Oklahoma Law Review

Volume 50 | Number 3

1-1-1997

Changing Landscapes and Evolving Law: Lessons from Mono Lake on Takings and the Public Trust

Andrew H. Sawyer

CHANGING LANDSCAPES AND EVOLVING LAW: LESSONS FROM MONO LAKE ON TAKINGS AND THE PUBLIC TRUST

ANDREW H. SAWYER*

As the Mono Lake water right proceedings approach a conclusion,[1] this may be an appropriate time to analyze the relationship between the public trust doctrine as enunciated in *National Audubon Society v. Superior Court*[2] and the regulatory takings doctrine.

I. The Mono Lake Proceedings

A. Mono Lake

Mono Lake is a terminal lake in a closed hydrologic basin to the east of the Sierra Nevada crest, about 190 miles east of San Francisco and 300 miles north of Los Angeles. Mono Lake is approximately one-half million years old, one of the oldest lakes in North America. The lake surface covers approximately sixty-nine square miles, with a surface elevation of about 6380 feet above sea level. Because the lake has no outlet, dissolved ions carried into the lake in streamflow and groundwater seepage have concentrated over the long life of the lake, making it highly saline and alkaline. The lake is about two and one-half times more saline than the ocean.[3]

Although too salty for fish, Mono Lake has a very productive ecosystem. Immense numbers of pelagic brine shrimp (*Artemia monica*) and benthic brine flies (*Ephydra hians*) provide food for hundreds of thousands of birds which nest at the lake or use it a stopover during migration. Birds which rely on Mono Lake include

---

* Assistant Chief Counsel, California State Water Resources Control Board (SWRCB). The views expressed in this article are those of the author, and do not necessarily reflect the views of the SWRCB, its individual members, or the State of California.

1. On September 28, 1994, the SWRCB issued a water right decision applying the public trust doctrine to diversions from four streams tributary to Mono Lake. *See* Water Resources Dec. 1631 (Cal. State Water Resources Bd. 1994) [hereinafter SWRCB Decision 1631]. No party sought administrative reconsideration or judicial review. The SWRCB opened an administrative hearing in early 1997 to review restoration plans called for in Water Resources Dec. 1631, but recessed the hearing when several of the parties to the proceeding announced they were close to settlement of the remaining issues. Most of parties, including the Los Angeles Department of Water and Power (LADWP) and the three environmental groups that have been most actively involved later reached an agreement. The SWRCB then reconvened the hearing, receiving the settlement agreement and evidence presented by a party who objects to portions of the settlement agreement. Based on the hearing record the SWRCB will take final action on the restoration plans.

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

3. *See* NATIONAL ACADEMY OF SCIENCES, THE MONO BASIN ECOSYSTEM — EFFECTS OF CHANGING LAKE LEVELS 12-15 (1987).

one-quarter to one-third of the North American population of eared grebes (*Podiceps nigricollis*) and fifteen to twenty-five percent of the North American population of California gulls (*Larus californicus*).[4]

The amount of water in Mono Lake is determined by inputs from rainfall and snowmelt and loss from evaporation. Five Sierra Nevada streams, Rush, Lee Vining, Mill, Walker, and Parker Creeks, provide about seventy-five to eighty-five percent of the total inflows into the Lake. Changes in lake volume and resulting changes in salinity and lake level affect the habitat for aquatic organisms and birds using the lake. Lake volumes fluctuate as rain and snowfall vary from year to year, but more substantial changes in recent years resulted primarily from diversions from the streams feeding Mono Lake.[5]

B. LADWP Diversions

Seeking an additional water supply to support its growing population, the Los Angeles Department of Water and Power (LADWP) designed a project to use Mono Basin water to augment its supplies from the Owens Valley, which lies to the south of the Mono Basin and to the east of the Sierra Nevada crest. The Mono Basin project involves diversion from Lee Vining Creek, Walker Creek, Parker Creek and Rush Creek to a reservoir on Rush Creek. From the reservoir, water is exported from the Mono Basin through the Mono Craters Tunnel approximately eleven miles to the upper Owens River. The water diverted from the Mono Basin commingles with water in the upper Owens River, which is diverted downstream on the Owens River into the Los Angeles Aqueduct for conveyance to the City of Los Angeles.[6]

In 1936, LADWP applied to the state for an appropriative water right for the project. In 1940, the Department of Public Works, a predecessor of the State Water Resources Control Board (SWRCB), issued permits for the project. The Department of Public Works recognized that the diversions would adversely affect the Mono Basin, but concluded that it was required to approve the project under the law then in effect.[7]

LADWP completed construction of its Mono Basin diversion structures in 1941 and began operation of the project. Initially, LADWP diversions from the Mono Basin were limited because the Los Angeles Aqueduct did not have sufficient capacity to convey all of the water which could have been diverted from the Mono Basin to the Owens River. Between 1940 and 1970, LADWP diverted an average of 57,067 acre-feet of water per year from the Mono Basin. After completion of a second barrel of the Los Angeles Aqueduct in 1970, LADWP was able to divert the full flow of the four streams during periods of average runoff. In 1974, the SWRCB issued licenses which confirmed LADWP's right to divert water from the four streams. The licenses authorized diversion and use of up to 147,700 acre-feet in any

4. *See id.* at 1-2.
5. *See id.* at 4-6, 9, 29.
6. *See* SWRCB Decision 1631, *supra* note 1, at 3.
7. *See id.* at 3; Water Resources Dec. 455, at 26 (Cal. Dep't Pub. Works 1940).

one year. Between 1974 and 1989, LADWP diverted an average of 83,000 acre-feet per year of water from the Mono Basin.[8]

LADWP's diversions from the Mono Basin between 1941 and 1983 resulted in a decline in the water level of Mono Lake of approximately forty-five feet and a reduction in the surface area of the lake of approximately thirty percent.[9] Because of the potential ecological effects of continued diversion, there was much concern about the future of Mono Lake. At higher levels of salinity, reproduction and survival of brine shrimp and brine flies would be reduced, affecting the birds that feed on them. As the lake level declined, some of the lake's islands would become peninsulas, allowing predators to prey on birds that ordinarily would nest on the islands.[10] Air quality also deteriorated. Declining lake levels also exposed large areas of dry lake bed, resulting in severe periodic dust storms and violation of federal Clean Air Act standards for fine particulates.[11]

C. National Audubon Society v. Superior Court

In 1979, the National Audubon Society, the Mono Lake Committee, Friends of the Earth and four Mono Basin landowners filed suit to enjoin LADWP's diversion based on the theory that Mono Lake is protected by a public trust. The suit eventually reached the California Supreme Court, which issued its landmark decision, *National Audubon Society v. Superior Court* in 1983.[12]

The plaintiffs in the litigation sought to take a doctrine that was well-established in California real property law and apply it to the law of water rights. Before 1983, the public trust doctrine had been applied to determine public ownership to the beds underlying navigable waters and to address public access to and use of navigable waterways.[13] A variant of the public trust doctrine also applied to fish in both navigable and non-navigable waterways.[14]

The public trust doctrine has its origins in Roman law and English common law.[15] The purposes of the public trust doctrine were originally defined in terms of navigation, commerce and fisheries, but the doctrine evolved to include protection of recreation, fish and wildlife habitat, and aesthetics as well.[16] Similarly, while English decisions applied the doctrine to tidelands, later case law extended the

---

8. *See* SWRCB Decision 1631, *supra* note 1, at 3; *see also* National Audubon Soc'y v. Superior Court, 658 P.2d 709, 714 (Cal. 1983) ("Between 1970 and 1980, the city diverted an average of 99,580 acre-feet per year from the Mono Basin.")

9. *See* SWRCB Decision 1631, *supra* note 1, at 1.

10. *See* NATIONAL ACADEMY OF SCIENCES, *supra* note 2, at 2, 9.

11. *See* SWRCB Decision 1631, *supra* note 1, at 75-82.

12. *See National Audubon Soc'y*, 658 P.2d at 711; SWRCB Decision 1631, *supra* note 1, at 7.

13. *See, e.g.*, Colberg, Inc. v. State *ex rel.* Dep't of Pub. Works, 432 P.2d 3 (Cal. 1967) (addressing public ownership); People *ex rel.* Baker v. Mack, 97 Cal. Rptr. 448 (Cal. Ct. App. 1971) (addressing public access). *See generally* Gregory S. Weber, *Articulating the Public Trust: Text, Near-Text and Context*, 27 Ariz. St. L.J. 1155, 1160 (1995) (summarizing pre-1983 public trust cases).

14. *See* People v. Truckee Lumber Co., 48 P. 374, 375 (Cal. 1897).

15. *See* Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct. 2028, 2041 (1997); *National Audubon Soc'y*, 658 P.2d at 718.

16. *See Nat'l Audobon Soc'y*, 658 P.2d at 719; Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971).

doctrine to all navigable lakes and streams, including recreationally navigable waters.[17]

The public trust doctrine served not only to establish power over tidelands and navigable waters; the doctrine also imposed on the state a duty to protect public trust uses, and restricted its authority to convey title or allow use of lands subject to the public trust. Statutes purporting to convey title to lands subject to the trust are strictly construed. The state may convey these lands for purposes in furtherance of the trust, such as for port construction, but where the conveyance is not in furtherance of the trust, title is passed subject to an easement for public trust purposes.[18]

The law of water rights had developed independently of the public trust doctrine. The California courts developed a "dual system" of water rights, recognizing both riparian and appropriative rights.[19] Riparian rights, which ordinarily are paramount to appropriative rights, allow a landowner whose parcel abuts a stream to divert and use water from the natural flow of the stream which can reasonably and beneficially be used on the riparian parcel and within the watershed of the stream, subject to the competing needs of other riparians.[20] Most California water rights are established under the doctrine of prior appropriation. The courts established the doctrine based on the customs followed in the use of water for mining. Appropriative rights may be used to divert water to non-riparian parcels and to divert water to long-term storage before it is rediverted for use. In contrast to riparian rights, which are an incident of land ownership, the doctrine of prior appropriation established rights based on the actual diversion of water and putting the water to beneficial use. As among appropriators, priority is based on seniority: "first in time, first in right."[21]

The Water Commission Act of 1913[22] established a permit system for the administration of appropriative rights. The Act contains the basic water right provisions which have been continued in the current Water Code, although there have been many additions and modifications to these provisions over the years.[23]

Like the public trust doctrine, the law of water rights recognizes initial title in the state and establishes the circumstances under which others may obtain rights from the state. The Water Code declares 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."[24] Until recently, however, fish and

17. *See National Audubon Soc'y*, 658 P.2d at 719; People *ex rel.* Baker v. Mack, 97 Cal. Rptr. 448, 451 (Cal. Ct. App. 1971); *see also* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 477-80 (1988) (discussing extension of public trust easement to include both tidelands and non-tidal navigable waters).

18. *See National Audubon Soc'y*, 658 P.2d at 728-30; City of Berkeley v. Superior Court, 606 P.2d 362, 366-67 (Cal. 1980).

19. *See* William R. Attwater & James Markle, *Overview of California Water Rights and Water Quality Law*, 19 PAC. L.J. 957, 959-60 (1988).

20. *See id.* at 969-71.

21. *Id.* at 962-65.

22. 1913 Cal. Stat. ch. 586, at 1013 (codified as amended at CAL. WATER CODE §§ 100-4360 (West 1971 & Supp. 1997).

23. *See* Attwater & Marble, *supra* note 19, at 972-73.

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

wildlife needs or other public trust purposes were not a limit on amounts that could be appropriated. Predecessor agencies to the SWRCB generally were limited to determining whether unappropriated water was available.[25] Since 1955, the Water Code has required the permitting agency to consider the relative value of all beneficial uses, including instream beneficial uses.[26] Since 1969, the Water Code has required the SWRCB to take into account, when it is in the public interest, amounts needed for instream uses when the SWRCB determines availability of unappropriated water.[27]

The California Supreme Court saw the issue as how to accommodate the public trust doctrine and the law of appropriative rights, two doctrines that had been developed independently and each of which could be interpreted to effectively swallow up the other. The environmental plaintiffs argued that the public trust doctrine should be applied to diversion of water in the same manner as it applied to submerged lands, an argument which the court viewed as implying that most appropriative rights had been acquired and were being used illegally.[28] At the other extreme, LADWP argued that the public trust doctrine had been "subsumed" into and effectively superseded by the law of appropriative rights, with a water right holder enjoying a vested right to continue diversions without regard to the values protected by the public trust.[29]

Like LADWP, the SWRCB contended that the public trust doctrine had been "subsumed" into the law of appropriative rights, but the SWRCB held a very different view of the state's authority to modify water rights based on impacts on public trust resources.[30] While the SWRCB did not believe the public trust doctrine provided an independent basis for limiting LADWP's diversions, the SWRCB recognized that LADWP's water rights could be reexamined under the reasonableness doctrine.[31]

Case law established that water right holders have a duty of reasonableness, to avoid waste, unreasonable use, unreasonable method of use and unreasonable method of diversion.[32] This duty of reasonableness was added to the state constitution in 1928.[33] The Water Code directs the SWRCB to take all appropriate proceedings or actions to prevent violations of this reasonableness requirement.[34]

---

25. *See* National Audubon Soc'y v. Superior Court, 658 P.2d 709, 725-26 (Cal. 1983).
26. *See* CAL. WATER CODE § 1257 (West 1971).
27. *See id.* § 1243 (West Supp. 1997).
28. *See National Audubon Soc'y*, 658 P.2d at 712.
29. *Id.* at 726-27.
30. *Id.* at 718.
31. *See id.* at 726-29.
32. *See* Attwater & Markle, *supra* note 19, at 968.
33. *See* CAL. CONST. art. X, § 2. The constitutional amendment overruled a case, which recognized that riparians have a duty of reasonableness to each other, but held that a riparian had no duty to avoid waste so that water would be available for an appropriator. *See* Herminghaus v. Southern Cal. Edison Co., 252 P. 607, 619 (Cal. 1926), *overruled by* CAL. CONST. art. X, § 2; *see also* Attwater & Markle, *supra* note 19, at 978-79.
34. *See* CAL. WATER CODE § 275 (West Supp. 1997).

The reasonableness doctrine applies to the use of all waters of the state, and is a limitation on every water right and every method of diversion.[35] The SWRCB and the courts have concurrent jurisdiction to conduct proceedings to adjudicate claims of waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of water.[36] Determination of what constitutes an unreasonable use or unreasonable diversion depends on the totality of the circumstances, and the reasonableness of a use or diversion varies as the current situation changes.[37] What constitutes a reasonable use or method of diversion ordinarily must be determined based on the facts of each case.

The California Constitution declares that the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent they are capable.[38] In determining the reasonableness of a particular use, the effect on the needs of other users should be considered.[39] Beneficial uses include uses involving diversion from rivers and streams, such as municipal supply or irrigation, as well as instream beneficial uses, such as recreation and preservation and enhancement of fish and wildlife resources.[40] Thus, the competing demands for consumptive and instream beneficial uses could be considered in applying the reasonableness doctrine. A use or diversion may be unreasonable based on its impacts on fish, wildlife, or other instream beneficial uses.[41] The SWRCB argued that the reasonableness doctrine could be used to reexamine LADWP's water rights, determine whether and to what extent continued diversion might be unreasonable in view of the impact on Mono Lake, and limit LADWP's diversions to the extent needed to avoid impacts that would make the diversion unreasonable.[42]

The California Supreme Court adopted a middle ground. The court held that the public trust doctrine applied to water rights, rejecting the views of LADWP and the SWRCB that the public trust had no independent applicability.[43] The court also rejected the environmentalists' view that the public trust doctrine should apply to water diversions in the same manner as it applies to lands subject to the public trust.[44]

The California Supreme Court's decision outlined three basic principles guiding the application of the public trust doctrine to water rights:

35. *See* Peabody v. Vallejo, 40 P.2d 486, 491, 498-99 (Cal. 1935).

36. *See* Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist., 605 P.2d 1, 10 (Cal. 1980).

37. *See id.* at 6.

38. *See* CAL. CONST. art. X, § 2.

39. *See In re* Waters of Long Valley Creek Stream Sys., 599 P. 2d 656, 665 (Cal. 1979); Joslin v. Marin Mun. Water Dist., 429 P.2d 889, 894 (Cal. 1967).

40. *See* CAL. WATER CODE §§ 106, 1243 (West 1971 & Supp. 1997).

41. *See Environmental Defense Fund*, 605 P.2d at 6-7.

42. *See* National Audubon Soc'y v. Superior Court, 658 P.2d 709, 726-29 (Cal. 1983).

43. *See id.* at 718-20.

44. *See id.* at 726-29.

(1) The public trust applies to water rights, and "prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust."[45]

(2) The SWRCB has authority to issue permits and licenses to divert and use water, "even though this [appropriation] does not promote, and may unavoidably harm, the trust uses at the source stream."[46]

(3) The state has a "duty of continuing supervision" over water rights which includes the power to reexamine earlier water right decisions to consider effects on public trust interests.[47] In so doing, "the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs."[48]

In so doing, the court applied the public trust to water right administration, but applied a modified doctrine that, with its emphasis on balancing of competing interests, looks more like the water right doctrine of reasonableness than the public trust doctrine as applied to land. The state has a "duty as trustee . . . to preserve, so far as consistent with the public interest, the uses protected by the trust."[49] In determining the public interest, however, the state could determine that the need for the water being diverted outweighs environmental harm caused by the diversion.[50] The court also held that the public trust applies to diversions on non-navigable tributaries of navigable waters which harm public trust uses in those navigable waters.[51]

The court did not apply the public trust to determine the appropriate balance between LADWP's need for water and the environmental needs of the Mono Basin, leaving that to further proceedings.[52] Those further proceedings could be either before the courts or the SWRCB. The court held that the courts and the SWRCB have concurrent original jurisdiction to apply the public trust.[53]

D. LADWP's Claim of Unconstitutional Taking

LADWP sought review of the case by the United States Supreme Court. In its petition for certiorari LADWP argued that "[t]he California Supreme Court decision abruptly took from petitioner City of Los Angeles the permanence and certainty of its state-granted, vested, appropriative water and subjected them to the recurring threat of reduction or revocation by engrafting onto them limitations imported from the public trust doctrine."[54] LADWP further contended that the decision un-

45. *Id.* at 727.

46. *Id.* If the court had applied the same public trust doctrine as applies to lands, "such appropriations [would have] been improper to the extent that they harm public trust uses, and [could] be justified only upon theories of reliance or estoppel." *Id.*

47. *Id.* at 728.

48. *Id.*

49. *Id.*

50. *See id.*

51. *See id.* at 719-20.

52. *See id.* at 728-29.

53. *See id.* at 730-31.

54. Petition for Writ of Certiorari at 1-2, City of Los Angeles Dep't of Water and Power v. National

constitutionally deprived it of vested water rights without compensation.[55] Summarizing its argument, LADWP contended that "[t]he California Supreme Court decision in this case . . . constitutes a sudden and unforeseeable change in state law which unsettles established rules of property law, defeats universally held expectations of inviolability, and expropriates valuable property rights for public purposes."[56] The United States Supreme Court denied LADWP's petition.[57]

E. The California Trout Litigation

As the litigation which brought the California Supreme Court's decision continued, and before any proceedings to apply the test enunciated in *National Audubon Society v. Superior Court* were conducted, environmental groups brought suit challenging LADWP's diversions on another theory. In 1985, California Trout, Inc., the National Audubon Society and the Mono Lake committee brought suit seeking a court order directing the SWRCB to rescind LADWP's water right licenses because they did not include a condition requiring bypass of water for fish in Rush, Lee Vining, Parker and Walker Creeks.[58]

The suit was based on the requirements of the California Fish and Game Code. Section 5937 of the Fish and Game Code specifies that "[t]he owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam."[59] This requirement was in effect when the SWRCB issued permits to LADWP. The requirement stems from an 1870 law requiring the construction of fishways by owners of dams and other obstructions on rivers and streams.[60] Amendments in 1915 and 1937 added the requirement for bypass or release of sufficient water to maintain fish in good condition.[61] When the SWRCB's predecessor issued the permits in 1940, it did not have authority to apply this requirement. Its role was limited to determining availability of unappropriated water.[62]

In 1953, section 5946 was added to the Fish and Game Code, in legislation enacted in response to LADWP's construction of hydroelectric facilities in the Owens River Gorge.[63] Section 5946 requires that permits and licenses issued after September 9, 1953, for dams in Mono and Inyo Counties include a condition

---

Audubon Soc'y, 464 U.S. 977 (1983) (No. 83-300).

55. *See id.* at 23-27.

56. *Id.* at 27.

57. *See* City of Los Angeles Dep't of Water and Power v. National Audubon Soc'y, 464 U.S. 977 (1983).

58. *See* California Trout, Inc. v. State Water Resources Control Bd., 255 Cal. Rptr. 184, 186 (Cal. Ct. App. 1989); SWRCB Decision 1631, *supra* note 1, at 8.

59. CAL. FISH & GAME CODE § 5937 (West 1984).

60. *See* 1870 Cal. Stat. ch. 457, § 3, pp. 663-64.

61. *See* 1937 Cal. Stat. ch. 456, § 1, at 1400 (codified at CAL. FISH & GAME CODE § 525; 1915 Cal. Stat. ch. 491, § 1, at 820 (codified at CAL. PENAL CODE § 820 (repealed 1935)).

62. *See supra* notes 7, 25-27 and accompanying text.

63. *See* CAL. FISH & GAME CODE § 5946 (West 1984); *California Trout, Inc. v. State Water Resources Control Bd.*, 255 Cal. Rptr. 184, 189, 192 (Cal. Ct. App. 1989).

requiring full compliance with section 5937.[64] LADWP's Mono Basin water right licenses, issued in 1974, confirmed the water right as permitted in 1940 and as developed by LADWP. The licenses did not include any conditions applying section 5937.

The case reached California's Third District Court of Appeal, which concluded that the SWRCB was required to amend LADWP's water right licenses to add conditions applying the requirement for bypass or release of sufficient water to maintain fish in good condition downstream of LADWP's diversion facilities on the four streams.[65] The court of appeal's decision required that flow be provided to protect fish downstream of LADWP's diversion facilities in the streams tributary to Mono Lake, not for protection of Mono Lake itself.[66] Because LADWP had no means of recapturing the water further downstream, however, the decision also meant additional water for Mono Lake.

F. Administrative Proceedings

In response to the court of appeal's *California Trout* decision, the SWRCB decided to initiate its own proceedings. These administrative proceedings before the SWRCB would determine appropriate flows in the Mono tributaries, applying the requirements set forth in *California Trout.* They would also reexamine LADWP's water rights in consideration of the impact on Mono Lake, in accordance with the public trust doctrine as set forth in *National Audubon Society v. Superior Court.* All pending lawsuits involving LADWP's Mono Basin diversions had been consolidated in the Superior Court for El Dorado County.[67] On September 29, 1989, upon motion of the SWRCB, the Superior Court issued an order staying further proceedings in court on the merits of the coordinated proceeding pending the outcome of the SWRCB's administrative proceedings.[68]

The SWRCB's review involved an extensive public participation and review process, including circulation of a three-volume environmental impact report (EIR) and preparation of twenty-eight auxiliary reports.[69] The SWRCB then conducted an evidentiary hearing. The hearing began on October 20, 1993, and ended on February 18, 1994, during which period the SWRCB held over forty days of hearings, collected the testimonies of more than 125 witnesses, and received over 1,000 exhibits into evidence.[70] The SWRCB later released a proposed final EIR and a draft water right decision. The Board adopted the 212-page decision, Water Resources Decision 1631, on September 28, 1994.

---

64. *See* CAL. FISH & GAME CODE §§ 5946, 11012 (West 1984).

65. *See* California Trout, Inc. v. State Water Resources Control Bd., 255 Cal. Rptr. 184, 210 (Cal. Ct. App. 1989); *see also* California Trout, Inc. v. Superior Court, 266 Cal. Rptr. 788, 795-802 (Cal. Ct. App. 1990) (addressing reasons given for delay in complying with the requirement).

66. *See California Trout,* 255 Cal. Rptr. at 210.

67. *See* Mono Lake Water Rights Cases, El Dorado County Superior Court Coordinated Proceeding Nos. 2284 & 2288.

68. *See* SWRCB Decision 1631, *supra* note 1, at 10.

69. *See id.* at 13-14.

70. *See id.* at 14-15.

Making use of instream flow incremental methodology (IFIM) studies, Decision 1631 sets minimum flow requirements for Rush, Lee Vining, Walker and Parker Creeks.[71] Decision 1631 sets channel maintenance flows, and addresses the need for restoration of stream channels that had deteriorated as a result of the long period of little or no flow.[72] Decision 1631 then proceeds to apply the public trust doctrine to determine an appropriate lake level for Mono Lake, considering the extent to which public trust resources will be protected at different lake levels and the economic and environmental effects of reducing LADWP's diversions to achieve those lake levels.[73] The SWRCB concluded that diversions should be limited to maintain an average water elevation of 6392 feet above sea level, and established criteria regulating diversions to bring the bring the level of Mono Lake, which at that time was below 6377 feet above sea level, up to the desired level.[74] Summarizing its decision on the lake level, Decision 1631 states:

> This decision also amends Los Angeles' water right licenses to include specified water diversion criteria which are intended to gradually restore the average water elevation of Mono Lake to approximately 6,392 feet above sea level in order to protect public trust resources at Mono Lake. Among other things, the increased water level will protect nesting habitat for California gulls and other migratory birds, maintain the long-term productivity of Mono Lake brine shrimp and brine fly populations, maintain public accessibility to the most widely visited tufa sites in the Mono Lake Tufa State Reserve, enhance the scenic aspects of the Mono Basin, lead to compliance with water quality standards, and reduce blowing dust in order to comply with federal air quality standards.[75]

In addition to amending LADWP's licenses to set instream flow requirements and diversion criteria to restore and maintain the level of Mono Lake, Decision 1631 requires LADWP to prepare and submit for SWRCB approval a stream and stream channel restoration plan and a waterfowl habitat restoration plan.[76]

Decision 1631 substantially reduces the amount of water LADWP is authorized to divert under its water right licenses. Computer modeling projected that, based on the 1941 though 1988 hydrology and operations in accordance with its 1974 licenses, LADWP would have diverted an average of 75,000 acre-feet per year from the Mono Basin.[77] Under the diversion criteria specified in Decision 1631 and during the estimated twenty-year period in which the lake was projected to rise to approximately 6392 feet, project diversions would average about 12,000 acre-feet per year.[78] Once the lake reaches 6392 feet, LADWP's diversions would increase

71. *See id.* at 21-33, 38-40, 46-48, 53-69, 76.
72. *See id.* at 21-23, 33-39, 41-47, 48-57, 69-77.
73. *See id.* at 77-194.
74. *See id.* at 154-59.
75. *Id.* at 195.
76. *See id.* at 35-38, 42-46, 49-53, 71-77, 118-19, 194-212.
77. *See id.* at 163.
78. *See id.* at 163-64.

to approximately 31,000 acre-feet per year.[79] Decision 1631 evaluates LADWP's water needs and potential sources of supply, concluding that other sources of supply are reasonably available.[80] Decision 1631 estimates that during the approximately twenty-year transition period, costs of a replacement water supply would average $27.8 million per year.[81] In addition, LADWP would incur costs of approximately $8.5 million per year during the transition period to replace hydroelectric power which would otherwise be generated through use of water diverted from the Mono Basin as it passes through power plants on the Los Angeles Aqueduct.[82] After the transition period, water replacement costs would average approximately $17.9 million per year, with power supply replacement costs estimated at $5.6 million per year.[83]

After the proposed final EIR and draft decision were released, and after negotiations among the parties, the major parties to the Mono Lake proceedings agreed that they would not seek judicial review of the decision. Immediately before the meeting scheduled to adopt the decision, the parties held a joint press conference to announce that they accepted the decision. After the SWRCB voted to adopt the decision, the two hundred spectators in the room stood up and applauded.[84]

The Mono Lake proceedings are not yet fully completed. The litigation which was stayed until the outcome of the SWRCB's administrative proceedings has not yet been dismissed. Further administrative proceedings to review the restoration plans required under Decision 1631 are still underway. It appears that any further proceedings will focus on issues specifically related to those restoration plans, and will not reopen the basic public trust and instream flow issues resolved in Decision 1631 or the litigation which preceded Decision 1631.

II. The Takings Issue Raised by LADWP

Although the specific issue raised in LADWP's petition for certiorari will not be litigated, it is instructive to consider the issues raised by the argument that the California Supreme Court's decision amounted to an unconstitutional taking of property without compensation.

A. The Takings Doctrine

The Takings Clause, included in the Fifth Amendment of the United States Constitution, specifies that "private property" shall not "be taken for public use, without just compensation."[85] This constitutional guarantee is "designed to bar

79. *See id.* at 164. Actual impacts could be substantially different if actual rainfall is substantially higher than that assumed in the hydrology used. *See id.* at 159.

80. *See id.* at 159-62, 165-68, 195.

81. *See id.* at 169-78, 180.

82. *See id.* at 178-80.

83. *See id.* at 169-80.

84. *See* JOHN HART, STORM OVER MONO: MONO LAKE BATTLE/CALIFORNIA WATER FUTURE 173-75 (1996).

85. U.S. CONST. amend. V.

Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[86] Originally, the Takings Clause applied only to the federal government. Its applicability has been extended to the states as part of the "due process" guaranteed under the Fourteenth Amendment.[87]

Traditionally, the Takings Clause was understood to limit only actual, physical seizures of private property, whether accomplished directly through the government's power of eminent domain or indirectly through physical occupation by the government.[88] Later, the Supreme Court established the doctrine of regulatory takings, announcing that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[89]

In general, there is no "set formula" for determining when a regulatory taking has occurred; the courts rely instead on "essentially ad hoc, factual inquiries."[90] This includes inquiry into the economic impact of the regulation, particularly "the extent to which the regulation has interfered with distinct investment-backed expectations," as well as the character of and interests protected by governmental action.[91] Regulation may substantially diminish the value of property without effecting a taking.[92]

In *Lucas v. South Carolina Coastal Council*,[93] the Court pronounced a categorical rule that a taking has been established, without the need for any case-specific inquiry into the public interest advanced by regulation, "where regulation denies all economically beneficial or productive use of [the] land."[94] But even this categorical rule is subject to exceptions, including cases where the regulation bars uses that would constitute a common law nuisance.[95]

LADWP's claim that the California Supreme Court's decision in *National Audubon Society v. Superior Court* was a taking departed from a typical regulatory takings case in two important respects. First, the alleged taking was not imposed by statute or through the action of an administrative agency, but by the courts. Second, the action did not take the form of a regulation of the use of LADWP's property; the action was a decision interpreting and defining the property right held by LADWP.

In its petition for certiorari, LADWP argued: "While states, through their courts,

---

86. Armstrong v. United States, 364 U.S. 40, 49 (1960).

87. *See* U.S. CONST. amend. XIV, § 1; Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 235-41 (1897).

88. *See* Richard M. Frank, *"Take" It to the Limit: Reconciling the Endangered Species Act and the Fifth Amendment*, ENVTL. L. NEWS (Envtl. Law Section, State Bar of Cal., San Francisco, Cal.), Summer 1994, at 1, 4.

89. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

90. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

91. *Id.* at 124-25.

92. *See id.* at 131; *see also* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (75% diminution in value caused by zoning law); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (75% diminution in value).

93. 505 U.S. 1003 (1992).

94. *Id.* at 1015.

95. *See id.* at 1027-31

have authority to enunciate state law which defines what is property, they may not retroactively define it out of existence and thus avoid the responsibility for paying compensation for taking it."[96] LADWP relied heavily on Justice Stewart's concurring opinion in *Hughes v. Washington*.[97] In that concurring opinion, Justice Stewart observed that the Supreme Court cannot resolve the issue whether there has been a taking without first determining who owns the property.[98] In noting that the Supreme Court ordinarily would accept the decision of a state court on the issue as conclusive, Justice Stewart observed:

> But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.[99]

LADWP argued forcefully as to the need to maintain the security of water rights.[100] But Justice Stewart's views did not represent an established legal doctrine. Previous Supreme Court decisions consistently held that states are free to develop and apply their own rules of property as applied to water.[101] In essence, LADWP sought to establish a new legal doctrine, based on the views of Justice Stewart, which would enhance the security of water rights by limiting the ability of the courts to change the law in response to changing conditions.

B. Ironies in LADWP's Position

There is some historical irony in LADWP's claim that its water rights had been taken. It was LADWP which, in its ruthless quest for additional water supplies, had effectively forced out the agricultural water users in the Owens Valley.[102] Although technically not the case, "[t]here is a widely held view that Los Angeles simply went out to the Owens Valley and stole its water."[103] The City of Los Angeles bought out the farmers, although many were effectively forced to sell. The irrigation ditches were maintained through private cooperatives. After some of the farmers along a ditch were bought out, those remaining could no longer afford to maintain the ditch by themselves.[104] The tactic was perfectly legal and does not

96. Petition for Certiorari at 24, City of Los Angeles Dep't of Water and Power v. National Audubon Soc'y, 464 U.S. 977 (1983) (No. 83-300).

97. 389 U.S. 290, 294-98 (1967) (Stewart, J., concurring).

98. *See id.* at 296 (Stewart, J., concurring).

99. *Id.* at 296-97 (Stewart, J., concurring).

100. *See* Petition for Certiorari at 11-14, City of Los Angeles Dep't of Water and Power v. National Audubon Soc'y, 464 U.S. 977 (1983).

101. *See, e.g.*, United States v. Willow River Power Co., 324 U.S. 499, 502-03 (1945); Fox River Paper Co. v. Railroad Comm'n, 274 U.S. 651, 657 (1927).

102. *See* MARC REISNER, CADILLAC DESERT 52-103 (rev. ed. 1993).

103. *Id.* at 62.

104. *See id.* at 90.

even arguably amount to a taking under established doctrines. But the effect was to dash the reasonable, investment-backed expectations of farmers who anticipated that the ditches would continue to be maintained through the cooperation of other landowners.

Less well known, but more closely on point, was Los Angeles' earlier quest for supremacy over water rights in its own area. In addition to the appropriative and riparian rights recognized in California's dual system, the courts recognized a third type of water right, called a pueblo right, giving Los Angeles a paramount claim to all of the waters that run through its territory, both surface and underground, from their source to the sea.[105] Although this pueblo right is purported to be based on Hispanic law in effect before California became part of the United States, Hispanic law had not recognized anything like the pueblo right later established through Los Angeles' litigation.[106] The doctrine was essentially invented to support Los Angeles' quest for expansion.[107]

The effect of recognizing a paramount pueblo right was to deprive upstream water right holders who would otherwise have the right to divert and use the water. If, as LADWP argued in its petition for certiorari, the California Supreme Court's decision that the public trust applies to water rights was an abrupt change in the law, unsettling established principles of property law and depriving water right holders of the ability to make use of their rights, the pueblo right doctrine successfully urged on the courts by the City of Los Angeles was an even more abrupt change with even greater impact on the affected water right holders.

It is also noteworthy that, in its effort to place a limit on a state court's authority to modify the law of water rights, LADWP was itself relying on a change in the law of takings. If the California Supreme Court has extended the reach of the public trust doctrine by applying it to water rights, the United States Supreme Court has made no less of an extension in applying the taking clause to regulatory actions. In asking the Court to apply the takings doctrine to a state court decision interpreting the extent of the right held by a property owner, LADWP was asking the court to make a further extension. If the California Supreme Court's interpretation of the public trust doctrine in *National Audubon Society v. Superior Court* could be criticized for "making new law," would not the same criticism apply to the United States Supreme Court if it expanded the reach of the Takings Clause to strike down that interpretation?

105. *See* Vernon Irrigation Co. v. City of Los Angeles, 39 P. 762, 764-67 (Cal. 1895), *overruled on other grounds*, Beckett v. City of Petaluma, 153 P. 20, 23 (Cal. 1915); Attwater & Markle, *supra* note 19, at 969 (1988).

106. *See* NORRIS HUNDLEY, JR., THE GREAT THIRST: CALIFORNIANS AND WATER, 1770S-1990S, at 126-35 (1992).

107. *See id.* at 408.

C. Legal Obstacles to the LADWP's Position

If the United States Supreme Court had agreed to hear the case, LADWP would have faced a number of obstacles to obtaining relief. Some of the problems arise out of the particular context of LADWP's petition, but many would be common to any argument that a decision interpreting the nature and extent of a person's water right amounts to an unconstitutional, uncompensated taking.

1. Ripeness

LADWP would first have to overcome the procedural problem that the case did not appear to be ripe for review. The United States Supreme Court will not hear a regulatory takings claim "until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."[108] The Court's reluctance to address regulatory takings issues at an earlier stage is compelled by the nature of the inquiry used to determine whether a taking has occurred. This requires case-specific examination into factors such as the economic impact of the regulation and its effect on investment-backed expectations. These factors cannot be evaluated until the regulation is applied to the property in question.[109]

Similar considerations support the conclusion that LADWP's takings claim could not be heard at the time it sought Supreme Court review. If the basic argument underlying LADWP's takings theory is that the state cannot avoid the Takings Clause by redefining property interests, then the theory should not apply where the impact of the redefinition does not go beyond what could validly be accomplished through regulation.

As set forth in *National Audubon v. Superior Court*, the public trust doctrine could have had a drastic impact, or little effect at all, on the amount LADWP could divert. The court established a balancing test which, when applied, might require a major reduction or even an elimination of LADWP's diversions, or it could require only a minor change. As the California Supreme Court explained the public trust doctrine, the SWRCB or a court applying the doctrine could conceivably have concluded that the need to divert water to supply the people of Los Angeles outweighed the environmental damage to the Mono Basin that would result from those diversions, and that LADWP's diversionary entitlement should not be changed.[110] Not until the public trust had been applied, as it was in Decision 1631,

---

108. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 297 (1981).

109. *See Williamson County Reg'l Planning Comm'n*, 473 U.S. at 190-91.

110. *See* National Audubon Soc'y v. Superior Court, 658 P.2d 709, 728 (Cal. 1983) ("This is not a case in which the . . . [SWRCB] or any judicial body has determined that the needs of Los Angeles outweigh the needs of the Mono Basin. . . . Neither has any responsible body determined whether some lesser [diversion from the Mono tributaries] would better balance the diverse interests."). The California Supreme Court did not discuss the ramifications of the provisions of the California Fish and Game Code requiring passage of sufficient water to keep fish in good condition. *See* CAL. FISH & GAME CODE §§ 5937, 5946 (West 1984). The California Court of Appeal later interpreted these provisions as a

would LADWP's takings argument be ripe for review.

The ripeness requirement poses an obstacle not just to a takings claim at the particular time LADWP sought to have the issue decided. It reveals a more fundamental problem with the theory that a judicial decision changing property law can be reviewed to determine whether it is a taking. Decision 1631 was not issued until eleven years after *National Audubon Society v. Superior Court*, and the public trust doctrine has been applied only to a small number of existing water right holders in the period since the California Supreme Court reached its decision.[111] As with LADWP, some water right holders who have been subject to proceedings to have the public trust applied have decided they can live with the decision, and have not sought to challenge it.[112] By the time the public trust doctrine is applied to any particular water right holder who might want to challenge the California Supreme Court's decision, the doctrine will become increasingly entrenched as an established principle of water right law, making it that much harder to characterize its application as an abrupt change.

2. Relation of the State to its Political Subdivisions

Another legal obstacle was presented by the fact that LADWP is a political subdivision of the state. The Supreme Court has held that the Fourteenth Amendment, and hence the Takings Clause, cannot be invoked by a city or other political subdivision of the state as a restraint on the power of the state.[113] This conclusion stems from the principle that cities and other political subdivisions are creatures of the state, which can grant or withdraw powers and privileges as it sees fit.[114]

It may be argued that where principles of justice and fairness would require compensation for the taking of private property, compensation should also be required when a state takes property from its political subdivisions. But that argument ignores the extent to which municipalities and special districts have acquired their water rights as a result of powers and privileges granted to them by the state. These include subsidies, taxing powers and authority to issue tax exempt bonds.[115] These powers and privileges invested in public agencies by the state

---

legislative expression of the public trust. *See* California Trout, Inc. v. State Water Resources Control Bd., 255 Cal. Rptr. 184, 209, 212 (Cal. Ct. App. 1989). In light of the court of appeal's decision in the *California Trout* litigation, the SWRCB did not have the option of deciding that LADWP's diversions could continue without change. At a minimum, diversions would have to be curtailed enough to maintain fish in good condition below the dams. *See* SWRCB Decision 1631, *supra* note 1, at 11-12. At the time LADWP asked the Supreme Court to hear its takings claim, however, the possibility that the public trust balancing might be struck in favor of continuing diversions as authorized under its water right licenses could not be ruled out.

111. *See generally* Weber, *supra* note 13 (reviewing cases and administrative decisions applying the public trust doctrine).

112. *See, e.g.*, SWRCB Order WR 95-4; *see also* SWRCB Order WR 91-1 (modifying earlier public trust order to incorporate changes agreed to in settlement of litigation challenging that order).

113. *See* City of Trenton v. New Jersey, 262 U.S. 182, 188 (1923).

114. *See id.* at 187.

115. *See* CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN 241 (1992).

distinguish them from private parties. Indeed, if the Owens Valley water rights had been held by irrigation districts instead of farmers relying on private cooperatives, the area would have been much better able to protect its water supplies. Using its power to tax and assess fees, an irrigation district could have assured that as individual irrigators were bought out the purchaser would have to continue to support the maintenance of the irrigation ditches.

The law of water rights also includes preferences for municipalities.[116] The water right permitting system embodies Progressive Era sentiments about water belonging to the people.[117] Thus, the state assigned water rights and supported the development of water by municipalities and special districts with the understanding that water rights would be held as public property. Application of the Takings Clause, which prohibits the taking of "private property,"[118] would alter the understandings on which the property was acquired.

3. Judicial Takings

To prevail on its claim, LADWP would also have to persuade the Supreme Court to determine for the first time that the actions of a state court in interpreting its laws defining property ownership is subject to the Takings Clause. As Professor Thompson notes in his exhaustive review of the subject, "the most relevant Supreme Court decisions suggest that courts are absolutely free to make such changes in property rights."[119] Although Justice Stewart's concurring opinion in *Hughes v. Washington* raises the possibility, the Court has not revisited the issue in thirty years.[120]

The Takings Clause does not establish property rights. Takings cases rely on state law to define property interests.[121] If the Supreme Court were not to accept a state court's definition of property rights, it is left without any clear basis for determining those property rights. The court risks substituting its own view for those of the state as to what state law is or should be.

Similarly, there does not appear to be any workable definition as to when a state court has changed its law too much or too suddenly. There may be a great deal of uncertainty as to what the law was before the state court decision under challenge was issued.[122] What one party may characterize as an unprecedented change in the law, another may see as clarifying prior cases, resolving conflicts among earlier cases, or applying preexisting principles to new settings or conditions.[123] Specifically discussing *National Audubon Society v. Superior Court*, Professor Thompson observes:

---

116. *See* CAL. WATER CODE §§ 106.5, 1460-64 (West 1971).
117. *See* CAL. WATER CODE § 102 (West 1971); Attwater & Markle, *supra* note 19, at 971.
118. U.S. CONST. amend. V.
119. Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1453 (1990).
120. *See id.* at 1469.
121. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984)
122. *See* Thompson, *supra* note 119, at 1530-35.
123. *See id.* at 1531-32.

> Los Angeles had a reasonable claim under appropriative law to the water that it was diverting. The public trust doctrine, moreover, was viewed as irrelevant to water allocation issues, an inhabitant of a different pigeonhole in the law. But it was only a matter of time before someone recognized and argued that California's version of the public trust doctrine, which can prevent a property holder from filling in portions of a lake or waterway to which they have technical title, seems equally offended by someone drying up portions of the same waterway. The California Supreme Court's decision to integrate the two doctrines . . . surprised many people and was certainly a deviation from most water lawyers' expectations. Given the underlying tension that existed in the law, however, it is difficult as a matter of positive law to say that there was a change in the law and thus a taking.[124]

It should also be recognized that changes in the law may be the cumulative impact of a number of decisions. Each precedent may itself build on earlier precedents. *National Audubon Society v. Superior Court* is in many ways a logical extension of *Marks v. Whitney*,[125] a 1971 decision which recognized fish and wildlife habitat and other environmental values among the interests protected by the public trust.[126] While any one decision may not appear sudden or unpredictable in light of earlier precedents, over time the law may evolve to be dramatically different from where it began. Yet any attempt to use the Takings Clause as a damper on state courts' development of state law would lack any objective or workable standard for determining whether or not changes in the law are acceptable.

4. Limitations that Inhere in the Title

Even if the public trust doctrine had been adopted by an act of the Legislature, as opposed to being developed through case law, it would be difficult to establish that the imposition of the public trust doctrine constituted a taking. In particular, it would be necessary to determine how the economic value of the property had changed, which in turn would require consideration of how the diversion and use of water might be limited under principles that were already part of California water right law before the state recognized the applicability of the public trust.

A water right incorporates these background principles of state law, and a water right holder has no right to divert water in a manner inconsistent with these principles of state law. To the extent that these principles of state law could have restricted Los Angeles' diversions, it cannot be said that comparable limitations imposed under the public trust doctrine take any property right held by Los Angeles. As the United States Supreme Court explained in *Lucas v. South Carolina Coastal Council*,[127] no taking occurs, even where the effect is to render property valueless, where "the logically antecedent inquiry into the nature of the owner's estate shows

124. *Id.* at 1533.
125. 491 P.2d 374 (Cal. 1971).
126. *See id.* at 380.
127. 505 U.S. 1003 (1992).

that the proscribed use interests were not part of his title to begin with."[128] Put another way, a statute or regulation changing the nature of property ownership or restricting its use should be upheld in the face of a takings challenge where the result can be defended on the basis of limitations which "inhere in the title itself, in the background principles of the State's law of property and nuisance already in place upon land ownership."[129]

This reference to background principles of state law does not depend on any claim by the state that a challenged regulation or a statute changing the law of water rights is in furtherance of common law principles, nor is it required that these background principles have been applied to the property right holder claiming a taking. As the Supreme Court explained, a regulation does not constitute a taking if its "effect" is to "do no more than duplicate that which *could have been achieved in the courts* by adjacent landowners . . . or by the State."[130] The quoted passage refers specifically to common law nuisance actions, but logically applies to any common law or other background legal principles that could be applied by the courts.[131]

The California law of water rights imposes a number of limitations on the exercise of those rights that would make it very difficult to establish that any particular regulation or change in definition of water rights is a taking.[132]

a) Permit and License Conditions

Where the law creates property rights subject to conditions or limitations, such as a condition allowing the government to revoke the right, no compensable taking occurs when the government exercises that condition or limitation.[133] If the government takes other action which constitutes a taking, for example through an exercise of eminent domain, the government is not required to pay for value that could be removed by exercise of that condition or limitation.[134]

The Water Code establishes a condition which severely limits the water right holder's ability to claim compensation if the water right is taken by the state or one of its political subdivisions:

> Every permittee, if he accepts a permit, does so under the conditions precedent that no value whatsoever in excess of the actual amount paid to the State therefor shall at any time be assigned to or claimed for any

128. *Id.* at 1027.

129. *Id.* at 1029.

130. *Id.* (emphasis added).

131. *See* Joseph L. Sax, *Rights that "Inhere in the Title Itself": The Impact of the* Lucas *Case on Western Water Law*, 26 LOY. L.A. L. REV. 943, 943-45 (1993) [hereinafter Sax, *Rights that "Inhere in the Title Itself"*].

132. *See generally id.*; Tara L. Mueller, *Federal Regulation of Water Resources: Does the Limited Nature of Property Interests in Water Preclude a Taking?*, ENVTL. L. NEWS (Envtl. Law Section, State Bar of Cal., San Francisco, Cal.), Summer 1994, at 2, 11-20 (discussing common law, constitutional, and statutory limitations on water rights and their impact on potential takings claims).

133. *See* Dames & Moore v. Regan, 453 U.S. 654, 674 n.6 (1981).

134. *See* United States v. Fuller, 409 U.S. 488, 492 (1973).

> permit granted or issued under this division [Division 2 (commencing with Section 1000 of the Water Code, which includes the water right permitting and licensing program] . . . in respect to any valuation for purposes of sale to or purchase, whether through condemnation proceedings or otherwise, by the State or any city . . . or political subdivision of the State, of the rights and property of any permittee, or the possessor of any rights granted, issued, or acquired under the provisions of this division.[135]

This condition, which is included in LADWP's license and every other water right permit or license issued in California, reflects a Progressive Era sentiment that water belongs to the people and should not be given away without reserving an interest in the public.[136] It has the effect of limiting recovery for condemnation of a water right whether through eminent domain or through inverse condemnation. Even if LADWP were able to establish that application of the public trust amounted to a compensable taking, its recovery would be limited to reimbursement for its water right application fee. Application fees are higher now than at the time LADWP filed its applications,[137] but still are not high enough to make it worthwhile for a permit or license holder to bring an inverse condemnation action to challenge the application of the public trust doctrine.

b) Reasonableness

A much more far reaching limitation, incorporated into every water right, is the reasonableness doctrine. The 1928 amendment[138] incorporating the reasonableness doctrine into the California Constitution applies to all uses of water, including public trust uses.[139] Even before its incorporation into the constitution, the reasonableness doctrine was an important feature of California water law.[140]

The California courts have also long recognized the reasonableness doctrine as a limitation that is incorporated into the title of a water right holder.[141] Therefore,

---

135. CAL. WATER CODE § 1392 (West 1971); *see also* CAL. WATER CODE § 1629 (West 1971) (setting identical condition for water right licenses).

136. *See* Attwater & Markle, *supra* note 19, at 971; *see also* Andrew H. Sawyer, *Hydropower Relicensing in the Post Dam-Building Era*, NAT. RES. & ENV'T, Fall 1996, at 12 (discussing relicensing requirement for hydroelectric facilities).

137. *See* CAL. WATER CODE §§ 1525-36 (West 1971 & Supp. 1997).

138. *See* CAL. CONST. art. X, § 2.

139. *See* National Audubon Soc'y v. Superior Court, 658 P.2d 709, 725, (Cal. 1983).

140. *See, e.g.*, Barrows v. Fox, 32 P. 811, 811-12 (Cal. 1893); *see* Mueller, *supra* note 132, at 13-14. *See generally* Brian E. Gray, *In Search of Bigfoot: The Common Law Origins of Article X, Section 2 of the California Constitution*, 17 HASTINGS CONST. L.Q. 225 (1989) (discussing history and effect of the 1928 amendment, especially its relationship to the common law).

141. *See* Peabody v. Vallejo, 40 P.2d 486, 492 (Cal. 1935) ("The right to the waste of water is not now included in the riparian right."); California Pastoral & Agric. Co. v. Madera Canal & Irrigation Co., 138 P. 718, 721 (Cal. 1909) ("An appropriator['s] . . . claim of right can include only such water as is reasonably necessary for the purpose for which the diversion was made, and the water is in fact used. Such is the full extent of his claim in view of the law relating to the appropriation of water. Such is the full extent of his claim in view of the law relating to the appropriation of water. His 'color or title' . . .

no taking occurs when the reasonableness requirement is applied. "[S]ince there was and is no property right in an unreasonable use, there has been no taking or damaging of property by the deprivation of such use and, accordingly, the deprivation is not compensable."[142]

It has also long been recognized that what constitutes a waste is relative, based on competing needs, and that the determination may change as conditions change.[143] Thus, the potential that applicable requirements may change is itself part of the reasonableness doctrine, and is therefore incorporated into the title held by a water right holder. While the manner in which the reasonableness doctrine has evolved may not have been anticipated by LADWP, the potential for change in response to changing circumstances was well established when LADWP's water right permits were issued.

The circumstances which may provide a basis for a determination that a diversion is unreasonable, the cases now recognize, include adverse impacts on fish, wildlife, and water quality.[144] Thus, the authority to reopen LADWP's water rights, for which the environmental plaintiffs invoked the public trust doctrine in *National Audubon Society v. Superior Court*, could also have been accomplished under the reasonableness doctrine. Indeed, Decision 1631 invokes the reasonableness standard in determining an appropriate lake level, and concludes that the changes ordered in LADWP's diversions are in accord with the reasonableness doctrine.[145]

Similarly, other water right orders applying requirements for the protection of instream beneficial uses often invoke both the public trust and reasonableness doctrines.[146] So long as application of the public trust doctrine does not go beyond what could have been accomplished under the reasonableness doctrine, applying the public trust to water rights does not take away anything to which the water right holder held title beforehand.

---

extends to no other water . . . .").

142. Joslin v. Marin Mun. Water Co., 429 P.2d 889, 898 (Cal. 1967); *see also* Gin Chow v. City of Santa Barbara, 22 P.2d 5, 18 (Cal. 1933) (interpreting the constitutional amendment to define the riparian right to include a limitation to reasonable use, and holding that this limitation did not amount to an unconstitutional taking).

143. *See* Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 45 P.2d 972, 1007 (Cal. 1935) ("What is a beneficial use, of course, depends upon the facts and circumstances of each case. What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time."); Natoma Water and Mining Co. v. Hancock, 35 P. 334, 337 (Cal. 1894) ("There is but a limited supply of water in this state . . . and a paramount public policy requires a careful economy of that supply. So long as there is but a single appropriator of water on a stream it matters not how imperfect or wasteful may be the means by which he diverts . . . . But when subsequent appropriators divert the entire surplus . . . he is required to use all reasonable diligence to husband what is left . . . and he cannot complain on account of the trouble and expense which it may involve.")

144. *See* United States v. State Water Resources Control Bd., 227 Cal. Rptr. 161, 187 (1986).

145. *See* SWRCB Decision 1631, *supra* note 1, at 121, 196.

146. *See, e.g., In re* Water of Hallett Creek Stream Sys., 749 P.2d 324, 338 n.16 (Cal. 1988); SWRCB Order WR 95-4 at 14-17, *modified*, SWRCB Order WR 95-5; SWRCB Order WR 90-5 at 6-7, *modified*, SWRCB Order WR 91-1.

c) Nuisance

California also has a well-developed law of nuisance, which may be applied to enjoin pollution or other environmental damage.[147] Nuisance law was applied to water rights in California's first major environmental battle -- the fight by California farmers and urban dwellers to halt the downstream flooding and destruction caused by hydraulic mining in the Sierra Nevada.[148] The California Supreme Court sustained a permanent injunction against a hydraulic mining company whose extractive activities caused widespread pollution.[149] The decision effectively put the hydraulic mining industry out of business, after three decades of operation,[150] marking the transformation of the California economy from mining to commerce.[151]

The California Civil Code, in a section originally enacted in 1872, provides:

> Anything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin . . . is a nuisance.[152]

This section, which incorporates into statute the state's common law of nuisance, is broad enough to include protection for instream beneficial uses and other interests protected by the public trust.

Early California cases have found a public nuisance based on interference with the public trust. In *People v. Truckee Lumber Co.*,[153] the California Supreme Court upheld an injunction, on public nuisance grounds, barring the continued operation of a private sawmill that polluted the Truckee River.[154] In terms that recognize a public trust interest in fish, the Court observed:

> The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general

147. *See also* CEEED v. California Coastal Zone Conservation Comm'n, 118 Cal. Rptr. 315, 324 (1974) ("current legislation for environmental and ecological protection constitutes but 'a sensitizing of and refinement of nuisance law.'" (citing CALIFORNIA CONTINUING EDUC. BAR, CALIFORNIA ZONING PRACTICE 28-29 (Supp. 1973)). *See generally, e.g.*, People v. Stafford Packing Co., 227 P. 485 (Cal. 1924) (addressing water pollution); Selma Pressure Treating Co. v. Osmose Wood Preserving, Inc., 271 Cal. Rptr. 596 (Cal. Ct. App. 1990) (addressing water pollution); Pfleger v. Superior Court, 218 Cal. Rptr. 371 (Cal. Ct. App. 1985) (addressing flooding and landslides caused by real estate development); Centoni v. Ingalls, 298 P. 47 (Cal. Ct. App. 1931) (addressing air pollution);

148. *See* People v. Gold Run Ditch & Mining Co., 4 P. 1152 (Cal. 1884).

149. *See id.* at 1159-60. A federal court issued its own injunction based on the same legal theory. *See* Woodruff v. North Bloomfield Gravel Mining Co., 18 F. 753, 809 (C.C.D. Cal. 1884).

150. *See* HUNDLEY, *supra* note 106, at 77.

151. *See* National Audubon Soc'y v. Superior Court, 658 P.2d 709, 720 (Cal. 1983).

152. CAL. CIV. CODE § 3479 (West 1997).

153. 48 P. 374 (Cal. 1897).

154. *See id.* at 374-75.

> right and ownership of which is in the people of the state [citation] as in England it was in the king; and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law . . . . The complaint shows that, by the repeated and continuing acts of defendant, this public property right is being, and will continue to be, greatly interfered with and impaired, and that such acts constitute a nuisance . . . .[155]

Similarly, the California courts have found a public nuisance where diversions of water or discharges of soil, sand and gravel have affected the navigability of waters of the state.[156]

Thus, nuisance law, like the reasonableness doctrine, could be applied to achieve the results reached when the public trust doctrine is applied. In fact, the environmental plaintiffs in the Mono Lake litigation raised common law nuisance claims as part of their arguments for curtailing LADWP's diversions.[157]

As has also more recently been the case with the reasonableness doctrine, California nuisance cases have long been informed by the public trust doctrine. It would be difficult at best to distinguish between the results of applying the public trust doctrine and the results that could have been achieved by applying the state's law of nuisance. Yet the Supreme Court's *Lucas* decision clearly states that no taking occurs, even if property is rendered valueless, by an action which merely duplicates what could have been achieved by the state courts applying the law of nuisance.[158]

d) Prior Rights

In the area of water rights, where each water right holder may use water only to the extent it is not required to satisfy the rights of other water right holders with prior rights, the rights of one property owner may effectively be diminished by a decision which enlarges a prior right or recognizes a prior right that had not previously been recognized. Indeed, that was the effect of decisions recognizing Los Angeles' pueblo water right.[159]

Under California's "dual system," appropriative rights have always been subject to uncertainty. Because riparian rights ordinarily are senior and are not lost through

---

155. *Id.* at 374 (citation omitted).

156. *See* People v. Russ, 64 P. 111, 112 (Cal. 1901); People v. Gold Run Ditch & Mining Co., 4 P. 1152, 1159 (Cal. 1884).

157. *See* National Audubon Soc'y v. Department of Water, 869 F.2d 1196, 1198-99 (9th Cir. 1988). The plaintiffs raised claims based both on California nuisance law and on arguments that water pollution caused by concentration of salts in Mono Lake and air pollution caused by the exposure of lakebed as the level of Mono Lake declined were grounds for enjoining LADWP's diversions under a federal common law of nuisance. *See id.* The federal courts dismissed the plaintiffs' federal common law nuisance claims based in part on the conclusion that California nuisance law was well suited to address the issues. *See id.* at 1204. The courts never reached the merits of the state law nuisance claims.

158. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992).

159. *See supra* notes 105-07 and accompanying text.

non-use, even appropriators who have been exercising their rights for a very long time may be forced to give up their supplies in order to accommodate a new use by a riparian.[160]

As the nature and extent of the riparian right is enunciated in the principal California Supreme Court case defining the riparian right and establishing the basic features of California's "dual system" of water rights,[161] the riparian right does not provide for the protection of flows desired to maintain instream beneficial uses on or adjacent to the property of the riparian landowner.[162] But the basis of that interpretation, that such uses are not "material,"[163] is inconsistent with current public policy.[164] Moreover, in a condemnation case brought by LADWP in connection with its Mono Basin diversions, California's Third District Court of Appeal held that resort owners whose lands bordered Mono Lake held riparian rights to inflows needed to sustain the lake and its surrounding attractions.[165]

At the same time as other environmental groups sought to protect Mono Lake based on public trust and nuisance theories, Laurens Silver of the Sierra Club Legal Defense Fund pursued a separate legal strategy aimed at protecting Mono Lake through recognition of a riparian right to inflows necessary to sustain the lake.[166] The resort owners whose riparian rights to maintain the natural level of the lake were recognized by the court of appeals could not bring such an action because their rights were bought out as part of those same condemnation proceedings.[167] The legal strategy therefore hinged on having the United States assert water rights as the owner of land adjacent to the lake.[168] In litigation between state and federal governments over title to the land exposed by recession of the Mono Lake, in which Silver filed a brief supporting the United States, the Ninth Circuit Court of Appeals held that the federal government has title to these lands.[169] In another case in which Silver filed a brief in support of the federal government, involving a water right adjudication affecting a national forest elsewhere in California, the California Supreme Court held that the United States has state riparian rights on federal reserved lands, including lands reserved for national forest purposes.[170] The federal

160. *See* Attwater & Markle, *supra* note 19, at 974. The recognition of a federal reserved right could have a similar effect. *See* Attwater & Markle, *supra* note 19, at 977.

161. Lux v. Haggin, 10 P. 674 (Cal. 1886).

162. *See id.* at 757.

163. *Id.*

164. *See* CAL. WATER CODE § 1242 (West Supp. 1997).

165. *See* City of Los Angeles v. Aitken, 52 P.2d 585, 588-90 (Cal. Ct. App. 1935).

166. *See* HART, *supra* note 84, at 126-27.

167. *See City of Los Angeles*, 52 P.2d at 587-88.

168. *See* Hart, *supra* note 84, at 126-27.

169. *See* California *ex rel.* State Lands Comm'n v. United States, 805 F.2d 857, 866 (9th Cir. 1986).

170. *See In re* Water of Hallett Creek Stream Sys., 749 P.2d 324, 325 (Cal. 1988). The state argued that federal statutes had relinquished the United States' riparian rights in public domain lands, but the court held that these statutes merely subordinated the riparian rights for these lands to any water rights established under state law during the period these lands were held as public domain lands. *See id.* at 331-35; *see also* Desert Land Act of 1877, 43 U.S.C. § 321-23 (1994); Mining Act of 1866, 43 U.S.C. § 661 (1994). *See generally* WELLS A. HUTCHINS, THE CALIFORNIA LAW OF WATER RIGHTS 57 (1956)

lands surrounding Mono Lake are not forested, but were reserved as national forest lands before LADWP acquired its water right permits, ironically as part of an LADWP strategy to prevent homesteading that might have established rights senior to LADWP's appropriations.[171] If the public trust had not been applied to protect the natural values of Mono Lake, LADWP could well have faced a challenge based on claims that its diversions interfered with the United States Forest Service's riparian rights.[172]

The California courts may not recognize a riparian right for instream beneficial uses, if only because recognition of the public trust makes it unnecessary to recognize the right.[173] If the courts were to do so, however, it could not be said that the change was unpredictable in terms of the relevant precedent. Yet the effect on an upstream appropriator of recognizing a downstream riparian right to instream uses would largely be the same as the effect of applying the public trust to that appropriation.[174]

The potential effect on appropriators of decisions defining the riparian right illustrates both the potential for decisions defining water rights to have a widespread impact on the security of water rights and the unsuitability of the takings doctrine for protecting the security of water rights. As Professor Freyfogle has observed, the California Supreme Court's decision recognizing riparian rights on federal lands "will reshuffle the priorities and security of water rights in California."[175] But supporters of the decision contend that it represents no more than a correct interpretation of the law based on established precedents.[176] If the Takings Clause provided a basis for compensation wherein a court decision defining the nature and extent of a right has the effect of limiting the exercise of the right, a riparian could claim that opinions which limit the right, including opinions applying the reasonableness doctrine, amount to a taking.[177] But a court's failure to recognize

---

(explaining that an appropriative right is superior to a riparian right on land that passed from the public domain into private ownership after the appropriative right accrued).

171. *See* HART, *supra* note 84, at 126; REISNER, *supra* note 102, at 83-84.

172. *See* Franco-American Charolaise Ltd. v. Oklahoma Water Resources Bd., 855 P.2d 568, 578 nn.53, 56 (Okla. 1993) (recognizing riparian right to instream beneficial uses under Oklahoma law).

173. *See id.* at 582, 595 (Lavender, C.J., concurring in part and dissenting in part) (contending that instream flows should be addressed as public rights under the public trust doctrine and not as private riparian rights); *see also* California Trout, Inc. v. State Water Resources Control Bd., 153 Cal. Rptr. 672, 675 (Cal. Ct. App. 1979) (holding that an appropriative water right cannot be obtained without diversion or control over the water); Fullerton v. State Water Resources Control Bd., 153 Cal. Rptr. 518, 520 (Cal. Ct. App. 1979) (reaching same holding as *California Trout*).

174. There are important differences, however. Presumably, a privately held riparian right to instream beneficial uses could be sold or condemned, and the riparian could not later claim a right to instream uses. Under the public trust doctrine, the state may reopen a water right it has previously approved.

175. Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 STAN. L. REV. 1529, 1529 (1989).

176. *See In re* Water of Hallett Creek Stream Sys., 749 P.2d 324, 334-35 (Cal. 1988) (noting how both sides argued that their position followed from established precedents).

177. *But see* Gin Chow v. City of Santa Barbara, 22 P.2d 5, 18 (Cal. 1933) (rejecting claims that application of reasonableness doctrine to riparians amounted to an unconstitutional taking). In *Franco-*

those limitations would have a similar effect on other water right holders who would have less water as a result.[178]

Even in a water rights system that recognizes only appropriative rights, failure to recognize the limitations on one right has the effect of limiting the exercise of another. A senior appropriator is protected by the requirement that junior appropriators curtail their diversions to the extent necessary to satisfy the rights of the senior appropriators, while junior appropriators are protected against the enlargement of prior rights.[179] Appropriative rights are not defined simply in terms of a right to a quantity of water, however, but in terms of rate and season of diversion, point of diversion, place of use, and purpose of use.[180] A senior appropriator may change its point of diversion, place of use or purpose of use, so long as the changes do not injure junior appropriators through reduced return flows, changes in the point of diversion or timing of diversion or use which affect flows available for downstream diversions, or other factors.[181] In the context of this complex interrelationship of rights, issues of how rights are defined — for example, what kinds of changes in project operations are defined to be changes subject to the rule that there be no injury to junior appropriators — may substantially affect the amount to which each appropriator is entitled. As in the case of riparian rights, the application or failure to apply the reasonableness doctrine to any particular appropriator may also affect the amount available for other appropriators.

e) The Public Trust as Part of "Background Principles"

Assuming that the public trust in water is not itself invalid as an uncompensated taking — and as indicated in the above discussion it almost certainly is not — the public trust doctrine is part of the "background principles" against which other laws and regulations affecting water use are judged. This principle apparently would apply not only to state regulation in furtherance of public trust interests, but also to

---

American Charolaise, the Oklahoma Supreme Court invalidated a 1963 Oklahoma statute that allowed riparian right holders to initiate new domestic uses, but otherwise abrogated unexercised riparian rights. Interpreting the takings cause of the Oklahoma Constitution, the court reasoned that the Legislature has no power to modify vested rights. *See Franco-American Charolaise*, 855 P.2d at 576. The California courts have rejected similar legal arguments. *See In re* Marriage of Bouquet, 546 P.2d 1371, 1376 (Cal. 1976) ("The vesting of property rights . . . does not render them immutable."); *see also Franco-American Charolaise*, 855 P.2d at 596 (Reif, S.J., concurring in part and dissenting in part). Special Justice Reif argued that the critical issue is not the nature of the right, but the power to make changes: "Although such power has been most commonly exercised by the courts, it is not exclusively within the ambit of judicial power to weigh competing interests, to define or refine legal rights, and furnish remedies and other means to protect such rights. The legislature unquestionably has such power as well." *Id.*

178. *See* Attwater and Markle, *supra* note 19, at 978 n.87 (discussing fears that enormous quantities of water would be tied up, leaving insufficient supplies for the appropriators, if a reasonableness requirement were not applied to riparians).

179. *See* George A. Gould, *Water Rights Transfers and Third-Party Effects*, 23 LAND & WATER L. REV. 1, 8-9 (1988).

180. *See id.* at 12.

181. *See id.* at 13-18.

federal requirements such as limitations imposed under the Clean Water Act or the Endangered Species Act.[182]

California is the only state that has a well-developed public trust doctrine in water rights.[183] Thus, similar requirements applied by state regulatory agencies, or the same regulatory requirements applied by a federal agency, might be valid in California but an unconstitutional taking in California.

A similar disparity may arise in the application of the common law of nuisance, which is well developed in California but may have much less expansive reach in another state. In a sense, the *Lucas v. South Carolina Coastal Council* decision, in formulating the nuisance exception to the takings doctrine, created fifty different tests of what constitutes a taking, each depending on the common law of the state where the property is held. Yet the problem is largely unavoidable.

This difference in the how the takings doctrine is applied from state to state could have been reduced, but not completely eliminated, if the Court had adopted the dissenting views of Justices Blackmun and Stevens that state regulation should be permitted for "harmful or noxious uses" even where those activities are not categorized as public nuisances under the law of the particular state where the property is located.[184] But the problem would still arise of how to treat the situation where a state court interprets its common law to impose restrictions on uses which are not encompassed within the Court's definition of "harmful or noxious uses."

Alternatively, the Court could adopt its own limitations on common law doctrines, establishing the outer reach beyond which a state's background principles cannot be

---

182. *See* Mueller, *supra* note 132, at 11-20. *See generally* Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994); Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1994); 15 U.S.C. § 1631 (1994). As the Supreme Court explained, there is no taking if regulation duplicates what "could have been achieved in the courts" under background legal principles. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992). Arguably, a distinction could be made between regulation interpreting or in furtherance of background legal principles and regulation which merely achieves that same results as could have been achieved under those background principles. But the Court did not make that distinction, and such a distinction would be very difficult to apply. State legislation may interpret or refine doctrines like nuisance law or the public trust doctrine without expressly mentioning those background principles. *See* California Trout v. State Water Resources Control Bd., 255 Cal. Rptr. 184, 209, 212 (Cal. Ct. App. 1989) (stating that the Fish and Game Code provisions requiring passage of water to keep fish in good condition downstream of dams are a legislative expression of the public trust). Regulation in furtherance of background legal principles such as nuisance law may also be adopted by the federal government. *See* 1, 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW, AIR & WATER §§ 3.1, 4.1 (1986) (discussing common law bases for provisions of federal air and water pollution control legislation).

183. *See generally* Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 Ariz. L. Rev. 701, 726-36 (1995) (discussing public trust doctrine in other western states, observing that no case outside of California has applied the public trust doctrine to an existing water right).

In 1996, Idaho enacted legislation declaring the public trust to be inapplicable to water rights. *See* Idaho Code § 58-1203(b) (West Supp. 1997). *See generally* Michael C. Blumm et al., *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794*, 24 ECOLOGY L.Q. No. 3 (forthcoming 1997) (contending that the legislation is unconstitutional).

184. *See Lucas*, 503 U.S. at 1036, 1047-58 (Blackmun, J., dissenting); *id.* at 1061, 1067-71 (Stevens, J., dissenting).

used to avoid a taking. Where Justice Stevens' approach would establish a floor where regulation is exempt from regulatory takings challenges even where state law does not categorize an activity as a nuisance, such an approach would establish a ceiling where regulation may be subject to a takings challenge even where state law categorizes the prohibited activity as a nuisance. But such an approach would be fraught with difficulty.

The Court in *Lucas v. South Carolina Coastal Council* consciously adopted what Professor Thompson calls a "positivist" rather than a "normative" view of property.[185] For the Court to adopt its own federal common law as a limitation on state authority would reinstate a normative approach and would create a number of problems. The court would be faced with a potentially tremendous workload, as it is asked to second guess state court decisions interpreting the common law. When it did, the Court would be accused, with some justification, of substituting its own values for that of the state on matters of state law. To the extent that the Supreme Court, in overturning a state's interpretation of its own law, assigns property to private parties that the state attempted to reserve to itself when it initially assigned a property right, the Court would in effect be taking public property for private use instead of preventing the taking of private property for public use. Moreover, it is not necessarily wrong that the same regulation could constitute a taking in one state but not another, because the property owner's reasonable, investment-backed expectations should differ based on what the laws of each state define the property owner's right to be.

Professor Sax argues that the Court's agenda in *Lucas v. South Carolina Coastal Council* is to send a clear message that states cannot require a landowner to maintain property in its natural condition.[186] To the extent that the public trust doctrine or other background principles of state law so require, however, the opinion does not preclude the state from regulating to protect property in its natural state. The Court's formulation based in limitations that inhere in the title, instead of relying on expectations of the property owner, almost certainly was intended to strengthen the claims of property owners against arguments that their rights must be adjusted to accommodate changing public needs and values.[187] In the case of water rights, however, this formulation works against property owners: the common expectation of water right holders is that they hold rights far more secure than is in fact provided for under the background principles of water rights.[188]

5. Reasonable Investment-Backed Expectations

As applied to LADWP's Mono Basin diversions in Decision 1631, most of the long term reduction in diversions required to protect public trust uses of Mono Lake was also required to provide flows in the Mono tributaries in compliance with

185. Thompson, *supra* note 119, at 1522-27.

186. *See* Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1438 (1993) [hereinafter Sax, *Property Rights*].

187. *See* Sax, *Rights that "Inhere in the Title Itself"*, *supra* note 131, at 944-45.

188. *See id.* at 945-46.

section 5937 of the Fish and Game Code. After an initial transition period, providing flows in the four tributaries consistent with section 5937 would reduce LADWP's diversions by an average of 35,200 acre feet per year, while an additional reduction of 8,500 acre feet per year would be necessary to protect public trust uses of Mono Lake.[189] Thus, it would be difficult to establish that applying the public trust could constitute a taking unless applying section 5937 of the Fish and Game Code was also a taking.[190] But the requirements of section 5937 were in effect when LADWP was issued its water right permits.

Despite the Supreme Court's emphasis in *Lucas v. South Carolina Coastal Council* on limitations that "inhere in the title itself" or are "background principles of the State's law of property and nuisance,"[191] there undoubtably are other circumstances where state laws will not be subject to a takings challenge because the Court will not recognize a "reasonable, investment-backed expectation"[192] to violate those laws. Of course, the Court's effort to restrict regulations which can survive a takings challenge to those which can be defended on the basis of limitations which inhere in the title applies only in the context of regulation that deprives land of all economic value.[193] Where some value remains, even if the value of the property has been substantially diminished, the degree of interference with reasonable, investment-backed expectations, and hence the extent to which the property has long been subject to regulation, is a relevant factor in determining whether there has been a taking.[194]

Even in the context of regulation which leaves the property without substantial value, there likely are circumstances where the Court will uphold the regulation on the grounds that the property owner could not have a reasonable expectation that it may violate the regulation. As Justice Kennedy framed the issue in his concurring opinion: "Property is bought and sold, investments are made, subject to the State's power to regulate. Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations."[195] In particular, the Court may find that a property owner's investment-backed expectations were not reasonable, and no taking has occurred, where the property owner seeks to operate in violation of statutes or regulations which were in effect when the property owner acquired the property.

---

189. *See* SWRCB Decision 1631, *supra* note 1, at 163-64.

190. The reduction in diversions attributable solely to what was required to maintain public trust values at Mono Lake is approximately 11% of what LADWP has authorized to divert under its original permits, or about 22% of the amount of diversion authorized after the requirement for maintain fish in good condition in the tributary streams is taken into account. *See id.* A decline in value of that magnitude would not be sufficient to establish a regulatory taking. *See supra* note 92 and accompanying text.

191. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992).

192. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

193. *See Lucas*, 505 U.S. at 1027.

194. *See* Concrete Pipe & Prods. of Cal. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602, 645 (1993).

195. *See Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring).

The requirement that dam owners bypass or release sufficient water to maintain fish in good condition, now codified in section 5937 of the Fish and Game Code, has been in effect in substantially the same terms since 1937, three years before LADWP first obtained water right permits for its Mono Basin diversions.[196] The SWRCB's predecessor did not include the requirement in water right permits, however. The SWRCB's predecessor had no authority at that time either to apply the requirement or to exempt projects from it.[197] Although the requirement was not expressly made a limitation on water right permits and licenses, the requirement could be enforced independent of those permits and licenses. A criminal prosecution could be brought for violation of the requirement.[198]

In the *California Trout* litigation, LADWP argued that section 5937 was not a limitation on the amount of water that may be appropriated, even if any remaining flows that are not appropriated are insufficient to keep alive any fish that lived below the dam before the appropriation.[199] The California courts never endorsed that interpretation, however, and the statute on its face applies to the operation of any dam.[200] It cannot be said that a water right holder that obtained its permit after enactment of the requirement, now codified in section 5937 of the Fish and Game Code, had a reasonable, investment-backed expectation that it could divert water from a dam in a manner that impaired or destroyed fish downstream without ever being required to bypass or release water to correct the problem.[201]

If, instead of accepting Decision 1631, LADWP had renewed its takings challenge, LADWP would have had an additional argument as to why it did not believe section 5937 of the Fish and Game Code would be applied to it. In 1940, the California Fish and Game Commission approved a negotiated agreement under which LADWP provided partial funding for construction of a hatchery on Hot Creek, a tributary of the Owens River, instead of constructing fishways at its Mono

196. *See* CAL. FISH & GAME CODE § 5937 (West 1984).

197. *See supra* notes 7, 25-27, 62 and accompanying text. The SWRCB has been required to apply the requirement in permits issued for projects in Mono and Inyo Counties since 1953. *See* CAL. WATER CODE § 5946 (West 1984). Since 1975, the SWRCB has applied the requirement statewide to all permits issued for diversions from rivers and streams by means of a dam. *See* CAL. CODE REGS. tit. 23, § 782 (1995); California Trout, Inc. v. State Water Resources Control Bd., 255 Cal. Rptr. 184, 192 n.4 (Cal. Ct. App. 1989).

198. *See* CAL. FISH & GAME CODE § 12000 (West Supp. 1997).

199. *See California Trout*, 255 Cal. Rptr. at 191.

200. *See id.* at 195.

201. The California Attorney General at one time endorsed, and later abandoned, the argument LADWP made in the *California Trout* litigation. *See* 57 Op. Cal. Att'y Gen. 577, 579-83 (1974) (reviewing the reasoning of the earlier opinion and finding it was no longer valid); 18 Op. Cal. Att'y Gen. 31 (1951) (concluding that the statute did not affect appropriation of water). Opinions of the Attorney General are advisory only, however, and do not have the force of law. *See* Sanchez v. Unemployment Ins. Appeals Bd., 569 P.2d 740, 747 (Cal. 1977); People v. Vallerga, 136 Cal. Rptr. 429, 441 (Cal. Ct. App. 1977); State Water Resources Control Bd. Order WQ 82-1 at 4-5. To the extent that reliance on an opinion of the Attorney General could support claims of a reasonable, investment-backed expectation for purposes of a takings analysis, the narrow construction of § 5937 of the Fish and Game Code once espoused by the Attorney General would have little bearing in cases where the dam was built before 1951, and no bearing where the dam was built after 1974.

Basin diversions. The agreement expressly provided that LADWP was released from its obligations under certain provisions of the Fish and Game Code, including the provision now codified as section 5937.[202] The *California Trout* court held that the state was not estopped from applying the requirement for bypassing or releasing water to maintain fish in good condition.[203] By the terms of the applicable provisions of the Fish and Game Code, the commission was authorized to approve construction of a hatchery in lieu of a fishery, but not to excuse dam owners from the requirement of bypassing or releasing water for protection of fish downstream from the dam.[204] While the hatchery agreement would not prevent the state from applying section 5937, it could have provided a basis for an argument by LADWP that, in considering whether application of the public trust amounted to a taking, the full extent to which its diversions were reduced should be taken into account, even where those reductions were also required to comply with section 5937.

Section 5937 of the Fish and Game Code could pose an especially difficult problem for other water right holders seeking to establish that applying the public trust to their diversions would amount to a taking. Few other water right holders will be able to point to an agreement with the Fish and Game Commission which purports to relieve them of the requirement to comply with section 5937 of the Fish and Game Code. In addition, it will often be the case that the flows required to comply with section 5937 and the flows required to protect public trust uses will be the same.[205]

Thus, section 5937 could pose a serious causation problem for a water right holder claiming that application of the public trust resulted in a taking. The water right holder's loss, or much of it, may have been caused by the statutory requirement to limit diversions as needed to keep fish in good condition. In addition, section 5937 poses a serious theoretical obstacle to a takings claim. The public trust doctrine would not appear to be a sudden change in state law, as LADWP contended in seeking Supreme Court review, if it is similar to, and in many cases duplicates the effect of, a statute long on the books.

III. Water as a Shared Resource

As the above discussion indicates, applying the public trust to water rights does not constitute a taking of private property for public use. Water rights in California are held subject to the public trust. The public trust doctrine sets a limitation which

---

202. *See California Trout*, 255 Cal. Rptr. at 188-89.

203. *See id.* at 205-06.

204. *See* CAL. FISH & GAME CODE §§ 5937, 5938 (West 1984).

205. *See, e.g.*, Cal. State Water Resources Control Bd. Order WR 95-4 at 18-19, 30-34, *modified*, Cal. SWRCB Order WR 95-5. There will, however, be cases where § 5937 of the Fish and Game Code does not apply but the public trust doctrine requires that diversions be cut back to protect fish. Section 5937 applies only in cases where there is a dam. *See* CAL. FISH & GAME CODE § 5937 (West 1984). "Dam" is defined broadly to include any artificial obstruction, but does not include diversions by means such as wells used to pump from the subsurface flow of the stream, even where surface and subsurface flows are connected and pumping from subsurface flows affects total streamflows to the detriment of fish downstream. *See id.* § 5900(a); Cal. State Water Resources Control Bd. Order WR 97-02, at 11-12.

inheres in the title conveyed to a water right holder. This limitation "prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust."[206] Even if a judicial taking could be established based on a court decision which abruptly and without any support in earlier precedents redefines the interest held in property, the application of the public trust to water rights would not constitute a taking. Recognition of the public trust was not an abrupt change in the law, but an extension of established principles from one area of the law, rights to tidelands and lakeshores, to a related area, rights to the use of water. This extension of the public trust to water was a continuation of trends in the law already visible in other doctrines which had long been recognized to apply to water rights, including the reasonableness doctrine and the law of nuisance.

If the application of the public trust would not be a taking, then it would be very difficult, if not impossible, to establish that the application a state or federal regulatory program for the protection of instream beneficial uses or other public trust values amounts to a taking. Actions taken under these regulatory programs do not constitute a taking if "the result could have been achieved in the courts" based on limitations that "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance,"[207] including the public trust and reasonableness doctrines.

The regulatory takings doctrine may have little bearing on actions affecting California water rights. As applied to water rights, the applicability of the Takings Clause may effectively be limited to its original intent: to require compensation when private property is taken "for public use";[208] for example, where the government takes over a privately owned water right and uses that right as part of a project to deliver water for irrigation or municipal use.[209] Where the government regulates water diversion and use to prevent harm to public trust uses, on the other hand, there is no basis for a takings claim.

In contrast, the regulatory takings doctrine is becoming increasingly important in land use issues, where regulations established for important environmental purposes may nevertheless be determined to violate the Takings Clause.[210] This raises the issue of how the nature of the property interest in water, or the state's interest in water, is different than when land is involved.

---

206. National Audubon Soc'y v. Superior Court, 658 P.2d 709, 727, (Cal. 1983).

207. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992).

208. U.S. CONST. amend. V.

209. Even in these circumstances, the amount of compensation may be limited. *See* CAL. WATER CODE §§ 1392, 1629 (West 1971).

210. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994) (exaction requiring dedication as a public greenway of the portion of the property that was in the floodplain); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (development setback on coastal barrier island to prevent beach and dune erosion); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (exaction for purpose of public access to a coastal beach).

A. A Shared Right to Use

Several features of the property interest in water distinguish it from interests in land. A water right is a right to use of water, not ownership of the water itself.[211] This use right is not exclusive. To the extent that an owner with paramount rights does not need to use the water, it cannot prevent others from making use of the water.[212] Indeed, one of the key features of a system by which water rights are allocated and administered is that it promotes the maximum beneficial use of available water supplies by allowing diversion and use of waters that either are not used by or constitute the return flows from waters used by senior water right holders.[213] When a senior water right holder leaves its land fallow, others with lower priorities may make use of the available water until the land is irrigated again. Downstream appropriators may make use of return flows from upstream appropriators, with the same water being used over and over again.

This sharing of the resource is in marked contrast to the property interest in land, where the property owner has title to the land itself, and has the right to keep others from using it. The Supreme Court has emphasized that "the landowner's right to exclude [is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[214] Not only does the water right holder lack a right to exclude others from using what the water right holder does not use, its right to use is itself limited, especially under the reasonableness doctrine, to protect other users.[215]

B. State Interest

These limitations on a water right to protect other uses are based not only on the private property rights of other users, but on the state's interest in how its limited resources are used.[216] The reasonableness doctrine, in particular, is based on recognition that because water is in scarce supply the state has an interest in making sure it is not wasted.[217]

---

211. *See* Cal. Water Code § 102 (West 1971); 1 ROBERT E. BECK, WATERS AND WATER RIGHTS § 4.01, at 65-67 (1991 ed.).

212. *See* CAL. WATER CODE § 1201 (West 1971); Stevinson Water Dist. v. Roduner, 223 P.2d 209, 212 (Cal. 1950).

213. *See generally* CAL. CONST. art. X, § 2 ("[T]he general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable."); Gould, *supra* note 179, at 5-12 (discussing the definition of water rights, emphasizing relationship between flows, including return flows, available at any given time, and demands on those flows at that time).

214. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

215. *See supra* notes 177-81 and accompanying text.

216. *See* Joslin v. Marin Mun. Water Dist., 429 P.2d 889, 894 (Cal. 1967).

217. *See, e.g.*, Peabody v. Vallejo, 40 P.2d 486, 491 (1935) ("When the supply is limited public interest requires that there be the greatest number of the beneficial uses which the supply can yield.")

Justice Holmes, who authored the opinion establishing the regulatory takings doctrine,[218] also authored an opinion taking the view that the Takings Clause does not limit a state's authority to regulate its water resources.[219]

> [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. . . . It is fundamental, and we are of opinion that the private property of [water right holders] cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down . . . of what otherwise would be private right of property, or that . . . those rights do not go to the height of what [the water right holder] seeks to do, the result is the same. . . . . 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.[220]

In sum, the property interest in water is not only a right to use the resource, but a responsibility to avoid abuses that would harm other users or the state's interest in effective use of the resource. As Professor Freyfogle has observed in contrasting water rights with other property rights:

> With the new and growing limits on the irresponsible use of water, it is now no longer permissible for a person of wealth to purchase a property right in water and then uselessly to destroy or waste it. A slumlord, it seems, can still "use" his property as a resting spot for a dilapidated, vacant building. A forest owner can still clearcut trees on a steep slope and watch erosion destroy centuries of soil growth. A vegetable farmer can toss out tons of carrots because they are slightly oversized, despite the fact that some people go hungry. All of these people can stand on their property rights today and can claim, not just membership, but high status in our exploitive society.[221]

As conditions change, the delineation of "irresponsible use" and the limitations that may be imposed on a water right holder may also change. In declaring that private rights are subject to the state's paramount interest in its waters, Justice Holmes continued: "We are of the opinion, further, that the constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not

218. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
219. *See* Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908).
220. *Id.* at 356.
221. Freyfogle, *supra* note 175, at 1548.

dependent upon by any nice estimate of the extent of present use or speculation as to future needs."[222]

C. Changing Landscapes and Evolving Law

The extent to which conditions are subject to change is another feature that distinguishes interests in water from interests in land. As the California Supreme Court has observed in discussing the reasonableness requirement:

> The waters of our streams are not like land which is static, can be measured and divided, and the division remains the same. Water is constantly shifting, and the supply changes to some extent every day. A stream supply may be divided but the product of the division in no wise remains the same.[223]

Moreover, the amount of water reliably available probably is substantially less than was thought when water rights were originally perfected. Recent studies indicate that over the past 150 years, the climate in the Sierra Nevada was wetter and more stable than has generally been the case.[224] Water right holders who believe they have a reliable supply because flows recorded in this century have been adequate for diversion under their priority of right may find their supplies unreliable if the climate returns to the drier, less stable conditions that once prevailed.

It is for this reason that, at least in the area of water rights, the law of takings cannot rely on the subjective expectations of the water right holder. Just as the subjective expectations may fail to fully understand the potential impact of senior claims, water right holders have failed to anticipate the potential severity of drought. Relying on more objective measures such as market values does not resolve these concerns. It may overcome the problems of proving what expectations in fact were, but to the extent that unrealistic assumptions about climate are held in common, they would be reflected in the market price.

At first glance, the constantly changing nature of the resource may appear to distinguish water from land. Unlike the amount of water available for appropriation, the amount of land available for use would not appear to fluctuate over time, or to be substantially less in the future than was assumed when land titles were established. But the difference is one of degree. Landscapes, like water supplies, change over time. The case relied on in LADWP's taking argument, *Hughes v. Washington*,[225] involves the issue of who holds title where land adjacent to a waterway is gained or lost through accretion. An issue being given increasing attention as a result of flooding in recent years is the natural tendency for rivers to

---

222. *Hudson County*, 209 U.S. at 356-57.

223. Peabody v. City of Vallejo, 40 P.2d 486, 491 (Cal. 1935).

224. *See* 1 CENTER FOR WATER & WILD LAND RESOURCES, UNIV. OF CAL., DAVIS, SIERRA NEVADA ECOSYSTEM PROJECT: FINAL REPORT TO CONGRESS: STORMS OF THE SIERRA NEVADA 9 (1996). "One implication of a longer view of climate is, for instance, that the "droughts' of the mid-1970's and mid-1980's were actually not droughts at all, relative to the century-long dry periods that have been common in Sierran climate history." *Id.*

225. 329 U.S. 290 (1967).

meander and the need to give the rivers room to move for both public safety and preservation of fish and wildlife habitat.[226]

The coastline, too, is moving. One of the most important recent takings cases, *Nollan v. California Coastal Commission*,[227] involved a coastal development permit condition requiring a Ventura County, California beachfront property owner to allow public access to cross a strip of beach between the mean high tide line and the landowner's seawall. The mean high tide line in the area is constantly shifting, ranging from about ten feet from the seawall when the water is at its lowest to the seawall itself when the water is at its highest.[228] Within a relatively short period, sea level is expected to rise to the point where the entire area subject to the condition will be property of the state. A recent study indicates that with a two foot rise in sea level, projected to occur by 2040, the Ventura County shoreline could recede by fifty to seventy-five yards.[229] The change in coastline has profound implications both for coastal economic development and environmental resources, such as coastal wetlands.[230] Our land use laws and policies will have to adapt to these changing circumstances.

In water rights, the law has been constantly adapting to changing conditions and changing needs. Throughout the history of water development in California, new water law doctrines have been developed, or doctrines from other areas of the law have been imported into water law, to the delight of those who see a need for change and to the dismay of others who decry the apparent instability.[231] In an opinion rejecting a water right holder's claim that applying the reasonableness doctrine interfered with the water right holder's vested rights,[232] a state court of appeal emphasized the dynamic nature of water right law:

> It is time to recognize that this law is in flux and that its evolution has passed beyond traditional concepts of vested and immutable rights. . . . Professor Freyfogle explains that California is engaged in an evolving process of governmental redefinition of water rights. He concludes that 'California has regained for the public much of the power to prescribe water use practices, to limit waste, and to sanction water transfers.' He asserts that the concept that 'water use entitlements are clearly and permanently defined,' and are 'neutral [and] rule-driven,' is a pretense

226. *See* JEFFREY F. MOUNT, CALIFORNIA RIVERS AND STREAMS: THE CONFLICT BETWEEN FLUVIAL PROCESS AND LAND USE 309-10 (1995).

227. 483 U.S. 825 (1987).

228. *See id.* at 850-51 (Brennan, J., dissenting).

229. *See* A. Constable et al., *Demographic Responses to Sea Level Rise in California*, 9 WORLD RESOURCE REV. 32 (1997).

230. *See id.*

231. *See* Gray, *supra* note 140, at 227 ("[S]ince its inception in 1855 California water rights law has developed pragmatically to facilitate the accomplishment of changing economic and, more recently, environmental purposes"). *See generally* HUNDLEY, *supra* note 106, at 406-22.

232. *See* Imperial Irrigation Dist. v. State Water Resources Control Bd., 275 Cal. Rptr. 250, 259-61 (Cal. Ct. App. 1990).

> to be discarded. It is a fundamental truth, he writes, that 'everything is in the process of changing or becoming' in water law.[233]

The dynamic character of the law is relevant to the takings analysis, because it bears on the reasonable expectations of the property owner.[234] To the extent that changes in the law are through judicial interpretation of common law or background principles such as nuisance, the reasonableness doctrine or the public trust, those changes are effectively immune from takings challenges.[235]

Comparing property rights to water and land, Professor Freyfogle has observed:

> Property rights in general change over time with the inexorable flow of the common law. But in the water law setting, temporal change is more expressly incorporated into the property right itself. A water user who begins a new use, perhaps with heavy capitalization, faces the prospect that her water use will someday become unreasonable, even if reasonable when begun; that someday it will cause unacceptable environmental damage or be needed by a nearby growing metropolitan area. A water right, then, exists in time as well as in space.[236]

By defining a property owner's expectations in terms of the state's law of property, the Supreme Court in *Lucas v. South Carolina Coastal Council* appears to be attempting to cut off arguments that the state can change the law in response to changing public needs and values.[237] The Court's formulation cannot fully insulate property owner expectations, however, because background principles of state law include the common law, which itself adapts to changing conditions. Real property law for land may not be changing as rapidly as the law of water rights, but it is also in flux. Professor Sax points out that property definitions have always been dynamic.[238]

The "background principles" of nuisance and property law to which the *Lucas v. South Carolina Coastal Council* majority refers are comprised largely of the rights and burdens established in the industrial era, which in turn replaced a different balance than that which applied in previous times.[239] To the extent that the *Lucas* Court's formulation actually serves to prevent changes in these common law conceptions of property, it is because recent changes in the law have been made more frequently by statute than by common law. The common law is in a state of arrested development because modern environmental statutes have made it unnecessary for the common law to adapt.

---

233. *Id.* at 267 (quoting Freyfogle, *supra* note 175, at 1546-47).

234. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1034 (Kennedy, J., concurring) ("[T]he test must be whether the deprivation is contrary to reasonable, investment-backed expectations. . . . [I]f the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what the courts say it is.")

235. *See id.* at 1029; *supra* notes 127-88 and accompanying text.

236. Freyfogle, *supra* note 175, at 1542.

237. *See* Sax, *Rights that "Inhere in the Title Itself"*, *supra* note 131, at 944-45.

238. *See* Sax, *Property Rights*, *supra* note 186, at 1446.

239. *See id.* at 1454-55.

The attempt to segregate changes in the law between statutory changes and common law changes is artificial, and in some areas may prove unworkable. Statutes and the common law interact and evolve together.[240] Some statutes codify the common law, others are assimilated into it.[241] California's common law of nuisance, for example, is codified in statute but still interpreted as a common law doctrine.[242] Regulatory standards help define what is reasonable for purposes of common law liability.[243]

The reasonableness doctrine — the overarching principle of California water rights law and the source of so much change over the years — began as a common law doctrine, was adopted into the state constitution, and continues to evolve in response to changing conditions and needs.[244] California's constitutional amendment incorporates the common law doctrine, while overruling a judicial decision that refused to extend the reasonableness doctrine to situations where waste of water by a riparian harmed an appropriator.[245] As noted by the dissenter in that case, however, that limitation on the applicability of the reasonableness doctrine was not immutable:

> One of the characteristics of the common law is that it contains within itself its own repealer; that is to say it changes as conditions change and adapts itself to new conditions, *ex proprio vigore*. It should be applied to our conditions when our conditions are similar to those out of which the common law arose, but when the common law is not applicable, because of different conditions, it should not be applied.[246]

The judicial decision that precipitated the constitutional amendment could have been decided differently, and could have been overruled by the court at later time.

At this point, the reasonableness doctrine must be considered part of the background principles that inhere in the title of every water right holder, even as applied to situations where the constitutional amendment overruled earlier common law precedents. Nevertheless, it serves to illustrate the difficulties with the Court's formulation in *Lucas v. South Carolina Coastal Council*, which seeks to divorce the common law from its context within a body of law that is increasing codified in statute.

Water law differs from the law governing interests in land, both in degree to which the law has changed over the years and the form of that change, with developments in water law still taking place largely though case-by-case evolution.

---

240. *See generally*, Hon. Roger J. Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATH. U.L. REV. 401 (1968) (discussing how statutes and common law decisions borrow from each other).

241. *See* at 410-11.

242. *See* CAL. CIV. CODE § 3479 (West Supp. 1997).

243. *See* Traynor, *supra* note 240, at 415-16.

244. *See* Gray, *supra* note 231, at 250-62.

245. *See id.* at 263-64.

246. *See* Herminghaus v. Southern Cal. Edison, Co., 252 P. 607, 625 (Cal. 1927) (Shenk, J., dissenting).

These differences account in large measure for the dissimilarity in how the takings doctrine impacts water and land but may not justify the dissimilarity.

D. The Justice and Fairness of the Obligations of Stewardship

This leaves the question of whether the property interest in land should not be more like water rights. The water right is held subject to responsibilities to accommodate other water users. Over time, these responsibilities have been enlarged to include responsibilities for the protection of instream beneficial uses.[247] Land ownership could be interpreted to include similar responsibilities.[248] Aldo Leopold advocated a "Land Ethic," incorporating responsibilities to the natural community.[249] Consistent with this view, property ownership could be interpreted to include concepts of stewardship, and move away from concepts of absolute dominion, as it long since has in the area of water rights.

There is substantial controversy as to whether the direction of public policy should be to promote stewardship, or to promote a strategy of resource exploitation. It is at the heart of a wide range of controversies involving preservation of resources, ranging from historic structures to prime agricultural lands to old growth forests. Should the Takings Clause be interpreted to take sides in this debate? At the heart of the regulatory takings doctrine is a determination that "'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[250] Stewardship may impose substantial costs, even hardship, on those assigned responsibilities,[251] but failure to recognize responsibilities of landownership also imposes hardships, both on individuals and the public at large. If our society decides that property ownership should include responsibilities for protection of environmental values, as the California courts have done, that decision necessarily includes a determination of what justice and fairness require.

---

247. *See* Gray, *supra* note 231, at 268-72.

248. Professor Freyfogle has advocated making land ownership more like ownership of a water right:

> If property law does develop like water law, it will increasingly exist as a collection of use-rights, rights defined in specific contexts and in terms of similar rights held by other people. Property use entitlements will be phrased in terms of responsibilities and accommodations rather than rights and autonomy. A property entitlement will acquire its bounds from the particular context of its use, and the entitlement holder will face the obligation to accommodate the interests of those affected by his water use.

Freyfogle, *supra* note 175, at 1531.

249. ALDO LEOPOLD, A SAND COUNTY ALMANAC 217-41 (1966).

250. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

251. A more recent innovation in resource protection programs has been the use of transfer of development credits or similar tools to reduce the impact on property owners who are substantially affected. The regulatory program at issue in *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659, 1662 (1997), includes an elaborate system of development credits to maintain property value for owners of wetlands or other environmentally sensitive lands where development is prohibited.