Santa Clara University
School of Law

Santa Clara Law Review

Volume 23 | Number 1 Article 6

1-1-1983

The Public Trust Doctrine Expansion and Integration: A Proposed Balancing Test

Ted J. Hannig

THE PUBLIC TRUST DOCTRINE EXPANSION AND INTEGRATION: A PROPOSED BALANCING TEST*

I. INTRODUCTION

The public trust doctrine[1] is premised on the concept that the public's interest in certain natural resources[2] is a property right,[3] which both restricts the sovereign's power as trustee,[4] and subrogates private ownership rights in favor of public use rights.[5] The California Supreme Court in two re-

---

* The author gratefully acknowledges the editorial assistance of Mary Lynne Thaxter and Barbara J.S. Kalhammer.

1. For additional views on the public trust doctrine, see generally Conference Proceedings, *The Public Trust Doctrine in Natural Resource Law and Management.* (C. Dunning, ed. 1981) [hereinafter cited as Conference Proceedings]; *The Public Trust Doctrine in Natural Resources Law Management: A Symposium*, 14 U.C.D. L. REV. 181 (1980); Eikel & Williams, *The Public Trust Doctrine and the California Coastline*, 6 URB. LAW. 519 (1974); Parker, *History, Politics and the Law of the California Tidelands Trust*, 4 W. ST. U.L. REV. 149 (1977); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970); Comment, *California's Tidelands Trust for Modifiable Public Purposes*, 6 LOY. L.A.L. REV. 485 (1973); Note, *State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey*, 25 RUTGERS L. REV. 571, 576-649 [hereinafter cited as Note, *State Citizen Rights*]; Note, *California's Tideland Trust: Shoring it up*, 22 HASTINGS L.J. 759 (1971); Note, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970) [hereinafter cited as Note, *Public Trust in Tidal Areas*]. For a perspective which differs from the author's, see Walston, *The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy*, 22 SANTA CLARA L. REV. 63 (1982).

2. These natural resources, oceans, tidelands, and swamps, historically have been associated with water. However, modern commentators are suggesting the application of the public trust doctrine to other natural resources. *See* Conference Proceedings, *supra* note 1, at 244.

3. Courts and commentators have generally treated this right as an easement or servitude. *See, e.g.*, Comment, *Public Access and the California Coastal Commission: A Question of Over-reaching*, 21 SANTA CLARA L. REV. 395, 404 (1981) [hereinafter cited as Comment, *Public Access*]; Littman, *Tidelands: Trusts, Easements, Custom and Implied Dedication*, 10 NAT. RESOURCES LAW. 279 (1977); *see also* Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); Bohn v. Albertson, 107 Cal. App. 2d 738, 238 P.2d 128 (1951).

4. *See, e.g.*, Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452-53 (1892); Marks v. Whitney, 6 Cal. 3d 251, 259-60, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971); Colberg, Inc. v. California, 67 Cal. 2d 408, 416, 432 P.2d 3, 10, 62 Cal. Rptr. 401, 408 (1967).

5. These rights typically have been defined as the right of commerce, naviga-

cent cases applied the public trust doctrine to more than 4,000 miles of California's nontidal shorezone property.[6] The supreme court, in *State v. Superior Court (Lyon)*[7] and *State v. Superior Court (Fogerty)*,[8] (hereinafter collectively referred to as "the *Lake Cases*"), recognized for the first time that public trust rights can be acquired by prescription.[9]

The ancient and nebulous public trust doctrine can be traced back to Roman law which recognized public rights in the seas and rivers.[10] Later, England applied the doctrine to that area where the tide "ebbed and flowed."[11] The modern public trust doctrine applied in the United States developed from English common law.[12] This two thousand year old doctrine is imbued with as much lore and confusion as were the sea dragons once rumored to exist in the same waters. Unlike mythical sea creatures, however, the public trust doctrine is worthy of close scrutiny because it is a vital component of public and private property rights and natural resource law.

The impact of the *Lake Cases* on both public rights and private property is staggering. Californians now have new rights of use, enjoyment, and preservation in millions of acres of valuable land.[13] As a result, hundreds of thousands of property titles have been clouded.[14] The *Lake Cases* have made a significant impact on natural resource law and property law by strengthening and expanding the public trust doctrine.

Despite this formidable victory for proponents of the public trust doctrine, the true nature and extent of this doctrine in California remains unclear. The confusion is largely attributable to the doctrine's two thousand year history and

---

tion, fishing, recreation, and preservation under recent California case law. *See infra* text accompanying notes 91-100.

6. The "shorezone" is the area between the normal season high-water and low-water marks. In State v. Superior Court (Lyon), 29 Cal. 3d 210, 216, 625 P.2d 239, 172 Cal. Rptr. 696, 699, *cert. denied*, 454 U.S. 1094 (1981), which involved Clear Lake, the court observed that 5,000 acres of property existed in the shorezone. *Id.*

7. 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696, *cert. denied*, 454 U.S. 1094 (1981).

8. 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713, *cert. denied*, 454 U.S. 1094 (1981).

9. *Fogerty*, 29 Cal. 3d at 248, 625 P.2d at 261, 172 Cal. Rptr. at 718.

10. *See infra* notes 23-26 and accompanying text.

11. *See infra* notes 28-31 and accompanying text.

12. *See* Shively v. Bowlby, 152 U.S. 1 (1893).

13. *Lyon*, 29 Cal. 2d at 233, 625 P.2d at 253, 172 Cal. Rptr. at 710 (Clark, J., concurring and dissenting).

14. *Id.; see also infra* note 77.

application in diverse legal systems.

This comment briefly explores and assesses the essential points in the public trust doctrine's historical development, proposing that states have utilized five legal techniques either to expand or to limit the common law concept of public trust rights.[15] It will then demonstrate that the California Supreme Court's holding in the *Lake Cases* adopted a sixth method by which public trust rights can be expanded: application of the public trust doctrine by prescription.[16] The comment argues that the court applied the public trust doctrine to millions of acres of valuable California lakeside and riparian land without adequate analysis, and contrary to the legislature's intent.[17]

Conflicts among various public trust rights, such as between fishing rights and open space preservation, are currently resolved by balancing one recognized trust use against another.[18] This balancing test, however, fails to take into account agricultural, residential, and other private and non-trust uses.[19] It will be shown that the application of the public trust doctrine by prescription to productive private property[20] deprives property owners of reasonable use of their land. The need for a new balancing test has been accentuated by the California Supreme Court's recent integration of the public trust doctrine and the water rights system.[21] This comment proposes a more equitable test for resolving conflicts between public and private uses of trust land. The proposed test can similarly be used in balancing public trust rights against water appropriation. This comment concludes with an analysis of potential future applications of the public trust doctrine.

II. Historical Perspective: The Development of the Public Trust Doctrine

The first step in understanding modern public trust doctrine law is to understand the doctrine's unique legal history.

---

15. *See infra* notes 52-110 and accompanying text.

16. *See infra* notes 111-42 and accompanying text.

17. *See infra* text accompanying notes 139-42.

18. *See Ex parte* Bailey, 155 Cal. 472, 476, 101 P. 441, 442-43 (1909).

19. *Lyon*, 29 Cal. 3d at 235, 625 P.2d at 254, 172 Cal. Rptr. at 711 (Clark, J., concurring and dissenting).

20. *Id.* at 236, 625 P.2d at 255, 172 Cal. Rptr. at 712.

21. National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

The literature is replete with informative accounts of the early history of the public trust doctrine.[22] While such a detailed historical analysis is beyond the scope of this comment, an appreciation of current public trust issues requires a basic understanding of the public trust doctrine's evolution through a variety of legal systems.

A. *Roman Law*

Most commentators[23] trace the public trust doctrine back to Roman law, which provided that: "No one therefore is forbidden access to the seashore . . . , all rivers and harbours are public, so that all persons have a right to fish therein."[24] Roman law also recognized that roads, public buildings, and "all things of which the property is in the community and the use in the members of the community"[25] were subject to a vested personal servitude held by members of the public.[26]

B. *English Common Law*

Public trust doctrine law in the United States developed from the early American courts' perception of the English common law.[27] The early American judiciary generally believed that English common law applied the public trust only to areas where the tide "ebbed and flowed." It was further believed that the King as sovereign could not grant tidal property into absolute private ownership because of *jus publicum*, the public trust rights with which those properties were impressed.[28] While there is evidence that these broad generalities were of doubtful validity,[29] these perceptions by the American judicial system have been so consistently adopted in

---

22. *See, e.g.*, Parker, *supra* note 1, at 149-53; Note, *Public Trust in Tidal Areas, supra* note 1, at 763-74; Note, *State Citizen Rights, supra* note 1, at 576-649.

23. *See, e.g.*, Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C.D. L. REV. 195 (1980); Note, *State Citizens Rights, supra* note 1, at 576.

24. INST. JUST., 2.1.1-2.1.6, *quoted in* Note, *Public Trust in Tidal Areas, supra* note 1, at 763-64.

25. GAVIS, INSTITUTES OF ROMAN LAW 128 (E. Poste trans. 1904).

26. *Id.*

27. Stevens, *supra* note 23, at 198; *see also* Shiveley v. Bowlby, 152 U.S. 1 (1893); Arnold v. Mundy, 6 N.J.L. 1 (1821); Weber v. Board of Harbor Comm'rs, 85 U.S. (18 Wall.) 57 (1873); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845).

28. Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 415 (1892).

29. *See* Annot., 23 A.L.R. 757, 757-59 (1923).

formulating American public trust doctrine law as to require viewing the above perceptions as valid.

With one notable exception,[30] modern public trust doctrine law in the United States has been based on the English common law's "ebb and flow" of the tide test,[31] and therefore has sometimes been referred to as the "tidelands trust" doctrine.[32]

C. *Early Public Trust Doctrine Rights in the United States*

1. *Establishment of a Public Right*

That the public must have some claim of right of ownership in the property in question is regarded as axiomatic.[33] In 1842, Chief Justice Taney, writing for the United States Su-

---

30. While the basic rule remains that modern public trust doctrine rights are based on perceptions of English common law, there is one exception which directly affects certain titles in California. Property held by successors in interest to Mexican land grants was generally believed to be free of the public trust, "a limitation resulting from the duty resting upon the United States under the Treaty of Guadalupe Hidalgo (9 Stat. 922), and also under principles of international law, to protect all rights of property which had emanated from the Mexican Government prior to the treaty. [Citations omitted]." Borax Ltd. v. Los Angeles, 296 U.S. 10, 15 (1935). The more proper analysis may be that under Spanish law, as applied in Mexico, public trust rights were recognized.

The California Supreme Court has held Mexican grants subject to the trust. City of Los Angeles v. Venice Peninsula Properties, 31 Cal. 3d 288, 644 P.2d 792, 182 Cal. Rptr. 599 (1982), *cert. granted*, 51 U.S.L.W. 3684 (U.S. Mar. 21, 1983) (No. 82-708). The United States Supreme Court has, however, granted certiorari in this case. *Id.* The two major issues presented for the United States Supreme Court's review are: 1) whether California can collaterally attack the 1851 Act patent proceedings' factual determination that the grant land was not tidelands, and 2) whether the United States silently reserved a public trust interest in the Mexican grant land, to which the State of California succeeded. 51 U.S.L.W. 3466 (1983).

Assuming that the Court rules that California may collaterally attack the factual determination that the grant land was tidelands, the public trust issue may be moot. If the federal government did not reserve the trust (which would likely be a breach of its duty as trustee and contrary to the great weight of authority), then the State of California could, under the *Lake Cases* holding, claim public trust rights by prescription.

31. Shively v. Bowlby, 152 U.S. 1, 11 (1893).

32. *See, e.g., Lyon*, 29 Cal. 3d at 226, 625 P.2d at 248, 172 Cal. Rptr. at 705 (referring to "the venerable doctrine of the tidelands trust" before applying it to nontidal lands).

33. City of Los Angeles v. Venice Peninsula Properties, 31 Cal. 3d 288, 307, 644 P.2d 792, 804, 182 Cal. Rptr. 599, 611 (1982) (Richardson, J., dissenting), *cert. granted*, 51 U.S.L.W. 3684 (U.S. Mar. 21, 1983) (No. 82-708). This claim can be an easement or servitude. *See supra* note 3. Another claim of right is by equitable title. Ivanhoe Irrigation Dist. v. All Parties & Persons, 47 Cal. 2d 597, 306 P.2d 824 (1957), *rev'd on other grounds*, 357 U.S. 275 (1958).

preme Court in *Martin v. Waddell*,[34] upheld the public's common use right in navigable waters of the original states:

> For when the Revolution took place, the *people* of each state became themselves sovereign; and in that character hold the absolute right to *all navigable waters*, and the soils under them, *for their own common use*, subject only to the rights surrendered by the constitution to the general government.[35]

Although *Martin* upheld public trust rights, these rights suffered from three potential limitations. First, the Court ruled only as to the original thirteen states. Second, navigable waters were defined as those subject to the tides' ebb and flow, regardless of navigability in fact. Finally, the Court did not charge the state with a trusteeship duty, a critical factor in the modern public trust doctrine.

The first potential limitation was eliminated when the Supreme Court later held that the equal footing doctrine[36] confirms to *all* states title in navigable waters and the soils beneath them.[37] The second limitation, defining "navigable waters" as those subject to the tides' "ebb and flow," was eliminated by the Court in 1870.[38] The Court announced a new federal test which would be used in determining what "navigable waters" the states took title to upon their admission to the Union: "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 susceptible of being used, in their ordinary condition in the customary modes of trade and travel on water."[39]

2. *Illinois Central Railroad: A New Track to Follow*

The United States Supreme Court removed the third and

---

34. 41 U.S. (16 Pet.) 367 (1842).

35. *Id.* at 410 (emphasis added).

36. The "equal footing doctrine" provides that all states joining the Union do so on an equal footing with the original states. "Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils within her limits passed to the State . . . ." Weber v. Harbor Comm'rs, 85 U.S. (18 Wall.) 57, 65-66 (1873) (reaffirming Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 223 (1845)).

37. *See* Barney v. Keokuk, 94 U.S. 324, 338 (1877); Shively v. Bowlby, 152 U.S. 1, 57 (1894).

38. The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870).

39. *Id.* at 563 (emphasis added).

final potential limitation of *Martin* in the 1892 case of *Illinois Central Railroad v. Illinois.*[40] The Court charged the state with specific trusteeship duties under the public trust doctrine. *Illinois Central* was characterized by the California Supreme Court in 1980[41] as the "seminal" public trust case[42] and the "primary authority even today."[43] One noted authority on the public trust doctrine has further highlighted *Illinois Central's* importance by referring to it as the "lodestar" of American public trust law.[44]

Illinois Central involved a grant by the Illinois State Legislature of 1,000 acres of Lake Michigan's shorezone and submerged lands,[45] "representing virtually the entire waterfront of Chicago."[46] Later, the state legislature had a change of political heart and repealed the act granting the land to the railroad.[47] The U. S. Supreme Court, in one of its few public trust doctrine opinions, declared the repeal of the grant was valid.

The Court first described the public trust nature of the title which the state held: "It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein freed from obstruction or interference of private parties."[48]

Thus, the Court announced not only the state was a trustee, but also recognized three public trust rights: navigation, commerce, and fishing. The Court further affirmed the public's protection against a state's alienation of the trust property title, an issue which arose in the *Lake Cases.* "The control of the State for the purpose of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without substantial impairment of the public interest in the lands and

---

40. 146 U.S. 387 (1892).

41. City of Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980).

42. *Id.* at 521, 606 P.2d at 365, 162 Cal. Rptr. at 330.

43. *Id.*

44. Sax, *supra* note 1, at 489.

45. 146 U.S. at 405 n.1; *see* City of Berkeley v. Superior Court, 26 Cal. 3d at 521, 606 P.2d at 365, 162 Cal. Rptr. at 330 (summarizing *Illinois Central*).

46. City of Berkeley v. Superior Court, 26 Cal. 3d at 521, 606 P.2d at 365, 162 Cal. Rptr. at 330.

47. 146 U.S. at 410.

48. *Id.* at 452.

water remaining."[49]

Illinois Central was limited on its facts to application to tidal property and the Great Lakes, which were described by the Court as "possess[ing] all the general characteristics of the open seas, except in freshness, and in the absence of the ebb and flow of the tide."[50]

3. *Beyond Illinois Central: State Determination*

So long as the minimum standards of *Illinois Central* are met, it remains a matter of state common law as to what waters or other resources are subject the the public trust doctrine. Further, the states have the ability to expand the public's rights beyond the historically recognized commerce, navigation, and fishing rights. The liberty of states to determine the terms and extent of the public trust doctrine beyond *Illinois Central* has resulted in various interpretations.[51]

Five techniques have been used by states to expand or limit the common law concept of public trust rights: express constitutional or statutory provision; determination of title to nontidal waters; definition of "navigable waters;" definition of public trust right, and integration with the appropriation and riparian water rights system.

The public trust doctrine in California has undergone rapid expansion by extensive use of each technique and a sixth technique, public trust rights by prescription, has been added by the California Supreme Court.

III. The California Experience: Five Methods of Teaching an Old Doctrine New Rights

A. *Constitutional and Statutory Provisions*

California has supported and enlarged the common law public trust rights through express constitutional and statutory provisions. California's constitution places explicit re-

---

49. *Id.* at 453.

50. *Id.* at 435.

51. Variation in public trust doctrine rights has been especially manifest in recognition of recreational rights. *See, e.g.*, Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971); Fairchild v. Kraemer, 11 App. Div. 2d 232, 204 N.Y.S.2d 823 (1960); Wilbour v. Gallagher, 77 Wash. 2d 306, 462 P.2d 232 (1969).

strictions on the sale of certain tidelands.[52] Statutory provisions have changed the restriction to an absolute prohibition.[53] Public access rights[54] have similarly been protected[55] and the common law has been expanded by statute to include public access anti-discrimination provisions.[56] Additionally, the California Constitution protects fishing rights[57]

---

52. CAL. CONST. art. X, § 3 provides:

> All tidelands within two miles of any incorporated city, city and county, or town in this State, and fronting on the water of any harbor, estuary, bay, or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations; provided, however, that any such tidelands, reserved to the State solely for street purposes, which the Legislature finds and declares are not used for navigation purposes and are not necessary for such purposes may be sold to any town, city, county, city and county, municipal corporations, private persons, partnerships or corporations subject to such conditions as the Legislature determines are necessary to be imposed in connection with any such sales in order to protect the public interest.

53. CAL. PUB. RES. CODE § 7991 (West 1977) implements the prohibition with the following language: "The shore and the bed of the ocean or of any navigable channel or stream or bay or inlet within the State, between ordinary high and low water marks, over which the ordinary tide ebbs and flows is hereby withheld from sale."

54. CAL. CONST. art. X, § 4 provides:

> No individual, partnership, or corporation, claiming or possessing the frontage or tidal 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 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 attainable for the people thereof.

See generally Comment, *Public Access*, *supra* note 3, at 403-20 (discussing public access over public trust lands).

55. *See, e.g.*, People v. El Dorado County, 96 Cal. App. 3d 403, 157 Cal. Rptr. 815 (1979) (holding CAL. CONST. art. X, § 4 gives the people a constitutional right of access to navigable streams).

56. CAL. GOVT. CODE § 54092 (West 1971).

57. CAL. CONST. art. I, § 25 protects public trust fishing rights restating the common law right to fish and placing restraints on the state's sale of land where the public fish:

> The people shall have the right to fish upon and from the public lands of the State and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; and no law shall ever be passed making it a crime for the people to enter upon the public lands within this State for the purpose of fishing in any water containing fish that have been planted therein by the State; provided, that the Legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken.

and restricts the sale of state lands along navigable waters.[58]

Section 102 of the California Water Code declares that "[a]ll water within the State is the property of the people of the State . . . ."[59] This statutory provision goes beyond the common law public trust doctrine by providing a public right in water per se. As was previously noted, the public must have a property right or claim of ownership in order for the public trust doctrine to apply.[60] Section 102 supplies that ownership right in water and can reasonably be expected to play a key role in the potential future expansion of the public trust doctrine to include ground water, water quality, non-navigable waters, and water impounded on private property.[61]

B. *Expansion of the Public Trust Doctrine by State Title Claims*

The states are free to determine whether private landowners or the state takes title to lands underlying nontidal navigable waters.[62] If the state elects to hold title it may assert its ownership interest at any point up to the high-water mark based on the body of water's actual water level *at the time that the state was admitted to the Union.*[63]

For nearly 130 years, California law was unsettled as to whether or not the state had elected to take title to the state's 34 navigable lakes and 31 navigable rivers.[64] The California Supreme Court was presented with the issue for the first time in the *Lake Cases.* In both *State v. Superior Court (Lyon)*[65] and *State v. Superior Court (Fogerty)*[66] landowners relied on a portion of California Civil Code section 830, enacted in 1872, which provided that "the owner of the upland, . . . when [the property] . . . borders on a navigable lake or stream, where there is no tide, . . . takes to the edge of the lake or stream, at

---

58. *Id.*

59. CAL. WATER CODE § 102 (West 1971).

60. *See supra* note 33 and accompanying text.

61. *See generally* Johnson, *Public Trust for Stream Flows and Lake Levels*, 14 U.C.D. L. REV. 233 (1980).

62. *See* McManus v. Carmichael, 3 Iowa 1, 31 (1856).

63. *See Lyon*, 29 Cal. 3d at 220, 625 P.2d at 244, 172 Cal. Rptr. at 696.

64. *Lyon*, 29 Cal. 3d at 216, 625 P.2d at 242, 172 Cal. Rptr. at 699.

65. 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696, *cert. denied*, 454 U.S. 1094 (1981).

66. 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713, *cert. denied*, 454 U.S. 1094 (1981).

the low water mark . . . ."[67] In *Lyon*, the upland property owner at Clear Lake, California,[68] objected to the state prohibiting him from reclaiming a marsh between the high and low-water marks (also referred to as "shorezone"), which he claimed title to under section 830. In *Fogerty*,[69] the upland property owners along Lake Tahoe, California,[70] objected to the State Lands Commission's[71] proposal to officially record state claims to the shorezone. The property owners maintained that any property interest the state might have had was conveyed to private landowners by section 830. The state claimed that section 830 was merely a "rule for the construction of deeds and does not constitute a grant of sovereign land."[72]

Illustration I, below, graphically depicts the court's hold-

---

67. Section 830 provides:

> Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tidewater, takes to high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at the low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.

CAL. CIV. CODE § 830 (West 1980).

68. Raymond and Margret Lyon, real parties in interest, owned 800 acres of property along the shoreline. Clear Lake, with a surface area of 64 square miles, is located in Lake County, California. 29 Cal. 3d at 214, 625 P.2d at 241, 172 Cal. Rptr. at 698.

69. 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713, *cert. denied*, 454 U.S. 1094 (1981).

70. A map of Lake Tahoe, Clear Lake, and other waterways in California appears in STATE OF CALIFORNIA, THE CALIFORNIA WATER ATLAS 2 (1979).

71. The legislature has granted the State Lands Commission exclusive authority over submerged lands:

> The commission has exclusive jurisdiction over all ungranted tidelands and submerged lands owned by the State and of the beds of navigable rivers, streams, lakes, bays, estuaries, inlets, and straits, including tidelands and submerged lands or any interest therein, whether within or beyond the boundaries of the State as established by law, which have been or may be acquired by the State (a) by quitclaim, cession, grant, contract, or otherwise from the United States or any agency thereof, or (b) by any other means. All jurisdiction and authority remaining in the State as to tidelands and submerged lands as to which grants have been or may be made is vested in the commission.
>
> The commission shall exclusively administer and control all such lands, and may lease or otherwise dispose of such lands, as provided by law, upon such terms and for such consideration, if any, as are determined by it . . . .

CAL. PUB. RES. CODE § 6301 (West 1977).

72. *Lyon*, 29 Cal. 3d at 217, 625 P.2d at 243, 172 Cal. Rptr. at 700.

ing in the *Lake Cases.*

Illustration I

DESCRIPTION:	TITLE STATUS:	ACTUAL TOPOGRAPHY:
Above High-Water Mark (HWM)	Private fee simple absolute	
HWM- - - - - - - -	- - - - - - - - - - - - -	- - - - - - - - - -
Nontidal Shorezone	Private fee subject to Public Trust Doctrine (Title conveyed from State)	(Water)
LWM- - - - - - - -	- - - - - - - - - - - - -	- - - - - - - - - -
Below Low-Water Mark (LWM)	State Property subject to Public Trust Doctrine	(submerged land)

Holding of the Lake Cases.

The California Supreme Court held that when California was admitted to the union with equal footing, took title to the high-water mark of the state's nontidal navigable waters[73] and that the public trust doctrine would apply equally to nontidal navigable waters and tidal waters.[74] The court agreed with the landowners' position that California Civil Code section 830 conveyed shorezone title to the upland owners.[75] The court reasoned that trust properties so conveyed could only have the trust burden removed only by specific legislative intent when made in the furtherance of the trust.[76] The court there-

73. The court's decision was based on consistent administrative construction of § 830. *Id.* at 225-26, 625 P.2d at 248, 172 Cal. Rptr. at 705.

74. *Lyon*, 29 Cal. 3d at 231, 625 P.2d at 251, 172 Cal. Rptr. at 708.

75. *Id.* at 226, 625 P.2d at 248, 172 Cal. Rptr. at 705.

76. *Id.*

fore held that the shorezone property conveyed under section 830 remained subject to the public trust,[77] as depicted in Illustration I.

The *Lake Cases* are an example of the technique of expanding the public trust doctrine by state title claim. The California Supreme Court went beyond the holding in *Illinois Central*, using California's former title claim to impose the public trust doctrine in an area not within the holding of *Illinois Central* which imposed the trust on submerged land, not the shorezone. As Justice Clark pointed out in his concurring and dissenting opinion in *Lyon*,[78] the court's reading of *Illinois Central* was strained at best.[79] *Illinois Central* "did not impose a trust on the shorezone."[80] Thus the *Lake Cases* are contrary on their face with the holding in *Illinois Central*. The United States Supreme Court found the Great Lakes involved in *Illinois Central* to be "inland seas" of a character close to that of the ocean.[81] The California Supreme Court, however, applied *Illinois Central* to *all* navigable waters, regardless of whether the waters could be characterized as "inland seas."[82]

C. *Redefining "Navigable Waters"*

The third means by which a state can expand the public trust doctrine is by increasing the number of waterways available for public use. Common law holds that the public has the right to navigate, carry commerce, and fish upon navigable waters; therefore, any change in the definition of "navigable waters" will necessarily affect the numbers of waters upon which the public can exercise their public trust rights.

---

77. *Id.* at 231, 625 P.2d at 251, 172 Cal. Rptr. at 708 (1981). This holding is likely to produce a plethora of litigation concerning breach of title warranties. Instances where property owners warranted title free of easements prior to the *Lake Cases* should not, in all fairness, be subject to liability. Litigation over thousands of titles would be an undue and unnecessary burden on the courts and the public trust doctrine was not found to previously exist but rather was imposed upon shorezone property by prescription.

78. Justice Clark agreed that owners of the upland took to the low-water mark; he disagreed with the majority on the public trust doctrine's application. *Id.* at 233, 625 P.2d at 253, 172 Cal. Rptr. at 710.

79. *Lyon*, 29 Cal. 3d at 238, 625 P.2d at 256, 172 Cal. Rptr. at 713.

80. *Id.* (quoting *Illinois Central*, 146 U.S. at 450).

81. 146 U.S. at 435.

82. 29 Cal. 3d at 231, 625 P.2d at 251, 172 Cal. Rptr. at 708.

As was observed above,[83] English common law stated that "navigable waters" consisted of the area where the ocean tide "ebbed and flowed."[84] The states have adopted a variety of standards for finding navigability under law, confirming the value of this third technique for modifying the public trust doctrine.[85]

Although one scholar has volunteered that "a navigable river is any river with enough water in it to float a Supreme Court opinion,"[86] and the California Supreme Court once "defined" navigable waters by stating that "all waters are deemed navigable which are really so,"[87] in fact a more useful standard has emerged. The California courts have progressively redefined "navigable waters" in order to increase public trust uses of the state's water resources.[88] The modern California standard is the "recreational boating test."[89] The test significantly increases the number of waterways available for public use over the English "ebb and flow" of the tide test, which limited navigability to tidal waters.

The California courts have applied the recreational boating test to expand public trust rights to waters "which are capable of being navigated by oar or motor-propelled small craft."[90] This redefinition of "navigable waters" indirectly affects the trust doctrine. The fourth method of expanding public trust rights, discussed below—judicial declaration of what uses constitute modern public trust rights—directly affects the public trust doctrine.

---

83. *See infra* text accompanying notes 23-32.

84. Shively v. Bowlby, 152 U.S. 1, 11 (1893).

85. Besides California, the recreational boating test is used by Idaho, Michigan, Minnesota, New York, North Dakota, Ohio, Oregon, South Dakota, and Wisconsin. Hitchings v. Del Rio Woods Recreation and Parks Dist., 55 Cal. App. 3d 560, 568 n.1, 127 Cal. Rptr. 830, 835 n.1 (1976).

86. C. MEYERS AND A. TARLOCK, WATER RESOURCE MANAGEMENT 240 (1941), *quoted in* United States v. Kaiser Aetna, 408 F. Supp. 42, 49 (1976), *aff'd*, 584 F.2d 378 (1978), *rev'd*, 444 U.S. 164 (1979).

87. Churchill Co. v. Kingsbury, 178 Cal. 554, 558, 174 P. 329, 331 (quoting Barney v. Keokuk, 94 U.S. 324, 336 (1876)).

88. *See, e.g.*, Marks v. Whitney, 6 Cal. 3d 251, 259-60, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971).

89. The "recreational boating test" was first articulated as the "pleasure craft test" in Lamprey v. State (Metcalf), 52 Minn. 181, 199, 53 N.W. 1139, 1143 (1893).

90. People *ex rel.* Barker v. Mack, 19 Cal. App. 3d 1040, 1050, 97 Cal. Rptr. 448, 454 (1971).

D. *Judicial Expansion of the Public Trust Doctrine by Incorporation of New Rights*

The fourth method of public trust doctrine modification is by the incorporation of new rights. The California courts have expanded the common law rights of commerce, navigation, and fishing to include access rights, recreational rights, and the right to preserve public trust property in its natural condition.[91] The California Supreme Court has also recently affirmed its strict adherence to the prohibition, announced in *Illinois Central*, of large public trust land grants to private ownership.[92]

1. *Recreation rights*

California courts have substantially expanded the public trust doctrine by recognizing recreation as a trust use. In the leading California recreational rights case, *Marks v. Whitney*,[93] the supreme court identified certain recreational activities protected by the public trust doctrine: the right to bathe, swim, and stand on the submerged lands.[94] The court, however, left open the scope of future uses, noting that the state is not burdened with enumerating each of the protected public trust rights,[95] and stated that the doctrine would remain flexible to meet the public's changing needs.[96] This flexibility creates an element of uncertainty as to what public uses will be permitted.

The *Marks* case is especially relevant to property owners who now hold title subject to the public trust doctrine under the *Lake Cases*. The property owner's title in *Marks*, as in the *Lake Cases*, was subject to the public trust. In the *Lake Cases* the California Supreme Court found no compelling reason why the scope of the public's rights in *nontidal* waters should not be equal to its rights held in *tidal* waters.[97] Landowners

91. *See, e.g.*, Marks v. Whitney, 6 Cal. 3d 251, 259-60, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971).

92. City of Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 449 U.S. 840 (1980).

93. 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

94. *Id.* at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796.

95. *Id.*

96. *Id.; see also* Colberg, Inc. v. California, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967).

97. *Lyon*, 29 Cal. 3d at 230, 625 P.2d at 251, 172 Cal. Rptr. at 708.

subject to the *Lake Cases* holding will therefore be subject to the same flexible recreation rights test announced in *Marks*.

2. *Preservation rights*

In addition to public trust rights for commerce, navigation, fishing, and recreation, California has incorporated the right of preservation of trust properties in their "natural state." The court has noted that public trust properties are fragile and complex resources which provide vital wildlife habitats and scientific study areas rich in biological diversity.[98] The court has further observed that in addition to concerns over water quality, the public trust properties "are ideally suited for scientific study, since they provide a gene pool for biological diversity."[99] In light of the foregoing characteristics, and the court's concern that "[i]f nature bats last, wetlands may be the natural team's designated hitter,"[100] public trust properties have been impressed with a restriction that they be preserved in their "natural state."

E. *Integration of Public Trust Doctrine and the Appropriation-Riparian System*

California operates under the dual system of water rights, recognizing both the appropriation doctrine and the riparian doctrine.[101] Thus, while the water is the property of the people of the state,[102] the use of the water is allowed by a riparian land owner or to anyone diverting the water for a useful, beneficial purpose.[103]

In the landmark 1983 case of *National Audubon Society v. Superior Court*,[104] the California Supreme Court held that the water rights system and the public trust doctrine

> are parts of an integrated system of water law. The public trust doctrine serves the function in that integrated sys-

98. *Fogerty*, 29 Cal. 3d at 245, 625 P.2d at 259, 172 Cal. Rptr. at 716.

99. *Id.*

100. *Id.* (quoting Nash, *Who loves a Swamp?*, in UNITED STATES DEPT. OF AGRICULTURE, STRATEGIES FOR PROTECTION AND MANAGEMENT OF FLOODPLAIN WETLANDS (1978)).

101. National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 441, 658 P.2d 709, 724, 189 Cal. Rptr. 346, 361 (1983).

102. *Id.*

103. *Id.* at 441-42, 558 P.2d at 724-25, 189 Cal. Rptr. at 361-62.

104. 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

> tem of preserving the continuing sovereign power of the state to protect public trust uses, . . . and imposes a continuing duty on the state to take such uses into account in allocating water resources.[105]

National Audubon mandates that the water uses under the appropriative water rights system must now be reevaluated and considered in tandem with the public trust doctrine rights and uses[106] described above. Previously, riparian or appropriative users did not have to be concerned with the effect of their water use on public trust waters.

The impact of the court's decision in *National Audubon* should not be underestimated. Any use of water, whether riparian or appropriative, will be subject to a balancing against the public trust doctrine. "No vested rights bar such reconsideration."[107] The court's decision provides members of the public with a new right: challenging any use of water which indirectly affects their trust rights.

In *National Audubon*, the court did not dictate any particular allocation of water for Mono Lake.[108] While indicating that "uses protected by the public trust doctrine . . . deserve to be taken into account,"[109] the court did not articulate an appropriate balancing test, recognizing that its opinion "is but one step in the eventual resolution of the . . . controversy."[110] The balancing test herein proposed suggests the next logical step in evaluating public trust controversies: a weighing and balancing of public and private interests. This balancing test is of even greater importance and necessity due to the final method by which states can expand the public trust doctrine: by prescription.

IV. Public Trust by Prescription: California Adopts a Sixth Public Trust Doctrine Expansion Technique

The previous section of this comment discussed five techniques which states historically have used to expand the public trust doctrine. In the *Lake Cases*, the California Supreme Court recognized a sixth technique which had not previously

105. *Id.* at 452, 658 P.2d at 732, 189 Cal. Rptr. at 369.
106. *Id.* at 447, 452, 658 P.2d at 728, 732, 189 Cal. Rptr. at 365, 369.
107. *Id.* at 447, 658 P.2d at 729, 189 Cal. Rptr. at 366.
108. *Id.* at 452, 658 P.2d at 732, 189 Cal. Rptr. at 369.
109. *Id.*
110. *Id.*

received wide application by other jurisdictions:[111] the public's acquisition of trust rights by prescription. The following discussion suggests that the supreme court applied the public trust doctrine by prescription without adequate analysis; that the court acted contrary to the intent of the people, as expressed by the state legislature; and that in so doing, the court has aggravated the unresolved conflict between public trust uses and private landowners' rights.

A. *Legal Requirements for Establishing Prescriptive Rights*

Under California law, property rights can be acquired in any of five ways.[112] One of the five means is by adverse use or occupancy. California case law[113] sets down four requirements to be met to establish adverse use. The use must be open and notorious, continuous and uninterrupted for a period of five years, hostile to the true owner, and under a claim of right.[114] The burden of proof for establishing each of the requirements is on the party asserting the claim.[115]

In order to satisfy the requirement of continuous use, daily use need not be shown; the court of appeals has stated that there must not be a break in the essential attitude of mind required for adverse use.[116] If members of the public believe they can use the land, and their occasional or periodic use is not prohibited by the true owner, continuous use is found.

B. *The Lake Cases: Applying the Public Trust Doctrine by Prescription*

When the California Supreme Court in the *Lake Cases* considered whether the state could impose public trust rights by prescription, there was "no direct authority . . . in California"[117] for guidance. The issue arose because the water level in both lakes involved had been artificially raised since Califor-

---

111. *See infra* notes 120-21.

112. *See* CAL. CIV. CODE § 1006 (West 1970).

113. *See, e.g.*, Zimmer v. Dyustra, 39 Cal. App. 3d 422, 432, 114 Cal. Rptr. 380, 386 (1974).

114. *Id.*

115. *Id.*

116. *Id.* (quoting RESTATEMENT OF PROPERTY § 459 comment to subsection (1) (1944)).

117. *Fogerty*, 29 Cal. 3d at 248, 625 P.2d at 261, 172 Cal. Rptr. at 718.

nia acquired statehood in 1850.[118] Since the state originally took title only to the high-water mark as it existed in 1850, the subsequent artificial rise in the water level caused the shorezone to incrementally encompass private property. The common law concept of the public trust doctrine does not apply to this "new" shorezone because title was never held by the state as trustee.

The supreme court based its holding in the *Lake Cases*, that the privately owned "new" shorezone was subject to the public trust doctrine, on the acquisition of a prescriptive easement.[119] Considering the potential impact of this innovative holding, there is scant explanation of the court's rationale in the opinion. The court's reliance on a 1918 Arkansas opinion[120] and a 1937 Iowa opinion[121] without discussing their particular application to California land is especially disturbing.[122]

As discussed below, the court's application of the public trust doctrine by prescription suffers from two major defects. First, the requirements of finding prescriptive rights under California law were not satisfied. Second, the application of the public trust doctrine by prescription is contrary to the people's intent. This is particularly irksome because the people are the intended trust beneficiaries.

1. *Prescription Requirements not Satisfied*

The state also failed to establish the continuous use requirement. Until the *Lake Cases*, the public had no legal right to go upon private property except when the land was sufficiently covered with water to permit navigation. As noted

---

118. *Id.* The dam in Lake Tahoe has been in existence since 1870. *Id.*

119. The court first took judicial notice of the "monumental evidentiary problem" before turning to a consideration of prescription. Both factors were considered when the court held "under all circumstances" the court would apply the public trust doctrine to the high water mark. *Id.* at 248-49, 625 P.2d at 261, 172 Cal. Rptr. at 718.

120. State v. Parker, 132 Ark. 316, 200 S.W. 1014 (1918).

121. State v. Sorenson, 222 Iowa 1248, 271 N.W. 234 (1937).

122. The court may have been "gun shy" after the adverse reaction of the public and legal community to their holding in Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970), where private property was unexpectedly declared subject to a continuous easement. *See, e.g.*, Berger, *Gion v. City of Santa Cruz: A License to Steal?*, CAL. ST. B. J. 24 (1974); Berger, *Nice Guys Finish Last—at least They Lose Their Property*, 8 CAL. W.L. REV. 75 (1971); Shavelson, *Gion v. Santa Cruz: Where do We Go from Here?*, 47 CAL. ST. B. J. 415 (1972); Comment, *A Threat to California's Shoreline*, SANTA CLARA L. REV. 327 (1971).

above, in order to meet the continuous requirement, members of the public must have had an "attitude of mind" where they reasonably believed they could use the property at issue whenever they desired and without the landowner's objections.[123] Since the public was frequently excluded by private property owners when the water receded, the public could not have had an "attitude of mind" sufficient to meet the continuous use requirement.

The final requirement for finding a prescriptive right, that the use be "hostile," was also not satisfied. The mere presence of water upon a landowner's property does not necessarily cause a finding of hostile or adverse use, even where the water stimulates the growth of marshland plants and other vegetation.[124] The water's presence may have benefitted the landowner by increasing fishing and other recreational uses, and providing agricultural irrigation water and crop nutrients.

Assuming the supreme court found that the water's periodic presence *was* sufficient to vest a prescriptive right in the parties controlling the water level, it does not follow that the public trust doctrine should also apply. It is settled California law that "[e]asements acquired by adverse use are limited to the uses made during the prescriptive period. Thereafter no different or greater use can be made of them . . . ."[125] The holding in the *Lake Cases* is contrary to this position. Declaring private property subject to the public trust and its increasing number of public uses is by far "a different and greater use" than the passive public right to periodically introduce water onto private property. Unlike public trust doctrine rights, imposition of a prescriptive right for raising the water level periodically should not include public use rights, natural land preservation rights, and title transfer restrictions.

2. *Prescription is Contrary to the Public's Intent*

The second defect in the court's application of the public trust doctrine by prescription is that it is contrary to the people's intent as expressed by legislation.

The supreme court's ruling in *Gion v. City of Santa*

123. *See supra* text accompanying note 118.
124. *See, e.g.*, Phillips v. Burne, 133 Cal. App. 2d 700, 284 P.2d 809 (1955).
125. Beyl v. Kasukochi, 135 Cal. App. 2d 638, 640, 287 P.2d 863, 865 (1955).

Cruz,[126] where private beach property was found to be impliedly dedicated to public use, caused many landowners to prohibit public access to their beachfront and shorezone property rather than risk being found to have impliedly dedicated their property to the public. The state legislature viewed the private landowners' reaction as undesirable, and thereafter enacted Civil Code section 1009 to provide a "safe harbor" for private landowners to allow public use on their property.

Section 1009 of the Civil Code[127] provides that it is in the state's interest to encourage private landowners to make their property available for public use.[128] The legislature noted, however, that such action by a private landowner could cloud his title.[129] To prevent private landowners from withdrawing their property from public use in anticipation of title problems, it therefore provided that "no use of such property after [1971] . . . shall ever ripen to confer upon the public or any governmental body or unit a vested right to continue to make such use permanently. . . ."[130]

The court's holding in the *Lake Cases* runs contrary to the intent of this legislation. By finding that public trust rights can be acquired by prescription, the court has once again encouraged private landowners to withhold their property from public use. As a practical effect, owners of property suited for recreation, especially private lakes, may fence off their property to prevent the imposition of public trust rights by prescription.

3. *A "Blunderbuss" Application*

In a concurring and dissenting opinion Justice Clark recognized the importance of protecting shorezone property in California[131] but viewed the majority's application of the public trust doctrine to all 4,000 miles of California shorezone property as a "blunderbuss" approach.[132] In Clark's view, the *Lake Cases* holding threatened valuable existing residential

126. 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970). *See supra* note 122.
127. CAL. CIV. CODE § 1009 (West Supp. 1980).
128. *Id.*
129. *Id.*
130. *Id.*
131. *Lyon*, 29 Cal. 3d 210, 238, 625 P.2d 239, 256, 172 Cal. Rptr. 696, 713 (1981) (Clark, J., concurring and dissenting).
132. *Id.*

and agricultural use on millions of acres.[133] The analysis below proposes a new balancing test to resolve the impending threat which could result from an overbroad application of the public trust doctrine.

C. *A New Balancing Test for the Public Trust Doctrine*

Current application of the public trust doctrine recognizes navigation, commerce, fishing, recreation, and natural area preservation as valuable public rights. Historically, the courts have used a balancing test when public and private uses of trust land conflict.[134] However, when public trust properties are put to uses which are not within the scope of the doctrine, such as for agricultural purposes, "a balancing of values is not the test under the doctrine. The test is a lack of value for trust purposes."[135] The dichotomy between recognized public trust uses and other unrecognized uses can produce anomalous results.[136]

The application of the public trust doctrine to 4,000 miles of shorezone constituting millions of acres[137] emphasizes the need for a new test which balances both public and private uses. Much of the private property in the *Lake Cases* held subject to the public trust had been put to productive agricultural and residential use, uses not within the public trust. It is unclear whether these uses will be prohibited after the *Lake Cases* decisions. The supreme court stated that property owners may utilize their land in any manner not incompatible with the public's interest in the property.[138] The opinion seems to indicate that the focus will be on incompatibility of private and public trust uses, but the court neither articulates any evaluation standards nor proposes a new balancing test. It

---

133. *Id.*

134. *See, e.g., Ex parte* Bailey, 155 Cal. 472, 476, 101 P. 441, 442-43 (1909) (fishing rights balanced against preservation rights); Blundell v. Catterall, 106 Eng. Rep. 1190 (K.B. 1821) (swimming rights balanced against navigation and fishing rights). Integration of the water rights system with the public trust doctrine has been viewed by at least one authority as involving a balancing of these two systems against each other. *See* L.A. Daily J., Feb. 18, 1983, § 1, at 1, col. 2.

135. *Lyon*, 29 Cal. 3d 210, 237, 625 P.2d 239, 255, 172 Cal. Rptr. 696, 712 (Clark, J., concurring and dissenting).

136. *See, e.g.*, Boone v. Kingsbury, 206 Cal. 198, 273 P.2d 797 (1928) (upholds use of public trust property for oil and gas prospecting).

137. *Lyon*, 29 Cal. 3d at 216, 625 P.2d at 242, 172 Cal. Rptr. at 699.

138. *Id.* at 232, 625 P.2d at 252, 172 Cal. Rptr. at 709.

is possible that the court viewed any non-public trust use as incompatible, and the opinion was merely a restatement of the current balancing test which does not recognize any non-public trust uses.

A new balancing test should be employed by the courts and the Water Resources Board to resolve conflict between public trust doctrine use rights and other uses which private landowners or public entities would like to make or may currently be making of trust resources. The balancing test proposed below consists of five weighted factors, each designed to remove uncertainty regarding the application of the public trust doctrine.[139]

Initially, courts should accord *current* public trust uses the greatest weight. Current public trust uses should be of paramount importance because public trust property is held for the people's benefit. Private or municipal benefits, including upstream water appropriation, should not be made at significant cost to current trust uses. Second, consideration should be given to *potential* public trust uses. The state, acting as trustee for the people, should ensure that public trust resources are protected, and are available for the use and enjoyment of future generations. The third factor for consideration is a closely allied concept: use compatibility. This factor is based on a broad reading of the *Lake Cases*, where the court stated that landowners could use their property so long as such use was not incompatible with public trust rights.[140] Since the preservation right is especially susceptible to permanent loss or diminution in value,[141] uses which could potentially impinge on the preservation of trust property should be subject to close scrutiny, and greater weight should be given to protecting trust property from irreversible environmental harm.

Fourth, the reasonable expectations of private landown-

---

139. The proposed balancing test was partially derived from the California Supreme Court's holding in City of Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980). In *City of Berkeley*, the court used a balancing test to determine if property should be *excluded completely* from the public trust doctrine. *Id.* at 534, 606 P.2d at 373, 162 Cal. Rptr. at 338. The balancing test proposed herein differs from that utilized by the court in *City of Berkeley* in that the proposed balancing test does not suggest eliminating property from the public trust, but rather evaluating competing uses and rights within the trust.

140. *Lyon*, 29 Cal. 3d at 232, 625 P.2d at 252, 172 Cal. Rptr. at 709.

141. *See supra* text accompanying notes 98-100.

ers, municipal entities, and the public should be taken into consideration. If the public reasonably expects that limited non-public trust uses, such as residential or agricultural uses, would be made of privately owned trust property, and all other test factors have been satisfied, such uses should be allowed. Reasonable water appropriation would therefore be permitted. Additionally, consideration should be given to the appropriators' or landowners' reliance upon previous law and the historical use of the resource. As noted above, landowners believed the shorezone was private property for more than 100 years and the public trust doctrine was thought to have been subsumed under the water rights system.[142] Proposed water appropriation and non-public trust uses, as contrasted with those historical uses arising before the *Lake Cases* and *National Audubon Society*, should not receive as much weight under the balancing test. This factor goes to the reasonableness of the landowners' or appropriators' expectations.

Finally, the court should consider whether appropriation or private use of trust property would constitute a significant diminution in the amount of land or water locally available upon which the public could exercise its trust rights. This factor takes into consideration the variety and optimal utility of public trust lands in a particular community.

After weighing the above factors, the court or the Water Resources Board could equitably resolve the problems arising from the expansion of public rights on private property and ease the conflicts between the public trust doctrine and California's water rights system.

V. Conclusion: The Future of the Public Trust Doctrine

Initially, it was observed in this comment that the public trust doctrine has evolved over a period of two thousand years in a variety of legal systems. It was proposed that the states have utilized five techniques to expand the public trust doctrine: through constitutional and statutory provisions; state title claims; expanding the redefinition of "navigable waters;" judicial incorporation of new rights; and integration with the water rights system. Further, it was proposed that California

142. *See supra* note 67 and accompanying text.

had adopted a sixth technique, public trust rights by prescription.

This application of the public trust doctrine under the *Lake Cases* to millions of acres of California land for the first time, and the integration of the public trust doctrine and the water rights system under *National Audubon Society*, has emphasized the need for the courts and the Water Resources Board to employ a broad balancing test. The proposed test, by taking into consideration any use which was not incompatible with the public trust doctrine, would permit the continued residential and agricultural use of some privately owned public trust lands and resolve the uncertainty of how public trust rights should be balanced against nontrust and water rights system uses.

The *Lake Cases* represent a significant step in the public trust doctrine's development. The court, by recognizing prescriptive public trust rights, has acknowledged for the first time that the public can acquire trust rights in private property by prescription, without regard to title origin. Before the *Lake Cases*, an essential requirement for finding a public trust right was that the state originally held property title as trustee.[143] Regardless of one's perspective on the public trust doctrine, this limitation is now removed in California.

The other requirement in American jurisprudence is that the doctrine be applied only to natural resources involving water. The public trust doctrine need not be limited in this way. Under ancient Roman law public trust rights included non-water resources of a communal interest.

The public trust doctrine, with two thousand years of historical momentum and recognition behind it, could develop into a comprehensive resource management tool capable of protecting all natural resources. The California Supreme Court's recognition of public trust rights by prescription removes one of the obstacles for such an expansion of the doctrine. In the wake of the *Lake Cases*, we are one step closer to a doctrine which embraces all natural resources and which can overcome the impediments of private ownership in resource

143. *See, e.g.*, Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452 (1892).

protection when properly balanced against private property rights.

Ted J. Hannig