

The public trust: Mono Lake's significance in California

by Harrison C. Dunning

Editor's Note: In September of 1980 law professor Harrison Dunning organized a timely conference entitled "The Public Trust Doctrine in Natural Resources Law and Management" at U.C. Davis. This conference proved extremely influential in the National Audubon Society v. Los Angeles public trust case. His foresight into the power of the public trust doctrine was instrumental in securing this landmark decision. The following article was compiled from several of his essays.

In the landmark 1983 Mono Lake case, the Supreme Court of California ruled that water rights are subject to limitations protecting the public trust in navigable waters. This is so, the court wrote, because the state as a sovereign entity has the authority and the duty "to protect the people's common heritage of streams, lakes, marshlands and tidelands."

Historically, the public trust doctrine has functioned to protect certain public values in navigable bodies of water—traditionally navigation, commerce, and fishing values; more recently, recreational and environmental values as well—against the unchecked exercise of ordinary property rights. In the Mono Lake case, the court defined a role for the public trust for the modern day.

In short, the court mandated protection for a lake by requiring an accommodation between the public trust doctrine and conventional principles of water law. The public trust values at stake were stated broadly. In the Mono Basin context, scenic views, air quality, and wildlife habitat were all mentioned as within the coverage of the public trust doctrine.

Two fundamental principles emerged: that public trust uses must conform to the constitutional reasonable beneficial use

standard; and that, where necessary to avoid harm to public trust values, water diversions must be restricted where feasible. And the decision spoke not only of the *power* of the courts and agencies in exercising concurrent jurisdiction to provide doctrinal integration, but also of their *duty* to protect insofar as feasible the common heritage resources of the people.

The Public Trust doctrine and California water law

The roots of the public trust doctrine are found in Roman law concepts of common property—the *Audubon* opinion quotes the Institutes of Justinian for the proposition that by the law of nature, air, running water, the sea, and the shores by the sea "are common to mankind." This is the "common heritage" of which the California court speaks, and it is the "property of a special character" spoken of by the United States Supreme Court in the leading public trust case of *Illinois Central Railroad Co. v. Illinois*.

Conceptually, there has been some uncertainty as to the basis of the public trust doctrine. Is it a public property right perhaps but one subject to special rules constraining alienation? Is it a version of the police power, perhaps one owing its unique status to early development historically? Is it part of the common law, so that it is subject to modification or revocation by statutory or constitutional provisions?

None of the answers suggested by these questions quite fit what is articulated in the Mono Lake decision. Rather, the public trust doctrine appears to be an expression of the inherent prerogative of the sovereign state to restrict or reallocate property rights to protect the integrity of the "special" or "common heritage" natural resources. Although occasionally treated

semantically or procedurally as if it were a property right, the sovereign's prerogative exists because of the common property nature of the resource—a nature that dictates the recognition of unusually limited conventional property rights. And although somewhat similar to the police power, which permits the sovereign to protect public health, safety, and welfare from harm stemming from the exercise of property rights in any natural resource, the sovereign's public trust prerogative derives from the nature of the resource rather than from the need to protect public health, safety, and welfare.

The difference between the police power and the public trust is important, for an exercise of the police power that bears too heavily on the exercise of property rights can constitute a "taking" that requires the payment of just compensation. A proper assertion of the public trust, however, simply serves to define the boundaries of common property in the resource and thus is not vulnerable to characterization as a "taking" and the concomitant constitutional need to pay compensation. This result is a just one, for it simply expresses the fact that the legitimate expectations for protection of those with conventional property rights are less where the rights pertain to common heritage resources.

In fact, the analysis of the California Supreme Court in the Mono Lake case suggests that neither a statute nor a constitutional provision can authorize the granting of property rights "vested" so as to protect them from reexamination.

California, like other western states, has a well-developed water rights law organized primarily in terms of appropriative water rights. An appropriative water right permits the diversion of water for beneficial use by a

claimant, whether riparian to the source or not. Since 1913, the appropriation in California of unappropriated surface waters or waters from the rare subterranean stream has required administrative approval through a permit and license process.

In the early days of California's permit system the administrative agency was treated as having only a ministerial function: if unappropriated water was available in a particular source, an applicant was allowed to appropriate it to the extent beneficial use could be demonstrated. Later, however, statutory and judicial changes occurred, so that it is now established in principle that the state agency reviewing applications to appropriate can deny or condition them in appropriate circumstances. In practice, denial of applications where unappropriated water is available is very rare, and the role of the public trust doctrine in protecting navigable sources was never considered by the agency prior to the *Audubon* opinion.

In 1940 the principal tenet of California water policy was to put the state's water resources to beneficial use to the fullest extent of which they were capable—generally for irrigation or municipal and industrial supply. The objective was to avoid waste or unreasonable use, for example by allowing riparians with rights paramount to appropriators to claim water for wasteful use patterns. The central concern was a fair balance between competing diverters, rather than a fair balance between allocation to diverters and source protection for the benefit of instream uses.

Beginning in 1957, concern with the impact of diversion on the integrity of California's rivers and lakes was reflected with increasing intensity. Recreational and fish and wildlife uses of water were identified as "beneficial," and subsequently the legislature directed that the agency reviewing applications to appropriate unappropriated water "take into account, whenever it is in the public interest, the amounts of water needed to remain in the source for protection of




Photo by Arya Degenhardt

beneficial uses." A demanding water quality law was enacted, and provisions were made to integrate water quality control and water rights law. An environmental protection act was passed. And some rivers were placed "off-limits" for state or local water projects by enactment of a Wild and Scenic Rivers Act.

Each of these relatively recent provisions seems to have been of some value in requiring balancing of instream and appropriative uses of California's limited water resources, but none of the new statutes applies to the older water rights. The public trust doctrine is thus unique in its ability to provide strong source protection against damage from the exercise of water rights that were acquired long ago.

Decision 1631, the State Water Resources Control Board's 1994 order regarding Mono Lake water rights, demonstrates the role the public trust now must play in water resource decisions. In a sense, the public trust is the driving force of Decision 1631. A lake level of 6,391 feet is projected to provide "appropriate" protection to the full range of public trust resources at the lake. It is, nonetheless, 26 feet below the pre-diversion lake level of 6,417 feet. Certainly, in an age when some environmental problems are tackled legally by Endangered Species Act brinkmanship, the public trust doctrine has demonstrated its merit as a tool for early intervention to maintain

environmental viability.

When the *Audubon* Case was decided over ten years ago, there were cries of alarm from many water lawyers. To some, it seemed the very underpinnings of our property system in water had been attacked in some unprecedented fashion. Change, however, has come very slowly, as agencies and courts have absorbed the new learning and applied it in particular situations. Insofar as law is slowly changing to reflect new social values, nothing is new. The same thing happened at the behest of gold miners in the 1850s when rules favoring landowners were supplemented by those protecting trespassers on federal land who captured water and put it to beneficial use. Insofar as law is beginning to recognize the need for ecosystem management and an ecosystem approach, we do have something new. It is, in fact, something needed, something promising, and something perhaps even the Los Angeles Department of Water and Power has finally come to embrace. 

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