

# WATER STRATEGIST

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## Water Policy In the Balance: Water Development and Environmental Interests In the Era of the Public Trust Doctrine

The "public trust" doctrine now plays a vital role in western water policy, having been finally cemented into place in 1983 by the California Supreme Court in the famous Mono Lake decision (*National Audubon Society v. Superior Court*, 1983). The doctrine requires states to consider how their water policies affect public trust values (including navigation, commerce, fisheries, recreation, and ecology), and to protect those values whenever reasonable. This means that state water codes no longer have sole control over how water is used. States are also no longer bound by prior water allocation decisions, because they

*The public trust doctrine is a broad mandate to consider public trust values rather than a rigid prescription to protect them.*

neither a complete victory for environmental interests nor a complete defeat for water development interests. Environmentalists won the required inclusion of public trust values in water resource policy--but many western states, including California, had already defined beneficial water use to include recreation, fish and wildlife, and other instream uses. Water development interests lost in as much as investments based on presumed vested water rights may be jeopardized by subsequent limitation on, or even revocation of, original water permits, but the Court did not guarantee public trust values absolute protection. Allowed diversions must *balance* the interests of the appropriator against any harm to public trust values.

So the public trust doctrine is a broad mandate to consider public trust values rather than a rigid prescription to protect them. The courts have provided guidelines for state legislatures and administrative agencies, but have expressly avoided prescribing specific outcomes. State legislatures

have the power to reconsider their decisions in light of changing circumstances and societal values.

It is unclear how the public trust doctrine will work in practice. The Mono Lake decision was

and administrative agencies will be called upon to perform the balancing act.

The process will be a continuing one. The pressure for legislative solutions--or at least clarification--has resulted in proposed legislation before current sessions of the Arizona, California, Kansas, and Oregon legislatures. Yet administrative agencies will ultimately make many policy decisions. State policy-makers, environmentalists and local water authorities (including their financial, legal, and operational advisors) must understand these legal, policy, and administrative issues if they are to represent their interests effectively in the debate over reconciling state water rights with the public trust doctrine.

### THE CASE LAW

To understand the full significance of the public trust doctrine, it is helpful to review how the Mono Lake decision has been used in western case law. In general, western courts have set only the framework for considering how water allocation decisions should affect economic development and environmental interests. Provided that policy decisions follow procedural guidelines, the courts have upheld permits that have allocated water for economic development purposes, even if public trust values are impaired. Only when policy decisions have failed to follow proced-

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ural guidelines have courts ruled in favor of protecting public trust values. This approach has been followed in California as well as other western states.

### California

The facts in the Mono Lake case place the ruling in its proper perspective. In 1940 the city of Los Angeles received permission from California's Water Commission (the predecessor to the State Water Resources Control Board) to divert virtually the entire flow of Mono Lake's feeder streams. The Commission reached its decision by relying on the "established policy of this state that the use of water for domestic purposes is the highest use of water," and therefore believed that it had no choice but to approve the diversion despite its potentially harmful environmental effects. The California Supreme Court held that the Commission's judgment was in error, because the public trust doctrine required it to consider those adverse effects on Mono Lake, the second largest lake in California.

When the Court ruled that either state courts or the State Water Resources Control Board must reconsider the Commission's erroneous permit decision, it reasoned that "the state is not confined by past decisions and according-

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***In Arizona, proposed legislation finds that termination of the state's streambed claims would best serve public trust values.***

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ly has the power to reconsider allocation decisions." The Court also held that grants of water rights or permits will be construed as subject to the public trust, unless the legislature explicitly deems otherwise. But the state

can only relinquish its public trust responsibility if such action achieves the purpose of that responsibility. The Court will defer to legislative and administrative judgments about how economic development and public trust interests should be balanced, provided that the legislature or agency considered and was knowledgeable about the effect of their decision on public trust values.

### Idaho

The Idaho Supreme Court has clarified the meaning of the public trust doctrine for water policy in Idaho. While that Court has ruled that policy-makers must consider how the allocation of water resources affects public trust values, it has not precluded water uses from impairing public trust values.

In *Kootenai Environmental Alliance v. Panhandle Yacht* (1983), the Idaho Supreme Court held that the public trust doctrine did not preclude Idaho's Department of Land from granting a lease to a private club for the purpose of construction, maintenance, and use of private docking

facilities on a navigable lake. The Court was impressed by the fact that the Department's decision to grant the lease was made in an open hearing process, in which the Department considered how the yacht club's activities would create economic benefits but only minor impairment of public trust values. While the Court asserted its responsibility to review whether the public trust was considered by the Department, it stated that the judiciary would not impose its own policy judgment over that of the legislature or appropriate administrative agency.

This judicial deference to agency decision-making was followed in *Shokal v. Dunn* (1985), in which the public trust doctrine was used as part of a broad challenge to a water permit granted by the Department of Water Resources (DWR). While the Supreme Court required DWR to conduct additional hearings on the permit application in order to investigate non-public trust issues, the Court found no legal basis for challenges of the proposed project on the grounds that it would reduce by 80% the minimum stream flow for a 700 foot stretch of a nearby creek.

### Montana

In *Dept. of State Land v. Pettibone* (1985), the Montana Supreme Court relied, in part, on the Mono Lake decision to rule on a dispute between the state and private ranchers who lease school trust lands. Under the terms of the state's trust, the revenues received from leased lands are used to finance public education in Montana. The issue involved who owned the water rights developed by ranchers on trust lands. The Montana Supreme Court held that, as trustee for School Trust Lands, the Department of State Lands could not alienate the state's interest in appurtenant water rights without express authority from the legislature, and without receiving full compensation for the explicit alienation of those rights. Since neither condition was satisfied, the Court held that the state owned the disputed water rights.

### PROPOSED LEGISLATION

Western legislatures are responding to the need for legislative clarification of how the protection of public trust values affects private water rights. Proposed legislation would limit subsequent state claims under the public trust doctrine, or change procedures under which agencies consider competing interests during review of water permit applications.

### Arizona

Arizona recently asserted that watercourses in that state, other than the Colorado River, were navigable at the time of its statehood. Under this claim, the state would own all lands in the beds of those watercourses, which would become subject to protection under the public trust doctrine. This claim adversely affected the interests of private landowners who had developed their holdings under

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federal or state patents. Proposed legislation would minimize the future uncertainty of private rights subject to the public trust doctrine.

(*HB 2017: Denny et al.*): Declares that the vagueness of the state's claim has clouded the titles to private lands, impaired their marketability and development, reduced their value, and restricted their ability to obtain title insurance. Notes that the "experience of other states indicates the probability of protracted, difficult, expensive, and disruptive . . . litigation to resolve this state's claim in the absence of legislation." Under the terms of the bill, the state would relinquish its streambed claim in exchange for a payment of \$20 per acre and a limited public right to use surface (but not diverted) waters for recreational purposes. The bill expressly prohibits the imposition of any minimum stream flow requirements. According to Sec. 1(C) of the act, the public benefits from the actions warrant the statutory termination of the state's streambed claim.

### California

The conflict in California between water development and public trust values includes disputes involving the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (see forthcoming *WS Vol. 1, No. 3*, for a discussion of recent court decisions and scheduled 3-year hearings before the State Water Resources Control Board). The issues raised include whether to complete the state water project or amend existing water rights, in light of the effects of those actions on fishery protection and salinity control in the Bay-Delta. Three bills propose different approaches in resolving the dispute.

(*AB 525: Stirling*): Requires the Department of Water Resources, the operator of the State Water Project, to proceed immediately with construction of delta facilities. Directs that project operations be coordinated with the federal Central Valley Project so that each project bears its appropriate share of obligations to protect the "water-related environment." Also requires DWR to pursue negotiations with the Department of Fish & Game and a local conservation district to mitigate the effect of the proposed project on a nearby marsh.

(*AB 1710: Costa*): Declares a variety of legislative findings about the economic and aesthetic benefits of the Bay-Delta, the vulnerability of water quality to degradation from many sources, and the importance of levee systems as a means of salinity control. Also finds it necessary and desirable that facilities be constructed to improve water quality for water uses within and outside the Bay-Delta, as well as public trust uses. Directs DWR to enter into agreements with the federal government and the Department of Fish & Game, for the respective purpose of coordinating the joint operation of federal with state water projects and protecting public trust values. Recognizes that any agreement need not result in fishery protection during dry years.

(*AB 2128: Bates*): Instructs State Water Resources Control Board to deny any permit applications for which it

determines that cost-effective water conservation programs, water reclamation, or water transfer alternatives are environmentally sound and provide a reasonable substitute supply for water sought under permit application. Prohibits the Board from issuing, before June 30, 1989, any new permits that would allow the export of delta water, unless the water is made available through conservation efforts. Also specifies means for more extensive economic and environmental review of permit applications than under current law, whenever applications involve the appropriation of more than 3,000 acre-feet of water per year.

These bills reflect different valuations of the comparative worth of promoting water development versus protecting public trust values. (*AB 525: Stirling*) would commence project construction while negotiations considered environmental protection. (*AB 1710: Costa*) would require negotiation and settlement of development/public trust issues before construction, placing DWR and other agencies on an equal footing in those negotiations. (*AB 2129: Bates*) would increase administrative scrutiny of proposed appropriations of water for traditional consumptive uses, which may result in an increased burden of proof for appropriators to demonstrate that their projects would result in minimal disruption of public trust values.

### Kansas

The *Water Projects Environmental Coordination Act* would require the review of water projects to include consideration of broadly construed public trust values. The bill provides water permitting agencies with little concrete guidance on how to balance the competing interests, and does not compel them to protect public trust values. Other agencies who provide environmental reviews of proposed projects serve solely as advisors.

(*S 40: Special Committee on Energy and Natural Resources*): Requires the permitting agency to obtain a review of the project's environmental effects from specified state environmental review agencies prior to approval or issuance of a permit for a proposed water development project. The permitting agency shall consider the comments of those agencies, which must address both beneficial and adverse environmental effects on water quality, fish & wildlife, forest and natural vegetation, historic, cultural, recreational, aesthetic, agricultural and other natural resources. Environmental review agencies must respond within 30 days of receipt of proposal from permitting agency. According to Sec. 3(d), "nothing in this act shall be construed as prohibiting a permitting agency from approving or issuing a permit if an environmental review agency determines adverse environmental effects will result if the project is approved."

### Oregon

Proposed legislation (*SB 136: State Agency*) would expand the public trust values that the Water Resources Commission may protect when it specifies minimum

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perennial stream flows. The bill would allow the Commission to adopt minimum flows for the purpose of maintaining aesthetic and recreational values, in addition to the support of aquatic life and pollution control allowed under current law. The bill illustrates how the protection of public trust values may expand in response to the change in values expressed in new legislation.

### IMPLICATIONS FOR PARTICIPANTS IN THE WATER INDUSTRY

Case law and legislative activity in the wake of the Mono Lake decision require policy-makers, water agencies, lawyers, and investment bankers to adapt to the dynamic

***Those who do not make water rights compatible with the public trust doctrine will find their interests given less weight in water policy.***

nature of water policy under the public trust doctrine. Policy decisions can no longer settle once and for all the definition of water rights and the protection of public trust values because

changing economic circumstances and societal values may require reconsideration of past decisions.

All participants in the water business must answer some basic questions: Will changes in future economic, hydrological, or environmental circumstances change the relative importance of economic development or public trust values? Will changes embodied in future legislation influence existing water rights? Do current and past administrative decisions represent a reasonable consideration of public trust values? If not, how much impairment of public trust values should be tolerated in order to protect investments made under the traditional assumption that water law awarded vested rights to appropriators? Should future policy decisions apply new standards when balancing water development and environmental interests?

Effective answers to these critical questions require careful monitoring and analysis of administrative rulings, proposed and passed legislation, and court decisions. Analysis must consider whether the means of resolving a specific issue have implications for future decisions or review of past decisions. The search for these answers will change how public and private sector participants in the water industry conduct their business.

**State Policy-Makers:** Executive and legislative policy-makers will be pressed to clarify through legislation the relative values of water development and the protection of public trust values. Policy staffs must be able to assess how any changes in the delegated responsibilities of administrative agencies (including changes in the criteria used during water permit hearings) would affect the allocation of water between traditional consumptive uses and uses to protect public trust values. They must also assess whether

administrative rulings promulgated under existing law promote state water policy goals. Without these capabilities, state policy-makers will be unable to implement the flexible, comprehensive balancing test required by the public trust doctrine.

**Local Water Agencies:** Special districts and municipal water departments find themselves at the fulcrum of the debate raised by the public trust doctrine. They must monitor legislation, administrative rulings, and case law more closely than in the past to detect policy changes which may later apply to them. To improve their prospects during any future review of their water rights, they should find ways to manage their water resources efficiently, because public trust values may be sacrificed to sustain efficient, but not inefficient, water uses. To protect themselves against hardship created by limitation or revocation of their water rights, they should diversify water sources by developing or acquiring water from sources which can be applied to consumptive uses without raising potential conflicts with the protection of public trust values. How effectively water agencies execute these steps will depend, in part, on the advice they receive from their policy advisors.

**Water Lawyers/Policy Advisors:** To protect the legitimate public interests represented by their clients, advisors must actively track legislative, administrative, and legal activity that may affect the balancing required by the public trust doctrine. For example, how will water permitting agencies implement the *Water Projects Environmental Coordination Act* if it is passed by the Kansas legislature? These outcomes affect the long-term interests of their clients even if they currently have no water permits before administrative agencies. The policies developed today may establish how water development interests will be balanced during future proceedings. Failure to track and analyze ongoing policy and legal trends from this perspective may leave their clients unprepared for review of their water rights under the public trust doctrine.

**Investment Banking:** The public trust doctrine raises new issues for the assessment of financial risk. Since borrowers may experience adverse changes in their future legal or policy environment as states perfect the balancing test, prudent risk assessment must therefore consider the certainty of all water rights, not simply the rights developed under the financed project. The loss of existing rights may impair the borrower's ability to service the project debt. No longer can risk assessment simply rely on whether a water right was vested under the state water code.

The California Supreme Court issued a landmark decision when it addressed the Mono Lake dispute. The full effect has yet to be established. Given the dynamic nature of the doctrine, participants in the water industry must find ways to make water rights compatible with public trust value. Those who do not will find their interests given less weight in the balancing of water policy. They will also be the most surprised by its outcome.