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MANAGING LAKE TAHOE: A Second Effort

The newly proposed California-Nevada compact governing the Lake Tahoe Basin is a compromise, reflecting the concerns of environmentalists as well as the construction and gaming industries. As written, the new compact significantly restructures the Tahoe Regional Planning Agency (TRPA), a bistate agency statutorily charged with the duty of protecting the environment of the Lake Tahoe Basin.

History and Current Status of the TRPA

The TRPA was originally formed in 1970, pursuant to a Congressionally approved compact between California and Nevada. Through the development and administration of a regional plan and land use ordinance, it was anticipated that TRPA could successfully balance human use of the basin with the fragile ecology of the alpine area. California and Nevada each provided five delegates to sit on the TRPA governing board; three members represented local governments within the Tahoe Basin and two members represented the state at large. All major public and private construction projects within the basin were required to be reviewed and approved by the TRPA governing board before actual development could take place.

In the past eight years, TRPA's efforts have received increasingly critical attention. Representatives of county and city governments in the basin claim that TRPA's land use ordinance imposes such severe land use restrictions that it threatens to harm the gaming, recreation and construction industries - the basin's economic base. TRPA is also viewed by local citizens as an intrusive governmental body which is unresponsive to concerns of the basin's year-round residents. Environmentalists attack TRPA as an ineffective protector of Lake Tahoe, blaming the predominance of local representatives on the agency's governing board for the approval of many large condominium and hotel-casino projects.

The interests of each state in Lake Tahoe often assumed conflicting positions. Nevada seeks to protect the established gaming industry at the lake and to ensure Tahoe's future as a gambling resort. Alarmed at the rapid spillover of casino support services and second home construction into its jurisdiction, California seeks to prevent overly rapid development from destroying the Lake's value as a scenic mountain area.

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LETTER FROM THE EDITOR

ENVIRONS is published by the students of King Hall - the University of California, Davis, School of Law. It is edited by members of the Environmental Law Society.

ENVIRONS was founded during the 1976-77 school year to act as a one-stop clearinghouse for the dissemination of all environmental information relevant to the Solano-Yolo-Sacramento area in particular, and to northern California in general. Our definition of the environmental/natural resources field includes zoning, land use planning, historical preservation, agriculture, water rights, air and water quality, resources development and conservation, and other related subjects. Our current circulation is one thousand copies, with most subscribers located in northern California and others scattered across the nation.

ENVIRONS presents its analysis of all substantive issues in an objective, non-partisan format. This editorial policy was adopted in hopes of reaching all segments of the population. The need to know is not limited to any part of the political spectrum.

In this issue, we present our first professionally written article, a piece on the development of the public trust doctrine by Rick Frank, Deputy Attorney General of California. We hope to include in future issues a substantial number of articles written by attorneys, resource managers, and others involved in the development, implementation, and analysis of environmental and resources law and policy. We encourage you to submit articles for publication in *ENVIRONS* on your area of expertise. Articles presenting the scientific or technical implications of environmental/natural resources regulations and policies, or explaining the nature and significance of the ecological systems which such policies will affect (in a manner understandable by a lay audience) are also welcome. All articles submitted should either conform to our non-partisan format, or be accompanied by suggestions of possible authors who could effectively present alternative views of the issues.

We are grateful for your past response to *ENVIRONS*, including both encouragement and financial support. Our financial situation, however, remains precarious. To achieve any measure of permanence, *ENVIRONS* must be supported primarily by our readers. If you have not done so already, please help ensure the continued publication of *ENVIRONS* by making use of the subscription form in the back of this issue. Suggestions for improving *ENVIRONS* and for obtaining alternative sources of funding are also welcome.

Special thanks for financial support of this issue to the UCD Law Students Association and the American Bar Association's Law Student Division.

Woody Brooks
Editor

UNITED STATES V. NEW MEXICO:

Federally Reserved Water Rights in the National Forests

An important United States Supreme Court decision regarding federally reserved water rights was issued this summer at the same time as *California vs. United States*. [See the article analyzing this case in this issue. Ed.] In this case, *United States v. New Mexico*, ___ U.S. ___, 98 S. Ct. 3012, 57 L. Ed. 2d 1052 (1978), a stream adjudication was begun by the State of New Mexico to determine the exact rights of each water user to the water of the Rio Mimbres. The Mimbres is a short stream originating in the upper reaches of the Gila National Forest and winding past more than 50 miles of privately owned land before disappearing in a desert sink.

The Federal Government, in setting aside tracts of land for national parks and forests, wildlife refuges, and other federal purposes, also impliedly reserves sufficient water appurtenant to the reserved land to accomplish the purpose of the land reservation. This water is federally "reserved" water.

In this adjudication, the United States claimed a reserved water right for use in the Gila National Forest to provide minimum instream water flows for aesthetic, recreational, fish-preservation and stockwatering purposes. Both the District Court of Luna County and the Supreme Court of New Mexico found that the United States could not establish a reserved right to minimum instream flows under the circumstances.

In a five to four decision, the United States Supreme Court, in an opinion by Justice Rehnquist, affirmed the ruling of the state courts and held that the Organic Administration Act of 1897, which authorized establishment of national forests "to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber . . . ," demonstrated Congress' intent, in setting aside the Gila

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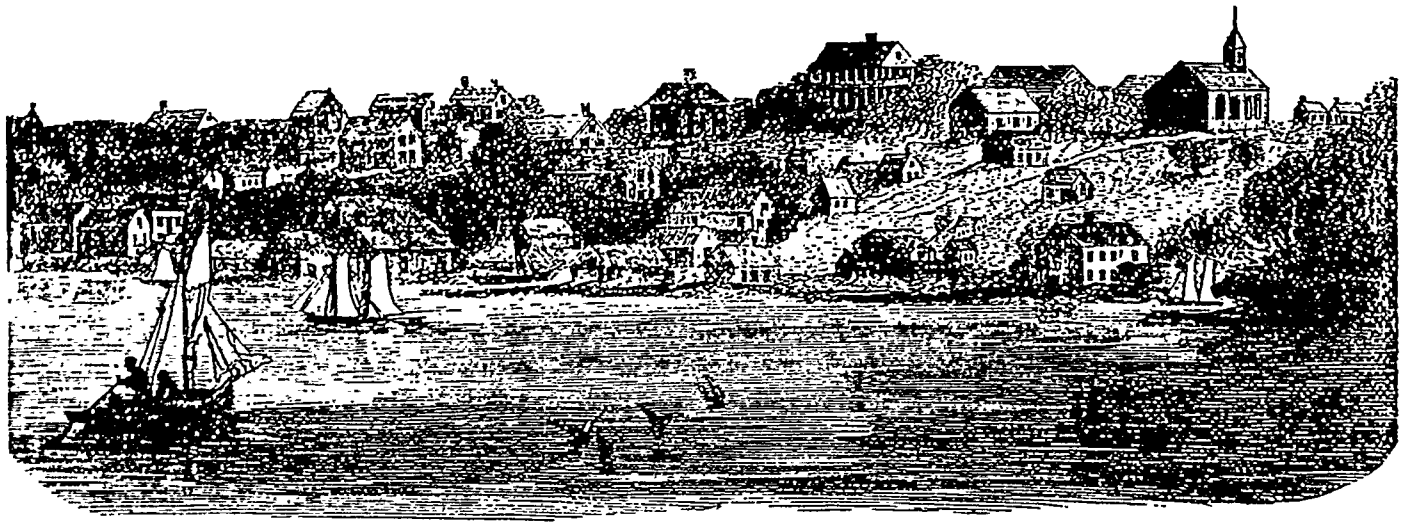
CALIFORNIA V. UNITED STATES: The New Melones Decision



The last cubic yards of rock and earth will soon be poured. Construction has produced a massive earth-filled dam which blocks the canyon and dwarfs the structure, one mile upstream, that it will replace. The physical existence of New Melones Dam is now a fact. Moreover, the doubt which has plagued its future operations is now dispelled. With the United States Supreme Court decision in *California v. United Sates*, ___ U.S. ___, 98 S. Ct. 2985, 57 L. Ed. 2d 1018, (1978), the issue of which rules govern the determination of who ultimately controls the dam's operations has been resolved.

New Melones Dam is scheduled to be a part of the Central Valley Project (CVP). It was built by the Army Corps of Engineers and will be operated by the Bureau of Reclamation (Bureau) as part of the federally funded and operated CVP. The reservoir has a capacity of 2.4 million acre feet (MAF), compared with the capacity of 112,000 acre feet of the existing Melones Reservoir. The Stanislaus River, which the dam will back up, is an important recreation and wildlife resource in central California.

Background

The legal controversy over New Melones began in 1972 when the Bureau applied to the California State Water Resources Control Board (Board) for permits to appropriate unappropriated water in the Stanislaus River. Following a period of study and hearings, the Board issued its Decision 1422 in April, 1973. The Board found that there was unappropriated water available during certain seasons. However, the Board found that the Bureau had "no specific plan for applying project water to beneficial use at any particular location." The Board approved the application, but made the permits subject to twenty-four conditions. The major import of the conditions was to: 1) prohibit full impoundment until the Bureau could show a specific plan for the water; 2) require preference for users in the Stanislaus River basin; 3) require storage releases to control the level of total dissolved solids (salinity) in the Sacramento-San Joaquin Delta, into which the Stanislaus flows, thereby protecting fish and wildlife.

The Bureau responded by filing a complaint for declaratory relief in United States District Court for the Eastern District of California. The Bureau alleged that it applied for the permits as a matter of comity, but was not required to do so as a matter of federal reclamation law. Thus the Bureau sought declaratory relief that: 1) When the United States chooses to submit applications to the Board, the State must grant the permit if unappropriated water is available; 2) The State cannot seek to control a federal reclamation project by placing conditions on the permit; and 3) Decision 1422 was void in all respects where it contradicted federal law. In *United States v. California* (1975), Judge McBride granted summary judgment to the United States (a non-moving party) and entered the requested relief.

On appeal, this judgment was affirmed. The Ninth Circuit Court of Appeals altered the judgment slightly and ruled that the United States *was* required by federal reclamation law, rather than just comity, to apply to the Board to determine if unappropriated water was available. However, the judgment was upheld in all other respects.

Supreme Court Decision

The issue of whether a state can place conditions on a permit to a federal water project was resolved by the United States Supreme Court on July 3, 1978. The Court held that a state could make a permit for appropriative water rights to the federal government conditional so long as the conditions did not contradict a "clear congressional directive."

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literature review:

Wetlands preservation is the topic of the July, 1978 issue of *Environmental Comment*. California's role in wetlands protection is analyzed and a special article examines the French government's successful management of the Camargue Reserve in Southern France. Strategies preserving and developing urban waterfront areas are proposed in *Environmental Comment's* June, 1978 issue, with special attention focused on the Port of Los Angeles and the California Coastal Management Program.

Nuclear power or "soft" energy sources: the October/November, 1978 *Not Man Apart* includes an article on the energy industry's alleged attempt to improve nuclear power's public image through media manipulation. Additionally, there is a piece on how to manage the transition from conventional to "soft" energy sources, such as geothermal and solar.

Can renewable energy sources provide five-sixths of the world's energy supply by the year 2025? Peter Hayes, the organizer of Sun Day, says yes, and explains how in the July/August 1978 issue of *Environment*. The same issue contains an article about the impact of land use planning decisions on energy conservation.

The City of Davis' progressive growth management, energy and land use policies are featured in the summer 1978 annual review issue of *Cry California* (Vol. 13, No. 3). Entitled "Where's California Going?," the annual roundup examines significant environmental trends of the past twelve months. Articles of interest include an evaluation of Governor Brown's proposed "Urban Strategy for California," a commentary on the development pressures experienced by the foothill communities of the Sierra Nevada Mother Lode Country, and an analysis of Lake Tahoe's political and environmental troubles. A special section, "California Futures," suggests state policies for the coming year in the areas of energy sources, timber management, watershed management, disaster planning, and the Los Angeles Basin.

Are you "using" controlled chemicals or are they "using" you? Volume 7, Number 2 of the *Ecology Law Quarterly* is a special issue titled, "Hazardous Substances in Environment: Law and Policy." The seven-article issue is dedicated to improving the quality of hazardous substances control.

Does your corporation have standing to sue under NEPA? Read 8 *Environmental Law* 47 (1977) and find out. Courts have denied standing to economically injured corporations who lack valid environmental injuries. This article provides a review of the major judicial decisions on point.

So your city plans to implement an energy conservation program! An overview of the general legal powers and limitations on a city's ability to support energy conservation is found in 8 *Environmental Law* 131 (1977). The article examines the police power, taxing power, and Commerce Clause as well as the practical considerations which could influence a city's exercise of its legal options.

Samuel J. Imperati

UNITED STATES V. NEW MEXICO

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National Forest from other public land, to reserve the use of water only where necessary to preserve timber or to secure favorable water flows. The court rejected the United States' contention that forest protection and improvement was a third purpose for the reservation, finding instead that this general purpose was limited to the specified timber and water purposes.

No reserved right was established for aesthetic, recreational, wildlife preservation and stockwatering purposes. The court did imply that, if the Gila National Forest had been authorized under a more specific act than the 1897 Organic Act, possibly some of the instream flow reserved rights asserted by the United States would have been recognized.

The dissenters, in an opinion by Justice Powell, disagreed with the Court's reading of the Organic Act. They read the above-quoted portion of the Act as setting forth three purposes. Further, they argued, citing the common law and modern works on forest ecology, that a forest could not be conceptually limited to exclude everything except "useable timber and whatever other flora is necessary to maintain the watershed," since the soil, wildlife, fish, and other biota are all part of an inextricably interdependent community upon which timber and watershed-maintaining flora are dependent.

Of interest in this case is the trend continued from *California v. United States* in which the court recognizes and grants deference to state water law. Now, applicable state water rights laws are recognized by the court as a proper means of protecting the important environmental, recreational and aesthetic interests in most national forests.

The *New Mexico* decision also casts substantial uncertainty upon the extent of federally reserved water rights. Admittedly, this case does not directly affect other reserved rights—the basis of this decision is solely the Organic Act's limited "purpose." The court, however, takes a restrictive reading of this "purpose" and may do so again when confronted with other reserved rights cases.

Bill Cunningham

NATIONAL FOREST MANAGEMENT

The National Forests, comprising about 187 million acres nationwide (about 20 million in California), contain nearly 20 percent of the nation's commercial timber lands. During the last generation this resource has increasingly been exploited, with National Forests now yielding almost one-third of our commercial timber production. One frequently used method of harvesting timber is "clearcutting," in which essentially all trees are removed from a designated area. Clearcutting is often more economical than cutting only individually designated trees, and in certain situations it may be the only economically feasible method. Selective cutting, however, causes less environmental damage to watershed and wildlife and theoretically ensures the maximum yield from each tree.

Two primary laws govern the management of the National Forests. The Forest Service Organic Act of 1897 formally established the National Forest system. The Multiple Use—Sustained Yield Act of 1960 directed that the forests be managed to accomodate other uses, such as watershed, grazing, wildlife, and recreation, along with lumbering, and further, that timber harvests be limited to the maximum rate that can be sustained in perpetuity.

In affirming the 1975 Monongahela decision, the United States Court of Appeals for the Fourth Circuit declared clearcutting of National Forests to be a violation of the Organic Act. In the Monongahela National Forest, 428 acres were to be clearcut in units ranging in size from five to twenty-five acres. The court interpreted the act to require that trees, not merely areas, be individually marked, and only large, dead, or physiologically mature trees be cut. Thus clearcutting, and also such management practices as thinning (removal of some trees from a stand to promote the growth of those remaining, or to improve the forest for other uses), were not permitted.

This decision caused a panic in the timber industry. According to Department of Agriculture estimates, compliance with the court's interpretation would have cut timber production by 90 % in young eastern forests and 50 % in the older western forests. Serious hardship would be inflicted on the timber industry. Considerable unemployment and increased cost to the consumer of paper, pulp, and wood products would be a direct result of the elimination of clearcutting.

Congress reacted quickly by passing the National Forest Management Act of 1976 which amended the Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA). The new section 6 of RPA directs the Secretary of Agriculture to prepare plans for the management of all National Forest lands by 1985. It further orders the Secretary to develop regulations governing the development and revision of the land management plans. These regulations were recently released in draft form in the Federal Register.

The Proposed Rules

The rules provide detailed procedures for the preparation of the management plans and establish guidelines and standards for resource management. The procedures for formulating plans involve extensive public participation at all levels. Each National Forest's supervisor is to appoint an interdisciplinary team of resource managers to develop a proposed forest plan and a correlative environmental impact statement (EIS). The forest supervisor will review the interdisciplinary team's evaluation of alternatives and recommend a preferred alternative for the final EIS.

The regulations establish Standards and Guidelines for management which must be followed in the plans. These Standards and Guidelines have not satisfied either the timber industry or the environmental groups. The most controversial issues, according to the Committee of Scientists who worked with the Forest Service in the drafting of the regulations are: diversity of tree species, identification of lands not suitable for timber production, silvicultural guidelines, and timber harvest scheduling. On each of these issues the draft regulations are disappointing to some environmentalists and on some they are displeasing to the timber industry.

It would be useful to look at each of these issues and see what the differences are.

Diversity: The regulations do provide for evaluation of the effect of proposed changes on diversity of fish and wildlife and for implementation of the silvicultural system which preserves diversity of tree species where appropriate. However, the regulations specifically allow for the removal of a particular species of tree after consideration has been given to the multiple uses of the area being planned.

Environmental groups want the diversity of tree species in the forests to be maintained for the protection of various types of wildlife. They do not wish to see the National Forests become single-species tree farms, practical to harvest, but far from their natural state.

Identification of land not suitable for timber production: The regulations exclude from harvesting land on which timber production would cause irreversible damage to soils, productivity, watershed conditions, or significant adverse impact on threatened or endangered species. Also, land which could not be adequately restocked within five years will not be harvested. Environmentalists would prefer more detailed and less subjective standards for protection of water and soil.

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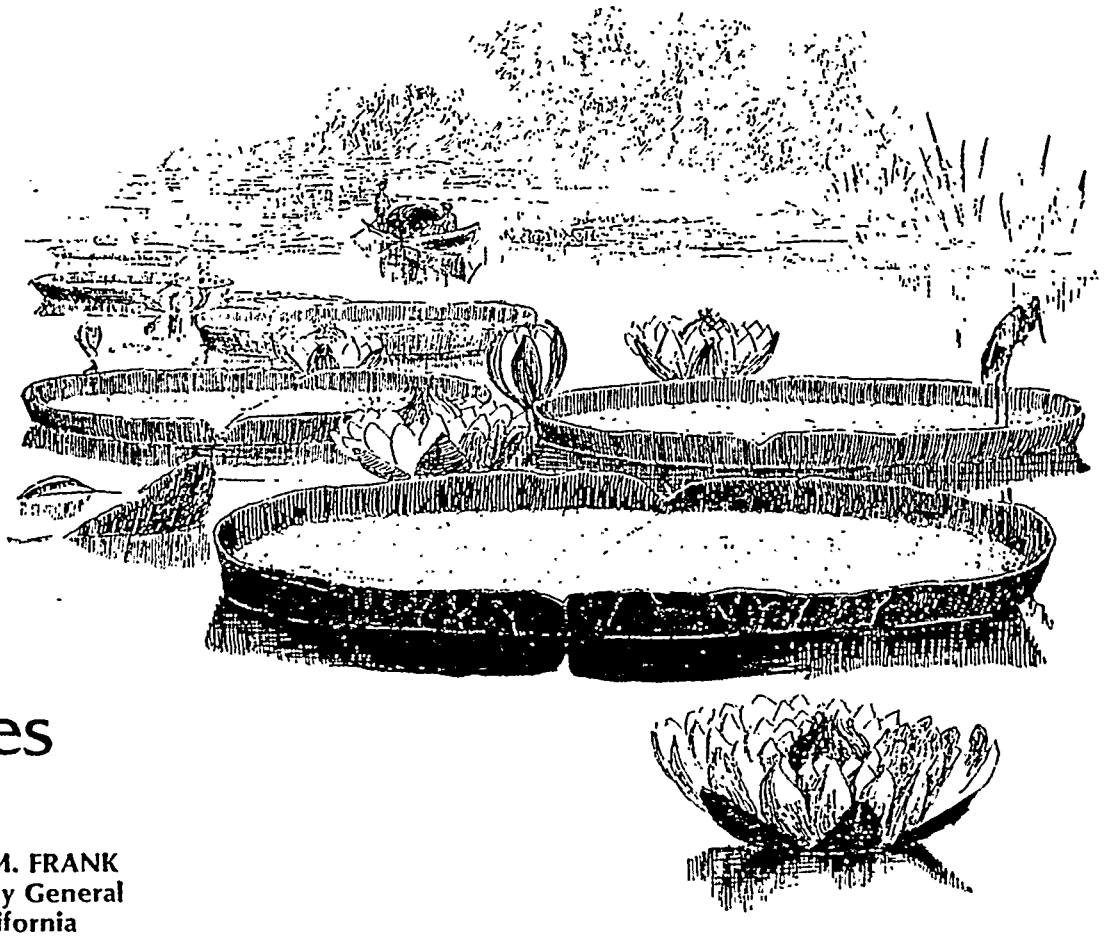
PUBLIC TRUST DOCTRINE: Current Trends and Future Opportunities



By RICHARD M. FRANK
Deputy Attorney General
State of California

Not very long ago, "environmental law" consisted exclusively of a few loosely-related common law doctrines such as nuisance and trespass. More recent years have seen the enactment of comprehensive legislation to confront a broad spectrum of environmental concerns ranging from air and water pollution to toxic substance control to land use planning. Nevertheless, environmental lawyers are finding that recourse to various long-standing common law concepts often remains worthwhile. A case in point is the public trust doctrine, which is receiving renewed attention in the form of several recent and pending California decisions.

Origins of the Public Trust Doctrine

The public trust concept is founded in ancient English and Roman law. The doctrine, simply stated, is that the government holds certain types of natural resources in trust for the benefit of the public at large. These resources are protected by the trust against unfair dealing and waste. Like any conventional trustee, the government must observe standards of procedural correctness and substantive care. Historically, the public trust has been applied to ocean beds, beaches, lakes and other waterways. The foundations of contemporary American public trust law are set forth in an 1892 United States Supreme Court case, *Illinois Central Railroad v. Illinois*, in which the court voided a wholesale giveaway by the Illinois Legislature of the Chicago waterfront along Lake Michigan to a private railroad. After chronicling the rather questionable history of the transaction, the court enunciated the principal holding of the case: When government holds a resource that is available for general public use, a court will carefully review any governmental attempt to alienate those resources to private parties or otherwise restrict public rights.

The California Supreme Court embraced this concept in a landmark but often overlooked 1913 decision, *People v. California Fish Co.*, holding that the state could not sell sovereign lands along San Pedro Bay without necessarily retaining a public easement for the public trust. The Court did not comprehensively address the issue again until the 1970s, when in one case it applied the trust to the shoreline resources of Tomales Bay and expanded the public trust beyond the traditional uses of commerce, navigation and fishing, to encompass environmental protection and other objectives. It was this 1971 decision, *Marks v. Whitney*, that gave environmentalists an effective legal tool in their efforts to control development of shorelines and other ecologically sensitive areas. Simultaneously, the case raised numerous other questions that are just beginning to be addressed by the courts.

The Berkeley Waterfront Litigation

Over the past 125 years, the character of San Francisco Bay has been altered dramatically. Large portions of the bay have been artificially filled for purposes of development, with a concomitant loss of natural wetlands and open space. (This was the primary impetus behind the creation of the San Francisco Bay Conservation and Development Commission in the 1960's.) These dredging and filling activities were fostered in large part by legislative grants of tidelands in the nineteenth century. The legitimacy and scope of some of these early grants in light of the state's public trust responsibilities

are currently being contested in an action involving 656 acres of the tide and submerged lands along the Berkeley waterfront.

In a pending lawsuit, individual and corporate claimants recently attempted to quiet their title to the Berkeley waterfront as against the City of Berkeley and the State of California in Alameda County Superior Court. In doing so, the private parties relied upon early deeds issued in the 1870s by a special board created by the Legislature. Some of the shoreline has been filled but is undeveloped. Other portions remain in their natural state. The state and city's position is that the state was incapable of selling these lands to private parties or, alternatively, that the private sales are subject to a reserved easement in favor of the public under the public trust doctrine.

In a 1977 order granting partial summary judgment, the trial court generally upheld the private landowners' position. The court ruled that the sales constituted valid, absolute grants of the waterfront and that any and all public rights to the property under the public trust doctrine were thereby terminated.

The state and city sought appellate court review of the decision, and last summer the First District Court of Appeal, in *City of Berkeley v. Superior Court,* reversed the trial court ruling. After describing in considerable detail the history of the legislative land grant program, the Court of Appeal held that these lands were sold subject to the public trust, and that they generally remain impressed with an "easement for the trust purposes."

This controversial case remains unsettled. In September, the California Supreme Court agreed to review the appellate court decision. However the Supreme Court rules, its decision is likely to have a profound effect on the future pattern of development and land use control not only along the Berkeley waterfront, but throughout San Francisco Bay (where over 15,000 acres of still unfilled land are located and subject to private claims under similar deeds). In recognition of this fact, interest groups as diverse as the California Land Title Association and the Save San Francisco Bay Association have already filed friend of the court briefs. The fundamental issues to be resolved in this and similar cases are (1) the extent to which legitimate trust purposes, such as public recreation and environmental preservation of increasingly precious California waterways, are to be protected, and (2) the relationship that benefits derived under the public trust bear to the exercise of private property rights.

Tahoe, Donner, and Clear Lake Litigation

Somewhat related public trust issues are likely to be resolved in cases involving three of California's most scenic mountain lakes: Lake Tahoe, Donner Lake and Clear Lake. In all three cases, individuals owning property along the lakes have sued the State of California to determine the boundary between private uplands and the publicly-owned lakebeds. The precise issue is whether the state owns the lakes to their high water levels or only to low water—a question that bears substantially on the fate of beaches, marshes, and other areas of ecological and recreational significance. As an alternative argument, the state is asserting that even if private parties own the lakefront to the low waterline, the areas between low and high waterlines are subject to the state-held easement for public trust purposes. This easement would presumably provide the state with a means to ensure that the lands are managed in a manner consistent with public trust goals. The private parties to the litigation contest not only the existence of the trust in these factual circumstances, but also the general applicability of the doctrine to inland—as opposed to coastal—waterways.

These cases are in various procedural stages before California trial and appellate courts, and it will be some time before a definitive ruling is obtained on the legal principles involved.

The Public Trust in the Future

The Berkeley waterfront and mountain lake cases are merely the first stages in a renewed judicial examination of the public trust doctrine. As environmental lawyers explore the potential uses of the concept, four basic themes are likely to predominate:

1. *What resources are impressed with the public trust?* As indicated above, the courts traditionally have focused on waterways in their efforts to establish and apply the public trust theory. Nevertheless, an aggressive and imaginative application of the concept could conceivably increase its scope to include virtually all air, water and land resources. To date, California courts have been none too clear on this point; last month the California Supreme Court reaffirmed that fish found in the state's lakes and rivers are subject to the trust, while earlier in the year the Court of Appeals in San Diego refused to afford such status to archeological remains.

2. *What uses of resources are consistent with the trust?* It was only in the 1971 *Marks v. Whitney* decision that California courts first acknowledged that environmental concerns formed a proper basis and rationale for the exercise of the public trust. In earlier eras, the courts had found governmental activities ranging from oil drilling to highway construction as being consistent with the trust. Reconciling and choosing among these often conflicting uses will be a recurring problem.

3. *Who has ultimate responsibility for the administration of the trust?* As the agency vested with authority over sovereign lands in California, the State Lands Commission has identified itself as holder and administrator of the public trust. However, language in the Coastal Act of 1976 reveals that the Legislature may have intended the Coastal Commission to play a role in this process with respect to the California coastline. Moreover, as the concept of the public trust expands to encompass more resources, other agencies at various levels of government may become involved.

4. *What is the scope of governmental authority under the public trust?* This is an issue that has received little treatment in California decisions to date. Ironically, it is likely to prove the most significant in the long run. What does appear clear is that public agencies, acting to enforce the public trust, have regulatory options beyond those found under the police power. The constitutional taking and just compensation issues, for example, are inapplicable where the former concept is concerned.

The public trust doctrine is a fertile resource in the battle for environmental protection. Its future utility is dependent largely on the imagination and vigor with which it is applied.

MANAGING LAKE TAHOE: A Second Effort

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As its popularity as a recreational site has increased in recent years, the Lake Tahoe Basin has experienced significant environmental deterioration. The area is formally classified as a "non-attainment area" under the federal air quality standards, largely as a result of heavy automobile use within the basin. This means that air pollution exceeds the acceptable levels established by the Clean Air Act of 1972 and subsequent amendments. Increased soil erosion and siltation into the lake threaten to destroy the purity and clarity of its water. Demand for sewage treatment and other essential services currently exceeds existing capacities. The new TRPA compact attempts to address the criticisms propounded by both environmental and developmental concerns, and to halt further destruction of the basin's environmental quality.

Environmental Guidelines

One of the primary changes effected by the new compact is a dilution of local government representation on TRPA's governing board. Each state's delegation will be increased to seven members. Three members will be elected representatives from the major county and city governments in the basin, and three members, appointed by the state legislature and the governor, will represent non-basin areas of the state. The six members, in turn, will appoint a seventh representative. Although local interests will be represented, local government will no longer control a clear majority of the governing board.

The new compact significantly amends the governing board's procedures for voting to approve or reject construction projects reviewed by the agency. Under the existing compact, a board decision to either approve or disapprove a proposed project must be agreed to by a majority of each state's delegation. A project which does not receive a majority vote from each state is "deemed approved" if the governing board takes no further action within sixty days of the original vote. In effect, no project could be rejected which was favored by three members of either state's delegation. In the past, several large casino projects, now the subject of litigation, were approved by the agency under this "dual majority" rule. As revised by the new compact, this is no longer possible. The compact specified that any project which fails to receive at least four favorable votes from each state's delegation will be treated as denied if the agency does not act on the project within the subsequent sixty day period.

The environmental criteria guiding the agency's project decisions will be more stringent under the revised compact. TRPA will be required to propose and adopt a regional plan consisting of several interdependent plans for land use, transportation, conservation, recreation, and public services and facilities. Utilizing the concepts of environmental quality thresholds and carrying capacities, the land use plan will permit development in a given area only if construction will not be unduly disruptive of the soil stability, vegetation, and other features of the area's ecology. Further, federal and state air and water quality standards will be applied to the Lake Tahoe Basin to protect environmental quality.

The new compact, like the existing agreement, provides that TRPA's ordinances, rules, and regulations establish a minimum environmental standard throughout the basin. The TRPA, as well as the states, counties, and cities which have jurisdiction within the basin are required to enforce all plans and ordinances adopted by the agency. Any construction project which will have an effect on the natural resources of the Lake Tahoe area must be approved by the agency prior to construction. To approve a project, the agency must find that it conforms to the TRPA regional plan and land use ordinance. The new compact specifically gives TRPA review power over all proposed public works projects for the basin, and approval power over all state agency proposals which would affect Lake Tahoe's environment. The TRPA governing board will have an extended time limit—180 days—in which to review and vote on each project submitted to it. A project approval granted by the agency expires within three years from the date of approval, unless the project applicant has commenced construction in a diligent fashion.

TRPA's enforcement powers have been enhanced substantially by the new compact. In the past, a violation of the TRPA ordinance was punishable as a misdemeanor. Under the new agreement, any person or governmental entity who violates the compact provisions will be subject to a civil fine of up to $100,000 per violation. Additional civil fines of up to $5,000 per day may be imposed for violations of TRPA's regional plan, ordinances or specific conditions of project approval. Thus, in recognition of the need to forestall future degradation of Tahoe's environment, the new compact authorizes the TRPA to adopt strict protective measures and provides the means to actively enforce them.

Regulations for Development

Perhaps the compact's most obvious concession to Nevada interests is the recognition of gaming as a conforming use in certain specifically designated portions of the Lake Tahoe Basin. Remodeling, relocation and expansion of gambling floorspace within existing casinos is permitted if approval is first obtained from the Nevada Environmental Commission. Although TRPA does not have approval power over such projects, the Nevada Environmental Commission staff are required to consult with TRPA prior to taking final action. However, expansions and additions to the exterior of existing casinos do require TRPA approval. Under the revised compact, no new casinos may be built at Lake Tahoe. Although the new compact curtails the expansion of Lake Tahoe as a gambling resort, it does place the regulation of existing casinos primarily under Nevada's control.

The potential for further construction and development of the Tahoe Basin under the proposed compact is uncertain at this point. A minimal amount of development will be permitted under the public services and facilities element of the regional plan. Specifically, the

element will allow construction of public service facilities "which, by the nature of their function, size, extent and other characteristics, are necessary or appropriate for inclusion in the regional plan." Both the land use and transportation elements of the regional plan will establish criteria for determining where and what types of residential, commercial and highway construction will be allowed. No clear guidelines are articulated in the compact. While some level of construction activity is assured, the extent of such activity will depend on the regional plan to be adopted by TRPA.

Although the TRPA compact appears to achieve a workable compromise between California and Nevada interests, it contains several flaws from the perspective of local government. Most apparent is the reduction in the influence of local government representatives sitting on TRPA's policy-making boards. In-basin county and city representatives are guaranteed only six seats on the fourteen-member governing board. Additionally, less than half of the fifteen-member advisory planning commission, responsible for drafting the agency's regional plan, will consist of local government delegates.

Perhaps the most unacceptable feature of the new compact from a local viewpoint is the retention of the regional plan, ordinances, and regulations adopted by the California Tahoe Regional Planning Agency (CTRPA). Created by the California Legislature in 1967, the CTRPA exercises jurisdiction over the California portion of the Tahoe Basin and actively enforces more stringent land use controls than the TRPA. The dual layer of "outside government" resulting from the overlapping jurisdiction of CTRPA and TRPA has been vociferously resented by local citizens. Under the proposed compact, CTRPA regulations will be enforced by the TRPA only in the California portion of the basin. The continued existence of CTRPA as a separate governmental body at Lake Tahoe remains uncertain. A final objection to the compact is that it will require counties within the basin to foot a heavy financial bill to support TRPA's working budget. Some representatives feel that local governments will receive very little direct benefit in return from the new TRPA.

Federal Participation on TRPA

The federal government will play an important, but unobtrusive, role in assuring the smooth functioning of the new TRPA. The President will appoint a nonvoting federal representative to sit on the TRPA governing board. Similarly, a representative of the United States Forest Service will participate as a member of TRPA's advisory planning commission. Federal air and water quality standards will be used as a baseline for the regional plan, and TRPA will be required to oversee the attainment and maintenance of these standards in the years ahead. The Council on Environmental Quality and the U. S. Forest Service will participate in the development of an initial environmental impact statement (EIS) for the basin. This EIS will function as an initial inventory of Lake Tahoe's environmental quality and will provide a foundation for drafting the new TRPA regional plan. Other federal agencies must be consulted for comments on the initial EIS, and on all subsequent project EIS's prepared by TRPA. Finally, federal agencies within the Tahoe Basin are specifically directed to cooperate with CTRPA until the new TRPA regional plan is drafted.

Ambiguities

The new compact fails to clarify two issues which are crucial to the future of Lake Tahoe's environment: 1) The applicability of the National Environmental Policy Act (NEPA) to the TRPA, and 2) the likelihood that several casino projects approved by TRPA in 1973 and 1974 will be permitted to proceed with construction.

In order for the NEPA to apply, TRPA must be deemed a federal agency. Although an interstate compact is created pursuant to federal law, it is uncertain whether a bistate agency whose formation is authorized by such a compact is an agency of the federal government for purposes of NEPA. In the past, TRPA asserted that it did not have to comply with NEPA or with state environmental quality acts. The new compact adopts many of the policies, portions of the language, and the EIS requirement of NEPA. Additionally, it provides for an initial EIS to be prepared as a foundation for the new regional plan, and outlines substantial federal participation in TRPA's day-to-day functions. Although the compact never specifically states that TRPA must comply with NEPA's provisions, the language suggests that TRPA will implement NEPA—at least to a limited extent. In a suit currently pending before the federal district court in Reno, CTRPA has alleged that TRPA's 1978 approval of additions to the North Shore Club casino violates NEPA's provisions. Absent clarification of the compact's language, the issue may ultimately be resolved by the judiciary.

The fate of several large casino projects approved by the TRPA in 1973 and 1974 remains uncertain. CTRPA filed suit against four of the casinos in 1977, alleging TRPA approved the projects in violation of provisions of the TRPA land use ordinance. In the past year the federal government has indicated an interest in purchasing two of the proposed casino sites which are the subject of litigation. The revised compact will permit construction of these casinos as originally approved by the TRPA unless a court ultimately determines: 1) that approval or development of the project violates an applicable federal, state, or regional regulation, or 2) TRPA's approval of the project is void or invalid, or 3) development of the project would constitute a nuisance or would be enjoinable. However, the compact also states that the intent is not to approve or prohibit any project whose validity is challenged in a lawsuit regardless of the outcome of the litigation.

Conclusion

Although the essential provisions of the compact have been accepted as satisfactory by negotiators from each state, the eventual success of the compact is far from certain. Initially, the compact must be ratified by the California and Nevada legislatures. Congressional approval is also necessary before the compact becomes effective. If accepted by all parties, it is doubtful that the compact could become operative before late 1979. As proposed, the compact addresses and resolves many of the deficiencies in the existing TRPA legislation. Like any plan, it is not perfect. However, it provides a workable framework for accomodating both public and private interests in the Lake Tahoe Basin.

Kathi Beaumont

The New Melones Decision

(continued from page 3)

The focus of the issue was sec. 8 of the Reclamation Act of 1902. This section provides that, "nothing in this Act shall be construed as affecting ... the laws of any State ... relating to the control, appropriation, use or distribution of water used in irrigation . . . and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws . . . ." In interpreting this section, the Court reviewed the development of water rights and reclamation law in the western states. Note was made of the "Severance Doctrine" expounded in *California Oregon Power Co. v. Beaver Portland Cement*, (1935) to show that water on the public domain was "subject to the plenary control of the States." After tracing the same concept through the Mining Act of 1866, the Desert Lands Act of 1877, and legislation in the 1890's which reserved reservoir sites for the federal government, the Court looked extensively at the legislative history of the 1902 Reclamation Act to determine the legislative intent in sec. 8.

The Court concluded that the legislative intent was unmistakably that of state control. Numerous quotes were taken from the Congressional Record. Among them was a response by a sponsor of the reclamation bill to the charge that under the bill the federal government could condemn water in contravention of state law. Representative Mondell said that "the bill provides explicitly that even an appropriation of water can not be made except under state law." The Court also quoted from the House Committee Report on the bill which said that "sec. 8 recognized State control over waters of non-navigable streams."

After establishing the legislative history and intent of the 1902 Act, the Court addressed itself to prior cases relied on by the lower courts. In *Ivanhoe Irrigation Dist. v. McCracken* (1958) and *City of Fresno v. California* (1963), the Court had ruled that sec. 8 did not compel the federal government to comply with a state law which was inconsistent with a specific federal provision. The most troubling problem was a statement in *Ivanhoe* that "we read nothing in sec. 8 that compels the United States to deliver water on conditions imposed by the State." In *United States v. California* the Court found that this statement "went beyond the actual facts of that case," disavowing it as "dictum." The Court's rationale focused on the fact that in *Ivanhoe* a direct conflict between federal and state law existed. Where no such conflict exists, as in *United States v. California*, the Court decided that sec. 8 *does* require the federal government to follow state law.

The majority concluded their argument by noting the Bureau policy of complying with state law, and by citing two recent Acts, the Flood Control Act of 1944, which authorized New Melones, and the McCarren Amendment (subjecting the United States to state court jurisdiction for general stream adjudications), to show the general legislative intent to have states control the water within their boundaries.

The dissent felt that the true rule should be the statement from *Ivanhoe*, arguing primarily on the grounds that federal law controls. The case, however, can be viewed as a blow for state's rights, especially when compared with another case reported the same day, *United States v. New Mexico*. [A casenote on this case follows this article. Ed.] That case construed the doctrine of federal reserved water rights very narrowly and in accordance with the state position on the issue. Thus the two cases, both authored by Justice Rehnquist, support the view advanced by the Board that the states retain the power to control their water resources, absent superceding federal directives.

The Future

The immediate future of the New Melones decision will be a further review of Decision 1422 by the federal district court to determine if any of its conditions do conflict with a "clear congressional directive." The State may seek to strengthen its position by renewing its arguments that the United States is equitably and collaterally estopped from denying the validity of Decision 1422. The equitable estoppel argument is that the federal government as in the past always initiated and complied with the Board's decisions and should not now be heard to deny the existence of the Board's jurisdiction. The collateral estoppel argument is that the Bureau failed to pursue its state court remedy, pursuant to California statute, and is therefore bound by the Board's decision. The District Court previously held that there was no collateral estoppel because the Board lacked jurisdiction over the Bureau. If *California v. United States* can be seen as recognizing this jurisdiction, the collateral estoppel argument may be revived.

Regardless of the outcome in this instance, the real impact of the ruling will be to give the State a much stronger hand in water management in California. In addition to delaying the inundation of the Stanislaus River until the Bureau can show a specific plan for the water, the decision will have a tremendous impact on the development of a comprehensive plan for management of the Sacramento-San Joaquin Delta. The Bureau has consistently maintained that it is not required to meet state-mandated water quality standards in the operation of its Delta facilities. The decision in *California v. United States* may be the ammunition the State needs to make its Delta water quality standards stick. This newly confirmed element of state control will also be a major factor in the continuing controversy over the Peripheral Canal. [See "The Peripheral Canal: Moment of Decision," *ENVIRONS*, Vol. 2, No. 2, and "The Peripheral Canal: A Setback in Round Two," *ENVIRONS*, Vol. 2, No. 4. Ed.] Moreover, it will provide a stronger state voice in the future development of reclamation projects in California.

It is interesting to note that this re-emerging concept of state control comes from amidst the most massive federal reclamation project in the nation. It is also fitting that the Court looked back to the early development of reclamation law in the west to find this concept. The Court pointed out that the federal government's intended role was that of assisting the state in developing its water resources rather than controlling it. From California's point of view, the New Melones decision has evened out a long-standing imbalance.

Donald Segerstrom

NATIONAL FOREST MANAGEMENT

(continued from page 5)

Silvicultural guidelines: The regulations allow, but do not require, that other objectives besides timber production be considered when choosing a method of harvesting. The regulations provide that the system should, among other things, provide protection for streams and other water and provide for steps to preserve diversity. Clearcutting is permitted when it is determined to be the "optimum method," defined as that "most favorable and conducive to the achievement of multiple-use goals specified in the plan." Clearcutting is the issue that initiated this entire problem in the Monongahela case and environmental groups would prefer a strict definition of when clearcutting may be used and a limit on the areas harvested by that system.

Timber Harvest Scheduling: The regulations require that, until the planned harvest rate reaches the long-term sustained yield capacity, the planned harvest for each successive decade equal or surpass the planned sale and harvest for the preceding decade. That is, a larger harvest is required each decade as long as the future potential of the forest is not damaged. Departure from this standard will be allowed when it is not producing sufficient timber to meet the planned objectives or when the economy of the area would be injured by restricting harvest to the base schedule.

Environmentalists do not approve of any departure from the "non-declining yield." Timber interests would like to see departures whenever there would be "greater public benefits." This would give them greater flexibility in the amount of timber produced from a particular forest in a particular year.

Summary

This is an area in which there can be no real agreement because the opposing sides have completely different theories about the proper use of the National Forests. Environmentalists want to maintain the forests as nearly as possible in their natural states. Logging interests want to use the forests in the most efficient manner for the production of timber.

The Forest Service, as "Steward of the Land," attempts to manage the forests in a manner that will, to the greatest extent possible, satisfy both groups. It acts to balance these interests as well as to attempt to manage the land in the best interests of all the people of the nation.

The regulations, because of their many subjective standards, leave practical decisions to the individual Forest Service officials or to the planning process.

The public participation in the planning process may well be the most significant part of these regulations. The forest plans, which will be drafted with as much input from environmentalists, the timber industry, and the general public as they wish to contribute, will make the real determinations as to what is to be done *with* and *to* the National Forests.

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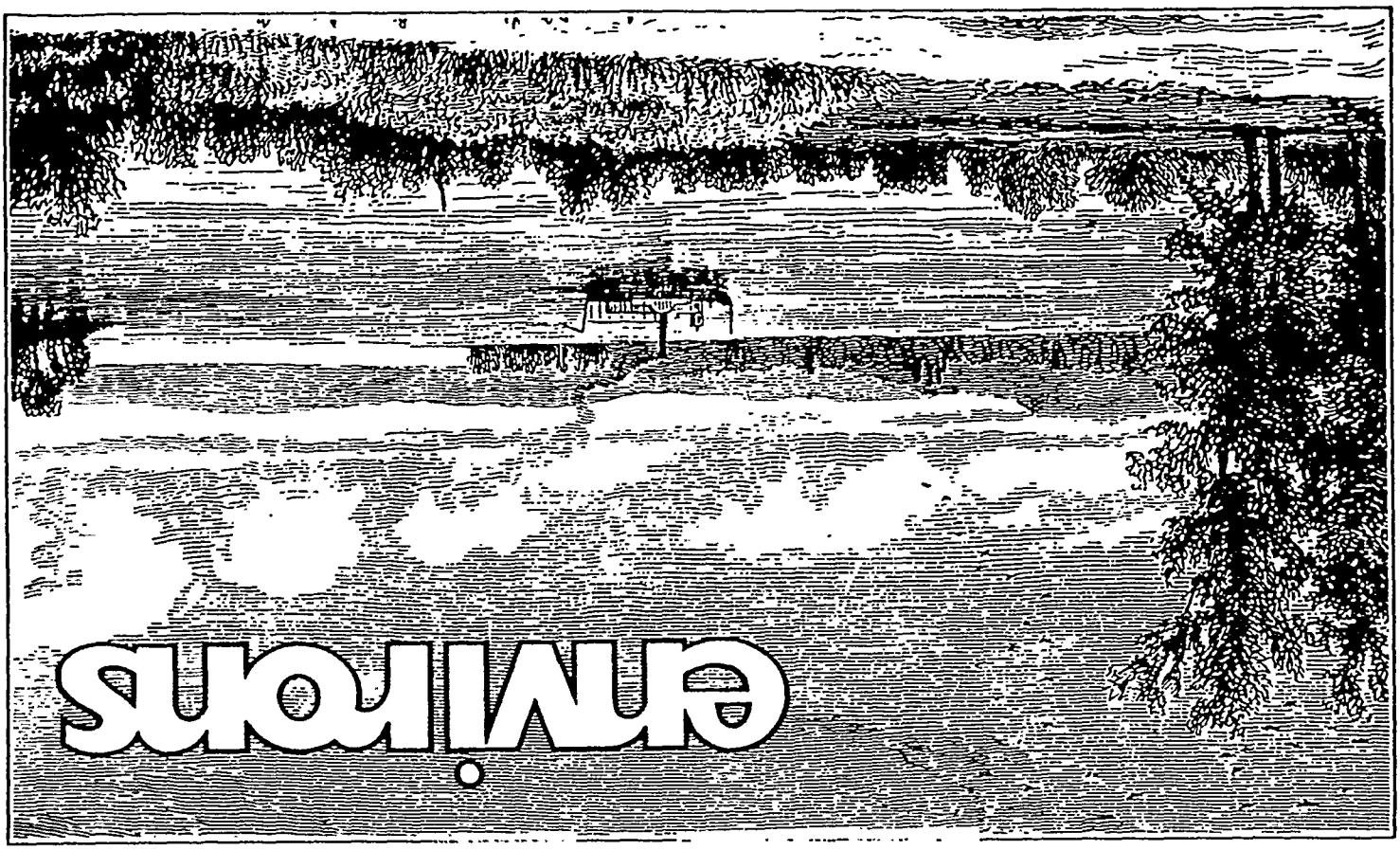

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