

The Public Trust Doctrine: Exploring Application on the Yuba and Bear Rivers

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I. Introduction

In the interest of advancing the discussion around improving ecosystem health in the upper Yuba and Bear Rivers, this memo considers the public trust doctrine – a theory that requires the state, as trustee, to protect public trust uses such as recreational and ecological values for the public, the beneficiaries of the trust. This memo will first explain the origins of the public trust doctrine. Next, it will outline how the scope of the doctrine and some cases where it has been applied in the past. The last section will suggest some ways in which the public trust doctrine applied in the context of Yuba and Bear Rivers.

II. Overview of the Public Trust Doctrine

The public trust doctrine has evolved over hundreds of years in keeping with its expansion into different physical and legal environments. In particular, the changing perception of what constitutes a navigable waterway has broadened the reach of the doctrine. The following

sections discuss first, the history of the public trust, and second, the enlargement of the definition of navigability as it relates to the public trust.

A. History and Origin of Public Trust

The origins of the public trust doctrine are ancient, dating back to Roman law. “By the law of nature these things are common to mankind--the air, running water, the sea and consequently the shores of the sea.” National Audubon Society v. Superior Court, 33 Cal. 3d 419, 433 (1983) (Audubon) (quoting Institutes of Justinian 2.1.1). “From this origin in Roman law, the English common law evolved the concept of the public trust, under which the sovereign owns ‘all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people.’” Id. at 434 (quoting Colberg, Inc. v. State of California ex rel. Dept. Pub. Works, 67 Cal. 2d 408, 416 (1967)). This theory immigrated to the United States, where title to these lands passed to the states upon admission to the union. Additionally, the state acts as trustee for public waters under its own laws. “The power of the state to control, regulate and utilize its navigable waterways and the lands lying beneath them, when acting within the terms of the trust, is absolute, except as limited by the paramount supervisory power of the federal government over navigable waters.” Marks v. Whitney, 6 Cal. 3d 251, 259 (1971). Thus, California now acts as trustee for these lands and waters and accordingly, California courts have recognized the state’s duties as trustee. Audubon, 33 Cal. 3d at 434. “The core of the public trust doctrine is the state’s authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters.” Id. at 425.

Originally, the sovereign held these lands and waters in trust to protect three uses: navigation, commerce and fisheries. Id. at 434. The courts have expanded upon those uses to and have included other uses including fishing, hunting, bathing, swimming, boating, general recreation purposes, as well as use of the bottom of the navigable waters for various purposes, including anchoring and standing. Id. The California Supreme Court has held that “[i]n administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another.” Id. (quoting Marks v. Whitney, 6 Cal. 3d 251, 259 (1971)). The court noted that there is “a growing public recognition that one of the most important public uses . . . 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.” Id. at 434-35.

Because the state holds these lands and waters in trust for the public, any conveyance to a private party is still subject to the public trust unless the conveyance was made for the purpose of promoting trust goals. State of California v. Superior Court (Lyon), 29 Cal. 3d 210 (1981). As such, the state can exercise continued supervision over any such conveyance, and can modify it as necessary to ensure that it meets public trust goals. Id.

The California Supreme Court reaffirmed the state’s duty to act as trustee in the seminal case, Nat’l Audubon Soc’y v. Superior Court, 33 Cal.3d 419 (1983). In that case, the court ordered the State Water Resources Control Board (SWRCB) to reconsider water rights granted to

the Los Angeles Department of Water and Power (LADWP) that diverted water from tributaries to Mono Lake. LADWP's diversions were drying up Mono Lake and seriously threatening the fish and wildlife of that area. At the time the SWRCB approved the diversions, it noted the negative effects on Mono Lake, but felt bound to approve the diversion because they were for domestic use, the highest use of water under California law. See Cal. Water Code § 106 (2006).

In resolving the dispute, the court noted that “parties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust.” Further, the state as trustee has a continuing supervisory duty to consider public trust uses against other uses of public assets.

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. Just as the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests.

Audubon, 33 Cal. 3d at 446. The court therefore recognized that the public trust could not always take complete precedence over the need to appropriate water, but that the SWRCB still had a duty to consider the effect on the public resource and to protect it as much as possible. As such, the court held that the SWRCB retains a duty to reconsider past appropriations. That duty exists even where the water is being taken for domestic uses in an area of short supply, as was the case with Los Angeles. Although considerations of water supply must be taken into account, so must the public trust: “neither domestic and municipal uses nor in-stream uses can claim an absolute priority.” Id. at 448, n. 30.

Tying into the continuing duty to consider the public trust is California's statutory mandate that water be used reasonably. Cal. Water Code § 100 (2006). “Hence, the appropriator can be compelled as the price of continued appropriation to take reasonable steps to attain the same end in a manner that does not involve unreasonable use of water.” California Trout, Inc. v. Superior Court, 218 Cal.App.3d 187, 210 n.6 (1990).

In sum, the public trust doctrine protects waters and underlying lands held in trust for the people of the state. Although the state can convey rights to use such waters, that use remains subject to the public trust and the state may reconsider whether such a conveyance is within the interest of the trust. The public trust does not apply to all waters, however, and the next section considers the scope of the public trust.

B. Scope of the Public Trust Doctrine- Navigability

Brought to the United States from England, the public trust originally applied only to tidal waters and lands covered by the daily tides. As the public trust evolved in the United States, and in particular in the western U.S., its application was expanded to include all navigable streams and lakes. The states have often expanded their definition of navigability and thus the

scope of the public trust. Because navigability is the benchmark for the application of the public trust, this section will consider the concept of navigability in more detail and the scope of the public trust doctrine's application.

Unfortunately, navigability is not a clear concept in the law. Several different standards determine navigability for various purposes. The public trust doctrine has been expanded from its origins both through federal and state definitions of navigability.

First, the federal test of navigability for title determines which waters remain subject to federal jurisdiction pursuant to the commerce clause of the United States Constitution. Under the commerce clause the U.S. has jurisdiction over waters that are navigable, or capable of use in interstate commerce. See U.S. Const. art. 1, § 8, cl. 3. However, the beds and banks of federally navigable waterways passed to the states upon admission to the Union. The United States Supreme Court has stated the federal test for navigability: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." The Daniel Ball, 77 U.S. 557, 563 (1870). That rule was later expanded by the court, which stated that "the true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation." The Montello, 87 U.S. 430, 441 (1874). "If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway." Id. at 441-42. Although the court broadened the definition of navigable in that case, it did place limits on the breadth of that holding, stating: "[i]t is not, however, . . . 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.'" Id. at 442.

Thus, those waters that meet that test are "navigable for title," and while the U.S. exercises jurisdiction over those navigable waters, the states have title to the beds and banks of those waters and hold those in trust for the public. The public trust doctrine has been expanded beyond federally navigable waters through the expansion of the definition of navigable by individual states.

California is one of many states that has made its rule of navigability more inclusive, and consequently the scope of the public trust in the state. That navigability is the measure of the public trust doctrine is indicated in our Constitution, which provides: "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

Golden Feather Cmty. Ass'n v. Thermalito Irrigation Dist., 209 Cal. App. 3d 1276, 1285 (1989) (citing Cal. Const., art X, § 4). Thus, in California navigability is determined case-by-case, based on the public right of access to and use of navigable waters. A review of the cases illustrates that California's definition of navigability under the public trust is broad; the public trust has even been expanded to include even those non-navigable waters that affect navigable waters. These cases are summarized briefly below.

First, California has expanded its definition of navigability to waters that can be used solely by a recreational boat.

Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit. Many, if not most, of the meandered lakes of this state, are not adapted to, and probably never will be used to any great extent for, commercial navigation; but they are used-- and as population increases, and towns and cities are built up in their vicinity, will be still more used--by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated. To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot perhaps, be now even anticipated.

Bohn v. Albertson, 107 Cal. App 2d 738, 744 (1951). The court went on: "we are satisfied that, *so long as these lakes are capable of use for boating even for pleasure, they are navigable, within the reason and spirit of the common-law rule.*" Id. The California Supreme Court more recently reiterated that rule stating, "[a] waterway usable only for pleasure boating is nevertheless a navigable waterway and protected by the public trust." Audubon, 33 Cal. 3d at 435, n. 17. As such, in California, the test for navigability includes all waterways that can be used for recreational boating and as a consequence, the public trust also covers all of those waters.

The California Supreme Court in the Audubon case also determined that non-navigable tributaries to navigable waters were covered by the public trust. Id. at 437. The court reasoned that the state's interest in navigable waters is not diminished even if the negative effects from the disputed activity come from actions on non-navigable tributaries. Thus, although the water was diverted from non-navigable creeks, because those creeks flowed into a navigable water body, Mono Lake, the court held that the public trust doctrine protects the navigable water from diversions from the non-navigable waterways. Id.

Although the courts have held that natural waterways used for recreation are navigable under the law, they have not so held for artificial water bodies. For example, in Golden Feather Cmty. Ass'n v. Thermalito Irrigation Dist., a California Court of Appeal held that the public trust did not apply to a reservoir, an artificially created body of water. 209 Cal. App. 3d 1276, 1279 (1989). In that case, the plaintiffs complained to the court that the defendant irrigation district had drawn down the reservoir "to the point where fishing, wildlife and recreational uses will be destroyed and the plaintiffs will be denied access to the waters of the reservoir for fishing purposes." Id. In addition, the plaintiffs were concerned because the defendant irrigation district

intended to build and operate a hydroelectric project at the dam, which would further draw down the reservoir. The court explained: “[i]n short, plaintiffs seek a judicial order which would compel defendants to continue their authorized diversion of waters from Concow Creek, but which would preclude them from using the diverted waters for authorized purposes [irrigation] in order to maintain a recreational reservoir.” *Id.* The court rejected that claim, based in part on the parties’ perhaps erroneous concession that the tributary waters were not navigable, but more importantly, because the public held no public trust rights in the reservoir predating the defendant’s title, or necessarily the artificial reservoir made by the defendant. Thus, the court stated, “we are aware of no authority which holds that the mere fact of diversion operates to convey otherwise private land into the public trust.” *Id.* at 1285.

Contrasting that decision, however, other cases have held that an artificial watercourse may effectively become a natural waterway under the law.

From the foregoing authorities we feel warranted in holding that a water course, although originally constructed artificially, may from the circumstances under which it originated and by long-continued use and acquiescence by persons interested therein become and be held to be a natural water course, and that riparian owners thereon and those affected thereby may have all the rights to the waters therein as they would have in a natural stream or water course.

Chowchilla Farms v. Martin, 25 P.2d 435, 442 (Cal. 1933); see also Natural Soda Products Co. v. City of Los Angeles, 23 Cal. 2d 193, 197 (1943) (“It is generally recognized that one who makes substantial expenditures in reliance on long-continued diversion of water by another has the right to have the diversion continued if his investment would otherwise be destroyed.”). Although those cases did not involve the public trust, it is important to consider that the effects of changes to water flow cannot be viewed in a vacuum, both legally and as a matter of common sense.

III. Application of the Public Trust to the Yuba-Bear Relicensings

The Public Trust Doctrine can be applied to the water diversions on the Yuba and Bear River systems, because the project involves either navigable waters or tributaries to navigable waters.¹ Further, the interests protected by the public trust are a large part of the Yuba-Bear and Drum-Spaulding relicensings due to begin in 2007. The shared values considered under the public trust doctrine and in relicensing include ecological values, recreation, and navigation².

The Audubon case dictated that the SWRCB has a continuing duty to consider water rights in light of the public trust. If the public trust is not being protected, the SWRCB can limit diversions so as to protect public resources. As in Audubon, the water rights in this case are

¹ Although the Yuba and Bear Rivers clearly support recreational boating, I have not yet found out whether a determination that those waterways are navigable has ever been made. Whether it has or not, it should be a fairly straightforward argument to make.

² Although navigation interests may in this case more properly fall under recreation.

largely used for domestic uses and irrigation, the highest uses of water in California, making the case one of balancing, favoring neither water rights nor the public trust to the exclusion of the other. To gain a license under the Federal Power Act, the licensee must show that it has sufficient water rights to support the project. (See Water Rights and Relicensing on the Yuba and Bear Rivers for a discussion of the validity of those rights.) SWRCB could reconsider the allocation of these water rights in light of the public trust doctrine at the time in which the licensees submit water rights licensing applications in the first phases of the Yuba-Bear and Drum-Spaulding FERC relicensings.

The application of this doctrine is largely dependent on whether these resources are in fact being harmed by the diversions, requiring a factual inquiry. Accordingly, this legal analysis falters somewhat without additional studies and sound science to show the negative impacts of the hydropower facilities on the river system. However, from a glib understanding, it is clear that fisheries and other aquatic organisms are affected by the interruptions and diversions out of the Yuba River watershed and the large de-watered sections on the Bear also must affect fisheries.

Additionally, as recreational interests are protected under the public trust, those activities can be protected as well. However, using the public trust theory for recreation may be slightly more tricky from a collaboration standpoint because of the different recreational interests with various desires for water flows.

It is clear that the public trust interests were not considered at the time the water rights nor FERC licenses were obtained.³ Finally, applying the Public Trust Doctrine will depend on its relevance to specific stretches of river.

IV. Conclusion

This memo is intended to serve as a starting point for knowledge and discussion of the legal context for the water management and ecosystem preservation of the Yuba and Bear.

³ A question arises as to how much the SWRCB can regulate the pre-1914 rights.