SYMPOSIUM ON ACCESS TO WATERWAYS

Foreword

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Man is a subaerial creature, existing between air and water. California air, pollution aside, is abundant and equable. But the state has always had only two kinds of water: too much and too little.

In early days, the principal problem of California was in containing excess water, the inevitable flooding that plagued agriculture and the sparse population centers. An old tale, probably apocryphal, has Leland Stanford, elected as the state's first Republican governor in 1860, rowing in the uncontrolled overflowing Sacramento River to the mansion which was to serve as his executive residence and climbing into the house through a second-story window.[1]

In the middle years of this century, the primary concern of the state was in distribution of scarce water, since two-thirds of the rainfall blesses one-third of the land mass, while two-thirds of the people live in the area receiving less than one-third of the rainfall.[2] Correction of this maldistribution has been sought first by construction of a series of dams in the north — the Central Valley Project authorized during the ad-

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† Justice Mosk has authored many of the opinions discussed in this Foreword. *See* City of Los Angeles v. Venice Peninsula Properties, 31 Cal. 3d 288, 644 P.2d 792, 182 Cal. Rptr. 599 (1982); State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713 (1981); State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696 (1981); City of Berkeley v. Superior Ct., 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980); People *ex rel.* San Francisco Bay Conservation and Development Comm'n v. Town of Emeryville, 69 Cal. 2d 533, 446 P.2d 790, 72 Cal. Rptr. 790 (1968).

[1] H. PHILLIPS, BIG WAYWARD GIRL: AN INFORMAL POLITICAL HISTORY OF CALIFORNIA 20 (1968).

[2] W. HUTCHINSON, CALIFORNIA: TWO CENTURIES OF MAN, LAND AND GROWTH IN THE GOLDEN STATE 34 (1969).

ministration of Governor James Rolph — and subsequently by the imaginative two billion dollar California Water Plan, long stymied by sectional rivalries, brought to fruition through the political genius of the original Governor Edmund G. Brown.[3]

Having become the most populous state in the nation, its water having become a diminishing resource, California finds in the final decades of the twentieth century that a major problem is public access to water — the waters of the Pacific, of navigable streams, and of inland lakes. To that end, agencies and courts recently have become increasingly alert to the public trust doctrine, a concept that had its origin in the days of Justinian,[4] brought to the American continent first by the Spaniards and later by the English, to Alta California by the Mexicans, and then long the victim of neglect — but never persuasively questioned.[5]

During the past two decades a number of significant cases involving water and various other aspects of environmental protection have ended on the doorstep of the California Supreme Court. A University of California study of court opinions over that period resulted in a conclusion that the court has been "stable, evolutionary, consistent" in dealing with these problems.[6] I am not prepared to quarrel with that empirical analysis.

Although the case was decided in a statutory construction context, contemporary de facto recognition of the public trust doctrine probably began with *People ex rel. San Francisco Bay Conservation and Development Comm'n v. Town of Emeryville.*[7] The Court pointedly quoted from the legislative intent manifest in the 1965 McAteer-Petris Act:[8] ". . . the public interest in the San Francisco Bay is in its beneficial use for a variety of purposes . . . the public has an interest in the bay

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[3] H. PHILLIPS, note 1 *supra*, at 195. *See also* G. HILL, DANCING BEAR: AN INSIDE LOOK AT CALIFORNIA POLITICS 209 (1968).

[4] Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 196 (1980).

[5] Indeed, it was firmly reinforced in California law by People v. California Fish Co., 166 Cal. 576, 596-99, 138 P. 79, 87-88 (1913). *But see* the superficial analysis in Knudson v. Kearney, 171 Cal. 250, 152 P. 541 (1915) and Alameda Conservation Ass'n v. City of Alameda, 264 Cal. App. 2d 284, 70 Cal. Rptr. 264 (1st Dist. 1968).

[6] DiMento, Dozier, Emmons, Hagman, Kim, Greenfield-Sanders, Waldau & Woolcott, *Land Development and Environmental Control in the California Supreme Court: The Deferential, the Preservationist, and the Preservationist-Erratic Eras*, 27 U.C.L.A. L. REV. 859 (1980).

[7] 69 Cal. 2d 533, 446 P.2d 790, 72 Cal. Rptr. 790 (1968).

[8] CAL GOV'T CODE §§ 66600-66661 (West 1966 & Supp. Pam. 1982).

as the most valuable single natural resource of an entire region . . . ."[9]

Though not expressly discussing the public trust, *People ex rel. Younger v. County of El Dorado*[10] validated an interstate compact designed to protect the balance of ecology and to keep an inland lake — Lake Tahoe — "water clear and fresh . . . and maintain all forms of wildlife at appropriate levels."[11] The court quoted Mark Twain's description of Lake Tahoe as "a noble sheet of blue water lifted six thousand three hundred feet above the level of the sea . . . with the shadows of the mountains brilliantly photographed upon its still surface . . . the fairest picture the whole earth affords."[12]

Soon thereafter the public trust doctrine was lovingly embraced by the Supreme Court in a rapid series of opinions: *City of Berkeley v. Superior Court*[13] (tidelands), *State v. Superior Court (Lyon)*[14] and *State v. Superior Court (Fogerty)*[15] (lands between high and low water in non-tidal navigable lakes), *City of Los Angeles v. Venice Peninsula Properties*[16] (tidelands acquired from Mexican government and later patented by the United States) and most recently in *National Audubon Society v. Superior Court*[17] (non-navigable tributaries to a navigable lake).

The extent and purposes of the trust have been the subject of considerable speculation. Although *City of Long Beach v. Mansell*[18] described the public trust as traditionally delineated "in terms of navigation, commerce and fisheries," a more expansive modern description of the doctrine came a year later from the pen of Justice McComb in *Marks v. Whitney.*[19] A unanimous court declared that public uses "are sufficiently flexible to encompass changing public needs." These were enumerated, as of that time, to be ". . . navigation, commerce, and fisheries . . . the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes . . . to use the bottom of the navigable waters for anchoring, standing, or other purposes . . . as ecological units for scientific study, as open space, and as environments which provide food

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[9] 69 Cal. 2d at 544, 446 P.2d at 797, 72 Cal. Rptr. at 797.
[10] 5 Cal. 3d 480, 487 P.2d 1193, 96 Cal. Rptr. 553 (1971).
[11] *Id.* at 486, 487 P.2d at 1195, 96 Cal. Rptr. at 555 (footnote omitted).
[12] *Id.* at 485, 487 P.2d at 1194, 96 Cal. Rptr. at 554.
[13] 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980).
[14] 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696 (1981).
[15] 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713 (1981).
[16] 31 Cal. 3d 288, 644 P.2d 792, 182 Cal. Rptr. 599 (1982).
[17] 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).
[18] 3 Cal. 3d 462, 482, 476 P.2d 423, 437, 91 Cal. Rptr. 23, 37 (1970).
[19] 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

and habitat for birds and marine life."[20] Adding "scenery and climate of the area," the court concluded that "it is not necessary to here define precisely all the public uses which encumber tidelands."[21] Nor should the state "be burdened with an outmoded classification favoring one mode of utilization over another."[22]

The University of California at Davis has been perceptive in interpreting California's laws and decisions on water, and particularly the public trust doctrine. Following a two-day conference, the Law Review in its Winter 1980 issue published a number of significant articles. Therefore it is not remarkable that the Law Review once again probes the subject, this time in a symposium emphasizing access to waterways.

Navigability, discussed by Deputy Attorney General Richard Frank, is an important aspect of public access and it needs explication. The *Mansell* theory of estoppel, advocated by Messrs. Futterman and Nixon, has some arguable merit, but judicial reticence to impose an estoppel on public officers or agencies induced the California Supreme Court to prefer an intermediate course in *City of Berkeley*.[23] To protect legitimate property rights the court held a better principle to be applied "is that the interests of the public are paramount in property that is still physically adaptable for trust uses, whereas the interests of the grantees and their successors should prevail insofar as the tidelands have been rendered substantially valueless for those purposes."[24] In other words it is hardly pragmatic to impose a trust for navigation on a ten story waterfront building. The right to fish as a *profit a prendre*, discussed by Richard Ekimoto and Jean Rice, is a thoughtful concept. It is consistent with the result in *Gion v. City of Santa Cruz*[25] and, indeed, was hinted at in that opinion.[26]

These discussions are valuable to a society understandably concerned with the environment and accessibility to its rewarding features.[27] If the

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[20] *Id.* at 259-60, 491 P.2d at 380, 98 Cal. Rptr. at 796.

[21] *Id.* at 260, 491 P.2d at 380, 98 Cal. Rptr. at 796.

[22] Colberg, Inc. v. State *ex rel.* Dept. of Pub. Works, 67 Cal. 2d 408, 422, 432 P.2d 3, 12, 62 Cal. Rptr. 401, 410 (1967).

[23] 26 Cal. 3d 515, 534, 606 P.2d 362, 373, 162 Cal. Rptr. 327, 338 (1980).

[24] *Id.*

[25] 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970).

[26] *Id.* at 43, 465 P.2d at 59, 84 Cal. Rptr. at 171.

[27] Arnold Toynbee put it this way:

> We need to reverse the order of our priorities and to make the restraint of greed and the practice of frugality our first objectives. There are at least three grounds for this: the maintenance of human dignity, the protection of our own generation against the danger of pollution, and the conservation for future generations of the limited natural resources of our planet.

public trust doctrine were to become a casualty of growth and development, future generations of Californians may find it increasingly difficult to frolic or fish in the ocean, streams, and lakes. Perhaps there are adequate alternatives to substitute for nature's wonders, but I cannot think of them.

A. TOYNBEE & D. IKEDA, CHOOSE LIFE 59 (1976).