The Significance of California's Public Trust Easement for California Water Rights Law

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Protracted litigation over water is commonplace in California. Several years after statehood the Supreme Court of California decided its first water law case,[1] and thereafter a steady flow of water law decisions filled the reports.[2] *Lux v. Haggin*,[3] spread across nearly two hundred pages of these reports, is the court's longest opinion on the subject,[4] and it is one of the most important.[5] The volume of cases has been so great that in 1922 Chief Justice Lucien Shaw, himself an expert on California water law

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[1] Eddy v. Simpson, 3 Cal. 249 (1853).

[2] Basic references are W. HUTCHINS, THE CALIFORNIA LAW OF WATER RIGHTS (1956), and the six "background and issues" papers prepared for the Governor's Commission to Review California Water Rights Law, D. ANDERSON, RIPARIAN WATER RIGHTS IN CALIFORNIA (1977); M. ARCHIBALD, APPROPRIATIVE WATER RIGHTS IN CALIFORNIA (1977); C. LEE, LEGAL ASPECTS OF WATER CONSERVATION IN CALIFORNIA (1977); C. LEE, THE TRANSFER OF WATER RIGHTS IN CALIFORNIA (1977); A. SCHNEIDER, GROUNDWATER RIGHTS IN CALIFORNIA (1977); and A. SCHNEIDER, LEGAL ASPECTS OF INSTREAM WATER USES IN CALIFORNIA (1978).

[3] Lux v. Haggin, 69 Cal. 255, 10 P. 674 (1886).

[4] Shaw, *The Development of the Law of Waters in the West*, 10 CALIF. L. REV. 443, 455 (1922). Shaw, then Chief Justice of the Supreme Court of California, stated the opinion then to be the longest on any subject treated by that court. *Id.* It was handed down after rehearing. The original, much shorter opinion is reported at 4 P. 919 (1884).

[5] Shaw, *supra* note 4, at 453-55. The decision settled that California recognizes riparian water rights as part of the common law. The riparian right is an incident of the ownership of land which abuts a stream, lake or pond, D. ANDERSON, *supra* note 2, at 1, and it entitles each landowner to a reasonable share of the waters in question. *Id.* at 2.

and the author of many leading water law opinions,[6] asserted that the California reports contain "more decisions on that subject [the law of waters] than on any other."[7]

For the most part California water law decisions have concerned disputes over the consumptive use of water from both navigable and nonnavigable sources. Miners, farmers and cities have been the leading claimants to water for consumption, and the courts have recognized several types of water rights. Riparian and appropriative rights have been of principal importance.[8]

At the same time that one line of cases has afforded protection to consumptive uses established under California water rights law, a different line of cases has made clear that the general public enjoys the right to various nonconsumptive uses of the state's navigable waters. This right, referred to in one of the recent cases as a "public trust easement,"[9] is a species of publicly held property right in water. The right, thought to have its origins in English and Roman law, encompasses navigation, commerce, fishing, and a series of other recreational, scientific and aesthetic uses of water.

From its earliest nineteenth century statements on the public trust easement, the Supreme Court of California has made it clear that the easement extends both to navigable waters and to the land lying beneath these waters.[10] The public interests pro-

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[6] *E.g.*, Antioch v. Williams Irrigation Dist., 188 Cal. 451, 205 P. 688 (1922); Northern Cal. Power Co., Consol. v. Flood, 186 Cal. 301, 199 P. 315 (1921); San Bernardino v. Riverside, 186 Cal. 7, 198 P. 784 (1921); Palmer v. Railroad Comm'n, 167 Cal. 163, 138 P. 997 (1914); Inyo Consol. Water Co. v. Jess, 161 Cal. 516, 119 P. 934 (1912); Hudson v. Dailey, 156 Cal. 617, 105 P. 748 (1909); Mentone Irrigation Co. v. Redlands Elec. Light & Power Co., 155 Cal. 323, 100 P. 1082 (1909); Burr v. Maclay Rancho Water Co., 154 Cal. 428, 98 P. 260 (1908); Duckworth v. Watsonville Water & Light Co., 150 Cal. 520, 89 P. 338 (1907); Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 P. 978 (1907); Southern Cal. Inv. Co. v. Wilshire, 144 Cal. 68, 77 P. 767 (1904); Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663 (1902).

[7] Shaw, *supra* note 4, at 444.

[8] CAL. GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, FINAL REPORT 10-12 (1978) [hereinafter cited as GOVERNOR'S COMM'N]. An appropriative right is acquired by putting water to beneficial use. W. HUTCHINS, *supra* note 2, at 120. Priority among appropriators is established by the "first in time, first in right" principle. M. ARCHIBALD, *supra* note 2, at 1.

[9] Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971).

[10] *Id.*; People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 151, 4 P. 1152,

tected, such as navigation, involve direct use of the water rather than of the underlying land. Yet most of the public trust litigation has involved the land, typically in situations where tidelands may be or have been filled for development with an incidental impact on public nonconsumptive uses of water.

In these coastal or "salt water" cases, consumptive water rights have not been an issue,[11] since salt water has been unusable for the various consumptive purposes and it exists in virtually unlimited quantities. In the rare cases involving interference with public nonconsumptive uses of inland waters, the source of the interference has been creation of physical obstacles in the water rather than diversion of the water for consumption.[12] Yet it is clear that diversions sometimes may interfere with navigable waters just as seriously as physical obstacles do

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1159 (1884). The public trust easement extends to three types of land underlying navigable waters: tidelands, submerged lands, and the beds of navigable streams, rivers and lakes. Tidelands are "those lands lying between the lines of mean high and low tide covered and uncovered successively by the ebb and flow thereof." Marks v. Whitney, 6 Cal. 3d 251, 257-58, 491 P.2d 374, 378-79, 98 Cal. Rptr. 790, 794-95 (1971). These tidelands include "the shores of every bay, inlet, estuary, and navigable stream as far up as tide water goes and until it meets the lands made swampy by the overflow and seepage of fresh water streams." People v. California Fish Co., 166 Cal. 576, 591, 138 P. 79, 85 (1913). The landward border of the tidelands is determined not by the very highest tides, but by the high-water mark of the neap tides, those tides which occur between the full and change of the moon. Teschemacher v. Thompson, 18 Cal. 11, 21 (1861). Submerged lands are those lands "covered by water at any stage of the tide." McKnight, *Title to Lands in the Coastal Zone; Their Complexities and Impact on Real Estate Transactions,* 47 CAL. ST. B.J. 409, 412 n.7 (1922). Regarding the applicability of the public trust easement to the beds of navigable streams, rivers and lakes, see text accompanying notes 165-72 *infra.*

[11] Generally, lawyers classify water rights according to the means by which they are acquired, *see* notes 5 and 8 *supra,* rather than according to their consumptive or nonconsumptive nature. *But see* Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation,* 3 NAT. RESOURCES J. 1, 63-76 (1963). Nonetheless, water users and water engineers well understand the distinction between consumptive and nonconsumptive use allowed by different types of water rights. Traditionally, a consumptive use requires the diversion of water from the source for agricultural or urban water supply, whereas a nonconsumptive use does not itself significantly alter the location, quantity or quality of a stream's flow. J. BAIN, R. CAVES & J. MARGOLIS, NORTHERN CALIFORNIA'S WATER INDUSTRY 16 (1966).

[12] People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 4 P. 1152 (1884); People *ex rel.* Baker v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (3d Dist. 1971).

and that in such cases the public trust easement may logically be invoked to protect the public uses.

It is thus important for those in California concerned with water rights and water rights law to be aware of the potential significance of the public trust easement.[13] The topic is particularly timely today in light of a major environmental controversy over diversions by the City of Los Angeles from several of the streams feeding Mono Lake.[14] These diversions, made pursuant to valid water rights,[15] are causing a significant decline in the

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[13] The constraint which federal law protecting navigability places on water rights held under state law has long been evident. At the end of the last century, the U.S. Supreme Court commented, for example, that

> if the State of New York should, even at a place above the limits of navigability, by appropriation for any domestic purposes, diminish the volume of waters, which, flowing into the Hudson, make it a navigable stream, to such an extent as to destroy its navigability, undoubtedly the jurisdiction of the National Government would arise and its power to restrain such appropriation be unquestioned. . . .

U.S. v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 709 (1899). *See also* Morreale, *supra* note 11, at 64-66. Recognition of a possible similar constraint stemming from the public trust easement of state law has come more recently. One leading commentator states that correlation of public uses under state law with riparian or appropriative rights in navigable waters is unsettled in several states. 1 W. HUTCHINS, WATER RIGHTS LAW IN THE NINETEEN WESTERN STATES 123 (1971). Another suggests regarding California law that there is "no reason to believe that application of the trust theory to water rights could not be as broad" as it is for tidelands. Robie, *The Public Interest in Water Rights Administration,* 23 ROCKY MT. MIN. L. INST. 917, 927 (1977). A recent authoritative review of California water rights noted the great potential significance of the public trust easement for consumptive water rights. GOVERNOR'S COMM'N, *supra* note 8, at 110.

[14] Mono Lake is a highly saline body of water situated in Mono Basin at the foot of the steep eastern escarpment of the Sierra Nevada Mountains due east of Yosemite National Park. Most of Mono Basin is arid high desert, but under natural conditions the lake is fed from the west by five significant creeks which capture spring and summer runoff from the mountains. CAL. DEP'T OF WATER RESOURCES, REPORT OF INTERAGENCY TASK FORCE ON MONO LAKE 11-12 (1979) [hereinafter cited as TASK FORCE REP.].

[15] More than forty years ago, Los Angeles acquired appropriative rights on four of the five creeks which feed Mono Lake and began exports from the basin. For the past ten years the city has exported an average of 101,000 acre-feet of water per year from the basin. *Id.* at 13. This constitutes approximately 17% of the city's municipal water supply, and it also provides an important source of hydroelectric power. *Id.* at 63. Since in a state of nature total inflow to Mono Lake including precipitation to the lake's surface is estimated to be

water level of this lake,[16] and serious damage to wildlife values is alleged to be occurring as a result.[17] The National Audubon Society and others recently filed a complaint against the Department of Water and Power of the City of Los Angeles,[18] in which injunctive relief is being sought on the ground that the public trust easement in the lake's navigable waters is being violated by the city's diversions.[19] This case has all the earmarks of the protracted water litigation so common in California,[20] and it may

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168,000 acre-feet annually, *id.* at 11, it appears that Los Angeles annually exports about 60% of the lake's total inflow.

[16] Since 1941 when diversions from Mono Basin began, the level of Mono Lake has dropped from one to two feet per year. *Id.* at 15. At the present rate of diversion, it is predicted that the water supply to the lake will equal evaporation from the lake, and consequently the lake's level will stabilize, in the year 2070. The lake would then have a surface area half its present size. *Id.*

[17] Because the lake is about two-and-one-half times more salty than the ocean, fish cannot live there. It therefore is able to support a profusion of brine shrimp and brine flies, which provide an important source of food for masses of migratory waterfowl. Islands in the lake provide nesting sites for the major colony of California gulls on the Pacific Coast, as well as resting places for a large number of several other species. *Id.* at 15-22. The damage to wildlife values is alleged to be twofold. First, the falling water level has caused an island rookery to become a peninsula, allowing predators to disrupt nesting by the California gull. *Id.* at 17. Second, with decreasing inflows of fresh water, salinity and alkalinity of the lake are increasing, with possible future harmful impacts upon the birds and their food sources in the lake. *Id.* at 19-20.

[18] National Audubon Soc'y v. Department of Water & Power, No. 6429 (Mono County Super. Ct., Cal., filed May 21, 1979), *removed*, No. 80-127 (E.D. Cal. 1981). The other plaintiffs are Friends of the Earth, the Mono Lake Committee, the Los Angeles Audubon Society and several individuals. Subsequently, a task force of officials from local, state and federal agencies recommended that the diversions by Los Angeles be cut back by about 85% until the lake stabilizes at an acceptable level. TASK FORCE REP. *supra* note 14, at 55. The engineer in charge of the Los Angeles Aqueduct, into which waters diverted from Mono Basin are routed, was the only member of the task force to dissent from the recommendation. *Id.* at 63-65.

[19] The complaint also seeks relief on the theory that the diversions are causing a nuisance and unconstitutionally depriving the public of access to a navigable waterway. The alleged nuisance is created by dust storms fed by particles from the relicted portions of the lake bed. These particles have caused violations of state ambient air quality standards, and they may constitute "a considerable health hazard." TASK FORCE REP., *supra* note 14, at 22.

[20] After the defendant filed a cross-complaint against the United States, the State of California, two water districts and more than 100 private water rights claimants in Mono Basin, the United States removed the action to federal court, where prolonged controversy over jurisdictional questions occurred. Subsequently, the federal district court allowed plaintiffs to add a nuisance cause

well produce a landmark decision on the meaning of the public trust easement for California water rights law.

This article will first summarize the public trust easement as it has been developed in the numerous cases dealing with land underlying navigable waters. Thereafter, the significance of the easement for the navigable waters themselves will be addressed, and suggestions for reconciling the easement with consumptive water rights will be made.

I. THE PUBLIC TRUST EASEMENT FOR LAND UNDERLYING NAVIGABLE WATERS

Since an extensive secondary literature on the public trust easement for land underlying navigable waters exists,[21] including several studies devoted exclusively to developments in California law,[22] this summary will be relatively brief. It will treat the ori-

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of action based on federal common law. This provided a successful basis for federal jurisdiction. Nonetheless, the court found that the case raised novel and difficult issues of state law which bear on substantial public policy problems, and accordingly abstained on those issues under Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959). The court then stayed the action with direction to the parties to seek in state court a determination of the interrelationship of the public trust doctrine and the state water rights system. National Audubon Soc'y v. Department of Water and Power, No. 80-127 (E.D. Cal. 1981).

[21] Some examples of leading works are H. ALTHAUS, PUBLIC TRUST RIGHTS (1978) (prepared for the U.S. Fish and Wildlife Service, Region 1); MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don't Hold Water*, 3 FLA. ST. U. L. REV. 511 (1975); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970); Stone, *Public Rights in Water Uses and Private Rights in Land Adjacent to Water*, in 1 WATERS AND WATER RIGHTS 177-279 (R. Clark ed. 1967); Note, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970).

[22] *See, e.g.*, Eikel & Williams, *The Public Trust Doctrine and the California Coastline*, 6 URB. LAW. 519 (1974); Martyn & Bohner, *The Loss of Public Tidelands to Private Parties Through Unconstitutional Land Trades*, 13 U.S.F. L. REV. 39 (1978); McKnight, *supra* note 10; Parker, *History, Politics and the Law of the California Tidelands Trust*, 4 W. ST. U.L. REV. 149 (1977); Robie, *supra* note 13; Taylor, *Patented Tidelands: A Naked Fee?* 47 CAL. ST. B.J. 421 (1972); Note, *Private Fills in Navigable Water: A Common Law Approach*, 60 CALIF. L. REV. 225 (1972); Note, *California's Tideland Trust: Shoring It Up*, 22 HAST. L.J. 759 (1971); Note, *California's Tidelands Trust for Modifiable Public Purposes*, 6 LOY. L.A.L. REV. 485 (1973); Comment, *The Tideland Trust: Economic Currents in a Traditional Legal Doctrine*, 21 U.C.L.A. L.

gin and nature of the easement, the range of public interests protected and several limits to the protection provided.

A. Origin and Nature of the Easement

Typically writers on the public trust easement attribute its origins to the Roman law, as partially incorporated into English common law during the medieval period.[23] The easement is said to stem from the Roman law concept of the common ownership of certain natural resources, including rivers, the sea and the seashore,[24] though the significance of this common ownership is debatable. For the seashore, for example, some commentators stress that the common property was perpetually dedicated to the use of the public, with the state cast in the role of protecting public use.[25] Others note that Roman law allowed the de facto appropriation of common land by building on it and thus "suffered the functional equivalent of private ownership along many parts of the shore."[26]

Similar differences of view exist as to the treatment in the English law of seashore or "foreshore" areas.[27] Highly influential American writers such as Kent regarded it as "a settled principle of English law" that the shore below the common highwater mark belongs to the public.[28] A recent study suggests that in fact, however, this so-called "common law" rule of foreshore ownership never existed in England.[29]

The correct views on Roman and English law are of no more than historical interest today. In a series of well known nine-

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REV. 826 (1974).

[23] *See* Eikel & Williams, *supra* note 22, at 520-21; MacGrady, *supra* note 21, at 517-34; SAX, *supra* note 21, at 475; 22 HAST. L.J., *supra* note 22, at 761; 79 YALE L.J., *supra* note 21, at 763-64.

[24] SAX, *supra* note 21, at 475.

[25] *Id.*

[26] MacGrady, *supra* note 21, at 534.

[27] Strictly speaking, the foreshore has been held to be that area between high and low water marks. State *ex rel.* Buckson v. Pennsylvania R.R., 267 A.2d 455 (Del. 1969); State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969). However, the term is often used loosely and treated synonymously with "shore," particularly in later English cases which use foreshore to denote the shore and bed of every body of water subject to tidal flow. 79 YALE L.J., *supra* note 21, at 762 n.1.

[28] 3 J. KENT, COMMENTARIES ON AMERICAN LAW 344 (1828).

[29] MacGrady, *supra* note 21, at 547.

teenth century decisions, the U.S. Supreme Court followed Kent in declaring that the states hold title to the submerged beds of all navigable waters in trust for the use of the public.[30] California, like the other American states, adopted this view. As early as 1864, the Supreme Court of California noted that such lands belong "to the state by reason of its sovereignty . . . ."[31] The court has reiterated this principle many times,[32] though with differing notions of the consequences when an attempt is made to patent sovereign lands to private persons.[33] Thus, in California, lands underlying navigable waters are, subject to the limits to be discussed below, made subject to a public trust easement by virtue of the state's common law.

Three points about the nature of this easement deserve emphasis. First, as it springs from the ownership of land conferred on the State of California upon admission to the United States,[34] it is a kind of public property right.[35] Indeed, where nothing has been done to create private rights in the land, the public's "easement" is undifferentiated from state ownership. Second, this

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[30] Shively v. Bowlby, 152 U.S. 1 (1894); Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892); Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842). Where no state existed, the property was held in trust for the future state by the federal government. Weber v. Harbor Comm'rs, 85 U.S. (18 Wall.) 57, 65-66 (1873). At the time of the state's admission to the Union, title in the lands underlying navigable waters passed to the state, "absolute so far as any principle of land titles is concerned." Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 374 (1977).

[31] People *ex rel.* Pierce v. Morrill, 26 Cal. 336, 353 (1864)

[32] *See, e.g.,* Marks v. Whitney, 6 Cal. 3d 251, 258, 491 P.2d 374, 379, 98 Cal. Rptr. 790, 795 (1971); People v. California Fish Co., 166 Cal. 576, 584, 138 P. 79, 82 (1913); Forestier v. Johnson, 164 Cal. 24, 30, 127 P. 156, 158 (1912); People v. Kerber, 152 Cal. 731, 733, 93 P. 878, 879 (1908); Ward v. Mulford, 32 Cal. 365, 372 (1867).

[33] Several early California cases held that a patent of land subject to the public trust easement purportedly made under a statute without sufficient authority was totally void and conveyed no interest to the patentee. People v. Cowell, 60 Cal. 400 (1882); Kimball v. Macpherson, 46 Cal. 103 (1873); People *ex rel.* Pierce v. Morrill, 26 Cal. 336 (1864). Beginning with People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913), the courts have consistently held that such a patent does convey an interest to the land, but that the grant is subject to the public trust easement. *Id.* at 589, 138 P. at 84.

[34] Borax Consol., Ltd. v. City of Los Angeles, 296 U.S. 10, 15-16 (1935).

[35] While acknowledging that the most common theory of the public trust easement is a property right theory, Sax expresses doubt as to its doctrinal basis. Sax, *supra* note 21, at 478. He treats the public trust as a specialized form of the state's police power. *Id.* at 484-85.

property right serves to limit subsequently created private property rights,[36] so that exercise of the public trust easement to the detriment of holders of those private rights gives rise to no right to compensation.[37] And finally, although clearly the state may extinguish the public trust easement, such extinction requires more than would be demanded for alienation of ordinary state property. Frequent judicial references to these lands as held in the state's "sovereign" capacity express a presumption that the public rights represented by the easement will be extinguished only in the most justifiable of cases.[38]

Nineteenth century mining debris cases made it plain that the public trust easement protects land underlying inland as well as that underlying ocean navigable waters. Mining was the first im-

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[36] People v. California Fish Co., 166 Cal. 576, 583-85, 138 P. 79, 82-83 (1913). Property rights acquired prior to statehood by Mexican grants are not subject to the common law public trust easement. Borax Consol., Ltd. v. City of Los Angeles, 296 U.S. 10, 15 (1935). But in a decision now before the California Court of Appeal it was held that such rights are subject to comparable restrictions originating in Mexican law. City of Los Angeles v. Venice Peninsula Properties (Los Angeles County Super. Ct., Cal. Oct. 11, 1977), *appeal pending*, No. 56383 (2d Dist.); *see* Dyer, *California Beach Access: The Mexican Law and the Public Trust*, 2 ECOL. L.Q. 571, 599, 604-05 (1972).

[37] *See, e.g.*, Colberg, Inc. v. State *ex rel.* Dep't of Pub. Works, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967), *cert. denied*, 390 U.S. 949 (1968).

[38] *See, e.g.*, Marks v. Whitney, 6 Cal. 3d 251, 258 n.5, 491 P.2d 374, 379 n.5, 98 Cal. Rptr. 790, 795 n.5 (1971); People v. California Fish Co., 166 Cal. 576, 584, 138 P. 79, 82 (1913); People *ex rel.* Pierce v. Morrill, 26 Cal. 336, 353-54 (1864). In its most recent treatment of the easement, the Supreme Court of California noted that "the public owns the right to tidelands for purposes such as commerce, navigation and fishing. . . ." City of Berkeley v. Superior Court, 26 Cal. 3d 515, 528, 606 P.2d 362, 364, 162 Cal. Rptr. 327, 329, *cert. denied*, 101 S. Ct. 119 (1980). This common law public property right, which is treated in this article, should be distinguished from certain constitutional limits on the power of the legislature regarding tidelands and on access to navigable waters. Article X, § 3 of the California Constitution limits the alienability of all tidelands "within two miles of any incorporated city, city and county, or town in this state, and fronting on the water of any harbor, estuary, bay, or inlet used for the purposes of navigation." Article X, § 4 of the California Constitution prohibits exclusion of the right of way to navigable water whenever required for any public purpose, as well as prohibiting the destruction or obstruction of the free navigation of such water. It has been argued that Art. XVI, § 6 of the California Constitution, which prohibits gifts by the legislature, requires that when the common law public trust easement is terminated valuable consideration be paid for those interests passing as a consequence of the termination. Parker, *supra* note 22, at 184.

portant economic activity in the State of California, and indeed it dominated the state for many years after 1850. Mining required water, and within a few years of statehood hydraulic mining had become common. This procedure was highly efficient for the miners, but the mine tailings wreaked havoc with many of the state's rivers.[39] The hydraulic mining was therefore terminated by the courts as a nuisance interfering with the rights of the public.

The key debris case in state court was *People v. Gold Run Ditch and Mining Company,*[40] decided by the Supreme Court of California in 1884. In this case, defendant's mining debris, together with the debris of other mines and with the products of natural erosion, had raised the bed of the American River from ten to twelve feet and the bed of the Sacramento River from six to twelve feet.[41] As a consequence, the rivers were more prone to flooding than previously and their navigability was greatly impaired.[42]

In a decision perhaps more important for the future of California's rivers than *Lux v. Haggin,*[43] the court perpetually enjoined defendant's deposits of mining debris.[44] They were held to be an unauthorized encroachment on the bed of a navigable river and an unauthorized impairment of the rights of the public to navigation,[45] despite the fact that the trial court had found

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[39] In hydraulic mining large quantities of water were diverted and directed under great pressure onto banks of gold-bearing gravel. The water washed the gravel into sluices which removed the gold. The water, heavy with tailings, was then returned to the river. This process did not become widespread in California until the mid-1850's when sufficient water became available. R. PAUL, CALIFORNIA GOLD: THE BEGINNING OF MINING IN THE FAR WEST 152-56 (1947).

[40] 66 Cal. 138, 4 P. 1152 (1884). In federal court the key case was Woodruff v. North Bloomfield Gravel Mining Co., 18 F. 753 (C.C.D. Cal. 1884).

[41] People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 145, 4 P. 1152, 1154 (1884).

[42] *Id.* at 145, 4 P. at 1154.

[43] Lux v. Haggin, 69 Cal. 255, 10 P. 674 (1886); *see* notes 2-5 and accompanying text *supra.*

[44] People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 152, 4 P. 1152, 1159 (1884). The case rested on the impaired navigability of the Sacramento River, "the principal navigable river within the state," and found the American River, also affected by defendant's acts, to be nonnavigable. *Id. But see* People *ex rel.* Younger v. El Dorado County, 96 Cal. App. 3d 407, 157 Cal. Rptr. 815 (3d Dist. 1979) (American River held to be navigable).

[45] People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 147, 4 P. 1152, 1156 (1884). Although much of the opinion is written in terms of public nuisance

that the aggregate of debris from all the mines had caused the damage.[46] Neither custom nor prescription was accepted as a basis for a right to deposit the debris.[47] To protect the integrity of the state's navigable rivers, the court issued an injunction which caused major dislocations in an important sector of the state's economy.[48]

B. The Range of Public Interests Protected

The range of public interests typically mentioned in the public trust cases are navigation, commerce and fishing.[49] "Navigation" includes recreational as well as commercial boating and shipping.[50] "Commerce" means water-related commerce going beyond the water-borne activity covered by navigation. It embraces harbor activity on wharves, piers and docks.[51] "Fishing" includes "the right to fish, hunt, bathe, swim . . . and to use the bottom of the navigable waters for . . . standing, or other purposes."[52]

In recent years the Supreme Court of California has repeatedly stated that the list of three classically recognized public

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law, the court clearly recognized that the beds of inland navigable waters are held in trust for the benefit of the people. *Id.* at 151, 4 P. at 1159.

[46] *Id.* at 148, 4 P. at 1156.

[47] *Id.* at 150-51, 4 P. at 1158-59.

[48] *Id.* at 152, 4 P. at 1159-60. At the time the injunction was granted, hydraulic mining operations were producing 10 million dollars' worth of gold per year. W. BEAN, CALIFORNIA: AN INTERPRETIVE HISTORY 278 (1973).

[49] Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452 (1892); City of Long Beach v. Mansell, 3 Cal. 3d 462, 482, 476 P.2d 423, 437, 91 Cal. Rptr. 23, 37 (1970); Colberg, Inc. v. State *ex rel.* Dep't of Pub. Works, 67 Cal. 2d 408, 417, 432 P.2d 3, 9, 62 Cal. Rptr. 401, 407 (1967), *cert. denied*, 390 U.S. 949 (1968); People v. California Fish Co., 166 Cal. 576, 584, 138 P. 79, 82 (1913).

[50] *See* Hitchings v. Del Rio Woods, 55 Cal. App. 3d 560, 127 Cal. Rptr. 880 (5th Dist. 1976); People *ex rel.* Baker v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (3d Dist. 1971). Although these cases concern interferences with navigable waters rather than interferences with the land underlying navigable waters, there is no reason to suppose that a narrower definition of navigation would be used in the latter cases. *See* Miramar Co. v. Santa Barbara, 23 Cal. 2d 170, 175, 143 P.2d 1, 3 (1943).

[51] Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452 (1892); Colberg, Inc. v. State *ex rel.* Dep't of Pub. Works, 67 Cal. 2d 408, 418, 432 P.2d 3, 10, 62 Cal. Rptr. 401, 408 (1967), *cert. denied*, 390 U.S. 949 (1968).

[52] Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971). *See also* People v. Truckee Lumber Co., 116 Cal. 397, 48 P. 374 (1897)(public trust asserted in the fish themselves).

trust uses is not exhaustive and that the state "should not be burdened with an outmoded classification favoring one mode of utilization over another."[53] Changing public needs have been cited in support of uses not mentioned in the older cases,[54] such as "the preservation of those lands [tidelands] 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."[55] The court has noted that it is "not necessary to . . . define precisely all the public uses which encumber tidelands."[56] It thus appears that the easement embraces any nonconsumptive public use of navigable waters and in principle prevents filling or other disturbance of the underlying land in a way which significantly impairs such use. This principle, however, is subject to important limits.

C. Limits to the Public Trust Easement

As presented so far, the public trust easement in California law has an absolute and unbending character which, if strictly observed, would prevent almost any development or utilization of the lands under California's navigable waters. Yet extensive development of these lands in fact has taken place, greatly contributing to the state's prosperity.[57]

Three important limits on the public trust easement have enabled the courts to approve such development. First, significant interference with public uses is countenanced where the legislature determines that the overall impact of the interference is to further public trust purposes. Second, considerations of equita-

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[53] Colberg, Inc. v. State *ex rel.* Dep't of Pub. Works, 67 Cal. 2d 408, 422, 432 P.2d 3, 12, 62 Cal. Rptr. 401, 410 (1967), *cert. denied,* 390 U.S. 949 (1968), *cited with approval in* Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971).

[54] Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971); People *ex rel.* Baker v. Mack, 19 Cal. App. 3d 1040, 1045, 97 Cal. Rptr. 448, 451 (3d Dist. 1971).

[55] Marks v. Whitney, 6 Cal. 3d 251, 259-60, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971), *cited with approval in* City of Berkeley v. Superior Court, 26 Cal. 3d 515, 521, 606 P.2d 362, 365, 162 Cal. Rptr. 327, 330, *cert. denied,* 101 S. Ct. 119 (1980).

[56] Marks v. Whitney, 6 Cal. 3d 251, 260, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971).

[57] *See* note 61 and accompanying text *infra.*

ble estoppel or fair public policy may limit the easement. Third, as the public trust easement is part of state law, it must yield in the face of properly authorized federal activity.

1. Legislative furthering of trust purposes

A part of the thinking about the public trust easement historically has been a sense of "specialness" of the property subject to it.[58] How any piece of property is used may, of course, have an impact on the public. Recognition of this obvious fact has helped support various police power regulations of the use of land, water and other types of property. In the civil law countries, this fact has led to formulations as to the "social" function of ownership.[59] In the modern common law, an awareness that the general public has a greater stake in some forms of property than in others seems to have contributed to acceptance of the public trust doctrine. Navigable waters more than most land parcels are capable of multiple, complementary uses, particularly the vitally important one of allowing access to the sea. Many courts, therefore, have looked with suspicion upon efforts to limit the public availability of these waters by directing the underlying land to an exclusive use.

The vehicle for expressing this judicial concern has been the public trust easement. A problem, however, is created by this vehicle. On the one hand, if the easement is treated as just one of many different kinds of government property interests, then presumably it can be freely alienated into private hands. Legislatures or their delegated agents could dispose willy-nilly of trust property, negating the idea that it is something special.

Equal perils attend the conclusion that public trust property is so special that it cannot be alienated. One might reach this conclusion by taking the trust language at face value and treating the people as equitable owners of property to which legal title is held by the state as trustee. This separation of interests

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[58] In the leading federal opinion on the public trust easement, the U.S. Supreme Court commented as follows: "So with trusts connected with public property, *or property of a special character, like lands under navigable waters,* they cannot be placed entirely beyond the direction and control of the State." Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 454 (1892) (emphasis added).

[59] Beekhuis, *Civil Law* in PROPERTY AND TRUST, VI INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 2-7 (F. Lawson ed. 1972).

only makes sense, however, if "the people" are treated as one entity and "the state" as another. If this is done, the people have no means to terminate their equitable interest, and the property is inalienable free of the trust. Courts have refused to accept so profoundly undemocratic a result.[60]

One means of charting a judicial middle course has been to allow the legislature to terminate the public trust easement if the effect is a general furthering of public trust uses. A good example of this approach is the statutory termination of the easement for tidelands and submerged lands within the San Francisco waterfront line, an area which has become the heart of San Francisco's downtown business district.[61]

On March 26, 1851, at its first session after California's admission to the Union, the state legislature passed a Beach and Water-Lot Act dealing with certain San Francisco properties.[62] This statute sought to facilitate the development of a deep water port and appropriate waterfront at San Francisco by extending the surface lands of the city into San Francisco Bay to a sufficient depth to permit increased shipping. To accomplish this end a waterfront boundary was established, to be "distinctly and properly delineated by a red line" on maps to be prepared by the city.[63] Beyond this boundary, the city authorities were charged with keeping the area up to five hundred yards free of obstructions.[64] Within the boundary, the use and occupation of land was granted to the city for a ninety-nine year term.[65] By

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[60] On the other hand, providing careful judicial review of attempts to terminate the public trust easement has been viewed as "a medium for democratization." Sax, *supra* note 21, at 509. It is argued that "public trust law is not so much a substantive set of standards for dealing with the public domain as it is a technique by which courts may mend perceived imperfections in the legislative and administrative process." *Id.*

[61] City of Berkeley v. Superior Court, 26 Cal. 3d 515, 524, 606 P.2d 362, 366, 162 Cal. Rptr. 327, 331, *cert. denied*, 101 S. Ct. 119 (1980); People v. California Fish Co., 166 Cal. 576, 586, 138 P. 79, 83 (1913).

[62] Ch. 136, 1850-53 Cal. Stats. 764 (1851).

[63] *Id.* § 5.

[64] *Id.* § 4.

[65] *Id.* § 3. The city's interest was subject to private titles originating during Mexican rule. Prior to the surrender of California by Mexico to the United States, the alcaldes of San Francisco had made a number of grants of the beach and water lots described in the 1851 statute to private citizens. With the Treaty of Guadalupe Hidalgo in 1848, the land in question passed to the United States to be held in trust for the state to be formed. Under the treaty,

further legislation in 1853, provision was made for sale of both the city's term interest and the state's reversionary interest in land within the waterfront boundary line.[66] Clearly the legislature anticipated that as the seaport developed private persons would fill and build upon the "water lots" within the boundary.

The filling and building were not long in coming, nor were the legal challenges to this activity. The challengers argued that the land under navigable waters was incapable of private appropriation, that the state did not have title to this land, and that all the state's navigable waters were common highways which must remain free and open to inhabitants.[67] But in a series of decisions beginning with *Eldridge v. Cowell* in 1854,[68] the Supreme Court of California held that the legislature had intended to and properly did terminate the public trust easement in these water lots. Three justifications for this conclusion emerge from the decisions.

First, the legislature had acted with great specificity in regard to the San Francisco waterfront. The land granted to the city and later made available for sale to private persons was described in metes and bounds, and a map accompanied this description. The land was conveyed to private persons pursuant to a definite plan for harbor development, the legitimacy of which was deemed "self-evident" by the court.[69]

Second, the import of the legislative plan was to further rather than to impede the public rights protected by the easement. Shipping would be greatly improved by implementation of the plan. Furthermore, public access to the harbor was assured by a canal and by the requirement that the city prevent any obstructions within five hundred yards of the waterfront.[70]

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vested rights under grants of the Mexican government were honored by the United States. Weber v. Harbor Comm'rs, 85 U.S. (18 Wall.) 57, 65 (1873); Chapin v. Bourne, 8 Cal. 294, 295 (1857). However, the practice of alcalde grants continued between 1848 and 1851, despite the lack of authority in the pueblo of San Francisco. These grants were subsequently confirmed under the terms of § 3 of this act. *Id.* at 296.

[66] Ch. 160, 1853 Cal. Stats. 219.

[67] Eldridge v. Cowell, 4 Cal. 80, 85-86 (1854).

[68] City of San Francisco v. Straut, 84 Cal. 124, 24 P. 814 (1890); People v. Williams, 64 Cal. 498, 2 P. 393 (1884); LeRoy v. Dunkerly, 54 Cal. 452 (1880); Knight v. Haight, 51 Cal. 169 (1875); Holladay v. Frisbie, 15 Cal. 630 (1860); Guy v. Hermance, 5 Cal. 73 (1855); Eldridge v. Cowell, 4 Cal. 80 (1854).

[69] Eldridge v. Cowell, 4 Cal. 80, 87 (1854).

[70] In any event, any interference actually destructive to navigation was said

Finally, to the extent that private persons lost direct water access because water lots between them and the bay were filled, the courts suggested that they exercised their private rights with full knowledge of and subject to the harbor development plan. In *Eldridge v. Cowell,* for example, the plaintiff purchased his lot "with a full knowledge of the plan of the City" and "practically admitted" the right of private persons to fill the water lots "in filling up that part of his own lot and the street in front of it, which was in the water."[71]

In sharp contrast to the San Francisco waterfront cases are those cases in which the legislature has authorized the disposition of tidelands without a specific plan for the improvement of public trust uses. The leading case is *People v. California Fish Company.*[72] There patents had been issued pursuant to statutes providing for the sale by the state of swamp and overflowed, salt-marsh and tidelands.[73] The object of these statutes was "to secure the reclamation of land suitable for agriculture and make it productive."[74] No provision was made for navigation,[75] and the Supreme Court of California refused to assume "that the state, which is bound by the public trust to protect and preserve this public easement and use, should have directed the sale of . . . land along the shores and beaches to exclusive private use, to the destruction of the paramount public easement. . . ."[76] The court concluded that the state's patentees took subject to the public trust easement.

Similar reasoning was employed in the recent case of *City of Berkeley v. Superior Court.*[77] There the lands had been patented under still another disposition statute, an act of 1870

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to be actionable by the people rather than by a private party. *Id.* at 87-88.

[71] *Id.* at 87.

[72] 166 Cal. 576, 138 P. 79 (1913).

[73] Ch. 388, 1869-70 Cal. Stats. 541 (1870). The state did not receive swamp and overflowed lands by virtue of its sovereignty. They were lands requiring drainage in order to be useful and were received by grant from the federal government under the Swamp Land Act of 1850. Act of Sept. 28, 1850, ch. 84, 9 Stat. 519 (codified at 43 U.S.C. §§ 981-987 (1976). These lands could then be sold by the state without restriction as to ownership or use. People v. California Fish Co., 166 Cal. 576, 591-92, 138 P. 79, 85-86 (1913).

[74] *Id.* at 591, 138 P. at 85.

[75] *Id.* at 590, 138 P. at 85.

[76] *Id.* at 591, 138 P. at 85.

[77] City of Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied,* 101 S. Ct. 119 (1980).

which authorized the Board of Tide Land Commissioners to sell at public auction tidelands within five miles of the exterior boundary of San Francisco.[78] In Berkeley the commissioners had been thorough, having "sold all the lots extending to 12 feet at ordinary high tide from the shore, granting to the purchasers the entire 2½ miles of the city's waterfront, without any provision for public access."[79] And most of these lots "have been acquired by a relatively small number of corporations that own substantial parcels purchased from the original grantees or their successors."[80]

The *City of Berkeley* action arose because certain private owners of tidelands, including the Santa Fe Land Improvement Company which now owns "[m]ost of the tidelands in Berkeley,"[81] brought an action to quiet title to seventy-nine acres of land adjacent to the Berkeley Marina.[82] On the authority of *Knudson v. Kearney*,[83] a 1915 decision holding that grants under the 1870 statute were in fee simple free of the public trust easement,[84] the trial court granted partial summary judgment for the plaintiffs.[85]

The response of the Supreme Court of California on review was to reexamine the 1870 statute, and principally because the court found that the statute was not designed to further public trust uses it concluded that *Knudson v. Kearney* was wrongly

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[78] Ch. 388, 1869-70 Cal. Stats. 541 (1870). A sale under this act could include land to nine feet of water at extreme low tide. Tidelands covered by the act stretched from Richmond in the northern part of San Francisco Bay to San Bruno and San Leandro in the southern part. City of Berkeley v. Superior Court, 26 Cal. 3d 515, 526, 606 P.2d 362, 368, 162 Cal. Rptr. 327, 333, *cert. denied*, 101 S. Ct. 119 (1980). A total of 56,400 acres (88 square miles) of the Bay was made eligible for sale. Over half was actually sold.

[79] City of Berkeley v. Superior Court, 26 Cal. 3d 515, 526, 606 P.2d 362, 368, 162 Cal. Rptr. 327, 333, *cert. denied*, 101 S. Ct. 119 (1980).

[80] *Id.*

[81] *Id.*

[82] Defendant State of California filed a cross-complaint claiming that Berkeley owns the property in fee, or, in the alternative, that plaintiffs' title is subject to the public trust easement. The cross-complaint also sought to include several hundred additional acres in the action. *Id.* at 519-20, 606 P.2d at 364, 162 Cal. Rptr. at 329.

[83] 171 Cal. 250, 152 P. 541 (1915).

[84] *Id.* at 253, 152 P. at 542.

[85] City of Berkeley v. Superior Court, 26 Cal. 3d 515, 520, 606 P.2d 362, 364, 162 Cal. Rptr. 327, 329, *cert. denied*, 101 S. Ct. 119 (1980).

decided.[86] The court overruled that decision,[87] and it held that grants made pursuant to the act of 1870 gave the grantees a fee interest subject to the public trust easement.[88] The court followed *California Fish* in concluding that tidelands disposition statutes are to be strictly construed, that legislative intent to extinguish the public trust easement must be clearly expressed or necessarily implied and that "if *any* interpretation of the statute is reasonably possible which would retain the public's interest in tidelands, the court must give the statute such an interpretation."[89]

2. Equitable estoppel and related considerations

A complete reconciliation of principle and practice with regard to lands underlying navigable waters in California has not been possible solely through judicial approval of legislative plans to further public trust purposes. As has been noted, strict stan-

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[86] The court noted that even if the *Knudson v. Kearney* opinion was correct in concluding that the purpose of the 1870 act was to promote navigation, the decision was incorrect for three other reasons: (1) to sell an area as vast as the parts of San Francisco Bay put under the jurisdiction of the Board of Tide Land Commissioners would be an abdication by the state of its role as trustee on behalf of the people; (2) to hold the trust terminated where a purported plan to improve navigation had not been fulfilled would improperly restrict legislative power to administer the trust; and (3) to hold that title free of the trust had vested in private parties who had made no improvements would be improper. *Id.* at 531-32, 606 P.2d at 371-72, 162 Cal. Rptr. at 336-37.

[87] *Id.* at 527-32, 606 P.2d at 368-73, 162 Cal. Rptr. at 338.

[88] *Id.* at 534, 606 P.2d at 373, 162 Cal. Rptr. at 338.

[89] *Id.* at 528, 606 P.2d at 369, 162 Cal. Rptr. at 334 (emphasis added). Before the *City of Berkeley* decision, it had been suggested that the public trust easement could also be legislatively terminated where the land is deemed no longer essential for public trust purposes. Parker, *supra* note 22, at 159. The citation in support of this suggestion was to Knudson v. Kearney, 171 Cal. 250, 152 P. 541 (1915), which was overruled in *City of Berkeley*. 26 Cal. 3d at 532, 606 P.2d at 372, 162 Cal. Rptr. at 337. Aside from *Knudson*, there have been occasions when the courts have stated that certain tidelands could be cut off from water access and rendered useless for trust purposes if found "necessary or advisable" by the state, but *only* pursuant to "proper administration of the trust." City of Long Beach v. Mansell, 3 Cal. 3d 462, 482, 476 P.2d 423, 437, 91 Cal. Rptr. 23, 37 (1970). Such administration requires that trust purposes in general be furthered. This nonconstitutional limitation on the sovereignty of any particular legislature is justified as necessary to preserve the power of succeeding legislatures to protect, improve and develop the public interest in commerce, navigation and fisheries. Mallon v. City of Long Beach, 44 Cal. 2d 199, 207, 282 P.2d 481, 486 (1955).

dards have been developed for such plans in order to guard against ill-conceived terminations of the public trust easement. In some notable instances, filling and development of tidelands have gone forward in a way which does not meet these standards, and situations have been created in which it makes no sense to speak of nonconsumptive public uses of navigable waters. In such cases the court has turned to the concept of equitable estoppel and related notions.

The leading example of equitable estoppel applied to terminate the public trust easement is *City of Long Beach v. Mansell.*[90] There, in a situation of confusion as to titles and boundaries, a tideland area on Alamitos Bay in southern Los Angeles County was intensively developed for commercial, recreational and residential purposes. With the cooperation of local and state governments, thousands of property owners acquired their lands in good faith and paid taxes on them for many years.[91] The various title and boundary problems remained unresolved, however, and ultimately a legislative solution was sought by means of a statute declaring that the developed lands "lie above the line of mean high tide, are no longer necessary or useful for commerce, fisheries and navigation and are hereby freed from the public use and trust for commerce, fisheries and navigation to the extent such may have existed as to any of said lands."[92]

Although the challenge to this statute was based on the constitutional prohibition of the alienation into private hands of tidelands within two miles of an incorporated city,[93] the California Supreme Court's opinion is significant with regard to termination of the common law public trust easement as well. For some of the lands in question, the court held that the settlement of a genuine boundary dispute by a formal conveyance in the form of a quitclaim deed executed by the state as trustee did not constitute a "grant or sale" within the meaning of the constitutional provision.[94] For other portions the court held that neither the common law nor the constitution was violated when legislation freed a relatively small area from the public trust easement

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[90] 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970).

[91] *Id.* at 471, 476 P.2d at 430, 91 Cal. Rptr. at 30.

[92] Ch. 138, § 7, 1965 Cal. Stats. 431, 447 (1964) (1st Ex. Sess.).

[93] CAL. CONST. art. X, § 3 (formerly CAL. CONST. art. XV, § 3).

[94] City of Long Beach v. Mansell, 3 Cal. 3d 462, 480-81, 476 P.2d 423, 435-36, 91 Cal. Rptr. 23, 35-36 (1970).

pursuant to a highly beneficial program of harbor development,[95] *i.e.*, when circumstances were appropriate for the "furthering trust purposes" limit discussed above.[96]

With regard to the remaining lands, however, neither the boundary settlement principle nor the furthering trust purposes limit was suitable. Filling occurred on lands "whose public character was clear."[97] It was "manifest that the filling in question was not undertaken pursuant to and as an integral part of a public program of harbor development."[98] The court therefore concluded that those tidelands remained subject to the constitutional prohibition against alienation into private hands.[99] Clearly they also remained subject to the common law public trust easement, to the extent that there had been no estoppel.

Equitable estoppel, which in the words of the *Mansell* court "rests firmly upon a foundation of conscience and fair dealing,"[100] had previously been used cautiously in California in cases involving title to land. It was thought that taking title to land from one person and vesting it in another by this means would be contrary to the intent and purpose of the statute of frauds.[101] Furthermore estoppel typically is raised in a trial of title by those who would be injured if paramount title were established in another. In *Mansell,* however, the state and local governments who might otherwise have claimed paramount title were raising estoppels on behalf of private owners.[102] Finally, estoppel against the government is not to be applied if this would effectively nullify a strong rule of policy adopted for the benefit of the public.[103]

Despite these various grounds for objection to the use of equitable estoppel, the court held that it extinguished the public

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[95] *Id.* at 484, 476 P.2d at 439, 91 Cal. Rptr. at 39.

[96] *See* notes 61-89 and accompanying text *supra.*

[97] City of Long Beach v. Mansell, 3 Cal. 3d 462, 486, 476 P.2d 423, 440, 91 Cal. Rptr. 23, 40 (1970).

[98] *Id.*

[99] *Id.* at 487, 476 P.2d at 441, 91 Cal. Rptr. at 41.

[100] *Id.* at 488, 476 P.2d at 442, 91 Cal. Rptr. at 42.

[101] City of San Diego v. Cuyumaca Water Co., 209 Cal. 105, 142-43, 287 P. 475, 490-91 (1930).

[102] City of Long Beach v. Mansell, 3 Cal. 3d 462, 487, 476 P.2d 423, 441, 91 Cal. Rptr. 23, 41 (1970).

[103] *Id.* at 493, 476 P.2d at 445, 91 Cal. Rptr. at 45; County of San Diego v. California Water & Tel. Co., 30 Cal. 2d 817, 829-30, 186 P.2d 124, 132 (1947).

trust easement. All the requisite elements for estoppel among private parties were found to exist: the State of California and the City of Long Beach were apprised of the facts as to "the serious and complex title problems in the Alamitos Bay area";[104] the public entities "conducted themselves relative to settled and subdivided lands . . . as if no title problems existed and . . . misled thousands of homeowners in the process";[105] the homeowners were ignorant of the true state of facts and were without any ready means for ascertaining those facts;[106] and the homeowners reasonably relied upon the conduct of the public entities in a way which "would result in substantial injury to themselves or their successors in interest if the state and city were now permitted to take a position contrary to the purport of their former conduct."[107] To justify applying the estoppel to the loss of the governments, the court found that successful assertion of the public trust easement by the state would result in "manifest injustice,"[108] whereas upholding the estoppel would not seriously diminish public access to Alamitos Bay.[109]

In the more recent *City of Berkeley* case,[110] no mention was made of equitable estoppel. Yet, in what seems an attempt to achieve a fair solution without invoking the intricacies of estoppel, the court decided to balance the interests of the private and public parties in a way which effectively terminates the public trust easement for much of the land in question.

In order not to "deprive the people of the state of full control over many thousand acres of tidelands acquired by them at the time of statehood,"[111] the *City of Berkeley* court overruled *Knudson v. Kearney*.[112] But it limited the application of its ruling by deciding that those lands granted by the board which had been improved or filled in reliance upon a subsequently over-

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[104] City of Long Beach v. Mansell, 3 Cal. 3d 462, 492, 476 P.2d 423, 444, 91 Cal. Rptr. 23, 44 (1970).

[105] *Id.* at 492, 476 P.2d at 445, 91 Cal. Rptr. at 45.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 499, 476 P.2d at 450, 91 Cal. Rptr. at 50.

[109] *Id.* at 500, 476 P.2d at 450, 91 Cal. Rptr. at 50.

[110] City of Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 101 S. Ct. 119 (1980).

[111] *Id.* at 533, 606 P.2d at 373, 162 Cal. Rptr. at 338.

[112] *Id.* at 527-532, 606 P.2d at 368-373, 162 Cal. Rptr. at 338, *overruling* Knudson v. Kearney, 171 Cal. 250, 152 P. 541 (1915).

ruled decision were freed of the public trust easement.[113] The court stated that 'the interests of the public are paramount"—*i.e.*, the public trust easement exists, if property still is "physically adaptable for trust uses"—but that since the lands presumed to have been filled in reliance on *Knudson v. Kearney* have been rendered substantially valueless for trust purposes the interests of the grantees and their successors in those lands should prevail.[114]

3. Federal activity

A third limit on California's public trust easement will be briefly noted here. Early in American constitutional history the U.S. Supreme Court concluded that the Commerce Clause authorizes federal control of navigable waters and the lands underlying those waters insofar as necessary to regulate commerce among the states, with foreign nations or with Indian tribes.[115] This regulatory authority has been expansively interpreted over the years,[116] and it is paramount to any rights of the state held by virtue of the public trust easement.[117]

The federal regulatory authority has been held to be the basis for a federal navigation servitude,[118] which functions as a federal property right similar to the state's public trust easement. The federal servitude, however, is more limited in scope than the public trust easement.[119] It requires some connection with navigation,[120] and even where such connection exists the servitude does not inevitably burden private property rights.[121]

II. The Public Trust Easement for Navigable Waters

At the outset of this article, it was noted that the public inter-

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[113] City of Berkeley v. Superior Court, 26 Cal. 3d 515, 534-35, 606 P.2d 362, 373-74, 162 Cal. Rptr. 327, 338-39, *cert. denied*, 101 S. Ct. 119 (1980).

[114] *Id.*

[115] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[116] United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940); MacGrady, *supra* note 21, at 594-95.

[117] Colberg, Inc. v. State *ex rel.* Dep't of Pub. Works, 67 Cal. 2d 408, 420, 432 P.2d 3, 11, 62 Cal. Rptr. 401, 409 (1967), *cert. denied*, 390 U.S. 919 (1968).

[118] United States v. Rands, 389 U.S. 121, 123 (1967).

[119] Kaiser Aetna v. United States, 444 U.S. 164, 170-71 (1979).

[120] *See* United States v. Gerlach Live Stock Co., 339 U.S. 725, 737 (1950).

[121] Kaiser Aetna v. United States, 444 U.S. 164, 170-71 (1979).

ests protected by the public trust easement have principally concerned the nonconsumptive use of waters, such as navigation. The underlying land has been involved only incidentally, as when users stand on the bottom in connection with their use of the waters. Once the land is no longer covered by navigable water, generally on one theory or another the easement is treated as extinguished.

Most public trust litigation has involved interferences in the underlying land, with an incidental interference with the overlying navigable water. Consequently, the meaning of the easement for the water itself and the critically important related question of its significance for consumptive water rights in inland waters have not been much explored.

This section will review the origin and nature of the public trust easement for navigable waters, the range of public interests protected and limits to the easement. The discussion is designed to be parallel to that provided above for the underlying land. Given the lack of case law on the waters themselves, the discussion will sometimes proceed by drawing analogies from the cases on the underlying land.

A. Origin and Nature of the Easement

As with the underlying land, the public trust easement springs from public ownership of a "special" natural resource. For the Romans, navigable rivers were "undoubtedly public,"[122] and for the English a finding of navigability "conferred an indestructible public right of navigation and boating."[123] American courts not only treated navigable waters as publicly owned from an early date,[124] but also occasionally expressed the view that such waters by their nature are incapable of private ownership.[125] The Su-

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[122] MacGrady, *supra* note 21, at 529. According to MacGrady navigable rivers were conceived of as a subclass of public rivers, and "not all public rivers were necessarily navigable." *Id.*

[123] *Id.* at 586.

[124] *E.g.*, Martin v. Waddell, 41 U.S. (16 Pet.) 367, 407 (1842); People v. California Fish Co., 166 Cal. 576, 584, 138 P. 79, 82 (1913).

[125] "[T]hat the running water in a great navigable stream is capable of private ownership is inconceivable." United States v. Chandlar-Dunbar Water Power Co., 229 U.S. 53, 69 (1913). "The State holds the absolute right to all navigable waters . . . subject, of course, to any rights in them which may have been surrendered to the general Government. . . . [S]he cannot grant the rights of the people to the use of the navigable waters . . . these are inaliena-

preme Court of California has unequivocally declared that the state is "owner of its navigable waterways subject to a trust for the benefit of the people. . . ."[126] As owner of these waters, the state may further public trust uses to the detriment of private uses without being required to compensate for injury.[127]

For land underlying navigable waters, where valid patents have been issued the public trust easement coexists with a private possessory interest. For the navigable waters, by way of contrast, no such private "ownership" interests are recognized. Instead the private interests are characterized as "usufructuary" and entitle the holders only to the use and enjoyment of the waters.[128]

Although since 1911 it has been provided by statute in California that all the state's water "is the property of the people of the State,"[129] the courts have not treated this provision as a codification of the common law public trust easement in navigable waters. The provision is in one sense much broader than the easement, since all water is included, navigable or not. But it has been read more as a statement of a strong regulatory power in the state than as a proprietary expression,[130] and in any event this residual public interest has been interpreted to have little direct bearing on the various private usufructuary rights.[131] In an opinion in 1921 discussing various usufructuary water rights and noting that the statutory provision could have no effect upon them, Justice Shaw — an expert on the public trust easement as well as California water rights law[132] — recognized,

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ble." People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 151-152, 4 P. 1152, 1159 (1884).

[126] Colberg, Inc. v. State *ex rel.* Dep't of Pub. Works, 67 Cal. 2d 408, 420, 432 P.2d 3, 11, 62 Cal. Rptr. 401, 409 (1967), *cert. denied,* 390 U.S. 949 (1968).

[127] *Id.*

[128] Eddy v. Simpson, 3 Cal. 249, 252 (1853); W. HUTCHINS, *supra* note 2, at 36-38.

[129] Cal. Water Code § 102 (West 1971).

[130] Cal. Water Code § 102 Code Commission Notes (West 1971).

[131] Palmer v. Railroad Comm'n, 167 Cal. 163, 175-76, 138 P. 997, 1002 (1914). The court suggested that the statute might be effective to dedicate to the public any riparian rights the state might have held at the time the statute was enacted. *Id.* at 175, 138 P. at 1002.

[132] Important public trust easement opinions authored by Shaw are Knudson v. Kearney, 171 Cal. 250, 152 P. 541 (1915); People v. California Fish Co., 166 Cal. 582, 138 P. 79 (1913); and Forestier v. Johnson, 164 Cal. 24, 127 P. 156 (1912). For California water rights opinions by Shaw, see note 6 *supra.*

however, that the easement is a separate matter unaffected by the code language.[133]

The one instance in which public ownership and control of water were treated as giving rise to a trust obligation occurred in special circumstances unrelated to the public trust easement. In *Ivanhoe Irrigation District v. All Parties*,[134] the Supreme Court of California invalidated the 160-acre "excess land" provisions of federal reclamation law as incorporated in contracts between California water agencies and the United States. The court there declared that the State of California holds in trust all unappropriated waters and all waters the control of which it has acquired by appropriation or purchase.[135] Following repudiation by the U.S. Supreme Court of the state court's interpretation of reclamation law,[136] the California court stated that its trust discussion had been "sheer dicta" and "should not be construed as a statement of the law of California."[137]

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[133] City of San Bernardino v. City of Riverside, 186 Cal. 7, 13, 198 P. 784, 787 (1921).

[134] 47 Cal. 2d 597, 306 P.2d 824, (1957); *see* Santa Barbara County Water Agency v. All Persons, 47 Cal. 2d 699, 306 P.2d 875 (1957); Albonico v. Madera Irrigation Dist., 47 Cal. 2d 695, 306 P.2d 894 (1957). *See also* Madera Irrigation Dist. v. All Persons, 47 Cal. 2d 681, 306 P.2d 886 (1957). In addition to the statutory public ownership provision, Cal. Water Code § 102 (West 1971), the court in *Ivanhoe* cited a series of constitutional, statutory and common law sources in support of its trust theory. 47 Cal. 2d at 620-27, 306 P.2d at 837-41. In effect it treated the trust as imposed on the state "by the water law of the state." *Id.* at 621, 306 P.2d at 837.

[135] Ivanhoe Irrigation Dist. v. All Parties, 47 Cal. 2d 597, 620, 627, 306 P.2d 824, 837, 841 (1957). The court noted that an irrigation district also has a trust obligation to landowners within the district. *Id.* at 624-25, 306 P.2d at 840. It reasoned that the United States in its role as an appropriator stood in the same relationship to the people as beneficial owners of water as did the State of California and the irrigation districts. The court said that to discriminate among such owners in the delivery of reclamation project water on the basis of the amount of land owned by them would violate the trust. *Id.* at 620-47, 306 P.2d at 837-54.

[136] The U.S. Supreme Court reversed on the theory that § 5 of the Reclamation Act of 1902, 43 U.S.C. § 431 (1976), plainly provides for imposition of the excess land limit in federal reclamation projects and that nothing in § 8 of the act, 43 U.S.C. §§ 372, 383 (1976), requiring the federal government to comply with state law in the acquisition of water rights, was intended to modify the scope of § 5. Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958).

[137] Ivanhoe Irrigation Dist. v. All Parties, 53 Cal. 2d 692, 716, 350 P.2d 69, 83, 3 Cal. Rptr. 317, 331 (1960). The court stated that the point of its earlier trust theory discussion had been to establish the limited nature of the title to

The effect of this disclaimer on unappropriated water or water held by the state is not entirely clear. To the extent that the *Ivanhoe* trust theory was based on the policy of limiting all water rights to reasonable beneficial use, that policy remains enshrined in the state constitution,[138] and it is enforced by the courts.[139] To the extent that it was tied to an erroneous interpretation of section 8 of the Reclamation Act,[140] the theory has obviously been repudiated by the California court.[141] Water districts in California continue to hold water in trust for landowners within the district,[142] but it is uncertain whether the state holds water in trust for all the people of the state.[143] What is certain is that the *Ivanhoe* trust theory was not developed to protect public trust easement uses such as navigation, commerce and fishing and that post-*Ivanhoe* decisions by the Supreme Court of California have continued to use trust language with regard to the easement.[144]

Conceptually, although the public trust easement in navigable waters is a type of public property right, it is not a "water right" in the accepted sense of the term. Although not all water rights provide for consumptive use of water,[145] all do involve some

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water held by the United States, but that the U.S. Supreme Court opinion made it plain as a matter of federal law that the federal title could be made unlimited.

[138] CAL. CONST. art. X, § 2 (formerly CAL. CONST. art. XIV, § 3).

[139] A leading decision on the meaning of the constitutional provision is Joslin v. Marin Municipal Water Dist., 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967).

[140] 43 U.S.C. §§ 372, 383 (1976).

[141] Ivanhoe Irrigation Dist. v. All Parties, 53 Cal. 2d 692, 716, 350 P.2d 69, 83, 3 Cal. Rptr. 317, 331 (1960). For subsequent developments on the meaning of § 8, see California v. United States, 438 U.S. 645 (1978).

[142] Cal. Water Code § 22250 (West 1956) (irrigation districts); Bryant v. Yellen, 100 S. Ct. 2232, 2243 (1980).

[143] *See* Robie, *supra* note 13, at 926-28 for the view that the state does hold all waters of the state in trust for the people. Robie relies upon both the first *Ivanhoe* decision by the Supreme Court of California and the public trust easement cases to support this view.

[144] *E.g.*, City of Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 101 S. Ct. 119 (1980); Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); Colberg, Inc. v. State *ex rel.* Dep't of Pub. Works, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967), *cert. denied*, 390 U.S. 949 (1968).

[145] *See, e.g.*, City of Los Angeles v. Aitken, 10 Cal. App. 2d 460, 52 P.2d 585 (3d Dist. 1935).

physical relationship between particular water and a particular parcel of land or person benefiting from the use of water. Riparian or overlying water rights always benefit a parcel of land located adjacent to, nearby or above the source.[146] For appropriative water rights, as the California courts have emphasized in two recent decisions,[147] there must be a particular appropriator who exercises control akin to possession. No water right may exist simply for the benefit of the public in general.

The public trust easement, on the other hand, does exist to benefit the public in general, and in some cases the easement operates as a limit on proprietary rights,[148] presumably including consumptive water rights. Conceptually, it is analogous to the public's right to be free of any public nuisance which might be caused by the exercise of proprietary rights. And just as the law permits private persons showing special injury to sue for relief from a public nuisance,[149] it grants standing to private persons as members of the public to claim protection for the public trust easement.[150]

Since the public trust easement is not a water right, it need assume no particular position in the temporal priorities characteristic of California water rights. Water is allocated to appropriators who put it to beneficial use in accordance with the principle "first in time, first in right."[151] In disputes between appropriators and riparians the same principle is employed, with the date of patent establishing the priority date for the riparian.[152] When water is not sufficient to satisfy all water rights, right holders are theoretically deprived of water in inverse order

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[146] *See* D. ANDERSON, *supra* note 2, at 1-2; A. SCHNEIDER, *supra* note 2 at 6-7.

[147] California Trout, Inc. v. State Water Resources Control Bd., 90 Cal. App. 3d 816, 153 Cal. Rptr. 672 (3d Dist. 1979); Fullerton v. State Water Resources Control Bd., 90 Cal. App. 3d 590, 153 Cal. Rptr. 518 (1st Dist. 1979).

[148] *See* notes 72-89 and accompanying text *supra;* Colberg, Inc. v. State *ex rel.* Dep't of Pub. Works, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967), *cert. denied,* 390 U.S. 949 (1968). The *Colberg* court explicitly left open the scope of the plaintiffs' right as against other private persons. *Id.* at 416, 432 P.2d at 8, 62 Cal. Rptr. at 406.

[149] Cal. Civ. Code § 3493 (West 1970).

[150] Marks v. Whitney, 6 Cal. 3d 251, 261, 491 P.2d 374, 381, 98 Cal. Rptr. 790, 797 (1971).

[151] M. ARCHIBALD, *supra* note 2, at 5-6.

[152] D. ANDERSON, *supra* note 2, at 46-49.

of priority, *i.e.*, the most junior is cut off first.[153] But just as no one exercising a water right is by that fact excused from liability for creation of a nuisance,[154] so no water right holder may act in a way which interferes with an unmodified public trust easement in navigable waters.[155] And where interference comes from several different sources, there is authority in California for enjoining one source even though others have contributed.[156]

Of great importance is the question which waters will be treated as "navigable" for purposes of the public trust easement. Navigability has no single meaning in American law, the courts having fashioned different tests to serve different purposes.[157] For purposes of determining title to land under navigable waters, a rather restrictive *federal* test has been developed. The federal title test serves to distinguish land under navigable waters, which belongs to the state subject to any disposition to others,[158] from land under nonnavigable waters, which belongs in some jurisdictions to the state or its grantees and in others to the riparian or littoral owners.[159] Often this owner is either a federal agency or a federal patentee,[160] which may explain why a federal test is used. The U.S. Supreme Court has stated, for example, that the extent and validity of a federal grant is a federal question,[161] apparently since an act done by the United States is

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[153] *Id.*

[154] Parker v. Larsen, 86 Cal. 236, 24 P. 989 (1890); *see* Kall v. Carruthers, 59 Cal. App. 555, 211 P. 43 (3d Dist. 1922). The fact that a water right is exercised pursuant to a permit issued by the state apparently does not modify this principle. *Cf.* People v. City of Reedley, 66 Cal. App. 409, 226 P. 408 (3d Dist. 1924).

[155] *See* note 148 and accompanying text *supra*.

[156] People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 148-50, 4 P. 1152, 1156 (1884).

[157] MacGrady, *supra* note 21, at 587.

[158] Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).

[159] Stone, *supra* note 21, at 210-11. In California the riparian or littoral owners own land under nonnavigable lakes or streams. Cal. Civ. Code § 830 (West 1954).

[160] U. S. PUBLIC LAND L. REV. COMM'N, ONE-THIRD OF THE NATION'S LAND 141 (1970). Most privately owned land in the western United States was at one time patented by the federal government. Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 372 (1977).

[161] *Id.* at 369. The Court refused, however, to apply federal common law in the situation presented in *Corvallis* (effect of movement of a river upon title to the underlying land).

involved.

The federal navigability test for title purposes provides that on the date the particular state was admitted to the Union the overlying waters must have been susceptible in their natural and ordinary condition to commercial navigation.[162] This navigation need not have been a part of interstate commerce,[163] but it must have been by a customary commercial mode.[164]

The federal test thus determines the ownership of the land underlying navigable waters. Nevertheless, for determination of the public trust easement, either as it applies to land recognized as vested in the state upon admission to the Union or as it applies to the navigable waters themselves, it is the state law which is important. "The ownership of the bed is not determinative of public navigational rights, nor vice versa."[165]

Decisions by the Supreme Court of California have involved relatively little discussion of navigability for public trust easement purposes. In most cases it was obvious that the waters in question were navigable. The court has made it plain that navigability does not depend on inclusion in the legislative list of navigable waters,[166] and that for tidal areas navigability at high tide is all that is required.[167]

The court has also emphatically stated that tributaries of navigable waters may not be diverted in such a way as to damage the navigability of the stream or lake below. In the important case of *People ex rel. Robarts v. Russ,* for example, the court in a unanimous opinion stated:

> Directly diverting waters in material quantities from a navigable stream may be enjoined as a public nuisance. Neither may the waters of a navigable stream be diverted in substantial quantities by drawing from its tributaries. If those tributaries form the source of the stream, no private ownership in their beds justifies a damming of them, to the result of an obstruction to navigation in the stream below.[168]

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[162] MacGrady, *supra* note 21, at 592-93.

[163] United States v. Utah, 283 U.S. 64, 75 (1931).

[164] United States v. Holt State Bank, 270 U.S. 49, 56 (1926).

[165] Hitchings v. Del Rio Woods Recreation & Park Dist., 55 Cal. App. 3d 560, 571, 127 Cal. Rptr. 830, 837 (1st Dist. 1976).

[166] Newcomb v. City of Newport Beach, 7 Cal. 2d 393, 399, 60 P.2d 825, 828 (1936).

[167] *Id.* at 402, 60 P.2d at 829; Forestier v. Johnson, 164 Cal. 24, 28-29, 127 P. 156, 158 (1912).

[168] People *ex rel.* Robarts v. Russ, 132 Cal. 102, 106, 64 P. 111, 112 (1901).

For more detailed guidance as to what constitute navigable waters under California law, resort must be made to opinions by the Court of Appeal. These have very clearly adopted the "recreational boating" test of navigability used today in many states.[169] An opinion in 1951 found, for example, that where a levee broke and an agricultural tract was flooded, the flood waters used by pleasure boats were navigable "in spite of obstructions such as tree trunks, farm machinery and low spots. . . ."[170] Subsequent Court of Appeal decisions have applied this recreational boating test "whenever a stream is physically navigable by small craft,"[171] even if navigation is possible for only part of the year.[172] A receptive attitude toward protection of the public uses of navigable waters is evident in these cases.

B. The Range of Public Interests Protected

Presumably the same broad range of public interests protected in the land cases will be protected in the water cases. The various nonconsumptive uses mentioned in the cases, from navigation to use for scientific study, principally involve the overlying waters rather than the underlying land. There is no ground for modification of the protection in the water cases.

A problem not yet considered by the California courts arises when one public trust use conflicts with another.[173] With the ex-

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[169] H. ALTHAUS, *supra* note 21, at 127-28.

[170] Bohn v. Albertson, 107 Cal. App. 2d 738, 747, 238 P.2d 128, 135 (1st Dist. 1951). The recreational boating test of navigability was anticipated by dicta in Miramar Co. v. Santa Barbara, 23 Cal. 2d 170, 175, 143 P.2d 1, 3 (1943).

[171] People *ex rel.* Baker v. Mack, 19 Cal. App. 3d 1040, 1051, 97 Cal. Rptr. 448, 454 (3d Dist. 1971).

[172] Hitchings v. Del Rio Woods Recreation & Park Dist., 55 Cal. App. 3d 560, 570-71, 127 Cal. Rptr. 830, 836-37 (1st Dist. 1976) (navigability in natural state for approximately nine months every year sufficient to make the Russian River suitable as a "public recreational highway" for most of the year and, therefore, navigable in law; court left open consequence of "navigability in fact" only after improvements have been made).

[173] In the Mono Lake litigation, it appears that the City of Los Angeles may assert public trust commercial uses of water in Los Angeles conflicting with other public trust uses at Mono Lake. *See* presentation by K. Downey, Proceedings: Conference on the Public Trust Doctrine in Natural Resources Law and Management (University of California, Davis, School of Law). Although the Supreme Court of California has spoken broadly of the power of the state as trustee to act relative to navigable waterways "in any manner consistent with the improvement of commercial traffic and intercourse," Colberg, Inc. v.

panded list of public trust uses, this problem becomes more complex. Extensive use of waters for commercial navigation, for example, clearly may conflict with preservation of the area in its natural state as an "ecological" unit for scientific study. Similarly, extensive fishing might interfere with the provision of food and habitat for birds and marine life.

An example of such conflict in public trust uses was presented in *Colberg, Inc. v. State ex rel. Department of Public Works,*[174] one of the leading California Supreme Court public trust decisions in recent years,[175] but the claims of the parties were analyzed in such a way that the conflict was not explicitly resolved. In *Colberg* the State of California planned to construct two fixed, low-level, parallel freeway bridges across a navigable waterway which terminated about a mile to the east. Owners and lessees of shipyards at the end of this waterway alleged that the bridges would impair access to and from the sea by the large ships they built or serviced.[176] They consequently brought actions for declaratory relief to determine whether they had a cause of action on the basis of eminent domain.

In affirming trial court judgments on the pleadings for the state, the Supreme Court of California treated the question as whether the alleged impairment of access from the shipyards to the navigable channel beyond the bridges would constitute a taking or damaging of private property in the form of the shipyards' littoral rights.[177] It concluded that there would be no such taking or damaging, since the state was merely exercising its public trust easement to which these littoral rights were subject. The court commented as follows:

State *ex rel.* Dep't of Pub. Works, 67 Cal. 2d 408, 420, 432 P.2d 3, 11, 62 Cal. Rptr. 401, 409 (1967), *cert. denied,* 390 U.S. 949 (1968), in *Colberg* and the other public trust easement cases commercial utilization has always been tied closely to the particular navigable waterway in question.

[174] 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967), *cert. denied,* 390 U.S. 949 (1968).

[175] Although commentators frequently distinguish between the public trust easement and a "state navigation servitude," *see generally* H. ALTHAUS, *supra* note 21, in California the two are identical. *See* Colberg, Inc. v. State *ex rel.* Dep't of Pub. Works, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967), *cert. denied,* 390 U.S. 949 (1968).

[176] *Id.* at 413, 432 P.2d at 6, 62 Cal. Rptr. at 404. Vertical clearance in the channel would be reduced from 135 feet to 45 feet, preventing plaintiffs from servicing ships standing over 45 feet above the water line.

[177] *Id.* at 414-15, 432 P.2d at 7, 62 Cal. Rptr. at 405.

> The state, as owner of its navigable waterways subject to a trust for the benefit of the people, may act relative to those waterways in any manner consistent with the improvement of commercial traffic and intercourse. We are of the further view that the law of California burdens property riparian or littoral to navigable waters with a servitude commensurate with the power of the state over such navigable waters. . . .[178]

Thus the shipyard interests lost in matching their private property rights against the public trust easement. Implicit in the situation, however, was a conflict of the public trust uses themselves. Navigation clearly is a principal public trust use, available to all members of the public including those going to and from the shipyards. Commerce is another public trust use, in this case somewhat attenuated as it involved only a freeway servicing a port, but one deemed nonetheless within the trust. Why should the commercial use be favored over the navigational use? The answer implicit in *Colberg* is that the state as administrator of the trust may make the choice. The state's power to utilize property within the terms of the trust "is absolute except as limited by the paramount supervisory power of the federal government over navigable waters."[179]

C. Limits to the Public Trust Easement

In coastal areas, the typical fill and development activity which leads to public trust litigation interferes both with navigable waters and with the underlying lands. All that has been said above about limits to the public trust easement for the land applies with equal force to the waters. But inland navigable waters are also subject to a type of interference which does not involve the underlying land: reduction of the quantity of water in the navigable stream or lake through diversions for consumptive use.

That California law permits such diversions, if pursuant to valid water rights, has been recognized for many years.[180] Although the leading U.S. Supreme Court decision establishing the theoretical basis for state allocation of water rights speaks only of state control of nonnavigable waters,[181] both federal and state

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[178] *Id.* at 420, 432 P.2d at 11, 62 Cal. Rptr. at 409.

[179] *Id.* at 416, 432 P.2d at 9, 62 Cal. Rptr. at 407.

[180] W. HUTCHINS, *supra* note 2, *passim.*

[181] California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

court decisions have acknowledged that the states may also properly provide for the allocation of navigable waters, subject to any paramount federal rights.[182] Such allocations occur, for example, when riparian rights are recognized by statutory and judicial law; when appropriations are provided for, either with or without state administrative review; and when prescriptive rights are recognized.

Recognition of both a public trust easement to inland navigable waters and various water rights allowing the diversion of navigable waters or their sources obviously requires some means for resolving conflicts between the public nonconsumptive uses protected by the easement and the consumptive uses protected by the water rights.[183] If various diversions are allowed totally to dry up a navigable stream, then the public's right to navigate, conduct commerce or fish in those navigable waters has been entirely destroyed. If, on the other hand, the easement is held to prevent any diversion whatsoever, the water rights are generally worthless.

In the absence of California case law resolving the conflict described here, it is suggested that the three limits developed for land interference situations be used for the "pure" water cases as well. That is, the public use rights should be regarded as modified or extinguished where the state legislature has properly modified or terminated the easement so as to further trust purposes; where equitable estoppel or fair public policy dictates that the easement should no longer be recognized; or where properly authorized federal activity is the source of the interference with public trust uses.

1. Legislative furthering of trust purposes

The massive sorts of diversions of water likely to interfere

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[182] Arizona v. California, 298 U.S. 558, 569 (1936); Waterford Irrigation Dist. v. Turlock Irrigation Dist., 50 Cal. App. 213, 220, 194 P. 757, 760 (3d Dist. 1920).

[183] To the extent that a water right is itself "nonconsumptive," *see* text accompanying note 145 *supra*, there is no conflict with the public trust easement. Even where water rights are consumptive, it has been the exception rather than the rule in California for their exercise to draw down a lake or stream to the extent that public trust uses are seriously threatened. This perhaps explains the lack of case law dealing with such conflicts. This may change as the pressures on limited water resources grow ever more intense.

with public uses of navigable lakes and streams typically occur pursuant to an appropriative water right. Riparian rights entitle landowners only to the natural flow of the stream,[184] and since this flow must be used on riparian parcels[185] it is unlikely that the aggregate of diversions pursuant to riparian rights on a particular stream will interfere with public nonconsumptive uses. Prescriptive rights to surface waters tend to be relied upon by small rather than large diverters,[186] so again the diversions are unlikely to compromise public trust uses. It is the large water development projects based upon appropriative water rights to which attention must here be addressed.

Since 1914, appropriation of surface water in California has required authorizaton by a state administrative agency.[187] A two-step process is used: upon approval of an application to appropriate unappropriated water, the agency issues a permit specifying all terms and conditions which it finds to be necessary;[188] then upon completion of the diversion works, the appropriator receives a license, again incorporating appropriate terms and conditions.[189]

California's Water Code states in detail the requirements for the appropriation of unappropriated water.[190] Nothing is explicitly stated with regard to the public trust easement in navigable waters, nor is there much which implies that the legislature has considered the impact of appropriative rights in general on the nonconsumptive public trust uses.[191] In view of this legislative

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[184] D. ANDERSON, *supra* note 2, at 20.

[185] *Id.* at 19.

[186] GOVERNOR'S COMM'N, *supra* note 8, at 11.

[187] Such state control was recommended in 1912 by the Conservation Commission. The Water Commission Act of 1913, implementing the Commission's recommendations, was approved by the people in a referendum in 1914. *Id.* at 9-10.

[188] Cal. Water Code §§ 1380, 1382, 1391 (West 1971); Cal. Admin. Code, tit. 23, §§ 761-763.5 (1979).

[189] Cal. Water Code §§ 1625-1626 (West 1971).

[190] Cal. Water Code §§ 1200-1801 (West 1971).

[191] What hints there are suggest that the consumptive uses being allowed to appropriators should not destroy the public uses. Section 1243 of the Water Code, for example, provides that in determining the amount of water available for appropriation, the state agency "shall take into account, whenever it is in the public interest, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources." Cal. Water Code § 1243 (West Cum. Supp. 1980).

silence on the subject, the Supreme Court of California would likely determine that mere enactment of the Water Code provisions on appropriations did not serve to extinguish the public trust easement for any particular lake or stream. Certainly if the *California Fish* principles,[192] reiterated in *City of Berkeley*,[193] are followed, there is no possibility of such an extinction.[194]

Where water rights are concerned, the statutes most likely to qualify according to the *California Fish* principles are those which authorize specific water development projects. Although these statutes do not themselves create the water rights, which are usually granted by the state administrative agency, they do clearly authorize the construction of facilities which necessarily inhibit the exercise of some public trust uses while facilitating others. Statutory provisions pertaining to the Central Valley Project provide a good example. This project was designed as a state endeavor, but for financial reasons certain portions of the project were taken over and constructed by the federal government.[195] Some of the state's most important water diversions are involved, including dams which have an obvious impact on public trust uses such as navigation at the damsite. Whatever passage might previously have been possible is blocked, and the alteration in flows downstream from the dams may also inhibit navigation.

That the legislature intended this modification in public trust uses seems clear from the specificity with which it authorized the facilities. The overall beneficial impact on trust uses justifies such modification. The dams on navigable rivers generally have the improvement of navigation as one purpose. One of the four primary purposes of Shasta Dam, for example, according to the state authorizing legislation, is improvement of navigation of the Sacramento River to Red Bluff.[196]

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[192] People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913).

[193] City of Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 101 S. Ct. 119 (1980).

[194] *See* note 89 and accompanying text *supra*. The *California Fish* principles apply to general disposition statutes like the swamp and overflow land disposition statute involved there or the general tidelands disposition statute involved in *City of Berkeley*. They presume that appropriate cases for public trust easement termination are those where the legislature acts in a site-specific manner which serves in general to further public trust uses.

[195] *See* United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950).

[196] Cal. Water Code § 11207(a) (West 1971). Shasta Dam was constructed

The situation is analogous to that of the San Francisco waterfront. Just as the filling of some water lots there facilitated development of a modern harbor, construction of Shasta Dam has enabled development of a more managed river. Flood control is provided, and significant quantities of water are supplied to farmers and cities, while navigation, fishing and other public uses are maintained or improved.[197] As in many water projects, the public trust uses are enhanced rather than diminished.

Statutory provisions authorizing appropriations of water seem less likely than project authorization statutes to qualify as a modification or extinction of the public trust easement. These provisions do provide for site-specific action when a water right is issued, for the permit and license will specify the point of diversion and the place of use of the appropriated water.[198] But such action differs from project authorization legislation in two important ways.

First, the action is taken by an administrative agency rather than by the legislature. Although the state's jurisdiction to administer a public trust resource may be delegated to an administrative body,[199] authority to modify or terminate the public trust easement is normally express. For example, in authorizing the State Lands Commission to exchange lands "in the best interests of the state, for the improvement of navigation" and for

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and is operated as part of the *federal* Central Valley Project. That project does not need to conform to California's Central Valley Project Act. Rank v. Krug, 142 F. Supp. 1, 103 (1956), *aff'd in part, rev'd in part on other grounds,* 293 F.2d 340 (1961), *modified,* 307 F.2d 96 (1962), *aff'd in part sub nom.* City of Fresno v. California, 372 U.S. 627, *aff'd in part, rev'd in part sub nom.* Dugan v. Rank, 372 U.S. 609 (1963). The feasibility report by Secretary of the Interior Ickes upon which Congress relied in approving the federal project identified the improvement of navigation as one of the project's principal values, "navigation having been practically abandoned above Sacramento in the summer season." M. MONTGOMERY & M. CLAWSON, HISTORY OF LEGISLATION AND POLICY FORMATION OF THE CENTRAL VALLEY PROJECT 253 (1946).

[197] In 1959 the U.S. Army Corps of Engineers estimated the navigation benefits alone from Shasta Dam to be $1,260,000 annually. J. BAIN, R. CAVES & J. MARGOLIS, *supra* note 11, at 715-16.

[198] Cal. Water Code §§ 1260(e), 1260(f), 1380, 1625 (West 1971); *see* Cal. Water Code § 1701 (West 1971); 23 Cal. Admin. Code, tit. 23, § 673 (1979).

[199] *See generally* Cal. Pub. Res. Code, §§ 6201-6226 (West 1977 & Cum. Supp. 1980) (dealing with the powers and duties of the State Lands Commission); *id.* §§ 6301-6360 (dealing with the administration and control of swamp, overflowed, tide or submerged lands and structures thereon); County of Orange v. Heim, 30 Cal. App. 3d 694, 718-719, 100 Cal. Rptr. 825, 845 (4th Dist. 1973).

other purposes, the legislature has expressly provided that when the commission has found that the exchanged lands have been improved so as to be no longer useful for navigation and fishing the lands "shall thereupon be free from the public trust for navigation and fishing."[200]

In the case of appropriative water rights, the granting body is the State Water Resources Control Board.[201] This board exercises the regulatory and adjudicatory functions of the state in the field of water resources,[202] but the legislature has never expressly provided the board with authority to terminate the public trust easement to the state's navigable waters. In light of the protective principles of *California Fish,*[203] it is unlikely that the courts would infer such authority.

Second, water rights permits and licenses are site-specific regarding the point of diversion but not regarding the impact of the diversion on navigable waters. Unlike a dam, which clearly will block passage by boats at a certain point on a river, an approved diversion may or may not have a significant impact on public trust uses. The appropriative water right is subject to all vested water rights,[204] the full extent of which is generally unknown to the administrative agency.[205] Whether these rights will be fully exercised in low-flow years when public trust uses are most in jeopardy is unknown to the agency. And indirect impacts on public uses, such as changes in salinity which affect aquatic life in the source, are often not fully understood until diversions occur.

One other type of legislation which has a bearing on legislative furthering of trust purposes is found in the "reasonable use" provisions of the California Constitution and the Water Code.[206] These provisions originated in the long-standing conflict between riparians and appropriators in California. *Lux v. Hag-*

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[200] Cal. Pub. Res. Code § 6307 (West 1977). The constitutionality of this provision has been questioned. Martyn & Bohner, *supra* note 22.

[201] Cal. Water Code § 1380 (West 1971).

[202] *Id.* § 174.

[203] *See* text accompanying note 89 *supra.*

[204] This results from the fact that only unappropriated water may be appropriated, Cal. Water Code § 1252 (West 1971), and that priorities among claimants follow the principle "first in time, first in right." *See* text accompanying notes 151-152 *supra.*

[205] GOVERNOR'S COMM'N, *supra* note 8, at 22.

[206] CAL. CONST. art. X, § 2; Cal. Water Code § 100 (West 1971).

gin,[207] of course, settled that riparian rights would be recognized, and the common law provided that in disputes among themselves riparians would be subject to a rule of reasonableness.[208] Appropriators by the common and statutory law were limited to beneficial use,[209] and one appropriator could prevent a wasteful or unreasonable use by another appropriator.[210] But when a dispute pitted a riparian against an appropriator, the courts held that the riparian—normally the paramount right-holder—was not limited by a reasonableness standard.[211]

To change this situation, the legislature provided and the people in 1928 approved the limitation of all water rights in all situations to reasonable beneficial use. In the language of the state constitution, rights to water or to the use or flow of water "shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water."[212]

Nothing in this language or its legislative history suggests either that it was intended to modify the public trust easement, which as noted above is not a "water right" in the accepted sense of the term, or that it would qualify to do so if scrutinized using the principles of *California Fish*.[213] It is not site-specific. It does not serve to further public trust uses. And it can easily be interpreted so as not to do violation to the trust. Like the statutory provisions on the appropriation of unappropriated waters, the reasonable use language merely contributes to the framework within which site-specific decisions are made.

Even if the reasonable beneficial use language of the California Constitution were interpreted more broadly, as intended to limit any type of right which causes the waste of fresh water whether a "water" right or not, there is reason to believe that any proper public trust use is not wasteful. The Constitution prohibits the destruction or obstruction of any navigable water

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[207] 69 Cal. 255, 10 P. 674 (1886); *see* note 5 *supra*.

[208] W. HUTCHINS, *supra* note 2, at 220-22.

[209] *Id.* at 120; Cal. Water Code § 1375(c) (West 1971).

[210] *See* Natoma Water & Mining Co. v. Hancock, 101 Cal. 42, 50-52, 35 P. 334, 337 (1894).

[211] Herminghaus v. Southern Cal. Edison Co., 200 Cal. 81, 252 P. 607 (1926), *cert. dismissed*, 275 U.S. 486 (1927).

[212] CAL. CONST. art. X, § 2. This limitation of water rights is based on the need to put the state's limited fresh water resources "to beneficial use to the fullest extent of which they are capable." *Id.*

[213] *See* text accompanying note 89 *supra*.

in the state,[214] thereby implicitly recognizing the reasonableness of using such water for navigation. The legislature has recognized in the Wild and Scenic Rivers Act that leaving fresh water in streams for environmental reasons is not inherently wasteful,[215] even though this means that the fresh water will reach the ocean without having been put to consumptive use. And the legislature has also recognized that the use of fresh water for recreation, fish and wildlife resources as specified in water quality control plans is not wasteful.[216]

2. Equitable estoppel and related considerations

As noted above, *Mansell* established in the context of tidelands litigation that equitable estoppel may serve to terminate the public trust easement for developed lands.[217] In *City of Berkeley*, considerations of fair policy led the court, in deciding how much retroactive effect to give to its overruling of *Knudson v. Kearney*, to balance interests so as to terminate the easement for filled land along the Berkeley waterfront.[218] If similar fact situations occur for navigable waters, comparable results would be reasonable.

Application of these pacifying notions that "what is done, is done" to a consumptive water use situation, however, is not easy. In one sense, each water year presents a new situation, with no physical reminder of how things were done in the past other than the existence of the diversion works. One might therefore argue that if the gates on a dam were to be left open, the river or lake fed by the river would be restored to a natural state compatible with the full range of public trust uses. Yet the diversion works themselves generally represent reliance on a legitimate expectation as to how much water will be available for diversion, and surely any court deciding a public trust easement case must take this expectation into account.

Without attempting any precise formula, it can be suggested that the public trust easement cases dealing with tidelands and submerged lands demonstrate a flexible and realistic attitude which should prove helpful in litigation involving water rights. It

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[214] CAL. CONST. art X, § 4.
[215] Cal. Pub. Res. Code § 5093.50 (West Cum. Supp. 1980).
[216] Cal. Water Code § 13050(f) (West 1971).
[217] *See* text accompanying notes 90-109 *supra*.
[218] *See* text accompanying notes 110-114 *supra*.

does not follow from recognition of an easement protecting public trust uses of a lake or river that a court should enjoin all diversions until the fullest range of public trust uses for which the natural resource is physically adaptable has been obtained. Conversely, it should not follow that, merely because the physical capacity exists and water rights are recognized, a court must permit a project operator to divert water from the basin to the full extent of the water rights.

The key to termination of the public trust easement in such cases is a situation in which public nonconsumptive use of navigable waters is no longer practical. Where a navigable lake has been drained, for example, and the lake bed developed for agriculture, it makes little sense to consider that the public trust easement burdens the dry farming land. There is no way that the easement can provide to the public those nonconsumptive uses of water which it is designed to protect. Where public trust uses are no longer practical and the draining appears to have been performed in reliance upon official representations or upon a judicial decision indicating termination of the easement, the case for termination is strong. But where the resource remains suitable for public trust uses, there is no proper ground for termination on an equitable estoppel or related theory.

3. Federal activity

Similarly the state public trust easement must yield where federal activity has interfered with public nonconsumptive uses. Whether the federal activity is pursuant to the Commerce Clause,[219] as in the typical navigation-related project,[220] or is based on other federal powers,[221] inconsistent state-created rights clearly must give way. An example of such activity in California is provided by Friant Dam, which contributed substantially to the loss of salmon fishing on the San Joaquin River.[222]

CONCLUSION

This article has considered an important and unsettled question in California natural resources law: How should consump-

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[219] U.S. CONST. art. I, § 8 (3).
[220] *See* note 116 *supra*.
[221] *See* United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950).
[222] J. BAIN, R. CAVES & J. MARGOLIS, *supra* note 11, at 512, n.25.

tive water rights be reconciled with the public trust easement in navigable waters? Significant public trust values protected by the courts since the early days of statehood are at stake, as are the expectations and investments of various public and private developers of water resources. Satisfactory resolution of the question will require a high degree of judicial craftsmanship, whether such resolution occurs in the Mono Lake litigation or in some future lawsuit.

The California water rights system can readily accommodate any particular result which may be reached in applying the public trust easement to consumptive water rights. That system recognizes a myriad of water rights, and it has long been characterized by adaptability to new needs.

The water rights situation of the City of Los Angeles provides an excellent example. The Los Angeles water supply from the Colorado River will soon be reduced to provide water needed for the Central Arizona Project, and the legal vehicle for this reduction is a recently discovered notion of congressional apportionment of interstate rivers.[223] The Colorado River water is also subject to "reserved" water rights needed for Indian and other federal reservations,[224] though the precise dimensions of these rights are still not fixed. All the water rights held by Los Angeles are subject to the constitutional reasonable beneficial use limit,[225] which is a dynamic concept applied generally on a case-by-case basis, sometimes to the detriment of established water uses.[226] And the water supplied to Los Angeles from the State Water Project via the Metropolitan Water District of Southern California is subject to various vested rights of unknown dimension, for example the hitherto unexercised rights of riparians[227] and the statutory rights of counties and watersheds where the water originates.[228]

Thus the need for adaptation is nothing new to California's water rights system. The prospect of such adaptation often

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[223] Arizona v. California, 373 U.S. 546 (1963). Los Angeles receives this water via the Metropolitan Water District of Southern California.

[224] *Id.* at 595-601.

[225] CAL. CONST. art. X, § 2.

[226] Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967).

[227] *See* D. ANDERSON, *supra* note 2, at 61-67.

[228] Cal. Water Code §§ 10505, 10505.5, 11460-11463 (West 1971). *See also* The Delta Protection Act, Cal. Water Code §§ 12200-12205 (West 1971).

brings forth consternation,[229] but changes must occur if legal doctrines are to accommodate new situations. Adaptation of the law on consumptive water rights to accommodate the protection of navigable waters long provided by the public trust easement is now an important task for the California courts.

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[229] In the Mono Lake litigation, the Attorney General of California, speaking on behalf of the State Water Resources Control Board, has referred to the "staggering ramifications" of successful assertion by plaintiffs of a public trust easement and has suggested that this would prejudice the rights of both the California Department of Water Resources and the U.S. Water and Power Resources Service to export waters from northern California rivers and from the Sacramento-San Joaquin Delta. State of California's Response to Federal Cross-Defendants' Opposition to Motion to Remand, National Audubon Soc'y v. Department of Water & Power, No. S-80-127 (E.D. Cal. 1980). Interestingly, the present director of the California Department of Water Resources apparently does not share this concern. *See* presentation by R. Robie, Proceedings: Conference on the Public Trust Doctrine in Natural Resources Law and Management (University of California, Davis, School of Law).