8/3/10 Bd Mtg Item 12
Delta Flow Criteria
Deadline: 7/29/10 by 12 noon

commentletters - Comment regarding Draft Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem Report

From: Rick Wood <rlw895@sbcglobal.net>
To: <commentletters@waterboards.ca.gov>
Date: 7/29/2010 10:40 AM
Subject: Comment regarding Draft Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem Report
Attachments: Public Trust.pdf

Dear Ms. Townsend:

The Draft Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem Report is correct in its premise that the Public Trust Doctrine, as applied to water rights per the *National Audubon* decision, only reaches "unimpaired flows." In support, I offer my attached paper, which originally appeared in the October 2001 issue of California Water Law & Policy Reporter. (In this paper, I use the term "natural flows" synonymously with the report's use of the term "unimpaired flows.")

The report's premise contrasts with Footnote 8 in Appendix A on Page 165, where The Bay Institute, et al., states "Recommendations occassionaly (sic) exceed unimpaired outflow in limited cases (would require reservoir releases in fall independent of antecedent conditions)," and my comment provides a counterargument to that footnote. It is only through properly crafted Physical Solution that the Public Trust can compel the release of previously stored water, and, as the report implies, application of the Physical Solution Doctrine is outside of the report's scope.

A full discussion of my views of (and comments on) the Physical Solution Doctrine is contained in the companion paper to the attachment. I would be happy to provide a copy the most recent version of that paper at your request.

Rick Wood

CAN THE PUBLIC TRUST DOCTRINE COMPEL THE RELEASE OF STORED WATER OUTSIDE OF A PHYSICAL SOLUTION?

by Richard L. Wood

Introduction

In a recent article, I postulated that it was only by the device of a physical solution that California water law allows the public trust doctrine to compel the release of water previously and lawfully diverted to storage (see Richard L. Wood, *The Physical Solution Doctrine: Extraordinary Judicial Power Requires Extraordinary Adherence to Procedure*, 5 Western Water Law & Policy Reporter 241 (July 2001) at 243). It seems appropriate at this time to follow up with an article in support of that postulation.

The Doctrines Defined

The public trust doctrine has been much commented upon and debated since the California Supreme Court expanded it into the water rights context in *National Audubon Society v. Superior Court* (1983) 33 Cal. 3d 419 (hereinafter "*National Audubon*"). The best expression of the public trust doctrine is perhaps found in *National Audubon* itself, which states: "[T]he public trust is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands, and tidelands." (*National Audubon*, p. 441.) The doctrine requires

the state to balance public trust interests with water appropriation interests to ensure that the "benefit gained" by appropriation "is worth the price." Furthermore, "[o]nce the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water...in light of current knowledge...[and] current needs." (*National Audubon*, p. 447.)

The physical solution doctrine rests on Article X, §2 of the California Constitution, which advances a policy favoring the maximum beneficial use of the state's waters by prohibiting waste or unreasonable water use or method of use. Once a judicial body (e.g., a court or the State Water Resources Control Board acting in its judicial capacity) determines it can impose a certain judgment on a junior water right holder based on a pure application of the priorities established by water rights law, Article X, §2 requires the judicial body to determine if a more efficient (i.e., less wasteful or more reasonable) "physical solution" exists that comparably protects senior right holders. In this context, "senior right holders" might include individuals asserting certain common law or statutory environmental rights, such as those established by the public trust doctrine.

Opinion on Stored Water Releases is Near Unanimous and Supported by Public Policy

In my case and literature research, I found no credible authority for the proposition that the public trust doctrine gives courts or the State Water

Resources Control Board (hereinafter, "SWRCB") authority to convert storage capacity or stored water to public trust uses without meeting the procedural and factual requirements of the physical solution doctrine. In fact, a contrary view would constitute a change in California water law that would disrupt the reasonable expectations of water right holders and their beneficiaries, in direct contradiction of *National Audubon* (see *National Audubon* at 446), and such an expansion of common law authority would be contrary to public policy (see generally, Arthur L. Littleworth, *The Public Trust vs. The Public Interest*, 19 Pacific Law Journal 1201 (1988); Roderick E. Walston, *The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy*, 22 Santa Clara Law Review 63 (1982); and Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa Law Review 631 (1986)).

Born of an urgent necessity to halt deterioration of Mono Lake, the public trust doctrine of California water law must be recognized as a "legal fiction," albeit a valuable one, that should be applied with great care (see Lazarus, *supra*, at 656-657; see also Littleworth, *supra*, at 1202-1203). There is certainly no necessity to *expand* the public trust doctrine, because it has already had the desired effect: By allowing environmental interests to challenge vested water rights that predate statutory protections for instream water uses, the doctrine has tipped the balance in water rights proceedings more toward the way contemporary society values water resources (see Littleworth, *supra*, at 1209-1210 and Gregory S. Weber,

Articulating the Public Trust: Text, Near-Text and Context, 27 Arizona State Law Journal 1155 (1995) at 1180; see also Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 Environmental Law 425 (1989) at 470).

The public trust doctrine has also allowed the SWRCB to reach water rights over which the SWRCB has no statutory jurisdiction; in particular, pre-1914 appropriative water rights and at least some water rights vested by license; and it has "invited the structuring of long-term physical solutions to resource development projects, in which both production and ecosystem preservation could be brought about" (Joseph L. Sax, *Bringing an Ecological Perspective to Natural Resources Law: Fulfilling the Promise of the Public Trust*, Natural Resources Policy and Law 148, Lawrence J. MacDonnell & Sarah F. Bates, eds., (1993) at 152; see also Wood, *supra*, at 242-243).

A Call for Greater Articulation of the Public Trust Doctrine

The bounds of the public trust doctrine, however, remain poorly defined (see Weber (1995), *supra*, at 1156 and in *The Role of Environmental Law in the California Water Allocation and Use System: An Overview*, 25 Pacific Law Journal 907 (1994) at p. 923; Lazarus, *supra*, at p. 657; and Clifford W. Schulz & Gregory S. Weber, *Changing Judicial Attitudes Towards Property Rights in California Water Resources: From Vested Rights to Utilitarian Reallocations*,

19 Pacific Law Journal 1031 (1988) at pp. 1093-1098). It is noteworthy that since *National Audubon*, few other states have followed California's lead.

National Audubon remains good law, and this article is not intended to suggest that it be overruled. Eighteen years after *National Audubon*, however, it is past time for the courts (or the legislature) to provide greater definition and certainty in how the public trust doctrine applies to water rights (see Littleworth, *supra*, at p. 1223 and Lazarus, *supra*, at p. 710; see also generally Weber (1995), *supra*, in which Professor Weber makes a Herculean effort to chart the doctrine as it had evolved in the first twelve years after *National Audubon*).

Perhaps because the California courts have provided relatively little further articulation of the public trust doctrine since *National Audubon*, the SWRCB has filled the void with an expansive view of the doctrine and claimed a coincident expansion of common law power (see Weber (1995), *supra*, at pp. 1156-1157), including the authority to order the release of stored water. The SWRCB's application of the public trust doctrine has been nearly devoid of analysis or explanation (*Id.* at 1173), but the SWRCB typically has sufficient statutory authority to achieve the same result, which has discouraged appeals of SWRCB decisions. Whether the SWRCB is correct in its application of the public trust doctrine consequently remains an open question.

National Audubon itself did not reach the stored water releases issue because the timing of tributary flow into Mono Lake, which could be regulated by storage releases, was irrelevant to the damage or the remedy: As long as sufficient flow could be made to reach the lake on an annual basis, the daily or seasonal flow regime in the tributary streams does not matter. Subsequent cases *did* address the flow regime in the streams tributary to Mono Lake (see *California Trout, Inc. v. State Water Resources Control Board* (1989) 207 Cal. App. 3d 585, often referred to as "*Cal Trout I*," and *California Trout, Inc. v. Superior Court* (1990) 218 Cal. App. 3d 187 (hereinafter "*Cal Trout II*")), but these cases merely endorsed the physical solution doctrine as the proper means to reach stored water (see *Cal Trout II*, n.6.).

<u>One Point is Clear: The Doctrine Only Addresses Natural Conditions</u>

Although many aspects of the public trust doctrine and its application remain controversial, there is little debate that the public trust *res* must be a natural condition that is part of "the people's *common heritage* of streams, lakes, marshlands and tidelands...." (*National Audubon* at p. 441, emphasis added).

Joseph L. Sax, in his influential article on the public trust doctrine, stated:

> "...[C]ertain interests are so particularly the *gifts of nature's bounty* that they ought to be *reserved* for the whole of the populace." (Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Michigan Law Review 471 (1970) at p. 484, emphasis added.)

> "...[T]he property subject to the trust...must be *maintained* for particular types of uses. [This] claim is expressed in two ways. Either it is urged that the resource must be *held available* for certain traditional uses, such as navigation, recreation, or fishery, or it is said that the uses which are made of the property must be in some sense related to the *natural uses peculiar to that resource*." (*Id.* at p. 477, emphasis added)

> "...[T]he [U. S. Supreme] Court [in *Illinois Central Railroad Company v. Illinois* (1892) 146 U.S. 387] articulated a principle that has become the central substantive thought in public trust litigation. When a state holds a resource *which is available for the free use of the general public* [emphasis added], a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties." (*Id.* at p. 490.)

Other commentators concur. [1]

A natural condition that is public trust *res* may be employed to support a number of sometimes competing "public trust uses" (see *Marks v. Whitney* (1971) 6 Cal. 3d 251 at pp. 259-260) as well as valuable consumptive uses. These public trust uses, however, should not be considered the public trust *res* itself (see Janet K. Goldsmith and Ariel Pierre Calonne, *The California Public Trust Doctrine—Unsettled Law, Unsettled Rights*, 4 California Real Property Journal 13 (1986) at p. 14). Proponents of public trust uses can call upon the public trust doctrine for support only insofar as the uses require protection or restoration of a *natural condition* that *is* part of the public trust *res* (see Littleworth, *supra*, at pp. 1213-1215 and Goldsmith and Calonne, *supra*, at p. 15).

When the disputed public trust *res* is natural streamflow, a trial court or the SWRCB has authority under the public trust doctrine to order the bypass of as much natural streamflow through a dam or around a diversion structure as a balancing of values per *National Audubon* justifies. Having done that, the court or SWRCB also has the authority and the responsibility, under Article X, §2 of the California Constitution, to devise an alternative physical solution, if possible, that is a less wasteful and more reasonable use of water to achieve the same or comparable results (see *City of Lodi v. East Bay Municipal Utility District* (1936) 7 Cal 2d 316 at pp. 339-341). Unless a physical solution applies, the common law does not reach stored water.

The most illustrative decision on this point is *Golden Feather Community Association v. Thermalito Irrigation District* (1989) 209 Cal. App. 3d 1276. In that case, plaintiffs, citing only the public trust doctrine, sought "to compel defendants to maintain an artificial body of water [a reservoir] so that members of the public may fish in it" (*Id.* at p. 1282). The court held for defendants, both because no naturally navigable waters were implicated (a condition necessary to bring a water body within the scope of the public trust doctrine) and because the public trust doctrine could not be used to preclude defendants from utilizing water they had legally diverted to storage (*Id.* at pp. 1286-1287). Significantly, the physical solution doctrine did not come into play because there was no valid, independent public trust claim in the first place.

A release of stored water to supplement the bypass of natural streamflow will, by definition, create a streamflow *above* a natural condition and consequently is not a remedy accessible under exclusive application of the public trust doctrine. In fact, the public trust doctrine protects the habitat that exists or could be created by the natural, highly cyclic, flow regime typical of many California streams to a far greater extent than it supports creation of the artificial, perennial stream habitat generally considered more desirable by the public. Looked at another way, *failure* to release stored water (as opposed to failure to bypass natural streamflow) cannot be the cause of damage to public trust resources, and a judicial body cannot order users of the stored water to remedy a problem they did not cause.

It is not necessary for diverters to prove the actual cause(s) of damage to public trust resources in order to show that failure to release stored water is *not* a cause. Nonetheless, it is clear that the natural cyclic drought condition in California is the primary cause of the periodic low flows in many of the state's streams. These naturally low flows, however, *define* public trust resources and consequently cannot be damaging to them (see previous paragraph). One must look elsewhere for the cause of damage, if damage indeed exists (e.g., illegal riparian pumping from the stream or its tributaries during periods of naturally low flow, depressed groundwater levels near the stream due to unregulated agricultural or domestic water supply pumping, especially during dry years,

pollution, introduced exotic species, and various land use practices in and along the stream).

Conclusion

It is only by virtue of the physical solution doctrine or separate statutory law, therefore, and not the exclusive application of the public trust doctrine, that a court or the SWRCB may order the release of stored water to support public trust uses.

Richard L. Wood, an attorney and civil engineer, is an Assistant Director of Public Works and Water Utility Manager for the City of Fairfield. The opinions expressed in this article, however, are those of the author alone.

Endnote

[1] In the 1978 report of the Governor's Commission to Review California Water Rights Law, Anne J. Schneider wrote:

> "According to Roman law [upon which the public trust doctrine is based], running water, like the air, the sea, the shore, and wild animals, could not be privately owned *where in a state of nature*. No property could exist in these *common resources* except upon capture and reduction to possession." (Anne J. Schneider, *Legal Aspects of Instream Water Uses in California*, Governor's Commission to Review California Water Rights Law, Staff Paper No. 6 (1978) p. 7, emphasis added.)

According to Ralph W. Johnson:

> "The public trust doctrine has historically been used to protect the public interest in certain unique, valuable and irreplaceable *natural* resources." (Ralph W. Johnson, *Public Trust Protection for Steam Flows and Lake Levels*, 14 U. C. Davis Law Review 233 (1980) at p. 240, emphasis added.)

In his influential article, Harrison C. Dunning stated:

> "...[T]the public trust easement springs from the public ownership of a 'special' *natural* resource." (Harrison C. Dunning, *The Significance of California's Public Trust Easement for California Water Rights Law*, 14 U. C. Davis Law Review 357 (1980) at p. 379, emphasis added.)
>
> "One might...argue that if the gates on a dam were to be left open, the river or lake fed by the river would be restored to a *natural state* compatible with *the full range* of public trust uses." (*Id.* at p. 395, emphasis added.)
>
> "It does not follow from recognition of an easement protecting public trust uses of a lake or river that a court should *enjoin all diversions* until the *fullest range* of public trust uses *for which the natural resource is physically adaptable* has be obtained." (*Id.* at p. 396, emphasis added.)

In a later article, Dunning added:

> "*Natural suitability for common use* together with scarcity may explain why courts view *natural* resources, such as navigable bays, as public assets....the government has an obligation to *preserve* the people's *historic* freedom of access. The duty springs from the *nature of the resource*--from recognition that a public trust resource is, as Justice Holmes once wrote of a river, 'more than an amenity, it is a treasure.'" (Harrison C. Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 Environmental Law 515 (1989) at p. 523, emphasis added.)

Jan S. Stevens commented:

> "The public trust as we recognize it today is an expression of concern for the navigable waters that are part of the *heritage of mankind*." (Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Remedy*, 14 U. C. Davis Law Review 357 (1980) at p. 231, emphasis added.)

Roderick E. Walston stated:

> "State water rights systems, in general, provide a basis for achieving economic development that might be denied under a rigorous application of the public trust doctrine. California and other western states suffer from largely arid conditions which make it difficult to achieve economic growth by preservation of water resources in their *natural* state." (Walston, *supra*, at p. 79, emphasis added.)

Scott W. Reed wrote:

> "[T]he public trust doctrine carries the presumption of innocence for the *natural* world. The burden of proof is upon the would-be violator, the developer, the *changer*." (Scott W. Reed, *The Public Trust Doctrine: Is It Amphibious?*, 1 Environmental Law & Litigation 107 (1986) at p. 108, emphasis added.)

Arthur M. Littleworth commented:

> "A careful reading of the *Marks* [*v. Whitney*, *supra*] decision makes it apparent that the California Supreme Court was expanding the public trust doctrine to preserve the *natural state* of a fragile and rapidly disappearing ecosystem. *It had no intention of encompassing artificial conditions*. (Littleworth, *supra*, at p. 1215, emphasis added.)

Charles F. Wilkinson contributed:

> "...[T]he traditional public trust doctrine deals with...our most valuable *natural* resources....[T]he general public...expects that most of its rivers will *remain* rivers, its lakes lakes, and its bays bays." (Wilkinson, *supra*, at p. 426, emphasis added.)

Michael C. Blumm & Thea Schwartz wrote:

> The public trust in water has not been characterized by standardless judicial reallocations of water, but instead by a grant of authority to administrators to maximize both appropriation rights and *trust resources*, which, after all, *antedate any appropriation rights*." (Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 Arizona Law Review 703 (1995) at pp. 737-738, emphasis added.)

An earlier version of this paper was published as the feature article in the October 2001 issue of California Water Law & Policy Reporter (citation: Richard L. Wood, "Can the Public Trust Doctrine Compel the Release of Stored Water Outside of a Physical Solution?" 12 California Water Law & Policy Reporter 1 (October 2001)).