions from other water bodies that would harm the ecosystems and public trust values associated with those water bodies.

In June 1990, the Los Angeles City Council approved a recycling goal of forty percent of Los Angeles' wastewater by 2010. The East Valley Water Recycling Project will begin distributing water to spreading grounds in Los Angeles which will in turn, within five years, pass through into groundwater basins in the city. This is DWP's biggest water recycling project and will eventually meet almost half of Los Angeles' 2010 recycling goal. An added benefit to this project is that it will also serve irrigation and industrial customers that lie along the route of the Recycling Project pipeline. According to the Mono Lake Committee, the capacity to recycle 35,000 acre-feet of water per year is enough to support 200,000 families per year, helping to offset some of the 78,000 acre-feet reduction in Mono Lake diversions required by the Water Board.

Recent conservation, including the efforts by Los Angeles residents, have allowed the existing Los Angeles water supply stretch further. In fact, even though an additional one million people moved into Los Angeles between 1975 and 1995, the City's water usage did not change. Other projects including the West Basin and East Valley reclamation facilities, other reclamation sources, and other conservation efforts are expected to recycle 141,250 acre-feet per year. In addition, the California Urban Water Conservation Council has developed a list of water conservation "Best Management Practices" expected to save 700,000 acre-feet of water annually in Southern California.

DWP has undertaken numerous other aggressive conservation strategies. To encourage conservation, Los Angeles' water rates are about twenty percent higher during the summer – a high water use season. DWP also provides Los Angeles residents with water conservation tools. For example, a Los Angeles resident may request free water conservation kits that include low-flow showerheads, water displacement bags for toilets, and dye tablets to help detect water leaks. A Los Angeles resident may also receive up to one hundred fifty dollars in rebates from DWP for purchasing and installing a high-efficiency washing machine. Similarly, DWP's Ultra-Low-Flush toilet rebate program provide a Los Angeles

212. Id.
213. Id.
217. Id.
218. Id.
220. Id.
221. Id.
223. Id.
resident up to one hundred dollars for replacing a regular toilet.\footnote{City of Los Angeles Department of Water and Power, \textit{City of Los Angeles Water Services Ultra-Low-Flush Toilet Rebate Program}, at http://www.ladwp.com/water/conserv/toilet/index.htm.}

The most important facet of these reclamation and conservation programs is that the programs do not draw new water from other sources. The programs reuse, recycle, and conserve used water. This is a major achievement for the environmentalists. Not only did they achieve preservation of the aesthetic and ecological values of Mono Lake, but the City of Los Angeles did not turn to and damage another water source in the State.

\section*{G. Progress}

Although it is too soon to make a definitive evaluation of the Mono Lake agreement’s effectiveness, there are promising developments in three areas that suggest the outcome of this conflict has had benefits. First, the level of Mono Lake has risen. As of October 1, 2001, Mono Lake was at 6,382.8 feet above sea level, which was a gain of 8.2 feet since the Water Board’s Decision 1631 in 1994.\footnote{Current Lake Level: Tracking the Progress of a Rising Lake, at http://www.monolake.org/live/level.htm.} Although the lake level experienced some decreases in 2000 and 2001 despite near normal runoffs, higher than normal runoff between 1995 and 1999 has put the lake level ahead of its schedule under normal runoff conditions to reach the target of 6,391 feet by 2021 (26 years after Decision 1631).\footnote{Reasonable Further Progress Report for the Mono Basin PM-10 State Implementation Plan 2 \& Fig. 2 (Sept. 2001).} Furthermore, there have been increases in water flows in the four creeks that were subject to the litigation, judicial decisions, and Water Board orders, and efforts are underway to restore stream channels and flows, and riparian habitats and ecosystems, despite the presence of damage from over forty years of excessive diversions.\footnote{Mono Basin Creeks: Rush, Parker, Walker, Lee Vining, Mill, at http://www.monobasinresearch.org/timelines/streams.htm.}

Second, Southern Californians have changed their water usage practices. The conservation and reclamation programs described above have had an impact. In 1998, the Metropolitan Water District (MWD) service area, which covers a significant portion of Southern California including Los Angeles (DWP), used the same amount of water as it had in 1983, fifteen years earlier, despite a population growth of about 30 percent.\footnote{Martha Davis, \textit{Stepping Outside the Box: Water in Southern California}, at http://www.monolake.org/waterpolicy/outsidebox.htm.} Indeed, MWD’s water sales dropped from 2.6 million acre-feet of water in 1990 to 1.5 million acre-feet of water in 1993.\footnote{Id.} Perhaps even more significantly, MWD and DWP are engaged in an effort to stabilize their supplies of water and become drought-resistant by pursuing five strategies: 1) conservation, which reduced the usage of water per person or per unit of economic activity; 2) reclamation, which reuses water; 3) storage, which places water in reservoirs when it is readily available for use when it is more scarce; 4) groundwater replenishment and storage programs; and 5) purchases of available water supplies in water markets.\footnote{See the following documents: \textit{Integrated Resources Plan; Water for Sale: Groundwater Boosts Local Supply; and Dividing the Water: A Colorado Plan That Ensures California’s Future}, at http://www.mwd.dst.ca.us/Docs/WaterReliability.htm.} It would appear that Southern California water agencies are responding to the potential uncertainty to water supplies posed not only by drought but also by litigation and judicial and administrative decisions limiting water rights to protect the environment. The Mono Lake conflict has contributed to a shift in Southern California water policy from rights-based approaches to management-based approaches.

Third, the Mono Lake Committee and other environmental groups have become active in other water law and policy issues. For example, the Committee works with Los Angeles area government and citizen groups on conservation ideas and policies as part of the Los Angeles Conservation Council. The Committee also has promoted state bonds for parks and water, become involved in negotiations over
the use and quality of water in the San Francisco Bay Delta, and lobbied for Federal ultra-low flush toilet regulations.\textsuperscript{232}

V. Making the Public Trust Doctrine Effective: The Real Public Trust

Commentators have described the public trust doctrine as a powerful and effective constraint on degradation of natural resources and their associated ecosystems.\textsuperscript{233} In particular, National Audubon has been regarded as one of the most important environmental law cases of the twentieth century because the California Supreme Court applied a common law principle as an inherent, albeit undelineated, limit on property rights that harm the environment.\textsuperscript{234} Other commentators have questioned the effectiveness of the public trust doctrine and other common law principles to achieve environmental protection or resolve conflicts between the economically productive use of natural resources and the protection of their ecological, aesthetic, and other non-commercial values.\textsuperscript{235} These commentators favor either regulation or market forces, instead of judicial oversight.

As this case study demonstrates, questions about the effectiveness of judicial decisions applying the public trust doctrine involve greater subtlety and nuance than might first appear. We might refer to the impact of judicial decisions and legal doctrine as "bounded effectiveness." In general, judicial decisions like National Audubon and doctrinal rules about the integration of the public trust doctrine with prior appropriation water rights systems are necessary, but not sufficient, to achieve the values behind the public trust. Non-litigation strategies are required to make the public trust effective in practice.

This "bounded effectiveness" is evident in both the Mono Lake litigation itself and the aftermath of National Audubon. In National Audubon, the California Supreme Court accomplished only three things. First, the Court resolved the legal issues presented to it, namely whether the public trust doctrine requires the elimination of recognized appropriative water rights that adversely affect navigable waters and if so, to what extent, and also whether the plaintiffs in the case had exhausted their administrative remedies or were required to do so. Second, the Court established both the legal authority and the legal duty of the Water Board to balance public trust values with appropriative water rights in all circumstances in which both legal interests might be implicated, as well as the power of the courts to enforce this obligation in future cases. Third, the Court issued a writ of mandate compelling the Water Board to reevaluate DWP's entitlements to water diversions by considering and balancing both the public trust doctrine and DWP's previously authorized water rights.

The National Audubon Court did not, however, establish the amount of water that DWP was entitled to divert from Mono Lake's tributaries. The Court did not resolve the conflict between Los Angeles and environmentalists, which persisted for ten years after the landmark decision was handed down. The Court did not identify any of the specific features of the compromise that ultimately solved the Mono Lake problem.

\textsuperscript{232} See http://www.monolake.org/waterpolicy/index.htm.


\textsuperscript{234} See Blumm & Schwartz, supra note 22, at 704.


\textsuperscript{236} With apologies to behavioral economics, we borrow from the terms "bounded rationality," "bounded willpower," and "bounded self-interest" to create the term "bounded effectiveness." See Christine Jolls et al., A Behavioral Approach to Law and Economics, 50 STAN. L. Rev. 1471 (1998).

\textsuperscript{237} See Part II, supra.
like reclamation and conservation, public education, and state funding. Furthermore, with respect to future conflicts between public trust values and appropriative water rights in other water systems, the Court did not establish bright-line rules for either courts or the Water Board to apply.\textsuperscript{238} Nor did the Court give either environmentalists or water appropriators much basis for evaluating the likelihood of winning or losing in subsequent public trust litigation. In short, the Court articulated only general principles, the specific meaning, content, and effectiveness of which would be determined in other forums and by non-judicial actors.

We contend, therefore, that the “real” public trust doctrine is defined by parties’ and decision makers’ non-litigation actions in light of judicially-determined general principles. If the parties to the Mono Lake dispute had not reached an acceptable solution, the public trust doctrine might have come to mean very little in the context of water rights. Of course, the environmental groups could have persisted with litigation to enforce the National Audubon decision and force the Water Board to reduce DWP’s legally permitted diversions. However, during continued conflict and non-resolution, further harm to the lake could have occurred while diversions continued. In addition, DWP could have found a replacement source of water to appropriate from another watershed, causing harm to bodies of water and their related ecosystems elsewhere. Further public trust litigation might have been needed to prevent such a replacement strategy or, more likely, to stop such replacement diversions after enough evidence of their harm could be gathered.

Perhaps more seriously, a completely rights-based “solution” limiting DWP’s rights to water appropriations generally in favor of the public trust might have generated political forces and public pressures that would have weakened the public trust doctrine altogether.\textsuperscript{239} It is not inconceivable that a large, thirsty Southern California electorate could have used the initiative process to pass a constitutional amendment limiting the public trust doctrine’s applicability to water rights.\textsuperscript{240} Likewise, courts and the Water Board might have weakened the application of the public trust doctrine to water rights in subsequent cases if the early disputes had not reached pragmatic solutions acceptable to the primary parties in interest.

We do not contend that either the public trust doctrine as a legal theory or litigation under the public trust doctrine is unimportant or unnecessary. Both the public trust litigation and the feeder stream litigation under the California Fish and Game Code played four critical roles. First, DWP’s losses upset its expectations that it had the right to use water without limits, therefore eventually bringing DWP to the bargaining table with the environmentalists. Second, the outcomes in both sets of cases shifted the relative bargaining power of the two parties towards greater power – both legally and psychologically – for the environmentalists than they had prior to the decisions. Third, the Water Board, for all practical purposes, “gained” authority and duty to consider environmental factors and public trust values in evaluating new and existing water rights generally, because the Court disabused the Board of its assumption that it had no such authority or duty.\textsuperscript{241} Finally, other water users are likely to reevaluate their positions and rethink conflicts and potential conflicts they may have with environmental interests over minimum instream flows, in light of the outcomes of National Audubon and the feeder stream litigation.\textsuperscript{242} In short, it was essential to

\textsuperscript{238} See Thomas, supra note 235, at 38-40; Williams & McHugh, supra note 235, at 155.

\textsuperscript{239} See Williams & McHugh, supra note 235, at 158.

\textsuperscript{240} Id.

\textsuperscript{241} For a discussion of the impact of National Audubon on subsequent cases and Water Board determinations and an argument that the Water Board has given effect to public trust principles in its decisions, see Gregory S. Weber, Articulating the Public Trust: Text, Near-Text, and Context, 27 ANNUAL SURVEY L.J. 1155 (1995).

have a judicial decision on the applicability of the public trust doctrine to water rights in order to have an “aftermath” to effectuate the doctrine.

Nonetheless, several non-litigation elements of the aftermath of National Audubon turned what could have been a doctrinally astonishing but practically ineffective judicial decision into effective protection for the Mono Lake ecosystem, as well as a model for subsequent conflicts between the public trust and appropriative rights. One of these elements was the ultimate choice by both sides to reframe the conflict.243 The parties initially appeared to perceive their dispute as a legal conflict over rights. They made substantial progress towards an efficient and effective solution when both sides perceived the conflict as a multi-faceted problem to be solved cooperatively, or at least by negotiation.

A closely related element was the creative pursuit of practical and feasible solutions that would maximize both sides’ interests.244 The environmentalists defined their interests as not just stopping or reducing diversions from Mono Lake’s tributaries. Instead, they understood that their interests encompassed the protection of all water sources that support ecosystems, and that a Mono Lake victory at the expense of another watershed would have meant failure. Likewise, the environmentalists insightfully perceived that DWP’s real interests revolved around an adequate, feasible, and reliable supply of water for its rapidly growing consumers. The environmentalists knew that DWP could accept reduced diversions if its interests could be met in other ways. The combination of conservation and reclamation programs enabled by state funding met the parties’ primary interests. The solution allowed for reduced diversions from Mono Lake’s tributaries without replacing that water with diversions from another watershed. It did so by enhancing supply from existing sources and stabilizing water supplies over time, and by reducing demand without reducing the urban growth and economic activity of Southern California.

An important factor in reaching agreement on this solution was public education and advocacy. Water disputes are highly political. Economic forces shape political forces, which in turn shape legal doctrine based on provisions of a state constitution amendable by the voters. Los Angeles officials needed clear evidence of public support for saving Mono Lake at the cost of DWP’s water rights. Conservation-based solutions would work only if consumers accepted them. In this political-economy context, the role of the public education campaign to “save Mono Lake” cannot be underestimated. Some elements of the public education and advocacy campaign involved information about Mono Lake’s valuable ecosystem and the harms caused by excessive water diversions. Other elements, especially the bumper stickers and the T-shirts, focused on building public support and enthusiasm, without detailed information. Both elements were critical to the effective application of public trust principles to the Mono Lake conflict.

A final factor important to the parties’ agreement was that of political leadership. State and federal leaders committed funding that served as both an incentive and a facilitator of a negotiated solution. Local officials replaced uncooperative DWP officials with leaders committed to cooperation and problem-solving. At least one official mediated the dispute. These leaders’ investment of political capital and public funds in reaching a solution that would maximize both parties’ interests not only reflected the success of the environmentalists’ public education and advocacy campaign but also moved the dispute past obstacles and delays to resolution.

243. For discussions on the importance of framing, see ROBIN HOGARTH, JUDGEMENT AND CHOICE 104-09 (2d ed. 1987); ROBERT H. MINICKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 207-09 (2000); J. EDWARD RUSSO & PAUL J.H. SCHDEMAKER, DECISION TRAPS 15-63 (1989).

244. The classic work on interest-based “win-win” negotiation is ROGER FISHER ET AL., GETTING TO YES: BARGAINING WITHOUT GIVING IN, 2d ed. (2d. ed. 1991).
VI. Conclusion

The Mono Lake conflict established the applicability of the public trust doctrine to appropriative water rights. The California Supreme Court's decision in *National Audubon Society v. Superior Court* gave judicial recognition to the public trust doctrine's potential limits on prior appropriation rights, and cleverly imposed on the Water Board the obligation to balance the two doctrines. The decision implicitly recognized that the real effectiveness of the doctrine could not be judicially mandated, but instead depended on the post-litigation actions of the parties. In the aftermath of *National Audubon*, both environmentalists and water appropriators moved towards practical and ultimately cooperative solutions of reduced diversions, publicly funded reclamation projects, and a broad conservation program. These solutions, arguably "win-win" in that they met the primary interests of both parties, emerged from a mix of litigation, reframing the conflict as a multi-faceted problem requiring solution, pragmatic assessment of the parties' respective interests, creative and practical ideas, public education and advocacy, and political leadership. The "real" public trust doctrine exists as much in the post-litigation interactions of parties that resolve conflicts and give effect to public trust values as it does in judicial decisions describing and announcing the doctrine's applicability.