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THE PUBLIC TRUST DOCTRINE IN THE WATER RIGHTS CONTEXT: THE WRONG ENVIRONMENTAL REMEDY

Roderick E. Walston*

I. Introduction

The West, often portrayed as the "Great American Desert" by nineteenth-century cartographers, suffers from an imbalance between water resources and public needs. Simply put, it has abundant land but little water. To correct this imbalance, the western states have developed water rights systems governing the right to divert and use water. Many western states have also developed water delivery systems which transport water from rivers, lakes and streams to distant areas where it is needed for human use.

A new theory of water law recently has been advanced that could potentially change the water rights systems of the western states. This theory, still in its embryonic stage, is based on an ancient common law doctrine—the public trust doctrine. This doctrine provides for public control of navigable waters for the protection of certain public uses, particularly navigation, commerce and fisheries. Some environmental advocates are now suggesting that this doctrine provides a basis for challenging water rights granted under state water rights laws. Under this argument, state-granted water rights are invalid if they impair navigation or other public uses protected by the public trust doctrine.[1] This argument is being

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1. This question has been generally discussed by several commentators of western water law. *See* R. Clark Waters, and Water Rights 177-279 (1967) [herinafter cited as Clark]; Dunning, *The Significance of California's Public Trust Easement for California's Water Rights Law*, 14 U. Cal. D. L. Rev. 357 (1980) [hereinafter cited as Dunning]; Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14

asserted by the National Audubon Society in its attempt to prevent the diversion of water from Mono Lake in northern California to the distant metropolis of Los Angeles.[2]

This theory has far-reaching implications. It would provide a basis for protection of important environmental resources, now threatened by water diversions authorized under state water rights laws. By the same token, however, it would jeopardize long-standing water rights by subjecting them to constraints that formerly were not thought to exist, thus creating confusion and uncertainty about the predictability of water supplies. The theory, by providing a new weapon in the environmental arsenal, could produce a new balance between environmental and economic interests in the West.

This article will analyze the public trust doctrine and state water rights laws from historical and policy perspectives. The focus will be on the laws developed by California, which have frequently served as a model for other states. As shall be seen, state water rights laws provide the exclusive basis for determining the allocation of water among competing uses. The public trust doctrine has no role in this context. The doctrine provides that the state has sovereign control of navigable waters as against private proprietary claims, and thus retains continuing jurisdiction over navigable waters for the protection of certain public uses. It, however, does not require the state to protect one such use as against another. The doctrine thus provides that the state has the right to choose among competing uses, but does not determine what the choice should be. That choice, as applied to water diversions and uses, is governed solely by state water rights laws.

Since the public trust doctrine allows the state to choose among competing uses, it provides a basis for the state to retain continuing jurisdiction over water rights so that continuing choices can be made. Existing state water rights laws, incorporating this facet of the public trust doctrine, enable the

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U. CAL. D. L. REV. 233 (1980) [hereinafter cited as Johnson]; Robie, *The Public Interest in Water Rights Administration*, 23 ROCKY MTN. MIN. L. INST. 917, 927 (1977); Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970) [hereinafter cited as Sax]; Schneider, *Legal Aspects of Instream Water Uses in California*, Governor's Commission to Review California Water Rights Law Staff Paper No. 6, at 6-29 (January 1978); Trelease, *Government Ownership and Trusteeship of Water*, 45 CALIF. L. REV. 638 (1957).

2. *See* Nat'l Audubon Soc. v. Dept. of Water and Power of Los Angeles, No. 639 (Alpine County Super. Ct., Cal.).

state to reallocate water supplies for the protection of important public uses. Such laws accordingly have a built-in safeguard which protects legitimate environmental values from threats posed by state-granted water rights. Therefore, the public trust doctrine has a role in the water rights context, but not the one now popularly asserted. Environmentalists have a remedy for the protection of important environmental values, but, again, not the one they are asserting. Their remedy is not found in distant, exotic common law jungles. Rather, it is found in statutory principles closer to home.

II. THE PUBLIC TRUST DOCTRINE

One of the dominant principles of the English common law, at the time of the American revolution, was that navigable waters were under the exclusive control of the King.[3] After the revolution, the King's control of navigable waters in the American colonies was assumed by the original thirteen states.[4] The states, in turn, passed the right to regulate commerce among the states to the new federal government.[5] This federal power includes an expansive right to protect the navigability of navigable waters, so that these waters can serve as highways of commerce.[6] Otherwise, the original thirteen states retained control of their navigable waters. This retained power includes control, not only of the waters themselves, but also of the fisheries and of the underlying beds.[7] When new states joined the Union, they were admitted on an "equal footing" with the original thirteen states.[8] The western states,

3. *See* Shively v. Bowlby, 152 U.S. 1, 11-18 (1894); Martin v. Lessee of Wadell, 41 U.S. (16 Pet.) 367, 410 (1842). As the Supreme Court commented in *Bowlby:* "By the common law, both the title and the dominion of the sea . . . where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King." 152 U.S. at 11.

4. *See, e.g.,* Shively v. Bowlby, 152 U.S. at 25-31, Manchester v. Massachusetts, 139 U.S. 240, 259-62 (1891); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 229 (1848); Martin v. Lessee of Wadell, 41 U.S. (16 Pet.) at 410.

5. U.S. CONST. art. I, § 8, cl.3.

6. *See, e.g.,* United States v. Grand River Dam Auth., 363 U.S. 229, 231-33 (1960); United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690 (1899); Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 724-25 (1866).

7. *See, e.g.,* Arizona v. California, 373 U.S. 546, 597 (1963) (underlying beds); Manchester v. Massachusetts, 139 U.S. 240 (1891) (fisheries); Pollard's Lessee v. Hagen, 44 U.S. (3 How.) 212 (1848) (underlying beds); Martin v. Lessee of Wadell, 41 U.S. (16 Pet.) 367 (1842) (fisheries).

8. *See* Utah v. United States, 403 U.S. 9 (1971); United States v. Texas, 339

including California, thus acquired the same control of their navigable waters and dependent resources as the original states.

This brief historical glimpse describes the powers of the states over navigable waters in our federal system and how that power relates to other states and the federal government. It does not, however, describe the power of the states in relation to their citizens. It describes how the states got their power, but not how they exercise it. The latter subject is governed by the public trust doctrine, an ancient common law doctrine providing for sovereign control of navigable waters.

Under the public trust doctrine, the state, acting on behalf of the people, has the right to regulate, control and utilize navigable waters for the protection of certain public uses, particularly navigation, commerce and fisheries.[9] The state, it is often said, retains a dominant "easement" or "servitude" in navigable waters for this purpose.[10] More recent cases have held that the trust includes a broader range of public uses than were recognized in earlier cases; it is now held that the trust protects varied public recreational uses in navigable waters, such as the right to fish, hunt and swim.[11] The trust is a dynamic, rather than static, concept and seems destined to expand with the development and recognition of new public uses.

U.S. 707, 716-18 (1950); United States v. Oregon, 295 U.S. 1, 14 (1934); Louisiana v. Mississippi, 202 U.S. 1, 52 (1905). In the Act admitting California to the Union, California was expressly admitted on an "equal footing" with the other states. Act for the Admission of California into the Union, ch. 50, 9 Stat. 452 (1850).

9. California v. Superior Court (Lyon), 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696 (1981); City of Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980); Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); City of Long Beach v. Mansell, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970); Colberg, Inc. v. California ex rel. Dept. of Pub. Works, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967); Mallon v. City of Long Beach, 44 Cal. 2d 199, 282 P.2d 481 (1955); Bohn v. Albertson, 206 Cal. 148, 273 P. 797 (1928); Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917); People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913); People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 4 P. 1152 (1884); Sax, *supra* note 1; Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U. Cal. D.L. Rev. 195 (1980).

10. *See, e.g.*, City of Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980); Marks v. Whitney, 6 Cal. 3d at 261, 491 P.2d at 381, 98 Cal. Rptr. at 797; People v. California Fish Co., 166 Cal. at 584, 138 P. at 82.

11. City of Berkeley v. Superior Court, 26 Cal. 3d at 521, 606 P.2d at 368, 162 Cal. Rptr. at 329; Marks v. Whitney, 6 Cal. 3d at 259, 491 P.2d at 379, 98 Cal. Rptr. at 795.

The public trust doctrine received its impetus from the U.S. Supreme Court's decision in *Illinois Central Railroad Company v. Illinois.*[12] The Illinois legislature granted 1,000 acres of submerged lands, representing virtually the entire waterfront of Chicago, to a private railroad company in fee simple. A few years later, the legislature reappraised its action and enacted a measure to revoke the grant. The railroad company sued. The Supreme Court ruled that the grant was revocable. It held that, although the state may lawfully grant individual parcels of land for wharves, docks and other structures to aid commerce, the state cannot grant the entire waterfront to a private party because the state holds this property in trust for the public. According to the Court, the state "can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of peace."[13]

Putting aside the broad language often appearing in public trust cases, these cases generally fall into three separate categories. The first category consists of cases, such as *Illinois Central,* raising the question whether the state has a paramount interest in navigable waters over private proprietary claims. These cases often arise in a quiet title context and usually relate to control of tidal or submerged lands. The cases hold, subject to various exceptions, that the state retains sovereign control of the waters and underlying lands notwithstanding interests granted to private parties.[14] In *City of Berkeley v. Superior Court,*[15] for example, it was held that California, in granting private interests in tidelands by legislation enacted in 1870, did not thereby surrender its control of such tidelands; "one legislature may not sell the discretion of its successors to exercise the state's power as the trustee of tidelands."[16] Generally, the courts have held that the trust re-

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12. 146 U.S. 387 (1892).

13. *Id.* at 453.

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

15. 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980).

16. *Id.* at 531, 606 P.2d at 371, 162 Cal. Rptr. at 336. The court overruled an earlier decision that had held that the trust was terminated by the legislative sales

mains intact, except with respect to small parcels of land that are used as part of a general scheme for the furtherance of trust purposes, and where the parcels have been rendered useless for trust purposes.[17] Subject to these exceptions, the general rule is that the trust provides for paramount state control of navigable waters as against private proprietary claims.

The second category of cases consists of those raising the question whether a structure or activity in navigable waters can be enjoined on grounds that it impairs navigation or other trust purposes. The courts have consistently held that the public trust prohibits a private party from impairing navigation or other trust purposes under these circumstances.[18] For instance, in *People v. Gold Run Ditch & Mining Company*,[19] a miner was enjoined from depositing debris in navigable waters which, because it raised the depth of the underlying bed, effectively impaired navigation. Thus, the trust does more than simply provide that the state has paramount control of navigable waters; it also provides that private water uses are invalid if they infringe on certain public uses, such as navigation. The trust provides not only that the sovereign has power over navigable waters, but also that this power is self-executing. In this sense, the trust functions much like a common law nuisance doctrine.

The public trust doctrine is different from the federal power to control navigation. In *Willamette Iron Bridge v. Hatch*,[20] the United States Supreme Court held that the federal navigation power does not, in itself, prohibit the placement of obstructions in navigable waters, and that no federal common law prohibits such obstructions. The federal navigation power does no more than equip Congress with authority to impose its own prohibitions.[21] Thus, the federal navigation

program under review. *Id.* at 534, 606 P.2d at 373, 162 Cal. Rptr. at 338. Because the earlier decision had been relied on by private parties, the court declined to give its decision full retroactive effect, instead limiting the trust to those lands that had not been filled and that were still subject to tidal action. *Id.*

17. *See, e.g.*, City of Long Beach v. Mansell, 3 Cal. 3d 462, 484-86, 476 P.2d 423, 438-41, 91 Cal. Rptr. 23, 38-40 (1970); Atwood v. Hammond, 4 Cal. 2d 31, 40, 48 P.2d 20, 24 (1935); People v. California Fish Co., 166 Cal. 576, 585, 593-94, 138 P. 79, 82, 83, 86, (1913).

18. *See* People v. Russ, 132 Cal. 102, 64 P. 111 (1901); People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 4 P. 1152 (1884).

19. 66 Cal. 138, 4 P. 1152 (1884).

20. 125 U.S. 1 (1888).

21. *Accord*, Hamilton v. Vicksburg, Shreveport & Pac. R.R., 119 U.S. 280

power, unlike the public trust, is not self-executing. Congress filled this void by enactment of the Rivers and Harbors Act of 1899,[22] which, within limits not yet wholly defined,[23] provides that the Army Corps of Engineers must approve any obstruction which affects the navigable capacity of navigable waters.[24] To the extent that the Act does not apply, however, no federal law prohibits obstructions in navigable waters. The federal navigation power is a dormant constitutional principle that, in itself, does not protect navigation interests, but only provides a basis for congressional action. The public trust, on the other hand, is an active common law principle which, without more, protects the public interest in navigable waters.

The third category of public trust cases concerns the authority of government, as opposed to private individuals, to

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(1886); Cardwell v. American River Bridge Co., 113 U.S. 205, 208-09 (1885); Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 724 (1866). Federal common law applies, however, in restraining states from polluting interstate waters to the detriment of other states, assuming that Congress has not adopted its own restraints. *See* City of Milwaukee v. Illinois, 451 U.S. 304 (1981); Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

In this sense, the federal navigation power, although based on the federal power to regulate interstate commerce, has been defined differently from the latter power. As a general rule, the federal executive branch has inherent power to prevent obstructions to interstate commerce even in the face of congressional silence. *See* In Re Debs, 158 U.S. 564 (1895); United States v. San Jacinto Tin Co., 125 U.S. 273, 279-80, 284 (1888). Further, an action can be maintained under the commerce clause to restrain a state from imposing an unreasonable burden on interstate commerce even where Congress has not authorized such an action. *See, e.g.*, Covington & Cincinnati Bridge Co. v. Kentucky, 154 U.S. 204 (1894); Hall v. DeCuir, 95 U.S. 485 (1878). Indeed, it appears that, under the English common law, the sovereign has an inherent right to prevent obstructions and nuisances in navigable waters that prevent the free flow of commerce. *See* Wisdom, *Obstruction in Rivers*, 119 JUST. P. 846 (1955); Note, *Substantive and Remedial Problems in Preventing Interferences with Navigation: The Republic Steel Case*, 59 COLUM. L. REV. 1065, 1074-76 (1959). Thus, the federal navigation power, in not directly prohibiting obstructions in navigable waters, appears to be an anomalous product of the federal commerce power.

22. 33 U.S.C. §§ 401-26 (1970).

23. For instance, in United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690 (1899), the Supreme Court stated that whether the Act applies to a private irrigation dam depends on "whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact." *Id.* at 709. Other federal appellate decisions, however, have held that the Act broadly applies to structures or activities that have *any* effect on navigable capacity. *See* Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971); United States v. Joseph G. Moretti, Inc., 526 F.2d 1306, 1310 (5th Cir. 1976). The Supreme Court recently granted certiorari to consider this question, but dismissed the action on grounds that actions to enforce the Act can only be maintained by the federal government, not by private parties. *See* California v. Sierra Club, 451 U.S. 287 (1981).

24. 33 U.S.C. § 403 (1970).

impair traditional purposes of the public trust, such as navigation. These cases hold that the state has authority to impair certain trust purposes, such as navigation, if the state is fulfilling other trust purposes, such as commerce.[25] Some early decisions suggested that the public trust requires the protection of "navigation and fishery,"[26] which implies that the state cannot take action which has any adverse effect on those specific values. More recent decisions, however, have held that the state can take action which promotes "commerce" in navigable waters, even at the expense of navigation itself.[27] For instance, in *Colberg, Inc. v. California ex rel. Dept. of Public Works*,[28] the California Supreme Court held that the state has the right to build a bridge over navigable waters even though the bridge obstructs navigation. The bridge, it was held, promotes commerce, whether navigational or otherwise. Similarly, in *Boone* v. *Kingsbury*,[29] the court held that, the state has the right to grant licenses for exploration of gas and oil in tidal or submerged lands although the explorations may be harmful to navigation and fisheries. The court held that the explorations result in the production of gas and oil which is vital to the nation's commerce. These cases make clear that the state can impair navigation uses in order to benefit commerce. Virtually any activity authorized by a state in navigable waters can be justified on grounds that it promotes commerce in one form or another. Therefore, the public trust doctrine, in allowing the state to impair navigation for the benefit of commerce, apparently places no restraints on the state in its allocation and regulation of navigable waters.

The state's increased authority to promote commerce at the expense of navigation is reflective of the evolving importance of those interests in our recent national history. At the time of the American revolution much, of the nation's com-

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25. Colberg, Inc. v. California ex rel. Dept. of Pub. Works, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967); Boone v. Kingsbury, 206 Cal. 148, 273 P. 797 (1928); Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917).

26. People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913); Ward v. Mulford, 32 Cal. 365, 372 (1867). *See* Eldridge v. Cowell, 4 Cal. 80, 87 (1854).

27. *See, e.g.*, California v. Superior Court (Lyon), 29 Cal. 3d 210, 214, 625 P.2d 239, 241, 172 Cal. Rptr. 696, 698 (1981); City of Berkeley v. Superior Court, 26 Cal. 3d 515, 521, 606 P.2d 362, 364-65, 162 Cal. Rptr. 327, 329-30 (1980); Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P.2d 374, 379-80, 98 Cal. Rptr. 790, 795-96 (1971).

28. 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967).

29. 206 Cal. 148, 273 P. 797 (1928).

merce was conducted on navigable waterways. Today, most of the nation's commerce is conducted on public highways, in the air and on railroad tracks. There is now less reason to insist on inviolate navigation interests. Indeed, the states' expanded powers over commerce under the public trust doctrine is analogous to the expansion of federal powers over commerce under modern judicial interpretation.[30] The public trust doctrine has been interpreted, consistently with the general modern trend, to recognize the legitimacy of expanded governmental authority in the commerce arena.

To recapitulate, the public trust doctrine, as judicially interpreted and applied, appears to establish three fundamental principles with respect to public control of navigable waters. First, as in *City of Berkeley,* the state retains sovereign control of navigable waters over private interests, subject to limited exceptions, for the purpose of adapting such waters to changing public needs. The state does not divest itself of such jurisdiction by granting certain rights in such waters to private individuals. Second, as in *Gold Run,* the doctrine provides that private parties cannot make the choice between navigation and commerce, or between development and conservation. The choice belongs exclusively to the state and cannot be exercised by private individuals. Third, as in *Colberg,* the doctrine provides that the state has the right to choose between the competing values of navigation and commerce, and that the courts will not interfere with that choice. The state has the right to develop or conserve its water supply, and the public trust doctrine is neutral on the choice that should be made.

To state these principles more succinctly, the public trust doctrine provides, as in *Colberg,* that the state has the right to choose between development and conservation of its water resources. Second, as in *Gold Run,* the choice belongs to the state, not to private individuals. Third, as in *City of Berkeley,* the state has a continuing right to make the choice. In short, the public trust doctrine limits the extent to which private entities can acquire interests in navigable waters, but does not limit the state's regulatory control of such waters. It allows

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30. *See, e.g.,* United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1 (1937). *Contra* National League of Cities v. Usery, 426 U.S. 833 (1976) where the Court held that the tenth amendment limits Congress, acting under the commerce clause, in applying restraints against the states.

the state to choose among competing public uses and preserves the state's continuing right to make the choice, but does not compel the state to make a specific substantial choice.

As we shall see now, the western states have developed water rights systems which provide a means for the states to exercise their choice—reserved to them by the *Colberg* line of cases—between developing and conserving their water resources. Moreover, as shall be seen, these water rights systems allow the states to retain continuing jurisdiction over the allocation of their water supplies, consistent with *City of Berkeley*. Under these systems, the states have adopted a reasonableness test as the basis for determining the existence of water rights, a test that requires a balancing of development needs against conservation needs on a case-by-case basis. Importantly, it is the state, in granting the water right, which makes the choice between development and conservation; the choice is not made by the private user, even though he exercises the right. Therefore, the right is more analogous to the rights asserted in *Colberg*, which held that the state had the right to choose between navigation and commerce, than to the rights asserted in *Gold Run*, where it was held that a private user cannot make this choice.

III. THE CALIFORNIA WATER RIGHTS SYSTEM

Western water law in general, and California water law in particular, has developed independently of the principles of the public trust doctrine. Specific rules have been established governing the right to divert and use water, and these rules, at least on the surface, owe little to the public trust rationale. Early western water law was governed by the riparian doctrine which provided that a landowner has the right to use water appurtenant to his land, subject to the right of downstream landowners to the continued natural flow.[31] The riparian doctrine originated in Roman law, and was adopted as part of the English common law.[32] It provides the basis of

31. *See* United States v. Gerlach Live Stock Co., 339 U.S. 725, 745 (1950); Vernon Irrig. Co. v. Los Angeles, 106 Cal. 237, 256, 39 P. 762, 768 (1895); W. HUTCHINS, CALIFORNIA LAW OF WATER RIGHTS 178-256 (1956) [hereinafter cited as HUTCHINS, CALIFORNIA LAW]; S. WEIL, WATER RIGHTS IN THE WESTERN STATES 773-75 (3d ed. 1911) [hereinafter cited as WEIL].

32. United States v. Gerlach Live Stock Co., 339 U.S. at 744-45; 1 W. HUTCHINS,

water law in most of the eastern states.[33]

The discovery of gold in California in 1848 led to the development of a new water doctrine in the West, the doctrine of prior appropriation. The early miners who searched for the precious metal developed a local custom recognizing the right to divert water out of its natural channel for mining purposes, as long as the diverted water was put to good use. The custom was soon adopted in the agricultural and manufacturing industries, and was recognized by the courts and legislature. The custom ripened into the appropriation doctrine, which authorizes the diversion and use of water, if it is put to reasonable and beneficial use.[34] Priority to the use of water depends on the chronological sequence of competing appropriations; to be "first in time" is to be "first in right."[35] This doctrine is well suited to the unique exigencies of the arid western states, where water is in short supply and its diversion is vital to economic development.

California and several other states have dual systems of water rights. Under the dual systems the riparian and appropriation doctrines exist side by side, providing two different methods for acquisition of water rights.[36] In other states, such as Colorado, the appropriation doctrine has supplanted the riparian doctrine and provides the exclusive basis for acquiring a water right.[37]

Most western states, regardless of whether they have dual water rights systems, have developed statutory systems governing appropriative water rights.[38] California's statutory sys-

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WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 180-82 (1971) [hereinafter cited as HUTCHINS, NINETEEN STATES].

33. *See* California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 165 (1935); CLARK, *supra* note 1, at 29-36.

34. *See generally* California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 153-57 (1935); Jennison v. Kirk, 98 U.S. 453, 456-61 (1878); HUTCHINS, CALIFORNIA LAW, *supra* note 31, at 41-45; POMEROY, WATER RIGHTS chs. 2, 3 (1893); WIEL, *supra* note 31, at 71-85.

35. *See* cases cited in note 34 *supra*.

36. *See, e.g.*, In re Waters of Long Valley Creek Stream System, 25 Cal. 3d 339, 347, 599 P.2d 656, 660-61, 158 Cal. Rptr. 350, 354 (1979), Lux v. Haggin, 69 Cal. 255, 10 p. 697 (1886). HUTCHINS, NINETEEN STATES, *supra* note 32, at 206; KINNEY, IRRIGATION AND WATER RIGHTS 870-80 (2d ed. 1912) [hereinafter cited as KINNEY]; WIEL, *supra* note 31, at 173-228.

37. *See* HUTCHINS, NINETEEN STATES, *supra* note 32, at 206; KINNEY, *supra* note 36, at 870-80; WIEL, *supra* note 31, at 173-228.

38. Of the eighteen western continental states, all but two have established such statutory systems. The two exceptions are Colorado and Montana. Colorado provides

tem is illustrative and, in fact, has provided the model for many other states. In 1914, the California legislature adopted a comprehensive statutory scheme which delegates the adjudicatory and regulatory functions over appropriative rights to a water rights agency.[39] Water users who propose to appropriate water must apply to the agency for an appropriative permit.[40] The agency, after a hearing,[41] may issue the permit if the proposed use is consistent with "reasonable and beneficial use" of water and in the "public interest."[42] The agency may attach conditions to the permit to ensure that this test is met.[43] Any interested party may seek judicial review in a mandamus proceeding.[44] The agency is authorized to issue a license to the appropriator after he has built the works authorized by the permit and has actually put the water to beneficial use.[45]

After the adoption of the California water rights system in 1914, a question arose concerning the interrelationship of the riparian and appropriation doctrines. Suppose that a downstream riparian user claims the right to use water which is necessary to satisfy the needs of an upstream appropriator. Does one right have supremacy over the other? Or, instead, are the rights to be accommodated on the basis of the relative importance of their uses? The questions were answered in *Herminghaus v. Southern California Edison Company*.[46] The

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a system of statutory adjudication for the acquisition of appropriative rights, rather than an administrative system. Montana provides for the acquisition of appropriative rights by either statutory adjudication or by posting of notice and filing of records. *See* HUTCHINS, NINETEEN STATES, *supra* note 32, at 302.

39. CAL. WATER CODE §§ 174, 175, 1200-1801 (West 1971). The agency, formerly the State Water Rights Board, is now known as the State Water Resources Control Board. *See id.* at 1250. *See generally* Temescal Water Co. v. Dep't of Pub. Works, 44 Cal. 2d 90, 280 P.2d 11 (1955); State Water Resources Control Bd. v. Forni, 54 Cal. App. 3d 743, 126 Cal. Rptr. 851 (1976).

40. CAL. WATER CODE §§ 1250, 1300, 1330 (West 1971).

41. A hearing is required and any interested party may attend and fully participate. CAL. WATER CODE §§ 1253, 1330, 1350, 1357 (West 1971); 23 CAL. ADM. CODE §§ 733(j), 735.

42. CAL. WATER CODE §§ 1253, 1255, 1257 (West 1971).

43. CAL. WATER CODE § 1253 (West 1971). Under § 8 of the Reclamation Act of 1902, the agency is also authorized to impose conditions in permits issued to federal agencies which operate federal reclamation projects, as long as the conditions are not inconsistent with "congressional directives" established in the federal reclamation laws. *See* California v. United States, 438 U.S. 645 (1978); 43 U.S.C. §§ 372, 383 (1970).

44. CAL. WATER CODE § 1360 (West 1971).

45. CAL. WATER CODE §§ 1600-77 (West 1971).

46. 200 Cal. 81, 252 P. 607 (1927).

California Supreme Court held that a downstream riparian has the right as against an upstream appropriator to command the entire flow of the stream to flood his pastureland, regardless of whether the result is consistent with reasonable water uses. Under the decision, a riparian right is superior to an appropriative right regardless of the relative importance of the uses.

The *Herminghaus* decision, however, was overturned by a constitutional amendment enacted in 1928.[47] The amendment provides that California's water resources shall "be put to beneficial use to the fullest extent of which they are capable . . . ."[48] The amendment also provides "that the waste or unreasonable use or unreasonable method of use of water [shall] 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."[49] The first provision cited above establishes a principle in favor of developing the state's water resources by providing that the "beneficial use" of water must be maximized. The second provision establishes a principle in favor of conservation by providing that water can be diverted and used only where it is "reasonable and beneficial" to do so. Thus, the constitutional amendment balances development and conservation needs by encouraging water development under "reasonable" circumstances.

The constitutional amendment effectively codified the "reasonable and beneficial use" test, which is the essence of the appropriation doctrine,[50] and made the test applicable to

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47. CAL. CONST. art. X, § 2.

48. *Id.*

49. *Id. See generally* Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 136-39, 429 P.2d 889, 891-94, 60 Cal. Rptr. 377, 379-82 (1967); Peabody v. City of Vallejo, 2 Cal. 2d 351, 40 P.2d 486 (1935); Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.2d 5 (1933).

50. The California legislature has adopted many guidelines for applying the "reasonable and beneficial use" test. The state water rights agency, in granting appropriative rights, is required to weigh and consider various kinds of water uses, such as domestic, irrigation, municipal, industrial, fish and wildlife, recreation, mining, and power needs. *See* CAL. WATER CODE § 1257 (West 1971). Under the California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-21176 (West 1977), the agency is required to consider various environmental needs, particularly the need for "clean air and water" and other "qualitative factors as well as economic and technical factors." *Id.* at § 21001. The agency is also required to give a preference to counties and watersheds which are the source of a particular water supply, as against other counties and watersheds which seek to import the water. CAL. WATER CODE §§ 10505,

all water rights in California—riparian, appropriative, or other.[51] A riparian can no longer claim the right, as against an appropriator, to use water simply because of the nature of his right; he must now justify his right by showing that it meets the reasonableness test. In this sense the constitutional amendment amalgamated the riparian and appropriation doctrines by making them subject to a common standard of use. As a result of the amendment, the riparian doctrine, although a child of the common law, is now subject to the discipline of a statutory master.

Even after the constitutional amendment, the courts have continued to uphold certain historic priorities governing rights established under the doctrines. For example, a riparian right was, and apparently still is, superior to an appropriative right, assuming that the rights are both reasonable and beneficial.[52] Also the appropriation doctrine, which affords a preference of "first in right" to the use which is "first in time,"[53] provides a priority based on the sequence in which competing rights are acquired, again assuming that the rights are reasonable and beneficial. The constitutional amendment did not repeal these various priorities. It substantially modified them, however, by subjecting all rights to the standard of reasonableness. As a result of the amendment the measure of a water right now depends more on the nature of the use than on its theoretical underpinnings or the time of its commencement.

The pivotal feature of the California water rights system is the reasonableness test. This test provides the basis for a water user to acquire the right to use water—whether the right is based on riparian, appropriative or other principles—and the basis for competing users to challenge the right.

11460-11463 (West 1971). The agency must also give a preference to domestic uses over irrigation uses. *Id.* at §§ 106, 1254. Finally, the agency, which is authorized to adopt general plans establishing water quality standards for entire water basins, is required to consider these plans in granting appropriative water rights. *Id.* at § 1258.

51. *See* In re Waters of Long Valley Creek Stream System, 25 Cal. 3d 339, 599 P.2d 656, 158 Cal. Rptr. 350 (1979); Tulare Dist. v. Lindsay-Strathmore Dist., 3 Cal. 2d 489, 45 P.2d 972 (1935); Peabody v. City of Vallejo, 2 Cal. 2d 351, 40 P.2d 486 (1935).

52. A "dormant" riparian right, *i.e.* one that is not being currently used, is not lost, and in fact retains its priority as against an "active" appropriative right. *See* In re Waters of Long Valley Creek Stream System, 25 Cal. 3d at 347, 599 P.2d at 660, 158 Cal. Rptr. at 354; Peabody v. City of Vallejo, 2 Cal. 2d 351, 40 P.2d 486 (1935). *A fortiori*, non-dormant riparian rights are superior to all appropriative rights.

53. *See* note 35 *supra* and accompanying text.

The question posed in this article, however, is whether this test is the *sole* basis for measuring a water right in California. Stated differently, assuming that a water right meets the reasonableness test, is the right still subject to challenge under public trust principles?

IV. The Public Trust Doctrine as a Basis for Challenging State-Granted Water Rights

The public trust doctrine is often advanced as a means for protecting certain kinds of instream values, such as navigation and fisheries, at the expense of out-of-stream values, such as the needs of metropolitan areas which depend on water diversions.[54] It is suggested, for example, that navigation and related needs are so important to the public welfare that they should not be sacrificed for the economic gain of a particular segment of society.[55] Or, if such needs must be sacrificed, the sacrifice must take place at the legislative level, not at the administrative level.[56] It is argued that the public values protected by the doctrine should be diminished, if at all, only by action taken by legislators who are directly answerable to the people.

There are several difficulties with this argument. As noted earlier, the public trust doctrine, although limiting the extent to which private claims can be asserted in navigable waters, allows the state to choose between the competing values of navigation and commerce, and does not compel the state to make a particular choice.[57] Under the *Colberg* line of cases, the state has the right to develop or conserve its water supply. The public trust doctrine is neutral on the choice that should be made. In adopting its water rights system, California has

54. *See* Dunning, *supra* note 1; Johnson, *supra* note 1. This argument is also advanced by the plaintiff in Nat'l Audubon Soc. v. Dep't of Water and Power of Los Angeles, No. 639 (Alpine County Super. Ct., Cal.).

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

56. *See* Dunning, *supra* note 1, at 388-96. One commentator has suggested that, under the public trust doctrine, consideration should be given to whether the governmental action is undertaken at the legislative level rather than subordinate levels, and whether the action has statewide rather than merely local significance. *See* Sax, *supra* note 1, at 531. This view was expressed, however, only in the context of whether the state should be deemed to have surrendered its sovereign interest in navigable waters to private interests, not as a basis for limiting the state's water allocation authority under water rights laws.

57. *See* notes 25-29 *supra* and accompanying text.

made a choice between navigation and commerce, and between development and conservation. Its choice, as reflected in the 1928 constitutional amendment, requires that water be developed to the extent that it is "reasonable and beneficial" to do so. Development needs, therefore, must be balanced against conservation needs on a case-by-case basis. The balance must initially be struck by the state's water rights agency, at least to the extent appropriative rights are concerned.[58] In any event, the balance so struck is ultimately subject to judicial review. In the contest between navigation and commerce, California has elected to protect neither interest at the expense of the other; rather, it has elected to accommodate these interests by requiring that both interests be weighed, along with all other relevant factors, in determining the reasonableness of a proposed water diversion.

This accommodation perhaps can be more clearly seen in a hypothetical example. Suppose that the state, during a drought, attempts to divert or authorize the diversion of water from a navigable waterway for the purpose of serving the needs of a metropolitan community which lacks sufficient water supplies to meet its current needs.[59] Suppose also that

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58. The state's water rights agency is responsible for granting appropriative rights after the adoption of the statutory water rights system in 1914 and, thus, has clear jurisdiction over post-1914 appropriative rights. Under § 275 of the California Water Code, the agency also has the right to "take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water." CAL. WATER CODE § 275 (West 1971). It has been held that this provision authorizes the agency to exercise administrative jurisdiction over rights other than post-1914 appropriative rights, such as riparian rights. *See* In re Waters of Long Valley Creek Stream System, 25 Cal. 3d 339, 599 P.2d 656, 158 Cal. Rptr. 350 (1979); State Water Resources Control Bd. v. Forni, 54 Cal. App. 3d 743, 126 Cal. Rptr. 851 (1976). The agency has accordingly established administrative procedures governing claims challenging all water rights—whether riparian, appropriative, or other—that assertedly result in waste or unreasonable use of water. *See* 23 CAL. ADM. CODE §§ 764.10-.12.

Although the agency, thus, has jurisdiction over all water rights, a claimant is not required to initiate his claim before the agency at least where the agency did not create the right in the first place, and where the claim does not challenge an agency-created right. *See* Environmental Defense Fund v. East Bay Mun. Util. Dist., 26 Cal. 3d 183, 605 P.2d 1, 161 Cal. Rptr. 466 (1980). Whether the agency must initially hear claims challenging rights granted by the agency itself, is now before the court in Nat'l Audubon Soc. v. Dep't of Water and Power of Los Angeles, No. 639 (Alpine County Super. Ct., Cal.).

59. This situation actually occurred during the 1976-77 drought in California, when the State Water Project diverted substantial amounts of water from the Sacramento-San Joaquin Delta for use in Marin County in northern California, under circumstances where Marin County users lacked alternative water supplies.

the diversion impairs instream values of the waterway, such as navigation. Under California water rights law, the lawfulness of the diversion depends on its reasonableness, which in turn requires a balancing of all relevant factors. These factors include the purposes served by the community's water uses, the purposes served by water uses that are in competition for the water supply, the availability of alternative water supplies for the community, and the effect of the diversions on navigation and other instream values. The public trust doctrine, which allows the state to protect either navigation or commerce, does not indicate how this balance should be struck. California's water rights laws, however, provide a basis for striking the balance. They vest jurisdiction in a state water rights agency which has substantial expertise in the field of water management and require the agency to apply the reasonableness test in granting water rights. California's water rights systems provide a basis for resolving the tension between navigation and commerce which is beyond the scope of the public trust doctrine.

State water rights systems, in general, provide a basis for achieving economic development that might be denied under a rigorous application of the public trust doctrine. California and other western states suffer from largely arid conditions which make it difficult to achieve economic growth by preservation of water resources in their natural state. Economic development can take place only by diverting water from natural channels to areas where it is needed for human or economic needs. Indeed, the appropriation doctrine was developed uniquely in the west as a basis for authorizing such diversions, in recognition of the fact that such diversions are often necessary to serve important public needs.

In California, for example, the federal government has built a massive water delivery system, known as the Central Valley Project, which distributes large volumes of waters from rivers in northern California to agricultural and municipal users in central California.[60] The state has also built a collateral water delivery system, known as the State Water Project, which also distributes large volumes of waters from northern

60. *See* California v. United States, 438 U.S. 645, 651-53 (1978); Ivanhoe Irrig. Dist. v. McCracken, 356 U.S. 275, 280-84 (1958); United States v. Gerlach Live Stock Co., 339 U.S. 725, 727-35 (1950).

California rivers to urban and agricultural users in the central and southern parts of the state.[61] These projects sell water to municipal and agricultural water districts, which in turn sell water to local users. The water is delivered to the districts by pumping plants located at the southern end of the Sacramento-San Joaquin Delta in northern California. The diversion of water by these projects may have some adverse impact on instream values in the Delta, such as navigation, which are protected by the public trust doctrine. If the doctrine were construed as protecting such instream values at all costs it might be invoked as a basis for halting or impeding diversions which are vital to economic growth. Under the California water rights system, however, the project diversions are lawful, whatever their effect on instream values, because they result in the "reasonable and beneficial use" of water.[62] They provide irrigation water to agricultural users in the Central Valley who produce food products which are shipped to national and international markets. They provide water for drinking, sanitary and other purposes for people who dwell in urban communities. They provide hydroelectric power which eases our reliance on costly imported fossil fuels. The diversions result in economic benefits which are ultimately beneficial to California society.

Some may argue that the social costs of the project diversions outweigh the social benefits; that it is better for the water to remain in northern California rivers than to be used by southern California urban and agricultural interests.[63] As

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61. CAL. WATER CODE §§ 12934, 12937 (West 1971); CAL. DEP'T OF WATER RESOURCES, BULLETIN 76, DELTA WATER FACILITIES at 30 (1978).

62. The state water rights agency has adopted a series of decisions, spanning several years, granting appropriative water rights to the federal and state agencies which operate the reclamation facilities, subject to conditions that are intended to avoid or mitigate the harmful environmental impacts on Delta water quality. *See Decision 1485*, State Water Resources Control Bd. (August 1978); *Water Quality Control Plan*, State Water Resources Control Bd., I-1 through I-11 (August 1978); *Environmental Impact Report for the Water Quality Control Plan and Water Rights Decision, Sacramento-San Joaquin Delta and Suisun March*, State Water Resources Control Bd., I-1 (August 1978). Several lawsuits have been filed against the state agency by (1) Delta interests claiming that the agency's decision affords too little protection of Delta interests, and (2) water districts that have contracted for water deliveries from the projects, claiming that the agency's decision affords too much protection for Delta interests. *See* Delta Water Cases, Judicial Council Coordination Proceeding No. 548 (County Super. Ct., San Francisco, Cal.).

63. *See* discussions of opposing views in Robie, *Some Reflections on Environmental Considerations in Water Rights Administration*, 2 ECOLOGY L.Q. 695, 714-18

noted above, however, the balancing between such costs and benefits is beyond the scope of the public trust doctrine. The doctrine authorizes the state to make the choice between competing instream and out-of-stream values, but does not compel a particular choice. The proper balance between these values must be found in the political arena, not in common law principles. In a democratic society, the people, through their elected representatives, have the right to allocate their natural resources in any manner which protects or promotes the perceived public interest. One may hope that the people will be respectful of environmental values, not just material ones. This hope, however, cannot be enforced by the public trust doctrine. The function of the doctrine, as explained more fully below, is to ensure that the people retain a sovereign interest in their water resources so that they can adapt their resources to changing public needs. Assuming that the requisite sovereign interest is retained, the public trust doctrine does not limit the state in allocating its resources in any particular manner.

Nor is there a persuasive basis for arguing that impairments of public trust values can only be made at the legislative level as opposed to the administrative level. In California, as in most other western states, the legislature has delegated its water rights functions to an administrative agency.[64] The administrative agency, by exercising this function, has developed substantial expertise on the subject of water allocation and use. Water allocation issues frequently involve complicated and technical questions that are often more properly resolved at the administrative, rather than the legislative, level. Indeed, water rights permits and licenses are not customarily granted at the legislative level; they are customarily issued at the administrative level pursuant to authority delegated under the water rights system.[65] In short, the water rights

(1973); Note, *The Delta Water Rights Decision*, 2 ECOLOGY L.Q. 733 (1973).

64. *See* notes 40-45 *supra* and accompanying text.

65. Although the federal Central Valley Project was authorized by Congress, Congress did not grant water rights for the project. *See* Rivers and Harbors Act of 1937, 50 Stat. 844 (1937); Rivers and Harbors Act of 1935, 49 Stat. 1028 (1935). Instead, under § 8 of the Reclamation Act of 1902, it has required federal operating agencies to acquire their water rights under state law. *See* 43 U.S.C. §§ 372, 383 (1958). Similarly, although the State Water Project was authorized under the Burns-Porter Act, CAL. WATER CODE §§ 12930-44 (West 1971), the authorizing legislation does not provide water rights for the project. The operating agency acquired its water

function has been traditionally, and necessarily, exercised at the administrative level. It is illogical and impractical to suggest that impairment of trust values cannot occur on the administrative level.

Finally, there is little basis in existing case authority for the argument that the public trust doctrine provides a basis for challenging a water right granted under state water rights laws. No California appellate court has ever considered whether or not the doctrine applies in this context.[66] Significantly, however, the appellate courts have traditionally examined issues concerning the right to divert and use water under traditional water law principles. The riparian and appropriation doctrines, for example, were developed by early judicial decisions which collectively produced a highly-developed body of water law.[67] After the adoption of the statutory water rights system in 1914, the appellate courts analyzed water rights issues within the framework of that system.[68] On the other hand, as noted earlier, cases involving the public trust doctrine have arisen in contexts unrelated to the right to divert and use water.[69] Indeed, the public trust doctrine has never been applied in the water rights context in California. This is not to suggest that old legal doctrines cannot be adapted to modern public needs. There is little basis for making this adjustment, however, where these modern needs are satisfactorily met under existing water rights laws.

There is still a basis, however, for applying the public trust doctrine in the water rights context. As noted earlier, under the *City of Berkeley* line of cases, California holds its

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rights from the state water rights agency.

66. The matter is now before a state court in Nat'l Audubon Soc. v. Dep't of Water and Power of Los Angeles, No. 639 (Alpine County Super. Ct., Cal.).

67. Early cases which developed the riparian doctrine include Meridian v. San Francisco, 13 Cal. 2d 424, 90 P.2d 537 (1939); Fall River Valley Irrig. Dist. v. Mt. Shasta Power Corp., 202 Cal. 56, 259 P. 444 (1927); Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 P. 645 (1890); Lux v. Haggin, 69 Cal. 255, 10 P. 674 (1886).

Early cases which developed the appropriation doctrine prior to 1914 include Inyo Consolidated Water Co. v. Jess, 161 Cal. 516, 119 P. 934 (1912); De Necochea v. Curtis, 80 Cal. 397, 20 P. 563 (1889); Thompson v. Lee, 8 Cal. 275 (1857); Irwin v. Phillips, 5 Cal. 140 (1855).

68. *See, e.g.*, Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967); Temescal Water Co. v. Dep't of Pub. Works, 44 Cal. 2d 90, 280 P.2d 1 (1955); Peabody v. City of Vallejo, 2 Cal. 2d 341, 40 P.2d 486 (1935); Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.2d 5 (1933).

69. *See* note 9 *supra* and accompanying text.

navigable waters in trust for certain public purposes and thus has paramount control of such waters as against private proprietary claims. As we shall now see, this trust responsibility provides a basis for the state to retain continuing jurisdiction over state-granted water rights so that water resources can be adapted to changing public needs. Rather than constraining the state to make a particular choice between navigation and commerce, the doctrine provides that the state has a continuing right to make that choice under changing conditions.

V. THE PUBLIC TRUST DOCTRINE AS A BASIS FOR RETENTION OF STATE JURISDICTION OVER WATER RIGHTS

A fundamental principle of western water law is that water rights are usufructuary rather than possessory.[70] The user does not *own* the water in the same sense that a person may own land. Rather, he has a limited right to *use* water. This use is subject to the paramount right of the public to use or dedicate water for state purposes. This principle is derived from both the Roman and English law, which recognized that certain parts of man's surrounding environment, such as the air that he breathes, the water which flows in streams and rivers, and the sea, belong to the people in common and cannot be fully owned by an individual.[71] This principle is reflected in the fact that the states, in granting appropriative water rights, issue only "permits" or "licenses" rather than "deeds" or other documents which evidence "ownership" of property.[72]

The usufructuary principle is expressed in various ways in the water rights laws of the western states. Some states, such as Colorado, constitutionally provide that water is the "property" of the people of the state.[73] Others, like California,

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70. *See, e.g.*, United States v. Gerlach Live Stock Co., 339 U.S. 725, 742-50 (1950); Seneca Consolidated Gold Mines v. Great W. Power Co., 209 Cal. 206, 287 P. 93 (1930); Gould v. Eaton, 117 Cal. 539, 49 P. 577 (1897); Eddy v. Simpson, 3 Cal. 249, 252 (1853); CLARK, *supra* note 1, at 349-51; KINNEY, *supra* note 36, at 769-73; WIEL, *supra* note 31, at 13-21.

71. *See* WIEL, *supra* note 31, at 13-21. The first principle of the Institutes of the Roman emperor Justinian provided that "by natural law these things are common to all: air, running water, the sea, and as a consequence, the shore of the sea." *Id.*

72. *See, e.g.*, CAL. WATER CODE §§ 1375, 1600 (West 1971); IDAHO CODE § 42-220 (1977); HUTCHINS, NINETEEN STATES, *supra* note 32, at 302.

73. *See, e.g.*, COLO. CONST. art. XVI, § 5; WYO. CONST. art. VIII, § 1. Many states, including California, have adopted the "property" terminology in statutory enactments. *See, e.g.*, CAL. WATER CODE § 102 (West 1971); IDAHO CODE § 42-101 (1977);

constitutionally provide that the use of water is a "public use" subject to state regulation and control.[74] The former approach is based on principles of property; the latter on principles of sovereignty. One establishes a public *dominium* and the other a public *imperium*. Whatever the reasoning, the result is the same. If the people *own* the water, private interests presumably cannot acquire an equivalent ownership interest, and private rights are thus subordinate to public rights. If, instead, the public has the right to control the *use* of water, private rights are subject to the state's sovereign power. Either way, the state has paramount control of its water resources over private proprietary claims.

The states' control of water resources, however, is subject to certain well-defined exceptions under federal law. For example, state control is limited by the preemptive federal power over navigation.[75] It is also limited by the paramount federal power to use waters, navigable or otherwise, on federal lands.[76] This power is based on federal powers over property, which suggests that the states do not have a pure "property" interest in their waters. Furthermore, state control is limited by federal common law principles found in the "equitable apportionment" doctrine. This doctrine provides that the United States Supreme Court, acting under its original jurisdiction, can apportion interstate waters between two or more states on the basis of equitable needs within each of the states.[77] These limitations suggest that the states do not truly *own* their water in any classical sense, and that their control of water is based on principles of sovereignty rather than property. The trust, in the final analysis, is more an attribute of the state's sovereign power over its citizens than an incident of its *dominium*.

S.D. COMP. LAWS ANN. § 46-1-4 (1967); TEX. REV. CIV. STAT. ANN. art. 7467 (Vernon 1954). Many states provide that water "belongs to" the people of the state. *See, e.g.*, ARIZ. REV. STAT. ANN. 45-101A (1956); N.D. CENT. CODE § 61-01-01 (1960); OR. REV. STAT. § 537.110 (1979).

74. *See, e.g.*, CAL. CONST. art. X, § 2; MONT. CONST. art. III, § 5; WASH. CONST. art. XXI, § 1.

75. *See* California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 159 (1935); United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690 (1899).

76. *See* United States v. New Mexico, 438 U.S. 696 (1978); Cappaert v. United States, 426 U.S. 128, 138-42 (1976); Winters v. United States, 207 U.S. 564 (1908).

77. *See* Arizona v. California, 373 U.S. 546 (1963); Nebraska v. Wyoming, 325 U.S. 589 (1945); Nebraska v. Wyoming, 295 U.S. 40 (1935); Kansas v. Colorado, 206 U.S. 46 (1907).

Whatever its conceptual source, the usufructuary principle is simply an expression of the state's trust responsibilities to its citizens in the water rights context. This trust responsibility, as set forth in the *City of Berkeley* line of cases, provides that the state retains continuing jurisdiction over navigable waters for the protection of certain public uses. The usufructuary principle extends that rule to the water rights context. So viewed, the public trust doctrine does more than simply protect certain historic instream values, such as navigation. It enables the state to allocate, and if necessary reallocate, its water supply for the protection of important public interests. The usufructuary principle is both an outgrowth and an extension of the public trust doctrine.

If this thesis is correct, it follows that the public trust doctrine applies to non-navigable waters in some instances. For example, western water laws, whether adopting the "property" or "public use" approach for establishing public control of waters, make no distinction between navigable and non-navigable waters.[78] Nor is such a distinction found in western water laws which establish appropriative water rights systems.[79] Therefore, the usufructuary principle applies both to navigable and non-navigable waters. Indeed, the same result may follow with respect to the public trust doctrine in its traditional context. Certain public trust values, for example fisheries, would seem protectible regardless of the navigability of the waters on which the values depend. In California, for instance, the state has jurisdiction over fisheries found in all waters, whether navigable or not.[80] Therefore, it may be improper to say that the public trust doctrine applies only to navigable waters. It may be more accurate to say that the doctrine protects certain interests, such as navigation, in navigable waters, and certain other interests, such as water allocations and fisheries, in all waters, whether navigable or not.

At first blush, the usufructuary principle is directed towards the question of whether or not the state can take water which is necessary to satisfy private rights and, thereby, make the water available for other uses. There would seem to be no

78. *See, e.g.*, COLO. CONST. art. XVI, §§ 5, 6; N.M. CONST. art. XVI, § 2; CAL. WATER CODE §§ 1200-1202 (West 1971); OR. REV. STAT. § 537.120 (1969 Supp.); WASH. REV. CODE §§ 90.03.010, 90.44.020-.030.

79. *See, e.g.*, CAL. WATER CODE §§ 1201, 1202 (West 1971).

80. CAL. FISH & GAME CODE §§ 5500-5512, 7145, 8603 (West 1958).

doubt as to the state's ability to take the water pursuant to its powers of eminent domain, provided the state compensates the holder of the rights.[81] Because of the high value of water in the western states, however, it is often prohibitive for the state to pay for water under its condemnation powers. The usufructuary principle is significant, in a practical sense, to determine whether the state can take the water without the payment of compensation. The question is not whether the state has the right to take the water, but whether it can exercise this right without payment of compensation.

The implications of the usufructuary principle, in terms of whether the state can take the water without payment of compensation, have not been fully explored by the courts. The basis of the principle is strongest where the state asserts continuing jurisdiction over water rights in order to protect traditional public uses in navigable waters, such as navigation itself. It is well established that the federal navigation power authorizes the federal government to take privately-held water rights without payment of compensation in order to protect the navigability of navigable waters.[82] Since, under the public trust, the state has analogous control of its navigable waters, it would seem that the state has continuing jurisdiction over water rights in order to protect navigation. Under this analysis, the state would not need to pay compensation for the loss of such rights.

A more difficult question arises, however, where the state exercises continuing jurisdiction over water rights to protect interests which are unrelated to navigation. Suppose that the state attempts to modify an appropriative water right in order

81. California's eminent domain power is codified in both constitutional and statutory law. *See* CAL. CONST. art. I, § 19; CAL. CIV. PROC. CODE §§ 1230.010-1268.720 (West 1972). Under this power, privately-held water rights can apparently be taken by the payment of compensation. *Cf.* City of Los Angeles v. Aitken, 10 Cal. App. 2d 460, 52 P.2d 585 (1935). The federal courts have held that the federal government can take privately-held water rights for non-navigation purposes by the payment of compensation. *See* note 82 *infra* and accompanying text.

82. *See, e.g.*, United States v. Twin City Power Co., 350 U.S. 222 (1956); United States v. Appalachian Power Co., 311 U.S. 377 (1940); Morreale, *Federal Power in Western Waters: The Navigation Rule and the Rule of No Compensation*, 3 NAT. RESOURCES J. 1, 64 (1963). If the water is taken for reclamation or other non-navigation purposes, however, the holder of the private right can sue the federal government under the Tucker Act for the payment of damages. *See* City of Fresno v. California, 372 U.S. 627 (1963); Dugan v. Rank, 372 U.S. 609 (1963); 28 U.S.C. § 1346 (1976).

to make water available for competing users because the state believes the reallocation is necessary for the public interest. Does the state have the right to alter the water right without the payment of compensation? Or, does the holder of the right have a vested interest that prohibits the state from acting for such non-navigation purposes?

It would seem that if the state has continuing jurisdiction over water rights for the protection of navigation, the state also retains continuing jurisdiction where other important interests are at stake. Because of the scarcity of the water supply in the arid western states, the allocation of water has, it would seem, no less an effect on the public interest than the protection of navigation. In the West, water is insufficient to supply the many demands upon it. Therefore, the state, in allocating water for specific uses, necessarily limits the availability of water for other kinds of uses. By authorizing water diversions for agricultural uses in one area, for example, the state may reduce the availability of water for competing agricultural uses in other areas, or for urban communities which need water for drinking and sanitary purposes, or for hydroelectric power production. The state, in granting water rights, makes decisions which cumulatively, if not individually, strike a balance between different kinds of economic interests and between economic and environmental interests. The balance ultimately determines the kind of society in which we live. One court declared several years ago, in hyperbole which is not without justification, that because of the scarcity of California's water resources "its waters are the very life blood of its existence."[83]

The above considerations provide ample authority for the state to develop a water rights system governing the *acquisition* of a water right in the first instance; no serious argument can be made that the state lacks such authority. The same considerations also appear to provide authority for the state to *retain* continuing jurisdiction over such rights, a proposition that is less widely accepted. Water uses and needs are dynamic rather than static, particularly in the arid western states. These uses and needs change with the alteration of many factors, such as demography, hydrology, climate and economics. They also change with the alteration of man's

83. Chow v. City of Santa Barbara, 217 Cal. 673, 702, 22 P.2d 5, 16-17 (1933).

subjective perceptions concerning the proper balance between his material needs and the needs of his surrounding environment.[84]

For example, there was a need to allocate substantial amounts of water to the mining industry in the last century because mining was the West's most important industry at that time. Today, there is a need to allocate substantial amounts of water to agricultural use because agriculture is now the West's most important industry. Perhaps in the future there will be a need to allocate substantially greater amounts of water to hydroelectric power production. Also, with our increasing environmental awareness, there is a growing recognition of the need to limit water diversions for consumptive uses so that some water resources can be preserved in their natural state as part of our environmental heritage. The usufructuary principle provides a basis for the people, through their elected representatives, to adapt their water resources to public needs which change with the inevitable march of human history. This result follows whether water is "property" which belongs to the people or whether its use is a "public use" which is subject to paramount public control.

The usufructuary principle provides a warning to holders of water rights that their rights are subject to modification as necessary to achieve more important social goals. If the result were otherwise, the allocation of water in the West would primarily depend on historical patterns of use rather than modern public needs. This consequence would unduly restrict the state's authority to allocate waters in a manner which provides the greatest number of public benefits, which is one of the most fundamental attributes of sovereign power. The usufructuary principle apparently provides a basis for the state to retain continuing jurisdiction over water rights, even after the rights have been granted.

The 1928 constitutional amendment, which establishes the reasonableness test as the basis for measuring a water

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84. Recent legislation adopted both at the federal and state levels articulates the need for governmental agencies to protect environmental values in the process of carrying out their statutorily-mandated duties. *See* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4334 (1970); National Environmental Quality Improvement Act of 1970, 42 U.S.C. §§ 4371-4373 (1970); Clean Water Act, 33 U.S.C. §§ 1251-1376 (1970); California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-21176 (West 1977).

right in California, also provides a basis for the state to retain jurisdiction over water rights. The California courts have held that the reasonableness of a water use varies from time to time and cannot be measured at any fixed point in time.[85] The implication of the decisions is that the reasonableness test must be applied on a continuing basis, not simply at the fixed point in time when the right was granted. As noted above, mining uses may have been reasonable during the last century and agricultural uses reasonable during the present one. No one can fully predict, of course, the kinds of uses that may be most reasonable during the next century. Thus, the reasonableness test provides another basis, in addition to the usufructuary principle, for retention of state jurisdiction over water rights.

The reasonableness test, as established under the 1928 constitutional amendment, does more than simply reaffirm the usufructuary principle. It implements the power reserved to the states under that principle. The usufructuary principle establishes that the state has continuing jurisdiction over water rights, consistent with public trust principles espoused in the *City of Berkeley* line of cases. Using its continuing jurisdiction, California has adopted a reasonableness test as the basis for measuring the continuing existence of a water right. The usufructuary principle enables the state to continue making the choice among competing water uses, and the reasonableness test provides the substantive criteria for making the choice.

The recent trend in California judicial decisions has been to interpret the reasonableness test as a basis for retention of broad state jurisdiction over water rights. For instance, the California Supreme Court recently ruled that, under the reasonableness test, riparian rights which are "dormant," i.e., not currently being exercised, can be quantified and prioritized by the state water rights agency.[86] This indicates that such rights cannot, like a sleeping dog in the manger, arise from their slumber to attack appropriative rights that have been exercised on the assumption that sufficient water was available for the appropriative right. In another recent decision, the Cali-

85. *See, e.g.*, Prather v. Hoberg, 24 Cal. 2d 549, 560, 150 P.2d 405, 411 (1944); Peabody v. City of Vallejo, 2 Cal. 2d 351, 368, 40 P.2d 486, 491-92 (1935).

86. *In Re* Waters of Long Valley Creek Stream System, 25 Cal. 3d 339, 599 P.2d 656, 158 Cal. Rptr. 350 (1979).

fornia Supreme Court ruled that prescriptive rights, rights that have been exercised by adverse possession, are subject to the authority of the state water rights agency.[87] In still another case, a California appellate court recently held, in an action brought by the state water rights agency, that a riparian user, using water for frost protection purposes, can be required to limit his water uses to make water available for more compelling appropriative uses.[88] These decisions suggest that, under the reasonableness test, the rights of a water user are subject to the state's paramount right to use water for other, more compelling uses which are in the public interest.

A similar approach has been taken by the United States Supreme Court in cases involving the apportionment of interstate waters between different states. In apportioning such waters, the Court has made it clear that "equitable" considerations ultimately govern.[89] Moreover, as these equitable considerations change from time to time, the Court can change its apportionments to reflect the changed circumstances.[90] Historic water rights priorities, such as the principle of "first in time, first in right," are "guiding principles," which must yield to more compelling equitable factors, such as the extent to which junior water uses sustain the economy of an entire region.[91] In short, the Court appears to have adopted a reasonableness test in apportioning waters among different states and has retained jurisdiction to alter the apportionments on the basis of changed circumstances. The water rights of the states, acting in a *parens patriae* capacity on behalf of private users, are thus subject to continuing equitable factors. It follows that the rights of individual users within each of the states are also subject to the same factors.

The importance of the reasonableness test, as a means to protect the public interest, is illustrated by the recent 1976-77 drought in California. During that period, a residential developer in southern California proposed to use large amounts of water to fill Lake Mission Viejo, a lake that served only the

87. People v. Shirokow, 26 Cal. 3d 301, 605 P.2d 859, 162 Cal. Rptr. 30 (1980).

88. State Water Resources Control Bd. v. Forni, 54 Cal. App. 3d 743, 126 Cal. Rptr. 851 (1976).

89. *See* Nebraska v. Wyoming, 325 U.S. 589, 607-11, 616-27 (1945); Wyoming v. Colorado, 259 U.S. 419 (1922); Kansas v. Colorado, 206 U.S. 46 (1907).

90. *See* Nebraska v. Wyoming, 325 U.S. at 618, 620, 623.

91. *Id.*

recreational needs of a surrounding residential development. The developer obtained much of its water from a large wholesaler which, in turn, obtained much of its water from northern California through the State Water Project. At a time when people in northern California lacked sufficient water for their own needs, embarking on stringent rationing programs, a developer in southern California obtained large quantities of water from northern California to provide recreation for a small number of people. The state prepared to take legal action to halt the developer's practice on grounds that it resulted in "unreasonable" water uses. The developer halted his practice before the action was filed.[92] The legal question nonetheless remains: Does the usufructuary principle authorize the state to revoke or modify a water right under circumstances which are vastly changed from the time that the right was granted? The usufructuary principle clearly enables the state to take action under such circumstances. This principle is an affirmation of the state's sovereign power over its natural resources, particularly as those resources are necessary to serve important public needs. The principle establishes a basis for the state to retain continuing jurisdiction over water rights for the protection of many public needs, not just navigation and other instream values.

On the other side of the coin, there is a need to provide substantial certainty and predictability with respect to private water rights so that water users can rely upon existing water supplies. This interest cannot be achieved if a state, in determining the allocations necessary to satisfy modern public needs, pays little heed to historical patterns of use. There will be sufficient certainty only if requisite consideration is given to the water rights holder's past reliance and present dependence on his water right. In allocating water among competing needs, the state must consider all factors related to the public interest. These factors properly include the extent to which a water rights holder has built diversion and distribution facilities in reliance on his right and the extent to which he and his customers now necessarily depend on the right in light of whether alternative water supplies are available. The greater

92. *See* Nat'l Audubon Soc. v. Dept. of Water and Power of Los Angeles, No. 639 (Alpine County Super. Ct., Cal.), Affidavit of Willian R. Atwater, filed in support of California's Motion for Summary Judgment at 5-6.

the reliance and dependence on a water right, the more reasonable its continued existence.

It was noted earlier that the significance of the historic priority principle of the appropriation doctrine—the principle of "first in time, first in right"—has diminished in light of the constitutional adoption of the reasonableness test.[93] This priority nonetheless establishes a presumptive validity of prior or existing rights as against newly-asserted uses. As a result of this presumption, water should not be reallocated from existing uses to new uses unless it is shown, by persuasive evidence, that the existing uses are no longer reasonable in light of all relevant circumstances. The fact that a water user has a longstanding water right is an important, but not determinative, factor in determining whether the right should continue to exist. This result accommodates the need to provide for stability in water rights systems with the need to protect important public needs that can only be served by new water supplies.

In summary, the usufructuary principle, on which the reasonableness test is based, is a deeply ingrained principle of Western water law. Although the implications of the principle have never been fully spelled out, it apparently provides a basis for the state to exercise continuing jurisdiction over water rights for the purpose of adapting a limited resource to changing public needs. Historical patterns of use, although highly relevant in determining modern public needs, cannot bind the state's exercise of sovereign power to meet these needs. Whether water is public "property" or its use a "public use," the state has an inherent right to utilize its water resources for protection of legitimate social interests as those interests change from one generation to the next.

VI. Conclusion

The public trust doctrine has relevance in the water rights context, but not in the manner currently suggested by some environmental advocates. The trust provides a means for the state to ensure that water resources are put to the best possible use under changing circumstances. It does not, however, require that the state put such resources to a particular

93. *See* note 53 *supra* and accompanying text.

use. It provides a basis for the state to retain sovereign control of waterways, but does not compel the state to exercise this power in a particular manner. Choices among competing water needs can only be addressed under state water rights laws which have been created for that specific purpose. The public trust is substantively neutral on the kinds of choices which the state should make. Therefore, environmentalists and others who wish to influence the choice must look to conventional water rights laws, not to the public trust. This is so, not because the trust has never been used in this situation, but because it does not apply. Those who attempt to make it apply misconceive the nature of the trust and have chosen the wrong remedy to advance their cause.