

Unearthing Subterranean Water Rights: The Environmental Law Foundation's Efforts to Extend California's Public Trust Doctrine

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INTRODUCTION	232
I. DEVELOPMENT OF THE PUBLIC TRUST DOCTRINE IN CALIFORNIA	234
A. "Navigable Waters" in California	234
B. Roots and Extension of the Public Trust Doctrine in California Common Law	234
C. The Public Trust Doctrine's Expanding Relationship with Water Rights in California	236
II. THE PUBLIC TRUST DOCTRINE IN OTHER STATES	238
III. ENVIRONMENTAL LAW FOUNDATION V. STATE WATER RESOURCES CONTROL BOARD	239
A. Factual and Legal Background	240
B. Assessment of Environmental Law Foundation's Complaint	241
C. Other Legal Arguments	244
CONCLUSION	245

INTRODUCTION

Although California has adapted to historical changes in water use patterns, coming decades pose unprecedented challenges.¹ Water demand will increase with California's growing population, which by some estimates will increase by more than fifteen million people between 1995 and 2020.² In addition, climate change is expected to affect California's water supply in two significant ways. First, the Sierra Nevada snowpack, which supplies water throughout the state during dry spring and summer months, may decrease by as much as seventy to ninety percent.³ Second, projected sea level rises heighten the risk of saltwater intrusion into the Sacramento-San Joaquin Delta, a major fresh water supply.⁴

California's groundwater reserves are also under stress. During a dry year or extended drought, groundwater withdrawals increase to account for insufficient surface water storage from precipitation and runoff.⁵ Groundwater overdrafts may have minimal effect during a particular year, but over time groundwater reserves will be substantially depleted. According to the California Department of Water Resources, Californians currently use groundwater faster than precipitation replenishes it.⁶ Moreover, there is limited oversight of groundwater extraction because California lacks both comprehensive state groundwater regulation and an effective monitoring system.⁷ In fact, appropriation of percolating groundwater⁸ does not require a permit from any

¹ See BRENT M. HADDAD, *RIVERS OF GOLD: DESIGNING MARKETS TO ALLOCATE WATER IN CALIFORNIA* (Island Press, 2000).

² *Id.* at 1 (citing California Water Plan Update, Bulletin 160-98 (DWR 1998a, at ES1-4)).

³ AMY LYND LUERS ET. AL., *THE CLIMATE CHANGE CENTER, OUR CHANGING CLIMATE: ASSESSING THE RISKS TO CALIFORNIA 6* (2006).

⁴ *Id.* at 7.

⁵ HADDAD, *supra* note 1, at 2.

⁶ *Id.*

⁷ CATHERINE FREEMAN, LEGISLATIVE ANALYST'S OFFICE, *LIQUID ASSETS: IMPROVING MANAGEMENT OF THE STATE'S GROUNDWATER RESOURCES* (2010), http://www.lao.ca.gov/reports/2010/rsrc/groundwater/groundwater_032410.pdf.

⁸ See CALIFORNIA DEPT. OF WATER RESOURCES, *CALIFORNIA'S GROUNDWATER, BULLETIN 118 82* (Update 2003), <http://www.water.ca.gov/groundwater/bulletin118update2003.cfm> (follow "California's Groundwater - Bulletin 118, Update 2003" hyperlink), which notes the difference between surface water and groundwater:

In California, two distinct legal regimes govern the appropriation of surface water and subterranean streams, and percolating groundwater. The California Water Code requires that water users taking water for beneficial use from surface watercourses and "subterranean streams flowing through known and definite channels" obtain water right permits or licenses from the State Water Resources Control Board (SWRCB) (Water Code § 1200 et seq.). Groundwater classified as percolating groundwater is not subject to the Water Code provisions concerning the appropriation of water, and a water user can take percolating groundwater without having a State-issued water right permit or license.

state agency.⁹

To address California's water issues, environmental organizations have focused on the public trust doctrine as a means to reevaluate and restructure California's water regime. Stated generally, the public trust doctrine is the legal principle that a state must hold title to submerged lands in its navigable waters in trust for public benefit.¹⁰ In 1970, Professor Joseph Sax revitalized the doctrine by arguing that it could be employed strategically on behalf of the environment.¹¹ Since then, academics and legal practitioners have sought to extend the public trust doctrine to a variety of public uses in state waters, including recreational purposes and environmental protections.¹² The Environmental Law Foundation ("ELF")¹³ is the public trust doctrine's latest proponent as it seeks to extend the doctrine to a new area of water rights: groundwater resources. In 2010, ELF filed a complaint against the California State Water Resources Control Board ("Water Board") and Siskiyou County, alleging failure to manage the Scott River's groundwater resources in accordance with California's public trust doctrine.¹⁴

This paper will review the evolution of California's public trust doctrine as applied to water rights, with specific focus on ELF's attempts to extend the doctrine to groundwater resources. Section I traces the doctrine's development in California. Section II compares and contrasts other state interpretations of the doctrine in relation to water rights, notably the state of Hawaii. Section III assesses whether the doctrine applies to groundwater resources in the Scott River sub-basin in the context of *Environmental Law Foundation v. State Water Resources Control Board*.

⁹ FREEMAN, *supra* note 7. Despite the lack of state groundwater regulation, there is increased engagement from local governments on the issue. In 1992, the passage of AB 3030 was supposed to facilitate local groundwater management by allowing local districts to submit their own plans. Yet, even though over 140 plans have been submitted statewide, many districts have not submitted plans, and some of the plans that have been submitted are inadequate. *See also* LEGISLATIVE ANALYST'S OFFICE, SAFE, CLEAN, AND RELIABLE DRINKING WATER SUPPLY ACT OF 2010 (2010), http://www.lao.ca.gov/ballot/2010/18_11_2010.aspx; CAL. WATER CODE § 79700 (operative if approved at the Nov. 6, 2012 election). The Safe, Clean, and Reliable Drinking Water Supply Act, intended for the 2010 November ballot but recently moved to 2012 November ballot, has potential to establish comprehensive state groundwater regulation.

¹⁰ *See* BLACK'S LAW DICTIONARY 1352 (9th ed. 2009).

¹¹ Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

¹² *See infra* text accompanying notes 26-49.

¹³ ELF is a California 501(c)(3) non-profit organization based in Oakland, California. *See* <http://www.envirolaw.org>.

¹⁴ First Amended Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief at 2, *Env'tl. Law Found. v. State Water Res. Control Bd.*, No. 34-2010-80000583 (Cal. Super. Ct. Oct. 15 2010) [hereinafter Complaint]. ELF brought this action with Pacific Coast Federation of Fishermen's Associations and Institute of Fisheries Resources. Pacific Legal Foundation and California Farm Bureau have intervened.

I. DEVELOPMENT OF THE PUBLIC TRUST DOCTRINE IN CALIFORNIA

A. “Navigable Waters” in California

Under the equal footing doctrine,¹⁵ California enjoyed the same rights as the original thirteen states upon its admission to the Union in 1850.¹⁶ Accordingly, California acquired title to federally defined “navigable waters”¹⁷ below the high water mark¹⁸ within its borders, subject only to federal interests in maintaining navigation and regulating interstate commerce.¹⁹ Moreover, once federal law confers title to the beds and banks of navigable waters on a state, that state may redefine property rights between its citizens and itself in relation to those submerged lands.²⁰ This discretion has been essential to the development of the public trust doctrine in California, because it allows the legislature and the courts to define the doctrine’s scope.²¹

B. *Roots and Extension of the Public Trust Doctrine in California Common Law*

The U.S. Supreme Court set forth the landmark holding of the public trust doctrine in American jurisprudence in *Illinois Central Railroad v. Illinois*.²² The Court held that the Illinois Legislature could not grant Chicago’s waterfront to private interests when such a grant would alienate a public resource. A state holds title to submerged land “in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have

¹⁵ See *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845) (explaining the equal footing doctrine: “[T]he shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. . . . [T]he new states have the same rights, sovereignty, and jurisdiction over this subject as the original states.”).

¹⁶ 58 Cal. Jur. 3d State of California § 1 (2011); California Admission Act, ch. 50, § 2, 9 Stat. 452 (1850).

¹⁷ The U.S. Supreme Court clarified the state title test in *Utah v. United States*, 403 U.S. 9 (1971). By virtue of its sovereignty, California gained title to the beds and banks of waters that were navigable at the time of its admission to the Union. Navigability is a federal question, but states can apply the federal test. See also *Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870), *superseded by statute*, Clean Water Act, 33 U.S.C. § 1362 (1972), as recognized in *Rapanos v. United States*, 547 U.S. 715 (2006) (“Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”).

¹⁸ See BLACK’S LAW DICTIONARY 1730 (9th ed. 2009) (defining high-water mark as “1. The shoreline of a sea reached by the water at high tide. . . . 2. In a freshwater lake created by a dam in an unnavigable stream, the highest point on the shore to which the dam can raise the water in ordinary circumstances. 3. In a river not subject to tides, the line that the river impresses on the soil by covering it long enough to deprive it of agricultural value.”).

¹⁹ 63 Cal. Jur. 3d Water § 736 (2011).

²⁰ *Hardin v. Jordan*, 140 U.S. 371, 381 (1891).

²¹ *Id.* at 383.

²² *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 435 (1892).

liberty of fishing therein freed from the obstruction or interference of private parties.²³ Significantly, the Court delineated three traditional public trust uses in navigable waters: navigation, commerce, and fishing.²⁴ In addition, the Court held that states could not abdicate their regulatory authority to protect these public trust uses.²⁵

Only five years after the *Illinois Central* decision, the California Supreme Court incorporated the *Illinois Central* doctrine into California law in *Oakland v. Oakland Water Front Co.*, signaling its early embrace of the public trust doctrine.²⁶ Almost seventy years later, when Professor Joseph Sax published his seminal article, California courts began interpreting the doctrine to extend beyond the traditional uses identified in *Illinois Central*. Three areas in particular caught the courts' attention: (1) recreational purposes and environmental protections; (2) submerged lands in navigable waters; and (3) wildlife preservation.²⁷

In 1971, the California Supreme Court first extended the public trust doctrine beyond traditional uses in *Marks v. Whitney*.²⁸ In holding that a private landowner could not divest his property adjoining tidelands of the burden of the public trust, the court extended the public trust doctrine to new public uses in navigable waters,²⁹ as well as to environmental preservation.³⁰ In addition, the court famously noted that the doctrine is "sufficiently flexible to encompass changing public needs" and that California need not apply the doctrine according to "an outmoded classification."³¹

Ten years later, the California Supreme Court again recognized the public trust doctrine's flexibility in *State v. Superior Court (Lyon)*³² and *State v. Superior Court (Fogerty)*.³³ Early California decisions had focused on the

²³ *Id.* at 452.

²⁴ *Id.*

²⁵ *Id.* at 453.

²⁶ *Oakland v. Oakland Water Front Co.*, 50 P. 268 (Cal. 1897). See also Richard M. Frank, *Forever Free: Navigability, Inland Waterways, and the Expanding Public Interest*, 16 U.C. DAVIS L. REV. 579 (1983).

²⁷ Frank, *supra* note 26, at 606.

²⁸ *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971).

²⁹ *Id.* at 380 ("Public trust easements are traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreational purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes.").

³⁰ *Id.* ("There is a growing public recognition that one of the most important public uses of the tidelands -- a use encompassed within the tidelands trust -- is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area. It is not necessary to here define precisely all the public uses which encumber tidelands.").

³¹ *Id.*

³² *State v. Superior Court (Lyon)*, 625 P.2d 239 (Cal. 1981).

³³ *State v. Superior Court (Fogerty)*, 625 P.2d 256 (Cal. 1981).

doctrine's application to California's coastal waters, fostering the notion that the public trust doctrine applied only to submerged lands in tidal waters.³⁴ However, in *Lyon* and *Fogerty*, the California Supreme Court held that the doctrine extended to non-tidal submerged lands as well.³⁵ These decisions indicated that by incident of statehood, California had acquired title to *all* lands under navigable bodies of water within its borders. In addition, both opinions reasserted the connection between the public trust doctrine and ecological preservation.³⁶

Beyond recognizing the value of maintaining ecosystems for wildlife survival, California courts have long found that the public trust doctrine encompasses wildlife itself.³⁷ The branch of the public trust doctrine that protects wildlife is separate but related to the common law public trust doctrine that applies directly to use of navigable waters.³⁸ In *Golden Feather Community Ass'n v. Thermalito Irrigation District*, the California Court of Appeal reaffirmed this fact by stating "[t]he general right and ownership of wild animals, the most important constituent of which are fish, is in the people of the state. The state's right to protect fish is not limited to navigable or otherwise public waters but extends to any waters where fish are habitated or accustomed to resort."³⁹ Put simply, wild fish in state waters constitute inalienable natural resources that California holds in trust for its people, whether those waters are navigable or non-navigable, public or private.⁴⁰

C. *The Public Trust Doctrine's Expanding Relationship with Water Rights in California*

The biggest coup for environmental protection based on California's public trust doctrine in the last fifty years is *National Audubon Society v. Superior*

³⁴ Frank, *supra* note 26, at 607-08.

³⁵ *Lyon*, 625 P.2d at 250 ("The application of the trust doctrine to tidal waters is not confined to those bodies which are huge in size and important for purposes of commerce; we can see no reason why such a test should not be applied to nontidal waters.").

³⁶ See, e.g., *Fogerty*, 625 P.2d at 259 ("[T]he shorezone has been reduced to a fraction of its original size in this state by the pressures of development. . . . The shorezone is a fragile and complex resource. It provides the environment necessary for the survival of numerous types of fish (including salmon, steelhead and striped bass), birds (such as the endangered species: the bald eagle and the peregrine falcon), and many other species of wildlife and plants. These areas are ideally suited for scientific study, since they provide a gene pool for the preservation of biological diversity.").

³⁷ *People v. Truckee Lumber Co.*, 48 P. 374, 374-75 (1897) ("[T]he fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the state").

³⁸ Pre-trial Amicus Curiae Brief of Cal. State Water Res. Control Bd. In Support of the United States, *Casitas Mun. Water Dist. v. United States*, No. 05-168 L (Fed. Cl. filed 2010).

³⁹ *Golden Feather Cmty. Ass'n v. Thermalito Irrigation Dist.*, 257 Cal. Rptr. 836, 840 (Ct. App. 1989) (citing *Truckee Lumber*, 48 P. at 374-75).

⁴⁰ *Id.*

Court.⁴¹ Here, the Audubon Society sued the City of Los Angeles, alleging that the diversion of freshwater streams—away from their natural destination of Mono Lake and into a city aqueduct—imperiled the lake’s scenic beauty and ecological integrity.⁴² The Audubon Society argued that the public trust doctrine required that Los Angeles reevaluate its prior appropriation system and reallocate water to preserve the lake.⁴³ The California Supreme Court found for the Audubon Society in three key holdings: (1) the public trust doctrine “protects navigable waters from harm caused by diversion of nonnavigable tributaries”⁴⁴; (2) the state retains supervisory “power to reconsider allocation decisions,” as well as an affirmative duty “to protect trust uses whenever feasible”⁴⁵; and (3) no party can claim “a vested right to divert waters [if] such diversions harm the interests protected by the public trust.”⁴⁶ These holdings show how far the scope of the public trust doctrine had extended beyond traditional uses since *Marks v. Whitney*.⁴⁷ Specifically, by interpreting the doctrine as capable of modifying water rights, even in non-navigable tributaries of navigable waters, the court orchestrated an unprecedented doctrinal expansion.⁴⁸

Subsequent cases have reaffirmed the holdings in *National Audubon*.⁴⁹ However, the public trust doctrine’s impact on water rights in California has largely stagnated since that decision; indeed, thirty years have passed without any significant developments in the doctrine. As California grapples with new water challenges, the public trust doctrine has again captured the imaginations of those who want to reform California’s water regime, especially concerning groundwater. California courts have currently declined to extend the doctrine, as defined in *National Audubon*, to groundwater,⁵⁰ but that does not mean

⁴¹ *Nat’l Audubon Soc’y v. Superior Court*, 658 P.2d 709 (Cal. 1983).

⁴² *Id.* at 711-12, 715-16.

⁴³ *Id.*

⁴⁴ *Id.* at 721.

⁴⁵ *Id.* at 728.

⁴⁶ *Id.* at 712.

⁴⁷ See generally *Nat’l Audubon*, 658 P.2d 709.

⁴⁸ *Id.* See Gregory A. Thomas, *Conserving Aquatic Biodiversity: A Critical Comparison of Legal Tools for Augmenting Streamflows in California*, 15 STAN. ENVTL. L.J. 3, 36-38 (1996); Timothy J. Conway, Note, *National Audubon Society v. Superior Court: The Expanding Public Trust Doctrine*, 14 ENVTL. L. 617, 638 (1984).

⁴⁹ See, e.g., *United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161, 202 (Ct. App. 1986) (quoting *Nat’l Audubon*, 658 P.2d at 728) (“In summary, the [Water] Board’s evaluation process was not only a valid exercise of its reserved jurisdiction but also, in retrospect, a proper exercise of its public trust authority as confirmed by our high court: ‘The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.’”). See also *State Water Res. Control Bd. Cases*, 39 Cal. Rptr. 3d 189, 272 (Ct. App. 2006) (quoting *Nat’l Audubon*, 658 P.2d at 728) (“The protection of recreational and ecological values ‘is among the purposes of the public trust.’”).

⁵⁰ See *Santa Teresa Citizen Action Group v. City of San Jose*, 7 Cal. Rptr. 3d 868, 884 (Ct. App. 2003) (“As respondents point out, the [public trust] doctrine has no direct application to

groups like ELF have stopped trying, or that such interpretations of the public trust doctrine are impracticable.

II. THE PUBLIC TRUST DOCTRINE IN OTHER STATES

Despite the national influence of the *National Audubon* decision, California in fact represents only one approach to the public trust doctrine.⁵¹ While some states interpret the public trust doctrine expansively to include ecological values and recreational purposes, others narrowly circumscribe it.⁵² As California considers emerging water rights issues, particularly whether the public trust doctrine extends to groundwater, other state approaches can be instructive. Such approaches can also help predict how California courts may evaluate ELF's claims.

Some states take a traditional approach to the public trust doctrine.⁵³ In Arizona, the state legislature defines "public trust purposes" as only those three purposes articulated in *Illinois Central*: commerce, navigation, and fishing.⁵⁴ In addition, Arizona courts have held that the public trust doctrine does not apply to the Groundwater Management Act of 1980,⁵⁵ and therefore cannot affect groundwater pumping.⁵⁶ Other states have experienced tension between state legislatures and courts in interpreting the public trust doctrine. For example, Idaho courts were expanding the public trust doctrine to non-traditional areas, such as recreation, wildlife, and water quality,⁵⁷ but the Idaho legislature restricted the doctrine's application and invalidated several public trust decisions by statute in 1996.⁵⁸

groundwater sources. To the extent it applies to Coyote Creek itself, there is no evidence in the record from which we may conclude that the potential irrigation of the surrounding area threatens the public's interest in this waterway. Furthermore, as is the case with the nuisance cause of action, the issue is not ripe for decision.").

⁵¹ See Michael C. Blum & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701, 701 (1995) (remarking that *National Audubon* ranks among the top ten most influential environmental law decisions).

⁵² See, e.g., IDAHO CODE ANN. § 58-1203 (Supp. 1997) (restricting the doctrine's applicability); *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984) (interpreting the doctrine expansively).

⁵³ See *infra* text accompanying notes 55-56. See, e.g., *State v. Harrub*, 10 So. 752 (Ala. 1892); *Kansas v. Akers*, 140 P. 637, 640 (Kan. 1914); *Skinner v. Osage County*, 822 S.W.2d 437, 444 (Mo. Ct. App. 1991); *Int'l Shoe Co. v. Heatwole*, 30 S.E.2d 537, 540 (W. Va. 1944).

⁵⁴ ARIZ. REV. STAT. § 37-1101(9) (2011) ("Public trust purposes" or "public trust values" mean commerce, navigation and fishing").

⁵⁵ ARIZ. REV. STAT. ANN. § 45-401 (1980). Arizona's legislature passed the Groundwater Management Act of 1980 to address overdrafts of groundwater that were threatening to destroy the economies of certain parts of the state.

⁵⁶ *Seven Springs Ranch, Inc. v. State ex rel. Ariz. Dep't of Water Res.*, 753 P.2d 161, 165-66 (Ariz. Ct. App. 1987).

⁵⁷ See Lisa Lombardi, *The Public Trust Doctrine in Idaho*, 33 IDAHO L. REV. 231, 243-52 (1996).

⁵⁸ IDAHO CODE ANN. §§ 58-1203 (Supp. 1997).

Other states recognize the flexibility of the public trust doctrine to adapt to changing societal values and needs.⁵⁹ Courts in New Hampshire, Vermont, New Jersey, and Washington have extended the doctrine to public uses and environmental purposes, but not to groundwater or non-navigable waters.⁶⁰ However, the state legislatures of both New Hampshire and Vermont have recently declared groundwater a public trust resource.⁶¹

The most expansive judicial interpretation of the public trust doctrine has occurred in Hawaii. Hawaii applies the public trust doctrine not only to traditional public water rights, like navigation, commerce, and fishing, but also to recreational uses, such as bathing, swimming, and boating.⁶² In light of the 1978 amendments to the Hawaii Constitution that codified the public trust doctrine,⁶³ the Hawaii Supreme Court further recognized the public's inalienable right to water use.⁶⁴ In *In re Water Use Permit Applications*, the Hawaii Supreme Court rejected the common law distinction between ground and surface water, noting "both categories represent no more than a single integrated source of water with each element dependent upon the other for its existence."⁶⁵ By this ruling, Hawaii held that the public trust doctrine applies to all water resources within the boundaries of the state without qualification; it is not limited to navigable waters or tributaries affecting navigable waters.

III. ENVIRONMENTAL LAW FOUNDATION V. STATE WATER RESOURCES CONTROL BOARD

Against this backdrop of California's common law and other state interpretations of the public trust doctrine, ELF hopes to extend California's public trust doctrine to groundwater.⁶⁶ Alleging the Water Board and Siskiyou County improperly managed groundwater in the Scott River sub-basin, ELF

⁵⁹ See, e.g., *State v. Cent. Vt. Ry.*, 571 A.2d 1128, 1130 (Vt. 1989) ("[T]he public trust doctrine retains an undiminished vitality. The doctrine is not 'fixed or static,' but one to 'be molded and extended to meet changing conditions and needs of the public it was created to benefit.'" (quoting *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984)).

⁶⁰ Opinion of the Justices, 649 A.2d 604, 609 (N.H. 1994) (quoting *Concord Co. v. Robertson*, 25 A. 718, 721 (N.H. (1889)) (explaining that New Hampshire's public trust doctrine applies to "all useful purposes"); *Cent. Vt. Ry.*, 571 A.2d at 1130. See also *Rettowski v. Dep't of Ecology*, 858 P.2d 232, 239 (Wash. 1993).

⁶¹ N.H. REV. STAT. ANN. § 481:1 (2007); VT. STAT. ANN. tit. 29, § 401 (2007).

⁶² *In re Water Use Permit Applications for the Waiahole Ditch*, 9 P.3d 409 (2000).

⁶³ HAW. CONST. Art. 11, § 1 (amended 1978) ("For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people."). See also *id.* Art. 11, §§ 3, 7.

⁶⁴ *Water Use Permit Applications*, 9 P.3d 409.

⁶⁵ *Id.* at 447 (quoting *Reppun v. Bd. of Water Supply*, 656 P.2d 57, 73 (1982)).

⁶⁶ See generally Complaint, *supra* note 14.

seeks two types of judicial relief. First, ELF requests a declaration that (1) the Water Board has regulatory authority under the public trust doctrine over groundwater hydrologically connected with the Scott River; and (2) Siskiyou County violated the public trust doctrine when it issued permits for groundwater pumping wells without analyzing potential impacts on the Scott River.⁶⁷ Second, ELF requests a writ enjoining Siskiyou County's issuance or renewal of well-drilling permits for groundwater extraction, until the County revises its practices to protect the Scott River's public trust resources.⁶⁸

A. *Factual and Legal Background*

ELF made a tactical choice to focus on the Scott River when it brought suit to apply the public trust doctrine to groundwater. By all accounts, the Scott River is a navigable waterway: as early as the 1820s, Shasta aboriginal tribes and fur traders used it for boating, fishing, trapping, hunting, and trading.⁶⁹ Today Californians continue to use it for recreational activities, like boating, rafting, and fishing; it also supplies water to local communities for domestic and agricultural purposes.⁷⁰

In addition, a hydrological link exists between the supply of groundwater in the Scott River sub-basin and the Scott River's surface flows.⁷¹ ELF alleges that prior groundwater rights adjudications have upset these flows by inadequately regulating human activity.⁷² In particular, ELF alleges that a 1980 Water Board order⁷³ regulating groundwater within a 500-foot zone adjacent to the river left groundwater beyond this zone "unregulated, unmanaged and unprotected from hundreds of well owners and water users who extract groundwater to either substitute for or supplement surface water allocations."⁷⁴

ELF further alleges that unregulated withdrawals of groundwater in the Scott

⁶⁷ *Id.* at 1.

⁶⁸ *Id.* at 1-2.

⁶⁹ See GAIL L. FIORINI-JENNER AND MONICA JAE HALL, WESTERN SISKIYOU COUNTY: GOLD AND DREAMS 7-8 (Arcadia Publishing 2002); SABRINA LITTON, U.C. DAVIS CENTER FOR WATERSHED SCIENCES, A REVIEW OF THE HISTORY OF WATER USE THROUGHOUT THE KLAMATH RIVER BASIN (2003), http://watershed.ucdavis.edu/scott_river/docs/reports/Sabrina_Litton.pdf.

⁷⁰ Complaint at 6. See generally THOMAS HARTER & RYAN HINES, U.C. DAVIS GROUNDWATER COOPERATIVE EXTENSION PROGRAM, SCOTT VALLEY COMMUNITY GROUNDWATER STUDY PLAN: FINAL REPORT (2008), http://groundwater.ucdavis.edu/Publications/GW_Study_Plan_2008-02-11-H.pdf. See also NORTH COAST REGIONAL WATER QUALITY CONTROL BOARD, BASIN PLAN FOR THE NORTH COAST REGION 2-1.00 (2011), http://www.waterboards.ca.gov/northcoast/water_issues/programs/basin_plan/083105-bp/03_bu.pdf; Scott River Adjudication, Decree No. 30662, at 11, Superior Court for Siskiyou County, California State Water Resources Control Board (Jan. 30, 1980).

⁷¹ Complaint at 7. See HARTER & HINES, *supra* note 70, at 24, 41.

⁷² Complaint at 7.

⁷³ Scott River Adjudication, Decree No. 30662, at 11, Superior Court for Siskiyou County, California State Water Resources Control Board (Jan. 30, 1980).

⁷⁴ Complaint at 7.

River sub-basin have harmed public trust resources. Specifically, base water flows have declined during dry summer months; water quality has deteriorated; populations of chinook salmon and steelhead trout have decreased from historical abundances; and coho salmon was recently listed under the federal Endangered Species Act as an endangered species.⁷⁵

B. Assessment of Environmental Law Foundation's Complaint

In arguing that the Water Board and Siskiyou County violated the public trust doctrine, ELF relies on *National Audubon*. *National Audubon's* holding that the doctrine “protects navigable waters from harm caused by diversion of nonnavigable tributaries” is particularly important.⁷⁶ ELF maintains that the Scott River, like Mono Lake, is a navigable waterway, and that its health is contingent on a hydrological connection between water sources.⁷⁷ That said, it is important to note that *National Audubon* does not eliminate the traditional common law requirement of “navigability” for the public trust doctrine to apply.⁷⁸ *National Audubon* requires that non-navigable waters be linked to navigable, public trust waterways if they are to be protected by the public trust doctrine.⁷⁹ Therefore, any argument that seeks to establish that the doctrine protects groundwater without showing an interconnection with navigable waters will likely fail. Accordingly, ELF must establish that (1) the Scott River is a navigable waterway; and (2) either the underlying groundwater resources constitute diverted non-navigable tributaries, like in *National Audubon*, or the groundwater resources implicate the public trust doctrine because they are sufficiently linked with the Scott River.

The court must determine whether the Scott River is a navigable waterway.⁸⁰ In this regard, ELF seems confident, asserting that the Scott River is a navigable waterway in its complaint.⁸¹ Moreover, Shasta aboriginal tribes and fur traders, who navigated the river before California's statehood, further underscore this point.⁸² As such, there is little doubt that the court will find the Scott River navigable. The public trust doctrine will then apply to the river (although not necessarily its groundwater) because, as held in *Lyon and Fogerty*, the doctrine

⁷⁵ *Id.* at 7-8. See Final Listing Determination for Evolutionarily Significant Units of West Coast Steelhead, 62 Fed. Reg. 43,974 (Aug. 18, 1997) (to be codified at 50 C.F.R. pt. 227, redesignated 50 C.F.R. § 223.102 (2010)). See also Endangered Species Act of 1978, 16 U.S.C. § 1531, et seq. (2006).

⁷⁶ Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 721 (Cal. 1983).

⁷⁷ Complaint at 10-11.

⁷⁸ See *supra* note 17.

⁷⁹ Nat'l Audubon, 658 P.2d at 721.

⁸⁰ See *supra* note 17.

⁸¹ See Complaint at 6.

⁸² Note that ELF may expound on the history of the Scott River in later court filings.

extends to submerged lands in non-tidal waters.⁸³

ELF already knows the Water Board's position on whether California can regulate groundwater resources in the Scott River sub-basin. The Water Board contends that it lacks authority to regulate percolating groundwater resources in the Scott River sub-basin, regardless of whether the groundwater is hydrologically linked to public trust waters, because the Water Board can only regulate groundwater in subterranean streams.⁸⁴ However, the legal distinction between percolating groundwater and subterranean streams is inconsistent with scientific understandings of hydrology.⁸⁵ In fact, the Water Board's own study emphasizes this inconsistency, noting that "the distinction between percolating groundwater and subterranean streams is meaningless, or nearly so."⁸⁶ Therefore, the Water Board should have authority over the groundwater resources of the Scott River. This strengthens ELF's argument because the groundwater in the Scott River sub-basin is hydrologically linked to the Scott River's surface flows, which is similar to the relationship of the "non-navigable tributaries" to Mono Lake in *National Audubon*.

Interestingly, ELF's complaint does not define the groundwater resources in question as "non-navigable tributaries," which would bring them under the public trust protections articulated in *National Audubon*. Instead, ELF seeks to extend *National Audubon* to include "groundwater which is hydrologically connected to navigable, public trust waterways."⁸⁷ As discussed, ELF presents a strong argument because of the arbitrariness of the legal distinction between percolating groundwater and subterranean streams.⁸⁸ Nevertheless, ELF might have sought a broader result by arguing that the public trust doctrine applies regardless of whether groundwater resources constitute "non-navigable tributaries" *per se*. The hydrological link between groundwater and surface water is itself sufficient to implicate the public trust doctrine, because unregulated groundwater withdrawals are harming a public trust waterway, the Scott River.⁸⁹

⁸³ See *State v. Superior Court (Lyon)*, 625 P.2d 239 (Cal. 1981); *State v. Superior Court (Fogerty)*, 625 P.2d 256 (Cal. 1981).

⁸⁴ See Complaint at 9-10; FREEMAN, *supra* note 7. See also *supra* note 8.

⁸⁵ See FREEMAN, *supra* note 7.

⁸⁶ JOSEPH L. SAX, REVIEW OF THE LAWS ESTABLISHING THE SWRCB'S PERMITTING AUTHORITY OVER APPROPRIATIONS OF GROUNDWATER CLASSIFIED AS SUBTERRANEAN STREAMS AND THE SWRCB'S IMPLEMENTATION OF THOSE LAWS, FINAL REPORT (SWRCB No. 0-076-300-0, Jan. 19, 2002).

⁸⁷ Complaint at 10.

⁸⁸ See FREEMAN, *supra* note 7.

⁸⁹ See HARTER & HINES, *supra* note 70, at 24, 41-43; ENVIRONMENTAL LAW FOUNDATION, FREQUENTLY ASKED QUESTIONS, CALIFORNIA'S PUBLIC TRUST DOCTRINE, http://www.envirolaw.org/documents/FAQFINALwithPCFFAedits_000.pdf ("Under the California Supreme Court's reasoning in Mono Lake, just as diversions from non-navigable upstream tributaries can be regulated to protect the public trust uses of Mono Lake, so too the Scott's hydrologically connected groundwater 'tributaries' should be regulated to protect the public trust resources of the Scott

ELF also argues that groundwater withdrawals from the Scott River sub-basin endanger public trust resources. *Whitney, Lyon, Fogerty, and Thermalito Irrigation District* emphasize that the public trust doctrine protects ecological values.⁹⁰ In *National Audubon*, the California Supreme Court declared that no party can claim “a vested right to divert waters once it becomes clear that such diversions harm the interests protected by the public trust.”⁹¹ If ELF establishes that the groundwater is hydrologically linked to the Scott River, it seems clear that unregulated groundwater withdrawals harm interests protected by the public trust doctrine. Among others, these interests include the river’s ecological health, as well as its aesthetic pleasures.⁹²

Moreover, California recognizes that fish, in particular, are resources held in trust for the people of California.⁹³ In the Scott River, these include the coho and chinook salmon and the steelhead. In its Complaint, ELF asserts that these fish are public trust resources harmed by unregulated groundwater withdrawals.⁹⁴ However, though ELF clearly recognizes the branch of the public trust doctrine that protects wildlife itself, it does not base its argument on this branch of the doctrine.⁹⁵ This seems strategic because by relying too heavily on this branch of the doctrine that protects wildlife, ELF may obtain the specific relief it seeks but not the general holding.⁹⁶ That is, the court could order the Water Board and Siskiyou County to protect fish, but the Water Board and Siskiyou County might do so without regulating groundwater. Even if the court ordered the Water Board and Siskiyou County to protect fish by regulating groundwater, the result would be fact-specific, setting a difficult evidentiary burden to overcome since coho salmon are listed as endangered species.⁹⁷ Rather, ELF seeks a broad holding that the public trust doctrine applies to groundwater hydrologically linked to surface flows of a public trust waterway. Such a holding would allow other parties in California to make similar arguments to facilitate statewide groundwater regulation. Therefore, ELF rightly focuses on the Water Board’s authority to protect groundwater

River.”). Note that in later court filings, ELF may emphasize the connection to the holding in *National Audubon*. ELF never uses the language groundwater “tributaries” in its Complaint.

⁹⁰ See *State v. Superior Court (Lyon)*, 625 P.2d 239 (Cal. 1981); *State v. Superior Court (Fogerty)*, 625 P.2d 256 (Cal. 1981); *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971); *Golden Feather Cmty. Ass’n v. Thermalito Irrigation Dist.*, 257 Cal. Rptr. 836 (Ct. App. 1989).

⁹¹ *Nat’l Audubon Soc’y v. Superior Court*, 658 P.2d 709, 712 (Cal. 1983).

⁹² See, e.g., *Fogerty*, 625 P.2d at 259 (“The shorezone. . . provides the environment necessary for the survival of numerous types of fish . . . birds . . . and many other species of wildlife and plants.”). See also *Nat’l Audubon*, 658 P.2d at 712 (“Mono Lake is a scenic . . . treasure of national significance.”).

⁹³ See *People v. Truckee Lumber Co.*, 48 P. 374, 374-75 (Cal. 1897).

⁹⁴ See Complaint, *supra* note 14, at 7-9.

⁹⁵ See *id.* at 9-13.

⁹⁶ Note that ELF may tie its argument to the branch of the public trust doctrine unrelated to navigable waters in later court filings.

⁹⁷ See 50 C.F.R. § 223.102 (1999).

hydrologically connected to navigable, public trust waterways under the public trust doctrine.

C. Other Legal Arguments

ELF may advance other arguments during the pendency of the case. First, ELF's complaint does not acknowledge *National Audubon's* holding that the state must "take the public trust into account in the planning and allocation of water resources, and to protect public trust uses *whenever feasible*."⁹⁸ The "whenever feasible" language gives the Water Board and Siskiyou County leeway to argue that more stringent regulation of groundwater is infeasible. They might argue that such regulation would harm local communities, which use the water for domestic and agricultural purposes. However, this argument is weak because, as is apparent from the ecological health of the river, unregulated groundwater withdrawals are inconsistent with the public trust doctrine.⁹⁹ Since Siskiyou County has not commissioned a scientific study to determine whether the effects of groundwater regulation would adversely affect local communities, Siskiyou County lacks data to rebut ELF's position.¹⁰⁰ Therefore, it seems that regulating groundwater to protect public trust resources is not only "feasible" but also necessary.

Second, as the matter approaches trial ELF should cite additional statutory support for its interpretation of the public trust doctrine, since arguments based on both statutory and common law are stronger.¹⁰¹ For example, section 66478.3 of the California Government Code states: "The Legislature further finds and declares that it is essential to the health and well-being of all citizens of this state that public access to public natural resources be increased. It is the intent of the Legislature to increase public access to public natural resources."¹⁰² California's legislature clearly supports increased public use of public trust resources.¹⁰³

⁹⁸ Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 728 (Cal. 1983) (emphasis added). See generally Complaint.

⁹⁹ See Complaint at 13. See HARTER & HINES, *supra* note 70, at 41-43, 44-47.

¹⁰⁰ See Complaint at 11. See generally HARTER & HINES, *supra* note 70. A study plan prepared for North Coast Regional Water Quality Control Board, Siskiyou Resource Conservation District, and Siskiyou County discusses the need for additional research regarding the extent of the interconnection between groundwater and surface flows in the Scott River. The plan also notes the need for additional research on how groundwater pumping affects the river's health.

¹⁰¹ Note that the Hawaii Supreme Court's holding in *In re Water Use* was based in large part on that court's interpretation of the Hawaiian Constitution, which had codified the public trust doctrine. See *supra* note 63.

¹⁰² CAL. GOV'T CODE § 66478.3 (2011).

¹⁰³ See CAL. WATER CODE § 1201 (2010) ("All water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes...or otherwise appropriated, is hereby declared to be public water of the State and subject to appropriation in accordance with the provisions of this code."); *Id.* at § 1243 ("[These provisions establish that] [t]he use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water."). See also CAL. CONST. art. X, § 2 (The reasonable use doctrine requires state water

Third, ELF's complaint does not mention the public trust doctrine's ability to adapt to changing societal needs and values.¹⁰⁴ Specifically, the California Supreme Court has held that the public trust doctrine is "sufficiently flexible to encompass changing public needs."¹⁰⁵ Because California's water regime faces new challenges in the coming decades, an argument could be advanced that protecting groundwater with the public trust doctrine meets a changing societal need.

CONCLUSION

The California public trust doctrine encompasses a variety of public uses. However, its extension into water rights has stalled since *National Audubon*.¹⁰⁶ Although California courts have declined to extend the public trust doctrine to groundwater, prior cases failed because the claim was not ripe, and because plaintiffs failed to show the connection between the groundwater resources and navigable public trust waterways.¹⁰⁷ ELF's complaint is more likely to succeed for two reasons. First, the claim is ripe. The Scott River has suffered definitive harm in terms of diminished water quality and fish populations. Second, ELF establishes that the Scott River is a navigable waterway, with its health contingent on the hydrological connection between surface flows and underlying groundwater. Accordingly, the court should give due consideration to ELF's suit, and it is this paper's position that ELF should prevail.

Even if ELF does not succeed in this action, California has other options to regulate groundwater. As shown in Arizona, Idaho, Vermont, and New Hampshire, state legislatures have the power to expand or restrict the public trust doctrine by statute.¹⁰⁸ Even more generally, the California state legislature may expressly regulate groundwater without connecting it to the public trust doctrine.¹⁰⁹ Moreover, California's public trust doctrine is not the only way to compel the courts to bring groundwater under the purview of state law.¹¹⁰ Therefore, regardless of the outcome of ELF's potentially historic suit, the fight

resources to be put "to beneficial use to the fullest extent" possible).

¹⁰⁴ See, e.g., *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971). See generally Complaint.

¹⁰⁵ *Marks*, 491 P.2d at 380.

¹⁰⁶ See *supra*, Section I(C).

¹⁰⁷ See, e.g., *Santa Teresa Citizen Action Group v. City of San Jose*, 7 Cal. Rptr. 3d 868, 884 (Ct. App. 2003) ("[T]here is no evidence in the record from which we may conclude that the potential irrigation of the surrounding area threatens the public's interest in this waterway. . . . [and] the issue is not ripe for decision.").

¹⁰⁸ See ARIZ. REV. STAT. ANN. § 45-401 (1980); IDAHO CODE ANN. § 58-1203 (Supp. 1997); N.H. REV. STAT. ANN. § 481:1 (2007); VT. STAT. ANN. tit. 29, § 401 (2007).

¹⁰⁹ See LEGISLATIVE ANALYST'S OFFICE, SAFE, CLEAN, AND RELIABLE DRINKING WATER SUPPLY ACT OF 2010. http://www.lao.ca.gov/ballot/2010/18_11_2010.aspx; CAL. WATER CODE § 79700 (operative if approved at the Nov. 6, 2012 election).

¹¹⁰ See CAL. CONST. art. X, § 2. See also Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1251 et seq. (2006).

to regulate California's groundwater will continue.