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In National Audubon Society v. Superior Court (the Mono Lake decision),¹ the California Supreme Court declared that interests safeguarded by the public trust doctrine must be considered and protected whenever possible in decisions involving the planning and allocation of the state’s water resources.² To achieve this, the court incorporated the public trust doctrine into the appropriative water rights system in California. Ultimately, Mono Lake may prevent the City of Los Angeles from taking most of the water from streams feeding Mono Lake.³

The Mono Lake court also expressly recognized both an administrative


³. Mono Lake stemmed from litigation over whether the public trust doctrine required reconsideration of appropriative water rights in the feeder streams of Mono Lake previously granted to the City of Los Angeles. 33 Cal. 3d at 424–33, 658 P.2d at 711–18, 189 Cal. Rptr. at 348–55. In 1940, the administrative predecessor to the California Water Resources Control Board (Water Board) granted a permit to the Department of Water and Power of the City of Los Angeles (DWP) that allowed the DWP to appropriate most of the water from four of five streams flowing into Mono Lake. Id. at 424, 658 P.2d at 711, 189 Cal. Rptr. at 348. Shortly thereafter, the DWP constructed a diversion tunnel which began taking approximately half the total flow from the four streams. Id.

As a result of the diversions, the level of the lake has dropped dramatically. The surface area of the lake has been reduced by one-third. The increasing salinity of Mono Lake, caused by the reduction of fresh water flowing into the lake, threatens an important brine shrimp population there. In addition, one of the two principal islands in the lake has become a peninsula, exposing a unique and critically important gull rookery to predators and causing the gulls to abandon it. Id. at 424, 658 P.2d at 711, 189 Cal. Rptr. at 348. The Mono Lake court concluded that "[t]he ultimate effect of continued diversions is a matter of intense dispute, but there seems little doubt that both the scenic beauty and the ecological values of Mono Lake are imperiled." Id. at 424–25, 658 P.2d at 711, 189 Cal. Rptr. at 348. See Hoff, The Legal Battle Over Mono Lake, CAL. LAW., Jan. 1982, at 28; Gilbert, Is This a Holy Place?, SPORTS ILLUSTRATED, May 30, 1983, at 76.
and a judicial remedy to protect public trust interests in water. Both remedies can, however, be more effective. This Note outlines the public trust remedies presently in place in California by discussing the background of the public trust doctrine and the appropriative water rights system in California as well as the holdings of the Mono Lake court. This Note also proposes changes to improve both the administrative and judicial public trust remedies.

I. BACKGROUND

A. The Public Trust Doctrine in California

The concept of a public trust began in Roman law and became a part of the English common law. Historically, the scope of the public trust doctrine was limited to tidal water and protected only the public's interests in navigation, commerce, and fishing. Due primarily to the presence of large rivers, the public trust doctrine in the United States was extended to include all navigable waterways. Moreover, the public trust doctrine in California protects more than such traditional interests as navigation, hunting, fishing, and general recreational activities. In its current form, the public trust extends to the preservation of trust resources in their natural state "as ecological units for scientific study, as open space," and as habitats for varied forms of life.

Upon admission to the union, California acquired title to its navigable waters as trustee for the public. The state has both the sovereign power and the duty to exercise continued supervision over trust resources.

4. 33 Cal. 3d at 452, 658 P.2d at 732, 189 Cal. Rptr. at 369.
5. See infra Parts IIIA1 & IIIA2.
6. See infra Parts IIIB1 & IIIB2.
11. Marks, 6 Cal. 3d at 259–60, 491 P.2d at 380, 98 Cal. Rptr. at 796. Public trust interests in water have evolved through time to meet changing public needs and values. Mono Lake, 33 Cal. 3d at 434, 658 P.2d at 719, 189 Cal. Rptr. at 356.
13. 33 Cal. 3d at 437, 658 P.2d at 721, 189 Cal. Rptr. at 358.
These resources cannot be placed beyond the control of the state. As a result, parties acquiring rights in trust property generally take subject to the requirements of the trust and can assert no vested interest to use those rights in manners harmful to the trust. Although the public trust doctrine in California does allow the state to choose between competing or conflicting trust uses, the choice is assumed to be between "uses and activities in the vicinity of the lake, stream, or tidal reach at issue."

B. The Appropriative Water Rights System in California

In California, a grant of water rights does not convey ownership of the water; a grantee receives only the right to use the water for useful and beneficial purposes. An amendment to the Water Commission Act of 1913 made the statute the exclusive procedure for the appropriation of water. Recent statutory and judicial developments have increased the power of the California Water Resources Control Board (Water Board) and have given it the authority to weigh and protect public trust values.

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15. 33 Cal. 3d at 437, 658 P.2d at 721, 189 Cal. Rptr. at 358.

16. Id. at 440, 658 P.2d at 723, 189 Cal. Rptr. at 360.

17. Id. (emphasis added). Because the state’s power to choose between conflicting trust uses is customarily limited to the vicinity of the water system at issue, the diversion of water to Los Angeles for domestic use is probably not a public trust use.


19. 1913 Cal. Stat. ch. 586. All provisions of the Act are now codified as amended in CAL. WATER CODE divisions 1, 2.


21. 33 Cal. 3d at 444, 658 P.2d at 726, 189 Cal. Rptr. at 363. Originally, the Water Board determined only whether water was available to appropriate. Its actions were thus largely ministerial. Tulare Water Co. v. State Water Comm’n, 187 Cal. 533, 202 P. 874, 876 (1921). A constitutional amendment in 1928 subjected all uses of water, including the previously exempt riparian uses, to a reasonable and beneficial standard. CAL. CONST. art. 10, § 2 (enacted in 1928 as art. 14, § 3); see also Peabody v. City of Vallejo, 2 Cal. 2d 351, 40 P.2d 486, 498–99 (1935). In 1955, the Water Board was given the power and duty to weigh the relative costs and benefits of competing beneficial uses of water in responding to requests for appropriative water rights. Act of June 17, 1955, ch. 1015, § 1, 1955 Cal. Stat. 1955 (codified as amended at CAL. WATER CODE § 1257 (West 1971)). Four years later, the legislature declared that the uses of water for recreation and for preservation and enhancement of fish and wildlife resources were beneficial uses of water. Act of July 17, 1959, ch. 2048, § 1, 1959 Cal. Stat. 4742 (codified as amended at CAL. WATER CODE § 1243 (West 1971 & Supp. 1983)). And since 1970, the Board is obligated to take into account the quantity of water necessary to protect
II. THE MONO LAKE DECISION

In Mono Lake, the California Supreme Court addressed two issues critical to the protection of public trust interests in state water allocation decisions. The first was whether the public trust doctrine was subsumed within the appropriative water rights system. The second was whether plaintiffs seeking to enforce the public trust were required to exhaust administrative remedies before filing suit.

The court held that the public trust doctrine and the appropriative water rights system are parts of an integrated system of law. Within that system, the public trust doctrine preserves the continuing sovereign power of the state to protect public trust uses and imposes on the state the duty to consider such uses in allocating water resources. The court required a re-

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22. The Mono Lake litigation has been procedurally complex. Plaintiffs originally filed suit in the Superior Court for Mono County on May 21, 1979. Venue and a tentative trial date were set in Alpine County, California. In early 1980, the DWP cross-claimed against numerous parties, including the United States, which promptly removed the case to the federal District Court for the Eastern District of California. The federal court stayed its proceedings under a branch of the federal abstention doctrine, which allows a federal court to temporarily extricate itself when presented with difficult questions of state law relating to issues of transcendent public importance. People v. Shiro-

23. 33 Cal. 3d at 431-32, 658 P.2d at 717, 189 Cal. Rptr. at 353-54 n.12.

24. Id. at 452, 658 P.2d at 732, 189 Cal. Rptr. at 369. At the time the administrative predecessor to the Water Board granted the permit to the City of Los Angeles to appropriate water from streams feeding Mono Lake, the agency did not—and could not—consider the public trust effects of the grant. Id. at 427-28, 658 P.2d at 713-14, 189 Cal. Rptr. at 350-51.

Mono Lake may figure prominently in a national emergence of the public trust doctrine in the water rights area. For example, the decision was relied on as an integral part of the Idaho Supreme Court's
consideration of the diversion of water from streams feeding Mono Lake in light of the public trust. As a result of Mono Lake, the public trust doctrine now protects navigable waters such as Mono Lake from harm caused by diversion of nonnavigable tributary streams. The court noted, however, that appropriative rights would not be invalidated simply because they harmed public trust interests. Rather, it held that the state has "an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible."

The court also held that parties raising public trust claims involving water resources need not exhaust administrative remedies before filing suit in superior court because the courts share concurrent original jurisdiction with the Water Board. For the first time, the California Supreme Court recognized that both an administrative and a judicial remedy exist for raising public trust claims involving water resources. In construing section 2501 of the California Water Code to allow claimants to raise public trust issues in determinations of water rights before the Water Board, the court recognized an administrative public trust remedy. In holding that the plaintiffs were not required to exhaust administrative remedies before filing their public trust claims in superior court, the Mono Lake court similarly recognized a concurrent judicial remedy to enforce the public trust doctrine in water resource decisions.

25. 33 Cal. 3d at 452–53, 658 P.2d at 732–33, 189 Cal. Rptr. at 369.
26. Id. at 437, 658 P.2d at 721, 189 Cal. Rptr. at 357. Mono Lake is the first California case expressly extending public trust protection to nonnavigable waters based on the effects that diversions have on historically protected navigable waters such as Mono Lake. In extending public trust protection to nonnavigable waters, the court adopted the reasoning of Professor Johnson, who has stated: "If the public trust doctrine applies to constrain fills which destroy navigation and other public trust uses in navigable waters, it should equally apply to constrain the extraction of water that destroys navigation and other public interests. Both actions result in the same damage to the public interest." Johnson, supra note 1, at 257–58 (footnotes omitted).
27. 33 Cal. 3d at 445–46, 658 P.2d at 727–28, 189 Cal. Rptr. at 364. The court went on to state that

[n]ow that the economy and population centers of this state have developed in reliance upon appropriated water, it would be disingenuous to hold that such appropriations are and have always been improper to the extent that they harm public trust uses, and can be justified only upon theories of reliance or estoppel.

Id. at 446, 658 P.2d at 728, 189 Cal. Rptr. at 364.
28. Id.
29. Id. at 452, 658 P.2d at 732, 189 Cal. Rptr. at 369.
30. CAL. WATER CODE § 2501 (West 1971), quoted infra note 34.
31. 33 Cal. 3d. at 449, 658 P.2d at 730, 189 Cal. Rptr. at 366–67.
32. Id. at 452, 658 P.2d at 732, 189 Cal. Rptr. at 369.
III. THE PUBLIC TRUST MODEL FOR WATER RIGHTS IN CALIFORNIA: EXISTING ADMINISTRATIVE AND JUDICIAL REMEDIES AND PROPOSED CHANGES FOR EACH MODEL

Mono Lake affirmed that evolving public needs and values require the protection of a wide variety of public trust interests in water. If judicial and administrative remedies are inadequate, however, important public uses and resources may be irrevocably lost and the underlying purpose of Mono Lake frustrated. Thus, the efficacy of Mono Lake requires a critical examination of the adequacy of both remedies.

A. The Administrative Remedy

1. Existing Administrative Remedy

Following Mono Lake, parties seeking to enforce the public trust in the use of water will have an express administrative remedy under section 2501 of the California Water Code. The Water Board can now be required to consider the interests protected by the public trust doctrine in all of its decisions, including those made in the past.

The Water Board will not, however, make a determination of water rights under section 2501 until a "claimant" has filed a formal petition, and the Board finds that "the public interest and necessity" will thereby be served. Once a claimant has successfully petitioned for a determination of all rights to water in a given water system, the Board initiates an

33. See supra notes 10–11 and accompanying text.
34. See supra note 31 and accompanying text. CAL. WATER CODE § 2501 (West 1971) provides: "The board may determine, in the proceedings provided for in this chapter, all rights to water of a stream system whether based upon appropriation, riparian right, or other basis of right." Public trust claims may be raised under § 2501 even though they were apparently not contemplated by the drafters of the statute. The Mono Lake court noted that it was unclear whether a public trust claim was technically a claim of a "water right" or whether a person asserting such a claim was a "claimant" entitled to an administrative determination by the Water Board. 33 Cal. 3d at 448, 658 P.2d at 729, 189 Cal. Rptr. at 366. Nonetheless, the Mono Lake court held that the public trust plaintiffs could seek an administrative determination, reasoning that because § 2501 gave the Board substantive powers to carry out a legislative mandate to give comprehensive protection to state water resources, it should have the power to hear such claims. Id. at 449, 658 P.2d at 730, 189 Cal. Rptr. at 366.
35. 33 Cal. 3d at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365.
36. CAL. WATER CODE § 2525 (West 1971) provides:
Upon petition signed by one or more claimants to water of any stream system, requesting the determination of the rights of the various claimants to the water of that stream system, the board shall, if, upon investigation, it finds the facts and conditions are such that the public interest and necessity will be served by a determination of the water rights involved, enter an order granting the petition and make proper arrangements to proceed with the determination.
37. Although the statutory adjudication procedure to determine water rights is expressly applicable to "stream systems," the term is nearly exhaustive, excluding only certain underground waters. Id. § 2500.
adjudicatory proceeding designed to resolve all related issues. Following the Board’s determination, its order and the administrative record are filed in superior court. Any party may challenge the order by requesting a hearing. After the hearing, or if no party requests a hearing, the court enters a final decree.

2. **Proposed Changes for the Public Trust Administrative Remedy**

The administrative public trust remedy should ensure (1) that public trust interests are adequately recognized and protected by the Water Board in all water allocation decisions and (2) that harm to trust values is permitted only when in the public interest and no feasible alternative exists. Under the existing administrative remedy, public trust interests may not always be considered because the Board need not act unless there is both a claimant and a Board finding of public interest and necessity. Thus, the public trust in water resources may not be adequately protected in actions before the Board. In addition, the burden of showing a violation of the public trust is on the public trust “claimant,” rather than on the party whose action may harm such interests.


In addition to a consideration of diversions and the beneficial uses being made of water from the system, the Board is required to “gather such other data and information as may be essential to the proper determination of the water rights in the stream system.” *Id.* § 2550 (West Supp. 1983). Following Mono Lake, this requirement should include a consideration of public trust values. In short, an examination of the effects which a particular mix of water uses in a water system would have on public trust interests ought to be treated as “other data and information as may be essential to the proper determination of the water rights in the stream system.” After a period in which claimants may contest proofs made by other claimants, the Board is required to enter an order in its office establishing those rights to water. *Id.* § 2700. Final determinations are preceded by a preliminary order of determination. *Id.* § 2603. Following entry of a final determination under § 2700, the Board may grant a rehearing for “good cause shown.” *Id.* § 2702.

39. Cal. Water Code § 2750 (West 1971). The court sets a date for a judicial hearing on the administrative order of determination. *Id.* Any party of interest may file exceptions to the order of determination. *Id.* § 2757. If no party in interest takes formal exception to the Water Board’s determination before the hearing date, no hearing is held and the Board’s determination becomes final. *Id.* § 2762. Hearing procedure is to be “as nearly as may be in accordance with the rules governing civil actions.” *Id.* § 2764. The court may require that the state be made a party, it may make additional investigations, and it may refer issues back to the Board. *Id.* §§ 2765–67.

40. *Id.* § 2768. The final decree must specifically state the rights of each claimant. *Id.* § 2769. There is a right of appeal. *Id.* § 2771.

41. The Mono Lake court held that parties asserting the public trust might be considered to be “claimants” within the statutory definition. See supra note 34. Such an interpretation would place
Several changes would strengthen the administrative public trust remedy. First, the public trust should be automatically considered in every water rights determination or allocation decision by the Water Board, whether or not there is a public trust "claimant." Second, public trust claims before the Board should as a general rule be held to meet the "public interest and necessity" requirement. Third, the Board should be required to consider express elements of the public trust and should be further required to make findings of fact with respect to each element. Fourth, determinations made by the Board should be subject to strict judicial scrutiny. Finally, each determination of water rights which the Board finds will have an effect on public trust values should be accompanied by an express statement (a) that the Board intends to alienate public trust rights, (b) that such alienation is in the public interest, and (c) that no feasible alternative to the action exists.

a. Public Trust Claimant Not Required

Despite the fact that the Mono Lake court liberally construed section 2501 of the California Water Code to grant an administrative public trust remedy to parties asserting public trust claims in water uses, no provision obligates the Water Board to consider public trust interests in the absence of a public trust "claimant." Consideration of such interests should not depend solely on an alert citizenry. Moreover, the burden of consideration and protection of public trust interests has been placed upon the state which, in water allocation decisions, acts through the Board. Therefore, the legislature or the courts should require the Board to consider the effects of each of its water rights decisions on the public trust, whether or not there is a public trust "claimant." 

the administrative burden of proof on the party claiming public trust violations before the Water Board.

42. As noted supra note 39 and accompanying text, under normal circumstances the procedural provisions for a determination of water rights by the Water Board are not initiated in the absence of a petition by a claimant. The court noted that although a party raising public trust issues in a petition for determination of water rights might not be a "claimant" within the contemplation of the statute, such a party nonetheless has a remedy under CAL. WATER CODE § 2501 (West 1971). Thus, in most cases brought before the Board, public trust "claimants" may require the Board to consider the effects which its allocation decisions have had, or will have, on interests protected by the public trust.

43. See supra notes 2 & 24 and accompanying text.

44. It might be argued that requiring the Water Board to consider effects on the public trust even absent a public trust claimant offends the United States Supreme Court's holding in Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc., 435 U.S. 519 (1978). Vermont Yankee, however, can be distinguished. In that case, the Court held that the Nuclear Regulatory Commission need meet only the minimum statutory requirements of the Administrative Procedure Act (APA) and was, therefore, under no obligation to consider environmental effects not raised by the parties. Under the administrative public trust remedy, however, the Board—apart from the fact
b. Public Trust Interests Are Synonymous With Public Interest and Necessity

The Water Board is under no statutory obligation to make a determination of water rights unless it first finds that such a determination would be in the "public interest and necessity." If the Board follows an overly narrow interpretation of "public interest and necessity," it might refuse to consider legitimate public trust claims. Such a result would clearly frustrate the spirit of Mono Lake. By granting the administrative remedy, despite the doctrinal difficulties in doing so, the California Supreme Court has already indicated that in most instances such claims serve the public interest and are necessary. The legislature or the courts should clarify this implicit conclusion to avoid confusion over the Water Board’s duty to consider good faith public trust claims raised under section 2501.

c. Mandatory Public Trust Interests and Findings of Fact

(1) Mandatory Consideration of Public Trust Factors

Although some elements of the public trust must already be considered by the Water Board, many other elements remain part of an amorphous judicial doctrine. As a result, the scope of the Board’s new public trust responsibilities may be uncertain, and the Board may fail to consider important elements of the public trust doctrine in actions involving water resources.

In order to ensure that the Water Board gives the public trust adequate consideration in its decisions, the Board’s responsibilities need to be clarified. As part of the duty to consider the public trust in all water re-
source allocation decisions, the courts or the legislature should require the Board to consider a comprehensive list of public trust interests.49 The list should include each interest protected by the public trust doctrine in California.

While the judicially fashioned public trust doctrine would retain its vitality,50 codification of the most important elements of the public trust in the water resources context would help to ensure that the Board fully considers the doctrine.51 Because the Board is charged with upholding all interests protected by the public trust, the list of interests should include the preservation of trust resources in their natural state for environmental reasons as well as the historic public trust uses such as navigation, commerce, and fishing.52 Finally, the list of public trust interests should not

49. Otherwise, the Water Board would be required to consider the entire range of judicial decisions involving the requirements imposed by the public trust doctrine.

50. The Mono Lake court stated in a related context: “Aside from the possibility that statutory protections can be repealed, the noncodified public trust doctrine remains important both to confirm the state’s sovereign supervision and to require consideration of public trust uses in cases filed directly in the courts without prior proceedings before the board.” 33 Cal. 3d at 446 n.27, 658 P.2d at 728 n.27, 189 Cal. Rptr. at 364 n.27.

51. Other jurisdictions have required that various public-trust-type interests be considered by administrative agencies charged with responsibility over them. E.g., Mystic Marinelife Aquarium, Inc. v. Gill, 175 Conn. 483, 400 A.2d 726, 734 (1978) (agency must protect waters with regard to prevention of erosion, the uses and development of adjoining lands, improvements for navigation, and other state interests, including pollution control and recreational uses); Indiana Envtl. Management Bd. v. Indiana-Kentucky Elec. Corp., 393 N.E.2d 213, 219 (Ind. Ct. App. 1979) (in approving regulations and making standards, agency must consider past, present, and future uses, air and water quality, technical feasibility and economic reasonableness, in taking into account the right of all persons to have a safe environment); Michigan State Highway Comm’n v. Vanderkloot, 392 Mich. 159, 220 N.W.2d 416, 428 (1974) (agency must find no feasible and prudent alternative to project and that project is in public interest given state’s paramount concern for the protection of natural resources); Michigan Oil Co. v. Natural Resources Comm’n, 71 Mich. App. 667, 249 N.W.2d 135, 143 (1976), aff’d, 406 Mich. 1, 220 N.W.2d 416, 428 (1974) (agency must find no feasible and prudent alternative to project and that project is in public interest given state’s paramount concern for the protection of natural resources); United Plainsmen Ass’n v. North Dakota State Water Conservation Comm’n, 247 N.W.2d 457, 462-63 (N.D. 1976) (public trust requires planning by state agencies in allocating public water resources, including determination of potential effect of water allocations on present supplies and future water needs of the state); Community College v. Fox, 20 Pa. Commw. 335, 342 A.2d 468, 476 (1975) (agency must consider direct and indirect effects of, and alternatives to, projects affecting natural, scenic, historic, and aesthetic values of the environment). In a 1981 advisory opinion, the Supreme Judicial Court of Massachusetts reviewed a proposed statute that would require careful consideration of the public trust doctrine before allowing development in tideland areas. Opinion of the Justices to the Senate, 1981 Mass. Adv. Sh. 139, 424 N.E.2d 1111. The statute would require consideration of public trust values such as navigation, commerce that benefits the public, recreational uses, and the state’s interest in the conservation of the natural environment. 247 N.W.2d at 1116 n.5. Under the statute, public interest development permits would be granted only upon written findings supported by substantial evidence that development will not (a) diminish public control of the resource or (b) lessen public rights of use and access to them. Id. at 1117 n.6.

be considered exhaustive and should be modified to meet changing public trust needs as they develop.53

(2) Required Findings of Fact

The Water Board should be required to make findings of fact with respect to each public trust interest considered under this proposal.54 Strong policy reasons support the requirement that administrative agencies justify their conclusions with written findings of fact and conclusions of law. In addition to facilitating judicial review,55 a findings requirement has been found to (1) help avoid judicial usurpation of the administrative function, (2) ensure more careful consideration of facts and issues, (3) aid parties in the preparation of their cases for rehearings and judicial review, and (4) ensure that agencies operate within their jurisdiction.56

These traditional reasons for requiring that an agency submit findings of fact apply with great force in the public trust context. In addition to providing a clearer record for review of the Water Board's determinations, a public trust findings requirement would make it more likely that each public trust interest is actually considered by the Board. It would also assist claimants in preparing their appeals or petitions for rehearing in the event they consider the public trust issue improperly resolved. Finally, the findings requirement would tend to encourage more fully reasoned determinations by the Board.57

A findings requirement may delay decisionmaking and thereby slow or even prohibit the development of water resources. However, the importance and frailty of the public trust interests outweigh the costs of possible delay which might be occasioned by the findings requirement. Many public trust uses, such as the preservation of water systems in their natural state, would be irrevocably lost if development of the water resource is allowed improperly or prematurely.58 Delaying such development until a

53. As the Marks court stated: "In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another." Id. at 259–60, 491 P.2d at 380, 98 Cal. Rptr. at 796.

54. This requirement is in addition to the express intent to alienate required. See infra notes 62–65 and accompanying text.

55. The United States Supreme Court has stated that "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." SEC v. Chenery Corp., 318 U.S. 80, 94 (1943).

56. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.05 (1958).

57. As Judge Frank observed, "[O]ften a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper." Id.

58. The possibility that public trust interests might be irrevocably lost through premature or improper development is well illustrated by the effects which the diversions have had on the ecology of Mono Lake. See supra note 3.
final, supportable determination has been made is consistent with the responsi-
ibility given the state by Mono Lake.

d. **Strict Scrutiny Review of Water Board Determinations**

Statutory judicial review of Water Board determinations by the supe-
rior court is not a proceeding by certiorari or appeal, but rather is an origi-
nal action.59 A court, therefore, can exercise its own judgment as to the pro-
per determination of rights to water in a given water system. Conse-
quently, the deferential standard of review of administrative decisions
generally used by the courts60 should not be employed in statutory adjudic-
cations involving public trust claims.

Water Board determinations which impair public use or enjoyment of a
public trust resource necessarily alienate part of that public trust resource.
Such determinations involve an alienation of the public trust analogous to
alienations which have been effected by legislative act and which have
been subject to strict judicial scrutiny.61 It follows that administrative de-
terminations which impair the public trust should be similarly subject to
strict scrutiny under the reasoning of cases involving legislative alien-
ation.62

e. **Intent to Alienate Clearly Expressed**

The state’s intent to alienate public trust uses “must be clearly ex-
pressed or necessarily implied.”63 Mono Lake obligates the Water Board
to consider the public trust in the allocation of the state’s water resources,
and requires that the public trust be protected whenever feasible. The Board may allocate water only when in the public interest. Each time its actions have an effect on interests protected by the public trust, the Board should be required to expressly state (a) that it intends to alienate public trust interests, (b) that such action is in the public interest, and (c) that no feasible alternative to the action exists. By requiring the Board to make a statement of intent to alienate public trust interests, parties before the Board can be assured that the public trust requirements imposed by California law have at least been considered.

B. The Judicial Remedy

1. Existing Judicial Remedy

In addition to recognizing an administrative remedy, the Mono Lake court held that parties can bring an original action in the courts to enforce the trust. After examining prior judicial decisions dealing with the jurisdictional relationship between the Water Board and the California courts in matters relating to the proper use of state waters, the court concluded that remedies before the Board are not exclusive and the courts have concurrent jurisdiction. The court acknowledged that original actions in the

64. See supra note 28 and accompanying text.
66. This test incorporates both the obligation of the state to consider the public interest in all uses of water, see infra note 86 and accompanying text, and the requirements imposed on it by Mono Lake. See supra note 28 and accompanying text.
67. This is in addition to the findings requirement because, while it will impose only negligible additional burdens on the Water Board, it will comport more fully with case law requiring that the intent to alienate public trust interests be expressly stated or necessarily implied. See supra notes 60–62 and accompanying text.
68. See supra note 32 and accompanying text.
69. 33 Cal. 3d at 449–51, 658 P.2d at 730–32, 189 Cal. Rptr. at 366–68. The Mono Lake court noted that in resolving the tension between agency expertise and an established line of cases which had assumed concurrent jurisdiction, the California Supreme Court previously had expressly recognized the existence of concurrent jurisdiction between the courts and the Water Board to enforce the self-executing provisions of art. 10, § 2 of the California Constitution. Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist. (EDF II), 26 Cal. 3d 183, 200, 605 P.2d 1, 10, 161 Cal. Rptr. 466, 475 (1980). Because the intervenors in EDF II had based their claims on unreasonable use of water under the constitutional provision, the court did not require them to exhaust their administrative remedies. Id.
70. 33 Cal. 3d at 451, 658 P.2d at 731, 189 Cal. Rptr. at 368. Although Justice Richardson dissented on this issue, see id. at 453–55, 658 P.2d at 733–35, 189 Cal. Rptr. at 370–71, the court pointed out that several statutory provisions in the California Water Code indicated the legislature had not intended to vest exclusive primary jurisdiction in the Water Board to decide water rights. Specifically, the court noted that the statutory power given courts to determine rights to water, to refer issues, and to remand for factual investigations necessarily implied that the courts were intended to share jurisdiction with the Board. Id. at 451, 658 P.2d at 731, 189 Cal. Rptr. at 368. The Mono Lake court held that the courts could adjudicate all rights to the use of water, including rights under the
courts to determine water rights might interfere with the obligations of the Board. The court concluded, however, that because a court involved in determining water rights could refer complex issues to the Board, such dangers could be substantially eliminated.

2. Proposed Changes for the Public Trust Judicial Remedy

The judicial remedy is a vital part of the comprehensive public trust scheme envisioned by the Mono Lake court. The importance of the judicial remedy will not be diminished even if the administrative remedy is strengthened through the adoption of the recommendations discussed above. Mono Lake thrusts important public trust responsibilities upon the Water Board, which has never before considered the public trust in its water allocation decisions. The Board may be hesitant or unable to fully implement the judicial doctrine of the public trust in the near future. By granting a judicial remedy, the Mono Lake court has recognized that judicial involvement in the water resources area is necessary to protect public trust interests.

The judicial remedy recognized in Mono Lake can ensure careful consideration of the public trust interests in the allocation of water resources. In its present form, however, the judicial remedy may not effectively protect public interests in water. First, the courts may find themselves handicapped by their lack of knowledge in the water resource field. Second, public trust interests may be jeopardized as a result of uncertainty as to allocation of the burden of proof in public trust cases.

public trust, whether or not such claims fell within the reasonable and beneficial purview of art. 10, § 2 of the California Constitution. Id.

71. Id. at 450–51, 658 P.2d at 731, 189 Cal. Rptr. at 368.
72. Id. at 451, 658 P.2d at 731–32, 189 Cal. Rptr. at 368.
73. California courts have broad power to grant immediate equitable relief, such as injunctions, when appropriate to protect the immediate rights and property interests of other parties. CAL. CIV. PROC. CODE §§ 525–35 (West 1979 & Supp. 1983). The interests sought to be protected by the public trust doctrine are particularly vulnerable to destruction or impairment, and are therefore especially well suited to protection by the courts pending the resolution of public trust issues raised or necessarily considered in each action.

While it may legitimately be argued that granting equitable relief may harm the interests of those asserting the right to the use of water when such right is subsequently affirmed, the fragile, unique, and often irreplaceable nature of the public trust interests in water makes it clear that the state should err on the side of caution when dealing with its public trust water resources. Further, the granting of such equitable relief is consistent with the recommendation, see infra notes 86–89 and accompanying text, that the ultimate burden of proof should be upon the party whose actions may affect the public trust.

74. See supra Part III A2.
75. If the Water Board subsequently demonstrates it is consistently meeting its public trust responsibilities, judicial involvement in the area, under the judicial remedy, can gradually be eased. Until that time, case-by-case decisions under the judicial remedy will help to define the Board’s duties in the area.
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Two proposed changes would help to ensure that the public trust judicial remedy announced in Mono Lake adequately protects public trust interests in water. First, when the public trust judicial remedy is invoked, the courts should in most instances retain jurisdiction and refer the case to the Water Board for an initial resolution of the issues. Second, following an initial prima facie showing of actual or probable harm to public trust interests, the burden of proof should shift to the party whose actions allegedly threaten the interests protected by the trust.

a. Initial Determination of Issues by Water Board

While the courts have dealt extensively with the public trust doctrine, they may lack the requisite expertise in complex cases to competently apply the doctrine in the water rights context. The courts, however, have broad statutory authority to seek administrative assistance, including the power to refer issues to the Water Board. After the court has framed the issues, the acknowledged expertise of the Board in the water area should be regularly employed.

The policy reasons behind the doctrine of primary jurisdiction support regular use of broad reference powers by the courts in water cases involving public trust claims. While longstanding judicial precedent in California has denied the Water Board exclusive primary jurisdiction in water rights cases, policy reasons behind the doctrine—the recognition of administrative expertise and the need for orderly and sensible coordination of the work of the courts—are equally applicable to water rights determinations. The courts should, therefore, make liberal use of the Board's expertise in the resolution of public trust issues raised in the courts.

Similarly, the policy supporting the well-established doctrine of exhaustion of administrative remedies favors use of the courts' reference powers. As a general rule, most jurisdictions have required exhaustion

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77. Id. § 2000.
78. 33 Cal. 3d at 451, 658 P.2d at 731–32, 189 Cal. Rptr. at 368. Elsewhere, the court discussed the complexity of the issues presented in water use actions. Id. at 451 n.32, 658 P.2d at 731 n.32, 189 Cal. Rptr. at 368 n.32.
79. The doctrine of primary jurisdiction does not govern judicial review of administrative actions but simply determines which body should make the initial resolution of the issues. 3 K. DAVIS, supra note 56, § 19.01.
80. See supra notes 69–70 and accompanying text.
of remedies before allowing relief in the courts "when the question presented is one within the agency's specialization and when the administrative remedy is as likely as the judicial remedy to provide the wanted relief." The Water Board's expertise with complex issues presented in the water context should not be overlooked. Courts addressing public trust claims involving the use of water should refer such issues to the Board before making their ultimate resolution of the issues. To facilitate well-reasoned judicial review, the Board's initial resolution of the issues referred to it should be supported by findings of fact.

b. Burden of Proof on Public Trust Impairer

Mono Lake did not establish which party will have the burden of proof in water rights litigation involving public trust claims. The party bringing an action in the courts to enforce the public trust should be required to make an initial prima facie showing that public trust interests have been, or probably will be, harmed. Following such an initial showing, the burden of proof should shift to the party whose actions are challenged. This

83. 3 K. Davis, supra note 56, § 20.01.
84. See supra note 78 and accompanying text.
85. The courts have the power to require the Water Board to make findings of fact and conclusions of law with respect to issues presented it. Cal. Water Code § 2012 (West 1971).
86. While the burden of proof in some jurisdictions has been placed upon the party seeking to show impairment of important public resources, other jurisdictions have placed the burden on the party whose activities impinge on public trust resources. Compare, e.g., In re Solid Waste Disposal Permit Application, 268 N.W.2d 599, 602-03 (S.D. 1978) (opponent of waste disposal permit failed to show feasible alternative existed) with Manchester Envtl. Coalition v. Stockton, 184 Conn. 51, 441 A.2d 68, 74-75 (1981) (after prima facie showing of likely impairment of public trust interests, burden of production shifts and the impairer must rebut prima facie showing); Ray v. Mason County Drain Comm'r, 393 Mich. 294, 224 N.W.2d 883, 889 (1975) (burden on public trust impairer after initial showing of likelihood of harm); Marcon, Inc. v. Department of Envtl. Resources, 462 A.2d 969, 971 (Pa. Commw. Ct. 1983) (burden on impairer after initial showing of likelihood of environmental harm); and Big Fork Mining Co. v. Tennessee Water Quality Control Bd., 620 S.W.2d 515, 520 (Tenn. Ct. App. 1981) (burden on party seeking privileges which threaten public's interest in natural resources).

The Michigan public trust statute, in pertinent part, provides as follows:

When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has, or is likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative to defendant's conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction. Except as to the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil actions in the circuit courts shall apply to actions brought under this act.

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party should be required to show either (a) that its actions will have no adverse effects on the public trust or (b) that the action is in the public interest[^7] and there is no feasible alternative.[^8]

Following *Mono Lake*, the public trust in water resources and uses must yield when the public interest requires it and where no feasible alternative exists. Nevertheless, alienation of public trust rights in water should be the exception rather than the rule.[^9] Thus, because the state carries an affirmative obligation to protect the public trust in water,[^10] the burden should be on the party seeking to benefit at the expense of the public and its trust resources.

IV. CONCLUSION

*Mono Lake* mandates consideration of the public trust in all water rights decisions. To ensure that the public trust is taken into account when required, the *Mono Lake* court recognized both an administrative and a judicial remedy. Important public trust interests in water resources, however, may not be adequately protected unless the remedies designed to protect them are strong. Changes to the administrative and judicial remedies recommended in this Note would help to ensure that the mandates of *Mono Lake* are in fact realized.

Kevin M. Raymond

[^7]: By constitutional amendment, all water in California must be put to “reasonable and beneficial use... in the interest of the people and for the public welfare.” CAL. CONST. art. 10, § 2. See also supra note 21.
[^8]: See supra note 28 and accompanying text. This is the *Mono Lake* test for determining whether the alienation of public trust interests is permissible.
[^9]: 33 Cal. 3d at 441, 658 P.2d at 724, 189 Cal. Rptr. at 360–61.
[^10]: See supra notes 24 & 28 and accompanying text.