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Toward Greater Certainty in Water Rights? - Public Interests Require Inherent "Uncertainty" to Support Constitutional Governance of Our State's Waters

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Toward Greater Certainty in Water Rights? Public Interests Require Inherent "Uncertainty" to Support Constitutional Governance of Our State's Waters

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I. WAS THE COMMISSION ON THE RIGHT TRACK? THE NEED FOR AN INSTITUTIONAL RECONNAISSANCE THAT RECOGNIZES DIFFERENT PERSPECTIVES TO FIND OUT WHICH PROBLEMS WE ARE TRYING TO SOLVE WITH "GREATER CERTAINTY"

The Governor's Commission to Review California Water Rights Law devoted an entire chapter of its 1978 Final Report to the problems caused by "uncertainty" in property rights in California's waters.[1] The Final Report concluded that this uncertainty "inhibits investment and encourages litigation."[2] The Commission proposed legislative reforms that would better quantify existing water rights, give the holders enhanced legal protections and enable them to treat their usufructs more like ordinary private property.[3] But water rights have always been a special sort of property with more limitations and associated responsibilities than experienced elsewhere and benefits that have never been exclusively assigned.[4] Claims of private ownership and public interests in water have long combined to create zones of uncertainty where courts have settled disputes. The way these zones are defined and managed by our legal institutions influences any attempt to increase "certainty" in any rights.

In fact, our approaches to "uncertainty" ultimately define the character and goals of our water management enterprise. The strategic suggestions which emerge from the following analysis start with a basic recognition that water management will always be perceived from many different vantage points, and in our democratic political context and western cultural tradition, each of these is entitled to the credibility that can be accorded within legal, scientific, and cultural limits.

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1. *See generally* GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, FINAL REPORT 16-49 (Dec. 1978) [hereinafter FINAL REPORT].

2. *Id.* at 12.

3. *See generally* Nirav K. Desai, *Up a Creek: An Introduction to the Commission's Final Report Discussion of Uncertainty in California Water Rights Law*, 36 MCGEORGE L. REV. 29 (2005) (detailing the Commission's recommendations on achieving greater certainty in water rights).

4. *See, e.g.*, CAL. CONST. art. X, §§ 2, 5 (stating that reasonable and beneficial use does not include waste, and that all uses of appropriated water are public uses subject to public regulation, respectively).

"Certainty" and "uncertainty" are intimately entwined in any understanding of these limits, and with the ultimate decisions about who gets how much water and under what terms.

The very question of whose problems are being solved by increasing "certainty" in property rights is at the heart of many water disputes. While some aspects of these complex challenges might be addressed through better definition and enforcement of private claims, other governance concerns depend on better recognition of the public sphere and the concurrent maintenance of the zones of "uncertainty" where physical arrangements can be negotiated and values and interests can be balanced. A careful survey of history gives us the tools to identify marginal zones[5] and to encourage appropriate public and institutional action at strategic points to shape adaptations that will best serve present as well as future generations.

The legal definition and treatment of water rights has produced a history characterized by anything but "certainty" and punctuated by some profound changes leading up to our present circumstances.[6] We are currently experiencing a situation where public discourse and decision making can be influenced by grossly asymmetric commitments of resources. It is also increasingly common for concentrations of private economic interest to overwhelm the public process.[7] In the water rights context, demands for greater certainty have largely come from holders of private rights who want to expand the scope of their options and reduce regulatory oversight. When these demands are introduced into grossly over-allocated systems like most of California,[8] greater certainty in private water rights can often only be gained at the expense of less zealously defended public interests in governance, future interests in economic development, the public health of vulnerable communities, or the condition of our natural environment.

Several of the zones where impacts of expanded private rights are felt have been theoretically conceived as involving rights of a "constitutional" dimension,

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5. Emphasis on the "marginal" nature of these zones is crucial for maintaining longer term systemic stability; core values and historic commitments are not necessarily being challenged at these points, but opportunities for adaptive action can indeed be found when proposals for new uses are made at the "margin" enabling a public weighing of values involved at a particular place and deciding whether a particular change should be made at a given time for the benefit of the larger system.

6. Perhaps one of the best illustrations is the shift from the "natural flow" doctrine, entitling riparian land owners to the natural flow of the stream, "undiminished in quality or quantity," to the more modern notion of "reasonable use" of a correlative share with other riparian claimants. The new concept in interpreting riparian rights came as changing technologies made water useful as a source of industrial energy. The transition was rationalized in the so called "mill cases" when affected riparians sought compensation for the installation of dams and mill races on "their" streams. *See generally* JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES (3d ed. 2000).

7. One commonly perceived reaction has been increasing social momentum for political campaign reform.

8. Ellen Hanak, *Who Should be Allowed to Sell Water in California? Third Party Issues and the Water Market*, *in* PUB. POL'Y INST. OF CAL. 1, 9 (2003) (quoting the State Water Resources Control Board Water Rights Division estimates of three times as many rights as there is actual water in California, but even these estimates do not include Native American claims or many dormant rights).

or interpreted as inherent responsibilities of institutions that are the successors or agents of historic sovereigns. We know that states have obligations to all their inhabitants to ensure that trust resources will be available for use by future generations and that certain public uses of water resources have always received enhanced protection in the laws of civilized societies.[9] This means that efforts to "reduce uncertainty" for private rights holders can sometimes appear to others as disguised attempts to wrest water and wealth from the public commonwealth for exclusive private benefit. This is a result inimical to historic democratic traditions.

The Governor's Commission was engaged in a sensitive task: functioning within a viable political consensus and making proposals that would serve the best interests of the broader public, while at the same time encouraging the participation of influential private parties who have become accustomed to a certain style of business. Narrow private interests have an enormous stake in the outcome of any broad policy implementation, and historically, advocates for these interests have not restrained themselves in flexing their influence.[10] The ambition for "certainty" in water rights from these historic players is of legendary proportion in the history of modern water regulation. There is absolutely no doubt that they, as well as more recent entrants into California water markets, would like to become accustomed to more certainty in the treatment of an expanded concept of their water rights.[11]

Very good institutional reasons explain why almost none of the Commission's suggested legislative reforms were enacted, even as some of its strategic observations were indeed later reflected in decisions by courts and boards enforcing water rights. The mixed results indicate relative concentrations of political and economic influence at different levels of government in California. They also reflect the varying degree of knowledge, ignorance, apathy, interest, and even political stamina among diverse communities that form the California public. Instead of functioning always as an institutional form intended to facilitate positive action, many know that a key function of California's legislative institutions is also to *prevent* harmful legislation from being enacted that might undermine fundamental democratic values. Expanded enforcement of private rights in water frequently bumps up against constitutional protections of public interests. In short, some aspects of the lack of

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9. *See generally* HELEN F. ALTHAUS, U.S. DEP'T OF INTERIOR, PUBLIC TRUST RIGHTS (1978); PUTTING THE PUBLIC TRUST DOCTRINE TO WORK: THE APPLICATION OF THE PUBLIC TRUST DOCTRINE TO THE MANAGEMENT OF LANDS, WATERS AND LIVING RESOURCES OF THE COASTAL STATES (David C. Slade et al. eds., 2d ed. 1997) (summarizing the public trust doctrine); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474 (1970).

10. For recounted stories, *see generally* GRAY BRECHIN, IMPERIAL SAN FRANCISCO: URBAN POWER, EARTHLY RUIN (1999); REMI A. NADEAU, THE WATER SEEKERS (4th ed. 1997); MARC REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER (1986); DONALD WORSTER, RIVERS OF EMPIRE: WATER, ARIDITY, AND THE GROWTH OF THE AMERICAN WEST (1985).

11. Some point to the lack of an "ENRON" crisis in California water markets as partly due to the decision of the ENRON subsidiary, AZURIX, to withdraw from water banking projects due to their perception that they would not be able to gain enough "certainty" in property rights for them to undertake business in the style they envisioned.

follow-through on the Commission's suggestions can be explained by the structural need for a certain level of *uncertainty* to co-exist with private claims. This uncertainty opens and gives ultimate effectiveness to the zones of negotiation where private claims interface with historic public interests.

When transactions are proposed on these margins, our laws require public institutions to inquire whether the transactions are consistent with long-term public interests. These inquiries can provide the deliberative space to enable our society and the natural environment to co-evolve within more responsible limits. We certainly do not want to keep approving patterns of development that cumulatively undermine the viability of our natural resource systems. The failure to make inquiries on the margins tends to result in increasingly brittle systems. While short-term economic gains have indeed been made in certain patterns of development, the cumulative tendency of these independent efforts seems to take us in the direction of systemic brittleness. Pleas for increasingly "streamlined" regulation involving more "certain" water rights will tend to take us faster along this path. Conversely, preservation of structural uncertainty in marginal zones keeps us asking the questions we need to ask to support transformations toward more socially and ecologically sustainable patterns of development.

II. SOURCES OF "UNCERTAINTY" IN WATER RIGHTS

Most of the problems identified by the Commission are even more acute and urgent today than they were during the drought-induced investigation of 1978. Private water rights holders continue their attempts to capture more benefits in more "uncertain" zones of their private property claims. The State, in turn, is managing the tensions arising from the combination of broad demands for environmental protection, preservation of agricultural capability, and assurance of adequate water supplies for possibly[12] increasing water demands from a growing population and sprawling development in a changing economy.[13] Over-appropriation of water, which "didn't matter" in times past because downstream users often found adequate supplies for their uses despite exaggerated claims by senior appropriators, is becoming increasingly controversial. More appropriators want to transfer their "conserved" water to remote users who can pay them more revenue than their own use might generate. These new opportunities for water marketing are generating additional incentives to exaggerate historic use to establish the broadest possible benchmarks for private claimants.

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12. The word "possibly" is used because there are substantial opportunities for using less water than is currently used for accomplishing the same functions in all sectors of water use. *See, e.g.*, PETER H. GLEICK ET AL., PAC. INST., WASTE NOT, WANT NOT: THE POTENTIAL FOR URBAN WATER CONSERVATION IN CALIFORNIA (2003) (discussing potentials of urban conservation).

13. *See, e.g.*, 4 DEP'T OF WATER RES., CALIFORNIA WATER PLAN-UPDATE 2004, ADVISORY COMMITTEE REVIEW DRAFT (2004), *available at* http://www.waterplan.water.ca.gov/b160/workgroups/chapter reviewgroup.htm (copy on file with the *McGeorge Law Review*) (concerning the process and text in the emerging 2005 update with input from an active Public Advisory Committee).

Problems of quantification and exaggeration that seemed difficult in the past are becoming ever greater challenges in the current policy environment devoted mainly to finding solutions to structural challenges through market transactions with transferable rights.[14] This is where "certainty" becomes more of a problem because buyers and sellers need to have reconcilable perceptions of just what they are buying and selling. Yet, at the same time, the original legal basis and the associated limits of legitimate expectations of what water rights might entitle an owner to do is also coming under increasing public scrutiny. As suggested in other contexts, vastly different policy approaches are appropriate in situations where "the problem contains some uncertainty" as opposed to those where "the uncertainty contains the problem."[15] The introduction of broad marketability of water rights in California, at a time when such rights are over-allocated and insufficiently quantified, has created the latter type of situation. Both scientific and legal policies will probably have to adjust to accommodate this changed context.

On top of the institutional pressures, the state's natural hydrologic patterns are far from stable in the face of accelerating climate change. Patterns of natural hydrology, formerly assumed to be a reasonably stable background, are no longer even predictable on a credible basis. While the Commission's analysis of uncertainty in property rights in water listed a number of institutional challenges,[16] the physical setting of water itself did not appear to be a major factor in that analysis. However, current science tells us that climate and other factors influencing California's hydrology make it more difficult than many believe to predict how much water will actually be present in what form at any given time in the future. The natural setting for water is extremely variable in California, with precipitation and runoff concentrated in short time periods mostly in the northern part of the state while human demands are much more evenly distributed throughout the year and most often concentrated geographically in more arid zones far to the south. A great deal of

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14. *See, e.g.*, CAL. WATER CODE § 109 (West Supp. 2004) (specifying the need for certainty in private rights and a policy to support and facilitate voluntary transfers of those rights).

15. Such a distinction in management approaches (suggesting that under conditions of extreme scientific uncertainty, "the institutions are the facts" and uncertainty should be embraced rather than reduced) was proposed for appropriate management of a perceived social-environmental crisis concerning the deforestation of the Himalayan Foothills. *See generally* MICHAEL THOMPSON ET AL., UNCERTAINTY ON A HIMALAYAN SCALE: AN INSTITUTIONAL THEORY OF ENVIRONMENTAL PERCEPTION AND A STRATEGIC FRAMEWORK FOR THE SUSTAINABLE DEVELOPMENT OF THE HIMALAYA (1986); Michael Thompson & Michael Warburton, *Decision Making Under Contradictory Certainties: How to Save the Himalayas When You Can't Find Out What's Wrong With Them*, 12 J. APPLIED SYS. ANALYSIS 3 (Apr. 1985); Michael Thompson & Michael Warburton, *Knowing Where to Hit It: A Conceptual Framework for the Sustainable Development of the Himalaya*, 5 MOUNTAIN RES. & DEV. 203 (1985); Michael Thompson & Michael Warburton, *Uncertainty on a Himalayan Scale*, 5 MOUNTAIN RES. & DEV. 115 (1985).

16. *See generally* FINAL REPORT, *supra* note 1, at 17-25. Concerning sources of uncertainty, the report emphasized the tendency of private claimants to exaggerate at every level of the appropriation process, unquantified rights including dormant municipal rights to future use and the 1928 Amendment to the California Constitution, Article X, Section 2, the effect of which was described "to cast a shadow over questionably reasonable uses of water." *Id.* at 21.

public concern, therefore, is concentrated on the practicability of maintaining and supporting the extensive storage and conveyance infrastructure that makes California lifestyles possible.

At the time of the Commission's Final Report, the basic tensions between the fluctuating natural basis of California water and a property rights system that places great value on predictability were never explicitly confronted. Indeed, the essential function of water in sustaining human life was barely mentioned. The notion that a global movement might arise positing that a basic level of access to clean water is actually a human right[17] was not even a blip on anyone's radar screen. Instead, the Report acknowledged that the era of trying to solve basic allocation challenges through the construction of a publicly subsidized storage and conveyance infrastructure was probably coming to an end, and that more locally and regionally crafted solutions emphasizing conservation and reuse would have to be pursued. This approach seems to be the one adopted in drafts of the current update of the California Water Plan.[18] This basic premise also supports the Commission's position that the current priority structure incorporated in existing water rights provides a viable starting point for sharing natural shortages, and that no revision of rights is needed. A basic argument here is that continued viability of this water rights system requires increasing attention to public interests in both the water itself and the decision making processes regarding its use and allocation.

On the institutional side, the context for water rights has always posed some uncertainty because water rights are usufruct, relating only to its use and not to the ultimate ownership of the object in question. The California Constitution, Water Code, and common law are quite clear on this point.[19] Just as in the case of human labor, where what is being bought and sold is

17. The links between access to safe water, alleviation of poverty, and economic development have long been a focus for discussion at the United Nations. *See, e.g.*, U.N., REPORT OF THE WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT, at 20-37, U.N. Doc. A/CONF.199/20, U.N. Sales No. E.03.II.A.1 (2002), *available at* http://www.johannesburgsummit.org/html/documents/summit_docs/131302_wssd_report_reissued.pdf (copy on file with the *McGeorge Law Review*) (relating to the achievement of the Millennium Development goal on Safe Drinking Water); *see also Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: The Right to Water*, U.N. ESCOR, 29th Sess., Agenda Item 3, U.N. Doc. E/C.12/2002/11 (2002), *available at* http://www.internationalwaterlaw.org/IntlDocs/UNCECSR-General-Comment-right_to_water.pdf (copy on file with the *McGeorge Law Review*); VANDANA SHIVA, WATER WARS: PRIVATIZATION, POLLUTION, AND PROFIT (2002); Robyn Stein, *SA New Democratic Water Legislation: National Government's Role as Public Trustee in Dam Building and Management Activities*, World Commission on Dams (1999-2000), *at* http://www.dams.org/kbase/submissions/showsub.php?rec=INS114 (copy on file with the *McGeorge Law Review*) (detailing the water provisions in South Africa's post-apartheid Constitution and public trust legislation).

18. *But see* Dan Walters, *Comprehensive Water Plan Crucial to California's Future*, OAKLAND TRIB., May 18, 2004, at L7 (reporting a higher level agency commitment to storage and conveyance solutions and adjustments to the draft plan by the new Administration despite long involvement and contrary recommendations of public advisory committee).

19. *See, e.g.*, CAL. CONST. art X, § 2; CAL. WATER CODE § 102 (West 1971) (stating that "[a]ll water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law").

constantly under negotiation,[20] there is an analogous zone of negotiation when water use is transferred, and here the bounds are historically relative as well, and constrained by legal convention.

Instead of recognizing the wisdom of the 1928 Amendment to the California Constitution for its embrace of uncertainty, the Commission stated that:

> [T]he effect of the Amendment has been to cast a shadow over questionably reasonable uses of water. With increased demand for water in general, changing ideas of what is reasonable, and the vagaries of climate and other factors involved in the ad hoc determination of reasonable use, the shadow of uncertainty may envelop increasing numbers of water uses.[21]

The idea that structural uncertainty is required for effective constitutional governance of our water system arises from a perspective where "uncertainty" is a positive thing in its own right, and not just a meddlesome characteristic to be reduced whenever possible. In some ways, what appears as "uncertainty" to the holders of private rights might be alternatively conceived as the public space into which private property rights intrude and, when pushed far enough, a point is reached where public institutions spring back to limit or redefine the private "right." This conception of uncertainty comprehends the inherent tensions and contradictory perspectives needed to maintain the public credibility of our constitutional system of checks and balances. It actually allows opposing perspectives to exist within a "single" institutional setting.

From this vantage point, the appropriate policy objective is better defined as trying to develop rules and presumptions tailored first to preserving essential uncertainty and then to strategies for practical functioning within it. Rather than engaging in a narrowly conceived quest to reduce "uncertainty" in generalized application to private property rights in the state's waters, a more useful approach might be to embrace "uncertainty" as an inherent aspect of our evolving constitutional system of governance and to figure out ways to manage it more constructively.[22]

III. WAS THE COMMISSION'S VIEW TOO NARROW?

From the very beginning, the Commission chose to exclude a number of broad categories of analysis that some might consider highly relevant to any discussion of water rights in the state. These categories were: 1) the federal

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20. The transition between legally sanctioned human slavery, where one could indeed buy the entire person, and the enactment of the Thirteenth Amendment to the U.S. Constitution happened in a very brief time period. Boundaries regarding employers' and employees' contributions to healthcare maintenance and other aspects of life support and relative interests in work product are indications that private interests in hired labor are still very much under negotiation.

21. FINAL REPORT, *supra* note 1, at 21.

22. An analogous management approach was suggested for constructive intervention in a perceived deforestation crisis in the Himalayan Foothills. *See supra* note 15.

aspects of rights (presumably including Native claims); 2) the particular functions of, and inter-relationships among, the water agencies that shape and enforce public policies; 3) contracts with, and management of, the major federal and state water storage and conveyance projects; and 4) the statutory protections for areas of origin to guard options for future development in those areas.[23] Without consideration of these aspects of California water rights, the Commission's starting perspective was narrow indeed. An added problem was the Commission's failure to note several important cases in its Final Report as it evaluated existing law.

Less than five years after publication of the Commission's Report, the California Supreme Court in *National Audubon Society v. Superior Court*[24] described one of the omitted cases, which ruled that hydraulic mining constituted a public nuisance when the spoils illegally blocked navigation on public rivers,[25] as "one of the epochal decisions of California history, a signpost which marked the transition from a mining economy to one predominantly commercial and agricultural."[26] This statement was, of course, made in the case formally recognizing the integration of the public trust doctrine and the prior appropriation system as concurrent aspects of California water rights law.[27] The Commission's deliberately narrow approach precluded discussion of the evolutionary role that protection of public interests plays at the margin in helping our society adapt to changing patterns of economic growth. It made it difficult for the Commission to even consider the factors that induced the Mono Lake litigation in the first place and that later sustained citizen advocacy in the face of misplaced political insistence that California's "business-as-usual" be preserved.

The cases omitted by the Commission Report and later cited by the California Supreme Court rationalized economic transition after judicial notice that the state's former primary industry was indeed a nuisance. These rulings opened the path for agriculture and other industry and commerce to replace mining as the leading economic engines for the development of the state.[28]

The Commission introduced its uncertainty discussion by noting that, "[f]or the individual and society together, property is the means for harnessing and utilizing resources. . . . Certainty gives the security of knowing what one has and what one can do with it. It allows planning and rational investment."[29]

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23. FINAL REPORT, *supra* note 1, at 3.

24. 658 P.2d 709 (Cal. 1983).

25. People v. Gold Run Ditch & Mining Co., 4 P. 1152 (Cal. 1884). On the federal level, just as in the Civil Rights movement much later, the recognition of public rights under conditions subject to considerable political and economic influence at the state level required additional impetus from Federal authority. *See* Woodruff v. N. Bloomfield Mining Co., 18 F. 753 (C.C.D. Cal. 1884).

26. *Nat'l Audubon Soc'y*, 658 P.2d at 720.

27. *Id.*

28. Though, from an ecological perspective, industrial agriculture's capital and chemical-intensive technologies and alliance with real estate development interests exerted forces that have closely paralleled the impacts of the mining industry which it replaced. *See also* ROBERT DAWSON & GRAY BRECHIN, FAREWELL, PROMISED LAND: WALKING FROM THE CALIFORNIA DREAM 51-80 (1999).

29. FINAL REPORT, *supra* note 1, at 16.

The Commission recognized that benefits associated with marketable rights included facilitating "the rational choices and calculated risks whereby present wealth joins labor to produce new wealth,"[30] but it failed to develop analogous discussion of cases where markets demonstrated inabilities to protect fundamental public values. Many commentators have expertly chronicled historic legal limitations on private rights in California waters.[31] The legal protection of public trust interests, in contrast to the enforcement of private claims, involves a long history of recognition that market prices rarely reflect fundamental long term public values and so a different set of criteria, not dominated by recognition of mere "economic use," must be applied to these particularly important resources.[32] Indeed, the concept of prior appropriation could only take root in a context where public limitations on the extent of the claims were explicitly acknowledged. These usufructs were not blank checks handed from the public purse to private actors. But, instead of acknowledging the existence of this network of limitations, the Commission endorsed an approach focusing on better quantification of private rights, which many actors knew might develop in a manner largely blind to the existence of public values in water and the historic legal protections that have evolved since before the founding of our republic to protect them.

IV. POINTS OF ATTENUATION OF PRIVATE INTERESTS

Most acknowledge that in order to realize the social benefits of property, we want to approach a situation where both buyers and sellers have a similar understanding of what is being bought and sold. This makes informed economic transactions possible and opens the way to gains in efficiency. But this should not be accomplished at the expense of historic public rights. Many can see points of attenuation of private property rights where the exercise of those rights infringes on the liberties of other private actors. But in the water world, because of public interests in water uses, dimensions of health and community self-sufficiency are simultaneously implicated in proposals to change relative allocations or even in the acts of diverting or transporting water.

The relative merits of private claims to water always have to be weighed against a range of other interests. Perhaps the great master of the common law, Oliver Wendell Holmes, Jr., expressed the legal challenges best when he wrote for the U.S. Supreme Court in the 1908 decision of *Hudson County Water Co. v.*

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30. *Id.* However, the presumptions inherent in this familiar assertion of an association between the mechanics of market forces and their connection to economic growth have been recently contested on the basis of archaeological evidence and the problems of reconciling this with modern economic theory. *See* DAVID A. WARBURTON, MACROECONOMICS FROM THE BEGINNING: THE *GENERAL THEORY*, ANCIENT MARKETS, AND THE RATE OF INTEREST 1-34 (2003).

31. *See, e.g.*, Brian E. Gray, *The Property Right in Water*, 9 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1 (2002) (describing the reasonable use doctrine and public trust doctrine as historical limits on private rights in water).

32. *See, e.g.*, City of Berkeley v. Superior Court, 606 P.2d 362 (Cal. 1980).

McCarter[33] to resolve a controversy over a proposal by a water company to export water from New Jersey to New York:

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side.[34]

This is actually the substance of much public trust doctrine jurisprudence,[35] where a major concern is identifying points where public management decisions actually convert public domain to private use or surrender too much public control over inherently public functions or resources to private parties.[36] In addition to the public trust doctrine, several other legal doctrines with roots in public values are commonly acknowledged to place limits on private appropriation of water. The choice of the Commission to adopt such a narrow lens with which to evaluate "uncertainty" in California water rights is politically understandable, but could never provide the degree of social consensus needed to adjust actual behavior. The Commission's narrow perspective certainly did not include additional areas explored in Justice Holmes' further description of public interests implicated in the *Hudson County* case noting that:

> [F]ew public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. . . . The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.[37]

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33. 209 U.S. 349 (1908).
34. *Id.* at 355.
35. *See, e.g.*, Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).
36. *See generally* Sax, *supra* note 9.
37. *Hudson County Water Co.*, 209 U.S. at 356.

Despite later critical treatment on individual dimensions of the *Hudson County* decision, the essential analysis of legal rights and public interests involved remain compelling. With this ruling, the U.S. Supreme Court firmly recognized the existence of a fundamental, protected public space upon which private property claims might intrude, but which any State could and should preserve and protect by virtue of its sovereignty and its trust relationships with its inhabitants and their natural environment. The public interests to be protected were not just relics of ancient sovereign prerogative; they could take on a number of different forms and Justice Holmes realized that a legitimate discussion could not take place solely in terms of the private rights involved. In the case before the Supreme Court, Justice Holmes went on to deal with exactly the sorts of issues that are challenging State governance of water resources in California today, particularly in the face of efforts to expand the marketability and transferability of water and water rights. Although subsequently refined in other cases, these additional fragments from that historic case might also serve as signposts for a more comprehensive analysis of water rights and allocation strategies:

> One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter. But the contract, the execution of which is sought to be prevented here, was illegal when it was made.[38]

And further:

> A man cannot acquire a right to property by his desire to use it in commerce among the States. Neither can he enlarge his otherwise limited and qualified right to the same end. . . . It constantly is necessary to reconcile and to adjust different constitutional principles, each of which would be entitled to possession of the disputed ground but for the presence of the others, as we already have said that it is necessary to reconcile and to adjust different principles of the common law.[39]

The conclusion of this last passage was a perfect forecast for the California Supreme Court's position seventy-five years later in recognizing the integration of the common law public trust doctrine and the prior appropriation systems in California water rights law.[40] In the *National Audubon* case, the Court commented:

> As we have seen, the public trust doctrine and the appropriative water rights system administered by the Water Board developed independently

38. *Id.* at 357 (citations omitted).

39. *Id.*

40. *See* Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1983).

> of each other. Each developed comprehensive rules and principles which, if applied to the full extent of their scope, would occupy the field of allocation of stream waters to the exclusion of any competing system of legal thought.[41]

The opposing parties in *National Audubon* laid out possible extreme arguments that either the public trust doctrine or the prior appropriation system defined the water rights decision space.[42] But in shaping a framework that might support a constructive public consensus, the California Supreme Court came to the following resolution:

> We are unable to accept either position. In our opinion, both the public trust doctrine and the water rights system embody important precepts which make the law more responsive to the diverse needs and interests involved in the planning and allocation of water resources. To embrace one system of thought and reject the other would lead to an unbalanced structure, one which would either decry as a breach of trust appropriations essential to the economic development of this state, or deny any duty to protect or even consider the values promoted by the public trust. Therefore, seeking an accommodation which will make use of the pertinent principles of both the public trust doctrine and the appropriative water rights system, and drawing upon the history of the public trust and the water rights system, the body of judicial precedent, and the views of expert commentators, we reach the following conclusions.[43]

The Court went on to outline a set of precepts (particularly noting a continuing duty of supervision by trustees and acknowledging their ability to revisit prior allocations and change them in light of current circumstances) that provided guidelines for solving the Mono Lake controversy.[44] The significant success of water conservation strategies and public education programs during a ten year advocacy push led to a landmark decision of the State Water Resources Control Board ("SWRCB") to maintain the surface level of Mono Lake at a higher level and for Los Angeles to release its claim to much of the water that it had claimed by right.[45] In the time since the *National Audubon* decision, the political removal of several California Supreme Court justices and the reassertion of similar constellations of political influence to those that shaped the Commission's original analysis have contributed to a situation where familiar questions are again on the table for additional consideration and negotiation.

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41. *Id.* at 726-27.

42. *Id.* at 727.

43. *Id.*

44. *Id.* at 727-28.

45. *See* S.W.R.C.B. Decision 1631, at 194-96 (Sept. 28, 1994). The appropriation and allocation of millions of dollars to support conservation programs and alternative water resources also contributed to smoothing the path toward this decision.

A point of interest is to note some history that brought the Mono Lake case to the court in the first place. A footnote in the *National Audubon* opinion describes SWRCB action bearing on the "uncertainty" in water rights presently under discussion:

> In 1974 the [SWRCB] confirmed that [the Department of Water and Power] had perfected its appropriative right by the actual taking and beneficial use of water, and issued two permanent licenses (board licenses Nos. 10191 and 10192) authorizing DWP to divert up to 167,000 acre-feet annually (far more than the average annual flow) from Lee Vining, Walker, Parker and Rush Creeks. The Water Board viewed this action as a ministerial action, based on the 1940 decision, and held no hearings on the matter.[46]

This footnote matter-of-factly recounts that perfected state water licenses were being granted in 1974 for "far more than the annual average flow" of creeks that also supplied other users, all on a ministerial basis with no hearings whatsoever, and that the action was based on findings generated by a process that never even considered the public interests in the subject water. Apparently, neither SWRCB procedures nor general public understanding were sufficient to classify this as any sort of problem at the time. Yet now, even as we know that numerous "rights" were established through similarly questionable processes, we still do not have a reliable or credible set of procedures to truly engage and evaluate the equities and uncertainties for anything like permanent solutions. The Governor's Commission's descriptions of confused courts dealing with decades of litigation over rights describing entitlements to flows many times what could be found in nature are not only relics of the distant past;[47] these circumstances are very much with us today in quantifying rights in both groundwater basins and interconnected surface flows.

V. THE MORE THINGS CHANGE, THE MORE THEY REMAIN THE SAME

The water rights situation in California since the resolution of the Mono Lake controversy reminds us that the same challenges and incentives that led to the *Hudson County* controversy in New Jersey in 1908 are very much with us today and will probably remain so for quite some time to come. The tension between the demand for certainty in private rights to encourage efficiency and the structural need for "uncertainty" to preserve public options at the interface of private rights and public values will indeed shape our responses as long as our economic system fosters incentives of private risk and reward. It is simply part of the structural territory. New Jersey had enacted a statute in 1905 to protect its

46. *Nat'l Audubon Soc'y*, 658 P.2d at 714 n.8.

47. *See generally* FINAL REPORT, *supra* note 1, at 22-25.

own development options from the private ambitions of water exporters[48] (somewhat analogous to area of origin statutes enacted in California prior to the construction of the State Water Project), and the U.S. Supreme Court laid out boundaries for private conduct. Legislation and jurisprudence in California have created similarly motivated limitations on private water rights in the form of the reasonable use doctrine and state water policy set forth in Article X, Section 2 of the California Constitution and in the various forms of the public trust doctrine.[49] Yet private actors still advance proposals and plans that seem deliberately designed to stretch the envelope as far as they can in the direction of their private interests, without respect or regard for these venerable principles of public law.

In mid December of 2002, the California Coastal Commission discussed a proposal by Alaska Water Exports to extract water from the mouths of the Gualala and Albion Rivers and deliver it in huge plastic bladders pulled by tugboats for a fee to San Diego and other growing coastal communities.[50] The argument appeared to be exactly parallel to the Hudson County Water Company's argument in maintaining that "surplus water" was available for private appropriation at that point. In the modern case, numerous public advocates called attention to the State's public trust interests in the water to support fisheries and other ecological and scenic values in the coastal zone beyond the mouth of the river.[51] This meant the water was already committed to supporting public values beyond those ordinarily considered by the Water Rights Division of the SWRCB.

In addition, the advocates raised questions about whether any "disputes" that would arise after the launch of such a program might be pre-empted by international trade tribunals (unaccountable to the local electorate) if it was determined that the water could be classified as "in commerce" at the point after it was diverted for the purpose of sale.[52] Local authorities would lose jurisdiction, and with it, any power to regulate the situation, even if it might include conditions threatening the health and safety of the local population.[53] This situation potentially poses a challenge concerning the improper alienation of public supervision similar to those that prompted the *Illinois Central Railroad Co. v. Illinois*[54] ruling by the U.S. Supreme Court more than a hundred years before. The recognition of the diversion of water for the purpose of sale as a "beneficial" use remains a challenging legal question as

48. Hudson County Water Co. v. McCarter, 209 U.S. 349, 353 (1908) (citing 1905 N.J. Laws ch. 238, at 461).

49. *See generally* Gray, *supra* note 31.

50. Pamela J. Podger, *Coastal Panel Rejects Plan to Tow River Water: Private Firm Would Have Supplied San Diego with Mendocino County Resource*, S.F. CHRON., Dec. 14, 2002, at A17.

51. *See, e.g.*, Ruth Caplan & Nancy Price, *Statement by the Alliance for Democracy for the Public Hearing of the California Coastal Commission*, ALLIANCE FOR DEMOCRACY, Dec. 13, 2002 (copy on file with the *McGeorge Law Review*) (comments regarding diversion of water from the Gualala and Albion Rivers); *see also* Podger, *supra* note 50 (describing objections of "[c]ommunity leaders, environmentalists and public trust advocates").

52. Caplan & Price, *supra* note 51, at 4.

53. *See id.*

54. 146 U.S. 387 (1892).

yet inadequately discussed or publicly understood with respect to its implications in the context of current trade regulations. The Gualala-Albion proposal was withdrawn before it could be challenged by the inevitable litigation that would have been filed if the proponents had persevered. But the same proposal by the same company has emerged again, this time with respect to the Mad River, a little further to the north.[55]

Other cases in California have paralleled the "contracts" aspect of the *Hudson County* case of 1908. Justice Holmes was of the opinion then that:

> One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. . . . A man cannot acquire a right to property by his desire to use it in commerce among the States. Neither can he enlarge his otherwise limited and qualified right to the same end.[56]

Yet, this is exactly what many agencies and individuals are attempting to do in relation to water supplied and transported in California's main storage and conveyance projects. A major claim has been that water described in contracts related to a fully constructed State Water Project ("SWP") constitutes "entitlement" to actual water. When parts of the originally envisioned project were never built because of lack of public support, many people referred to quantities in excess of actual project capacity as "paper water," but most people were not troubled because there was usually enough water to do what most contractors wanted to do. However, as time passed and pressures on water supplies tightened, there was increased incentive for contractors to market their contracts as if they reflected real water. A few county planning departments and others long engaged in California real estate development and compliant bureaucracies determined that business could proceed as usual (without regard to pesky details such as non-existent water). Behind closed doors, a few project contractors and water agencies came to an agreement that essentially rewrote provisions of the law related to the apportionment of "shortages" and substituted their own pact, which came to be known as the "Monterey Agreement."[57] Several groups united in an effort to challenge this action in court.[58]

In the autumn of 2000, the California Court of Appeals for the Third District explained paper water, stating that:

> Paper water always was an illusion. "Entitlements" is a misnomer, for contractors surely cannot be entitled to water nature refuses to provide or the body politic refuses to harvest, store, and deliver. Paper water represents the unfulfilled dreams of those who, steeped in the water culture of the 1960's,

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55. Friends of the Gualala River, *Davidge Withdraws Waterbag Applications!*, *at* http://www.gualala river.org/export/default.html (last visited Mar. 2, 2005) (copy on file with the *McGeorge Law Review*).

56. Hudson County Water Co. v. McCarter, 209 U.S. 349, 357 (1908).

57. *See* California Water Impact Network, *The Monterey Agreement, The State Water Project Contracts (SWP)-The Kern Fan Element* (Feb. 2004) (copy on file with the *McGeorge Law Review*).

58. *See* Planning & Conservation League v. Dep't of Water Res., 100 Cal. Rptr. 2d 173 (Ct. App. 2000).

created the expectation that 4.23 maf of water could be delivered by a SWP built to capacity.[59]

The Court also rejected an Environmental Impact Report on implementation of the Monterey Agreement because the purported "lead agency" was much more an interested party than a public decision maker.[60] Even though the contractors and agencies carried on business as they had for years, somehow, this time, the court reflected the strained public credibility engendered by customary action in the water world.[61] It remains to be seen if the words in the Court's opinion will actually affect behavior in the rarefied world of California water, but the idea that public interests in water and its allocation are a public matter that reaches the very roots of our democratic system of governance was again given credence. The challenge and appeals were brilliantly crafted under provisions of the California Environmental Quality Act.[62] A procedural maneuver called a "reverse validation cause of action" was successfully employed to question the legitimacy of the transfer of title to an additional part of the Kern Water Bank.[63] This is the controversial private enterprise to store and transfer water from underground storage near the terminus of the SWP.[64] In one of the most important court decisions since *National Audubon,* public interests in planning and governance again became part of the water debate.

Most often, when actions are taken asserting private water rights, there is a noticeable lack of resistance at points where one would guess public interests might be defended. Perhaps due to a lack of public understanding or political will, the agencies established to supervise water rights simply avoid this part of their job as they tend to other pressing duties in their permitting and project approval departments. This is apparently the case as publicly subsidized irrigation water is applied to fields containing toxic levels of selenium contamination.[65] It is well known that the runoff from such fields causes genetic damage and death to wildlife and also grievously contaminates drinking water supplies anywhere downstream.[66] Often, as was the case at Kesterson National Wildlife Refuge, contamination is known to exist before the construction of a federal water project[67] and there is an understanding that contractors would be responsible for any damaging impacts—but a responsible inquiry has never been

59. *Id.* at 190 n.7.

60. *Id.* at 184-85.

61. *Id.*

62. *Id.* at 182-83.

63. *Id.* at 182.

64. *See* JOHN GIBLER, PUB. CITIZEN, WATER HEIST: HOW CORPORATIONS ARE CASHING IN ON CALIFORNIA'S WATER (Dec. 2003); *see also supra* note 41 and accompanying text.

65. *See generally* Felix E. Smith, *The Kesterson Effect: Reasonable Use of Water and the Public Trust,* 6 SAN JOAQUIN AGRIC. L. REV. 45 (1996)

66. *See id.* at 45-48, 59.

67. *See id.* at 46-47.

made as to whether it is actually reasonable and in the public interest to continue the application of water to these lands.

In some cases, excessive compensation has been paid to particular landowners to take especially dangerous lands out of "production."[68] This compensation has been paid on the basis of appraisals that compare these lands to "prime" agricultural land, even though it would have been practically worthless without the public water that was seemingly unreasonably applied to it. Such situations are commonplace in the world of California agriculture and real estate development where many fortunes have been created and magnified with the addition of publicly subsidized water. But they are becoming more difficult to justify to an increasingly skeptical public.

Another area where the private exercise of water rights is intruding on publicly protected space is in cases where politically and economically vulnerable communities are forced to bear a disproportionate share of the negative health, environmental, and economic burdens suffered as a consequence of the implementation of public policies—a fundamental cause of the modern environmental justice movement. There has been clear recognition of unfair impacts on both federal[69] and state[70] levels and a growing commitment to see that they are mitigated at early stages of planning for any significant public actions. Two particularly important environmental justice concerns are the very predictable health, economic, and cultural impacts of water transfers negotiated mainly between buyers and sellers of private water rights, and impacts of toxic contamination on subsistence fishers who depend on public fisheries as an important source of food.

In the case of water transfers, a wide range of the public is affected not only because new activities and uses are possible in areas receiving water, but impacts are inevitably broader than those likely to be considered by water rights holders or cash-strapped public servants in counties of origin. Sometimes whole communities and their agricultural economies depend on traditional uses of water for that purpose. The situation can be easily distinguished from the case of an industrial plant closure because water is naturally seen as a kind of "capital asset" of the source area *itself* that is being mined, not merely shaped into wealth through the efforts

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68. *See* Firebaugh Canal Co. v. United States, 203 F.3d 568 (9th Cir. 2000) (recounting the settlement filed in partial resolution of the extensive conflict). *But see id.* at 597 (Trott, J., dissenting) (setting forth what appears to be a more publicly compelling analysis and conclusion). *See also* Lloyd G. Carter, *How I See It: Westlands Escapades*, 12 ESTUARY 4 (2003), *available at* http://www.estuarynewsletter.com/2003_02/sfep_2003_02.pdf (copy on file with the *McGeorge Law Review*).

69. *See* Exec. Order No. 12898, 3 C.F.R. 859 (1994), *reprinted as amended in* 42 U.S.C.A. § 4321 (West 2003 & Supp. 2004) (entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" and enacted to supplement and sharpen longstanding constitutional obligations).

70. 1991 Cal. Stat. ch. 690 (establishing the Office of Planning and Research as coordinating agency for California environmental justice programs and mandated that individual agencies promulgate their own respective policies); *see, e.g.*, CAL. STATE LANDS COMM'N, ENVIRONMENTAL JUSTICE POLICY (Oct. 2002), *available at* http://www.slc.ca.gov/Policy%20Statements/Env_Justice/Environmental%20Justice%20Policy% 20Final%20Web.pdf (last visited Nov. 12, 2004) (copy on file with the *McGeorge Law Review*) (finding environmental justice obligations consistent with Public Trust responsibilities owed to all Californians, adopted October 1, 2002).

of an entrepreneur. Once it is gone and there are people depending on it elsewhere, it becomes far more difficult for the source area to recapture. People affected when water is transferred out of a basin range from farm workers to fertilizer sales and pesticide application industries. Well levels, public health, and basic access to clean water may also be impacted while reduced tax revenues can further squeeze public services. The consequences of decisions to transfer water clearly have public dimensions that are currently being negotiated.[71]

While in most purely economic contexts the public is surer about the division of public and private benefits, the context of water still raises fundamental questions that resonate with large sectors of the public. One such question is posed when one considers that "[a]ll water within the State is the property of the people of the State,"[72] and increasing prices are being offered to farmers by urban water suppliers: How much of that increased price belongs to the water rights holder and how much should actually go to the public, especially when the infrastructure to move the water was built at public expense? When does the seller of a private water right begin to traffic on the value of an inherently public asset? The easy answer offered by most legal professionals involved in such transactions, that it all goes to the water rights holder, is coming under increasing social scrutiny by many present inhabitants of the state who were simply not represented at the time of "the Great Barbeque," or the many incremental occasions since, when public assets have passed to private control. We now have separate markets for agricultural and urban water and the resolution of price differentials cannot be achieved so simplistically.[73] Gains, made by moving an inherently public asset between the two markets, cannot be privatized by mere desire. Yet that is what seems to be happening by degrees in California. Holmes was very deliberate in maintaining a zone of structural uncertainty when he wrote about state powers with regard to natural resources, stating:

> [T]he constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent on any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the State is not required to submit even to an aesthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be great public good, and what it has it may keep and give no one a reason for its will.[74]

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71. *See, e.g.*, S.B. 1374, Reg. Sess. (Cal. 1999) (as introduced on February 18, 2004, but not enacted, by Senator Machado to regulate certain proposed transfers that might involve third party impacts).

72. CAL. WATER CODE § 102 (West 2004).

73. *See, e.g.*, longstanding negotiations involved in the Imperial Irrigation District-San Diego transfer and current negotiations concerning compensation for "third parties."

74. Hudson County Water Co. v. McCarter, 209 U.S. 349, 357 (1908).

Public accommodation can only emerge with the involvement of a broader cross section of the public in particular policy situations. This is beginning to happen as California water planners are finding that private negotiations behind closed doors are not automatically approved by an informed public. The decision in the *Planning & Conservation League*[75] case noted above is a key reminder of this.

The rise of an environmental justice movement is another indication of the changing demographic and socio-political landscape in California. Ethnic and low-income communities suffer disproportionately when subsistence fisheries are contaminated by toxic chemicals or damaged due to hydropower facilities' operations. These communities frequently do not have the disposable income needed to substitute other foods or travel to safer waters. Heavy metals and many other toxic contaminants tend to accumulate in the tissues of fish higher on the food chain and pose higher risks to people who eat them most frequently, as is the case with many racial and ethnic communities located near polluted California waters. Fishing access and use in California waters is explicitly protected by the California Constitution in the Declaration of Rights.[76] The issue is made more complex since fishing is one of the traditional public uses protected by the common law public trust doctrine. The failure of the State to maintain its trust resources in a suitable condition for such a long-established trust use is a serious problem that environmental justice advocates have begun to notice. California's duty with regard to public fisheries is clearly greater than a simple obligation to warn people in different languages that they are endangering their personal health and safety when using trust waters for intended purposes. But just how much this duty will be enforced when polluting industries are accustomed to treating waterways as free waste disposal services is a point of ongoing negotiation.[77] Traditional trust obligations to maintain resources in condition suitable for trust uses are owed to all Californians, regardless of their political or economic power. In fact, one of California's primary trustee agencies, the California State Lands Commission, has explicitly recognized environmental justice duties as consistent with its original trust obligations.[78]

It is by now abundantly clear in California that existing water management practices are impinging on public interests in the resource, and that these situations cannot be regulated or remedied solely by protecting or enforcing private rights and duties, though that sometimes appears to be the ideological commitment of some private actors and courts that have recently evaluated recent controversies.[79] The often convoluted reasoning and tortured descriptions of

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75. 100 Cal. Rptr. 2d 173 (Ct. App. 2000).

76. CAL. CONST. art. I, § 25.

77. *See, e.g.*, Clean Estuary Partnership negotiation of new Total Maximum Daily Loads for San Francisco Bay under the leadership of the Regional Water Quality Control Board.

78. *See* CAL. STATE LANDS COMM'N, *supra* note 70.

79. *See, e.g.*, Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313 (2001) (finding a

history that have been offered to justify judicial decrees asserting certainty in property rights in water are becoming harder to explain to a public that is most often looking for a basically reasonable story to support judicial problem solving. Just how long these judgments that fly in the face of fair treatment for all Californians will be tolerated is an open question. It might be relevant to recall some of the social strife following the *Dred Scott* decision,[80] probably one of history's more ill-advised forays introducing judicially imposed certainty in socially contested property rights.

The government's credibility is further strained in the California water rights context by the manner in which scientific authority is sometimes claimed when resolving questions involving common property resources such as water. A recent issue of *Science* devoted a special section to a modern look at the "Tragedy of the Commons" essay by Garrett Hardin that was first published on its pages thirty-five years earlier.[81] The original essay posited an inherent tendency for humans to undermine the ecological basis of any commonly held resource since they would obviously take actions at all times maximizing short term private benefit, even when it could be clearly seen that collective welfare was being harmed.[82] The main consequence of Hardin's analysis was that an entire academic and political orthodoxy was spawned claiming that ownership of valuable resources should not be shared, but rather had to be assigned to a single agent to prevent the inevitable tragedy that would result otherwise. In the new retrospective, anthropologists and scientists from various disciplines recognized a myriad of institutional mechanisms that have historically been implemented by any number of cultures to avert exactly this type of "tragedy." One sentiment expressed in one of the major pieces that formed the special section was that:

> Effective governance requires not only factual information about the state of the environment and human actions but also information about uncertainty and values. Scientific understanding of coupled human-biophysical systems will always be uncertain because of inherent unpredictability in the systems and because the science is never complete.[83]

This statement summarizes some of the main concerns about premature quantification and imposition of certainty in water right systems. The *Science* analysis also pointed to governance challenges posed when social consequences and physical impacts of public policies are not perceived at the levels where the

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regulatory taking without undertaking the required inquiry to establish an underlying property right); *see* Gray, *supra* note 31, at 4-15.

80. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1856) (recognizing slaves as chattel in all states, "altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect").

81. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

82. *Id.*

83. Thomas Dietz et al., *The Struggle to Govern the Commons*, 302 SCIENCE 1907, 1908 (2003).

policies are proposed or consent is given.[84] This is especially true of negative environmental impacts induced by incentives created in various international trade agreements. Resource damage and labor exploitation often occur on both geographic and temporal scales far removed from the experiences or jurisdictions of the parties who propose or receive benefits from the policies. The basic conclusion was that there is a need to make a transition from an "adaptive management" form of regulation to an "adaptive governance" framework to encompass more of the parties externalized by arbitrarily imposed political and economic boundaries.[85] The authors felt that improved governance is particularly needed in cases where there is a tendency for powerful actors to "game" any system of regulation.[86]

Adaptive governance has been the historic province of the public trust doctrine for as long as its constituent inquiries have been invoked in crisis situations to re-establish new, or at least slightly more sustainable, balances between people and the resource systems that support them.[87] The history of progress here involves legal and political action at all levels. Positions adopted in trial courts cannot be underestimated in this arena because rulings that have not been appealed have always played a large role in shaping action on the ground. Indeed, all the public interest limitations that shape the enforcement of private claims in water serve to establish institutional signposts that can aid in finding practicable accommodations to uncertainties encountered in marginal zones.

VI. THE EMERGING HAWAI'IAN APPROACH —A POSSIBLE CALIFORNIA FUTURE?

In August of 2000, the Hawai'ian Supreme Court forged a framework for a socially inclusive future where that state will recognize its primary responsibility to maintain an ecologically viable water resource system.[88] The opportunity for a comprehensive reappraisal of history and endorsement of a public trust framework for adaptation toward a more sustainable future came with the closing of a major sugar growing and processing operation on the island of Oahu in the early 1990s.[89] Prior to closing, water, to the tune of about twenty-seven million gallons a day, in addition to drafts from the Pearl Harbor aquifer, was imported from streams and groundwater systems on the wet side of Oahu to the drier side to irrigate the sugar

84. *Id.*

85. *Id.*

86. *Id.*

87. *See* Nat'l Audubon Soc'y v. Superior, 658 P.2d 709 (Cal. 1983) (recognizing affirmative State duty to protect trust resources whenever feasible); *In re* Water Use Permit Applications, 9 P.3d 409 (Haw. 2000) [hereinafter *Waiāhole Ditch*] (recognizing primary State duty to preserve and protect trust resources whenever feasible); *see, e.g.*, Arnold v. Mundy, 6 N.J.L. 1 (1821) (establishing order in the public oyster fishery by recognizing a right to public access).

88. *Waiāhole Ditch*, 9 P.3d 409.

89. *Id.* at 423.

operation.[90] After its closing, the sugar business would not need the water so the question of how it would be reallocated became a controversy when several parties questioned the permit applications for current and new uses.[91] At about the same time the closure of the sugar business was announced in 1993, applications were also made to increase the amount of water reserved for instream uses on the windward side of the island and it became obvious that less than perfect knowledge existed about either the human or natural systems' needs or capacities.[92] A broader public inquiry was clearly demanded, and since the public saw the harm caused to trust resources due to inadequate historic supervision of private conduct, the court recognized a need for precaution when dealing with these inherently public resources.

A long history of community activism and continuing media attention created a fertile environment for public deliberation. As in so many other cases concerned with finding a resolution based in the "public interest," questions were raised about inherently conflicting roles of public representatives, ranging from Commissioners in dual roles to the Attorney General herself representing state agencies with conflicting mandates.[93] But after all the elements of procedural due process were settled, the court went on to recognize a practicable set of principles, drawing from the common law public trust doctrine and Hawai'i's unique constitutional history to set out important guideposts for finding a viable solution to the problem at hand.

The court emphasized the traditional Hawai'ian notion that the King held all resources in trust for his subjects and that since the cession of sovereignty was not the outcome of a conquest, but rather an agreement, portions of title passed to the new state with these traditional attributes.[94] Of course, most of the traditional attributes of title were explicitly articulated in the State's constitution and its resource codes as well.[95] The merger of constitutional history with the many similar strands of concern in the development of other states' common law public trust doctrines led to the recognition of a comprehensively developed set of principles that could be applied to reach responsible decisions. The trust obligations were firmly fixed on a constitutional level.[96] Both ground and surface water were recognized as aspects of the same State resources trust.[97] Traditional uses of water by native Hawai'ians were recognized as protected by the public trust.[98] The State was seen as having a primary duty to preserve and protect the ecological basis of its water resources system and the

90. *Id.*

91. *Id.* at 423-24. In 1992, the Water Commission had designated five windward stream aquifers as ground water management areas requiring new and existing diverters to apply for permits within one year. *Id.* at 423; *see* HAW. REV. STAT. §§ 174C-41 to 174C-63 (1993 & Supp. 1999) (regulating water use).

92. *Waiāhole Ditch*, 9 P.3d at 423.

93. *Id.* at 432-39.

94. *Id.* at 440-41.

95. *Id.* at 441-42.

96. *See id.*

97. *Id.* at 447.

98. *Id.* at 449.

precautionary principle was explicitly found to be a restatement of the State's pre-existing public trust obligations to its present and future inhabitants:

> [A]t minimum, the absence of firm scientific proof should not tie the Commission's hands in adopting reasonable measures designed to further the public interest. So defined, the precautionary principle simply restates the Commission's duties under the constitution and Code. Indeed, the lack of full scientific certainty does not extinguish the presumption in favor of public trust purposes or vitiate the Commission's affirmative duty to protect such purposes wherever feasible.[99]

In essence, the court acknowledged the need to function within, and not be paralyzed by, uncertainty at multiple levels. While scientific uncertainty is analyzed on different scales and dimensions when compared to legal uncertainty concerning property rights, it has many common features and institutional responses are often analogous in the two areas. In dealing with a concrete case on the margin where contested claims were being asserted, the Hawai'ian Supreme Court found it useful to reappraise how the State had reached its present situation and how various rights had been recognized in the State's water resources. The solution was essentially to resurrect the public spaces inherent in our legal traditions, in a manner very similar to the approach taken by the U.S. Supreme Court in *Hudson County* in 1908 when it put an end to plans to export water from New Jersey to New York.[100]

In describing its decision, the majority of the Hawai'ian Supreme Court signed onto the notion that historic public obligations can no longer be disregarded in planning and supervising the use of one of our most important public resources stating:

> [W]e do not establish any "priorities" as that notion is commonly understood in water law and has been previously eschewed by the legislature. Rather, we simply reaffirm the basic, modest principle that use of the precious water resources of our state must ultimately proceed with due regard for certain enduring public rights. This principle runs as a common thread through the constitution, Code, and common law of our state. Inattention to this principle may have brought short-term convenience to some in the past. But the constitutional framers and legislature understood, and others concerned about the proper functioning of our democratic system and the continued vitality of our island environment and community may also appreciate, that we can ill afford to continue down this garden path this late in the day.[101]

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99. *Id.* at 467.

100. *See* Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908).

101. *Waiāhole Ditch*, 9 P.3d at 502 n.108.

The State of Hawai'i thus made the decision that it was well past time to recognize some of the principles and priorities that had proven so easy to ignore in the daily business of economic life. The Hawai'ian Supreme Court renewed the network of responsibilities and obligations that are inherent in the public trust doctrine so that the state could credibly deal with situations that had gotten out of balance. The same trajectory could clearly develop in California, where our own Supreme Court provided some of the key precedents relied upon by the Hawai'ian court to shape its decision.

While Hawai'ian decisions are not binding law in California, the implications are obvious. The gracious leadership that is emerging in Hawai'i should be a strong wake-up call that an increasingly engaged California public will probably soon be calling for its own trustees to do a better job of protecting this state's precious natural resources. The Hawai'ian choice was to move forward and engage scientific and legal uncertainty within a framework of public precaution. Longstanding habits in the California water world, such as closed door meetings to craft policies with broad public impacts, are simply not appropriate for making decisions about how to allocate one of our most precious public resources.

This "late in the day," as the Hawai'ian court put it, it is no longer appropriate to "continue down the garden path" of proceeding by assumption or simply failing to make inquiries required by law.[102] The duties imposed on public trustees by the California public trust doctrine serve as an excellent series of guideposts to identify the zones where more attention is needed to perceive and address the scientific and legal uncertainties inherent in our current water rights system. Just as in Hawai'i, California's trustees have a continuing duty to supervise public trust resources and ensure that they are used in a manner consistent with trust purposes. This supervisory duty is combined with an affirmative obligation to exercise discretion in such a manner as to protect trust resources whenever feasible.

Perhaps more than any other obligation arising from public trusteeship, these are the two that should give greatest pause to those proposing streamlined processes for water transfers. The transfer of water or water rights to new uses is the essence of a historical "marginal zone" where "uncertainty" is most needed to provide the public space to protect future options. Yet these are exactly the cases where water transfer proponents are clambering for more "certainty" in their rights and less responsibility for researching and recording information about the economic and environmental impacts of their actions. The duty of state supervision necessarily implies the capacity for supervision, and this is exactly what is being surrendered in many of the models being proposed to regulate this area. This creates a dilemma for public trustees and regulatory agencies: if they give in to political demands for more "certainty" for private water right holders and less accountability, and basically continue to ignore their public duties, the

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102. *See, e.g.*, Gray, *supra* note 31, at 4-15.

larger water regulation system drifts toward ecological and social brittleness and the trustees breach their public obligations of continuous and meaningful supervision.

The Hawai'ian experience indicates that times do arrive when it is essential to acknowledge public values and interests in the service of long-term social welfare. Happily, with the time-tested principles of the public trust doctrine as a guide, the balance sought in "uncertain" zones is not simply an entirely relative one where everybody is equally unhappy; rather it resides within ecological and social limits that must be reasonably described within a framework of public precaution. Our legal institutions do indeed require a tolerable amount of "uncertainty" to make room for public deliberation and successful adaptation to changed circumstances. We should not inadvertently eliminate this in a generalized quest to achieve greater certainty in water rights. That would actually lead to a more brittle system, increasingly vulnerable to both social and ecological stresses. Perhaps these observations can help put some of the mixed results of the Governor's Commission in a broader context and offer still another perspective for future policy development.

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