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The Mono Lake Case, The Public Trust Doctrine, and the Administrative State

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In 1983, the California Supreme Court decided National Audubon Society v. Superior Court, *now commonly referred to as the* Mono Lake Case. *The* Mono Lake Case *is widely viewed as an environmental law classic. Commentators credit the case with transforming California water law and often cite it in support of arguments for expanded reliance on the public trust doctrine.*

This Article tests that conventional view by examining the actual influence of the public trust doctrine upon subsequent California judicial and agency decision-making. Based on documentary evidence from court cases and administrative proceedings, it concludes that the doctrine, though important, has exerted less influence upon California water management than conventional wisdom suggests. Outside of the Mono Lake basin, the public trust doctrine's effects are largely intertwined with, and often eclipsed by, the impacts of other environmental laws. Those effects also are concentrated on prospective new water uses, with little evidence that the doctrine has encouraged re-examination of existing patterns of water use, even when such patterns were environmentally problematic. The doctrine's effects have occurred primarily at the administrative level. There is little evidence of influence in the courts.

These findings have important implications for understanding the actual and potential influence of the public trust doctrine. Much of the public trust doctrine scholarship emphasizes the judicial role in implementing the doctrine and argues that the doctrine should assume central importance to

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*environmental protection, not just as a broad governance principle, but also as binding and enforceable law. The post-*Mono Lake Case *record shows that California has not adopted that approach, and instead has treated the doctrine as a complementary and modestly important component of a statute-based, agency-driven environmental law system. Although this Article supports calls for a more influential public trust doctrine, it concludes that such integration with administrative environmental law is desirable, not problematic. It proposes several reforms that would bolster the role of the public trust doctrine within that administrative regulatory system.*

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INTRODUCTION

In 1983, the California Supreme Court decided *National Audubon Society v. Superior Court*, a case now widely referred to as the *Mono Lake Case*.[1] The court held that the public trust doctrine[2] applied to the City of Los Angeles's rights to divert water from several streams flowing into Mono Lake.[3] More broadly, the court held that the doctrine operated as a potential limitation on both new and established water rights, and that, "whenever feasible," state agencies and courts were obliged to consider and protect public trust resources when allocating water.[4]

According to conventional wisdom, the case was enormously influential:[5] it "revolutionized western water law"[6] and helped place California at "the vanguard of the ecological public trust doctrine."[7] In a 2001 poll, a large group of law professors ranked the *Mono Lake Case* as the sixth "most excellent" case in the history of American environmental law.[8] The prominence of the case reflects broader interest in the public trust doctrine. For decades, the doctrine has captured the imagination of environmental lawyers and scholars, with public trust principles spawning hundreds of articles and cases and now populating legal systems across the globe.[9] Calls for expanded use

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[1] Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty. (*Mono Lake Case*), 658 P.2d 709 (Cal. 1983).

[2] The public trust doctrine establishes the state as the trustee of certain natural resources and obligates the state to manage those resources for the benefit of the public as a whole. For more detailed discussion of the doctrine, see *infra* Part II.A.

[3] *Mono Lake Case*, 658 P.2d at 719-21.

[4] *Id.* at 719-24, 728.

[5] *See* ELLEN HANAK ET AL., MANAGING CALIFORNIA'S WATER: FROM CONFLICT TO RECONCILIATION 59 (2011) (citing "profound effects on California water policy").

[6] Gregory S. Weber, *Articulating the Public Trust: Text, Near-Text and Context*, 27 ARIZ. ST. L.J. 1155, 1155 (1995).

[7] Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781, 838 (2010).

[8] In 2001, Professor James Salzman asked environmental law professors what they considered the top ten "most excellent" cases in environmental law history. *See* James Salzman & J.B. Ruhl, *Who's Number One?*, 26 ENVTL. F. 36, 38 (2009). The *Mono Lake* decision ranked sixth, ahead of classics like *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992), *Penn Central Transportation Authority v. New York City*, 438 U.S. 104 (1978), and *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). By 2009, when Salzman and Ruhl repeated the survey, the *Mono Lake Case* had dropped out of the top ten. *See id.*

[9] On March 11, 2011, a search of Westlaw's Journals and Law Reviews database for the phrase "public trust doctrine" generated 2,343 hits.

of the doctrine still abound, and those calls still often cite the *Mono Lake Case*.[10]

But how much influence does the public trust doctrine actually exert? The answer is not as straightforward as the sheer volume of articles and citations might imply.[11] Much of the attention focuses on landmark cases, and that focus is understandable; the classic public trust opinions are filled with historical complexity, doctrinal riddles, and thorny policy questions.[12] But sometimes high-profile doctrines produce little impact or affect outcomes in unforeseen ways, while unheralded regulations and statutory provisions can play major roles in shaping real-world outcomes.[13] Even seemingly landmark cases, standing alone, can have limited reach. Environmental change typically occurs through the cumulative effect of many actions.[14]

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[10] *See, e.g.*, Carol Necole Brown, *Drinking from a Deep Well: The Public Trust Doctrine and Western Water Law*, 34 FLA. ST. U. L. REV. 1, 26-29 (2006) (using the case as a supporting example in a call for broader application of public trust principles); Karl S. Coplan, *Public Trust Limits on Greenhouse Gas Trading Schemes: A Sustainable Middle Ground?*, 35 COLUM. J. ENVTL. L. 287, 324 (2010) (citing the *Mono Lake Case* as a useful model).

[11] The effect of some of these decisions on the particular resources at issue in the cases has received careful study and now is fairly well documented. *See, e.g.*, Craig Anthony (Tony) Arnold, *Working Out an Environmental Ethic: Anniversary Lessons from Mono Lake*, 4 WYO. L. REV. 1 (2004) (chronicling the aftermath of the *Mono Lake* decision). But the broader impact of the doctrines articulated in those cases is harder to discern.

[12] The seminal American public trust case, *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892), fits this description, as do state-court classics like the *Mono Lake Case*, 658 P.2d 709 (Cal. 1983) and *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972). All involve difficult questions about the powers of the legislature and the courts and the balance of public and private rights.

[13] *See, e.g.*, Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 322 (2005) (arguing that *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992), did not energize the takings doctrine in way its supporters hoped and detractors feared, and instead "represents one of the starkest recent examples of the law of unintended consequences"); Holly Doremus, *The Story of* TVA v. Hill: *A Narrow Escape for a Broad New Law*, *in* ENVIRONMENTAL LAW STORIES 112-14 (Richard J. Lazarus & Oliver O. Houck eds. 2005) (describing the unexpected emergence of the Endangered Species Act as a powerful law); Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing the Government's Environmental Performance*, 102 COLUM. L. REV. 903, 932-37 (2002) (explaining how the National Environmental Policy Act has spurred environmental protection not so much by promoting deliberative discussion of environmental consequences, as its sponsors appear to have intended, but instead by raising transaction costs for projects with negative environmental impacts).

[14] For detailed exploration of this problem, see William Odum, *Environmental Degradation and the Tyranny of Small Decisions*, 32 BIOSCIENCE 728, 728 (1982), and

Consequently, individual cases will effect systemic change only if they spawn broadly applicable legislative or regulatory changes, or if the doctrines they articulate extend their influence into many subsequent agency and judicial decisions.[15] The public trust literature includes few articles considering whether the doctrine has had such a broad impact, or whether the classic judicial opinions, for all their eloquence and seeming importance, had little consequence beyond the controversies directly at issue.[16]

To explore those questions, this Article examines the implementation of California's freshwater public trust doctrine following the *Mono Lake Case*. I reviewed all California freshwater public trust cases that were decided during or after 1984 and that are available on Lexis or Westlaw.[17] I also reviewed all of the orders and decisions that the California State Water Resources Control Board ("SWRCB" or "the Board") — the California state agency with primary regulatory authority over water rights — issued from 1984 through 2010.[18] I tracked the frequency with which those cases, orders, and decisions mentioned the public trust doctrine. I also examined the context of those references and whether the court or agency relied on the public trust doctrine as a basis for compelling environmental protection.[19] For court opinions and agency documents that did address the doctrine, I qualitatively analyzed the reasoning

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Kevin M. Stack & Michael P. Vandenberg, *The One Percent Problem*, 111 COLUM. L. REV. 1385, 1386-1402 (2011).

[15] *See* Melissa Kwaterski Scanlan, *The Evolution of the Public Trust Doctrine and Degradation of Trust Resources: Courts, Trustees, and Political Power in Wisconsin*, 27 ECOLOGY L.Q. 135, 170 (2000) ("The shortcoming of simply analyzing court decisions is that the published opinions cannot describe how the trust is actually administered on a daily basis. Regulators make thousands of decisions every year about the trust that never reach a court of law.").

[16] For exceptions, see Gregory S. Weber, *Articulating the Public Trust: Text, Near-Text and Context*, 27 ARIZ. ST. L.J. 1155 (1995) and Scanlan, *supra* note 15. Weber's article, like mine, examines California court cases and State Water Resource Control Board decisions and orders following the Mono Lake decision. His focus, like that of most of the public trust literature, is on doctrinal development, but his analysis goes well beyond high-profile judicial decisions. Scanlan evaluates implementation of the public trust doctrine through qualitative interviews with agency staff.

[17] The relevant Lexis and Westlaw databases include appellate decisions from California, Ninth Circuit cases, some cases from the United States district courts in California, cases from the Court of Federal Claims, and cases from the Federal Circuit Court of Appeals. Neither Lexis nor Westlaw publishes California Superior Court decisions.

[18] For a more detailed description of the SWRCB's role, see *infra* Part II.C.

[19] The resulting data tables are on file with the author and with the UC Davis Law Review and are available upon request.

employed.[20] I also qualitatively evaluated the importance of the steps taken and the relative influence of the public trust doctrine in comparison to the protective mandates of other environmental laws.

This methodology raises two important caveats. First, this Article addresses the influence of one version of the public trust doctrine upon one state's decision-making. The public trust doctrine significantly varies from state to state and, now, from nation to nation.[21] California's freshwater public trust doctrine is widely viewed as particularly important, but a study of California alone cannot support definitive conclusions about the impact of all versions of the doctrine. Second, this Article does not address every possible way in which the public trust doctrine could influence environmental outcomes. I have not attempted to discern the extent to which public trust ideals have accelerated the evolution or implementation of statutory environmental law.[22] Nor have I comprehensively analyzed whether the public trust doctrine has had an undocumented influence on judges' and administrators' decision-making by informing their ideals of good governance or their basic understanding of the controversies before them. A written record can suggest the presence or absence of such influence, but this Article is not a definitive study of how effectively the doctrine has played that broader role.

Notwithstanding these caveats, caselaw and administrative documents support some important conclusions. Most strikingly, they reveal a doctrine with little significance in the courts.[23] In the post-1983 California freshwater cases available on Lexis and Westlaw, no court has cited the public trust doctrine as a reason for ordering anyone to do anything.[24] Only once has a litigant successfully invoked

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[20] *See infra* Part III. In particular, I focused on the importance courts and agencies ascribed to the doctrine.

[21] *See* Michael C. Blumm & R.D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxian Vision*, 45 UC DAVIS L. REV. 741, 746 (2012) ("Courts, legislatures, and voters in the countries considered in this study have significantly expanded the public trust doctrine beyond the reach of the traditional doctrine, beyond the reach of the Mono Lake decision . . ."); Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. ENVTL. L. REV. 1 (2007) (exploring variations); Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 80-91 (2010).

[22] For an interesting exploration of the intertwinement of public trust principles into statutory and common law, see Alexandra Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006).

[23] *See infra* Part III.A (describing court decisions).

[24] *But see infra* note 145 and accompanying text (discussing successful public trust

the public trust doctrine to defend environmental protection measures.[25] Nor have public trust claimants secured significant doctrinal advances despite losing their claims. Most judicial discussions of the doctrine have been brief, and the few detailed opinions have not offered any doctrinal expansion.[26]

At the agency level, there is more evidence of impact. The SWRCB often does refer to the public trust doctrine. In approximately half of its decisions and approximately eight percent of its orders, the Board cites the public trust doctrine as a basis for environmentally protective restrictions on water use.[27] The restrictions vary in their apparent stringency: some are significant while others seem modest.[28] Nevertheless, the SWRCB hardly ever invokes the public trust doctrine in isolation. The Board generally relies on other sources of statutory authority as additional justifications for the measures it requires.[29] The SWRCB also hardly ever invokes the doctrine to change established water uses, instead using it primarily as a constraint on the impacts of proposed new water rights and on some proposed new uses under existing rights.[30] Finally, though the precise level of importance is impossible to discern, the public trust doctrine appears to exert much less influence than statutory environmental laws.[31] The doctrine clearly matters to water administration in California, but outside of a few exceptional watersheds, there is very little documentary evidence of a transformative role.[32]

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litigation, which did not lead to a published decision, involving Putah Creek).

[25] The one decision is *United States v. State Water Resources Control Board*, 227 Cal. Rptr. 161 (Cal. Ct. App. 1986). For more discussion of the decision, see *infra* notes 159-165 and accompanying text.

[26] *See infra* notes 145-154 and accompanying text.

[27] I say approximately because some decisions and orders do not clarify whether the public trust doctrine was a basis for the protective measures ordered, and these numbers therefore contain some imprecision. *See infra* notes 188 and 208-219 and accompanying text.

[28] *See infra* notes 190-198 and accompanying text.

[29] *See infra* notes 208-219 and accompanying text. Unfortunately, I did not have sufficient time to track how often the SWRCB mentions every other legal requirement. I did review many decisions and orders in which other environmental law requirements were prominent, but the public trust doctrine played little or no role.

[30] *See infra* notes 200-204 and accompanying text.

[31] *See infra* notes 224-229 (comparing the impact of the public trust doctrine to the impact of the Endangered Species Act).

[32] The doctrine clearly did help catalyze major changes in the Mono Lake basin and also played an important role in the protection of Putah Creek. *See infra* note 145 (discussing the Putah Creek litigation).

These conclusions have several implications. First, they create a challenge for commentators who argue that environmental litigants can use the public trust doctrine as a lever to compel systemic improvements in environmental protection.[33] I found little evidence that the doctrine has played such a role in California water management, and commentators predicting different outcomes in other jurisdictions or in response to other environmental problems should explain why they expect different results. Second, this Article calls into question one common understanding of the doctrine. Both proponents and critics of the public trust doctrine sometimes argue that the doctrine is, or at least should be, a thing apart from the predominant statutory and administrative systems of environmental law.[34] In California, however, no such separation exists. The doctrine is thoroughly integrated into the state's statutory and administrative environmental law system, and has accomplished little outside of it.[35]

That integration leads to a third conclusion, and to some proposed reforms. Much of the public trust literature has focused on judicial articulations of doctrinal substance.[36] However, if the public trust doctrine is to play a more significant role in California water law, its proponents should focus less on doctrine and more on the kinds of

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[33] *See, e.g.*, Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43 (2009) (arguing that the public trust doctrine should play a more central role in re-energizing environmental protection).

[34] *See, e.g.*, *id.* at 55-61, 75-76 (arguing that those statutory systems are deeply inadequate).

[35] That integration partly follows from the *Mono Lake* decision itself, which clearly contemplated an administrative role in implementing the doctrine. But the decision also reserved concurrent authority to the courts, and thus raised the possibility, so far not realized, that judicial implementation would be important. *See Mono Lake Case*, 658 P.2d 709, 712 (Cal. 1983) ("Accordingly, we believe that before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.").

[36] For example, the articles prepared for the 1980 predecessor to this symposium were almost entirely focused on doctrinal evolution and substance. *See e.g.*, Harrison C. Dunning, *The Significance of California's Public Trust Easement for California Water Rights Law*, 14 UC DAVIS L. REV. 357 (1980) (using caselaw to explore the doctrine's implications); Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 UC DAVIS L. REV. 233 (1980) (discussing leading cases and predicting future doctrinal development through additional litigation); Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 UC DAVIS L. REV. 195 (1980) (tracing the doctrine's evolution, as reflected in judicial decisions).

procedural and institutional questions that are so prominent in debates about statutory environmental law. Particularly promising reforms would involve providing a more robust procedural framework for public trust analysis and addressing the information shortages that the agencies charged with protecting trust resources routinely face.

Part I of this Article provides the historic and legal context for this analysis. It presents a brief explanation of the modern public trust doctrine, discusses its emergence into California water law in a series of cases culminating in the *Mono Lake Case*, and then explains the institutional role of the SWRCB. Part II draws upon the public trust literature to develop several alternative hypotheses about how the *Mono Lake Case* might have affected California water management. Part III uses judicial decisions and agency documents to test the validity of those hypotheses. Part IV considers implications for broader debates about the future of the public trust doctrine.

I. THE *MONO LAKE CASE*

The *Mono Lake Case* marked the apparent culmination of a long process of legal evolution.[37] This Part briefly describes that evolution. I first explain the emergence of the public trust doctrine and summarize the *Mono Lake Case*. I then describe the public agency that, in the wake of that decision, found itself to be the public trust's primary administrator.

A. The Doctrine

The core of the public trust doctrine is the principle that the state holds, in trust, certain natural resources for the benefit of its citizens.[38] The state may allow for private use of trust resources, and sometimes it may allow private entities to obtain property rights in those resources.[39] Nevertheless, even as it allows those rights, it may — in some versions of the doctrine, must — ensure that the underlying purposes of the trust are fulfilled.[40]

The doctrine has old, ambiguous, and disputed roots. Its proponents characterize it as a common law or even constitutional doctrine deriving from Roman and English law, while skeptics contend that

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[37] *See generally* Stevens, *supra* note 36 (describing the doctrine's evolution).

[38] *See* Klass, *supra* note 22, at 702.

[39] *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892) (allowing disposition of trust lands so long as trust purposes are upheld).

[40] *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 486-87 (1970).

current public trust doctrines are modern contrivances.[41] Regardless of its origins, the public trust doctrine now appears, in at least some form, as part of the law of almost every state.[42]

Historically, the trust applied to navigable waters and the submerged lands beneath them, and the primary public uses of trust resources were fishing, commerce, and navigation.[43] But in a 1970 law review article, Joseph Sax laid the intellectual foundation for a more ambitious and geographically extensive doctrine, which he hoped would turn an emerging public consensus in support of environmental protection into meaningful and binding law.[44] "Of all the concepts known to American law," Sax wrote, "only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems."[45] Sax envisioned the doctrine as a basis for judges to compel legislative or administrative reconsideration of actions harmful to trust resources.[46] His emphasis on judicial action was quite deliberate. In Sax's view, the doctrine would allow citizens to circumvent legislatures and administrative agencies, which he perceived to be dominated by powerful entities interested in exploiting the natural environment for private economic gain.[47] Instead, he hoped the doctrine would allow citizens to take their concerns directly to the courts.[48]

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[41] *See* James L. Huffman, *Speaking of Inconvenient Truths: A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 7-9 (2007) (arguing that modern doctrines have dubious historical roots); Sax, *supra* note 40, at 475; Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 458-59 (1989) (arguing for constitutional origins).

[42] Robin Craig's comparative articles provide useful summaries of the different versions of the doctrines. *See supra* note 21.

[43] *See* Stevens, *supra* note 36, at 196. An independent branch of the doctrine applies to wildlife. *See generally* Michael C. Blumm, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673 (2005) (discussing the public trust doctrine in wildlife).

[44] *See* Sax, *supra* note 40.

[45] *Id.* at 474.

[46] *See id.* at 560-61.

[47] *See id.* at 560 ("[S]elf-interested and powerful minorities often have an undue influence on the public resource decisions of legislative and administrative bodies and cause those bodies to ignore broadly based public interests.").

[48] *See id.* Sax did not envision complete circumvention, however. He instead anticipated judicial remedies designed to compel reconsideration of flawed decisions and to broaden and improve legislative and administrative decision-making. *See id.* at 495, 560-61.

Those ideas remain controversial and influential. Sax wrote his article when the statutory and administrative systems of modern environmental law were transitioning from gestation to infancy.[49] Some scholars argue that with the maturation of those systems, the article's recommendations have become anachronistic.[50] Others claim that what supporters saw as the public trust doctrine's core virtues — its ability to check legislative and administrative action and to alter status quo patterns of resource use — are actually vices, for they threaten democratic decision-making and established property rights.[51] But, Sax's ideas still command a substantial following. Commentators continue to argue that the doctrine should be a powerful tool for compelling administrative and legislative recognition of public interests in a healthy environment, and that courts should play a key role in providing that environmental protection.[52] Litigants continue to seek new, and sometimes dramatically ambitious, ways to put those ideas into practice.[53]

Without question, Sax's ideas have changed the doctrinal evolution of environmental law. Versions of the public trust doctrine now are standard components of state environmental law systems, and many states have expanded the doctrine's geographic reach and have included environmental protection as a core purpose of the trust.[54] Indeed, as Michael Blumm's and R.D. Guthrie's contribution to this

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[49] *See* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 47-97 (2004) (describing this formative period).

[50] *E.g.*, Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 631-33, 690 (1986).

[51] *See, e.g.*, William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385 (1997) (critiquing arguments for using the doctrine to achieve countermajoritarian results); James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989) (arguing that the doctrine is antidemocratic); Barton H. Thompson, *The Public Trust Doctrine: A Conservative Reconstruction and Defense*, 15 SOUTHEASTERN ENVTL. L.J. 47, 47-48 (2006) (summarizing critiques, and adding that "what environmentalists and public-access advocates like about the doctrine, conservatives hate").

[52] *See, e.g.*, Wood, *supra* note 33 (arguing for a major role in addressing current environmental problems, including climate change).

[53] *See, e.g.*, Felicity Barringer, *Suit Accuses U.S. Government of Failing to Protect Earth for Generations Unborn*, N.Y. TIMES, May 5, 2011, at A22 (describing a lawsuit attempting to use the public trust doctrine to compel controls on greenhouse gas emissions).

[54] *See generally* Craig, *supra* note 21 (describing the doctrine's many versions); Lazarus, *supra* note 50, at 643-50 (describing expansions in the doctrine's scope and reach).

symposium points out, ecological public trust concepts now populate the legal systems of countries across the globe.[55]

Even prior to the *Mono Lake Case*, California occupied the cutting edge of these trends.[56] In a series of cases, the California courts expanded the doctrine's geographic reach, holding that it extended not merely to tidal waterways, but also to navigable inland rivers and lakes.[57] In 1978, in *Marks v. Whitney*, the California Supreme Court also expanded the purposes of the doctrine.[58] The court held that those purposes were "sufficiently flexible" to encompass an emerging public concern for environmental protection.[59] By 1979, when the Mono Lake litigation began, California seemed to be witnessing the rise of a powerful new environmental law doctrine with far-reaching implications for water resource management.[60]

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[55] *See* Blumm & Guthrie, *supra* note 21, at 746 ("The public trust doctrine is . . . leading a vibrant and significant life abroad.").

[56] *See* Stevens, *supra* note 36, at 203-10 (describing the doctrine's evolution in California).

[57] *See* State v. Superior Court of Placer Cnty., 625 P.2d 256, 259-60 (Cal. 1981) (holding that the doctrine applied to Lake Tahoe's shoreline); State v. Superior Court of Lake Cnty., 625 P.2d 239, 248-52 (Cal. 1981) (holding that the doctrine applied to land between the high and low water marks along Clear Lake); Hitchings v. Del Rio Woods Recreation & Park Dist., 127 Cal. Rptr. 830, 837-38 (Cal. Ct. App. 1976) (holding that the public trust doctrine applied to the Russian River). The California courts have not extended the doctrine to groundwater, but currently pending litigation is testing whether the doctrine extends to groundwater aquifers whose depletion is impairing surface water flows. *See* Santa Teresa Citizen Action Grp. v. City of San Jose, 7 Cal. Rptr. 3d 868, 884 (Cal. Ct. App. 2003); Fiona Smith, *Courts Tackle Water Ownership: A Sacramento County Case Could Determine if River is "Real Property,"* CAL. DAILY J., Aug. 2, 2011, at 1.

[58] Marks v. Whitney, 491 P.2d 374, (Cal. 1971).

[59] *Id.* at 380. The court explained:

> In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another . . . . There is a growing public recognition that one of the most important public uses of the tidelands — a use encompassed within the tidelands trust — is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.

Id.

[60] *See* Roderick E. Walston, *The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy*, 22 SANTA CLARA L. REV. 63, 63 (1982) ("A new theory of water law recently has been advanced that could potentially change the water rights systems of the western states.").

These doctrinal shifts set the stage for a dramatic legal confrontation. For decades, California, like much of the West, had operated under a prior appropriation system of water rights.[61] The sole limits on an appropriator's water use were the availability of water in the stream, claims of competing users, and vague and rarely enforced prohibitions on unreasonable use and waste.[62] Obtaining an appropriative right to instream flow was impossible,[63] and water users perceived pumping a stream dry not merely as an allowed outcome, but as a desired one.[64] While a few statutory constraints upon environmentally degrading water uses did exist, they were largely ignored.[65] By the time of the Mono Lake litigation, the foundations for change were partially laid. Then-recent statutes like the Clean Water Act,[66] the National Environmental Policy Act,[67] the Endangered Species Act,[68] and their state-law counterparts offered the prospect of a fundamental shift in western water law.[69] But to a large extent, traditional patterns of water use still reigned supreme, and those traditional patterns were inimical to the environmental values the

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[61] California also recognizes riparian rights, Native American reserved rights, and Pueblo rights. For excellent summaries of California water history, including the *Mono Lake Case*, see HANAK ET AL., *supra* note 5, at 19-69. *See generally* NORRIS HUNDLEY, JR., THE GREAT THIRST (rev. ed. 2001) (discussing California water history).

[62] *See* JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 124-25 (4th ed. 2006); Eric T. Freyfogle, *Water Rights and the Common Wealth*, 22 ENVTL. L. 27, 28-29 (1996); Janet C. Neumann, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 922 (1998) (describing the prohibition on waste as "mostly hortatory").

[63] *See* Brian E. Gray, *A Reconsideration of Instream Appropriative Water Rights in California*, 16 ECOLOGY L.Q. 667, 667 (1989).

[64] *See, e.g.*, United States v. Gerlach Livestock Co., 339 U.S. 725, 728-29 (1950) ("These dominating rivers collect tribute from many mountain currents, carry their hoardings past parched plains and thriftlessly dissipate them in the Pacific tides. When it is sought to make these streams yield their wasting treasures to the lands they traverse, men are confronted with a paradox of nature. . . .").

[65] *See* Karrigan Bork, *The Rebirth of California Fish & Game Code Section 5937: Water for Fish*, 45 UC DAVIS L. REV 809, 824-26 (2012) (describing non-implementation of CAL. FISH & GAME CODE § 5937 (West 2011)).

[66] 33 U.S.C. §§ 1251-1387 (2006).

[67] 42 U.S.C. §§ 4321-70(h) (2006).

[68] 16 U.S.C. §§ 1531-44 (2006).

[69] Major litigation involving the reasonable use requirement of article X, section 2 of the California Constitution also had raised the possibility that a use could be deemed unreasonable because of its impact on instream resources. *See* Envtl. Def. Fund v. E. Bay Mun. Util. Dist., 605 P.2d 1, 6-10 (1980) (allowing the case, which eventually settled, to proceed).

public trust doctrine purported to protect.[70] A clash was brewing, and in the Mono Lake litigation, the battle between competing conceptions of water law was joined.

B. The Case[71]

In the 1940s, Los Angeles obtained appropriative water rights[72] to divert water away from four streams flowing into Mono Lake — a large, hyper-saline lake in the high desert just east of Yosemite National Park.[73] At the time, protestors[74] predicted damage to the Mono Lake ecosystem. But the State Water Board asserted that it lacked any authority to deny Los Angeles's application.[75] The protestors' predictions were accurate; the diversions lowered the level of the lake, threatening its unique ecology and creating the potential for severe air quality impacts.[76] Diversions also damaged habitat in the

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[70] The ESA now plays a central role in western water management, but in the early 1980s it had not yet assumed its present significance. *See generally* U.S. GEN. ACCOUNTING OFFICE, ENDANGERED SPECIES: LIMITED EFFECT OF CONSULTATION REQUIREMENTS ON WESTERN WATER PROJECTS (1987) (concluding that the ESA was exerting little effect on water management); Joseph L. Sax, *Environmental Law at the Turn of the Century: A Reportorial Fragment of Contemporary History*, 88 CALIF. L. REV. 2375, 2380 (2000) (noting that the ESA did not fully emerge until the 1990s). Some of the key cases linking water quality and quantity regulation had not yet been decided, though the SWRCB had begun efforts to link protection of water quality in the Sacramento-San Joaquin Delta to water right restrictions. *See, e.g.*, PUD No. 1 of Jefferson Cnty. v. Wash. Dept. of Ecology, 511 U.S. 700, 719-21 (1994) (holding that a flow reduction may be cognizable as a water quality problem); United States v. State Water Res. Control Bd., 227 Cal. Rptr. 161 (Cal. Ct. App. 1986) (upholding water right restrictions imposed to protect water quality).

[71] Several other sources provide more detailed discussions of the story of the case. Its facts are eloquently described in the decision itself, and several articles have described the aftereffects of the decision. *See* Arnold, *supra* note 11; Sherry A. Enzler, *How Law Mattered to the Mono Lake Ecosystem*, 35 WM. & MARY ENVTL. L. & POL'Y REV. 413 (2011); Cynthia L. Koehler, *Water Rights and the Public Trust Doctrine: Resolution of the Mono Lake Controversy*, 22 ECOLOGY L.Q. 541 (1995).

[72] An appropriative water right is a property right to divert water from a natural watercourse and put it to beneficial use elsewhere. *See* SAX ET AL., *supra* note 62, at 124-26 (summarizing the basic elements of an appropriative right).

[73] *Mono Lake Case*, 658 P.2d 709, 711 (Cal. 1983). The four streams originate from the Sierra Nevada Mountains. *See id.*

[74] In the language of California water law, "protestors" are people or entities who formally oppose a water rights application or petition. State Water Resources Control Board, Division of Water Rights, Protest Submittal Information, http://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/docs/protestsubmittalinfo.pdf (last visited November 23, 2011).

[75] *Mono Lake Case*, 658 P.2d at 713-14.

[76] *Id.* at 715-16.

dewatered streams.[77] In 1979, environmental groups filed suit, arguing that Los Angeles's diversions should be enjoined and that the public trust doctrine provided grounds for the injunction.[78] Los Angeles disputed some of the environmental harm allegations.[79] The city's primary defense, however, was an argument that its water rights were established property rights not subject to administrative or judicial adjustment.[80]

In a lengthy and eloquent decision, the California Supreme Court ruled largely in the plaintiffs' favor.[81] The court held that the public trust doctrine applied to the diversions from Mono Lake's tributary streams, and that the doctrine protected the fish and wildlife in those streams and in Mono Lake itself.[82] It also rejected Los Angeles's arguments that the city's established property rights were not subject to revision.[83] While the court did not find that public trust needs automatically trumped water use rights, it held that the public trust doctrine authorized and might sometimes require adjustment of existing rights.[84] No one, it held, could obtain a vested property right to use water in a manner harmful to public trust interests.[85] The court

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[77] *See id.* at 711, 716.

[78] *See id.* at 716-17.

[79] *Id.* at 716.

[80] *Id.* at 727.

[81] The court's opinion leaves little doubt that the justices viewed the case as significant. In a passage within the lengthy introduction, Justice Broussard set the stage for the court's determination:

> This case brings together for the first time two systems of legal thought: the appropriative water rights system which since the days of the gold rush has dominated California water law, and the public trust doctrine which, after evolving as a shield for the protection of tidelands, now extends its protective scope to navigable lakes. Ever since we first recognized that the public trust protects environmental and recreational values, the two systems of legal thought have been on a collision course. They meet in a unique and dramatic setting which highlights the clash of values. Mono Lake is a scenic and ecological treasure of national significance, imperiled by continued diversions of water; yet, the need of Los Angeles for water is apparent, its reliance on rights granted by the board evident, the cost of curtailing diversions substantial.

Id. at 712 (citations omitted).

[82] *Id.* at 719-21.

[83] *Id.* at 711-12, 721-24.

[84] *Id.* at 711, 721-24.

[85] *Id.* at 712 ("This authority . . . bars DWP or any other party from claiming a vested right to divert waters once it becomes clear that such diversions harm the interests protected by the public trust."). For an exploration of ambiguities in that

also charged state agencies and all courts with the concurrent duty to consider public trust values and to protect those values "whenever feasible."[86]

Although a notable victory, the *Mono Lake Case* was not a complete win for the plaintiffs. The California Supreme Court did not actually order Los Angeles to cease its water diversions.[87] Obtaining actual reductions in those diversions would require years of additional federal and state court litigation, administrative proceedings, and political campaigning.[88] On the broader legal questions, the California Supreme Court clearly contemplated some accommodation between public trust protection and maintenance of traditional water uses. "The prosperity and habitability of much of this state requires the diversion of great quantities of water from its streams," the court observed, and "[t]he state must have the power to grant nonvested usufructuary rights to appropriate water even if diversions harm public trust uses."[89] The court, therefore, entrusted courts and state agencies with some discretion to strike that balance.[90] Nevertheless, the case signaled the possibility of a dramatic shift in California water law. Established water rights were no longer inviolate.[91] Courts and agencies would have the ability and, sometimes, the obligation to adjust those rights to provide environmental protection.[92]

C. The SWRCB

The *Mono Lake* decision conferred public trust authority and responsibilities on the courts and on state agencies generally,[93] but the SWRCB assumed primary responsibility for public trust administration.[94] Because of the SWRCB's central importance to public

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mandate, see generally Brian Gray, 45 UC DAVIS L. REV. 1099 (2012).

[86] *Mono Lake Case*, 658 P.2d at 728.

[87] *Id.* at 732 ("This opinion is but one step in the eventual resolution of the Mono Lake controversy. We do not dictate any particular allocation of water.").

[88] *See* Arnold, *supra* note 11, at 17-26.

[89] *Mono Lake Case*, 658 P.2d at 712. *See generally* Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 PACE ENVTL. L. REV. 649 (2010) (emphasizing this capacity for accommodation).

[90] *Mono Lake Case*, 658 P.2d at 712 ("Accordingly, we believe that before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.").

[91] *See id.* at 721-24.

[92] *See id.* at 728.

[93] *Id.* (conferring this responsibility upon "the state").

[94] For a concise description of the SWRCB's role, see ARTHUR L. LITTLEWORTH &

trust resource protection, this section provides a brief description of its institutional structure and role.

The SWRCB is California's primary water use regulator.[95] Since 1914, no one has been able to obtain an appropriative water right without a permit from the SWRCB.[96] Changes in the place or purpose of water use also require SWRCB approval.[97] The SWRCB reviews compliance with existing water rights and can bring enforcement actions to correct violations.[98] The Board issues its decisions and orders following adjudicatory proceedings,[99] some of which can involve extensive hearings and enormous administrative records.[100]

ERIC L. GARNER, CALIFORNIA WATER II 187-89 (2007).

[95] *See generally California Environmental Protection Agency*, STATE WATER RES. CONTROL BD., http://www.swrcb.ca.gov/about_us/water_boards_structure/ (last visited Oct. 29, 2011) (explaining the SWRCB's responsibilities).

[96] *See History of the Water Boards: The Early Years of Water Rights*, STATE WATER RES. CONTROL BD., http://www.swrcb.ca.gov/about_us/water_boards_structure/history_water_rights.shtml (last updated Sept. 20, 2011). Prior to 1967, those permits came from the State Water Rights Board, which then merged with the State Water Quality Control Board to form the State Water Resources Control Board. *See History of the Water Boards*, STATE WATER RES. CONTROL BD., http://www.swrcb.ca.gov/about_us/water_boards_structure/history.shtml (last updated Sept. 20, 2011).

[97] CAL. WATER CODE §§ 1435-42 (West 2011) (allowing temporary urgency changes under specified conditions); *id.* §§ 1725-40 (West 2011) (governing temporary and long-term water transfers).

[98] *Id.* §§ 1825, 1831 (West 2011).

[99] The Board records its initial resolution of new water right applications in documents known as "decisions," and records its remaining determinations, including the resolutions of petitions to rehear decisions, in "orders." *See Resolutions, Orders & Decisions*, STATE WATER RES. CONTROL BD., http://www.swrcb.ca.gov/board_decisions/adopted_orders/index.shtml (last visited Oct. 29, 2011). On occasion, the SWRCB will classify the resolution of a particularly high-profile controversy as a decision rather than as an order. *See, e.g.*, Fishery Resource and Water Right Issues of the Lower Yuba River, Revised Water Right Decision 1644 (State Water Res. Control Bd. July 16, 2003), http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1644revised.pdf.

[100] *See, e.g.*, Revised Order WRO 2002-13, at 9-11 (Cal. Water Res. Control Bd. Oct. 28, 2002) (describing a multiphase, fifteen-day hearing), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2002/wro2002-13revised.pdf. The administrative record for that proceeding occupied a daunting portion of a large bookshelf in the law office in which I used to work.

Not all matters are resolved by the Board itself. Many routine water rights decisions are assigned to the chief of the SWRCB's division of water rights. *See* State Water Res.Control Bd., Resolution 2002-0106 (2002), http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2002/rs2002-0106.pdf.

All of the SWRCB's decisions and orders are available at http://www.swrcb.ca.gov/board_decisions/adopted_orders/index.shtml.

In reaching its decisions and orders, the SWRCB must consider an extensive body of law, of which the public trust doctrine is just one part.[101] A summary of California water law could fill a book,[102] and multiple provisions of the California Water Code protect fisheries, wildlife, water quality, recreation, and the other values also protected by the public trust doctrine.[103] The California Environmental Quality Act ("CEQA") requires all state agencies, including the SWRCB, to consider the environmental impacts of and alternatives to their proposed actions.[104] CEQA also requires state agencies to avoid or mitigate significant adverse environmental impacts if it is feasible to do so.[105] The California Endangered Species Act[106] and other sections of the California Fish and Game Code — particularly Fish and Game Code section 5937, which requires dam operators to maintain below-dam fisheries in good condition — provide additional protection.[107]

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[101] *See generally* Dave Owen, *Law, Environmental Dynamism, Reliability: The Rise and Fall of CALFED*, 37 ENVTL. L. 1145, 1175-89 (2007) (describing the complexity of California water law).

[102] In fact, it does fill a book. *See generally* LITTLEWORTH & GARNER, *supra* note 94 (outlining California water laws).

[103] *See, e.g.*, CAL. WATER CODE §§ 1243 (West 2011) (declaring the use of water for recreation or fish and wildlife to be a beneficial use of water, and providing for consideration of amounts needed for instream beneficial uses in determining if water is available for a proposed appropriation); *id.* § 1257-58 (requiring consideration of environmental impacts and benefits, among other factors, when the SWRCB grants appropriative rights); *id.* § 1260(j) (requiring water right applicants to submit information about impacts to fish and wildlife); *id.* § 1425(b) (allowing permits for temporary and urgent water uses so long as those uses are "without unreasonable effect upon fish, wildlife, and other instream beneficial uses"); *id.* § 1435(b) (allowing temporary urgency changes in the place of diversion or use so long as the change "may be made . . . without unreasonable effect upon fish, wildlife, and other instream beneficial uses"); *id.* § 1725 (allowing temporary changes in a water user's "point of diversion, place of use, or purpose of use" if the change "would not unreasonably affect fish, wildlife, or other instream beneficial uses"); *id.* § 1736 (allowing long-term transfers subject to the same constraint); *id.* §§ 13000-13633 (Porter-Cologne Water Quality Control Act).

[104] CAL. PUB. RES. CODE §§ 21000-21177 (West 2011). Some water rights determinations are exempt from CEQA, however. *See* CAL. WATER CODE § 1729 (West 2011) (exempting from compliance with CEQA the SWRCB's approvals of temporary changes in the place of use, point of diversion, or purpose of use under an existing water right).

[105] Mountain Lion Found. v. Fish & Game Comm'n, 939 P.2d 1280, 1298-99 (Cal. 1997) ("CEQA compels government first to identify the [significant] environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through the selection of feasible alternatives.").

[106] CAL. FISH & GAME CODE §§ 2050-97 (West 2011).

[107] CAL. FISH & GAME CODE § 5937 (West 2011); *see, e.g.*, Natural Res. Def. Council v. Patterson, 333 F. Supp. 2d 906, 917-19, 924-25 (E.D. Cal. 2004) (holding that

Under the California Constitution, all California water use must be beneficial, reasonable, and nonwasteful, and environmental impacts can inform determinations about the reasonableness of particular uses.[108] Although state law governs the SWRCB's actions, the Board also acts in the shadow of federal requirements. Perhaps the most important come from the federal Endangered Species Act ("ESA").[109] Most of California's major waterways provide actual or potential habitat for protected species.[110] With all of these requirements, the public trust doctrine is rarely the only environmental law that applies.

As with any agency, the SWRCB's decision-making can be influenced by institutional constraints as well as by law. Financial limits are particularly import. The agency has been chronically underfunded, even by state or federal agency standards.[111] Consequently, its investigation and enforcement resources have often been quite thin, and it has an enormous backlog of unprocessed water rights applications.[112]

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section 5937 prohibited the United States Bureau of Reclamation from dewatering the San Joaquin River).

[108] CAL. CONST. art. X, § 2; CAL. WATER CODE § 100 (West 2011); *see* United States v. State Water Res. Control Bd., 227 Cal. Rptr. 161, 186-88 (Cal. Ct. App. 1986) (finding that adverse water quality impacts were an appropriate basis for finding a use unreasonable).

[109] *See* LITTLEWORTH & GARNER, *supra* note 94, at 131 (observing that the ESA "increasingly dominates the conflict between environmental and consumptive uses of water" and has "essentially taken control over the operation of the State Water Project and federal Central Valley Project").

[110] For a graphical depiction of the current extent of endangered species' "critical habitat" in California, see *FWS Critical Habitat for Threatened & Endangered Species*, U.S. FISH & WILDLIFE SERV., http://criticalhabitat.fws.gov/ (last visited Apr. 7, 2011).

[111] *See* Michael Hanemann & Caitlin Dyckman, *The San Francisco Bay-Delta: A Failure of Decision-Making Capacity*, 12 ENVTL. SCI. & POL'Y 710, 722 (2009) ("[The SWRCB] lacks adequate staff and resources to conduct an independent analysis. It has meager staff in hydrology, engineering, biology, or economics."); Richard Roos-Collins, *A Plan to Restore the Public Trust Uses of Rivers and Creeks*, 83 TEX. L. REV. 1929, 1935 (2005) (describing the Division of Water Rights' budget as "grossly inadequate").

[112] Roos-Collins, *supra* note 111, at 1935. Ideology, by contrast, appears to play a relatively minor role in SWRCB decision-making. In reviewing recent SWRCB decisions and orders, I did not find language suggestive of a strong ideological commitment to water resource development or to environmental restoration. *See generally infra* Part III.B (discussing SWRCB decisions and orders). The agency also is not generally perceived as an active proponent or opponent of water development, and the most common critique of the SWRCB focuses on its alleged weakness and passivity, not on any perceived bias. *See, e.g.*, Hanemann & Dyckman, *supra* note 111, at 722 (describing the SWRCB as "the hollow center" with a "lack of imagination and a narrow vision").

The SWRCB must deploy its limited resources in a complex institutional landscape. Hundreds of governmental, quasi-governmental, and private entities participate in the distribution and use of California's waters.[113] Some are behemoths; the United States Bureau of Reclamation and the California Department of Water Resources manage some of the world's largest water supply projects.[114] Some of the local agencies that distribute California's water have enormous annual budgets and ample political clout.[115] Others are small; many water rights belong to small individual landowners.[116] Advocacy organizations — particularly sportfishing groups, but also many general-interest environmental groups — also routinely intervene in the SWRCB's decision-making processes.[117] Other environmental agencies generally play particularly important roles in SWRCB proceedings. For example, the California Department of Fish and Game ("CDFG") frequently protests applications and petitions, usually seeking some sort of environmentally protective modification of the proposed action.[118] Federal agencies like the National Marine Fisheries Service and the Fish and Wildlife Service similarly use SWRCB proceedings to advocate for protective measures.[119]

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[113] *See generally* Barton H. Thompson, Jr., *Institutional Perspectives on Water Policy and Markets*, 81 CALIF. L. REV. 671, 687-701 (1993) (describing some institutional complexities of western water management).

[114] *See* HUNDLEY, *supra* note 61, at 203-302 (describing the history of the Bureau's Boulder Canyon and Central Valley Projects and DWR's State Water Project).

[115] *See, e.g.*, METRO. WATER DIST. OF S. CAL., BUDGET 2009-10, at 7-8 (2009), *available at* http://www.mwdh2o.com/mwdh2o/pages/finance/budget/AB09_10web.pdf (projecting 1.8 billion dollars in expenditures); WESTLANDS WATER DIST., NOTICE 3 (2011), *available at* http://www.westlandswater.org/short%5C201102%5Cnotice327.pdf ("The Board of Directors approved the 2011-2012 budget....The budget totals $157,828,100 and will be revised when the final water supply is determined, if warranted."); Mark Grossi, *Westlands District a Powerhouse for Valley Farmers*, FRESNO BEE, Nov. 7, 2009 (describing Westland Water District's political clout).

[116] *See, e.g.*, Order WR-2009-18 (Cal. Water Res. Control Bd. Mar. 17, 2009) (considering an individual landowner's water right).

[117] Though I have not tallied exact numbers, the California Sportfishing Protection Alliance appears to be the most frequent nongovernmental participant in SWRCB proceedings, and many other environmental groups also regularly appear.

[118] *See, e.g.*, Order WR-2007-25, at 2 (Cal. Water Res. Control Bd. July 23, 2007) (describing a CDFG protest). At least in the decisions that mentioned the public trust doctrine (I did not track participation in decisions that did not mention the public trust doctrine), CDFG participated more frequently than any other governmental entity.

[119] *See, e.g., id.* (describing a protest from the National Marine Fisheries Service).

II. POTENTIAL IMPACTS OF THE *MONO LAKE CASE* AND THE PUBLIC TRUST DOCTRINE

To change the outcomes produced by this complex legal and bureaucratic system would be no small task. Yet conventional wisdom holds that the public trust doctrine and the *Mono Lake Case* were important catalysts for reform.[120] Testing that conventional wisdom requires understanding how the public trust doctrine might have impacted environmental decision-making. This Part therefore summarizes some of the primary ways in which commentators have hoped — or feared — that the doctrine might affect real-world outcomes. Several of their ideas lead to testable hypotheses about the *Mono Lake Case*'s actual effects.

A. The Doctrine as a Lever to Compel Environmental Protection

A primary hope of the public trust doctrine's proponents has been that it would provide a legal lever for activists seeking to compel environmental protection.[121] If that promise has been fulfilled, one might expect judicial decisions to invoke the doctrine as a mandate for taking environmentally protective measures or for compelling reconsideration of environmental harms. Similar evidence might emerge from agency documents. Indeed, if the *Mono Lake Case* truly was one of the most important environmental law cases of all time, the evidence of the doctrine's impact probably would be substantial. Therefore, in reviewing both cases and administrative decisions, I tracked instances when the courts or the SWRCB cited the doctrine as requiring some sort of environmentally protective action.[122]

B. The Doctrine as a Shield to Protect Environmental Regulation

A complementary view focuses on the public trust doctrine's ability to empower legislatures and administrative agencies to protect the environment.[123] In this view, the doctrine operates as an inherent limit

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[120] *See supra* notes 5-10 and accompanying text.

[121] *See supra* notes 43-53 and accompanying text.

[122] This category would include cases or administrative decisions that merely stayed some sort of environmentally destructive action pending consideration of public trust impacts.

[123] Of course, the distinction between requiring agencies to take protective action and empowering them to do so can be rather fuzzy. *See* Oliver Houck, *The Clean Water Act Returns (Again): Part I: TMDLs and the Chesapeake Bay*, 41 ENVTL. L. REP. 10208, 10216 (2011) ("[F]ixed requirements are often the bureaucrat's best friend, their shield from unhappy constituencies. . . .").

on any claimed property right to use public trust resources.[124] The doctrine might function as a sort of public easement, which allows public use of or access to trust resources without infringing upon property rights.[125] Alternatively, it might operate as a source of retained environmental regulatory authority.[126] Either way, the ultimate effect is the same. The doctrine would empower the government to engage in environmental protection and provide a defense to takings claims.[127]

This potential defense existed for decades,[128] but it received heightened attention following the U.S. Supreme Court's decision in *Lucas v. South Carolina Coastal Commission*.[129] In *Lucas*, the Court held that a government regulation that destroyed all economic value of a property right was a categorical taking, unless background principles of state law already prohibited the regulated activity.[130] The case signaled a renewed judicial interest in categorical takings claims, but it also suggested that the public trust doctrine could emerge as an important defense.[131] Because the public trust doctrine seems to derive from common law traditions, it should operate as "background principle" capable of providing a takings defendants with a strong defense, even against a categorical claim.[132]

The *Mono Lake Case* seems to supply a particularly powerful version of that defense.[133] As the California Supreme Court repeatedly noted, the doctrine "precludes anyone from acquiring a vested right to harm the public trust."[134] That language suggests that no regulation

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[124] *See* Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257, 260 (1990).

[125] *See id.* at 269 (discussing the public trust doctrine as an example of a prior public right limiting private property claims).

[126] *See id.* at 261-62 (describing government's broad police power authority).

[127] *See* Brian Gray, *The Property Right in Water*, 9 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1, 1, 4 (2002).

[128] *See, e.g.*, Just v. Marinette Co., 201 N.W.2d 761, 768-69 (Wis. 1972) (holding that state laws protecting wetlands did not effect an unconstitutional taking of regulated landowners' property).

[129] Lucas v. S.C. Coastal Comm'n, 505 U.S. 1003, 1028-29 (1992).

[130] *Id.* at 1029. What qualifies as a background principle is a subject of some debate, but Justice Scalia did clearly identify traditional state common law doctrines like nuisance and property law as background principles. *Id.*

[131] *See* Blumm & Ritchie, *supra* note 13, at 321.

[132] Blumm & Ritchie, *supra* note 13, at 341-44; *see* Thompson, *supra* note 51, at 53-54 (summarizing cases invoking this defense).

[133] *Mono Lake Case*, 658 P.2d 709, 732 (Cal. 1983).

[134] *Id.*; *see id.* at 727 (stating that the doctrine "prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the

designed to protect trust resources from harm could affect a taking.[135] Therefore, in reviewing cases, I also looked to see how frequently that defense succeeded.[136]

C. The Doctrine as an Impediment to Environmental Protection

Although most environmental advocates take a favorable view of the public trust doctrine, critiques have come primarily from resource users worried about the doctrine's potential to destabilize established property rights.[137] However, in a 1986 article, Richard Lazarus — a strong proponent of environmental protection — penned an exhaustive "liberal rejection" of the doctrine.[138] Lazarus argued that the development of statutory and administrative environmental law, the loosening of the Supreme Court's standing requirements, and the willingness of courts to accept regulatory adjustment of property rights removed much of the need for the public trust doctrine.[139] Those arguments might suggest that the doctrine was merely irrelevant, but Lazarus went one step further. He worried that the doctrine would undermine regulatory environmental law by breathing life into a common law- and property-based legal scheme that had operated to the detriment of environmental protection.[140] The public trust doctrine, in Lazarus's view, was not just the wrong tool for protecting the environment; it was actually a threat.[141]

Lazarus's fears support a very different hypothesis about the effects of the public trust doctrine. If his warnings were prescient, cases and administrative decisions ought to contain evidence of the doctrine actually undermining the regulatory state. Therefore, in reviewing the reasoning of judicial and agency decisions, I searched for indications that the availability of public trust protections had undercut judicial or

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public trust").

[135] *See* Gray, *supra* note 127, at 10-14.

[136] I also tried to track the frequency with which the SWRCB cited the public trust as a potential defense of its regulatory authority, but I found that the agency rarely stated with clarity whether it viewed the doctrine as directly requiring environmental protection or just as potential defense for protective measure imposed under other regulatory provisions.

[137] *See* Thompson, *supra* note 51, at 54-58 (summarizing concerns).

[138] Lazarus, *supra* note 50, at 692.

[139] *Id.* at 656-91.

[140] *Id.* at 691-715.

[141] *Id.* at 692 ("Continued use of the doctrine ultimately threatens to impede environmental protection and resource conservation goal . . .").

agency willingness to uphold or enforce environmental statutes or regulations.

III. ACTUAL IMPACTS OF THE *MONO LAKE CASE* AND THE PUBLIC TRUST DOCTRINE ON CALIFORNIA WATER ADMINISTRATION

So which, if any, of these hypotheses about the effects of the public trust doctrine is correct? This Part summarizes the actual record of the California's freshwater public trust doctrine through almost thirty years of cases, administrative orders, and administrative decisions.[142]

A. The Public Trust Doctrine in the Courts

1. The Unused Lever

The clearest lesson from an empirical review is that California's freshwater public trust doctrine has exerted very little influence in the courts.[143] The *Mono Lake Case* did have one clear consequence: no one disputes the decision was crucially important to the process of restoring Mono Lake.[144] But later cases have hardly ever produced similar results. In the cases available on Lexis or Westlaw,[145] not one

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[142] I did not review cases involving tidal and submerged coastal lands. *See* Dunning, *supra* note 36, at 359 (describing differences between fresh and saltwater cases).

[143] This conclusion comes with one caveat: I have not evaluated the extent to which the public trust doctrine and the *Mono Lake* decision facilitated a shift in judicial attitudes toward environmental protection. Perhaps the doctrine and case sensitized judges to some of the environmental problems with water use, and that change in sensitivity affected the outcomes of cases in which the public trust doctrine was never actually mentioned. The evidence I reviewed provides no basis for verifying or falsifying that hypothesis.

[144] Political advocacy and outreach also played crucial roles in restoring Mono Lake. *See* Arnold, *supra* note 11, at 17-26 (describing events following the *Mono Lake* decision); Weber, *supra* note 16, at 1191 (describing the reduction in Los Angeles's diversions); *id.* at 1244 ("[T]he lion's share of the results in the Mono Lake Basin litigation is attributable to Fish and Game Code sections 5937 and 5946.").

[145] *See* Citizens Legal Enforcement & Restoration v. Connor, 762 F. Supp. 2d 1214, 1231-32 (S.D. Cal. 2011) (rejecting a public trust claim against a federal agency as outside the Administrative Procedure Act's authorization for suits remedying failures to act); Envtl. Prot. Info. Ctr. v. Cal. Dept. of Forestry & Fire Prot., 187 P.3d 888, 925-26 (Cal. 2008) (rejecting a public trust claim; the plaintiffs did prevail on some statutory claims); Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, 62 Cal. Rptr. 3d 651, 659 (Cal. Ct. App. 2007) (depublished) (rejecting a public trust claim as premature); Cal. Water Network v. Castaic Lake Water Agency, No. 215327, 2006 WL 726882, at *11-*12 (Cal. Ct. App. Mar. 23, 2006) (rejecting a public trust claim as insufficiently supported by record); Save Our

has set aside an agency decision on public trust grounds, or has ordered the re-examination of an existing (or applied-for) water right. Since the *Mono Lake Case*, no plaintiff in that pool of decisions has

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Neighborhood v. Lishman, 45 Cal. Rptr. 3d 306, 315 (Cal. Ct. App. 2006) (declining to consider a public trust claim and resolving the case on other grounds); State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d 189, 271-73 (Cal. Ct. App. 2006) (deferring to the SWRCB's decision and rejecting a public trust claim; the plaintiffs did prevail on another argument); *In re* Bay-Delta Programmatic Envtl. Impact Report Coordinated Proceedings, 34 Cal. Rptr. 3d 696, 763-64 (Cal. Ct. App. 2006), *rev'd on other grounds*, 184 P.3d 709 (Cal. 2008) (rejecting an argument that the "CALFED" Record of Decision violated the public trust doctrine); Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, 25 Cal. Rptr. 3d 596, 613-14 (Cal. Ct. App. 2005), *rev'd on other grounds*, 150 P.3d 709 (Cal. 2007) (rejecting an argument that approval of a development project, which allegedly would sometimes dewater the Cosumnes River, violated the public trust doctrine); Envtl. Prot. Info. Ctr. v. Cal. Dept. of Forestry & Fire Prot., 7 Cal. Rptr. 3d 31, 72 (Cal. Ct. App. 2005), *aff'd in part and rev'd in part*, 187 P.3d 888 (Cal. 2008) (rejecting a public trust claim); Friends of Santa Clara River v. Castaic Lake Water Agency, 19 Cal. Rptr. 3d 625, 628 (Cal. Ct. App. 2004) (mentioning that a public trust claim was dismissed earlier in the litigation; the plaintiffs did prevail on statutory grounds); Santa Teresa Citizen Action Grp. v. City of San Jose, 7 Cal. Rptr. 3d 868 (Cal. Ct. App. 2003) (rejecting a public trust claim against a pipeline project as unsupported and premature); Protect Our Water Res. v. Cnty. of Sonoma, No. 227962, 2003 WL 22977665, at *8 (Cal. Ct. App. Dec. 19, 2003) (rejecting a public trust claim against a mining project); Long v. Great Spring Waters of Am., Inc., No. E030817, 2002 WL 31813096, at *8 (Cal. Ct. App. Dec. 16, 2002) (rejecting a public trust claim against a water bottling project because the plaintiff had shown neither a surface water impact nor an impact to public trust resources); Planning & Conservation League v. Dept. of Fish & Game, 62 Cal. Rptr. 2d 510, 518 (Cal. Ct. App. 1997) (mentioning a public trust claim but resolving the case on other grounds); Golden Feather Cmty. Ass'n v. Thermalito Irrigation Dist., 257 Cal. Rptr. 836 (Cal. Ct. App. 1989) (rejecting a public trust claim because the parties had conceded that the reservoir at issue was non-navigable); Big Bear Mun. Water Dist. v. Bear Valley Mut. Water Co., 254 Cal. Rptr. 757, 766-67 (Cal. Ct. App. 1989) (rejecting a public trust claim because the defendant agency had considered the environmental impacts of its decision).

Environmental plaintiffs did succeed in at least one public trust decision not included in the Lexis or Westlaw databases. The successful case involved Putah Creek, which flows from the Coast Range to the Sacramento River, passing through the city of Davis along the way. "Pursuant to Fish and Game Code section 5937, the public trust doctrine, and Article X, section 2 of the California Constitution," the court issued an injunction ordering the Solano County Water Agency to increase instream flows. Statement of Decision, Putah Creek Water Cases, Judicial Council Coordination No. 2565, Solano Superior Ct. No. 108552, Sacramento Superior Ct. No. 515766, July 19, 1996, at 13. The parties settled the litigation before any appellate decision issued, and the resulting flow increases have significantly improved environmental conditions in the stream. Alan Lilly, Bartkiewicz, Kronick & Shanahan, Presentation at the UC Davis Law Review Symposium: The Public Trust Doctrine: Thirty Years Later (Mar. 4, 2011).

prevailed on any public trust claim.[146] Few plaintiffs have tried, even as water litigation remains a constant feature of California life.[147] The pool of freshwater cases includes only fourteen instances when plaintiffs asserted a public trust argument.[148]

Numbers of wins and losses may be deceptive, for sometimes a losing party can obtain judicial language that favorably develops doctrine or that improves its position in future disputes.[149] In the post-*Mono Lake* cases, however, such discussion is rare at best. Some of the decisions provide only passing reference to the existence of a public trust claim.[150] Others involve plaintiffs asserting that an agency decision neglected to provide "feasible" protection for public trust resources.[151] All of these arguments failed, with courts consistently allowing the agencies to balance public trust protection against competing resource claims.[152] Many of the claims appear to have assumed secondary importance within the litigation, with plaintiffs focusing their attentions upon other arguments.[153] Most decisions' discussions of public trust claims are terse, and the more extensive

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[146] In *California Trout, Inc. v. State Water Resources Control Board*, 255 Cal. Rptr. 184 (Cal. Ct. App. 1989), the public trust doctrine played an important part in helping the plaintiffs fend off a statute of limitations defense. The court held that the public trust doctrine created a continuing duty for the state to implement legislative protections of trust resources, and that a claim that the SWRCB had failed to fulfill those legislative duties was timely even though brought many years after the agency had made any sort of affirmative decision. *Id.* at 209-13. The public trust doctrine therefore did help the plaintiffs prevail on their statutory claims.

[147] I reviewed only published decisions, not case filings, so this assertion reflects an assumption that the frequency with which the doctrine appears in litigation is roughly proportional to the frequency with which it appears in published decisions. Based on my own experience as a water lawyer, I can think of no reason why an abnormally large pool of public trust complaints would be resolved without producing a published decision.

[148] *See* cases cited *supra* note 145. Where a single case produced multiple decisions, I counted the case once.

[149] *See, e.g.*, DANIEL A. FARBER ET AL., CASES AND MATERIALS ON ENVIRONMENTAL LAW 376 (8th ed. 2010) (describing Sierra Club v. Morton, 405 U.S. 727 (1972), which the Sierra Club lost, as "a step toward more liberal standing law").

[150] *See, e.g., Friends of Santa Clara River*, 19 Cal. Rptr. 3d at 628 (briefly mentioning a claim).

[151] *See, e.g.*, State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d 189, 271-73 (Cal. Ct. App. 2006) (rejecting that argument).

[152] *See, e.g., id.* at 272 ("What is 'feasible,' however, is a matter for the Board to determine.").

[153] *See* cases cited *supra* note 145 (listing several cases in which plaintiffs lost on public trust arguments but prevailed on statutory claims).

discussions provide little encouragement to plaintiffs contemplating public trust claims.[154]

The first hypothesis about the public trust's influence — that it provides a lever to compel environmental protection — therefore finds hardly any support in freshwater case law emerging from California. In those cases, plaintiffs are neither winning on public trust claims nor obtaining favorable doctrinal development.[155] If the doctrine truly encourages judges to issue environmentally protective orders, it is doing so entirely in undocumented ways.

2. The Rarely-Used Shield

Even if the public trust doctrine is not serving as a lever to compel protection, it might be shielding government regulation of water use from takings challenges.[156] But such defenses also have a thin record of success.[157] A public-trust based defense of environmental regulation has been considered in only three published cases arising out of California, and it has prevailed in just one. A paper record may be somewhat misleading, for it will contain no record of regulators emboldened to take environmentally protective measures or antiregulatory legal challenges that never were filed.[158] Nevertheless,

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[154] *See* Citizens Legal Enforcement & Restoration v. Connor, 762 F. Supp. 2d 1214, 1231-32 (S.D. Cal. 2011) (concluding that federal courts lack jurisdiction to hear public trust claims against ongoing agency activities); *State Water Res. Control Bd. Cases*, 39 Cal. Rptr. 3d at 271-73 (emphasizing deference to administrative discretion).

[155] *See supra* notes 143-154 and accompanying text.

[156] *See supra* notes 123-133 and accompanying text.

[157] Of course, the defense may have succeeded largely by deterring potential takings claims or by informing settlements. On the written record I reviewed, the extent of that effect is impossible to assess.

[158] As discussed in Part IV.B below, I found little evidence that state regulators are engaged in bold regulation of existing rights, which suggests that the undocumented influence of this potential defense may be small. Federal regulators are engaged in extensive regulation of existing rights, particularly under the Endangered Species Act, but there are two reasons to suspect that the public trust doctrine has played little role in emboldening or protecting those regulatory initiatives. First, the United States Court of Federal Claims has created some ambiguity about whether public trust defenses are available to federal regulators. *See infra* notes 166-183 and accompanying text. Second, in a recent detailed study of Endangered Species Act implementation, I found relatively consistent approaches to ESA implementation throughout the multi-state study area, and found no documentary evidence that state public trust doctrines affected those approaches. *See* Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 63 FLA. L. REV. 141, 163-74 (2012).

the three cases provide some basis for questioning how influential the doctrine has been and will be.

The defense did succeed in *United States v. State Water Resources Control Board*.[159] That case addressed the SWRCB's imposition of water quality-based constraints upon the water rights of the Bureau of Reclamation and the California Department of Water Resources.[160] Those agencies operate the Central Valley Project and the State Water Project, two intertwined water supply projects in California's Central Valley.[161] The Bureau's contractors argued that any restriction upon the Bureau's existing water rights would be unlawful.[162] The court disagreed, concluding that "[t]he issue is now clearly controlled by [the *Mono Lake Case*]."[163]

But while the court viewed the public trust doctrine as a sufficient defense of the exercise of governmental regulatory authority, it did not appear to view it as necessary. In another passage of the decision, the court wrote that "[t]here is little doubt that the state may undertake to regulate environmental quality notwithstanding the resulting limitation imposed on the free use of property rights."[164] It cited several other cases and legal principles in support of this conclusion, but that part of the opinion made no mention of the public trust doctrine.[165]

More recently, that defense has failed twice. First, in *Tulare Lake Basin Water Storage District v. United States*, the plaintiffs challenged federally imposed restrictions on the California Department of Water Resources' deliveries of water to several of its contractors.[166] They argued that these restrictions had taken their water rights without just compensation.[167] The National Marine Fisheries Service and the U.S. Fish and Wildlife Service had imposed the requirements pursuant to the federal ESA, and the restrictions clearly protected trust

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[159] United States v. State Water Res. Control Bd., 227 Cal. Rptr. 161, 165 (Cal. Ct. App. 1986).

[160] *Id.* at 165-66.

[161] *Id.* at 166-67 (describing the history of the projects).

[162] Rather than delivering water directly to end users, or using the water themselves, the Bureau and DWR both deliver water to contractors who then distribute the water to end users. *See* Owen, *supra* note 101, at 1180-83 (describing these contractual arrangements).

[163] *State Water Res. Control Bd.*, 227 Cal. Rptr. at 201.

[164] *Id.* at 183.

[165] *Id.*

[166] Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 314 (2001).

[167] *Id.*

resources.[168] However, the Court of Federal Claims brushed aside a public trust doctrine-based defense to the plaintiffs' takings claims.[169] It concluded that even if the public trust doctrine might provide a basis for readjustment of existing rights, the SWRCB, not a federal environmental agency or court, needed to do the readjusting.[170] Consequently, the court held the federal government liable for a substantial taking despite the government's public trust doctrine defense.[171]

In 2011, in *Casitas Municipal Water District v. United States*, the same Court of Claims judge revisited many of the same issues and, despite a more nuanced analysis, reached largely the same result.[172] *Casitas* also involved water use restrictions deriving from the ESA, and the United States invoked a public trust argument as one of several defenses.[173] This time, the court conceded that it had an independent obligation to consider whether the doctrine applied.[174] The court also concluded that the federal government's actions had been designed to protect public trust resources.[175] And it noted the *Mono Lake Case*'s language cautioning that the doctrine "bars 'any. . . party from claiming a vested right to divert waters once it becomes clear that such diversions harm the interests protected by the public trust.' "[176] Nevertheless, the court rejected the public trust doctrine defense. To support such a defense, the court held, the United States would have needed to show not just that public trust resources were protected by the restriction at issue, but also that such protection was in the public

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[168] *Id.* at 314-16.

[169] *Id.* at 321-24.

[170] *Id.*

[171] *See* John D. Echeverria, *Is Regulation of Water Rights a Constitutional Taking?*, 11 VT. J. ENVTL. L. 579, 581 & n.14 (2010) (describing controversy surrounding the Bush Administration's decision to not appeal the Court of Claims' decision).

[172] Casitas Mun. Water Dist. v. United States, No. 05-168L, 2011 WL 6017935 (Ct. Fed. Cl. Dec. 5, 2011).

[173] *Id.* at *11 (describing the United States' background principles defenses). The United States had previously argued that the claim should be analyzed as a regulatory taking. Casitas Mun. Water Dist. v. United States, 543 F.3d 1276 (Fed. Cir. 2008) (rejecting this defense). After that defense failed, it also argued that Casitas could not prove a taking because the restriction had not affected its ability to put water to beneficial use. This defense succeeded. *Casitas*, 2011 WL 6017935, at *26-*27.

[174] *Casitas*, 2011 WL 6017935, at *12 ("The public trust and reasonable use doctrines are self executing, as well as evolving, and do not therefore lend themselves to such a static interpretation.").

[175] *Id.* at *16.

[176] *Id.* at *14 (quoting Nat'l Audubon Soc'y v. Superior. Court., 658 P.2d 709, 712 (Cal. 1983).

interest.[177] According to the court, the United States had made no such showing.[178] The court did readily acknowledge that the SWRCB, considering essentially the same water use and the same set of environmental restrictions, could come to a different conclusion, and it stated that such a conclusion would dispose of future takings claims.[179] That conclusion appeared to preserve much of the state administrative primacy that underlay the *Tulare Lake Basin Water Storage District* decision. But even if the SWRCB retained flexibility to implement the doctrine differently, the ability of a federal takings defendant to invoke the doctrine in court remained narrowly circumscribed.

These cases leave many questions unanswered. Still unknown, for example, is whether other federal or state courts will adopt the Court of Claims' reasoning. The *Tulare Lake Basin Water Storage District* decision has received ample judicial and academic skepticism, though much of the criticism has focused on the court's use of a physical takings analytical framework rather than on the public trust discussion.[180] Similar questions surround the use of categorical takings

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[177] *See id.* at *17 ("Defendant must therefore show that the balance between Casitas's various uses and the uses identified in the biological opinion weighs in favor of the fish.").

[178] *See id.* at *18. While the court's desire to find some balance in the doctrine is unsurprising, its application of that balancing principle to the facts of the case is remarkable. The court noted that a takings claim must be based on injuries already suffered, not on the possibility of future injury. *See id.* at 26-27. It also noted:

> The evidence before the court suggests that there has been no encroachment on plaintiff's beneficial use to date. Since the issuance of the biological opinion in 2003, plaintiff has not reduced water deliveries to any of its existing customers, has not turned away any prospective customers (and has in fact both added new customers and eliminated its wait list), has not changed how it allocates water to its customers, has not purchased alternative water supplies, has not instituted any mandatory water conservation measures or changed its drought contingency measures, and has not increased the price of the water due to the biological opinion.... Plaintiff, in other words, has produced no evidence that the biological opinion has so far resulted in any reduction in actual water deliveries by Casitas.

Id. at *26. How these non-existent harms could outweigh the value of public trust protections is somewhat difficult to fathom.

[179] *Id.* at *30 ("Should the SWRCB ultimately find that flows of 50 cfs or more are necessary to protect the steelhead, then any prospect plaintiff may have had for pursuing a takings claim in this court will be eliminated.").

[180] *See, e.g.*, Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504, 538 (2005) ("[W]ith all due respect, *Tulare* appears to be wrong on some counts, incomplete on others, and distinguishable, in all events."); Allegretti & Co. v. Cnty. of Imperial, 42

tests for regulatory restrictions on water rights.[181] Courts have usually, though not always, rejected such tests.[182] But plaintiffs keep trying, and if they succeed, then establishing prima facie takings claims will be much easier, and governmental defendants will likely increase their reliance on background principles defenses like the public trust doctrine.[183] In summary, the public trust doctrine may yet assume importance in the courts as a takings defense, if not as a basis for compelling government action. But in freshwater cases emerging from California, the evidence of such importance remains thin.

B. The Doctrine Before the SWRCB

Even if the public trust doctrine exerts very little influence upon judicial decision-making, it still could play an important role. Courts play a somewhat secondary role in environmental policymaking; because of deferential standards of review, most disputes are won or lost before administrative agencies.[184] The public trust doctrine's

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Cal. Rptr. 3d 122, 132 (Cal. Ct. App. 2006) ("[W]e disagree with *Tulare Lake's* conclusion that the government's imposition of pumping restrictions is no different than an actual physical diversion of water."). *See generally* Melinda Harm Benson, *The Tulare Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 ENVTL. L. 551 (2002) (thoroughly critiquing the decision). Because the decision is so recent, *Casitas Municipal Water District* has not received similar judicial or academic analysis.

[181] For contrasting views, see Benson, *supra* note 180, at 583-85 and Josh Patashnik, *Physical Takings, Regulatory Takings, and Water Rights*, 51 SANTA CLARA L. REV. 365, 365 (2011).

[182] *See, e.g.*, CRV Enters., Inc. v. United States, 626 F.3d 1241, 1247 (Fed. Cir. 2010) (declining to "hold that a physical taking of water rights occurs merely when a particular use of the water is restricted"); Casitas Mun. Water Dist. v. United States, 543 F.3d 1276 (Fed. Cir. 2008) (applying a physical takings framework where the ESA restrictions at issue led the water district to divert water from its supply canal to a fish ladder).

[183] If they fail, the defense still might matter occasionally, but because the *Penn Central* standard for regulatory takings increases the challenges for takings claimants, a public trust defense is likely to be necessary in many fewer cases. *See, e.g.*, Echeverria, *supra* note 171, at 585 (describing the potentially dispositive effect of the choice of a takings framework).

[184] *See generally* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984) (articulating a deferential standard for judicial review of agencies' legal determinations); Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 103 (1983) (calling for highly deferential review of agencies' technical determinations). California courts have extended these general principles of judicial review to public trust cases. *See* State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d 189, 271-73 (Cal. Ct. App. 2006) (applying a deferential standard of review). *See generally* Ronald Robie, *Effective Implementation of the Public Trust Doctrine in California Water Resources Decision-Making: A View From the Bench*, 45 UC DAVIS L.

significance in agency proceedings does seem to exceed its importance in the courtroom. Again, however, that importance is modest.

1. Frequent References, Less Frequent Constraints

General statistics provide a rough sense of the importance of the doctrine.[185] From 1984 through the end of 2010, the SWRCB issued sixty-two decisions (including decisions delegated to the chief of the Division of Water Rights) and 559 orders. Fifty-six percent of the decisions at least mentioned the public trust doctrine. Forty-three percent of the orders did so. In total, forty-four percent of the combined decisions and orders contained at least a reference to the doctrine. Nevertheless, many of those references were contained in brief boilerplate passages reserving continuing authority to revise rights.[186] Others were contained in background discussions summarizing prior decisions or explaining general principles of California water law, or in passages rejecting protestors' public trust arguments.[187] The SWRCB at least may have treated the public trust

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REV. 1155 (2012) (arguing for deferential review of the SWRCB's public trust decisions).

[185] All of these numbers are reproduced in *infra* Figure 1. The raw data tables are available on request from the author or from UC Davis Law Review.

[186] The standard language reads as follows:

> Pursuant to Water Code sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this transfer and temporary change Order, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of said water.

E.g., Order No. WR 2009-55, at 8 (Cal. Water Res. Control Bd. Aug. 26, 2009), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2009/wro2009_0055dwr.pdf.

[187] *See, e.g.*, Order No. WR 2009-39, at 6 (Cal. Water Res. Control Bd. June 16, 2009), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2009/wro2009_0039.pdf (stating general principles); Order No. WR 2008-30, at 3-5 (Cal. Water Res. Control Bd. July 3, 2008), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2008/wro2008_0030dwr.pdf (rejecting a public trust argument); Order No. WR 2001-07, at 1 (Cal. Water Res. Control Bd. May 2, 2001), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2001/wro2001-07.pdf (mentioning the public trust doctrine in discussion of a prior order). The nature of each order and decision's public trust discussion is briefly summarized in the project data tables.

doctrine as a basis for actually taking or requiring some action in fifty percent of the decisions, eight percent of the orders, and only twelve percent of the combined decisions and orders.[188]

Table 1: The Public Trust Doctrine in SWRCB Decisions and Orders, 1984-2010

Year	# decisions	Decisions referring to PTD	PTD a basis for action[189]	# orders	Orders referring to PTD	PTD a basis for action	Total decisions & orders	Decisions & orders referring to PTD	PTD a basis for action
1984	10	3	3	14	5	0	24	8	3
1985	4	0	0	6	1	1	10	1	1
1986	5	2	2	12	2	1	17	4	3
1987	2	1	1	13	5	2	15	6	3
1988	6	3	3	26	4	2	32	7	5
1989	1	1	1	26	8	1	27	9	2
1990	4	2	2	19	8	5	23	10	7
1991	0	0	0	10	4	0	10	4	0
1992	1	0	0	8	1	1	9	1	1
1993	0	0	0	8	0	0	8	0	0
1994	2	2	2	7	2	1	9	4	3
1995	2	2	1	19	9	5	21	11	6
1996	2	1	1	7	4	0	9	5	1
1997	3	1	1	7	4	1	10	5	2
1998	0	0	0	9	3	1	9	3	1
1999	5	4	3	12	4	1	17	8	4

[188] There is some imprecision in these numbers, and they may be too high. As explained in more detail below, there are some decisions and orders that mention the public trust doctrine and impose environmental restrictions, but that do not clearly indicate whether the public trust doctrine was a basis for those restrictions. To address those ambiguities, I erred on the side of inclusiveness. If the public trust doctrine was mentioned and environmental restrictions were imposed, and the public trust doctrine's role in spurring those restrictions was at least ambiguous, I counted the decision or order as one in which the public trust doctrine did lead to environmental protection.

[189] For an explanation of how I defined this category, see *supra* note 188.

2000	2	2	2	17	8	1	19	10	3
2001	2	2	1	25	19	2	27	21	3
2002	1	0	0	17	10	1	18	10	1
2003	2	2	2	19	6	0	21	8	2
2004	0	0	0	45	21	2	45	21	2
2005	1	1	1	26	10	1	27	11	2
2006	0	0	0	20	7	0	20	7	0
2007	0	0	0	42	14	3	42	14	3
2008	3	3	2	47	25	1	50	28	3
2009	2	1	1	65	38	9	67	39	10
2010	2	2	2	33	16	2	35	18	4
Total	62	35	31	559	238	44	621	273	75
Percentages		56.5%	50%		42.6%	8%		44%	12%

Within the subset of decisions and orders that gave at least some importance to the public trust doctrine, the SWRCB often required what appear to be meaningful environmental protection measures.[190] The SWRCB ordered compliance with a wide variety of measures designed to mitigate the impacts of new water uses.[191] A particularly common measure was a requirement for some minimum level of instream flow.[192] On a few occasions, rather than ordering mitigation, the Board cited the public trust doctrine as a basis for simply rejecting modifications of existing rights.[193] When confronted with new water

[190] I considered trying to quantify the significance of these requirements — perhaps by tracking the number of requirements imposed — but decided that those data would not be meaningful. One major condition may be more protective than many minor ones. And without knowing more about the context of each decision or order, and without monitoring data considering the effectiveness of the measures imposed, finding another meaningful numeric classification of these measures seemed impossible. The descriptions in this section therefore are qualitative.

[191] These conditions are summarized in the raw data tables, which are available on request from UC Davis Law Review or the author.

[192] *See, e.g.*, Order WR 2009-15, at 5 (Cal. Water Res. Control Bd. Mar.17, 2009), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2009/wro2009_0015.pdf (requiring bypass flows "[f]or the protection of fish, wildlife, and public trust resources"). The most prominent exception to this general rule involved temporary transfer petition orders. While those orders invariably refer to the public trust doctrine, the references are almost always in boilerplate language reserving future regulatory authority. I did not find a single transfer petition that the SWRCB denied, or even approved with conditions, on public trust grounds.

[193] *See, e.g.*, Division Decision No. 2010-0001, at 7-11 (Cal. Water Res. Control

right applications or proposed changes in use under existing rights, the SWRCB appeared to view avoiding public trust impacts as an important goal. Several orders pointedly noted the absence of public trust resource impacts as a reason for approving a proposed new water use, and I did not find any recent decisions or orders in which the SWRCB acknowledged substantial public trust impacts yet still allowed some new water use.[194]

Although many decisions and orders seemed to provide significant protection, others established requirements that appeared more minimal. Sometimes the SWRCB required the preparation of a study, but allowed potentially harmful water diversions to proceed.[195] The SWRCB also occasionally implied that it could impose protective restrictions only if the agency thought that those restrictions were necessary.[196] Because environmental regulators are often unsure how a

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Bd., Div. of Water Rights, Oct. 28, 2010), *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/division_decisions/2010/dd2010_0001.pdf (citing the public trust doctrine as a reason for rejecting an application for a revised water rights permit and for compelling preliminary steps toward removal of a dam); Order WR 2007-32, at 3-5 (Cal. Water Res. Control Bd. Oct. 9, 2007), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2007/wro2007_0032_dwr.pdf (citing public trust concerns as a basis for denying a temporary urgency change permit); Order WR 2004-40 (Cal. Water Res. Control Bd. Sept. 17, 2004), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2004/wro2004_0040.pdf (same).

[194] *See, e.g.*, Order WR 2008-16, at 13 (Cal. Water Res. Control Bd. Mar. 18, 2008), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2008/wro2008_0016.pdf ("There is no evidence that granting an extension of time until 2010 will have any adverse impacts on public trust resources."); Order WR 2006-18, at 5 (Cal. Water Res. Control Bd. Nov. 30, 2006), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2006/wro2006_0018.pdf ("There is no evidence that approval of the change petition, with the inclusion of the State Water Board's standard terms, will have any adverse impacts on public trust resources."); *see also* Order WR-2004-40, at 5 (Cal. Water Res. Control Bd. Sept. 17, 2004), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2004/wro2004_0040.pdf (denying a temporary urgency change petition partly because "there is evidence that the proposed change may impact public trust resources").

[195] *See, e.g.*, Order No. WR 2009-57, at 7, 11 (Cal. Water Res. Control Bd. Sept. 17, 2009), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2009/wro2009_0057exec.pdf (requiring a study of impacts to steelhead trout but removing a protective condition). A study might lead to future protective measures or might reveal such measures to be unnecessary, but the order did not condition future actions on study results.

[196] *See, e.g.*, *id.* at 7 (acknowledging uncertainty about impacts but removing a protective condition because "there is not substantial evidence in the record showing what amount of flow . . . will benefit Steelhead, other federally listed species, or species of special concern").

proposed project will adversely affect the environment,[197] that reluctance to prevent uncertain impacts is a potentially significant limitation. In many orders and decisions, the SWRCB imposed restrictions that fell short of those that environmental groups or the CDFG had requested.[198] Without knowing the full context of each decision (and without post-decisional monitoring data), one cannot perform any sort of rigorous assessment of the effectiveness of the protective restrictions that the SWRCB imposed.[199] But based on a qualitative review, the conditions seem to run the gamut from meaningful to minor.

The SWRCB's silences and areas of inaction also provide important signals about the practical relevance of the public trust doctrine. One of the *Mono Lake Case*'s most heralded holdings is that the SWRCB has a continuing obligation to re-examine and, sometimes, adjust existing water rights.[200] On very rare occasions, it has done so.[201] The

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[197] *See generally* Holly Doremus, *Constitutive Law and Environmental Policy*, 22 STAN. ENVTL. L.J. 295, 297 (2003) ("Uncertainty pervades every aspect of environmental law.").

[198] *See, e.g.*, Division Decision No. 2008-01 (Cal. Water Res. Control Bd., Div. of Water Rights, Aug. 7, 2008), *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/division_decisions/2008/dd2008_0001.pdf (rejecting the CDFG's requests for more extensive public trust protection). Qualitatively, the CDFG appeared to be a more effective intervenor than the environmental groups, and its requests for modifications were often reflected in the decisions or orders. *See, e.g.*, Corrected Decision 1647, at 32 (Cal. Water Res. Control Bd. Dec. 2, 2008), *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/santa_ana_river/docs/corrected_decision1647.pdf (ordering compliance with conditions negotiated with the CDFG). If CDFG did *not* comment on an application or petition, the SWRCB often pointedly noted its silence. *See, e.g.*, Order No. WR 2010-23, at 7 (Cal. Water Res. Control Bd. July 2, 2010), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2010/wro2010_0023dwr.pdf (noting that CDFG identified no problems with the requested water transfer). Of course, nothing in those decisions and orders indicates whether the CDFG declined to comment because its staff thought the proposed water use was environmentally benign or because the CDFG just lacked sufficient time and information to prepare comments.

[199] *See* Karkkainen, *supra* note 13, at 926-29 (describing the frequent inaccuracies of environmental prediction and the consequent need for post-project monitoring).

[200] *See supra* notes 80-93 and accompanying text.

[201] *See, e.g.*, Revised Decision 1644, at 31 (Cal. Water Res. Control Bd., July 16, 2003), *available at* http://www.swrcb.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1644revised.pdf ("[A]pplication of the public trust doctrine requires amendment of YCWA's water right permits to establish instream flow requirements that involve release of water from storage during some periods."); Order No. WR 90-05 (Cal. Water Res. Control Bd. May 2, 1990) (ordering the Bureau of Reclamation to comply with new environmental restrictions on its management of the Central Valley Project). On one occasion, the SWRCB contemplated relying on the

overwhelming majority of the orders and decisions that actually do something with the doctrine, however, involve limiting the scope of a new water right or of a water user's requested change to an existing right.[202] Existing uses have almost always been left alone.[203] Indeed, in a recent dispute over water rights fees, the SWRCB repeatedly asserted that for water users with pre-1914 rights, there is essentially no public trust monitoring or enforcement at all.[204]

2. Intertwinement with Statutory and Administrative Environmental Law

The relationship between the doctrine and other legal constraints complicates any effort to discern the public trust doctrine's influence. The doctrine rarely operates as a stand-alone constraint.[205] Instead, as applied by the SWRCB, the doctrine is thoroughly intertwined with other environmental laws.[206]

While the SWRCB often invokes the public trust doctrine as a basis for imposing conditions upon water use, it is rarely, if ever, the sole basis.[207] The SWRCB routinely invokes the mandates of CEQA as an additional basis for imposing water use constraints.[208] It also draws

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public trust doctrine as a key basis for a major adjustment of rights to use water flowing through the Sacramento and San Joaquin Rivers, but it never finalized the decision. *See* Draft Decision No. 1630 (Cal. Water Res. Control Bd., Dec. 1992), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1630.pdf.

[202] This distinction explains the disparity between the percentage of decisions that invoke the public trust doctrine as a basis for ordering someone to do something (50%) and the percentage of orders that do so (8%). Decisions almost always address proposed new water rights, while orders only sometimes address proposed new water uses.

[203] *See* Roos-Collins, *supra* note 111, at 1931 (drawing a similar conclusion).

[204] *See* Order No. WR 2005-02, at 15 (Cal. Water Res. Control Bd., Jan. 12, 2005), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2005/wro2005_0002.pdf ("Although the SWRCB has the authority to apply public trust and reasonable use requirements to riparian, pre-1914, and pueblo water right holders, it has applied those requirements so infrequently that the associated costs amount to an insubstantial portion of the water right program costs."). Prior to 1914, water users did not need permits to establish water rights. *See supra* note 96 and accompanying text.

[205] *See infra* notes 207-16 and accompanying text.

[206] *See infra* notes 207-16 and accompanying text.

[207] To the extent they were explained in decisions and orders, the bases for environmental restrictions are recorded in the raw data tables. Those tables are available on request from UC Davis Law Review or from the author.

[208] *See, e.g.*, Decision 99-02, at 4 (Cal. Water Res. Control Bd., Div. of Water Rights, Nov. 1, 1999), *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/division_decisions/1999/1999_02dec.pdf (describing

upon the environmentally protective provisions of the California Fish and Game Code and the California Water Code as bases for protection.[209] Federal environmental laws also enter the mix. The SWRCB has ordered compliance with the ESA as a public trust remedy, and in a few instances it has initiated water rights proceedings in response to regulatory changes imposed under the ESA.[210]

The SWRCB's process for considering public trust impacts also intertwines with its procedures for complying with other environmental laws. When assessing public trust impacts, the SWRCB routinely relies on CEQA studies.[211] In many decisions and orders, CEQA compliance and public trust requirements are discussed in one combined section.[212] Furthermore, the SWRCB occasionally takes notice of species' protected status under the federal ESA when determining how much environmental protection to require.[213]

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mitigation measures included to facilitate compliance with CEQA).

[209] *See, e.g.*, Decision 1638, at 64-65 n.26 (Cal. Water Res. Control Bd. Sept. 18, 1997), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1638.pdf (citing provisions of the Water Code and Fish & Game Code as alternative bases for protective requirements).

[210] *See, e.g.*, Order WR 2004-05, at 1 (Cal. Water Res. Control Bd. Feb. 25, 2004), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2004/wro2004_0005.pdf ("In order to ensure the protection of environmental resources, this Order requires USBR to consult with the fisheries agencies . . . USBR will be required under this change to meet the flows recommended by the fisheries agencies for the term of this change unless the Chief of the Division of Water Rights (Division) revises the flows recommended by the fisheries agencies."); Order WR 92-02, at 4 (Cal. Water Res. Control Bd. Mar. 19, 1992), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/1992/wro92-02.pdf (revising salinity control requirements imposed on the California Department of Water Resources and the United States Bureau of Reclamation to align those requirements with "reasonable and prudent alternatives" specified in federal biological opinions); *see also* Order WR 2008-44, at 2 (Cal. Water Res. Control Bd. Dec. 1, 2008), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2008/wro2008_0044.pdf (ordering compliance with CAL. DEPT. OF FISH & GAME & NAT'L MARINE FISHERIES SERV., GUIDELINES FOR MAINTAINING INSTREAM FLOWS TO PROTECT FISHERIES RESOURCES DOWNSTREAM OF WATER DIVERSIONS IN MID-CALIFORNIA COASTAL STREAMS (2002), a draft set of protective guidelines created by the National Marine Fisheries Service).

[211] *See, e.g.*, Order No. WR 2006-18, at 4-5 (Cal. Water Res. Control Bd. Nov. 30, 2006), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2006/wro2006_0018.pdf (describing the SWRCB's use of a CEQA study prepared by the applicant).

[212] *See, e.g.*, Order No. WR 2000-13, at 20-38 (Cal. Water Res. Control Bd. Oct. 19, 2000), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2000/wro2000-13.pdf (providing CEQA and public trust issues discussion in a section entitled "CEQA and the Public Trust Doctrine").

[213] *See, e.g.*, Order No. WR 2004-40, at 2-3, 5 (Cal. Water Res. Control Bd. Sept.17,

Discerning the relative influence of these different legal requirements is not easy. The SWRCB often describes conditions as satisfying multiple legal mandates or imposes conditions without explaining which legal requirements those conditions were designed to implement.[214] The SWRCB also adopts conditions negotiated between applicants and protestors — particularly the CDFG — and the decisions and orders do not record what legal arguments the CDFG cited in support of its requests.[215] In an interview, a retired SWRCB environmental scientist said that the public trust doctrine was relevant to those negotiations, but as "a concept that's interwoven with all these other pieces."[216]

Despite these ambiguities, a few SWRCB documents contain signs of the doctrine's importance. Occasionally, the SWRCB's language indicates that the public trust doctrine played a significant role in its decision-making. Order 2008-14, which addressed a complex multiparty dispute over the Yuba River, is a good example.[217] There, the SWRCB repeatedly cited its public trust authority as a basis for rejecting a water supply agency's proposed flow regime in favor of one designed to provide fisheries with more protection.[218] Other decisions and orders, however, suggest a much less consequential role.[219] Perhaps most striking is a series of orders involving the Salton Sea.[220]

2004), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2004/wro2004_0040.pdf (noting the presence of steelhead trout, an ESA-protected species, in the affected stream).

[214] *See, e.g.*, Decision 1999-04 (Cal. Water Res. Control Bd., Div. of Water Rights, Dec. 29, 1999), *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/division_decisions/1999/1999_04dec.pdf (imposing several mitigation requirements to protect public trust resource, but not specifically citing the public trust doctrine or any other legal provision as authority for the requirements).

[215] I was not able to interview current CDFG staff on the record.

[216] Telephone Interview with Jim Canaday, Senior Envtl. Scientist (retired), Cal. State Water Res. Control Bd. (June 9, 2011). I also asked if he thought outcomes would have been different without the *Mono Lake Case*. His answer was "on a few decisions, yes." *Id.*

[217] Corrected Order No. 2008-14, *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2008/wro2008_0014corrected.pdf (Cal. Water Res. Control Bd. May 20, 2008).

[218] *Id.* at 18-29.

[219] *See, e.g.*, Order No. 2009-20 (Cal. Water Res. Control Bd. Mar. 20, 2009), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2009/wro2009_0020.pdf (imposing many conditions, but referring to the public trust doctrine only in reservation of authority boilerplate language).

[220] Order No. WR 2002-16 (Cal. Water Res. Control Bd. Dec. 20, 2002), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2002/wro2002-16.pdf; Revised Order No. 2002-13 (Cal. Water Res. Control Bd. Dec.

The Salton Sea's artificial creation has generated ambiguity about whether the public trust doctrine applies, and environmental groups argued that the SWRCB had erred in failing to treat the sea as a public trust resource.[221] In response, the SWRCB argued that statutory environmental protections made the public trust doctrine redundant and the debate irrelevant.[222] According to the SWRCB, the environmental groups' assumption "that the SWRCB would have afforded the Salton Sea greater protection if the SWRCB had found that the public trust doctrine applies to the Salton Sea is unsupported."[223]

While the language of decisions and orders sends ambiguous and conflicting signals about the doctrine's importance, another comparison supports a rough upper estimate of public trust doctrine's relative impact. In the period from January 1, 2005 to December 31, 2009, the SWRCB issued eighteen decisions and orders that invoked the public trust doctrine as a basis for imposing or upholding some sort of regulatory requirement.[224] During that same period, U.S. Fish and Wildlife Service and National Marine Fisheries Service offices in California, acting pursuant to Section 7 of the federal ESA,[225] issued approximately 500 "biological opinions" for fish species alone.[226] These biological opinions assess whether proposed federal agency actions would jeopardize the continued existence or adversely modify the critical habitat of threatened or endangered species.[227] Like the SWRCB's orders and decisions, these biological opinions almost invariably imposed conditions designed to protect fish.[228] While evaluating the relative stringency of the different sets of conditions is

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20, 2002), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2002/wro2002-13revised.pdf.

[221] Order 2002-16, *supra* note 220, at 19. In its current incarnation, the Salton Sea was created by an accidental flood and is sustained by irrigation return flows. Corrected Order 2002-13, *supra* note 220, at 6-8.

[222] Order 2002-16, *supra* note 220, at 19; Corrected Order 2002-13, *supra* note 220, at 19 n.5.

[223] Order 2002-16, *supra* note 220, at 19; Corrected Order 2002-13, *supra* note 220, at 19 n.5.

[224] *See supra* Table 1.

[225] 16 U.S.C. § 1536 (2006).

[226] These numbers come from a concurrent research project for which I have reviewed all fish-species-related biological opinions from this five-year period. *See* Owen, *supra* note 158, at 161-63 (describing my methodology). The supporting data tables for this study are on file with the author.

[227] *See* 16 U.S.C. § 1536.

[228] Owen, *supra* note 158, at 171-72.

difficult, they appear comparable to those imposed by the SWRCB.[229] If the number of decisions is a reasonable, albeit crude, measure of the level of impact, the ESA therefore is providing almost thirty times as much protection to species as the public trust doctrine.[230] In fact, the disparity of importance is probably much larger, because the conditions discussed in the biological opinions are usually grounded in the ESA alone.[231]

In summary, the SWRCB's decisions and orders demonstrate that the public trust doctrine is a factor in the agency's decision-making. The SWRCB discusses the public trust doctrine as one among many reasons for limiting the environmental impacts of new rights or permanent changes to existing rights. However, the doctrine's influence is mostly limited to these prospective changes; the SWRCB hardly ever invokes the doctrine to revise pre-existing rights. The doctrine's full impact upon SWRCB proceedings also is difficult to measure. The influence of the public trust doctrine is hard to separate from the influence of other legal doctrines, and the doctrine seems comfortably enmeshed within a system of statutory protections. The relationship is consistently complementary. At the administrative level, I found no evidence substantiating Richard Lazarus's fear that the public trust doctrine would undermine application of statutory or regulatory environmental law.[232] But the documentary evidence

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[229] *See id.* (describing conditions imposed through the consultation process). Some appear to be much more meaningful than anything required under the public trust doctrine. For example, Section 7 consultations and related litigation recently led to major restrictions on export pumping from the Sacramento-San Joaquin Delta, and those restrictions have constrained almost every subsequent decision, including many SWRCB orders, involving Bay-Delta exports. *See* Corrected Order WR 2009-40, at 6 (Cal. Water Res. Control Bd. July 3, 2009), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2009/wro2009_0040_dwr_corrected.pdf ("Rediversion of water at the Banks Pumping Plant and the Jones Pumping Plant pursuant to this Order is also subject to compliance by the operators with all applicable biological opinions, including the Delta Smelt Biological Opinion and the Salmon Biological Opinion, and any court orders applicable to these operations."); HANAK ET AL., *supra* note 5, at 64 (describing consultation and litigation); *id.* at 60 (showing pumping levels).

[230] *See* sources cited *supra* notes 224-26 and accompanying text.

[231] Unlike SWRCB decisions, which often cite multiple sources of law, *see supra* notes 207-216 and accompanying text, the biological opinions I reviewed cited only the ESA as a source of authority for imposing regulatory constraints.

The disparity also may be understated because these numbers do not include biological opinions for non-fish species like shorebirds or amphibians.

[232] *See* sources cited *supra* notes 138-140 and accompanying text (summarizing Lazarus's concerns about the public trust doctrine). This conclusion is consistent with the findings of scholars studying doctrinal developments in other states. *See, e.g.*,

suggests that the importance of the doctrine pales in comparison to the influence of statutory environmental laws.

IV. ADAPTING THE PUBLIC TRUST DOCTRINE TO A REGULATORY ERA

Several questions arise from the public trust doctrine's limited role in California water management. Why has the doctrine assumed so little discernable importance? And what lessons do the doctrine's apparently modest past accomplishments hold for its future? Past scholarship partially answered the two questions by asserting that the doctrine would play a relatively minor role in an era of administrative and statutory environmental law.[233] This Article provides empirical validation of those arguments. Particularly for new water uses, an administrative and statutory system appears to have partially, but not completely, obviated the need for the public trust doctrine.

Nevertheless, the historically limited impact of the public trust doctrine does not mean that the doctrine has no greater role to play. For all their strengths, environmental statutes and regulations still have their failings. Some statutes — though by no means all — focus on narrowly defined sets of environmental injuries and can encourage a myopic focus on particular environmental problems.[234] Perhaps more

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Craig, *supra* note 21, at 121-22 (documenting similar integration in Hawaii); Klass, *supra* note 22 (finding that public trust principles have been integrated into statutory schemes).

The United States Court of Federal Claims' recent decision in Casitas Municipal Water District v. United States does provide one data point in support of Lazarus's hypothesis, however. The United States had invoked California Fish & Game Code section 5937, which requires dam operators to keep below-dam fisheries in "good condition," as another background principles defense. *Id.* at *18. The court rejected the defense, however, concluding that because section 5937 was considered to be a legislative expression of the public trust doctrine, it must incorporate the balancing principles inherent in the public trust doctrine, and therefore could not elevate fish protection above the system of appropriative water rights. *Id.* at *18 n.20. Among all the decisions I reviewed, however, this curious little footnote is unique; nowhere else did I see evidence of a court relying in any way on the public trust doctrine to weaken statutory environmental protections.

[233] *See, e.g.*, Lazarus, *supra* note 50, at 656-91 (arguing that the doctrine had little to add to statutory and administrative environmental law); Walston, *supra* note 60, at 63 (arguing that environmentalists' "remedy is not found in distant, exotic common law jungles. Rather, it is found in statutory principles closer to home").

[234] This critique is most frequently leveled at the ESA, which focuses on the protection of individual species and their habitat. *See, e.g.*, John Charles Kunich, *Preserving the Womb of the Unknown Species Through Hotspots Legislation*, 52 HASTINGS L.J. 1149, 1149-50 (2001) (faulting this single-species focus). Statutes like NEPA and its state-law counterparts, by contrast, do provide for a more holistic approach to environmental impacts.

importantly, many environmental regulatory systems function primarily to blunt the environmental impacts of new actions while providing fewer and less effective remedies for the environmental impacts of the physical and legal status quo.[235] The public trust doctrine, which can address a broad range of environmental impacts and (theoretically) provides a basis for re-evaluating present circumstances, is a potentially valuable supplement.

Getting the public trust doctrine to play that role, however, requires a different way of thinking about the doctrine. Public trust thinkers have largely focused on judicial articulations of the substance of the doctrine. An implicit premise of this approach is that the combination of a well-articulated doctrine and the availability of judicial review should suffice to produce better environmental outcomes.[236] In contrast, many analysts of statutory environmental law assume that effective environmental protection requires those basic elements and more.[237] Consequently, they have embraced environmental law's integration with the procedures and institutions of administrative governance as something to be developed rather than decried.[238] Their

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[235] NEPA and Section 7 of the ESA provide the most prominent examples of this problem, for both are directed at new federal actions, not at the ongoing effects of decisions already made. *See, e.g.*, Cal. Sportfishing Prot. Alliance v. F.E.R.C., 472 F.3d 593 (9th Cir. 2006) (holding that Section 7 does not require consultation on the effects on a newly listed species of an already-licensed hydroelectric project). Such grandfathering is a common feature of environmental law. *See* Bruce R. Huber, *Transition Policy in Environmental Law*, 35 HARV. ENVTL. L. REV. 91, 91 (2011).

[236] *See, e.g.*, Mary Christina Wood, *Atmospheric Trust Litigation*, *in* CLIMATE CHANGE READER (W.H. Rodgers, Jr. & M. Robinson-Dorn eds. 2009), *available at* http://www.law.uoregon.edu/faculty/mwood/docs/atmo.pdf ("[M]ap[ping] out a remedy by which courts can invoke their injunctive powers to impose carbon responsibility on government at all levels."); Sax, *supra* note 40 (emphasizing the judicial role in implementing the public trust doctrine). *But see* Scanlan, *supra* note 16, at 140 (arguing that agency culture and political pressures will still play important roles even where courts articulate a robust version of the public trust doctrine).

[237] *See generally* LAZARUS, *supra* note 49, at 85-86 (describing the importance of NEPA's procedures); *id.* at 68-69 (explaining the importance of creating environmental institutions like EPA); Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59, 69, 72-73 (1992) (explaining the importance of procedures to the implementation of environmental law).

[238] Many articles address these basic questions. *See, e.g.*, J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2218 (2005) (arguing that public agencies actually can and do function as effective environmental advocates); Richard Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 L. & CONTEMP. PROBS. 311, 341-69 (1991) (arguing that distrust of EPA has undermined the implementation of environmental law, and proposing reforms designed to promote a more robust EPA role). For a less favorable view of the roles of agencies in environmental law implementation, see Wood, supra

work provides many metrics by which an environmental regulatory system can be evaluated, two of which — the robustness of decision-making procedures and the adequacy of provisions for delivering information to decision-makers — I focus on here. Each could be a key determinant of the future utility of public trust concepts, and each offers a promising and at least moderately plausible option for reform.

A. Procedures

As every environmental law student learns, procedures are essential components of statutory and regulatory environmental law.[239] Almost every major environmental statute has significant procedural requirements; some contain nothing else.[240] Those procedural provisions establish methods for initiating agency proceedings, for gathering and publicizing information about environmental consequences, for allowing input from other agencies and from the public, for documenting and justifying decisions, and for bringing proceedings to completion.[241] Many statutes also allow private petitions to compel compliance with those procedural mandates.[242] The importance of these measures is hard to overstate. Procedural design is widely and correctly viewed as integral to the success or failure of an environmental regulatory scheme.[243]

To most environmental scholars, the observations of the preceding paragraph may seem rather banal. The role of procedures in

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note 33, at 61, lamenting that "something close to an administrative tyranny now presides over Nature".

[239] *See* Nicholas A. Robinson, *Legal Systems, Decisionmaking, and the Science of the Earth's Systems: Procedural Missing Links*, 27 ECOLOGY L.Q. 1077, 1084 (2001) ("Conceiving, employing, and refining procedures lies at the core of environmental law.").

[240] *See, e.g.*, Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) ("[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.").

[241] *E.g.*, 16 U.S.C. § 1536 (2006) (procedures for interagency consultation); 42 U.S.C. § 4332 (2006) (creating procedures for environmental impact review); *see* DeShazo & Freeman, *supra* note 238, at 2252-60 (describing the creation of legal mechanisms facilitating interagency lobbying in hydroelectric licensing proceedings); James D. Fine & Dave Owen, *Technocracy and Democracy: Conflicts Between Models and Participation in Environmental Law and Planning*, 56 HASTINGS L.J. 901, 916-19 (2005) (describing procedures for public participation).

[242] *See generally* Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law*, 58 UCLA L. REV. 321, 327-28 (2010) (describing the role of such petitions).

[243] *See, e.g.*, Robinson, *supra* note 239 (commenting on the central role of procedures in environmental law).

environmental law is so well documented that it might not seem worth mentioning. Yet, at least in California, the public trust doctrine is environmental law with minimal procedures. The *Mono Lake Case* held that public agencies are required to consider public trust impacts, but it only established limited procedural requirements for putting that mandate into effect.[244] Subsequent court decisions have provided little additional procedural development.[245] The SWRCB has established no procedures specifically tailored to the implementation of the public trust doctrine, and the California Legislature has hardly ever enacted any such legislation.[246] Interested parties do have the ability to petition the SWRCB to initiate a public trust proceeding, but the public trust doctrine has no other process of its own.[247]

In the absence of any dedicated procedural framework, the public trust doctrine utilizes procedural requirements established by other statutes. That approach has succeeded to some extent, for those procedural requirements are extensive. The Calfornia Water Code already provides procedures for considering new water rights applications and changes to existing rights, including measures designed to facilitate the participation of other agencies and of interested members of the public.[248] CEQA establishes extensive procedural requirements for assessing the environmental impacts of proposed agency decisions, and compliance with those requirements can facilitate evaluation of public trust impacts.[249] For proposed new actions, there is limited need for an independent set of public trust decision-making procedures. Not surprisingly, evaluations of those activities' public trust impacts are reasonably robust.[250]

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[244] The court did hold that provisions of the water code created a right to initiate a public trust proceeding. *Mono Lake Case*, 658 P.2d 709, 730 (Cal. 1983). The decision otherwise says little about procedures for testing the scope of public trust protections. The contrast to CEQA, which contains dozens of detailed procedural provisions, is striking. *See* CAL. PUB. RES. CODE §§ 21000-177 (West 2011).

[245] *See supra* notes 149-154 and accompanying text (discussing cases).

[246] The only exception I am aware of is recently enacted CAL. WATER CODE § 85086(c)(1) (West 2011), which mandates a public trust proceeding for the Sacramento-San Joaquin Bay-Delta.

[247] *See In re* Water of Hallett Creek Stream Sys., 749 P.2d 324, 337 n.16 (Cal. 1988) ("This court has also recognized the standing . . of any member of the general public to raise a claim of harm to the public trust. Such claims may be brought in the courts or before the Board.") (citations omitted).

[248] *E.g.*, CAL. WATER CODE §§ 1300-02 (West 2011) (requiring notice of water right applications and providing procedures for protesting those applications).

[249] CAL. PUB. RES. CODE §§ 21000-177 (West 2011).

[250] *See supra* notes 190-232 and accompanying text.

In two specific contexts, however, the absence of specific public trust procedures is a salient problem. The first involves the ongoing exploitation of existing water rights.[251] If a water right holder is just exercising existing rights without seeking a new permit or other agency approval, neither Water Code procedural requirements nor CEQA is triggered.[252] Consequently, essentially no mandatory procedure for evaluating public trust impacts exists.[253] In theory, the SWRCB could initiate a public trust proceeding, or interested parties could petition for one.[254] Absent such an affirmative effort, however, nothing will happen. The SWRCB lacks any protocol or schedule for periodic review of public trust impacts, and even if a petitioner does request public trust review of an existing permit, the SWRCB claims broad discretion to deny the request.[255] It should be no great surprise, then, that the SWRCB hardly ever reconsiders existing water rights, even though the exercise of those rights continues to create enormous impacts to public trust resources.[256] It has a theoretical mandate to do so, but no real procedural obligation to put that mandate into effect.

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[251] Importantly, acting pursuant to an existing right doesn't necessarily mean maintaining the status quo. Many California water users have historically used less than their full water allocations and may therefore be able to increase their level of use, sometimes substantially, without seeking SWRCB approval. *See, e.g.*, Owen, *supra* note 101, at 1181-82 (describing water allocations from the Central Valley Project and State Water Project).

[252] *See, e.g.*, Nacimiento Reg'l Water Mgmt. Advisory Comm. v. Monterey Cnty. Water Agency, 19 Cal. Rptr. 2d 1, 2 (Cal. Ct. App. 1993) (holding "that the agency's annual decision to release varying amounts of water" from a project constructed and licensed prior to the enactment of CEQA "is part of an ongoing project, and is therefore exempt from CEQA").

[253] *See, e.g., id.* (exempting ongoing activity from environmental review).

[254] *In re* Water of Hallett Creek Stream Sys., 749 P.2d 324, 337 n.16 (Cal. 1988) (recognizing a public right to petition for evaluation of public trust impacts). A third possibility is that the legislature could mandate specific public trust proceedings, as it recently did for the Sacramento-San Joaquin Bay-Delta. *See* CAL. WATER CODE § 85086(c)(1) (West 2011). Such legislative intervention represents a significant and sensible step, but a similar level of legislative interest seems highly unlikely to recur for the hundreds of waterways where established water uses and public trust values come into conflict.

[255] *See, e.g.*, Order No. WR 91-06, at 4 (Cal. Water Res. Control Bd. Aug. 22, 1991), *available at* http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/1991/wro91-06.pdf (dismissing a California Sportfishing Protection Alliance complaint, which had requested a public trust proceeding, because "a State Board proceeding to address the issues raised in the complaint would require commitment of substantial resources from the engineering, environmental, and legal staffs," and the SWRCB did not view the stream at issue as important enough to justify those commitments).

[256] *See supra* notes 200204 and accompanying text. For a partial sampling of the

The second context arises when the procedural requirements of other environmental laws do apply, but those requirements do not prompt the SWRCB to act.[257] For example, water right holders often are involved in "consultations" under Section 7 of the federal ESA.[258] In these consultation processes, the Fish and Wildlife Service or National Marine Fisheries Service assesses whether proposed actions will "jeopardize" protected species or adversely modify their critical habitat.[259] Consultations are procedurally complex and typically produce substantial documentation of the public trust impacts of the federal action at issue.[260] Therefore, they provide opportunities for re-evaluating the public trust duties of water right holders and the SWRCB. But because consultation is a federal process conducted by federal agencies, the SWRCB has no obligation to participate.[261] On rare occasions, the SWRCB reacts to consultations by reconsidering existing water rights.[262] Usually, however, federal and state processes

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enormous body of literature documenting harms to California's public trust resources, see HANAK ET AL., *supra* note 5, at 185-88, 199-206, describing "a widespread crisis for native aquatic ecosystems in California"; and Harrison P. Dunning, *Confronting the Legacy of Irrigated Agriculture in the West: The Case of the Central Valley Project*, 23 ENVTL. L. 943, 966 (1993).

[257] Another sometimes-overlapping opportunity would arise when the California Department of Water Resources and the Bureau of Reclamation renew or revise their water supply contracts. These contract renewals require no SWRCB approval, but they do involve environmental review under other statutes. *See* Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1125-28 (9th Cir. 1998) (holding that federal contract renewals trigger ESA's consultation requirement); Planning & Conservation League v. Dept. of Water Res., 100 Cal. Rptr. 2d 173, 180-82 (Cal. Ct. App. 2000) (discussing amendments to Department of Water Resources' long-term contracts).

[258] Consultations are triggered only by federal agency actions, but the federal government is a major holder of water rights in California. *See, e.g.*, Pac. Coast Fed'n of Fishermen's Ass'n v. Gutierrez, 606 F. Supp. 2d 1122 (E.D. Cal. 2008) (considering a consultation process with enormous implications for water right holders); NRDC v. Kempthorne, 506 F. Supp. 2d 322 (E.D. Cal. 2007) (same). The federal government also manages infrastructure used to deliver water to many state or private water right holders, and it often takes actions adjusting its management of that infrastructure. *See, e.g.*, Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1280-83 (Fed. Cir. 2008) (describing operation of the Ventura River Project).

[259] *See* 16 U.S.C. § 1536 (2006).

[260] *See* Owen, *supra* note 158, at 151-52 (describing the contents of biological opinions).

[261] *See* 16 U.S.C. § 1536 (imposing obligations only upon federal agencies).

[262] *See, e.g.*, Order No. WR 92-02 (Cal. Water Res. Control Bd. Mar. 19, 1992) (revising salinity control requirements imposed on the California Department of Water Resources and the United States Bureau of Reclamation to align those requirements with "reasonable and prudent alternatives" specified in federal biological opinions).

occur on separate tracks, if any state process occurs at all.[263] Consequently, federal efforts to protect public trust resources are often disjointed from any reconsideration of state public trust obligations.[264]

There are two potential solutions to these problems. First, the SWRCB should have a default schedule for periodically reviewing the public trust impacts of existing rights. This would end the SWRCB's dependence on its own ad hoc and infrequent initiation of proceedings, or on petitioners' rare requests to re-evaluate public trust impacts.[265] Second, the SWRCB would benefit from a policy of reconsidering public trust obligations any time a federal decision-making process involves an assessment of the public trust impacts of existing water rights. Both changes would require staff time and effort. Both also would generate political controversy; any measure that involves revisiting established resource allocations is likely to be contentious.[266] Nevertheless, both proposed solutions would be preferable to the present improvised system, in which environmentally destructive water uses often continue unabated until checked — sometimes drastically and almost always contentiously — by the requirements of other environmental laws.[267]

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[263] While hundreds of consultations occurred during the 1984-2010 period, I found less than a handful of examples of SWRCB orders citing biological opinions as a reason for re-examining public trust obligations. *See also* Casitas Municipal Water Dist. v. United States, No. 05-168L, 2011 U.S. Claims LEXIS 2289, at *5 - *6 (Fed. Cl. Dec. 5, 2011) (describing the SWRCB's decision to refrain from reconsidering a water user's public trust obligations precisely because a section 7 consultation was pending).

[264] *See, e.g.*, Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 321-22 (2001). In *Tulare Lake*, the Court of Claims considered whether water use restrictions flowing from two biological opinions effected a taking. After the biological opinions were issued, the SWRCB issued Order No. 92-02, which excused the water users from compliance with salinity standards but did not, in the court's view, revise the underlying water rights. It was not until 1995, after the period on which the takings claims were based, that the SWRCB issued a decision revising the underlying rights to reconcile them with the federal controls. In the court's view, this delay was crucially important, and the federal government was liable for a taking for the period when federal controls alone applied. *Id.*

[265] For a somewhat similar suggestion, see HANAK ET AL., *supra* note 5, at 425 (arguing for the creation of a "public trust advocate" within a newly created Department of Water Management or within the SWRCB).

[266] The state would also lose some of the political expedience of the current approach, which sometimes allows the state to claim the environmental benefits of protection while leaving the political burdens of regulating to the federal government.

[267] *See* Owen, *supra* note 101, at 1199-203 (describing the demise of the "CALFED" program, which collapsed partly in response to litigation under the ESA).

B. Information

Information is the "lifeblood" of environmental regulation.[268] It allows agencies to track environmental conditions, identify threats, set priorities, develop policies, and justify their actions to the public and the courts.[269] Conversely, if the consequences of potentially regulated activities are unknown, as is often the case, or if regulated entities decline to provide or selectively provide information, agency decision-making can become paralyzed.[270] But information is not self-generating,[271] and lawmakers do not always provide agencies with mechanisms to obtain the information they need, or with adequate incentives to regulate where significant information gaps exist.[272] The SWRCB's public trust decision-making is no exception to this general rule. The SWRCB cannot effectively implement the doctrine without adequate information about impacts to public trust resources, and there is no reason to presume that the SWRCB will always possess the information it needs.

For proposed new water rights and applications to change existing water rights, these informational challenges exist but are far from insurmountable.[273] The California Water Code requires applicants for new rights or for revisions to existing rights to provide information

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[268] Cary Coglianese et al., *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 277 (2004); *see, e.g.*, Holly Doremus, *Data Gaps in Natural Resource Management: Sniffing for Leaks Along the Information Pipeline*, 83 IND. L.J. 407, 408 (2008) (emphasizing the importance of information for environmental regulation); Jody Freeman & Daniel Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 824-25 (2005) (describing environmental agencies' ongoing information needs); Wendy Wagner, Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment, 53 DUKE L.J. 1619 (2004) (emphasizing the common inability of environmental regulators to access needed informaiton).

[269] *See* Coglianese et al., *supra* note 268, at 278-80; Doremus, *supra* note 268, at 408-10.

[270] *See* Wagner, *supra* note 268, at 1633-59 (explaining regulated entities' disincentives for information disclosure).

[271] For that reason, informational measures and procedural requirements often go hand in hand, and procedural and informational public trust reforms would function best as a combined package.

[272] *See generally* Doremus, *supra* note 268 (exploring why regulators so often confront data gaps); Wagner, *supra* note 268, at 1624-25, 1670-717 (discussing failures to require needed information and identifying disincentives to regulatory action in the absence of such information).

[273] The exception is short-term water transfers, which are specifically exempted from CEQA compliance. *See* HANAK ET AL., *supra* note 5, at 333-35 (explaining and criticizing this exemption).

about the consequences of their proposed changes.[274] CEQA also requires disclosure of the environmental impacts of most new water uses, and the SWRCB can compel applicants to produce the information needed to support CEQA studies.[275] If an applicant furnishes insufficient information, the SWRCB can demand more supporting documentation, or protestors can supply supplemental information.[276]

When water users are exercising existing rights and not requesting regulatory authorization for some change, however, informational burdens fall very differently. So long as an existing user is not trying to change its point of diversion or place or purpose of use, the Water Code does not empower the SWRCB to demand information on the environmental consequences of that ongoing use. Until quite recently, many water users were not even required to report how much water they were using.[277] Similarly, ongoing water use generally does not trigger CEQA at all, and the SWRCB therefore has no basis for requiring an environmental impact report.[278] The SWRCB also lacks good mechanisms for correcting these informational shortfalls. Theoretically, it can undertake its own studies of the environmental impacts of existing uses. But with so many water users and such a limited agency budget, those studies are difficult to pursue.[279] The

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[274] *See, e.g.*, CAL. WATER CODE § 1260 (West 2011) (requiring water right applicants to submit, among other information, "[a]ll data and information reasonably available to applicant or that can be obtained from the Department of Fish and Game concerning the extent, if any, to which fish and wildlife would be affected by the appropriation, and a statement of any measures proposed to be taken for the protection of fish and wildlife in connection with the appropriation"); CAL. WATER CODE § 1727 (West 2011) (placing on applicants for temporary transfers the "burden of establishing" that "[t]he proposed temporary change would not unreasonably affect fish, wildlife, or other instream beneficial uses").

[275] *See* CAL. PUB. RES. CODE §§ 21000-177 (West 2011). Temporary water transfers are generally exempt from CEQA compliance, however. CAL. WATER CODE § 1729 (West 2011).

[276] CAL. WATER CODE §§ 1331(a)-(d) (West 2011) (allowing protestors to submit "other information"); *id.* § 1334 (allowing the SWRCB to request information from applicants or protestors).

[277] Christian L. Marsh & Peter S. Prows, *California's New Water Legislation: A Bucket of Reform or But a Drop?*, 25 NAT. RES. & ENVTL. 37, 39-40 (2010) (describing new requirements for agricultural users, holders of pre-1914 appropriative rights, and holders of riparian rights); *see* HANAK ET AL., *supra* note 5, at 330-31 (noting pervasive gaps in reporting of California water use).

[278] If, however, an existing right-holder needs to renew a water contract, and that right-holder is a public agency, the procedural requirements of several environmental laws may apply. *See supra* note 257 and accompanying text.

[279] *See, e.g.*, Order No. WR 91-06, at 5 (Cal. Water Res. Control Bd. Aug. 22,

SWRCB also can rely on studies produced by university researchers or other third parties, and for a few exceptional waterways those studies are extensive.[280] For most waterways, however, the SWRCB has an obligation to continuously reassess public trust impacts, but it lacks effective mechanisms for getting the information needed to carry that mission out.[281]

Several reforms could address these informational shortfalls. First, obligating water users to participate in or provide financial support for an ongoing monitoring program could help the SWRCB fulfill its obligation to continuously reevaluate water uses.[282] Second, the California Legislature could allow the SWRCB to demand information from water users whose activities may create significant public trust impacts. Third, the SWRCB could take more extensive advantage of processes — most notably Section 7 consultations — that do generate information about the public trust impacts of water use under pre-established rights.[283] Even with these changes, informational challenges would remain; aquatic systems are complex and often difficult to understand.[284] But the SWRCB would be at least somewhat better positioned to regulate public trust impacts.

1991), *available at* http://www.swrcb.ca.gov/waterrights/board_decisions/adopted_orders/orders/1991/wro91-06.pdf (rejecting a petitioner's request for a public trust proceeding partly because "[i]n addition to the necessary technical studies, State Board action to grant the relief requested in the complaint probably would require further documentation and analysis to comply with [CEQA]. No source of funding for an environmental impact report or other CEQA documentation has been identified."); Hanemann & Dyckman, *supra* note 111, at 722-23 (explaining how independent studies of Mono Lake facilitated informed action by the SWRCB, but noting that the absence of similar studies of the Bay-Delta hampered the Board's effectiveness). Even those studies, however, required external funding. *See* Hanemann & Dyckman, *supra* note 111, at 723 n.82.

[280] The Sacramento-San Joaquin Bay-Delta, for example, has been heavily studied over the past fifteen years. *See, e.g.*, JAY LUND ET AL., COMPARING FUTURES FOR THE SACRAMENTO-SAN JOAQUIN DELTA (2008) (describing potential solutions to the Bay-Delta's environmental ills). Many of the COMPARING FUTURES authors are affiliated with the UC Davis, and similar university-based research or university-agency collaborative work could provide a valuable supplement to the SWRCB's own meager research resources.

[281] *See Mono Lake Case*, 658 P.2d 709, 721-24 (Cal. 1983) (establishing this obligation).

[282] *See* HANAK ET AL., *supra* note 5, at 344-46 (suggesting a "public goods charge" on water use).

[283] *See supra* notes 258-64 and accompanying text.

[284] *See generally* HANAK ET AL., *supra* note 5, at 248 (identifying uncertainty as a central challenge of water management).

As with any increase in procedural requirements, these changes would be controversial. Information production costs money and, if it reveals significant environmental problems, can create legal vulnerability.[285] Water users therefore are likely to strongly oppose any additional disclosure requirements.[286] Some of the produced information would likely be self-serving, and its validity would almost certainly be hotly contested.[287] But the benefits of such disclosure should be well worth the controversy. Informational reforms would ameliorate some of the dysfunctions inherent in a regulatory system in which the regulators often lack sufficient information to do their jobs.

CONCLUSION

For decades, environmental lawyers have viewed the *Mono Lake Case* as exemplifying the promise of the public trust doctrine.[288] The case combined a dramatic setting, a compelling historical narrative, and, seemingly, a fundamental legal transformation. That the transformation came not through complex legislative provisions that "virtually swim before one's eyes" or through highly technical regulations, but instead through an eloquent judicial decision, only heightens the appeal.[289] According to conventional wisdom, this was "effective judicial intervention" at its finest, a sort of *Brown v. Board of Education* for the environmental movement.[290]

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[285] *See* Wagner, *supra* note 268, at 1631 (exploring regulated entities' disincentives for information production).

[286] Litigation over water rights fees provides a potential preview of the vehemence of the opposition. In 2004, in response to legislation compelling it to impose fees in order to partially make up a budgetary shortfall, the SWRCB imposed water right fees designed to partially fund its operations. It was promptly sued by many of California's major water user groups. *See* Cal. Farm Bureau Fed'n v. State Water Res. Control Bd., 247 P.3d 112, 119-22 (Cal. 2011) (explaining the history of the fees).

[287] *See* Freeman & Farber, *supra* note 268, at 846 (describing the distrust attached to much of the scientific information produced in disputes over the Sacramento-San Joaquin Bay-Delta).

[288] *See supra* notes 5-8 and accompanying text (describing the case's perceived importance).

[289] United States Steel Corp. v. United States Envtl. Prot. Agency, 444 U.S. 1035, 1035 (1980) (Rehnquist, J., dissenting from denial of certiorari) ("Admittedly, it would be easier to decide a case turning on common-law principles of property or contract, and more interesting to decide a case involving competing fundamental principles of constitutional law.").

[290] Brown v. Bd. of Educ., 347 U.S. 483 (1954). Of course, there is vigorous debate about whether *Brown*'s effects justify its iconic status. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008) (questioning Brown's importance); William N. Eskridge, Jr., *Channeling: Identity-Based*

The public trust cases and administrative orders and decisions following the *Mono Lake Case* provide sparse support for that conventional wisdom, however. The *Mono Lake Case* helped trigger a dramatic change in the Mono Lake basin itself, but there is little evidence of a broader transformative effect throughout California. Instead, nearly thirty years of judicial and agency decisions reveal a doctrine with real but relatively modest importance for California water management.

I argue that public trust doctrine's meager influence is problematic and suggest several fixes designed to increase the doctrine's relevance, particularly with respect to established water rights. But these recommendations raise deeper questions: why these changes, and why not instead argue for re-energizing judicial enforcement of the doctrine?[291] After all, the public trust doctrine often has been understood as a doctrine primarily by and for the judiciary. To condone the doctrine's intertwinement with administrative regulatory governance, and to accept a modest role within that administrative structure, may seem a defeatist approach. Re-animating the doctrine through a broad program of impact litigation might appear far more enticing.

Perhaps such a program will yet succeed, but in this country and this historical moment it holds little promise.[292] Many judges are deeply wary of common law impact litigation and seem acutely aware of the limits of their competence in matters of environmental science

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Social Movements and Public Law, 150 U. PA. L. REV. 419, 446 (2001) (asserting that *Brown* "stimulated a decades-long process by which school boards, episodically prodded by judges and powerfully prodded by the federal Department of Health, Education and Welfare after 1965, were forced to adopt school systems that did not discriminate on the basis of race"); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994) (arguing that Brown did facilitate legislative change, but primarily by provoking ugly, televised outbreaks of racial violence that northern whites found intolerable). If *Brown* is correctly viewed as a case that did change outcomes, but primarily through an expression of values later translated into concrete law by legislative and administrative action, then *Brown* and the *Mono Lake Case* may in fact be similar.

[291] *See, e.g.*, Wood, *supra* note 236 (arguing for an ambitious program of atmospheric trust litigation).

[292] This challenge is by no means unique to environmental law, and the literature questioning the capacity of courts to induce social change is extensive. *See, e.g.*, ROSENBERG, *supra* note 290 (questioning the influence of civil rights litigation). *But see* Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539 (2009) (arguing that judicial opinions do play an important role); Charles F. Sabel & William A. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004) (arguing the public law impact litigation can play an influential role).

and policy, and "judicial activist" remains a popular and resonant antijudicial slur.[293] In such a climate, bold assertions of judicial power over administrative agencies are unlikely to occur with any regularity.[294] Indeed, as many environmental litigators will readily acknowledge, prevailing on traditional statutory claims is hard enough.[295] The thirty-year judicial record explored in this Article amply illustrates that judicial reticence. California has faced no shortage of threats to public trust resources and no lack of water law litigation.[296] In all that water litigation, however, the public trust doctrine was only marginally relevant.

Conversely, the thirty-year record of the SWRCB and its fellow agencies shows that an administrative forum can be a promising focus for reform. The SWRCB is rarely applying the public trust doctrine to established rights, but when confronted with new applications or petitions, the SWRCB protects public trust resources reasonably well, albeit through a combination of environmental laws rather than through the public trust doctrine alone.[297] It is bolstered in those efforts not just by environmental groups, but also by other administrative agencies.[298] With a few additional procedural triggers and informational requirements, the doctrine's influence at the administrative level could expand. As tempting as calls for greater judicial involvement may be, those reforms probably offer the doctrine's best future hope. Achieving the greatest future impact of the

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[293] *See* William P. Marshall, *Judicial Takings, Judicial Speech, and Doctrinal Acceptance of the Model of the Judge as Political Actor*, 6 DUKE J. CONST. L. & PUB. POL'Y 1, 6 (2011) (describing the use of accusations of activism); Emily Hammond Meazell, *Super-Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 737 & n.19 (2011) (noting the frequent invocation of "super-deference" principles in environmental law cases).

[294] The fate of the recent climate change nuisance cases, all of which were dismissed by district courts, exemplifies that wariness. *See* Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005), *rev'd*, 582 F.3d 309 (2d Cir. 2009), *dismissal aff'd*, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011) (dismissing a climate change nuisance case on political question grounds); California v. Gen. Motors Corp., No. C06-05755, 2007 WL 2726871, at *3 (N.D. Cal. Sept. 17, 2007) (same).

[295] *See* Vic Sher, *Breaking out of the Box: Toxic Risk, Government Action, and Constitutional Rights*, 13 J. ENVTL. L. & LITIG. 145, 149 (1998) (noting that environmental groups win cases primarily in response to governmental "arrogance, incompetence, or outright efforts to evade the law").

[296] The importance of CEQA to water litigation provides an instructive contrast. *See* Owen, *supra* note 101, at 1186 n.276 (listing some of the many cases in which plaintiffs have successfully used CEQA to challenge proposed water uses).

[297] *See supra* Part IV.B.

[298] *See supra* notes 119-216 and accompanying text.

public trust doctrine will require more effective integration into the larger system of administrative environmental law.

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