

## California's Public Trust Doctrine

“By the law of nature these things are common to mankind – the air, running water, the sea, and consequently the shores of the sea. .... All rivers and ports are public: hence the right of fishing in a port, or in rivers, is common to all men.”

--- *Institutes of Emperer Justinian*, Book 2, Div. 1 (535 A.C.E)

The Public Trust Doctrine is an ancient legal doctrine under which some waters, tidelands and wildlife resources of the State are held in trust for all of the people, and the State acts as the Trustee to protect these resources for present and future generations. In California, this Doctrine has been recognized to extend to the protection of navigable surface waters, to non-navigable tributaries of those waters, to aquatic resources, and to birds and other wildlife.

The State has a continuing duty to manage public trust resources for the benefit of the people of the State, traditionally by balancing three traditional interests: fishing, navigation and commerce. To those three traditional uses, the courts have added the right of the public to pass over public trust lands and waters free from restrictions by private landowners, and also protection of ecological units and recreation. The Public Trust Doctrine allows any person to bring a lawsuit against the State if it fails to fulfill its duty as Trustee to manage these protected resources in accordance with the Doctrine.

## **Groundwater**

Although the laws granting the State Water Board the power and duty to regulate water use and diversions should extend to all of the state's water -- surface and groundwater alike -- the State Water Board has never regulated groundwater even close to the extent that surface waters are regulated. This near complete lack of oversight and management has led to unfortunate depletion and over-extraction of groundwater in many areas; when that groundwater is hydrologically connected to nearby rivers and streams, the groundwater extractions can have huge negative impacts on those larger water bodies.

## **Theory of the Case**

In 1983, the California Supreme Court decided *National Audubon Society v. Superior Court* ("Mono Lake") (33 Cal.3d 419 (1983)), formally bringing the Public Trust Doctrine into California water policy case law. This quickly became a pivotal case for advancing the Public Trust Doctrine, as it recognized the State's duty to protect not only the navigable waters traditionally covered by the Doctrine, but also diversions from non-navigable tributaries of those rivers and lakes when the diversions harm or destroy public trust resources. Failing to manage and protect tributaries, in turn, is tantamount to a failure to protect the water body that they feed into.

The Scott River is a navigable water body, protected by the Public Trust Doctrine. Although surface water diversions for irrigation are state regulated, large volumes of groundwater extraction is still allowed in areas where the groundwater is hydrologically connected to the surface flow of the Scott River, which results in diminishing – even eliminating – water that once flowed through springs into the Scott. As a result, the

Scott River itself in being increasingly dewatered, and the river is dying. Neither the County nor the State has been regulating these groundwater withdrawals to assure they do not deplete the river – which Petitioners allege is a violation of the Public Trust Doctrine. Among the casualties of this widespread practice is a once-abundant run of coho salmon in the Scott River, which is facing extinction and is federally as well as state protected under their respective Endangered Species Acts.

Under the California Supreme Court’s reasoning in *Mono Lake*, just as diversions from non-navigable upstream tributaries can be regulated to protect the public trust uses of *Mono Lake*, so too the Scott’s hydrologically connected groundwater “tributaries” should be regulated to protect the public trust resources of the Scott River.

The parties bringing this case hope to achieve not only in-stream water protections for and restoration of the Scott River and its valuable aquatic resources, but also to establish the State’s continuing duty under the Public Trust Doctrine to manage groundwater resources that affect public trust waters and resources.

**Parties to the Case:**

**PETITIONERS:**

Environmental Law Foundation

Pacific Coast Federation of Fishermen’s Associations

Institute for Fisheries Resources

**RESPONDENTS:**

State Water Resources Control Board

County of Siskiyou