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# Using The Public Trust Doctrine To Achieve Proportionate Reductions of Water Diversions From The Delta

*Michael Graf\**

## I. INTRODUCTION

On December 15, 1993, the United States Environmental Protection Agency<sup>1</sup> announced newly proposed water quality standards for the San Francisco Bay - San Joaquin Delta Estuary<sup>2</sup> in order to protect the natural habitat and fish and wildlife uses occurring there.<sup>3</sup> The Proposed Rule required reductions in the amount of freshwater diversions in order to reduce high salinity levels in the Delta.<sup>4</sup> Although the Proposed Rule overrode previous water quality standards set by the California State Water Resources Control Board<sup>5</sup>, the EPA did not attempt to preempt the State's traditional authority to allocate water according to state law. Instead, the Proposed Rule noted that, pursuant to section 101(g) of the federal Clean Water Act (33 U.S.C. 1251(g)), the Water Board has "full discretion in determining the source of water flows necessary to meet [the proposed] criteria."<sup>6</sup>

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\* The author would like to thank Professor Joseph L. Sax for his suggestion of the topic of this essay.

1. Hereinafter referred to as the "EPA."

2. Hereinafter referred to as the "Delta."

3. Water Quality Standards for Surface Waters of the Sacramento River, San Joaquin River, and San Francisco Bay and Delta of the State of California, 59 Fed. Reg. 810 (proposed January 6, 1994) (Hereinafter referred to as the "Proposed Rule.")

4. The EPA's water quality regulations relating to salinity levels represent an attempt to restore habitat conditions in the Delta to those existing in the late 1960s and early 1970s. The Proposed Rule states that "fully offsetting the impacts of water development should be the goal of long-term planning efforts by the State Board and other agencies" but that "this goal is no longer reasonably attainable in the short term, given the existing physical facilities and water project operations in the Delta." Proposed Rule, 59 Fed. Reg. at 820.

5. Hereinafter referred to as the "Water Board".

6. Proposed Rule, 59 Fed. Reg. at 821.

Despite deferring to the State's authority over water allocation, the Proposed Rule urged the Water Board to spread the burden of meeting increased instream flow requirements "across as broad a spectrum of water users as possible."<sup>7</sup> The Proposed Rule specifically endorsed the water allocation concept adopted by the Water Board in Decision 1630.<sup>8</sup> In D-1630, the Water Board proposed reducing freshwater diversions of major water users in the Delta on a proportionate basis without regard to the relative water right priorities among these water users.<sup>9</sup>

The proportionate reduction approach originally adopted by the Water Board and subsequently endorsed by the EPA conflicts with traditional California water rights law which establishes strict priorities among water users and places the burden of reduced water availability squarely on those water users with the lowest priority.<sup>10</sup> The legal justification offered by the Water

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7. Proposed Rule, 59 Fed. Reg. at 822.

8. Draft Water Rights Decision 1630, State Water Resources Control Board, California Environmental Protection Agency, December 1992 (Hereinafter referred to as "D-1630").

9. D-1630 at 103-104. In contrast to the Proposed Rule, the EPA's final rule on Delta water quality regulations, subsequently published on January 24, 1995, does not specifically recommend any particular water allocation *among* consumptive users. See *infra* note 57, Water Quality Standards for Surface Waters of the Sacramento River, the San Joaquin River, and the San Francisco Bay and Delta of the State of California, 60 Fed. Reg. 4664 (1995) (hereinafter cited as the "Final Rule"). The Final Rule states that it is "part of an interagency effort designed to ensure that the fish and wildlife resources of the San Francisco Bay/Sacramento - San Joaquin Delta Estuary (Bay/Delta) are protected and to minimize the likelihood of future listings of Bay/Delta species under the Endangered Species Act." *Id.* The Proposed and Final Rules were implemented under the authority of the Federal Clean Water Act, 42 U.S.C. section 1301 et. seq., and are part of a coordinated federal response to water management issues in the San Francisco Bay and Delta between the EPA, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service and the U.S. Bureau of Reclamation. In 1993, these four agencies formed the Federal Environmental Directorate (known as "Club Fed") for the purpose of assuring that federal agencies worked in a coordinated manner in taking actions under their respective statutory authorities that could affect the Delta ecosystem. In addition to the Clean Water Act, federal authority for improving water quality in the Delta by reducing fresh water diversions exists under the Endangered Species Act, 16 U.S.C. section 1531 et. seq. and the Central Valley Project Improvement Act, Pub. L. No. 102-575, §§ 3401-3412, 106 Stat. 4706, 4769 (1992).

10. See, e.g., *Irwin v. Phillips*, 5 Cal. 140, 146 (1855). The Proposed Rule also stated that spreading the burden of reducing salinity in the Delta among as many users as possible was a "matter of fairness" since, presumably, each user was contributing to the problem by removing fresh water which would otherwise be flowing into the Delta. Proposed Rule, 59 Fed. Reg. at 821. Whether proportionate reduction represents an "equitable" solution to the question of how to reallocate water resources from consumptive to instream uses given the traditional adherence of California water law to strict temporal priorities among users is, of course, a mat-

Board in D-1630 for proportionate reduction among all major users, as compared to reduction based on seniority, was 1) rights reserved by the Water Board in appropriation permits; 2) the reasonable use doctrine as stated in the state Constitution and the state Water Code; and 3) the common law public trust doctrine.<sup>11</sup> The purpose of this article will be to examine each of these legal justifications for proportionate reduction. The article will conclude that the public trust doctrine offers the best legal and conceptual grounds for proportionate reduction of water diversions without regard to the relative priorities existing among the water users.

## II.

### BACKGROUND

#### A. *California Water Rights Law*

California has a dual system of water rights, using both the riparian and appropriation doctrines. The riparian doctrine, adopted from English common law upon California's entry into the union in 1850<sup>12</sup>, provides that a landowner may divert water flowing adjacent to the landowner's property and that each riparian user is equally entitled to the water from the common stream regardless of priority in time.<sup>13</sup> A corollary to this common ownership is that in times of water scarcity, all riparian users are required to share proportionately in the reduced amount of available water.<sup>14</sup> The 19th century custom of diverting stream waters for gold mining led to California's adoption of the appropriation doctrine.<sup>15</sup> Under this doctrine, available water may be appropriated, provided that it is put to reasonable and beneficial use.<sup>16</sup> Unlike the riparian doctrine, the appropriation doctrine establishes a priority system based on "first in time, first in

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ter of debate. The Final Rule does note, however, that the costs of complying with the required reductions in freshwater diversions will be significantly higher for urban and agricultural users under a priority, rather than a proportional reduction system. This is particularly true in years of water shortage due to drought. Final Rule, 60 Fed. Reg. at 4701-03.

11. D-1630 at 99-103.

12. *Lux v. Haggin*, 69 Cal. 255, 279 (1886).

13. *Miller & Lux, Inc. v. Enterprise Canal & Land Co.*, 169 Cal. 415, 440 (1915).

14. *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82, 101 (1986) (Hereinafter cited in the main text as *U.S. v. SWRCB.*); *Prather v. Hoberg*, 24 Cal. 2d 549, 559-60 (1944).

15. *Supra* note 10 at 147.

16. *Jennison v. Kirk*, 98 U.S. 453, 456-61 (1878); *See also* Cal. Water Code § 1240 (Deering 1977) which states:

right."<sup>17</sup> Thus, a senior appropriator is entitled to its full allotment of water before a junior appropriator may divert from the stream. In times of water scarcity, the junior appropriator is obliged to reduce and ultimately cease its diversions before the senior appropriator is required to alter its water use pattern.<sup>18</sup>

In 1914, the legislature enacted a statutory permit system for appropriating water.<sup>19</sup> The legislation delegated permit-issuing authority to the state agency precursor to the Water Board. Under the permit system, a water user proposing to appropriate water must apply to the Water Board, which will grant an appropriation permit upon a determination that 1) available water exists to be appropriated;<sup>20</sup> 2) the intended use is beneficial;<sup>21</sup> and 3) the appropriation will be in the public interest.<sup>22</sup> The Water Board may issue appropriation permits subject to terms and conditions which will "best develop, conserve and utilize in the public interest the water sought to be appropriated."<sup>23</sup>

In addition to these requirements, both riparian and appropriation water rights are subject to Article X, Section 2 of the California Constitution which requires that "the water resources of the State be put to beneficial use to the fullest extent of which

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The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases.

17. *Supra* note 10, at 147.

18. *Supra* note 14, at 131, n.25; *see also*, *Joerger v. Pacific Gas and Elec. Co.*, 207 Cal. 8, 26 (1929).

19. Cal. Water Code §§ 1200-1801 (Deering 1977). The statutory permit procedure constitutes the exclusive method of acquiring the right to appropriate water. *People v. Shirokow*, 26 Cal. 3d 301, 306 (1980).

20. *Id.* § 1375(d). Sections 1243 and 1243.5 provide that, in determining the amount of water available for appropriation, the Water Board may consider the in-stream flow requirements for the beneficial uses of recreation, fish and wildlife preservation and enhancement and water quality regulation.

21. *Id.* § 1375(c). Section 1254 states that "domestic use is the highest use and irrigation is the next highest use of water." Section 1257 states that beneficial uses include "domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, mining and power purposes and any amount specified to be protected in any relevant water quality control plan." Section 1243 states that the "use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water."

22. *Id.* § 1255. In determining whether an appropriation will be in the "public interest" the Water Board must consider the relative benefit of "all beneficial uses of the water concerned" and any reuse or reclamation of the appropriated water proposed by the applicant.

23. *Id.* § 1253. Section 1257.5 authorizes the Water Board to establish streamflow requirements necessary to protect fish and wildlife as conditions to appropriation permits and licenses.

they are capable, and that the waste or unreasonable use or . . . method of use of water be prevented.”<sup>24</sup> The state Water Code reiterates the reasonable use requirement of the state Constitution and gives the Water Board the authority to take all appropriate actions to prevent the unreasonable use of water resources.<sup>25</sup>

The California water rights system establishes priorities among water users. Riparians do not have relative priorities among themselves but do enjoy priority over post-patent appropriators.<sup>26</sup> Within the group of appropriators, priority is established by the rule of “first in time, first in right.”<sup>27</sup> Traditionally, priority under the appropriation system was established at the time water was diverted.<sup>28</sup> Under California’s appropriative permit system, priority is established at the time a permit application is

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24. Article X, section 2 was enacted in 1928 in response to the California Supreme Court’s decision in *Herminghaus v. Southern California Edison Company*, 252 P. 607 (1926). In *Herminghaus*, the California Supreme Court held that the common law “reasonableness limitation” existing between two appropriators did not apply between a riparian and an appropriator. *Id.* at 614-15.

Article X, section 2 imposes a “reasonableness” requirement on *all* water users regardless of their relative priority or legal status. Article X, section 2 states:

It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposed for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

25. Cal. Water Code §§ 100, 275. *See also*, *Imperial Irrigation Dist. v. State Water Resources Control Bd.*, 225 Cal. App. 3d 548, 560-561 (1990); *infra* note 78.

26. In times of water shortage, all riparians must curtail their usage in order that they share the available water. *Rancho Santa Margarita v. Vail*, 81 P. 2d 533, 562-64 (1938); *U.S. v. SWRCB*, 182 Cal. App. 3d at 104. Since riparian rights “vest” with the granting of land patents, and since almost all riparian land patents predate the earliest appropriations, riparians as a general rule enjoy priority over appropriators. *See Lux v. Haggin*, 69 Cal. at 344-349; *see also Herminghaus*, 252 P. at 619-21; *San Bernadino v. Riverside*, 198 P. 784, 787-89 (1921).

27. *Irwin v. Phillips*, 5 Cal. at 147.

28. *Id.*

first filed.<sup>29</sup> Under the priority system, a senior rights holder is allowed its entire allotment of water before water will be available to a water user holding a junior priority.<sup>30</sup> Thus, California's priority system is in direct conflict with the concept of proportionate reduction among water users.<sup>31</sup>

### B. *Federal and State Efforts to Improve Delta Water Quality*

The Delta is the largest estuary on the west coast, draining the Sacramento and San Joaquin river systems in a network of islands and channels covering an approximate 1753 square mile area.<sup>32</sup> A key element of the Delta estuary ecosystem is the mixing of fresh water outflow from the rivers with saltwater flowing east with the tides from San Francisco Bay.<sup>33</sup> The fresh and saltwater mixing creates a distinct environment which supports a vast fishery composed of over 120 fish species as well as important waterfowl and shorebird habitat.<sup>34</sup>

#### 1. Water Use in the Delta

A variety of water users access the freshwater flowing into the Delta. The two largest users are California's major water distribution systems, the Central Valley Project and the State Water Project.<sup>35</sup> Together the CVP and the SWP hold rights to approximately 60% of the fresh water flowing into the Delta which has been allocated for consumptive use.<sup>36</sup> The remaining Delta water users include local city and county water districts, irrigation districts, utilities and farmers.<sup>37</sup> The result of these fresh-

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29. Cal. Water Code § 1450.

30. See *supra* note 18.

31. For a more thorough discussion of the conflict between proportionate reduction and traditional appropriation law, See Dunning, *State Equitable Apportionment of Western Water Resources*, 6 NEB. L. REV. 76 (1987).

32. Proposed Rule, 59 Fed. Reg. at 810.

33. *Id.*; U.S. v. SWRCB, 182 Cal. App. 3d at 107.

34. Proposed Rule, 59 Fed. Reg. at 810.

35. Hereinafter respectively referred to as the "CVP" and the "SWP".

36. D-1630 at 51. According to D-1630, the CVP has diversion and storage rights totalling 62,200 cubic feet of water per second ("cfc") and 13.7 million acre feet ("MAF"), the SWP has diversion and storage rights totalling 23,500 cfc and 3.7 MAF and the remaining "major water users" have diversion and storage rights of 107,000 cfc and 10.9 MAF respectively. D-1630 qualifies these statistics, however, by noting that, due to duplication of water rights and the fact that not all water rights are pursued to full development, the actual total rights are less than these figures. *Id.*

37. Decision 1630, Table I: Major Water Right Holders in Bay Delta Watershed. The Final Rule states that there are approximately 7,000 permitted water diverters

water diversions has been a relative increase in salinity in the estuary, which has had an adverse impact on the survival rates of juvenile fish species.<sup>38</sup>

## 2. EPA and Water Board Attempts to Regulate Salinity Levels

In 1978, the Water Board adopted Decision 1485, a water quality control plan to protect beneficial uses within the Delta.<sup>39</sup> In order to protect fish and wildlife, the Water Board established minimum salinity and flow criteria to maintain the Delta's fisheries at levels that would have existed in the absence of the CVP and the SWP.<sup>40</sup> In 1980, the EPA reviewed and approved D-1485, subject to the conditions that 1) the Water Board continue to monitor fish populations and revise criteria where necessary; and 2) the State Board implement additional criteria to protect the Suisun Marsh ecosystem.<sup>41</sup> Over the next decade, it became clear that the implemented standards were not achieving the

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using water from the Delta watershed. Final Rule, 60 Fed. Reg. at 4665. The Final Rule also notes that 75-85% of the State's developed water is used for irrigation purposes by agriculture, irrigating over 4.5 million acres throughout the State, and that the Bay Delta watershed also provides all or part of the drinking water for over 18 million people. *Id.*

38. The Final Rule states that water development projects divert, on average, 50% of the natural flow in the Delta. Final Rule, 60 Fed. Reg. at 4665. *See also* Proposed Rule, 59 Fed. Reg. at 814-815. The adverse impacts of increased freshwater diversions on the Delta ecosystem were in large part responsible for the decisions of the National Marine Fisheries Service to list the winter-run chinook salmon as federally "endangered" on January 4, 1994, 59 Fed. Reg. 440, and the U.S. Fish and Wildlife Service to list the Delta smelt as "threatened" on March 3, 1993, 58 Fed. Reg. 12854. In addition, the Sacramento splittail has been recently proposed for listing as a threatened species and listings for the spring-run chinook salmon, green sturgeon and the Red Hills roach appear to be warranted. 60 Fed. Reg. at 4665.

39. Hereinafter referred to as "D-1485". The beneficial uses designated by the Water Board were 1) municipal and industrial; 2) agricultural; and 3) fish and wildlife. 59 Fed. Reg. at 810.

40. Referred to in *U.S. v. SWRCB*, 182 Cal. App. 3d at 115, as the "without project" levels. The without project levels were based on the statistical relationship between three variables: 1) the abundance of juvenile striped bass in the Delta ("Striped Bass Index"); 2) the amount of freshwater flowing through the Delta to the Pacific Ocean; and 3) the amount of freshwater diversions out of the Delta. The Water Board's focus was due to the striped bass' importance to the Delta's commercial fishery, the availability of scientific information on striped bass and the assumption that striped bass populations provided an accurate portrayal of the health of the Delta ecosystem. Proposed Rule, 59 Fed. Reg. at 811.

41. The EPA conditionally approved D-1485 pursuant to its state oversight powers under section 303(c)(3) of the Federal Clean Water Act, 43 U.S.C. § 1313(c)(3).



Water Board's stated fishery goals and thus, in November 1987, the EPA withdrew its conditional approval of D-1485.<sup>42</sup>

D-1485 was also the subject of considerable litigation, which culminated in a California appellate decision, holding that the Water Board had failed to consider the impacts of *all* water users in the Delta - instead of just the CVP and the SWP - in formulating water quality standards.<sup>43</sup> The Court directed the Water Board to draft a new plan setting forth water quality standards designed to protect beneficial uses in the Delta, including the preservation of the Delta ecosystem. After preparing a draft plan in 1988, the Water Board presented a new plan for EPA approval in May, 1991. In September, 1991, the EPA disapproved the 1991 Plan for failing to provide adequate criteria to protect fisheries resources in the Delta.<sup>44</sup> After a series of followup hearings, in December 1992 the Water Board proposed D-1630, a set of interim measures designed to protect the Delta ecosystem pending completion of a final plan.<sup>45</sup> In January 1993, the EPA advised the Water Board that it would disapprove D-1630, if adopted, based on its failure to establish new salinity criteria sufficient to protect the fish and wildlife resources in the Delta.<sup>46</sup> Subsequently, the Water Board declined to adopt D-

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42. The EPA had based its original conditional approval on the Water Board's ability to meet its recommended Striped Bass Index of "79" for the "without project levels." During the 1980s, however, the average SBI was 23.5, with an all time low of 4.3 occurring in 1985. 60 Fed. Reg. at 4665, n.1. The decline of striped bass in the Delta was matched during this time by other important fish species including chinhook salmon, Delta smelt, Sacramento splittail and longfin smelt. In 1992, the California Department of Fish and Game testified that all of the Delta's major fish populations were in decline. Proposed Rule, 59 Fed. Reg. at 811. See *supra* note 38.

43. Proposed Rule, 59 Fed. Reg. at 811. See *U.S. v. SWRCB*, 182 Cal. App. 3d at 118.

44. Proposed Rule, 59 Fed. Reg. at 811-12. Specifically, the EPA found that the criteria adopted by the Water Board in the 1991 Plan was inadequate to protect the following designated uses: Estuarine Habitat; Cold and Warm Water Habitat; Fish Migration; Fish Spawning; Ocean Commercial and Sport Fishing; Preservation of Rare and Endangered Species; Shellfish Harvesting; and Wildlife Habitat. The EPA also disapproved as inadequate the salinity standards adopted by the Water Board to protect fish and wildlife in the Suisun, San Pablo and San Francisco Bay, the Suisun Marsh and the San Joaquin and Sacramento Rivers. *Id.* See also 60 Fed. Reg. at 4666.

45. Pursuant to 33 U.S.C. section 1313(c)(3), the Water Board legally had 90 days to respond to the EPA's September 1991 disapproval of the 1991 Plan. Instead, the Water Board did not hold hearings to establish interim revised standards until the summer of 1992. The EPA still chose to participate in these hearings in deference to the state's primary responsibility for water allocation decisions under 33 U.S.C. section 1251(g). Proposed Rule, 59 Fed. Reg. at 812.

46. Proposed Rule, 59 Fed. Reg. at 812.

1630. On January 6, 1994, in response to the Water Board's failure to adopt a water quality control plan for the Delta in compliance with the Clean Water Act, the EPA issued the Proposed Rule, intended to supersede the disapproved state plans.<sup>47</sup>

Public hearings on the Proposed Rule were held during February and the official comment period was closed on March 11, 1994. Subsequently, the EPA and several other federal and state agencies participated in a series of scientific workshops sponsored and facilitated by interested water users and environmental organizations.<sup>48</sup> These workshops and accompanying discussions led to a renewed commitment by the State to draft a Bay-Delta protection plan consistent with the EPA standards setting forth maximum levels of freshwater diversions from the Delta for each season.<sup>49</sup> The EPA published its final rule on water quality standards for the Delta on January 24, 1995,<sup>50</sup> but agreed to withdraw these standards if the Water Board adopted a final plan consistent with the Principles.<sup>51</sup>

### 3. Federal and State Adoption of Proportional Reduction

In D-1630, the State Board recommended imposing a proportionate reduction in water diversions upon the CVP, the SWP and other "major water users" in the Delta.<sup>52</sup> In doing so, the

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47. The timing of the EPA's action was hastened by a lawsuit brought by environmental groups to force the EPA to exercise its authority under the Clean Water Act to protect the Delta's water quality. *Golden Gate Audubon Society et. al. v. Browner*, (E.D. Cal. Civ. No. 93-646).

48. 60 Fed. Reg. at 4666-67.

49. PRINCIPLES FOR AGREEMENT ON BAY-DELTA STANDARDS BETWEEN THE STATE OF CALIFORNIA AND THE FEDERAL GOVERNMENT, December 15, 1994 (hereinafter referred to as the "Principles"). The Principles set forth maximum freshwater diversions as a percentage of Delta inflow depending upon flow conditions in a given year.

50. 60 Fed. Reg. 4664.

51. Principles at 5. The Final Rule states that the federal regulations "have the effect of supplanting and supplementing the state's standards for all purposes under the CWA . . . " but that it is EPA's longstanding policy that the federal water quality standards will be withdrawn if a state submits standards that in the Agency's judgment meet the requirements of the Act." 60 Fed. Reg. at 4668.

52. D-1630 at 51, 53. D-1630 states that the "responsibilities set forth in this order are set *proportionately*, according to the amount of water needed from each of the several watersheds that contribute to the estuary." *Id.* at 105 (emphasis added). D-1630 concedes that the "responsibilities" affected by D-1630 "do not represent the full responsibility of all of the water users in the watersheds" but that the Water Board would determine in the next few years whether or not similar requirements on the smaller water rights would provide a significant further benefit for the estuarine public trust uses. *Id.* at 104-105.

Water Board rejected the argument of senior appropriators that, under the "first in time, first in right" priority rule, the Water Board could not modify senior rights without first cutting off the diversions of junior appropriators.<sup>53</sup> D-1630 stated that it did not reallocate existing water rights but instead identified and enforced the public trust requirements and implemented the existing water quality control plans.<sup>54</sup>

The EPA's Proposed Rule, which proposed significant reductions in diversions from water flowing into the Delta, left the implementation of the proposed reductions to the State.<sup>55</sup> The Proposed Rule did recommend, however, that the State follow the proportionate reduction approach adopted in D-1630.<sup>56</sup> The EPA's recommendation was based upon its analysis that proportionate reduction among as many water users as possible "increases the operational flexibility of the water system, and thereby reduces the total impact of meeting the proposed criteria."<sup>57</sup>

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53. D-1630 at 103-104.

54. D-1630 at 104. D-1630 states that "each water right holder should be responsible for the effects caused by its own diversion," that "cutting off diversions in the order of priority would allow a few water right holders to entirely escape their public trust obligations at the expense of many other diverters" and that "such a massive cutoff while leaving others to divert public trust water at will would not be in the public interest." D-1630 at 105.

55. The EPA's deference to the Water Board is consistent with the policy reflected in Section 101(g) of the Clean Water Act which states:

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Chapter. It is the further policy of Congress that nothing in this Chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State.

33 U.S.C. § 1251(g)(1982). Section 101(g) has been interpreted by the federal courts as a general policy statement which "cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly stated purpose." *Riverside Irrigation Dist. v. Andrews* 758 F.2d 508, 513 (10th Cir. 1985).

56. 59 Fed. Reg. at 822. One problem identified by the Final Rule in implementing reductions based on the priority system is that many of the junior appropriators, which rely on water from federally supported projects, already bear the burden of federal agency compliance with the consultation requirements and jeopardy prohibitions of the Endangered Species Act. See 16 U.S.C. § 1536(a-b); 60 Fed. Reg. at 4701.

57. Proposed Rule, 59 Fed. Reg. at 822. In contrast to the Proposed Rule, the Final Rule makes no specific recommendation regarding how the State should implement water reallocation among traditional users. Instead, the Final Rule sets forth a series of alternatives, including requiring reductions only from SWP and CVP exporters or adopting variations on the proportionate reduction approach. Such variations could include differential reductions, a compromise between proportionate reduction and a strict application of the priority principles, combined with

## III.

## PUBLIC LIMITATIONS ON WATER RIGHTS IN CALIFORNIA

The proportionate reduction approach to improving water quality in the Delta directly conflicts with California law which states that priority among appropriative water users is determined by the law of "first in time, first in right."<sup>58</sup> A senior appropriator may with legal justification argue that if less water is now available for diversion due to water quality concerns, appropriation law requires that the junior appropriator give up its water allotment before the senior user is required to reduce its water use.<sup>59</sup> One may argue that any required reduction in water use not in conformity with this traditional principle of appropriation priority is a taking of private property, compensable under the Fifth Amendment of the federal Constitution.<sup>60</sup>

To circumvent the takings issue, the Water Board based its D-1630 proportionate reduction recommendation on the public limitations on privately held water rights found in the common law, the California Constitution and state statutes. These public limitations are derived from the recognition by California law that water within the State "is the property of the people of the State"<sup>61</sup> and that "the right of property in water is usufructuary and consists not so much of the fluid itself as the advantage of its

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innovative market-based approaches utilizing mitigation credits, water banks, and purchases of water for instream use. 60 Fed. Reg. at 4701. The Final Rule does indicate, however, that a proportionate reduction approach would be significantly less costly than reductions based on priority, especially in dry years when opportunities for water transfer may be limited. 60 Fed. Reg. at 4703.

Presumably the Final Rule's shift away from a specific recommendation of proportionate reduction reflects an increased sensitivity to the arguments of senior appropriators that proportionate reduction is inequitable given the traditional priority structure of the State's water law. The language of the Principles reflects this heightened sensitivity to the equities between senior and junior appropriators in the Delta. In discussing eventual State implementation of the Bay-Delta protection plan, the Principles state:

In implementing the Plan, the [Water Board] will act in compliance with all provisions of law which may be applicable, including, but not limited to, *the water rights priority system* and the statutory protections for areas of origin.

Principles at 6 (emphasis added).

58. See *supra* note 17 and accompanying text. Proportionate reduction also violates the seniority of riparian users to the extent they are affected by state implementation of the EPA's water quality requirements.

59. See *supra* note 18 and accompanying text.

60. See, e.g., Schultz and Weber, *Changing Judicial Attitudes Towards Property Rights in California Water Resources: From Vested Rights to Utilitarian Reallocations*, 19 PAC. L.J. 1031, 1100-09 (1988).

61. CAL. WATER CODE § 102.

use."<sup>62</sup> The three public limitations relied upon by the Water Board in D-1630 are 1) reserved rights; 2) the reasonable use doctrine; and 3) the public trust doctrine. This section will discuss each of these public limitations on private water rights.

#### A. *Reserved Rights*

Under Water Code section 1394, when issuing appropriation permits, the Water Board may reserve jurisdiction to "amend, revise, supplement, or delete terms and conditions" in an appropriation permit in order to best serve the "public interest" in the water sought to be appropriated.<sup>63</sup> In determining what will best serve the "public interest", the Water Board must consider the relative benefit derived from all beneficial uses of the water sought to be appropriated.<sup>64</sup> Other statutes specifically authorize the Water Board to impose conditions upon appropriation permits in order to meet the public interest in water quality objectives and instream flow requirements for fish and wildlife and recreation.<sup>65</sup>

#### B. *The Reasonable Use Doctrine*

D-1630 reiterates the Water Board's ongoing authority under Water Code sections 100 and 275 to enforce the requirements of the California Constitution, Art. X, Section 2, that the waste, unreasonable use, or unreasonable method of use of water by any water user be prevented.<sup>66</sup>

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62. U. S. v. SWRCB, 182 Cal. App. 3d 82 (1986), (citing *Eddy v. Simpson* 3 Cal. 249, 252 (1853)). See also, Joseph Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257 (1990).

63. CAL. WATER CODE § 1394(a); U. S. v. SWRCB, 182 Cal. App. 3d at 141. Under CAL. WATER CODE § 1394(b), however, the Water Board may not exercise its reserved jurisdiction once a license has been issued to the water user. See *infra* note 121.

64. CAL. WATER CODE § 1257. Specifically enumerated beneficial uses include domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, mining and power purposes and *any water specified to be protected under any water quality control plan* (emphasis added). For the complete text of section 1257 See *infra* note 119.

65. *Id.* § 1258 authorizes the Water Board to subject appropriations to such terms and conditions as it finds are necessary to carry out water quality control plans established pursuant to Division 7 of the Water Code. Pursuant to §§ 1243, 1243.5, and 1257.5 the Water Board must consider the public interest in water quality and preservation of instream flows for recreation and fish and wildlife in deciding the terms upon which an appropriation permit may be granted.

66. *Id.* Section 100 states as follows:

It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial

The language of Article X, Section 2 can be traced to the California Supreme Court's decision in *Herminghaus v. Southern California Edison Co.*<sup>67</sup> In *Herminghaus*, the Court held that downstream riparians using peak flood flows of the San Joaquin River to irrigate their crops were not subject to any reasonable use requirement as to an upstream appropriator and thus could enjoin the appropriator's proposed hydroelectric project based on riparian seniority.<sup>68</sup> In response to this decision, Article X, Section 2 was passed in 1928 as a constitutional amendment holding *all* water users subject to the reasonableness requirement.<sup>69</sup> Since 1928, several important cases have interpreted the Water Board's powers over private water rights under the constitutional amendment.

In *Joslin v. Marin Mun. Water Dist.*<sup>70</sup>, the California Supreme Court rejected the riparian plaintiff's claim that the water district's upstream dam had interfered with the plaintiff's compensable property right to have the stream deposit sand and gravel on his property for commercial extraction.<sup>71</sup> The Court held that since the 1928 amendment, all water rights were subject to the implied condition of reasonableness and that, in order to establish a compensable property interest, a water user must first show that its water use was "reasonable."<sup>72</sup> Finding the plaintiff's use

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use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

*Id.* § 275 states as follows: "The department shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this State." See *supra* note 24, for text of article X, § 2 of the California Constitution. See also, *U. S. v. SWRCB*, 182 Cal. App. 3d at 129.

67. 252 P. 607 (1926).

68. *Id.* at 612-16. The Court did reaffirm the reasonable use requirement which existed among riparians. *Id.* at 614-16; see *Miller & Lux v. Madera Canal & Irrigation Co.*, 155 Cal. 59, 63-65 (1909). Reasonable use among appropriators had always been part of the common law appropriation doctrine.

69. In *Peabody v. City of Vallejo*, 40 P.2d 486, 492 (1935), the California Supreme Court affirmed that Article X, Section 2 imposed a reasonable use requirement on riparians vis-a-vis appropriators.

70. 429 P.2d 889 (1967).

71. *Id.*

72. *Id.* at 895. The Court stated:

of the stream for gravel deposit unreasonable, the Court held that no compensable property interest existed; consequently, the plaintiff had no claim for damages.<sup>73</sup>

In *State Water Resources Control Board v. Forni*<sup>74</sup>, the appellate court examined the validity of a Water Board regulation which required riparian vineyardists to build winter storage reservoirs in order to avoid the overpumping by both riparian and appropriative users which was occurring during the frost season.<sup>75</sup> The Water Board regulation was based upon the overdemand for available flow during the frost season which made the winter diversion of flow for frost protection unreasonable under Article X, Section 2, given the practical alternative of storage.<sup>76</sup> The riparians argued that as senior right holders they had no obligation to curtail or alter their uses for the benefit of junior appropriators. The Court rejected this argument holding that:

[T]he overriding constitutional consideration is to put the water resources of the state to a reasonable use and make them available for the constantly increasing needs of all the people. In order to attain this objective, the riparian owners may properly be required to endure some inconvenience or to incur reasonable expenses. . . .<sup>77</sup>

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While plaintiffs correctly argue that a property right cannot be taken or damaged without just compensation, they ignore the necessity of first establishing the legal existence of a compensable property interest. Such an interest consists in their right to the *reasonable use* of the flow of the water. Their riparian rights attach to no more of the flow of the stream than that which is required for such use. *Id.*

73. Significantly, the Court flatly rejected the plaintiff's argument that its riparian use was a "beneficial use" and thus reasonable. *Id.* at 895-96. The Court instead noted that under the language of Article X, Section 2, beneficial use and reasonable use were separate requirements and that the mere fact that a use was beneficial did not guarantee its reasonableness. *Id.*

74. 54 Cal. App. 3d 743 (1976).

75. *Id.* at 750-51. The Water Board's regulation also restricted water diversions by appropriative users during the winter months to replenishing winter storage pursuant to a water distribution program among users that would assure protection to prior rights. *Id.* at 752 n.4.

76. *Id.* at 749-50. The Court held that whether a water use is unreasonable or reasonable is a question of fact to be determined according to the circumstances in each particular case and that the Water Board had stated sufficient facts in its complaint that the riparians' water use was unreasonable and thus could survive a judgment on the pleadings. *Id.* at 750-51.

77. *Id.* at 751-52. The Court noted that whether the requirement of building reservoirs in the case at bench is the only feasible method for achieving the constitutional mandate of reasonableness was manifestly a question of fact. *Id.* at 752.

The reasoning in *Forni* was furthered by *In re Waters of Long Valley Creek Stream System*<sup>78</sup>, which held that the Water Board may act under Article X, Section 2 to eliminate the priority of an unused riparian water right with respect to all other rights currently being exercised.<sup>79</sup> The Court's holding was based upon its finding that the "uncertainty" created by unused riparian rights renders these potential uses "unreasonable" and thus not compensable property rights under *Joslin*.<sup>80</sup>

In *U.S. v. SWRCB*<sup>81</sup>, the Court held that the Water Board had authority to find that water use by Delta appropriators "had become unreasonable" due to the new information regarding the deleterious effect of the diversions on Delta water quality.<sup>82</sup> Citing *State Water Resources Control Board v. Forni*, the Court held that all permits are subject to the continuing authority of the Board to prevent "unreasonable use" which the Court characterized as "essentially a policy judgement requiring a balancing of the competing public interests. . . ."<sup>83</sup> The Court then went on to note that the Water Board was uniquely qualified to make this policy judgement "in view of its special knowledge and expertise and its combined statewide responsibility to allocate the rights to, and to control the quality of water of, state water resources."<sup>84</sup>

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78. 25 Cal. 3d. 339 (1979).

79. *Id.* at 358-59.

80. *Id.* at 354-55. The Court based this finding on a Governor's Commission report which identified uncertainty as one of the major problems in contemporary California water rights law and that riparian rights were a principal source of this uncertainty. *Id.* at 355.

81. *See supra* note 14.

82. 182 Cal. App. 3d at 130. The court cited *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.*, 605 P.2d 1, 5 (1980) for the proposition that "what is a reasonable use of water depends on the circumstances of each case, [and that] such an inquiry cannot be resolved in vacuo from statewide considerations of transcendent importance." 182 Cal. App. 3d at 130.

83. 182 Cal. App. 3d. at 130.

84. *Id.* The Court also held that the Water "Board has the separate and additional power to take whatever steps are necessary to prevent unreasonable use or methods of diversion." 182 Cal. App. 3d. at 142. Such authority, noted the Court, included the power to impose costs on particular users. *Id.* (citing *State Water Resources Control Bd. v. Forni*); *see also* *Imperial Irrigation Dist. v. State Water Resources Control Bd.*, 225 Cal. App. 3d. at 569. (Water Board has authority to adjudicate on its own initiative the Article X, Section 2, issue of unreasonable use of water.)

The California Supreme Court has held that the courts possess concurrent jurisdiction to enforce the self-executing provisions of Article X, Section 2 and that private parties may seek court aid in the first instance to prevent unreasonable water use or unreasonable method of diversion. *Environmental Defense Fund, Inc. v. East Bay Municipal Utility Dist.*, 605 P.2d at 10.



### C. *The Public Trust Doctrine*

D-1630 states that the common law public trust doctrine confers on the Water Board continuing authority over all water rights to protect public trust uses.<sup>85</sup> The public trust doctrine, which can be traced back to Roman law, states that the sovereign holds all of its navigable waterways and the lands lying beneath them for the benefit of the people.<sup>86</sup> Under the Equal Footing Doctrine, California assumed sovereignty over public trust property upon admission to the Union.<sup>87</sup> A series of important cases have since defined the nature of the public trust doctrine in California.<sup>88</sup>

In *People v. California Fish Co.*<sup>89</sup>, the Supreme Court examined a series of conveyances of tidelands by the State to private parties pursuant to statutory authorization. The Court first noted that the lands were subject to the public trust<sup>90</sup> and then addressed whether the State's grant of fee title in the tidelands to

85. D-1630 at 103. D-1630 also states that "the standard permit term for continuing authority at Section 780(a) of Cal. Code Regs., Title 23, is based in part on the public trust doctrine." *Id.* The standard permit term under section 780(a) states the existing authority of the Water Board to modify water allocations where appropriate under the public trust and the reasonable use doctrines.

86. *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 434 (1983) (citing *Colberg, Inc. v. State of California ex rel. Dept. of Pub. Wks.*, 67 Cal. 2d 408, 416 (1967)). See also, Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention* 68 MICH. L. REV. 471, 475-489 (1970). See also, *Illinois Central Railroad Co. v. Illinois*, (1892) 146 U.S. 387. In *Illinois Central*, the U.S. Supreme Court upheld the revocation by the Illinois legislature of its prior sale of 1,000 acres of submerged waterfront land to the railroad on the grounds that the sale represented an impermissible abdication of the legislature's trust over "property in which the whole people are interested, like navigable waters and soils under them. . . ." *Id.* at 453. *Illinois Central* represents the seminal case in common law public trust doctrine.

87. *Illinois Central*, 146 U.S. at 435; *Pollard's Lessee v. Hagan*, 44 U.S. 212, 229 (1845).

88. Included among the complex issues raised by the public trust doctrine are 1) the scope of public trust "property"; 2) the nature of the public's interest in public trust property; 3) what constitutes, and who gets to define, a proper "use" of public trust property; 4) which other property rights may be affected by the public trust interest; 5) the extent to which public trust interests may infringe upon private property interests; and 6) which responsibilities does the state have in overseeing public trust resources, including the state's ability to divest itself of trust property.

89. 166 Cal. 576 (1913).

90. 166 Cal. at 584. The Court noted that:

It is a well established proposition that the lands lying below the lines or ordinary high and low tide, as well as that within a bay or harbor and permanently covered by its waters, belong to the state in its sovereign character and are held in trust for the public purposes of navigation and fishery. A public easement and servitude exists over these lands for those purposes. *Id.*

private parties eliminated the State's public trust interest in the conveyed property.<sup>91</sup>

In order to answer this question, the Court defined the nature of the State's interest in public trust property as consisting of two property rights; a *jus publicum* representing the State's "sovereign" interest, and a *jus privatum* representing the State's "proprietary" interest.<sup>92</sup> The Court went on to hold that, while the State might freely alienate its *jus privatum* interest, the State could only alienate its *jus publicum* interest pursuant to an *expressly worded* statute authorizing a plan or system of improvement adopted by the State for the promotion of the larger public trust interest.<sup>93</sup> The Court then found that the general language of the statutes granting the tidelands clearly showed that the Legislature had acted without consideration of the public trust interest.<sup>94</sup> The Court thus held that the State had retained its *jus publicum* in the tidelands and that the purchasers had taken fee title subject to, and without authority to interfere with, the public trust easement.<sup>95</sup>

Public trust doctrine and California water rights law finally collided in *National Audubon Society v. Superior Court*.<sup>96</sup> In *National Audubon*, the Supreme Court was asked to decide whether the public trust doctrine placed any limitations on the rights of the Los Angeles Department of Water and Power<sup>97</sup> to divert tributary streams of Mono Lake pursuant to an appropriation permit

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91. 166 Cal. at 583.

92. *Id.* at 593.

93. *Id.* at 585, 597. The Court added that legislative intent to abandon the public interest could be "necessarily implied" but only where no other inference was reasonably possible. *Id.* at 597.

94. *Id.* at 597-598.

95. *Id.* Several cases have since upheld the holding of *California Fish* that the State retains the public trust or *jus publicum* interest in public trust property granted or sold pursuant to "general" statutory schemes not expressly designed to further public trust interests.

In *Boone v. Kingsbury*, 206 Cal. 148, 192-193 (1928), the Supreme Court held that off-shore oil drilling licenses granted by the State to private parties remained subject to the public trust easement and the accompanying power of the State to remove at a later time any drilling structures found to substantially interfere with the public trust interest.

In *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 532 (1980), the California Supreme Court held that tideland deeds conveyed pursuant to an 1870 statute were subject to the public trust easement since 1) the Legislature had expressed no clear intent to abandon the public trust interest; and 2) the conveyances were not made as part of a general plan to further trust purposes.

96. 33 Cal. 3d 419 (1983).

97. Hereinafter cited as "LADWP".

received in 1940.<sup>98</sup> In holding that the LADWP's appropriation permit was subject to the public trust easement, the Court made a number of important rulings.<sup>99</sup>

First, the Court held that the public trust doctrine was separate and independent from the California water rights system.<sup>100</sup> Thus, no party could acquire a vested right to appropriate water in a manner harmful to public trust interests.<sup>101</sup> Second, the Court held that because of the importance of water allocation and appropriation in California, the Water Board has the power to grant appropriation permits which may unavoidably harm the public trust resource.<sup>102</sup> Given the resulting tension between the public trust doctrine and the water rights system, the Court concluded that "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."<sup>103</sup> Importantly, the Court rejected arguments from both the State

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98. The public trust interest adversely affected by LADWP's diversion was the ecological integrity of Mono Lake, which was being damaged by rising salinity levels due to the reduction in incoming freshwater flows from tributary streams. Preservation of ecological integrity was recognized as a public trust interest by the Supreme Court in *Marks v. Whitney*, 491 P.2d 374, 279-80 (1971).

99. A key ruling not addressed in this paper was *National Audubon's* holding that the restrictions of the public trust easement apply to water diversions from non-navigable waterways which have an impact upon a navigable body of water. 33 Cal. 3d at 437. Based upon this holding, any water user creating an adverse impact upon the Delta, a navigable body of water, is thereby subject to the public trust easement.

100. LADWP had argued that the public trust doctrine was "subsumed" by the California water rights system. 33 Cal. 3d at 445. This argument had some academic support based upon the idea that the Water Board is required to consider instream "public trust" values when granting appropriation permits under Water Code sections 1243, 1243.5, 1257, 1257.5, and 1258. See Walston, *The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy* 22 SANTA CLARA L. REV. 63, 85 (1982).

101. 33 Cal. 3d. at 445.

102. *Id.* at 446. These two rulings are not as inconsistent as they might first appear. Under *National Audubon*, an appropriator may acquire the right to appropriate water in a manner potentially harmful to public trust interests. However, this right is not vested but instead subject to the continuing authority of the Water Board (and the judiciary) to modify the appropriator's use in order to protect the public trust interest. *Id.* at 446-447.

103. *Id.* at 446. Commentators have noted that *National Audubon* essentially sets up a procedural remedy in which agencies are required to consider the effects of agency actions upon public trust resources. See, e.g. Michael Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. LAW 573, 589-594 (1989). An important question thus remaining from *National Audubon* is what the proper balance between public trust and water allocation interests should be. See *Environmental Defense Fund v. East Bay Municipal Utility Dist.*, Alameda Superior Court Case No. 425955 (1990), described at *infra* note 111. See also *infra* note 164.

and LADWP that the State may allocate public trust property to any legitimate "public" purpose.<sup>104</sup> Instead, the Court held:

[T]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.<sup>105</sup>

Applying these holdings, the Court found that the LADWP's right to appropriate water was subject to the State's continuing *jus publicum* interest, which had not been extinguished at the time of the original permit issuance.<sup>106</sup> Accordingly, the Court ordered the Water Board to reconsider the terms of LADWP's permit in light of the public trust resources needing protection.<sup>107</sup>

*National Audubon's* holding that water allocations could be reconsidered in order to protect public trust resources was reaffirmed in *U.S. v. SWRCB*.<sup>108</sup> In *SWRCB*, the Court held that the Water Board may set water quality standards requiring reallocation of water uses in order to protect public trust interests.<sup>109</sup> The Court defined these interests as "nonconsumptive, in-stream uses" such as navigation, fishing, recreation, ecology and aesthetics.<sup>110</sup> The Court acknowledged that the effect of water diversions on water quality in the Delta constituted an adverse impact upon public trust resources warranting reconsideration of the terms of the appropriation permits.<sup>111</sup>

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104. 33 Cal. 3d at 440. The State had argued that public trust uses encompass all public uses and thus, there were no restrictions on the State's ability to allocate trust property. *Id.* See also *Walston*, *supra* note 100, at 79.

105. 33 Cal. 3d at 441.

106. *Id.* at 447.

107. *Id.* at 447. The Court held that the State has the power to *reconsider allocation decisions* even though those decisions were made after due consideration of their effect on the public trust. In reconsidering allocation, the Water Board is "not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs." *Id.* The Court concluded that grounds for reconsideration were "even stronger" in this case in which the Water Board, in issuing LADWP's permit in 1940, had not considered the effects of the diversions on the public trust resources of Mono Lake. *Id.* In remanding to the Water Board, the Court did not dictate any particular allocation of water but instead directed that "[the] human and environmental uses of Mono Lake - uses protected by the public trust doctrine - [be] taken into account." *Id.* at 452.

108. See *supra* note 14.

109. 182 Cal. App. 3d. at 149.

110. *Id.* at 149, n. 41.

111. *Id.* at 151. The Court went on to note that the validity of the water quality standards established by the Water Board was a question of fact turning on whether

## IV.

ABILITY OF PUBLIC LIMITATIONS ON WATER RIGHTS  
TO ACHIEVE PROPORTIONAL REDUCTIONS  
OF WATER DIVERSIONS FROM THE  
DELTA

D-1630 bases its proposal to proportionately reduce the water usage of all major Delta water users on its reserved rights, the reasonable use doctrine and the public trust doctrine. The following pages will address the efficacy of each of these approaches in achieving proportionate reduction in diversion of freshwater flows to protect the Delta ecosystem.

A. *Reserved Rights Doctrine*

Under Water Code section 1394, the Water Board may reserve jurisdiction to modify the terms and conditions of appropriation permits to protect water quality and fish and wildlife.<sup>112</sup> In *U.S.*

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such standards were "necessary and reasonable" in light of the Water Board's dual responsibility to oversee water rights allocation and to protect the public trust resource. *Id.*

The Superior Court's decision on remand in *Environmental Defense Fund, Inc. v. East Bay Municipal District*, 26 Cal. 3d 183 (1980), illustrates the complexity of the Water Board's dual responsibility. The long-running dispute in this case was the desire of EBMUD to divert water from the Folsom Reservoir at the Folsom-South Canal which EDF and the County of Sacramento claimed would adversely impact riparian habitat, fisheries and recreational activity (primarily whitewater rafting). EDF and the County argued that these adverse impacts to the public trust required EBMUD to divert below the American - Sacramento River confluence. In resolving the dispute, the Court, citing National Audubon, sought "an accommodation which will make use of the pertinent principles of both the public trust doctrine and the appropriative rights system. . . ." *Id.* at 25 (citing National Audubon, 658 P.2d at 727). The Court implemented this balancing test by first asking whether the downstream diversion could be accomplished at a reasonable cost and without compromising the long-term health requirements of EBMUD's municipal water users. *Id.* at 29. After reviewing a series of expert testimony the Court found that water quality for municipal purposes was appreciably superior when drawn from the upstream reservoir site. *Id.* at 74. The Court then went on to examine the impacts of upstream diversion upon the public trust resources of ecological preservation, fisheries and recreation. Finding the recreational interests subordinate to the ecological interests, *id.* at 100, the Court found that a "physical solution" could be implemented which would allow for upstream diversion and preserve fisheries and riparian habitat. *Id.* at 108. The Court's heavy reliance on scientific analysis in determining the proper balancing between the interests of the water rights system and the public trust is a likely indicator of how future disputes between water rights and the public trust will be resolved.

112. *U. S. v. SWRCB*, 182 Cal. App. 3d. at 132. The Water Board has specific authority to subject appropriation permits to terms and conditions to protect water quality and corresponding fish and wildlife values. See CAL. WATER CODE §§ 1243, 1243.5, 1257, 1257.5, 1258.

v. *SWRCB*, the Court specifically held that the Water Board's power to modify permits pursuant to its reserved jurisdiction includes the authority to impose the responsibility of maintaining water quality upon the projects *equally*.<sup>113</sup> The Court's holding was based on its reasoning that the scope and priority of appropriative rights are properly defined by the Water Board while acting within its powers to consider the relative benefits of competing interests under Water Code section 1257 and to impose such conditions as are necessary to protect the public interest.<sup>114</sup>

Thus, the Water Board appears to have authority under its reserved jurisdiction power to reprioritize appropriative water rights in order to achieve proportionate reduction.<sup>115</sup> Several problems remain, however, with using the reserved jurisdiction power to achieve overall proportionate reduction of water usage in the Delta. First, on a purely practical level, many of the major water users in the Delta hold licenses<sup>116</sup> or permits whose terms preclude future modification by the Water Board.<sup>117</sup>

An example of this limitation is Water Board Decision 1485, which gave rise to *U.S. v. SWRCB*, in which the Water Board, acting on the assumption that its power to modify permit terms was limited, only attempted to modify the SWP and CVP operating permits held by the Department of Water Resources and the U.S. Bureau of Reclamation respectively.<sup>118</sup> The fact that many of the major users of Delta water are not susceptible to the reserved rights power precludes this authority from achieving overall proportional reduction of water use in the Delta.

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113. 182 Cal. App. 3d. at 132.

114. *Id.* at 133. More specifically, the Court stated that, because the Water Board had the power to weigh the value of competing beneficial uses in setting initial permit terms, it also should be authorized to "alter the historic rule of 'first in time, first in right' by imposing permit conditions which give a higher priority to a more preferred beneficial use even though later in time." *Id.* at 132.

115. It is important to note that neither the California nor the U.S. Supreme Court has ruled on the validity of the expanded powers of the Water Board as stated by the appellate court in *U. S. v. SWRCB*.

116. *See* CAL. WATER CODE §§ 1600-1610.

117. Permits issued prior to the 1960s typically did not contain reservations of rights. D-1630 at 99.

118. These were the "without project" standards rejected by the court in *U. S. v. SWRCB* 182 Cal. App. 3d at 118-20. Most of the CVP and SWP permits contain specific reservations of jurisdiction to revise terms and conditions concerning salinity control and fish and wildlife protection in the Delta. The remaining CVP and SWP permits are required to coordinate terms and conditions with those of the other permits held by the CVP and the SWP. D-1630 at 99-100.

In addition to this practical limitation on the Water Board's reserved rights power, it is unclear whether the Court's reasoning in *U.S. v. SWRCB*, that the Water Board's authority to weigh beneficial uses under Water Code section 1257<sup>119</sup> implies the power to reprioritize water rights in the future, is either sound policy or good law. The Water Board's power to balance beneficial uses under section 1257 at the time a permit application is made is consistent with the Water Board's authority to grant or deny water appropriations based on its determination of the "public interest."<sup>120</sup> However, this power may not be appropriate as a *continuing* authority for three reasons. First, this approach defeats the clear language of section 1394 that reserved rights be a temporary limitation on a permittee's rights prior to the ultimate issuance of a license.<sup>121</sup> Second, allowing the Water Board to reprioritize under its reserved rights power effectively nullifies the force and effect of Water Code sections 1450 and 1455 which confer priority at the time of an appropriative water user's application.<sup>122</sup> Finally, the Court's holding severely undermines the stability of the appropriation system by granting the Water Board the power to rearrange priorities in the future

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119. *U. S. v. SWRCB*, 182 Cal. App. 3d at 132. The text of Section 1257 (West 1971) reads as follows:

In acting upon applications to appropriate water, the board shall consider the relative benefit to be derived from (1) all beneficial uses of the water concerned including but not limited to, use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, mining and power purposes, and any uses specified to be protected in any relevant water quality control plan, and (2) the reuse or reclamation of the water sought to be appropriated, as proposed by the applicant. The board may subject such appropriations to such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest, the water sought to be appropriated.

CAL. WATER CODE § 1257 (West 1971).

120. CAL. WATER CODE § 1255 (West 1971).

121. *Id.* § 1394(b) (West 1971) states, in pertinent part:

Jurisdiction shall be reserved under this section for no longer . . . than the board finds to be reasonably necessary, and *in no case shall such jurisdiction be exercised after the issuance of the license.* (emphasis added)

Standard Permit Term 12, adopted by the Water Board on October 30, 1984, specifically applies the continuing authority of the public trust and the reasonable use doctrines to licenses as well as permits. Cal. Code Regs. title 23 § 780(a) (1987). Standard Permit Term 12 does not, however, extend the Water Board's reserved rights power under Water Code section 1394 to licenses. Instead, it reiterates the existing authority of the Water Board under common law and the State Constitution to modify water allocations where appropriate under the public trust and reasonable use doctrines.

122. CAL. WATER CODE § 1450 (West 1971) provides an appropriation permit applicant a priority right as of the date of the application. Section 1455 retains this priority date through the issuance of the appropriation permit.

based upon administrative determinations as to which beneficial uses best serve the "public interest."<sup>123</sup>

### B. Reasonable Use Doctrine

All water rights are subject to the overriding constitutional limitation that water use must be reasonable.<sup>124</sup> The question remains, however, whether the reasonable use doctrine provides legal support for proportionate reduction of water diversions from the Delta. The starting point for this analysis is *Joslin v. Marin Mun. Water Dist.*, in which the Supreme Court held that there is no compensable property right in the unreasonable use of water.<sup>125</sup> *U.S. v. SWRCB* held that water diversions which as a group have an adverse impact on water quality may be characterized as "unreasonable" under the Article X, Section 2 of the Constitution.<sup>126</sup> Under a straightforward analysis, a finding of unreasonable use allows either the Water Board or a court<sup>127</sup> to reprioritize or even extinguish the unreasonable use of water without the threat of a takings claim.<sup>128</sup> Despite the attractive simplicity of this approach, difficulties remain in using the reasonableness doctrine to achieve proportionate reduction of water diversions from the Delta to protect water quality.<sup>129</sup>

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123. The Water Code envisions long term stable water rights for appropriation licensees. Section 1627 states that a license shall be effective for such time as the water is used for a useful and beneficial purpose. Section 1675 provides that a license may only be revoked if 1) the licensee fails to put the water to a useful or beneficial purpose; or 2) the licensee ceases to put the water to a useful or beneficial purpose; or 3) the licensee fails to comply with any of the terms of the permit.

124. Cal. Const. Art. X, § 2; *U.S. v. SWRCB*, 182 Cal. App. 3d at 129.

125. 429 P.2d at 888.

126. 182 Cal. App. 3d at 130.

127. *Environmental Defense Fund v. East Bay Mun. Util. Dist.*, 26 Cal. 3d at 200.

128. *Joslin*, 429 P.2d at 898.

129. As an initial matter, there is some confusion as to whether the reasonable use doctrine may be used to reallocate water between consumptive and non-consumptive instream uses due to the failure of *U.S. v. SWRC* to cite the reasonable use doctrine as one of the Water Board's authorities to protect instream uses in the Delta. 182 Cal. App. 3d at 148-150. Instead, the Court relied upon the Water Board's reserved rights power and the public trust doctrine to protect the instream uses. *Id.*; see also *Joslin*, 429 P.2d at 893 [effect of article X, section 3 has been to apply the doctrine of reasonable use between riparian owners and appropriators, and between overlying owners and appropriators.]

Although no case appears to have specifically addressed this issue, the Supreme Court's decision in *Environmental Defense Fund v. East Bay Mun. Util. Dist.*, implicitly approved a reasonable use challenge to a water diversion potentially damaging to the instream uses of ecology and recreation. 605 P.2d at 8. Based on this case and on the Water Code's designation of instream uses as beneficial uses to be considered by the Water Board in conserving the "public interest" (Cal. Water Code § 1255



First, it is doubtful that the reasonable use doctrine legally supports proportionate reduction as part of a reallocation of water uses where there is nothing inherently "wasteful" or "unreasonable" in each individual's use of water or method of diversion. The issue of whether the test of unreasonable use applies only to "inordinate and wasteful use of water . . . or to any use less than the optimum allocation of water" was left open by the Supreme Court in *National Audubon*.<sup>130</sup> *U.S. v. SWRCB* addressed the issue by holding that the reasonable use doctrine may be used to reallocate water in order to achieve a more optimum allocation among different user groups, whether or not a group's use is "inordinate" or "wasteful."<sup>131</sup> *U.S. v. SWRCB* is extraordinary because it confers unprecedented power on the Water Board to reallocate water from a group of water users whose individual uses are neither wasteful nor unreasonable.<sup>132</sup> This ruling signifies a marked departure from the decisions in *Joslin* and *SWRCB v. Forni* which based their respective reallocations of water rights on the unreasonableness of the riparians' individual water uses.<sup>133</sup>

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(West 1971), this article will assume that the reasonable use doctrine may be used to protect adverse effects to instream "non-consumptive" uses.

130. 658 P.2d 709, 728 n.28 (emphasis added). In *National Audubon*, the two user groups competing for water were the LADWP on one side and the instream values protecting Mono Lake on the other. LADWP had argued that its water diversions for domestic consumption were prima facie reasonable, presumably based on the language of Water Code sections 106 and 1254 that designate domestic consumption as enjoying highest priority among beneficial uses. Relying on the public trust doctrine, the Court chose not to address the reasonable use issue. *Id.*

131. 182 Cal. App. 3d at 130.

132. The Court's opinion makes no mention of any "wasteful" uses or methods of use by the Delta water users. Instead, the Court's finding of unreasonableness is based entirely upon the effect of the diversions on other beneficial uses. 182 Cal. App. 3d at 130.

133. Both *Joslin* and *SWRCB v. Forni* reprioritized water rights based on the Courts' rulings that senior riparian uses were unreasonable in light of competing demands for the available supply of water. In *Joslin*, the Court found that a riparian's use of streamwater to deposit gravel on his property for a gravel mining operation was unreasonable as a matter of law in light of the increasing needs for water in the state. 429 P.2d at 896. In *Forni*, the Court held that senior riparian could be required to construct water storage reservoirs at their own expense in order to allow junior appropriators continued access to water during the winter shortages. 54 Cal. App. 3d 743, 751-752. In both these cases, the Courts found that the individual uses or methods of diversion of the senior riparian were unreasonable and/or wasteful. Because the individual use of the riparian users in each case was found to be unreasonable, reprioritization was appropriate based on *Joslin's* accompanying holding that there is no property right to use water in an unreasonable manner. 429 P.2d at 896.

In contrast, *U.S. v. SWRCB* held that the water use of the *water user group* was unreasonable due to the adverse impact of the user group's total diversion of freshwater on the Delta's water quality.<sup>134</sup> In other words, under the Court's ruling, a single appropriation providing water supply for domestic consumption (the highest priority beneficial use in California under Water Code sections 106 and 1254) and employing state of the art conservation techniques could be characterized as "unreasonable" based on the fact that the total diversion of water—of which the single appropriation is a small percentage—causes "unreasonable" adverse impact upon water quality.

Given that all water diversions from Mono Lake were made by a single user, LADWP, *National Audubon* understandably did not reach the proportionate reduction issue. In *U.S. v. SWRCB*, however, the water user group consisted of all users of Delta water. Nevertheless, and in contrast to its endorsement of proportionate reduction under the Water Board's reserved rights power, *U.S. v. SWRCB* did not address how a reduction in total diversions under the reasonable use doctrine might be imposed upon individual users within the regulated water user group.

*U.S. v. SWRCB*'s reluctance to address the proportionate reduction issue in its discussion of reasonable use is attributable to the failure of the reasonable use doctrine to provide conceptual support for reprioritization *among* individual appropriations which are themselves reasonable and beneficial.<sup>135</sup> Neither *U.S.*

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134. 182 Cal. App. 3d at 130.

135. Note that one could argue that *any* diversion of water from a natural stream or river has a negative effect on water quality and is thus, on an individual basis, "unreasonable." This approach is initially problematic in that, by characterizing any stream diversion as "unreasonable" due to water quality impacts, it effectively eliminates the distinction between wasteful and non-wasteful consumptive water uses, necessary to further water conservation and efficient use in the State. On a more fundamental level this approach impermissibly rejects the balancing of beneficial uses inherent in determining what is "reasonable" under the public interest standard. See Water Code section 1257. Finally, characterizing any diversion's impact upon a stream as unreasonable has the effect of elevating instream values above consumptive uses, in clear violation of the balancing approach adopted by *National Audubon*, 658 P.2d at 727.

A similar approach was in fact accepted by the Supreme Court in the context of nuisance law. In *People v. Gold Run Ditch and Mining Co.*, 66 Cal. 138 (1884), the defendant argued that its dumping of mining debris into a stream did not, on its own, create a nuisance but that, instead, it was only the aggregate of debris dumped by *all the companies* working the stream that created the actionable claim. *Id.* at 148. In rejecting the defendant's argument, the Court noted that "each element of contributive injury is a part of one common whole; and to stop the mischief in the whole, each part in detail must be arrested and removed." *Id.* at 150. *Gold Run* may be

v. *SWRCB* nor D-1630 states or implies that the individual appropriators using Delta water are wasteful or fail to apply the diverted water to an efficient, beneficial use. Instead the problem is that, given the increased need for instream flows, there is simply less water available for appropriation. According to traditional appropriation law, however, the remedy for lack of available water is the reduction, leading to eventual elimination, of junior water allotments.<sup>136</sup> In other words, under the reasonable use doctrine, reduction according to priority is more justifiable than proportionate reduction since it is only due to the additional "junior" users that the total water use has become "unreasonable."<sup>137</sup>

A second difficulty with utilizing the reasonable use doctrine to achieve proportionate reduction in the Delta is the unavoidable discretion conferred upon both the Water Board and the courts to redefine what constitutes unreasonable water use and to reallocate water in contravention of traditional water rights law regarding priority and ownership. The holdings of *Joslin* and *U.S. v. SWRCB* may be legitimately criticized for impermissible judicial activism in reinterpreting the meaning of "reasonable use" and thus interfering with the legitimate expectations of water users.<sup>138</sup> Nothing in the language of *U.S. v. SWRCB*, for

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distinguished from the Delta water rights system, however, in that no priority system existed among miners regarding a "right to dump." Perhaps more importantly, *Gold Run*'s holding was based in large part on the Court's finding that the deposit of hydraulic mining debris in the streams of California had become an *unreasonable custom*, dangerous to public and private rights. *Id.* at 151. In contrast, water diversions, as recognized in *National Audubon*, are relied upon by the population and economy of the State. 658 P.2d at 728.

136. *See supra* note 18.

137. One method of avoiding this problem would be for the Water Board (or a Court) to identify current state-of-the-art conservation methods not being utilized by members of the user group and to declare these individual uses to be "unreasonable." An initial obstacle to this approach would be the logistical difficulties in establishing uniform water conservation levels among a diverse group of water users. Additionally, two problems arise from this method. First, a top-down implementation of conservation measures would likely be less efficient than one based on incentives through proportionate reduction requirements. Second, reductions achieved through the reasonable use doctrine based upon the failure of individual users to conserve would not necessarily free up water for instream uses since the basis for the determination of "unreasonableness" would derive not from the individual user's effect on water quality but instead on the user's failure to conserve.

138. *See, e.g., Schulz and Weber, supra* note 60, at 1086-93.

In *Joslin*, the Court noted that the question of reasonable use was a question of fact but then went on to note that:

Although . . . what is a reasonable use of water depends on the circumstances of each case, such an inquiry cannot be resolved *in vacuo* isolated from statewide

example, limits the Water Board's powers under the reasonable use doctrine to a balancing of the competing public interests of water quality and water supply. Instead, a plausible interpretation of the court's language is that the reasonable use doctrine may now be employed to reallocate water among a variety of past and present beneficial uses.

The potential effect of the language in *U.S. v. SWRCB* on the stability of water rights *among competing beneficial uses* is a legitimate cause for concern. However, the language of D-1630, which extends *U.S. v. SWRCB*'s holding to allow proportionate reduction *within* the water user group, reduces the level of uncertainty down to the individual water user. In order to employ the reasonable use doctrine to rearrange priorities *within* a single appropriative user group, the water uses of individuals holding senior priorities must be characterized as "unreasonable." Under *Joslin*, there is no compensable property interest in the unreasonable use of water. If any individual water use which contributes to a total "unreasonable" impact upon another beneficial use may be deemed "unreasonable," there is no longer any limit on an administrative or judicial body's power to rearrange water allocations.<sup>139</sup> Individual property rights in water are, in this event, simply products of current administrative or judicial allocation.<sup>140</sup>

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considerations of transcendent importance. Paramount among these we see the ever increasing need for the conservation of water in this state, an inescapable reality of life. . . . 429 P.2d at 894.

The Court then held that the defendant's use of water was "as a matter of law unreasonable. . . ." *Id.* at 141. The Court's willingness to treat definitions of "reasonable use" as matters of law raises additional concern in light of the concurrent jurisdictional authority of the courts to hear reasonable use cases. *Environmental Defense Fund v. East Bay Mun. Util. Dist.*, 26 Cal. 3d at 200.

139. In other words, it is difficult to see how the Water Board's reasonable use power, construed in such a way as to allow for reprioritization without regard to the "reasonableness" of the individual user, could be limited to the imposition of reductions which are proportional over the entire water user group. Instead, such a reasonable use power would also by implication include the power to elevate junior over senior users and to even eliminate certain "beneficial" uses entirely. *See Joslin*, 429 P.2d at 898 [noting that the fact that a use is "beneficial" does not necessarily mean it is "reasonable" under Article X, Section 2 of the Constitution.]

140. An especially problematic aspect of allowing the reasonable use doctrine to reallocate among beneficial uses at the level of the individual water user is the lack of political protection that individual users—as compared to beneficial use groups—may enjoy. For example, if the Water Board finds that water used for irrigation has become unreasonable due to its adverse impacts upon another beneficial use, farmers could be expected to lobby the legislature for relief. If the farmers were unsuccessful in convincing the legislature to overturn the Water Board's decision, one might feel confident that at least the voice of the farming group had been heard in

### C. Public Trust Doctrine

In contrast to the reserved rights power and the reasonable use doctrine, the public trust doctrine effectively offers both a legal and conceptual basis for achieving proportionate reduction in order to protect water quality in the Delta. The legal basis for achieving proportionate reduction under the public trust doctrine is derived from the public trust easement which overlays all water rights in the Delta. The holdings of *National Audubon* and *U.S. v. SWRCB* that appropriative water rights are subject to the public trust doctrine<sup>141</sup> implicitly stand for the proposition that neither the 1914 legislative act establishing the appropriative permit system nor the administrative permit process divest public trust resources to private appropriators.<sup>142</sup> Under *California Fish*, appropriation permits to divert water from navigable waterways therefore confer only the *jus privatum* right to apply the water to beneficial use while the State continues to retain its *jus publicum* interest in the water being diverted.<sup>143</sup> Thus, because the Delta is a navigable waterway, the property right in water

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the democratic process of characterizing the "public interest." In contrast, if the Water Board is able to characterize Farmer A's water use as unreasonable since it contributes to the irrigation group's previously determined "unreasonable" impact, then, under *Joslin*, there is nothing to prevent the Water Board from reallocating water away from Farmer A. Farmer A's subsequent failure, as an individual, to overturn the Water Board's determination through the legislative process would not necessarily provide comfort that the democratic "process" was adequately protecting the "public interest."

One question not addressed in this paper is the extent to which arguably differential treatment by the Water Board of different individual users under the reasonable use doctrine would give rise to an equal protection claim.

141. *National Audubon*, 658 P.2d at 728; *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82, 149 (1986).

142. Neither *National Audubon* nor *United States v. SWRCB* specifically holds that the legislative establishment of the water appropriation system was a general act not in furtherance of public trust principles. Such a holding is implicit, however, in *National Audubon's* language that "the public trust imposes a duty of continuing supervision over the taking and use of appropriated water." 658 P.2d at 728. See also Ralph W. Johnson, *Water Pollution and the Public Trust Doctrine*, 19 ENVTL. L. 485, 498-501 (1989).

Several commentators have noted the possibility of specific legislative approval of water projects such as the SWP and CVP creating, by necessary implication, divestiture of the State's public trust easement in those waters appropriated. See, e.g., Harrison C. Dunning, *The Significance of California's Public Trust Easement for California Water Rights Law*, 14 U.C. DAVIS L. REV. 357, 389-392 (1980); Arthur L. Littleworth, *The Public Trust v. The Public Interest*, 19 PAC. L.J. 1201, 1220-1221 (1989). In *United States v. SWRCB*, however, the Court found that the appropriation permits held by both the SWP and the CVP were subject to the public trust easement. 182 Cal. App. 3d at 149-51.

143. *People v. California Fish Co.*, 166 Cal. 576, 593 (1983).

held by *each* Delta appropriator is subject to the public trust easement.<sup>144</sup> This easement prevents *any* party from acquiring a *vested* right to appropriate water in a manner harmful to the interests protected by the public trust.<sup>145</sup>

An additional important holding from *National Audubon* is that the public trust doctrine is independent from the appropriative water rights system.<sup>146</sup> Thus, the sovereign power of the State to enforce its *jus publicum* interest, represented by the public trust easement, exists outside of, and is therefore not subject to the inner rules of, the water rights system. As a result, the State is not legally required to uphold user priorities developed under the water rights system in enforcing the public trust easement against individual water users.<sup>147</sup> Freed from the constraints of the priority system, the State may enforce the public trust easement on each individual water user on a proportionate basis, according to the relative amount of impact caused by each user upon the public trust interest.<sup>148</sup>

In striking contrast to the reasonable use doctrine, the public trust doctrine also offers a conceptual basis for imposing proportionate reduction. This conceptual basis is derived from the fact that each individual Delta water user, by interfering with the public trust value of a *naturally flowing* Delta ecosystem, has an adverse impact upon the instream values of the public trust, irre-

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144. Because the public trust easement was established in navigable waterways upon California's entry into the Union in 1850, it predates any existing appropriative rights which may exist. *Illinois Central*, 146 U.S. at 435; *Pollard's Lessee*, 44 U.S. at 229 (1845).

145. *National Audubon*, *supra*, 33 Cal. 3d. at 445; *United States v. SWRCB*, 182 Cal. App. 3d at 149. The public trust doctrine thus avoids a takings claim by asserting the pre-existing "jus-publicum" property interest of the State existing on the title of every water user claiming water rights in navigable waters. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2900 (1992) (noting that a state regulation which deprives landowner of all economically beneficial use is not a taking where proscribed uses are not part of landowner's title to begin with.) See also, Sax, *Rights that 'Inhere in the Title Itself': The Impact of the Lucas Case on Western Water Law*, 26 LOYOLA OF LOS ANGELES L. REV. 943 (1993).

146. 33 Cal. 3d at 445.

147. The public trust doctrine does not reprioritize rights among consumptive users within the water rights system. Instead, it enforces the pre-existing public trust easement upon each water user on a proportional basis, according to the relative amount of water diverted. Both the non-priority reductions among the consumptive user group and the functional reductions given to limited instream flows for the public trust are incidental byproducts of enforcing the public trust easement.

148. This approach is supported by the language of D-1630 which states that "each water right holder should be responsible for the effects caused by its own diversion." D-1630 at 105.

spective of the number of ultimate users.<sup>149</sup> The adverse impact is inevitable given the substantive values protected by the trust which, in turn, are derived from the public trust's independence from the water rights system.<sup>150</sup> Having developed *outside* the water rights system, public trust values, such as ecological preservation, are undiluted by the balancing which takes place *within* the water rights system in determining the nature of the "public interest."<sup>151</sup> As a result, *any* consumptive water use adversely affects the instream values protected by the trust.<sup>152</sup> Moreover, a consumptive user may not claim that its single use causes no harm; clearly *any diversion* of water impairs the public trust value of natural flow.<sup>153</sup> The inability of a water user to make

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149. *Marks v. Whitney* stated, in regards to defining the public trust interest in tidelands:

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. 491 P.2d at 379-80 (emphasis added).

One definition of "natural" in the Delta's ecosystem would be the natural flow regime of freshwater from the Sacramento and San Joaquin Rivers. In this context, any diversion of that "natural flow" would constitute an adverse impact upon the public trust interest. Such "adverse impact" is directly supported by the Proposed Rule, which notes that the long term goal of water quality regulation in the Delta is to fully offset the impacts of water development on the Delta ecosystem. 59 Fed. Reg. at 820. See also *supra* note 4.

150. The argument that the State has broad authority to construe the public trust values as any use serving a "public purpose" was flatly rejected by the Supreme Court in *National Audubon*. Instead, the Court noted that the public trust is an "affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands . . ." 33 Cal. 3d at 440-441.

151. The instream values of the public trust should not be confused with legislation or administrative rulings which attempt to strike a balance between the public trust value at issue and other competing public interests. In *California Trout v. Superior Court*, 218 Cal. App. 3d at 211, the Court characterized Fish and Game Code section 5946 - which conditions dam licenses on compliance with sufficient instream flow for downstream fisheries - as a "balancing of the public interest" by the legislature. The water quality standards set by the Water Board and subsequently by the EPA also represent compromises between public trust values and competing public uses. Thus, the Water Board's mandate under Water Code section 13241 is to establish water quality standards at a *reasonable* level of protection which will best serve the "public interest". *United States v. State Water Resources Control Board, supra*, 182 Cal. App. 3d at 141. The Proposed Rule, meanwhile, specifically states that the EPA's water quality standards represent a compromise in light of the competing uses for water in the Delta. 59 Fed. Reg. at 820.

152. D-1630 supports this view by stating that "each water right holder should be responsible for the effects caused by its own diversion." D-1630 at 105.

153. One commentator has approached this problem through the analogy of water pollution. See Johnson *supra* note 142. This approach is based upon the public

this claim conceptually distinguishes the public trust from the reasonable use doctrine because, as discussed earlier, a senior water user in the Delta may legitimately argue that its individual use of water does not "unreasonably" impair Delta water quality.<sup>154</sup> Thus, because each Delta water use affects the public trust resource, the State is empowered to modify the rights of each individual water user.<sup>155</sup>

Aside from offering a legal and conceptual basis for proportionate reduction, the public trust doctrine offers clear practical

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trust value of water quality which is adversely affected by water appropriators. Since no individual has a constitutionally protected right to pollute, the State may regulate these appropriators as it would any polluting entity, under either the police power or by enforcing the values of the public trust doctrine. *Id.* at 504-506.

One difficulty with a pure application of this approach is the contrast between the typical profile of a "polluter" and an appropriator under the water rights system. Historically, water pollution has been disfavored as a water use based on its "consistently poor showing under the criteria invoked to sort out competing uses." *See* 2 W. RODGERS JR., *ENVTL. LAW* 141 (3d ed. 1986) Such disfavor is based primarily on the facts that (1) the goal of waste disposal is *not* a water dependent activity; (2) the benefits of pollution tend to be disproportionately outweighed by the costs. Water pollution's high "cost" is due to its tendency to be exclusive as to other water dependent uses. *Id.* In contrast, water appropriation is a water dependent activity which benefits the public while not necessarily excluding other water uses, including in-stream uses such as protection of water quality. It is for this reason, of course, that the Supreme Court in *National Audubon* rejected the plaintiffs' argument that appropriative water rights in California were acquired and subsequently being used unlawfully in violation of the public trust. 33 Cal. 3d at 445.

An approach which instead emphasizes the impact to public trust values over the relative social utility of the offending water use offers the conceptual advantages of (1) conceding the "public interest" value of water appropriation while still retaining the idea of an adverse impact upon the public trust by each individual user; and (2) allowing for proportional reduction based on the adverse impact in a manner not inconsistent with the individual water user's right to appropriate in the public interest.

154. However, an individual water use may legitimately be characterized as unreasonable where it belongs to a class of uses which have been deemed to be unreasonable under the public interest standard. *See e.g., Long Valley Creek System* 599 P.2d at 355-56 (noting that unexercised riparian rights are unreasonable for causing uncertainty in the water rights system); *Joslin v. Marin Mun. Water Dist.*, 429 P.2d at 895-96 (holding that use of stream as means of gravel deposit is unreasonable as a matter of law); *Gold Run D & M Co.*, 66 Cal. 3d at 151 (holding that use of stream as outlets for mining debris constitutes a per se nuisance based upon its unreasonable impact upon other water uses).

It is less clear, however, how an individual use which is neither wasteful nor a part of a disfavored class may be characterized as "unreasonable." *See supra* note 135. As previously stated, the public trust doctrine avoids this dilemma by focusing on the adverse impact to the pure trust value rather than the social utility of the consumptive use.

155. *National Audubon*, 33 Cal. 3d at 445; *Boone v. Kingsbury*, 206 Cal. at 192-193; *California Fish*, 166 Cal. 3d at 599; *United States v. State Water Resources Control Board*, 182 Cal. App. 3d at 149.



advantages in implementation. Using the public trust doctrine to achieve proportional reduction is significantly less disruptive to the water rights system than using either the reasonable use doctrine or the reserved rights power. As discussed earlier, in order to employ these latter two authorities to reprioritize water rights, broad discretion to modify permits in the public interest must be conferred upon the Water Board and the judiciary.<sup>156</sup>

In contrast, conferring power on public officials to proportionately reduce water allocations to protect the limited values of the public trust does not create significant disruption within the water rights system for three reasons.<sup>157</sup> First, the public trust doctrine represents a limited set of non-consumptive values, essentially restricted to instream uses such as navigation, recreation, fisheries and ecological preservation.<sup>158</sup> Thus, the public trust doctrine does not confer power on public officials to reallocate water among consumptive uses, such as irrigation and domestic. This is important since the real competition for future water in California will be between agricultural and urban users, not between these uses and the instream values protected by the trust.

Second, because the public trust doctrine exists outside the water rights system, it does not reprioritize water rights among

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156. Because the reserved rights power and the reasonable use doctrine exist within the water rights system, it is difficult, if not impossible, to limit such discretion once conferred. As a result, under a broadly construed reserved rights power, the Water Board is empowered to issue revocable permits permanently subject to modification by the Water Board. Under a broadly construed reasonable rights doctrine, the Water Board and the judiciary are given discretion to reallocate all competing beneficial uses within the water rights system. Whether or not such powers are even exercised, such discretionary authority over rights previously considered to be vested would create the potential for instability in the water rights system.

157. An additional reason for the public trust's lesser impact is the historical interpretation which restricts the public trust easement to navigable waters or non-navigable streams directly affecting navigable waters. *National Audubon*, 33 Cal. 3d at 437. This paper does not cite this interpretation as a grounds for the public trust's lesser impact since the issue is still undecided by the Supreme Court. *Id.* at 437 n. 19 [Court does not consider the question of whether the public trust extends for some purposes - such as fishing, environmental values and recreational interests - to non-navigable streams.] On a conceptual level it is at least arguable that the expansion of public trust values under *Marks v. Whitney*, to include *non-navigatory* values such as ecological preservation would require a concomitant expansion of the public trust doctrine to non-navigable waters. 491 P.2d at 379-80; *see, e.g., McCurdy, Public Trust Protection for Wetlands*, 19 ENV. LAW 683 (1989); *Meyers, Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENV. LAW 723 (1989).

158. *See National Audubon*, 33 Cal. 3d at 440-441; *Marks v. Whitney*, 491 P.2d at 379-80; *United States v. SWRCB*, 182 Cal. App. 3d at 149 n.41.

individual consumptive users. Implementation of proportional reduction under the public trust doctrine does not rearrange consumptive use priorities but instead enforces the pre-existing public trust easement on each user.<sup>159</sup> Under the public trust doctrine, individual consumptive users within the water rights system may retain their relative priorities while contributing a proportionate percentage of their allocations to the public trust interest.<sup>160</sup>

Finally, the impact of the public trust doctrine on the water rights system is limited by the clear language of *National Audubon* that efficient use of California's water resources for its growing population and economy requires diversions of water from in-stream uses.<sup>161</sup> The resulting balancing test set up by the Supreme Court between consumptive and instream uses allows the water rights system to "unavoidably harm" public trust interests.<sup>162</sup> Thus, under *National Audubon*, the consumptive uses of the water rights system have been accorded a basic level of protection, if not from each other,<sup>163</sup> at least from the in-stream values of the public trust doctrine.

## V.

### CONCLUSION

In contrast to the reserved rights power and the reasonable use doctrine, the public trust doctrine offers persuasive legal and conceptual grounds for achieving the Water Board's stated goal of proportionate reduction of water diversions from the Delta. The ability of the public trust doctrine to achieve proportionate reduction is due to its unique attributes as a property easement of the State, representing substantive values and existing outside

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159. In contrast, a characterization of individual water uses as "unreasonable" cannot, under the water rights system, avoid eliminating the priorities which exist within the user group. See *Long Valley Creek*, 599 P.2d at 668-69; *Joslin*, 429 P.2d at 897.

160. For example, under the public trust doctrine, the reduced amount of available water in a drought year may be allocated under the priority system with seniors entitled to first meet their needs, subject to the requirement that each ultimate user contribute a proportion to the public trust.

161. 33 Cal. 3d at 446.

162. *Id.*

163. *National Audubon* does not address how water may be allocated in the future within the consumptive water user group. Enforcement of the public trust easement would generally not affect future reallocations among consumptive users except, perhaps, to the extent certain consumptive uses caused disproportionate impacts upon public trust values.

the structure of the California's water rights system. Although not discussed at length in this paper, the public trust doctrine also offers the best method of protecting the values of instream flows in navigable waters, given the constraints imposed by existing water diversions.<sup>164</sup> By elevating in-stream values to equal stat-

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164. Despite *National Audubon*' holding that the public trust resource may be impaired by the needs of consumptive water users, the Supreme Court's "balancing approach" offers clear substantive and procedural improvement over previous protection of instream values under the public interest standard of the water rights system.

Substantively, the language of *National Audubon* provides that trust values must be protected *whenever feasible* in state planning and allocation of water resources. 33 Cal. 3d at 446. Despite the scant case authority to implement this language, one may assume that the "whenever feasible" standard of protection is considerably higher than the level of protection afforded instream values within the water rights system.

Under the "public interest" standard, the Water Board is vested with discretion to "consider" instream values in granting appropriations and to reallocate water to instream uses from consumptive uses found to be wasteful or unreasonable. *See CAL. WATER CODE* §§ 1243, 1243.5, 1257, 1257.5, 1258 and 1394). Although a consumptive water use may be neither wasteful nor unreasonable, it still may be "feasible" to modify its allocation or method of use to reduce impacts on the trust value. *See EDF v. EBMUD*, 26 Cal.3d 183 (holding that protection of public trust values feasible by imposing physical conditions on upstream diversions). Thus, in the practical setting of water allocation and litigation, the "feasibility" standard of *National Audubon* represents increased substantive protection for the public trust instream interest.

Procedurally, *National Audubon* lifts review of instream values out of the water rights system and places them into the independently evolved common law doctrine of the public trust. This shift results in several favorable consequences for protecting instream values. First, under the public trust doctrine the legislature is limited in its ability to eliminate consideration of trust interests in water planning decisions. *California Fish*, 166 Cal. at 585, 597. Second, under the public trust doctrine the judiciary retains original jurisdiction to impose strict review on legislative or agency decisions which have failed to adequately protect the public trust interest. Finally, by confirming the State's continuing sovereign interest in its navigable waters, the public trust doctrine ensures that the "whenever feasible" standard of *National Audubon* will be more than simply an additional procedural hoop for agencies to jump through. *National Audubon*, 33 Cal. 3d at 446 n.27.

Another proposal to protect instream uses is to grant appropriative rights to instream uses, which would require overturning *Fullerton v. State Water Resources Control Board*, 90 Cal. App. 3d 590 (1979), and *California Trout, Inc. v. State Water Resources Control Board*, 90 Cal. App. 816 (1979) (noting that courts find no legally recognized appropriation possible in the absence of a physical diversion of water). *See Gray, A Reconsideration of Instream Appropriative Water Rights in California*, 16 *ECOL. LAW Q.* 667 (1989). The advantage in using the public trust doctrine to protect instream use is that, as a pre-existing easement on the property rights of the water user, the public trust interest enjoys an automatic priority in the appropriative rights system, subject, of course, the subsequent balancing adopted in *National Audubon*. Although this "balancing" cannot *guarantee* protection of instream uses in every case, it is doubtful that a higher degree of protection could be obtained by leaving the ultimate allocation decisions between instream and consumptive uses to

ure with traditional consumptive uses, the public trust doctrine can take water resource planning into the 21st century.<sup>165</sup>

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the increasing market orientation of the appropriative rights system. *See e.g.* Water Code §§ 382, 1011, 1745.06; Gould, *Transfer of Water Rights*, 29 NAT. RES. J. 457 (1989)); Gray, *The Modern Era in California Water Law*, 45 HASTINGS LAW J. 251, 272-308 (1994).

165. *See Sax, Liberating the Public Trust Doctrine from its Historical Shackles*, 14 U.C.DAVIS L. REV. 185, 188 (1980).

