

THE MONO LAKE CONTROVERSY AND THE EVOLUTION OF CALIFORNIA'S PUBLIC TRUST DOCTRINE

By Timothy A. Heydinger

On September 22, 1989, California Governor George Deukmejian signed into law Assembly Bills 444 and 1442. These bills, introduced by Assembly members Phillip Isenberg (D-Sacramento) and William Baker (R-Danville), establish the Environmental Water Fund, and allocate \$65 million for this fund. Appropriations from the fund which protect and preserve the wildlife and environment of the Mono Lake Basin receive top priority. Thus, the fund tips the scales of California's public trust doctrine balancing test in favor of preserving the Mono Lake ecosystem. The legislation conceivably signals the beginning of the end of the long and tortured Mono Lake litigation.

The Mono Lake controversy has exposed numerous difficulties in implementing California's evolving public trust doctrine. The California Supreme Court, after acknowledging the applicability of the public trust doctrine to Los Angeles' diversions from the Mono Lake Basin, simply required that public trust values be protected "whenever feasible." National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 446, 658 P.2d 709, 189 Cal. Rptr. 346 (1983), cert. denied, 464 U.S. 977 (1983). In interpreting the supreme court's language, lower courts and administrative agencies have proven equally incapable of balancing the public's interest in preserving the Mono Lake ecosystem against Los Angeles' continued diversions. The Baker-Isenberg legislation purportedly performs this balancing test.

One must applaud the Baker-Isenberg legislation to the extent that it serves to protect the public trust resources of the Mono Lake Basin. However, the bills stop far short of legislative recognition or implementation of the public trust doctrine, and arguably hinders further meaningful development of the doctrine by emphasizing the role of economics in the public trust balancing test. The legislature must take further action to fully implement the public trust doctrine if California is serious about protecting its aquatic resources and preventing a future Mono Lake scenario.

Evolution of California's Public Trust Doctrine

The public trust doctrine has its roots in ancient civil codes. Early Roman law declared that "[b]y the law of nature these things are common to [human]kind—the air, running water, the sea and consequently the shores of the sea." J. INST. 2.1.1. The doctrine developed in American law as an inalienable responsibility of the state to preserve the public's right to use the state's navigable waters. Navigable waters include both tidelands and inland navigable waterways.

Under the public trust doctrine, the sovereign owns "all of its navigable waterways and lands lying beneath them 'as trustee of a public trust for the benefit of the people.'" Colberg, Inc. v. State, 67 Cal. 2d 408, 416, 432 P.2d 3, 62 Cal. Rptr. 401 (1983) (citing People v. Gold Run Ditch and Mining Co., 66 Cal. 138, 151, 4 P. 1152 (1884)). Title to public trust resources vests in the people of the state; the sovereign serves as trustee to protect the public's ownership rights. In its early phase, the doctrine absolutely prevented the state from divesting the public of its interest in the navigable waters of the state, as well as its title to the land lying beneath those navigable waters.

Traditional public trust uses include navigation, commerce, and fishing. Subsequent judicial decisions have expanded the realm of trust uses to include bathing, swimming, boating and general recreation, and the right to use the ocean, lake, or river bed for anchoring. Thus, the doctrine developed as a means to protect various uses the public makes of the navigable water.

The California Supreme Court significantly expanded the scope of the public trust doctrine in Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971). Marks involved an attempt by an owner of tidelands to build a pier on the tidelands. A neighbor, seeking to enjoin construction of the pier, invoked the public trust doctrine in order to preserve the tidelands in their natural state.

The Marks court concluded that the public trust doctrine serves to protect navigable waters in their

natural state, apart from any use the public may make of those waters. The court noted that “[t]he public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs,” and determined that “one of the most important public uses of the tidelands . . . is the preservation of those lands in their natural state . . . as environments which provide food and habitat for birds and marine life.” Marks, 6 Cal.3d at 259-260. Arguably, the Marks court simply redefined public trust uses to include preservation of tidelands in their natural state. However, such an interpretation seems unduly restrictive. Maintaining tidelands in their natural state goes beyond uses the public makes of the resource. Marks should stand for the proposition that the public trust doctrine protects tidelands as ends in themselves, and not merely as a means to protect any uses the public may make of the tidelands. Under this expansive reading of Marks, the public trust doctrine protects both the uses the public makes of the resource, and the resource as an end in itself.

The Marks decision highlights two distinct aspects of the public trust doctrine. First, the doctrine permits members of the public to enjoin actions by others on navigable waterways which interfere with the public’s ability to exercise its public trust rights. In this sense, resource preservation is merely a means for protecting the uses the public makes of the trust *res*. Second, the doctrine serves as a tool for protecting the public trust resource as an end in itself, distinct from any use the public may make of the resource. Both aspects of the Marks decision proved direct precursors to the Mono Lake litigation.

Mono Lake is concededly a navigable waterway, and therefore is burdened with the public trust.

Plaintiffs, relying on the Marks decision, invoked the public trust doctrine both as a means to protect public uses of the resource (Mono Lake), and as a theory for preserving Mono Lake as an end in itself. However, the activity plaintiffs sought to enjoin occurred on non-navigable streams tributary to Mono Lake. Plaintiffs, therefore, hoped to expand the scope of the public trust doctrine beyond the Marks decision.

The Public Trust Doctrine and the Mono Lake Controversy

Numerous writers and commentators have detailed the history behind the Mono Lake controversy. See, *e.g.*, “Mono Lake Symposium”, 13 Environs (April 1989) at 15. This hauntingly beautiful lake on the eastern slopes of the Sierras supports an ecosystem unparalleled anywhere in the world. Water diversions from the Mono Lake basin by the Los Angeles Department of Water and Power (LADWP) have sparked heated controversy between LADWP and environmental groups seeking to preserve the lake.

LADWP has diverted Mono Basin water from four non-navigable streams tributary to Mono Lake since 1941. The diversion works provide Los Angeles with 17% of its water. Hydroelectric plants built along the aqueducts supply the city with a large percentage of its electricity. The city utilizes all of the water and electricity now provided by diversions from the Mono Lake Basin.

These diversions have had numerous adverse impacts on the Mono Lake ecosystem. As a result of LADWP’s diversions, the level of Mono Lake has dropped 40 feet. Declining lake levels increase the lake’s salinity, making it unsuitable for the brine shrimp and brine fly populations. This in turn affects some



ninety migratory bird species that nest at Mono Lake and use the brine populations as a primary food source. Land bridges threaten to connect the mainland with islands now used as nesting grounds by the various bird species. These land bridges would allow predators to prey on eggs and young birds. An alkali salt flat now rings the lake, which leads to severe dust storms on windy days. Exposure of the lake's famed tufa towers subjects them to unnatural erosion.

Fearing complete destruction of the Mono Lake ecosystem, various environmental groups, headed by the National Audubon Society and the Mono Lake Committee, filed suit in 1979 to enjoin further LADWP diversions from the Mono Lake basin. Plaintiffs, relying primarily on the public trust doctrine, faced two significant legal hurdles from the outset. First, although Mono Lake is a navigable waterway, plaintiffs invoked the public trust doctrine to enjoin activity occurring on non-navigable waterways feeding into the lake. Second, LADWP was diverting water under valid licenses and permits granted by the state.

In National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983), cert. denied, 464 U.S. 977 (1983), the California Supreme Court significantly expanded application of the public trust doctrine. In National Audubon, the primary values plaintiffs sought to protect were recreational and ecological—"the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding of birds." National Audubon, 33 Cal. 3d at 435. Use of the lake by birds for nesting and feeding is an end in itself, and not a means toward protecting the lake for human use. The court adopted the holding of Marks, and held that "these values [are] among the purposes of the public trust." Id.

However, the supreme court went beyond the Marks holding by expanding the range of activities which the public may enjoin under the public trust doctrine. The court held that "the public trust doctrine . . . protects navigable waters from harm caused by diversion of non-navigable waterways." Id. at 437. The precise scope of this holding has not been explored; however, the supreme court's language has far-reaching implications and should be interpreted as broadly as possible.

Having determined that the public trust doctrine applied to LADWP's diversions, the court next held that California's system of water allocation did not subsume the public trust doctrine. The State Water Board did not consider public trust values when it initially authorized

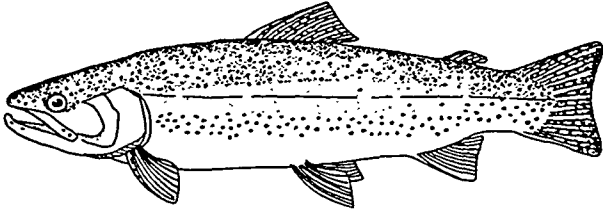
LADWP's diversions from the Mono Basin. The supreme court held that LADWP's permits and licenses could be modified in order to protect the public trust resources of Mono Lake, and that "some responsible body ought to reconsider the allocation of the waters of the Mono Basin." Id. at 447.

The Audubon court concluded that "[t]he state has an affirmative duty to . . . protect public trust uses *whenever feasible*." Id. at 446 (emphasis added). This determination has proven especially problematic. The language suggests the state may divest the public of its interest in the natural resource with an ease previously unrecognized. At the very least, the "whenever feasible" language has been interpreted as requiring a balancing of the public's interest in preserving the resource against the need to develop the resource.

Neither side of the balance can be precisely defined. Additionally, the balancing test does not take into account the biotic community's interest in preserving the resource. The test merely compares the interest in developing the navigable waterway with the public's interest in preserving its usage of the waterway. The test does not consider protection of the resource as an end in itself. If the public trust doctrine protects the navigable waterway as an end in itself, as both the Marks and Audubon courts imply, this end must be included in the balancing test.

The supreme court's decision marked the real beginning of the Mono Lake controversy. Los Angeles suddenly was confronted with the possibility of losing up to 100,000 acre feet of water (about 32.6 billion gallons) as well as 300 million kilowatt hours of hydroelectric power per year, together totalling losses approaching \$33 million per year. This dollar figure does not include the millions required to find replacement sources, or the millions already spent on diversion works. After years in federal courts resolving federal issues (see National Audubon Soc'y v. Department of Water, 869 F.2d 1196 (1988)), the parties now join the battle to give concrete meaning to the supreme court's holding.

The task facing the courts and the State Water Resources Control Board (SWRCB, or Board) is to interpret and implement the term "whenever feasible." The Board must consider public trust values before it issues water rights permits and licenses, which it failed to do before issuing LADWP's original permits. Therefore, the Board may modify LADWP's permits to protect public trust values, but only insofar as protection of public trust values is feasible. Courts and the Board



must balance Los Angeles' interest in continuing to divert Mono Lake Basin water against the public's interest in preserving the Mono Lake ecosystem.

By invoking the public trust doctrine, the various environmental groups do not seek to raise the lake to its pre-diversion level of over 6400 feet above sea level. No group suggests that the doctrine applies to damage already done, at least in the context of the Mono Lake controversy. However, the parties do not dispute that continued diversions of 100,000 acre feet per year will have further detrimental effects on the lake's ecosystem. The real dispute between the parties focuses on the lake level necessary to preserve current public trust values. The environmental groups claim a lake level of 6377 feet is necessary to protect the present ecosystem. LADWP claims a level of 6372.5 feet will preserve the ecosystem. The difference means millions of gallons of water for Los Angeles.

On June 15, 1989, with the lake level at 6376.5, El Dorado County Superior Court Judge Terrence Finney issued a temporary restraining order prohibiting LADWP from diverting any more water from the Mono Basin. Judge Finney also ordered the city to store 50,000 acre feet of water behind its Rush Creek dam while he considered whether to issue a preliminary injunction. The stored water served to protect both parties interests while Judge Finney considered the matter.

Subsequently, Judge Finney issued a preliminary injunction, ordering LADWP to maintain the lake at a level of 6377 feet. Finney's decision sounds a ringing victory for environmentalists. His decision requires LADWP to release the 50,000 acre feet of water stored behind the Rush Creek dam into lower Rush creek, where it will flow into Mono Lake. Once the lake reaches 6377 feet, LADWP may divert to the extent the lake level is maintained. Finney's preliminary injunction remained in effect until March 30, 1990.

On September 29, 1989, Judge Finney heard LADWP's motion to reconsider the preliminary injunction. A showing of irreparable harm must be made

before a court issues a preliminary injunction, and LADWP claimed there had been no showing of irreparable harm. Mono Lake had previously dropped to 6372 feet. LADWP claimed the ecosystem did not suffer irreparable harm, even though the gull population was nearly obliterated and the brine shrimp hatch fell off by 85%. Judge Finney declined to lift the injunction.

The National Audubon Decision and Related Proceedings

The implications of the National Audubon decision cannot be understood in a vacuum. Two related proceedings must be analyzed in order to appreciate the complexity of applying the public trust doctrine to the Mono Lake Basin. The first is the California Trout line of cases. The second is the concurrent jurisdiction of the SWRCB in reviewing LADWP's licenses and permits.

California Trout, Inc. v. Department of Water and Power, 207 Cal. App. 3d 585, 255 Cal. Rptr. 184 (1989) was a direct attack on LADWP's water permits and licenses. The plaintiffs in Cal. Trout, primarily the same environmental groups leading the National Audubon litigation, sought to protect fish life downstream from LADWP's diversions on the non-navigable streams. Therefore, Cal. Trout involved an attempt to protect the non-navigable waterways tributary to Mono Lake rather than an attempt to protect the lake itself.

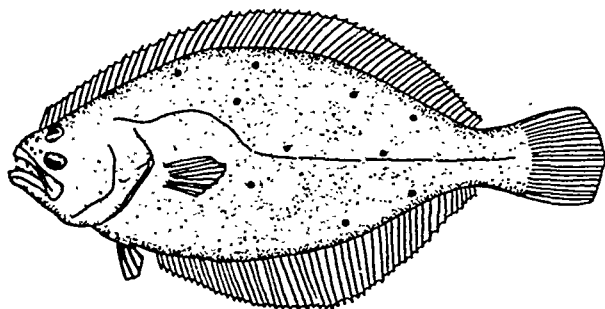
The plaintiffs in Cal. Trout relied on two theories. First, plaintiffs invoked the protections of California Fish and Game Code Sections 5937 and 5946. Section 5937 requires that dam operators allow sufficient water to by-pass a dam to maintain fish in "good condition." Section 5946 prohibits the state from issuing licenses and permits to divert water from the Mono Lake Basin after 1953 unless conditioned on full compliance with Section 5937. Second, plaintiffs relied on the public trust doctrine, even though the waters they were trying to protect were non-navigable.

On appeal, Judge Blease agreed with plaintiffs that Sections 5937 and 5946 applied to LADWP's diversions insofar as LADWP was seeking renewal of their licenses and permits after 1953. Judge Blease ordered the trial court to issue appropriate writs commanding the Board to attach conditions to LADWP's permits consistent with Sections 5937 and 5946. Unlike the Audubon decision, which stated that LADWP'S licenses and permits *may* be modified, the Cal. Trout decision marked the first time a court stated that water permits and licenses must be modified to accord with state law.

The trial court determined that indeed the public trust doctrine applied to these non-navigable streams, regardless of statutory enactment. Because Judge Blease found for plaintiffs on statutory grounds, he did not specifically address the public trust issue independent of the statutes. Instead, Blease viewed the Fish and Game Code sections as specific rules concerning the public trust, an issue explicitly left open by the Audubon court. National Audubon, 33 Cal.3d at 437, fn. 19.

Judge Blease stated that “the common right to take fish extends not alone to navigable waters, but exists as to all waters . . . To the extent that waters are the common passageway of fish . . . they are deemed for such purposes public waters, and subject to all laws of the state regulating the right of fishery.” Cal. Trout, 207 Cal. App. 3d at 629 (quoting People v. Truckee Lumber Co., 116 Cal. 397, 48 P. 374 (1897)). He concluded that Sections 5937 and 5946 represent a statutory type of public trust interest pertaining to non-navigable streams which sustain a fishery. However, Blease explicitly noted that “it does not follow from the application of the term ‘public trust’ to the state’s interest in fisheries of non-navigable streams that all of the consequences of the public trust doctrine as applicable to navigable waters also apply to non-navigable streams.” Cal. Trout, 207 Cal. App. 3d at 630. By enacting Fish and Game Code Sections 5937 and 5946, Blease held, the legislature had adopted specific rules concerning the public trust doctrine. Blease determined that the SWRCB may not divest the public of its interest in public trust values which have received legislative enactment.

The implications of the Cal. Trout holding are unclear, but may well limit application of the public trust doctrine on non-navigable streams to specific legislative enactment. Such a reading of the Cal. Trout decision comports with an interpretation of National Audubon which allows the state to divest the public of its interest in public trust values insofar as the public trust doctrine is not statutory.



The Board faces the task of reviewing LADWP’s water rights permits in the light of both National Audubon and Cal. Trout. The Board has realized that National Audubon and Cal. Trout are intricately interrelated, and has concluded that their review will include consideration of the public trust doctrine as well as instream flows to maintain fisheries. Unfortunately, the two cases present overlapping issues, and neither decision provides the Board with clear guidance. According to the Board’s revised draft workplan issued in August, 1989, the Board will not complete its review of LADWP’s licenses and permits until December, 1992.

Section 5937 should provide a starting point for the Board in reconsidering LADWP’s permits. Section 5937 represents a specific legislative enactment concerning the public trust doctrine, and the Board is incapable of divesting the public of this interest. This code section is not subject to a balancing test as is the public trust doctrine. Instead, the code states that enough water must pass in order to preserve fish in good condition. The Board should revise LADWP’s permits to comply with these code sections before any public trust balancing occurs.

Interpreting the “whenever feasible” language of the National Audubon decision presents the Board with a much more onerous task. The Board has no clear definition of what waters are burdened by the public trust and what uses and values the public trust doctrine protects.

“Whenever feasible” should be interpreted as giving public trust values absolute preference over resource development. Unfortunately, “whenever feasible” traditionally equates with “whenever economically feasible.” In this sense, the doctrine protects public trust resources only when the cost of foregoing development does not outweigh the “need” to protect the resource, or when the resource may be developed at an alternative site at similar costs and with fewer environmental impacts.

The SWRCB adopted the traditional interpretation of the National Audubon decision, equating “whenever feasible” with “whenever economic feasible.” Thus, the purported balancing test required by the National Audubon decision became mere rhetoric. The millions of dollars already spent, the millions LADWP stood to lose through lost water and power, and the millions necessary to develop new sources made the “balancing test” a foregone conclusion. Legislative action was necessary for the public trust doctrine to have any affect at all.

The Baker-Isenberg Legislation

On September 15, 1989, the California legislature, with Los Angeles' representatives' consent, voted overwhelmingly to pass the Baker-Isenberg legislation. Governor George Deukmejian signed the bills one week later. The legislation creates the Environmental Water Fund and greatly reduces prospective economic impacts from the public trust balancing test.

Assembly Bill (AB) 1442, known as the Environmental Water Act of 1989, is the funding provision for AB 444. AB 1442 authorizes a series of paper transfers among various state water-related accounts and relieves certain debts relating to the State Water Project. The Bill creates the Environmental Water Fund and deposits \$65 million in the fund (again, through paper transfers).

AB 444 enacts the Environmental Water Act of 1989 and prescribes the purposes of the Environmental Water Fund. The bill declares that money appropriated from the fund shall be used "for projects or programs concerning the water resources of the state that will contribute significant environmental benefits." Cal. Wat. Code §12929.11. Within the Fund are two programs. The Environmental Water Program contains \$60 million, available at \$7 million per year between 1991-1995, and \$8 million per year between 1996-1999. The Water Quality Program contains \$5 million available at \$1 million per year between 1990-1995.

The Environmental Water Program specifically relates to Mono Lake. The bill encompasses other eligible waterways, subject to legislative approval, but prioritizes Mono Lake. Under the program, Los Angeles jointly with the Mono Lake Committee may submit grant applications to the California Department of Water Resources (DWR). Grant applications shall benefit and enhance [Mono] Lake's ecosystem and contribute to permanent protection of the Mono Lake Basin environment, including, but not limited to, nesting and migratory bird populations, air quality, fish, and other wildlife, as well as provide replacement water or power to the city. Any project funded by a grant shall not unreasonably affect fish, wildlife, or other instream beneficial uses. CAL WATER CODE §12929.21.

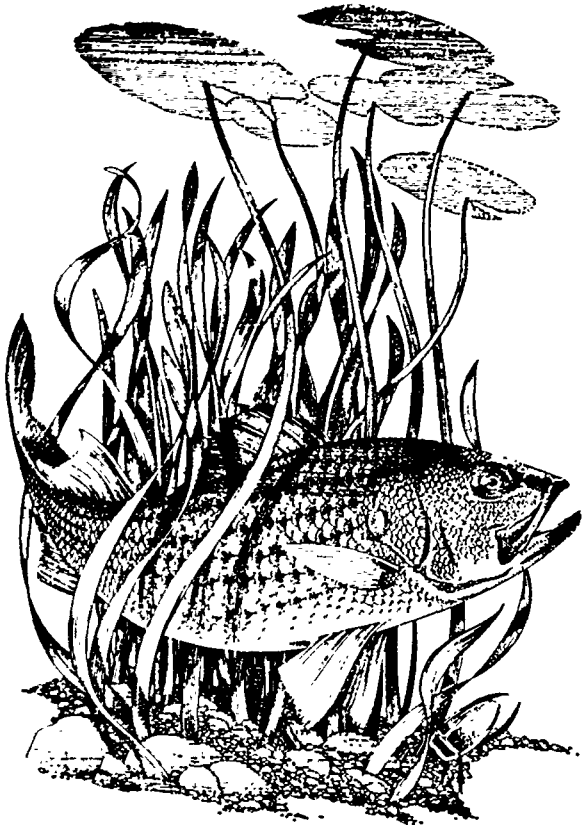
The bill requires that both parties benefit from any grant issued before July 1, 1994 (after which either party may submit an application for its own interests alone), although Los Angeles is prohibited from simply transferring unreasonable environmental impacts onto other basins.

The bill lists specific projects eligible for appropriations. The bill gives priority to projects which conserve water or power. An eligible project includes water marketing programs, except that money may not be used by Los Angeles to buy replacement water from the Metropolitan Water District of Southern California. Also, money may not be used to replace water and power supplies lost because of a final court judgment or water board ruling.

One must applaud the Baker-Isenberg legislation insofar as it serves to protect the public trust values of the Mono Lake Basin. Arguably, if the public wants to protect its trust resources, then the public should pay for that protection. However, the bills should not be interpreted as legislative recognition or implementation of the public trust doctrine. To do so would be to acknowledge the importance of economics in an already flawed public trust balancing test. At most, the legislation should be interpreted as specific legislative recognition of a certain ecological system worthy of legislative protection. A legitimate public trust balancing test gives due consideration to protection of the resource as an end in itself, and excludes consideration of economic factors.

A Blueprint For Change

The Mono Lake controversy, on its face, presents a simple fact pattern. On one hand, Los Angeles invested millions of dollars to perfect valid water rights within the Mono Lake Basin. However, the city's 40 years of diversions threatened to decimate the Mono Lake ecosystem. On the other hand, environmental groups wanted the lake and ecosystem preserved for its own sake, even though the city spent millions of dollars to divert water under valid state-issued permits and licenses, and even though the city might have to spend millions more to replace lost water and power. The parties were clearly defined, their interests arguably laudable, and their legal theories clearly recognizable. The controversy also highlights the difficulties faced in implementing the public trust doctrine. Judge Blease avoided addressing the application of the public trust doctrine to non-navigable streams independent of statutory considerations. The California Supreme Court did



little more than state that the public trust doctrine applies to LADWP's diversions insofar as they affect Mono Lake (which, given what Los Angeles stood to lose, was in itself a remarkable admission). However, both Blease and the supreme court left it up to lower courts and the SWRCB to determine how, and to what practical extent, the doctrine applies.

The legislature should recognize the Mono Lake controversy as a straight-forward fact pattern, realize the problems with implementing the public trust doctrine, and act in response to the Mono Lake litigation. Meaningful implementation of the public trust doctrine requires legislative action. The legislature must decide when the public trust doctrine applies and what interests the doctrine protects. Without legislative enactment, the doctrine remains a pliable tool which courts and administrative agencies may mold as they see fit.

Meaningful legislative enactment of the doctrine requires a fundamental change in the way we think about the public trust doctrine and public trust resources. Previous court decisions have paved the way for this fundamental change in thought. Following both Marks and National Audubon, legislators (and the public) must realize that the doctrine serves to protect natural resources as ends in themselves, and not merely as means for protecting the public's use of the resource. Natural resources, including (but surely not limited to) fish and

water, have a right to exist apart from any use humans may make of that resource. Thus, any purported balancing test must encompass resource preservation as an end in itself.

Such a realization leads to a necessary shift in the way we think about our relationship with the physical environment. *Homo sapiens* becomes an integral part of a world biota as a whole, and not merely conqueror of the physical world. Our interactions with the environment occur on perpendicular planes which necessarily intersect, not on parallel planes whose paths never cross. We begin to realize our interrelatedness with the ecological environment and our place as a part of the organism we call earth. As goes the destruction of the environmental community, so goes the decimation of the human race.

Aldo Leopold understood the interconnectedness of all plant and animal species as participants in the same ecological system. Aldo Leopold, A Sand County Almanac (Ballantine Books, 1980). Leopold believed that environmental ethics, and all ethics, should be based upon the concept that the individual is a member of a community of dependent parts. Human experience and interaction does not occur on a separate plane linear to the rest of the environmental community, but arises out of and occurs within that sphere. Accordingly, an environmental ethic "simply enlarges the boundaries of the community to include soils, waters, plants, and animals . . . [this ethic] changes the role of *homo sapiens* from conqueror of the land-community to plain member and citizen of it." Id. at 239-240.

Leopold's ethic extends beyond the land-community to the world-community as a whole. Meaningful implementation of the public trust doctrine must adopt such an ethic. Anything less will result in a short sighted, short term "solution" doomed to failure. As Leopold states, "A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong if it tends otherwise." Id. at 189. Adopting such perpendicular thought is not revolutionary, but rather evolutionary. It redefines our relations with what we term public trust resources by recognizing the necessary interconnectedness of those relations. This realization provides necessary insight into meaningful implementation of the public trust doctrine.

Legislative action should encompass all resources and members of the biotic community, not just fish and navigable waterways. All living organisms, plant and animal, as well as air, water, and land resources should be protected by such legislation. This legislation should place the biotic community on a plane equal with hu-

mans and acknowledge that community's right in itself to exist.

Prospectively, legislation must abolish the "whenever feasible" language of National Audubon. Such legislation would not mean that fish won't be killed, dams won't be built, trees won't be felled, and the face of the land won't be altered. The legislation should emphasize co-existence between humans and the physical environment. Humans have a right to co-exist within the world community, as do the varying members of the biotic community among themselves. However, such legislation should flatly negate any notion that humans have a right to exist at the expense of our natural resources, and the world biotic community as a whole, which necessarily depend on these same resources.

Meaningful public trust enactment entails social reform at virtually every level of our existence. Yet such reform must be made in order to maintain the integrity and existence of the world community as a whole. Now is the time for such reform.

Conclusion

Both the Marks and National Audubon decisions provide a starting point for judicial, as well as legislative, reform of the public trust doctrine. At the very least, "whenever feasible" should be interpreted as giving public trust resources priority over resource development. Further, the National Audubon court concluded that the doctrine protects navigable waters from activities on non-navigable waterways. This hold-

ing has very broad implications, and paves the way for application of the doctrine to harm caused to non-navigable waterways themselves (consistent with the trial court's holding in Cal. Trout). Finally, both decisions recognize that the public trust doctrine protects the resource as an end in itself. This holding deserves further recognition and makes the current balancing test fundamentally flawed.

The National Audubon proceedings provide a simple microcosm of the problems inherent in judicial and administrative implementation of the public trust doctrine. California legislators responded by purportedly performing the public trust balancing test and implicitly comparing public trust values with economic impacts. Such a response, although laudable insofar as it serves to protect Mono Lake, will prove incredibly short-sighted. Legislators should learn from the Mono Lake controversy, and act before a truly large scale Mono Lake situation arises-one where the biotic community can't be maintained or rejuvenated and all the economic bail-outs in the world fail to restore the lost equilibrium.

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