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# Environmental Quality, Water Marketing, and the Public Trust: Can They Coexist?

*Thomas J. Graff\**

Nearly my entire professional lifetime has been spent in behalf of environmental protection in the West, most of it in the field of water resources. During that time I have become increasingly committed to integrating economic analysis with environmental preservation values. I believe that my employer, the Environmental Defense Fund (EDF), has also become committed to that philosophy. We have long advocated least-cost investment planning for major private and public electric, gas and water utilities. We have experimented with attempts to qualify what most have thought to be unquantifiable environmental and recreational assets such as trout streams and high-quality river rafting. We have sought to introduce economic criteria into a range of pollution control regulatory and investment contexts, most recently in connection with the growing problem of drainage from irrigated agriculture in the West. And for many years we have championed and promoted relaxed marketing of water rights in the West as an alternative to the government subsidy-and-regulation policies which have been the dominant method of allocating scarce water in all the Western states.

The question then arises: if we are so committed to an economic way of thinking, what are we doing promoting the greater application of the public trust doctrine in the water rights field? The public trust doctrine is a lawyer's and judge's dream. But at least at first glance it seems to leave little room for the balancing of economic costs and benefits. And certainly it seems to elevate public property rights to a status well above those of private property, a result that inevitably will lead to more bureaucratic inefficiency and less market-based efficient allocation of private property interests in water.

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\* Thomas J. Graff, Senior Attorney, Environmental Defense Fund. Adapted from a presentation given at a symposium on "Western Resources in Transition: the Public Trust Doctrine and Property Rights," sponsored by the Political Economy Research Center at Bozeman, Montana May 17, 1986.

I think there are several answers to the question of why we have promoted the implementation of the public trust doctrine, in at least some situations, which should be acceptable to all but the most extreme devotees of libertarian thought. They hinge primarily on the concept of market failure. They include situations where interests in public resources are shared so broadly among so many people, without any reasonable method for restricting access to those resources, that the only way to protect those resources is by public intervention, and situations where economic activity causes negative environmental externalities to publicly held goods or values.

To take the most salient example, there appears to be no effective way to tax every bird watcher or duck hunter who takes pleasure from the birds nesting or feeding at Mono Lake. Nor is it likely to be feasible to assess every passer-by on Route 395 who enjoys the view of the Mono Lake Basin. Yet these disparate interests are committed to having the greater society take their values into account in determining the future of Mono Lake. Judicial implementation of the public trust doctrine is one means to force society to come to terms with the conflict in values over what should be Mono Lake's future. Many who have criticized the California Supreme Court's decision in the Mono Lake case, I believe, have insufficiently recognized that it was not the Court which created the clash over Mono Lake's future, but rather the contending litigants.

Having said this much, let me say now that I do not believe that the courts, via the public trust doctrine or any other legal artifice, will decide Mono Lake's future. The public support for Mono Lake's preservation is so pervasive that I am convinced it will cause the Governor and Legislature of California to fashion a compromise between environmental interests and the City of Los Angeles. Such a compromise will limit the City's diversions from the basin and will include some financial contribution, direct or indirect, by the state (and perhaps the federal government) that will partially compensate the City for its loss of water and power. A political problem with environmental and economic components will be solved in the political area. Contrary to de Tocqueville's maxim that all major American political questions eventually become judicial questions, I believe the various Mono Lake legal controversies will recede when a political compromise is hammered out. The myriad lawsuits are basically tactical devices to win advantage in the political negotiation yet to come.

The second major water controversy in California where the public trust doctrine is lurking barely below the surface of public con-

sciousness and contentiousness involves the level of freshwater inflow to San Francisco Bay. In 1978, a California regulatory board, the State Water Resources Control Board, issued a water rights and water quality decision dividing the waters of the Sacramento and San Joaquin River systems between Sacramento and San Joaquin Delta interests. One interest group included agricultural, municipal, industrial and fishing interests, and the other group included the two major water projects which divert water from the San Francisco Bay/Delta Estuary, the Federal Central Valley Project and the State Water Project. Approximately a dozen challenges to that decision were taken to the courts of California and are now pending before a California Court of Appeal in San Francisco.

One of these challenges raises the failure of the State Board to employ the public trust doctrine to protect the environmental values of the entire San Francisco Bay/Delta Estuary. This challenge appears in an amicus brief EDF filed in association with several other environmental and fishing groups. I am hopeful (what kind of a lawyer would I be if I were not?) that the Court of Appeal will soon issue an opinion invoking the public trust doctrine to protect the Bay and Delta that will give direction to the Board as it again begins the process of hearing evidence which will lead to a decision in 1989 or 1990 updating its 1978 decision.

It may be instructive, moreover, to describe what kind of directions we are asking the courts to give to the Board as it allocates the water of the Sacramento/San Joaquin and Bay/Delta/Estuary systems. We are asking for more economic investigation, not less. We are calling on the Board to consider whether the diverters' uses of water from the Estuary are economic. What about all those government subsidies which encourage too many diversions? We will be asking the Board to consider what would be the extent of the need for diversions if the major diverters encouraged, rather than obstructed, the free trading of water in the state. And we will be asking what would the real need for diversions be if water were priced at what it is really worth or at least at what it actually costs to store and deliver.

Admittedly an imperfect, cumbersome, and not very expert State Board will hear the evidence and allocate the waters of the estuary. The Board, much like the California Public Utilities Commission in the mid-1970s when we first brought economic criteria to the electric utility investment business, has only recently hired its first staff member who has an economic background and is not even employing him as an economist. But the locus for deciding the Bay's fu-

ture is at least formally in the Board. And we at EDF, in invoking the public trust doctrine, are merely asking that widely shared public values in San Francisco Bay water quality and ecological integrity be weighed in the balance where previously they have been ignored entirely or given extremely short shrift.

What then do these two examples (Mono Lake and San Francisco Bay) of highly visible, and yet very complex and contentious, controversies teach us? I suppose that we are doomed to live in an era of mixed systems. Private and public property rights. Public trust doctrine and free marketing of water rights. Economists and lawyers.

Having said that in a room probably filled with committed libertarians, let me hasten to add that I agree with those who are critical of the public trust doctrine because its broad application raises some serious problems. I will now detail a few of those problems and make a few suggestions as to how the use and scope of the doctrine should be deployed to reduce those problems to a minimum. I have already alluded to the first problem. Judicial implementation of a public trust doctrine to protect environmental resources diminishes the certainty with which private property interests in water are held. If appropriators of water from a stream are forever subject to the open-ended possibility that a court or a regulatory authority may seek to take back that appropriated water to protect the in-stream value which that diversion may be threatening, the appropriative right, which may long have been thought by its holder to be a vested right, may turn out instead to be an illusory right. Moreover, the uncertainty which is engendered by the possibility that the public trust doctrine will be invoked may well make the transfer of that appropriative right less likely and it certainly will make the right less valuable. A potential buyer seeking a new water supply may well be deterred from paying the transaction costs of negotiating a water purchase if his prospective supply is subject to a higher and non-compensating use, thus possibly precluding a more efficient use for that water.

A second problem arises because it is unlikely that the courts will see fit to limit application of the public trust doctrine only to those resources which truly are "public" in nature and to which access cannot reasonably be restricted. It is my understanding that the Montana legislature has recently sought to make a distinction between categories of streams where public access and public management are prescribed and others where private control will continue to be the norm. Whether such a distinction can be made success-

fully, time may tell. It certainly will be difficult to fashion criteria that satisfactorily distinguish cases where public intervention is justified from those where it is not.

Finally, a third problem also already alluded to is the perceived arbitrariness of bureaucratic allocation of resources. So-called "public choice" theorists and others have convincingly made the case that bureaucrats (and most probably judges) frequently, if not invariably, act in ways which maximize their own interests rather than those of the public they are theoretically serving. Moreover, in many cases, even where the motivation of bureaucratic or judicial decision-makers is not suspect, their capacity to make sensible allocation decisions among competing resource claimants is likely to be biased by political philosophy, environmental attitude, and information limitations. When eco-minded decision-makers are in power, which tends to be rather rare, the pendulum will swing one way. When the boomers take over, the pendulum swings the other way.

These are all serious problems. None is easily solved. But in trying to bring this presentation to a close, let me suggest if not a resolution of these problems at least the beginning of an approach to their amelioration. In essence, what I will recommend is an effort to integrate the economist's interest in efficiency with the environmental lawyer's advocacy of judicial and bureaucratic preservationist doctrine.

First, we should all recognize that the principal reason the public trust doctrine is being employed and discussed ever more frequently in judicial and academic circles is that generally the value society is placing on environmental and recreational amenities seems to be steadily increasing. People may debate whether this is primarily a function of higher incomes, increasing population density, or diminishing environmental quality, but the phenomenon is difficult to dispute. Fifty years ago no one thought twice about the value of a wetland or a tidal marsh if economic development was proposed on such a site. Today, as they have become increasingly scarce, society values such environments much more highly. Accordingly, at least in a rough sort of way there is frequently an implicit economic valuation taking place when the public trust doctrine is invoked to protect a particular environmental resource.

Second, as societal experience with the public trust doctrine concept increases, economic criteria are likely to play an increasing role in the real-world decisions which flow from application of the doctrine. The Mono Lake case has been remanded to lower courts and may be referred to the State Board for fact-finding which will bal-

ance the interests of the lake and its supporters against those of the City of Los Angeles. In the San Francisco Bay situation, as I noted earlier, EDF has already announced its intention to urge the Board to consider economic evidence and arguments in allocating the waters of the Bay/Delta estuary. The public trust doctrine, at least as it applies to water rights allocation, is still in its infancy, yet it is clear that its implementation will involve the application of economic criteria.

That still leaves the question, however, whether a market in water can be integrated with the application of the public trust doctrine. Bureaucratic or judicial implementation of economic criteria does not a market make. Here I think progress is still in a fledgling state. Earlier in this presentation I predicted the ultimate resolution of the Mono Lake controversy and labelled that resolution political. But that resolution, if it takes place, can also be termed an economic and almost a market solution. Representatives of the public that appreciates Mono Lake, i.e., the state and perhaps the federal government, will pay Los Angeles at least partial compensation for foregoing a significant percentage of its potential diversions from the Mono Lake Basin. In the San Francisco Bay situation, such a political/economic solution is both harder to fashion and to predict, but the seeds of such an approach have already been sown. A bill now wending its way through Congress reallocates the costs of the Central Valley Project so that if more Project water is ultimately dedicated to Bay/Delta protection, less reimbursement of the Project's financial cost will be required of its water contractors. Similarly, at the state level, discussion has begun concerning a similar reallocation of cost to the state taxpaying public as a proxy for the public interest in the Bay should more water be dedicated to Bay outflow.

I do not mean to suggest that the above approaches to resolve the Mono Lake and San Francisco Bay controversies are perfect. Far from it. Indeed, a lengthy and bitter debate is anticipated concerning the question of what segment of the public benefits from invocation of the public trust and what segment of the public should compensate the property rights holders whose interests are infringed by application of the trust (if compensation is to be paid at all). Not all California taxpayers are bird-lovers. Nor is it clear that a resident of New Jersey or even of San Diego has such a compelling interest in the ecological health of San Francisco Bay. Our democratic political process, with its inevitable trade-offs, is at best an imperfect method for discerning the preferences of the body poli-

tic. But for the major public resource questions we face it is the best we have.

I conclude with an exhortation. Let's just make sure that as political decisions are made to allocate our resources, both the public's interest in environmental preservation and its interest in economic efficiency are considered. In many situations, if not in most, the two should be reconcilable, particularly if the environmental concerns are given the imputed economic value which they deserve.



