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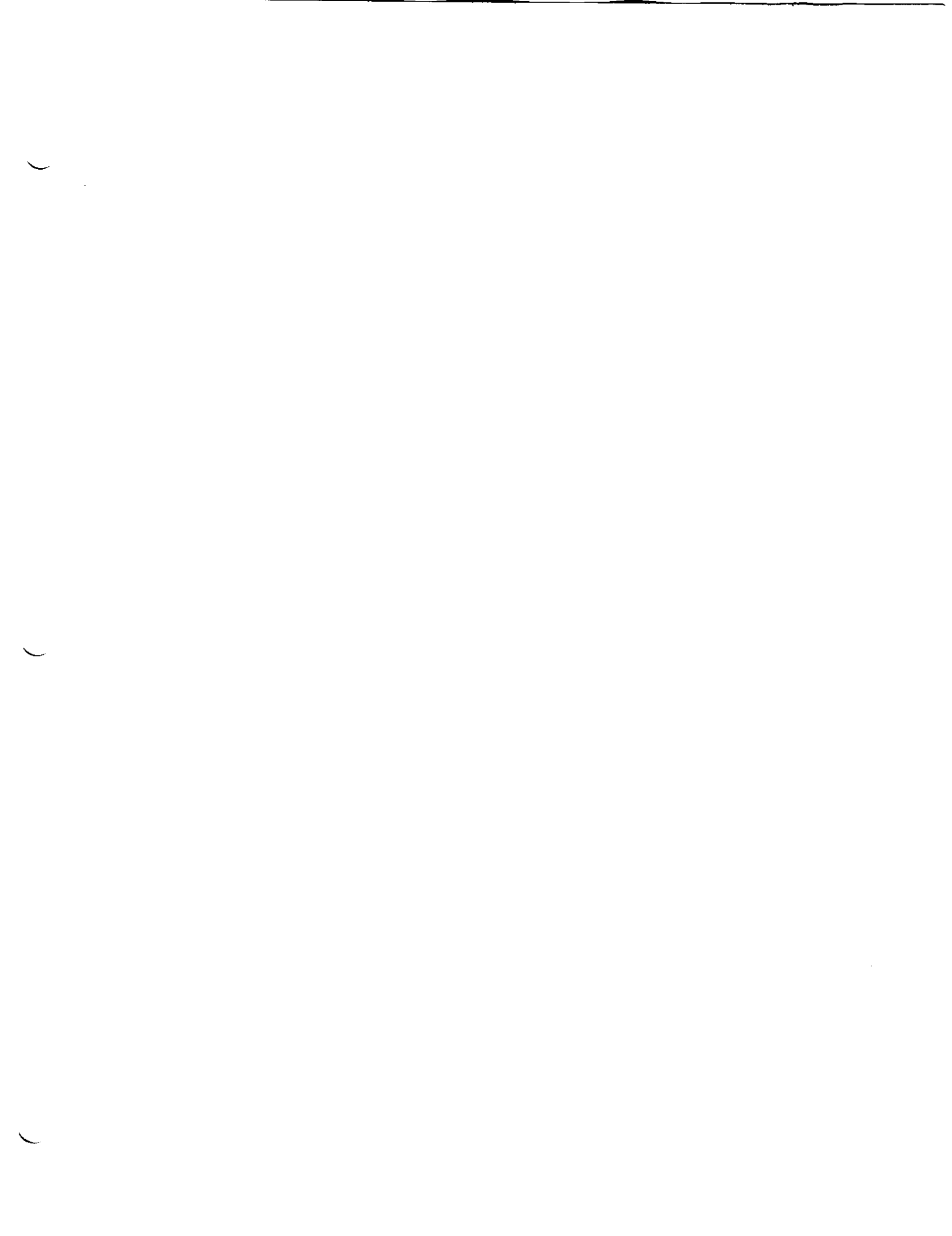
IN THE BEGINNING GOD CREATED THE PUBLIC TRUST DOCTRINE?

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Water as a Public Resource:
Emerging Rights and Obligations

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I. INTRODUCTION.

SHOULD THE PUBLIC TRUST DOCTRINE APPLY TO
CONSTRAIN APPROPRIATORS, RIPARIANS, AND OTHER
WATER EXTRACTORS?"

- A. Demands for existing water supplies are increasing, requiring difficult choices in reallocation.

New uses, for urban centers, recreation, industry, etc., demand a share of existing supplies.

Historic patterns of water use are changing.

New supplies of water are seldom available, except at prohibitive costs, e.g., diverting water from the Columbia River to the Southwest, or from the Mississippi to the High Plains area of Texas.

California is facing conflicts that will soon appear in other states.

- B. The California Court, in National Audubon Society v. Superior Court of Alpine County, 33 Cal. 3d 419, 685 P. 2d 709, 189 Cal. Rptr. 346, cert. denied, 104 S. Ct. 413 (1983), (hereinafter referred to as the Audubon case), has stated the public trust doctrine constrains both past and future appropriations.

- C. This paper will examine the bases for Audubon, and will suggest its potential future impact on western water use.

The paper will also examine the potential impact of state regulatory power over water rights by comparing zoning and other police power regulations.

II. ORIGIN OF THE PUBLIC TRUST DOCTRINE

- A. The doctrine originated from the widespread practice, from time immemorial, of using navigable waters as public highways and fishing grounds.

"By the law of nature these things are common to mankind--the air, running water, the sea and consequently the shores of the sea." The Institutes of Justinian 2.1.1 (Moyle trans. 5th ed. 1912).

"Certain interests, such as navigation and fishing, were sought to be preserved for the benefit of the public; accordingly, property used for these purposes was distinguished from general public property which the sovereign could routinely grant to private owners. . . [w]hile it was understood that in certain properties--such as seashore, highways, and running water, 'perpetual use was dedicated to the public' [Hunter, Introduction to Roman Law 311 (1921)] it has never been clear whether the public had an enforceable right to prevent infringement of these interests."

Sax, "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention," 68 Mich. L. Rev. 471, 475 (1970). For further historical references, see Dunning, "The Public Trust Doctrine and Western Water Law: Discord or Harmony?" Proceedings of Thirtieth Annual Rocky

Mountain Mineral Law Institute, p. 17-1 (1985).

- B. In the United States the doctrine was announced early in Arnold v. Mundy, 6 N.J.L. 1 (1821).

"By the law of nature. . . the civil law. . . the common law. . . the navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purposes of passing and repassing, navigation, fishing, fowling, sustenance, and all other uses of the water and its products. . . are common to all the citizens" [emphasis added]

Later cases supported this view. See Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842). Illinois Central RR v. Illinois, 146 U.S. 387 (1892) (hereinafter cited as Illinois Central).

III. THE WATERS COVERED BY THE PUBLIC TRUST DOCTRINE.

- A. In England the doctrine covered waters where the tide ebbed and flowed.
- B. In the U.S. the doctrine was expanded to cover all waters "navigable in fact". See Carson v. Blazer, 2 Binn.475 (Pa. 1910).

For the historical evolution of the public trust doctrine, see Sax, *supra*, Dunning, *supra*, Selvin, "The Public Trust Doctrine in American Law and Economic Policy, 1787-1920, 1980 Wis. L. Rev. 1403 (1980). Cohen, "The Constitution, the Public Trust Doctrine, and the Environment" 1970 Utah L. Rev. 388 (1970); Stevens, "The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right," 14 U.C. Davis L. Rev. 195 (1980).

In some states the public trust doctrine covers

additional waters, including those that are navigable only for pleasure boat use. See Hitchings v. Del Rio Woods Recreation & Park District, 55 Cal. App. 3d 560, 127 Cal. Rptr. 830 (1st Dist. 1976); People ex rel, Baker v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr 448, (3d Dist. 1971). See Montana Coalition for Stream Access, Inc. v. Curran, 682 P. 2d 163 (Mont. 1984), Day v. Armstrong, 362 P. 2d 137 (Wyo. 1961). See Johnson, "Public Trust Protection for Stream Flows and Lake Levels," 14 U.C. Davis L. Rev. 233 (1980).

IV. ACTIVITIES PROTECTED BY THE PUBLIC TRUST DOCTRINE.

HISTORICALLY THE DOCTRINE WAS USED TO PROTECT NAVIGATION, COMMERCE AND FISHERIES.

- A. But the doctrine evolved at an early date to cover a broad array of interests. See Selvin, *supra*, including railroad rights of way, highways, streets, as well as tidelands and the beds of navigable waters.

- B. In recent years some courts have explicitly included the right to fish, hunt, bathe, swim, the preservation of trust land "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." Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P. 2d 374, 380, 98 Cal. Rptr. 790, 796 (1971). See also Audubon, *supra*. For a similar listing of trust protected interests, see Kootenai Environmental Alliance v. Panhandle Yacht Club, Inc., 105 Idaho 622 671 P. 2d 1085 (1983), "Trust interests include property values, 'navigation, fish and wildlife

habitat, aquatic life, recreation, aesthetic beauty and water quality" (671 P.2d at 1095), and Shokal v. Dunn, 109 Idaho 330, 707 P. 2d 441 (1985).

The Washington court in 1987 said the doctrine covers not only navigation, but also "incidental rights of fishing, boating, swimming, water skiing, and other related purposes generally regarded as corollary to the right of navigation and the use of public waters." Caminiti v. Boyle, 107 Wn. 2d. 662, ___ P. 2d. ___. This is consistent with the broad coverage indicated in Arnold v. Mundy, supra (1821).

V. STATE POWERS TO CONVEY AWAY PUBLIC TRUST RESOURCES, AND DESTROY PUBLIC TRUST INTERESTS.

It is usually held that public trust resources can be conveyed into private ownership and the trust destroyed, but only where the legislation clearly expresses such purpose, Robbins v. Department of Public Works, 355 Mass. 328, 244 N.E. 2d 577 (1969), City of Berkeley v. Superior Court of Alameda County, 26 Cal. 3d 515, 606 P. 2d 362, 162 Cal. Rptr. 327, cert. denied, 101 S. Ct. 119 (1980); and see "Audubon".

Some courts allow termination of the trust if the legislation furthers some other trust purpose. See City of Berkeley, supra.

- A. The California Court in Audubon, supra, held that the appropriation code of 1913, under which a permit was issued to Los Angeles in 1940 to extract water from tributaries supplying water to Mono Lake, did not

terminate the public trust interest in this navigable lake (used primarily as a bird refuge). In fact, the Cal. Water Board, in issuing the permit, said it had no choice but to grant the application, in spite of the harm that would occur to the lake. The Board said:

"It is indeed unfortunate that the City's proposed development will result in decreasing the aesthetic advantages of Mono Basin but there is apparently nothing that this office can do to prevent it. The use to which the City proposes to put the water under its applications . . . is defined by the Water Commission Act as the highest to which the water may be applied. . . . This office therefore has no alternative but to dismiss all protests based upon the possible lowering of the water level of Mono Lake and the effect that the diversion of water from these streams may have upon the aesthetic and recreational value of the Basin.

The Audubon Court said "The water rights enjoyed by DWP (Los Angeles Department of Water and Power) were granted, the diversion was commenced, and has continued to the present without any consideration of the impact on the public trust. An objective study and reconsideration of the water rights in Mono Lake is long overdue. The water law of California -- which we conceive to be an integration including both the public trust doctrine and the board-administered appropriative rights system -- permits such a reconsideration; the values underlying that integration require it."

The court added that "Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs. No vested rights bar such reconsideration."

Thus it is clear that the California Court did not consider the 1913 Code, and the permits issued under that Act, to be sufficiently clear in their intention to destroy the public trust interest.

It can be argued that the California Court could have reached the same result (as in Audubon) by using the "reasonable use" requirement of the 1928 Constitutional Amendment. But the court chose to rely on the public trust doctrine.

Audubon was sent back to the trial court for allocation of the water under the law as announced by the State Supreme Court. Meantime a secondary issue is being litigated in the federal courts, i.e., whether the federal court should proceed with the litigation or it should be returned to the state courts. It may be several years before any actual allocation occurs.

In Summa Corp. v. Cal. ex Rel State Lands Com'n, 104 S. Ct. 1751 (1984) the Supreme Court held that the California public trust doctrine did not apply to property which originally came from Mexican grants and where the present owners title have been confirmed in federal patent proceedings without any mention of the public trust doctrine, and where, by federal statute, the validity of the titles were to be decided according to Mexican law.

- B. Prior to Audubon no court decision ever applied the public trust doctrine to allocate water between the public under the public trust doctrine, and appropriators, riparian, or other water extractors.
- C. In United Plainsmen Association v. North Dakota State Water Conservation Commission, 247 N.W. 2d 457 (N.D. 1976), the court prohibited issuance of appropriation permits until a comprehensive water use plan was completed which would take account of

navigation, commerce, and fisheries, and explicitly said the public trust doctrine applied to the allocation of waters under the appropriation system in N. Dak.

VI. SEVERAL REASONS EXIST FOR APPLYING THE PUBLIC TRUST DOCTRINE TO APPROPRIATORS AND OTHER WATER EXTRACTORS.

- A. The court in Audubon said the result of a fill (historically covered by the public trust doctrine) and water extraction is often identical. Both can destroy navigation, fisheries, and other public trust interests.
- B. Another reason for applying the doctrine - not explicitly addressed by the court - is that all, or nearly all, extractions of water cause or contribute to pollution, either by:
1. Reducing the quantity of water and thus its assimilative capacity; (See Audubon where the court was concerned that L.A. extractions would increase the salinity in the lake enough to kill the brine shrimp, and thus harm the bird population.)
 2. Causing return flows containing natural salts, selenium, and other chemicals, leached from the soil, which cumulatively increase salinity;
 3. Causing return flow which carries pesticides, herbicides, fertilizers, and other polluting agents. See, for example: Aiken, "The National Water Policy Review and Western Water Rights Law Reform: An Overview, 59 Neb. L. Rev. 327 (1980).
- C. Individual extractions, although not necessarily significant in themselves, produce cumulative loss of

water quality. Under the Clean Water Act, the Clean Air Act, and many environmental laws and court decisions, individual actions that cumulatively cause pollution are recognized as proper subjects of regulation, and even prohibition. See, Clark "An Expanded Role for the State in Regional Land Use Control" 70 Cal. L. Rev. 151 (1982).

1. Two examples of cumulative pollution caused by water withdrawals, combined with polluted return flow, are:
 - a. The San Francisco Bay Delta problem. For a description of this problem, see United States v. State Water Resources Control Board, 182 Cal. App. 3d 82, ___ Cal. Rptr. ___ (1986) (hereinafter the Delta Decision). The salinity problem is discussed at 182 Cal. App. 3d 143.
 - b. The Kesterson Wildlife Refuge problem in central California. Natural selenium is leached from the soil by irrigation return flows and is concentrated in the Wildlife Refuge by drainage canals, killing all fish, and many birds which live there.
3. As this type of problem multiplies, legislatures and courts will be under pressure to restrict and regulate water extractions, under either the public trust doctrine, or state police powers.

As the purposes of the public trust doctrine include protection of fisheries, recreational, and environmental values, (some courts explicitly include water

quality, See Kootenai Environmental Alliance v. Panhandle Yacht Club Inc., 671 P. 2d 1085 (1983), and Audubon), this doctrine might be used to control cumulative pollution caused by water extractions under either appropriative or riparian rights.

4. Water pollution caused by extractions may also be considered an "externality", in economic terms. The costs of pollution caused by the extraction by appropriators or riparians have not historically been included in the cost of the extractions. The public trust doctrine can require that these costs be internalized.
5. Such controls might be developed in the form of:
 - a. Requiring increased efficiency, and more conservation by holders of existing rights.
 - b. Controlling times of day, week, or month, for that irrigation would be permitted.
 - c. Regulating the type and amount of pesticides, herbicides, and other chemicals that can be used on land.
 - d. Restricting the quantity of water extracted by existing riparians or appropriators in order to assure adequate water quality. See Delta case, supra. See also Audubon where the court was concerned about increased salinity in Mono Lake from L.A. extractions.

VII. POLICE POWER REGULATION MIGHT ALSO BE USED TO ACCOMPLISH SIMILAR RESULTS.

- A. Police power regulations might be used to constrain existing water extraction rights. Such regulations might be given added strength by the

public trust doctrine. The doctrine has sometimes been used as a basis (or a supplemental basis) for such legislation.

- B. The constitutionality of police power regulations has often been an issue in ZONING and other land use regulations. Zoning regulations directly impact "vested" property rights. They are usually upheld unless they "go too far", Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). The Suoreme Court recently said a land use regulation will only be struck down if it "does not substantially advance state interests, ... or denies an owner economically viable use of his land. Keystone Bituminous Coal Assn v. DeBenedictis, USSC Decided March 9, 1987, Daily Appellate Report, Wed. March 18, 1987 (hereinafter Keystone). Diminution in value alone is not sufficient to strike down a zoning ordinance. (See Keystone, and Hadacheck v. Sebastian, 239 U.S. 394 (1915); for collected cases on this issue see "Developments in the Law -- Zoning, 91 Harvard L. Rev. 1427 (1978). Ordinances diminishing value from 1,500,000 to \$275,000, \$450,000 to \$50,000, and \$65,000 to \$5,000 have been upheld. On the other hand ordinances reducing value from \$48,750 to \$11,250, and from \$350,000 to \$100,000, have been struck down. Some courts apply a "balancing test". See Keystone and Turnpike Realty Co. v. Town of Dedham, 362 Mass. 221, 284 N.E. 2d 891 (1972), cert. denied, 409 U.S. 1108 (1973). Comment, "Balancing Private Loss Against Public Gain to Test for a Violation of Due Process or a Taking Without Just Compensation, 54 Wash. L. Rev. 315 (1979). And see Delta case 182 Cal. App. 3d at 147.

For other water cases see Town of Chino Valley v. City

of Prescott, 638 P.2d 1324; (Ariz. 1981) Appeal dismissed, 102 S. Ct. 2897, reh'g denied 103 S. Ct. 199 (1982); Village of Tequesta v. Jupiter Inlet Corp. 371 So. 2d 663 (Fla. 1979), cert denied 444 U.S. 965; and People v. Shirakow, 26 Cal. 3d 301, 162 Cal. Rptr. 30, 605 P. 2d 859 (1980); and Cherry v. Steiner 716 F. 2nd 687 (9th Cir.1983) (upholding Arizona's Ground Water Law).

The Supreme Court seems to require that zoning regulations, to be upheld, must allow a "reasonable return" on one's investment. See Keystone, and Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

For a recent California water case that discusses the police power, see the Delta case where the California Court said ". . . a state regulation that merely restricts a party to the gains reasonably expected from [a] contract does not constitute a substantial impairment. [And is not unconstitutional]. "Nor is every impairment constitutionally proscribed. Contract rights, like other property rights, may be altered by the exercise of the state's inherent police power to safeguard the public welfare. . . . The key inquiry is whether the importance of the state interest justifies the impairment." 182 Cal. App. 3d at 147.

1. Such controls might, for example, do the following:
 - a. Require greater efficiency in water use.
 - b. Require more conservation (lining ditches)
 - c. Regulate types of crops grown
 - d. Regulate methods or times of irrigation

- e. Regulate the amount of water to be used.
- f. Regulate the types of insecticides, herbicides, etc., that can be used, and how they are used.

VIII. CONCLUSION

THE PUBLIC TRUST DOCTRINE - AS APPLIED TO WATER EXTRACTION RIGHTS - IS NOT THE PRODUCT OF ACADEMIA, AESTHETES, OR BIRD WATCHERS. RATHER IT HAS EVOLVED NATURALLY FROM THE CHANGES WROUGHT BY POPULATION AND ECONOMIC GROWTH, LEADING TO CHANGING PRIORITIES, TOWARDS ENVIRONMENTAL QUALITY AND INCREASED RECREATIONAL USES OF WATER.

WE CAN ANTICIPATE WIDER APPLICATION OF THE PUBLIC TRUST DOCTRINE IN THE FUTURE AS MORE STATES FACE THE CHALLENGE OF ALLOCATING SCARCE WATER RESOURCES IN THE FACE OF INCREASING DEMANDS.

THE WATER POLLUTION PRODUCED BY THE CUMULATIVE IMPACT OF WATER EXTRACTORS IS SUBJECT TO EITHER JUDICIAL OR LEGISLATIVE REGULATION UNDER THE PUBLIC TRUST DOCTRINE, JUST AS OTHER SOURCES OF POLLUTION HAVE BEEN REGULATED. NO ONE, NOT EVEN IRRIGATORS, INDUSTRIES, OR MUNICIPALITIES, HAS A "VESTED RIGHT" TO POLLUTE PUBLIC WATERS.

SUCH POLLUTION IS ALSO SUBJECT TO REGULATION UNDER THE STATE POLICE POWERS.

IN 1926 THE SUPREME COURT DECIDED IN VILLAGE OF EUCLID V. AMBLER 272 U.S. 365 (1926) TO UPHOLD THE CONSTITUTIONALITY OF ZONING. WITHIN A FEW YEARS ZONING HAD SPREAD THROUGHOUT THE COUNTRY. I WOULD NOT BE SURPRISED IF WE SOON SEE A SIMILAR SPREAD OF REGULATION OF WATER EXTRACTION RIGHTS UNDER THE PUBLIC TRUST DOCTRINE, AND THE STATE POLICE POWERS.

