The Public Trust Doctrine:
Water Resources, Uses and Ecological Values

by

Felix E. Smith[1]

Abstract

California has many unique natural resources, ecological settings and other assets under its stewardship. Protecting the sustainability of the people's common heritage resources, associated uses and ecological values for the benefit of society is a duty and a moral obligation at all levels of government.

Water development and use is the bases of much of California's prosperity. Water is also critical throughout the State for it is a valuable resource and a valuable ecosystem that provides many uses and values to society free of charge.

The Public Trust Doctrine has persisted in European, English and American law but has its roots back in Roman times. The Institutes of Justinian in the Sixth Century A.D. stated: "by the law of nature these things are common to mankind —-the air, running water, the sea and consequently the shores of the sea." These resources, associated uses and ecological values are therefore held in trust by governments for the people.

The Public Trust Doctrine as management tools pre-dates this Nation's and the various States' water rights, waste discharge (both air and water quality) permits, land use laws and regulations. In using and managing common heritage resources we must protect the corpus of the trust. Any action should not make matters any worse than they are. To protect and help assure resource sustainability must err on the side of the resource and precaution.

In addition, the more unique, the more valuable, the wide spread the resource or impacts, the more irreplaceable the resource or object of the trust, the more likely courts will enforce protection provided by the Public Trust Doctrine. A use of water, land or air, a state or national park, a coastal area, forestland, a historic sites can be considered unreasonable if it pollutes habitats, harms species; if it offends our sense of aesthetics or natural beauty; if it interfere with the right of the public to enjoy a natural resource of state or national significance; if it threaten in a harmful way to upset the ecological balance of nature, or to allow the use or its continued use confers a valuable privilege which is inconsistent with public trust protection. The State has the implied power to do everything necessary to protect the viability of all trust assets.

The Attorney General has the implied power to do everything necessary to protect and assure the continued viability of all trust assets. If the Attorney General fails to act, activist groups and concerned citizens should greet resources administrators with a lawsuit with each and every administrator / manager held personally liable. Oct.17, 2008

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Public Trust Doctrine
Water Resources, Uses and Ecological Values

By
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Background

California has many unique resources and other assets under its guidance and protection. The State is the trustee of its lakes, rivers, and streams and coastal waters and the lands under them. California is also the trustee of its wildlife, fish and other aquatic resources and the quality of the water and associated ecosystems upon which fish and wildlife depend. The State can bring suit to protect the corpus of the trust for the beneficiaries of the trust, the people.

Water is free in California. There are no annual royalty fees. When one receives a water right permit or license, one pays an application fee and the costs to develop and transport that water to its place of use. In many situations the responsibilities of the water right holder ceases at that point. The responsibility to clean up or restore the quality of the once used water is foisted off to others. Too often the cost of clean-up becomes a social cost with public resources lost and with beneficial uses and ecological values foregone.

Water development is the bases of much of California's prosperity. While it is realized that water is a resource and an ecosystem, it frequently was viewed solely as a commodity to be used for selected activities and then discarded. Too frequently this now wastewater and drainage is so polluted that it is not fit for other beneficial uses. It becomes a source or non-point discharge to surface water (inland and coastal) or to groundwater.

About 35 years ago (1975-76) forty-six (46) water projects in California were reviewed and evaluated to determine effects on fish and wildlife resources. These 46 projects covered a variety of habitats and fish species, many purposes and several sponsors. The results were: two streams were extinct along with fish resources and associated biota; 20 streams were degraded along with some species of fish eliminated or their populations severely reduced and about 20 streams were maintained or improved. The primary reason for the degraded state was insufficient instream flow / conditions during some critical period of the year. The overall impact assessment of such water projects on fisheries and fish resources was severely adverse. (See Final Report - Governor's Commission to Review California Water Rights Law- 1978). It is no stretch of one's imagination that California's salmon and steelhead resources have been hammered by these water development project and their continued operations. Not much has changed in the past 35 years. California's salmon and steelhead resources continue to be hammered by water development project operations. Recent

headlines in the Sacramento Bee and the San Francisco Chronicle discuss the collapse of the Central Valley salmon resources. The Pacific Fishery Management Council on April 10, 2008 voted to close the commercial and recreational salmon fishery off the coast of California and most of the Oregon Coast this year.

Public Trust Protection and Management

Public trust protection has persisted in European, English and American law throughout history. Its roots trace back to Roman times. The Institutes of Justinian in the Sixth Century A.D. stated: "by the law of nature these things are common to mankind —-the air, running water, the sea and consequently the shores of the sea". These resources belonging to all the people are therefore held in trust by governments (Althaus – 1978, Sax 1970). The public trust doctrine, as a resource management tool predates this State's water right, waste discharge permits (air, water, on land), and land use laws and regulations.

Professor Joseph L. Sax in his classic article "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention", 68 Mich. L. Rev. 471 (1970), indicated that the Public Trust Doctrine, of all concepts known to American law, constitutes the best practical and philosophical premise and legal tool for protecting public rights and for managing resources or objects held in trust. The Public Trust Doctrine makes the government the public guardian / trustee of common heritage resources, uses and ecological values and other assets of significant use and public value. This trusteeship is for the people. Public trust assets are not held primarily for sale or conversion into money. In simple terms Public trust assets, associated uses and ecological values should be devoted to fulfilling the purposes of the trust, i.e. in the service of the people (Sax -1970, Raffensperger-2006.)

Case law involving the public trust doctrine, waste and unreasonable use, nuisance law, and laws protecting fish, wildlife and water quality provide a principled and legal foundation for protecting common heritage resources, uses and ecological values. Protecting the sustainability of California's common heritage resources, their support ecosystems so that people can continue to benefit from such resources, uses, and ecological values should be a legal and a moral obligation at all levels of government.

Trusteeship fixes the responsibility for the day-to-day, as well as long-term management of public trust assets. Therefore governments have a high fiduciary duty and responsibility to manage such assets for the long-term public interest (Cohen - 1970). What this entails can be best understood by examining a trustee's obligations in the most classic of situations -- a trustee of financial resources. A financial trustee has two basic obligations. The first is to safeguard trust assets from decline, and the second, is to increase trust assets.

Trusteeship extends far beyond custodial activities. It requires prudent management. A trustee must be aware of potential adverse impacts; should seek out improvement opportunities and act upon them appropriately consistent with its stewardship duties and responsibilities in mind.

The ownership of water in California resides in the people. The California Supreme Court in *Eddy v. Simpson* (3 Cal 249 - 1853) stated "It is laid down by our law writers that the right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use". The American Heritage Dictionary defines –usufruct –as the right to utilize and enjoy the profits and advantages of something belonging to another so long as the property is not damaged or altered in any way". In the context of a water right - a water right holder or user of water must respect the rights and interests of others and to protect the integrity of that water as a supply and an ecosystem. To say it another way, the holder of a water right has the obligation to secure to the rest of us the right to use that same water down stream or down slope into the future.

The public trust is well developed by case law in large lakes, tide, submerged and marshlands, and with the rights and limitations on the diversion and use of water. The key case regarding the Public Trust Doctrine and the allocation of trust resources is *Illinois Central R.R. v. State of Illinois*, (146 U.S. 387 - 1892). In this case, the United States Supreme Court said that it may be reasonable for the State of Illinois to grant some of the Chicago waterfront and lands underlying Lake Michigan to the Illinois Central Railroad for purposes allied with the public trust. However the "wholesale giveaway" of the Chicago - Lake Michigan waterfront and its submerged lands to a private corporation for seemingly private purposes was unreasonable and illegal. A grant to use a resource held in trust is subject to revocation (146 U.S. 387, 453 -1892).

The *Illinois* Court also held that "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instances of parcels mentioned for improvement of the navigation and use of the waters and when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police power in the administration of government and preservation of peace" (146 U.S. 387, 453 - 1892).

This giveaway was illegal because the State violated the trust under which such lands and waters are held. The Federal Court held that the State of Illinois did not have the authority to make wholesale grants of public resources held in trust, because to do so violated the trust under which such resources are held. Today such a court would realize that the waterfront resource is more than access to water. It is submerged land, it is water / aquatic habitat and it is the land / water interface all separate resources of significant value to the public. It is realized that the waterfront (the land / water interface) with its ecological and biological values, access, recreation uses and values is much more than the sum of its parts. The result of the Court opinion is that the Chicago waterfront did not pass to the Illinois Central Railroad, but was preserved for diverse

public uses that include commercial navigation, fishing, recreation and other public interests. The U.S. Supreme Court relied on the Public Trust Doctrine to limit the actions of the Illinois State legislature.

The heart of the Public Trust Doctrine is that it imposes limits and obligations upon government administrators, on behalf of all the people. That obligation being, the State as trustee, is not to impair the resources, uses or ecological values even if private interests are involved. This statement was made in 1892 over 115 years ago. To summarily destroy public trust assets to benefit one aspect of society at the expense of the larger society penalizes future generations and the long-term public interest.

A logical extension of the *Illinois Central* case is that the State can only issue permits to appropriate an amount of water from a lake, river or stream that does not abrogate the State's public trust responsibilities to the aquatic resources of that stream and the quality of the aquatic habitat. If the State does and there are impacts to resources, uses and ecological values, then the action violates the trust under which such assets are held. The *Audubon* case verified this finding. Therefore the flow and water quality conditions needed to protect fish and aquatic resources and ecosystems, were not and never were transferable by a water right allocation.

Public trust protection moved from the coastal waters, bays and marshlands, inland to river, streams and lakes in the same manner as maturing salmon and steelhead, after spending their growth period on their Pacific Ocean pasture, migrate to their ancestral spawning rivers, streams and nursery grounds. Public trust protection is now imposed on inland waters as Clear Lake and Lake Tahoe and to streams flowing to such waters. Mono Lake and its tributary streams is now a classic example of public trust protection under *Audubon, Cal Trout 1* and *2*.

Ownership / Trusteeship

Ownership / trusteeship consists of rights and obligations that fix the responsibility for how a water right is used: how a parcel of land is used: how a resource is used, or how a person uses his watch or work boots. For example, a water right holder must respect the rights and interests of others. Land ownership and putting it to beneficial use can be challenging. The owner or lessee of land really has the obligation to secure for the rest of us the right to use that same property in the future. Therefore a person or corporation really does not own land in the same sense that a CEO owns his shoes or watch. A person can destroy his watch, or his shoes or boots without impacting others. A person destroying one's land can have far reaching impacts to resources, uses and values that belong to or are of interest to others.

For the owner of a small piece of land, its use may be a minor concern. However an agency or corporation that owns or controls 1,000s upon 1,000s of acres of land, the use and property rights become blurred and especially so when viewed as the river basin or watershed level. At the river basin or watershed level one must consider the unique characteristics of the area, its resources, uses and values to society. The area may be habitat for a multitude of wildlife species including threatened and endangered

birds, mammals, fish, plants and other wildlife. The area may support unique species such as steelhead, Chinook and silver salmon. It may contain a unique ecosystem or environmental values such as critical winter range for deer. It must be realized that natural resource and environmental amenities have value which are not fully captured in our commodity / market place system (*U.S. v. Union Pacific R. Co*. - 2008). Impacts to natural resources, associated uses and values can be tied to poor logging practices; to poor road building that can result in accelerated runoff causing erosion and down stream flooding; to impacts from oil and gas exploration such road building, well pad construction, well drilling wastes; to impacts to water quality from the use of agricultural chemicals; agricultural runoff and drainage can impact down slope surface and ground water and aquatic ecosystems. Impacts to trust resources, uses and values such as fish and wildlife and associated terrestrial and aquatic ecosystems; impacts to scenic and line of sight, to ecosystems, to water quality and recreational uses all must be considered as important public values in the same way that a forest fire destroys more than trees. It can destroy a multitude of resources, uses, unique ecosystems and societal values which are not fully captured in our commodity / market place economy.

At the river basin or watershed level an activity can have far reaching impacts that can extend hundreds of miles and impact many resources, uses and environmental values. One can follow water from the watershed of the Trinity River (Trinity Dam and Clair Engle Lake) to the Sacramento / San Joaquin Delta Estuary. This water is then pumped out of the Delta and after traveling many miles in a canal, is delivered to lands of the San Luis Unit, Central Valley Project on the west side of the San Joaquin Valley. A portion of the water applied to the land becomes agricultural runoff and drainage contaminated with selenium. This selenium-laced drainage manifests itself in a contaminated aquatic ecosystem and food chain for both fish and wildlife of the San Joaquin River and Delta as well as contaminating the ground water of the area. (See Presser and Luoma –2006.) Because of the integrated operations of the Central Valley Project facilities, one can trace water delivered to the San Luis Unit and the resultant impacts back to the development and operation of Shasta Dam -Sacramento River, Trinity Dam -Trinity River and Folsom Dam -American River. Such facilities also had impacts to wildlife and fish resources, uses and ecological values of their respective rivers that are very much in the news and are still controversial today.

The privilege to use a water right or land is subject to police power regulations of governments and is subject to the common law of nuisance. If an activity or use is determined a nuisance, it is the responsibility of the landowner or water right holder to cease the activity, bring it up to standard or remove it. In the spirit of free enterprise, such costs should not be a public cost.

Background for action

Protecting ecosystem sustainability so people can continue to benefit from its common heritage resources, uses and ecological values is a moral obligation supported by nuisance law and the principles of the public trust doctrine. This meaning has been supported by Federal and State Court decisions since at least 1884.

The *Woodruff v. North Bloomfield* (Fed Rpt. Vol. 12 –1884*), People v. Gold Run Ditch and Mining Co.,* (4 Pac. Rpt. At 1152-1884), *People ex rel Ricks Water Co. v. Elk River Mill and Lumber Co* (40 Pac Rpt 486-1895) and *People v. Truckee Lumber Co.* (116 Cal 397 –1897) decisions make it clear that as a matter of law, one must exercise his or her rights or use his or her property so as not to infringe on the rights, interests or properties of others. Also holders of water rights are entitled to the natural flow of the water undiminished in quality. In *People ex rel Ricks Water Co*. –1895 the Court stated if the conformation of the defendant land is such that the owner cannot carry out a dairy and milling activity without putting debris and filth into Elk River, then the owner must find some other use for the land.

These findings and rulings made over 110 to 120 years ago relied on common law nuisance theory. However these rulings also fit the contemporary understanding of public trust protection and the needs of the people for protecting water quality for all beneficial uses including ecological values associated resources and uses both public and private.

The California Supreme Court in *Marks v. Whitney*, 6 Cal. 3d 251; 98 Cal. Rptr. 790, 491 P.2d 374(1971), helped define the contemporary scope of the State's public trust interests in navigable waters and tidelands. The decision recognized and clarified that uses encompassed within the tidelands trust, in addition to the traditional purposes of navigation, fishery and commerce, also included the preservation of those tidelands in their natural state as open space, as environments which provide food and habitat for preservation and protection of birds and marine life, preservation for ecological study, open space, scenery and the climate of the area. The *Marks* Court recognized that tidelands, with their plant and invertebrate life, the water over them and in the sand, gravel or mud substrate, all interact and are valuable ecosystems in themselves supporting a variety of public trust interests. This is a much broader understanding of the classical tidelands trust. This no doubt applies to the state's rivers, streams, and lakes. Under the right conditions it might also apply to the vast forest and range –lands and other open space lands, or prime agricultural lands. To clarify public trust rights, any member of the general public has standing, because it involves a right to which any member of the public is entitled. Members of the public have done so in *Gion v. City of Santa Cruz* (1970 - 214 2 Cal.3d 29), *Morse v E.A. Robey & Co.* (1963) 214 Cal. App 2d 464) as discussed in *Marks v. Whitney* (See Sax –1971, Stevens -2004.)

The Federal Clean Water Act, as amended, California's Porter / Cologne Water Quality Control Act and the public trust doctrine embrace affirmatively and positively that the people are to be protected against all unwise and unreasonable uses of the State's waters. The State Water Resources Control Board (State Board) is responsible for allocating water rights and for reviewing water quality appeals and the Regional Water Quality Control Boards are responsible for protecting water quality of all State's water via a permit program.

The State Board's Water Quality Control Plan Report –1998 revision, describes beneficial uses. Protecting and managing water quality is critical to protecting beneficial uses and ecological values. This 1998 Report lists at least 21 beneficial uses

for which water quality is managed. The list of beneficial uses, do not include all of the reasonable uses of water. The report states that disposing wastewater (contaminated drainage) into state waters is not a beneficial use of water because to satisfy that use would be detrimental to several beneficial uses covered by the Public Trust Doctrine.

A use of water can be considered unreasonable if it pollutes, or because it offends our sense of aesthetics or natural beauty, or because it interferes with the right of the public to enjoy a natural resource of state or national significance, or because it threatens in a harmful way to upset the ecological balance of nature, or because to allow this unreasonable use confers a valuable privilege which is inconsistent with protecting the public trust and beneficial uses. (See *Gold Run, Elk River Mill and Lumber Co*. and *Truckee Lumber Co*.)

The State has the affirmative duty to protect people's rivers, streams, lakes, marshlands and tidelands, surrendering that right only in rare cases when abandonment of that right is consistent with the purposes of the trust. (*Audubon* (*National Audubon Society v. Department of Water and Power, City of Los Angeles* (33 Cal 3d419, 658 P 2d 709, 189 Cal. Rpt. 346, cert. Denied 464 U.S. 977 - 1983). The *Audubon* Court tied public trust protection to the maintenance of natural resources for their innate value and not to private beneficial uses of water (Koehler – 1995).

A very important point made by the *Audubon* Court was that "the public trust is more than the affirmation of State powers to use public property for public purposes. It is an **affirmation of duty** of the State to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when abandonment of that right is **consistent** with the purposes of the trust" (emphasis added, *Audubon* at 441).

In 1998, the U.S. Court of Appeals, about 50 years after the Bureau of Reclamation dried up the San Joaquin River at Friant Dam, and based on Section 8 of the 1902 Reclamation Act, stated the Bureau of Reclamation has the duty to comply with state law in the operation of Friant Dam. This included the duty to comply with Fish and Game Code Section 5937 and to keep fish in "good condition" below the dam. This law applies independently of any contractual arrangements with Federal or non-Federal water users (*Natural Resources Defense Council v Houston*, D.C No. CV 88-1658 LKK, June 24, 1998). To keep fish and other aquatic life "in good condition" was imposed on the Bureau of Reclamation's operation of Friant Dam by a Federal Court (*NRDC, et al. v Roger Patterson, et al*. No. CIV S-88-1658 LKK – Aug 27, 2004). Judge Lawrence Karlton ruled that Fish and Game Code Section 5937 was an expression of the State for the protection of its fish resources and is in force independent of it being stated in a water right permit or license. Water is not flowing from Friant Reservoir down the San Joaquin River to the Delta and fish and other aquatic life are not being maintained "in good condition".

The Racanelli decision in *US v State Water Resources Control Board* (227 Cal Rpt 161 – 1986), re-enforced many of the Audubon findings and clarified others. A very important point of Racanelli (at 180) is that the State Board must take a global

perspective and consider all upstream diversions and uses of water as a part of its water-planning obligation. Racanelli (at 195) also stated that the State Board must protect all beneficial uses from degradation, even if the resulting level of water quality exceeds that provided by a water right. It would logically follow that the meaning of Fish and Game Code Section 5937 would require that the flow and ecological conditions necessary to keep fish and aquatic life "in good condition" in the river downstream from a dam should be determined and implemented for all major dams on tributaries to the Sacramento / San Joaquin Delta.

What has happened

It is now near the end of 2008. *Racanelli's* global view requiring flow and water quality standards (timing / duration, water quality / temperature, etc.) from rim reservoirs have not been implemented. There have been some negotiated settlements, but protection of public trust resources, uses and ecological values is a hit and miss proposition.

The *Racanelli* global view of basin-wide planning should apply to the Central Valley rim reservoirs on tributary rivers and streams and it also should apply to the upper basin dam and reservoir projects that owe a portion of such waters to meet downstream public trust needs. This planning objective should also apply to other watersheds such as the Klamath-Trinity River system, and the Russian and Carmel Rivers. Enforcement of *Racanelli* will help provide effective implementation of the Public Trust Doctrine. This could in turn force constraints on existing water right allocations and could force prioritizing out of stream uses of water.

California Administrative Code, Title 23, provides that upon cause shown by any interested person, the State Water Resources Control Board shall investigate any nuisance or unreasonable use of water or any public nuisance resulting from the use of water. *Audubon* clarified that one does not have to exhaust administrative remedy before taking further action. The State Board's jurisdiction is not exclusive. The courts have concurrent jurisdiction (*Audubon*, 189 Cal. Rptr. 346 at 367).

Discussion

The heart of the Public Trust Doctrine is that it imposes limits and obligations upon government agencies and their administrators, on behalf of all the people. For example, resources, uses and ecological values or objects in which the people have a special interest are held subject to the duty of the State as trustee, not to impair the resources, associated uses and ecological values even if private interests are involved. Case law and findings provide some guidance for managing common heritage resources, uses and ecological vales. See Appendix A for some case law tools to help restore and manage public trust resources, associated uses and ecological values.

Today, people recognize that rivers (their water, bed and shore lands) are an integral system from their headwaters to their mouths and terminal waters, and that once destroyed or greatly diminished in a biological and ecological sense may never be

restored. Clearly such waters and waterways deserve the highest degree of protection from the State as the trustee for the people.

The Public Trust Doctrine can serve as a legal mechanism for requiring active protection and management of resources, uses, and interests or objects of the trust that serve many different segments of the public. It can strengthen our ability to share trust resources (land, air, water, fish, etc.) so long as the corpus of the trust is protected against loss or degradation. To say it another way, the government institutions we have in place at the local, state and national levels are responsible for protecting the trust.

The Public Trust Doctrine has a time frame. It protects resources, uses and ecological values not only for this generation, but also for future generations. The Public Trust Doctrine gives the public a voice, and if necessary through the courts, in the allocation, management and use of public lands, waters and resources and other public trust assets (Raffensperger – 2006). Professor Sax in his book "Defending the Environment" (1971), discusses why an individual has the right to go to court to protect his environment and trust objects, and that the court can enforce that right in the same manner it can enforce private laws.

Adolph Moskovitz, before the Sacramento Regional Water Forum, explained that Public Trust Doctrine is multi-faceted involving many resources, uses and ecological values. Protecting the public trust is not just another use co-equal with irrigation, power production, an industrial use or leaching salt from soils, etc. Protecting the public trust occupies an exalted position in any judicial and administrative determination of water resource allocation (Moskovitz, March 3, 1994). This includes preservation and enhancement of fish, wildlife and other aquatic resources, (Racanelli at 195 and 200.)

Protecting the public trust should force governments, at all levels, to think ecologically. Their administrators must look broadly at ecosystems, understand them and then manage them to meet the needs of the conventional economy and those of nature where lakes, rivers, streams, and estuaries produce healthy fish populations, where forests can provide timber and still provide habitats for diverse populations of wildlife and where wetlands remain biologically productive and uncontaminated by persistent chemicals and trace elements (Sax- 1992.)

Illinois Central, Marks, Audubon, Racanelli, Cal Trout 1 and 2 provide the foundation for the State Board or the Courts to establish water use priorities, set water quality (temperature and chemical parameters) and stream flow standards. *Audubon* harmonized the public trust with water rights and water quality concerns consistent with prior opinions (Stevens 1989). Audubon also provided some new insight for administering the public trust as well as expanded the Public Trust Doctrine to protect natural resources and ecosystems when competing against out of stream demands.

Preserving and protecting water quality stretches the water supply and protects beneficial uses. This is critical to the productivity of water, as both an ecosystem and a commodity for domestic and industrial uses. A river can be lost to the farmer; to fish; as a place to recreate or as a water supply. It can be diverted, polluted, misused or over

appropriated. Worster (1984) refers to Aldo Leopold's *Round River*. Leopold, looking for a way to make the principles of ecology clear and vivid, suggested that nature is a round river, i.e. hydrological cycle, continuously flowing into itself, going through all the soils, the flora and fauna of the earth while supporting many resources, uses and ecological values. Therefore, persistent and bio-accumulative chemicals and trace elements such as selenium have no place in our *Round River.* Destroying one part of this river can destroy other parts of it or all of it while the benefits to society are lost or severely degraded.

The *Racanelli* decision (227 Cal Rpt 161, at 169-170 –1986) told the State Board to set water quality standards to protect all beneficial uses. What *Racanelli* really said to the State Board was "Set water quality standards to protect beneficial uses (including fish and wildlife) and then let the agencies do everything necessary to meet them." If they can't meet the standards through their water right and changes in operation or facilities, they should explain why in detail. *Racanelli's* global view of the Central Valley – Delta watershed would include pre-1914 right holders, post 1914 water right holders and diverters as well as dischargers.

Setting standards would force diverters and dischargers, as a priority, to meet those standards. Water quality could easily be traced back to releases from upstream reservoirs. It could be traced to runoff or drainage from a land use activity. Do water quality standards and flow releases adequately protect and provide ecological conditions for salmon and steelhead all the way to the Delta? What about outflow needs? Did the discharge impact resources, associated uses and ecological values covered by public trust protection? Enforcement of *Racanelli* will permit effective implementation of the Public Trust Doctrine to protect instream flows, uses and ecological conditions. This could spur on a genuine sensitivity to ecosystem protection and resource restoration.

Integrating Public Trust Doctrine protection of instream flows, water quality and associated resources could force constraints on existing water right allocations and waste discharges would probably force prioritizing off stream uses of water as well as changes in reservoir operations. Effective implementation of the public trust doctrine regarding water diversion and use will force constraints on project operations regarding the release of water for downstream uses and for export from the Delta for use on west side San Joaquin valley soils. We already know that a use of water when deemed unreasonable or wasteful is beyond allocation. The priority is to protect the public trust and the people' interests.

Audubon demonstrated that if water rights are taken for public trust purposes there is no taking issue and compensation is not required. In past court cases, the priority was to protect the paramount public interest against a nuisance. (See *Woodruff v. North Bloomfield, People v. Gold Run Ditch and Mining Co., People ex rel Ricks Water Co. v. Elk River Mill and Lumber co. and People v. Truckee Lumber Co.)* In recent court decisions the priority / paramount interest was to protect the public trust. *Audubon* does just that. In Cal Trout 1, the licenses of the City of Los Angeles to divert Mono Basin water had to be amended to comply with Fish and Game Code Sections

5937 and 5946. The Cal Trout 2 decision required that stream flow requirements be added to the City of Los Angeles immediately, not after years of study and laid the groundwork for stream restoration. Restoration activities are to be monitored for effectiveness in order to determine if the restoration and protection means and measures are doing what they were designed to do. And if not, why? And then; what should be done to correct the situation?

Based on the principle of Illinois Central, "the wholesale giveaway" or allocation of stream flow which results in degraded aquatic resources or environments is unreasonable, therefore illegal and contrary to the trust these resources, uses or values are held. A logical extension of Illinois Central and confirmed by Audubon (National Audubon Society v. Department of Water and Power, City of Los Angeles, 33 Cal. 3d 419, 658 P 2d 709, 189 Cal. Rpt. 346, cert. Denied 464 U.S. 977 - 1983) is that California lacked authority to convey vested water rights that were harmful to trust. Therefore the State con only issue permits to appropriate an amount of water that does not abrogate the State's public trust responsibilities to such assets as anadromous fish (fish like salmon return from the ocean to spawn in river and streams). The same can be said of discharges to state waters since water quality is protected by the public trust.

With this understanding when a specific temperature or flow is needed to protect anadromous fish and to assure resource sustainability, those instream conditions were not and never were transferred through a water right allocation. Flow and temperature standards can be incorporated into a water right permit as a condition for receiving a water right allocation. When a specific water quality is needed to protect native salmonid fishes, the water quality conditions to protect the salmonid life history needs should not be violated by a water right holder, an owner of a dam, a diverter, a regulating facility or a discharger. If such conditions are violated, the State under its public trust authority can and should take back the water needed to make whole the corpus of the trust, such as a run of salmon and steelhead. A discharge permit can also be withdrawn under such authority. It is logical that "the wholesale giveaway" or allocation of trust interests in lands, water, timber, grazing rights and minerals, etc., which destroys soil sustainability or which degrades trust resources, associated uses and ecological values, also would be unreasonable and therefore illegal.

The *Cal Trout 1* decision required the City of Los Angeles license to divert water from the Mono Lake Basin be amended to comply with Fish and Game Code Section 5937 & 5946. This action put providing or determining instream flows and the water quality needs first to the corpus of the trust, before water is allocated to those bent on exploitation. *Cal Trout 2* required that stream flow requirements be added to Los Angeles licenses immediately, not after many years of study. It also laid the groundwork for stream restoration.

Court orders have already impacted the diversion of water from the Delta to protect species list under the Endangered Species Act, such as the Delta smelt, winter and spring run Chinook salmon. (See Case 1:05-cv-01207-OWW Doc.575 –Filed April 8, 2008 and Wanger decision, Case 1:06-cv-00245-OWW-GSA - of April 16, 2008, both by the U.S. District Court for the Eastern District of California.) This is called for

because protecting the Public Trust is just not another use co-equal with irrigation, power production, etc., it occupies an exalted position in any judicial or administrative determination in the allocation and use of the State's water resources. Judge Hodge in his decision in Environmental Defense Fund (EDF) v. East Bay Municipal Utility District (EBMUD) – (Case No. 425955, Superior Court, Alameda County, CA. Jan 2, 1990), followed the *Audubon* decision model. He developed his own physical solution for protecting the Lower American River many public trust resources, uses and values. His priority was to protect the people's interest **first** while still allowing the EBMUD to take some water under a set of reasonable and feasible constraints and conditions.

Racanelli (at 227 Cal Rpt 161,180 1986) stated the State Board should take a global perspective in its water quality planning efforts. This also puts protecting public trust assets and beneficial uses as a paramount interest. The State Board should consider all watershed diverters and uses of water. For example providing for the biological / life history needs of salmon and steelhead in the American and Trinity Rivers should be a priority over providing subsidized water for irrigating price supported crops in the San Joaquin Valley.

The Bureau of Reclamation annually establishes a list as to who gets water and how much for the coming water year from the CVP. When irrigating land results in a down stream or down slope water supply so contaminated by selenium runoff or other saline drainage that aquatic and terrestrial habitats are polluted and that fish and wildlife are contaminated, and the waters are unfit for beneficial uses, that land should not make the "list of lands that must be irrigated or otherwise served by contract water.

This view is particularly true when one looks at other beneficial uses of water that could be served by applying the same amount of water to non-saline seleniferous soils. Providing water for the life history needs for salmon and steelhead in the Trinity and American Rivers should be a priority over delivering northern California water to irrigate crops on selenium laden soils which result in drainage and return water contaminating fish and wildlife habitats and groundwater in the San Joaquin Valley. Providing for the biological needs of salmon and steelhead should be a priority over generating power to light up bill boards and similar signs in downtown Los Angeles or Sacramento.

A work in progress -- The Lower American River.

Providing stream flows and meeting water quality criteria of releases from dams to provide "good conditions" is the key purpose of Fish and Game code section 5937 as discussed in *Audubon, Racanelli* and *Cal Trout 1 and 2*. However, questions about instream flow and temperature needs are frequently phrased as "What is an acceptable risk for public trust resources and the aquatic ecosystem to suffer so the Bureau of Reclamation can export water?" This question should not be part of the equation. The question should and must be refocused to: "How can the stress, harm and mortality to Chinook salmon and steelhead from elevated water temperature and fluctuating flows in the American River best be prevented or minimized?

The Bureau of Reclamation has operated Folsom / Nimbus Dams and Reservoirs on the American River, tributary to the Sacramento River and the Delta since 1955. The Folsom / Nimbus facilities do not have hard flow regimen standards (flows and temperatures) to be met by water releases to fully protect the Chinook salmon and steelhead in the lower American River.

The Water Forum's lower American River Flow Management Standard (FMS) at the time it was formulated was a negotiated settlement. The settlement was heavily swayed by water available and the Bureau's operation to meet contract needs south of the Delta. The Bureau remained the ultimate decision maker. Meeting public trust needs and responsibilities did not really play a part in the negotiations. Meeting south of the Delta contract wants did. The FMS flows would improve conditions over pre–CVPIA (1992) conditions. Temperature criteria were soft targets, not hard criteria. As a result the FMS would not be fully protective of Chinook salmon and steelhead that utilize the lower American River. Meeting water quality (temperature criteria) needs of steelhead during the summer and early fall months and adult Chinook salmon holding during early fall months to provide and keep such fish "in good condition" is a key element and purpose of Fish and Game Code Section 5937.

Meeting temperature criteria for salmonid fish life history needs is critical to protecting such resources, uses and ecological values as discussed in several state and federal court decisions. To protect Chinook salmon and steelhead utilizing the American River, a water temperature of less than 65 Degrees F along with adequate flows (2,000 to 2,500 cfs) will provide "good conditions" for Chinook salmon and steelhead during the over summering months. The above temperature criteria are frequently exceeded for many days to several weeks a year with temperature approaching and exceeding 70 Degrees F. The cool water pool of Folsom Reservoir is reduced during the summer months by the large releases (4,000 to 4,500 cfs in 2007) made mostly to provide water to Bureau contractors on the west side San Joaquin Valley, including the San Luis Unit. Such releases deplete the cool water pool, which then results in marginal to poor (high) temperature conditions exceeding 65 Degrees F in the River during August, September, October, and in some year into November and early December.

Each year adult fall-run Chinook salmon enter the American River in late summer and fall months to spawn. Every effort must be undertaken to assure that instream conditions (less then 65 Degrees F) are provided to keep the holding adults with their maturing eggs in good conditions. Flows for spawning should be about 2,000 to 2,500 cfs with temperature less then 60 Degrees F preferably less then 58 Degrees F for spawning and the eggs incubation. Chinook salmon live for only 2 to 5 years. In the American River the run is composed of mostly 3 year olds. In 2007 less than 2 percent of the escapement run were 2 year olds. The semelparous Chinook salmon return to the stream where they were hatched then spawn 3,000 to 4,500 eggs and then die.

Water temperature above 15.5 Degrees C (60 Degrees F) is common in the lower American River during the beginning of spawning runs. This can delay migration, impact egg viability and health of adults, and contribute to female Chinook salmon pre-

spawning mortality as these fish are forced to hold until suitable spawning temperatures are reached. Higher than normal egg retention and pre-spawning mortality continues to be a concern as this may impact on future cohorts (generations). Water temperature above 15.5 Degrees C (60 Degrees F) supports several diseases, parasites and fungi typically common in such an environment. Incidence of disease and mortality rate of Chinook salmon is enhanced by stress factors such as low stream flow, extended periods of unfavorable water temperature, crowding, and injury (Healey 2001 - 2006).

Because Chinook salmon spawn only once, they should be provided the best environmental conditions possible for producing their next cohort (generation). The present marginal to poor instream conditions are not acceptable for protecting the Public Trust on a sustainable basis.

The decision by Federal Judge Wanger (U.S. District Court) dated April 16, 2008, discussed Temperature Control at Shasta Reservoir. The Judge allowed little leeway for Reclamation to meet temperature criteria. According to Judge Wanger, Reclamation "shall manage" the coldwater pool supply within Shasta Reservoir and make coldwater releases from Shasta Reservoir to provide suitable habitat for Sacramento River Chinook salmon and Steelhead in the Sacramento River between Keswick Dam and the Bend Bridge. This was based on his reading of the Temperature Criteria in the national Marine Fisheries Service's Biological Opinion. With *Racanelli's* lead that the State Board should set standards for the operation of the Folsom / Nimbus facilities, the American River temperature standard criteria would read "Reclamation shall manage the coldwater pool within Folsom Reservoir and make coldwater releases from it to provide suitable habitat for Chinook salmon and Steelhead in the American River between Nimbus Dam and the Watt Ave Bridge." Criteria being 65 F Degrees or less June 1 thru October 31, and 58 F Degrees or less November 1 thru May 31. Point of compliance could be adjusted upstream (to Arden Bar or Ancil Hoffman Park) depending on available water supply.

Now is the time for the Bureau to model and operate the Folsom / Nimbus facilities in a manner that meets the Water Forum's Flow Management Standard with its continuous flow and temperature components to conserve and protect the Chinook salmon and steelhead resources, uses and values of the Lower American River. The Bureau's staff has so far refused to entertain such an operation or modeling activity.

The question then must be: -- Does the Bureau really have all the operational tools, associated facilities and skills necessary for managing Folsom Reservoir to provide instream flow and temperature needed to assure the sustainability of Chinook salmon and steelhead resources of the American River?" If the answer is No! What does the Bureau need? The Bureau should step up to the plate and indicate what means and measures it needs to better operate the Folsom / Nimbus facilities to meet the ecological and biological needs of Chinook salmon and steelhead of the Lower American River.

Guideline for managing public trust assets

Managing public trust assets under the public trust doctrine does not mean that there will be no water or coastal zone developments, or that no logging will occur in our national forests, or that grazing will not occur on the public domain. What it does mean that in managing our common heritage resources and other assets protected by the public trust, every effort should be made to incorporate means and measures adequate to protect and to assure ecosystem renewability and resource sustainability before the activity is commenced. For example, water resource development or use should not produce significant:

- Negative impacts to resources or ecological systems, adjacent plant communities and wildlife and fish resources.
- Loss or degradation of natural resources (fish, wildlife, plant communities or soils), scenic, recreational, open space, climate, or weather of an area. The more unique the area, the resource, the scenic area or open space the greater should be its protection.
- Negative impacts to sensitive ecosystems (wetlands and riparian habitats) and to water quality that impact the productivity or sustainability of renewable resources, recreational, domestic or industrial uses of water.
- Cumulative impacts to resources, ecological systems, adjacent plant communities, wildlife and fish resources, that result from the domino affect of numerous like project or activities that espouse “no significant impacts”. The people and their resources must be protected from death by 1,000 cuts.
- Impacts that cannot be mitigated or offset to a significant degree.

In essence public trust protection means protecting the corpus of the trust should come first (as in *Cal Trout 1*) before those bent on exploitation. The public right to clean water will not necessarily mean the right to water as fresh and clean as it is in a high Sierra or coastal wilderness stream. It means that the people have a constitutional right to expect that their rivers and streams will be as clean as they can be to protect the public health. It means that rivers, streams and lakes will support healthy and sustainable populations of fish and wildlife resources and that the fish will be fit to eat. It means that the purposes and intent of the Federal Clean Water Acts will be realized and that the waters of this State and Nation will be fishable and fit for swimming and other water contact recreational uses.

It also means that demands of other beneficial uses or users must consider other alternatives. Such users must consider existing and potential technology and the possibility of other less harmful methods use or locations for development could be used. Or whether there should be development or use at all, in light of the resources, uses and ecological values which are at stake and could be lost with inappropriate development or use.

A use of water in a watershed that impacts trust resources and degrades or greatly diminishes ecosystem sustainability or renewability <u>is wrong</u>. Allocating a

watershed's only water supply to support out-of-area uses at the expense of area-of-origin trust resources, uses and ecological values, is wrong. If a use, method of use or activity makes an environment unsuitable for sustaining viable agriculture or grazing resources, wildlife, or fish and other aquatic life, if it makes fish unsuitable for human consumption; if it is a hazard to other fish and wildlife, if it degrades ecological, aesthetic, recreation uses, small craft navigation, and scenic values, that use or activity is wrong and a nuisance based on *Elk River Mill and Lumber Co*. Such uses in question are then inconsistent with the Public Trust Doctrine. They are inconsistent with reasonable use and therefore a nuisance. When chemicals / trace elements enter the bodies of our children, or enter the domestic or wildlife food supply to toxic levels or disrupts the immune, nervous, endocrine or reproductive systems without our consent, it is a toxic trespass and that is wrong (Colborn – 1995, Steingraper –1998).

The public must be forever on guard against the piecemeal and incremental losses, as well as the wholesale termination, of public trust rights, interests and responsibilities. It can be concluded that:

- Implementing public trust management principles will probably force prioritizing out-of-stream water uses; constraints on the timing of diversion, method of use or diversion; the amount of water to be used, and the use itself whether by a water right or a contract.

- The public trustee must assume the posture that in place water, i.e., lake, river, estuary, embayment, is a biological, ecological and physical resource of irreplaceable natural value which requires the highest degree of protection.

- Government agencies, special districts and private interests receiving grants or permission to use water resources or other interests held in trust, have an obligation to protect public rights, resources and interests from injury or damage into the future.

- The State Board has the authority to review and issue permits and licenses to use a water resource also carries with it the responsibility to deny requests as well as to revoke permits or licenses when public trust resources, uses and ecological values are being unreasonably harmed.

- An applicant for a water right permit or a discharge permit has the responsibility to justify and document the need, as well as how the public interest will be served, and how public rights and resources will be protected or improved by such an activity.

- By definition a use of water that destroys it for other beneficial uses constitutes a waste or unreasonable use. Such a situation should automatically trigger the State's enforcement powers and aggressive litigation action to protect the public trust and beneficial uses.

- The State Board has the power and the affirmative duty to reconsider water allocation decisions, water use and discharge permits at any time. However it has been reluctant to do so on its own investigations and findings.

- The focus of the public trust doctrine protection is starting to change from the narrow aspects of the water resource itself, to that of an integrated aquatic ecosystem, the bed

of the bays, lakes, rivers and streams, wetlands and tidelands and the interaction of soil, water and vegetation of irrigated lands.

- Agencies empowered to protect and manage public resources, uses, interests and objects of the trust must take a pro-active role to protect such assets from injury, degradation or loss.

- At the Federal level all public land statutes (for US Forest Service, Bureau of Land Management, National Park Service, Fish and Wildlife Service) should be read in light of the trust obligations. The intent of Congress was to protect public resources for their innate values and for the long-term public interest (Wilkinson – 1980).

Conclusion

Common heritage resources, associated uses and ecological values under the control of State agencies are held not as a proprietor, but in the sovereign capacity of the State as trustee for the benefit of all the people. This commitment to protect, conserve and improve the status of such fish and wildlife resources and the quality of our inland and coastal waters is a contract like duty / obligation between the State and its agencies and the people for future generations, who actually own such resources.

The trusteeship duties require professional ethics in managing for the long-term public interest, so such assets will continue to benefit future generations. It demands political will, not political favoritism. It demands openness of action and not being a shill for those who want to exploit public trust resources or other public trust assets.

The evidence is that the State Board does not voluntarily take aggressive action to correct past mistakes or to correct water use and management activities impacting public trust resources, ecological values and uses without the force of a lawsuit, court decision or order. A common thread in most of the older cases reviewed was that public trust issues were frequently discussed and protected under nuisance law terms. (*Gold Run, Elk River Mill and Lumber Co.*, and *Truckee Lumber Co.*)

Agency officials hold positions of sacred trust. Those managing public trust resources, uses and values must be held accountable for their facts and their actions. In addition those who encourage lapses of moral judgment, or unethical behavior (special favors for special friends) or who cover-up such behavior, or corrupt the governance, should be held accountable. These same government officials cannot plead obedience to political appointees for their failure to protect the public trust. They must each be held personally accountable. In addition those who corrupt the governance should be held accountable under applicable civil and / or criminal statutes.

Waste and unreasonable use of water and pollution control can be accomplished either under the State's regulatory authority via the State Board or the Regional Boards or under the public trust doctrine through the courts without becoming derailed by the taking issue. The State Water Board has not had the political will to do this in the Central Valley where irrigated creates selenium / drainage problems impacting public trust resources and interests.

The Attorney General, acting on behalf of the people or on his own information can maintain an action to protect the public trust or to enjoin a public nuisance, without the intervention of a private party or interest. The Attorney General has the implied power to do everything necessary to protect, and assure the continued viability of all trust assets. The Attorney General must some how be persuaded into protecting the greater public interest and the public trust on its own action.

The public is monitoring the actions of regulatory and natural resource agency administrators for their adherence to trustee/stewardship principles. If these administrators fail to follow their respective trustee duties, activist groups and concerned citizens should greet them with lawsuits with each and every administrator / manager being held personally liable. Only the lack of imagination will stymie incorporating public trust principles into practical management actions that protect common heritage resources, other public assets and aspects of this State's and Nation's common heritage resources, uses, ecological values and other assets protected by the doctrine of the public trust.

END END END

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Appendix A

Some Case Law Tools for Restoring and Managing Public Trust Resources, Associated Uses and Values.

The foundation for managing common heritage resources, their associated uses and ecological values has been embodied in case law and statutes since statehood. Case law and findings provide some guidance for managing common heritage resources, uses and ecological vales. Such general guidelines might be the best practical and philosophical premise and legal tool for protecting and managing common heritage resources, ecological values, and associated uses. What we do know:

- A water right is a usufructuary right - It is a grant or permission to use a resource held in trust - it is not a free and clear transfer of ownership (*Eddy v. Simpson*, 3 Cal.249 – 1853).
- Companies do not gain any right through custom, to dump their waste hydraulic fluids, sediment and other debris into State waterways. The disposal of mining debris was found to be a public nuisance, may be enjoined and a perpetual injunction ordered. (*People* v. *Gold Run Ditch and Mining Co*. 4 Pac. Rpt 1152 – 1884.)
- The rights held by the people in navigable waters (it could easily be fish resources, water quality, water supply or other beneficial uses of water) are paramount and controlling, over any private use to dispose of waste and other debris into such waters. (Gold Run and Woodruff v. North Bloomfield Mining Co.- 1884)
- The Court ruled if the conformation of the defendant's land is such that he cannot carry on a dairy and milling activity without putting filth and debris directly into the water, than the owner must find some other use for the land. (*People ex rel Ricks Water Co. v. Elk River Mill and Lumber Co.* 40 Pac. Rpt-486- 1895.)
- It is a well established principle that every person shall so use and enjoy his own property, however absolute and unqualified his title, that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property nor injurious to the rights of the public. (*People v. Truckee River Lumber Co.- 116 Cal 397-1897.)*
- The public trust and associated rights exist in the waters of the state, in fish and in wildlife (in the resources themselves) and associated ecological values predicated upon public ownership of all such interests, with the State as trustee. There may be other or dual trustees (*Truckee* River).
- The water in our lakes, rivers and streams is held in trust for all the people and is to be protected by the various trustees (*Gold Run*).
- The *Woodruff v. North Bloomfield, Gold Run, Elk River and Truckee Lumber* decisions make it clear that as a matter of law, one must exercise his or her rights, or use his or her property so as not to infringe on the rights, interests or properties of others and that holders of water rights are entitled to the natural flow of the water undiminished in quality.

- The statute of limitation does not apply where State property or public trust interests are involved. (*People v Kerber,* 93 Pac Rpt 878-1908).

- The public trust fundamentally limits private rights obtainable in waters and water related lands and resources, (*People v California Fish Co*. 166 Cal 576 – 1913.)

- The powers of the state as trustee are not expressed. They are commensurate with the duties of the trust. Every trustee has the implied power to do everything necessary to the execution and administration of the trust (underlining added for emphasis.) (*People v California Fish Co*. 166 Cal 576, 138 Pacific Reporter at 79-87 – 1913.) (Also see City of Long Beach v. Mansell 3 Cal 3d 462 – 1970.)

- The State Board can fully or partially revoke a water use permit or license for non-compliance with the stipulated conditions, non-compliance with State law, for unwise or unreasonable use of water and a nuisance (Water Code and *Audubon*).

- The public trust in aquatic ecosystem and environmental parameters can be expressed as a classic trust, with title in the people, and the State as trustee (*Marks v Whitney* - 6 Cal 3d 251-1971.)

- Any member of the general public has standing to invoke the public trust doctrine because it involves a right to which any member of the public is entitled. (Marks v. Whitney)

- Uses within the traditional tideland trust include the preservation of those tidelands in their natural state as open space, as environments which provide food and habitat for preservation and protection of birds and marine life, for scientific study and which favorably affect the scenery and the climate of the area. (*Marks v Whitney*, 6 Cal. 3d 251 –1971.)

- The more rare or unique, the more valuable, the more irreplaceable the public resource, use, or object of the trust, the more likely that courts will enforce the principles of the public trust doctrine. (Wilkinson - 1980)

- Consumptive water rights and contracts have been modified by assertion of the public trust. See *Audubon* (Mono Lake), *Racanelli* (*United States v. State Water Resources Control Board*, 227 Cal. Rpt. 161 (1986), *Cal. Trout* (Mono Lake tributaries), Lower American River (*Environmental Defense Fund v. East Bay Municipal Utility District, Superior Court.* County No. 425955, Jan. 2, 1990), Bear Creek via State Board Order WR 95-4, Putah Creek (*Putah Creek Council v. Solano Irrigation District, Sacramento Superior Court* No. CV515766, April 8, 1996). And they will continue to be modified.

- Riparian water rights are subject to the public trust doctrine restrictions (*Audubon)*

- The public trust is more than an affirmation of state's power to use public property for public purposes. It is an affirmation of the State's duty to protect the people's common heritage of streams, lakes, marshlands and tidelands and their associated biota, surrendering that right of protection only in rare cases when abandonment of that right is **consistent** with purposes of the trust (*Audubon*).

- Many beneficial uses and ecological values are protected under the Public Trust Doctrine. The public trust cannot be diluted by treating it as merely just another beneficial use under the California Constitution, Article X, Section 2, and co-equal with irrigation, power production and municipal water supply. The Public Trust is multi-faceted Doctrine that occupies an exalted position in any judicial or administrative determination of water allocation (Hodge Decision–1990, Moskovitz - 1994.)

- All appropriators or users of water should be required to undertake all reasonable steps to protect aquatic ecosystems, associated resources, public rights, uses and ecological values from degradation (*Audubon and re-enforced by Racanelli and implemented by Judge Hodge in his 1990 decision)*.

- The State Board can implement water quality standards by using its powers to prevent unreasonable use as well as to protect fish and wildlife and other public trust interests by conditioning appropriative rights (*Audubon and Racanelli*).

- The State Board has the power and the affirmative duty to reconsider water appropriation decisions at any time especially when earlier decisions failed to weigh or consider public trust interests (*Audubon*).

- The State Board under its public trust responsibilities has a continuing duty to oversee the use of appropriated water, to determine what is a reasonable use, and to assure to the rest of the people that the renewability of fish and other aquatic dependent resources are protected (*Audubon*).

- Remedies before the Water Board are not exclusive. The Federal and State Courts have concurrent jurisdiction (Sax-1970, *Audubon*). As a result of *Audubon,* action taken by the State Board in its Decision 1631 to protect Mono Lake has curtailed consumptive water rights in order to protect public trust assets. There is nothing to prevent the State Board on its own action to curtail pumping out of the Delta. A court order has already so ordered to protect species listed under the Endangered Species Act during the past several years through 2007.

- No party has a vested right to appropriate water in a manner harmful to interests protected by the public trust (*US v SWRCB.* Also called *Racanelli*).

- The State Board, under its police powers, as well as its public trust duties and responsibilities, has continuous jurisdiction and the obligation to review, amend or withdraw permits and licenses to use the water resource for any purpose (*Racanelli*).

- The State Board is to take a global view of the problems of the Delta. It must review and consider all Delta diverters and well as upstream diverters and water right holders. It must also consider all upstream discharges and what is being discharged (Racanelli).

- The public trust imposes restrictions and obligations on the sovereign as trustee, to protect the physical, chemical and biological aspects of such things as the water in lakes, rivers and streams, and their ecosystems, associated resources and public rights uses and interests (*Racanelli*).

- The California Supreme Court has held that the doctrine of concurrent jurisdiction applies to public trust – related claims, such as the plaintiffs claim under CDFG Code Section 5937 (*Cal Trout v Superior Court*, 218 Cal. App. 3d 187 – 1990)

- The State Board has the authority to order improved conditions for fish and wildlife and ecological values impacted by water development projects (*Racanelli*).

- The State Board has the authority to withhold water from appropriation when it is in the public interest to do so to protect the public trust (*Audubon* and *Racanelli*).

- The State Board may impose conditions on Federal water right licenses including conditions to protect fish and wildlife, other trust uses and interests. (*Racanelli*).

- Efforts to maintain instream resources and ecological values can be met by natural flow, release of stored water as well as restrictions on diversions. (*Racanelli*).

- The State Board must take a global perspective and consider all upstream diversions and uses of water as a part of its water-planning obligation. (*Racanelli*)

- The State Board should be protecting all beneficial uses of water in its water right and water quality planning and permit issuance activities (Racanelli).

- The State Board has a mandate under state and federal law to set water quality standards necessary to protect fish and wildlife resources and associated beneficial Uses. (Racanelli).

- Fish and Game Code Section 5937 is an expression of the State legislature for the protection of its fish and other aquatic resources. (*NRDC v Patterson* – 2004.)

- The "in good condition" of F&G Code Section 5937 includes the flow, the timing and duration of that flow and the water quality necessary (for example – temperature requirements) to protect the aquatic ecosystem and associated resources, uses and ecological values of the river or stream. Fish and aquatic resources are beneficial uses of water. (*Racanelli and Cal Trout 1*)

- The Federal Bureau of Reclamation, under Section 8 of the 1902 Reclamation Law, is by implication a trustee for water stored, diverted, delivered or used via a water right permit or license issued to it by the State Board. (*NRDC v Patterson* – 2004.)

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