

1-2011

Instream Flow and the Public Trust: Statutory Innovation in California's 2009 Delta Reform Act

Paul S. Kibel

Golden Gate University School of Law, pkibel@ggu.edu

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/pubs>

 Part of the [Environmental Law Commons](#), and the [Water Law Commons](#)

Recommended Citation

13 Water Resources Committee Newsletter 4 (ABA, Jan. 2011)

This Article is brought to you for free and open access by the Faculty Scholarship at GGU Law Digital Commons. It has been accepted for inclusion in Publications by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.



Water Resources Committee Newsletter

Vol. 13, No. 2

January 2011

INSTREAM FLOW AND THE PUBLIC TRUST:

STATUTORY INNOVATION IN CALIFORNIA'S 2009 DELTA REFORM ACT

Paul Stanton Kibel

INSTREAM FLOW AND THE PUBLIC TRUST: STATUTORY INNOVATION IN CALIFORNIA'S 2009 DELTA REFORM ACT

Paul Stanton Kibel

New Context for an Old Doctrine

As legal creatures go, the public trust is an odd duck. Public trust principles are often echoed in state constitutional provisions but state constitutions are not the source of the public trust. State statutory provisions often reference the public trust but its legal foundation is not found in such statutes. The public trust has been characterized as a property interest but one not held by any particular private or governmental entity.

In California, a comprehensive legal elucidation of the public trust was set forth in the California Supreme Court's 1983 decision in *National Audubon Society v. Superior Court (National Audubon)*. 33 Cal. 3d 419. This case centered on whether the California State Water Resources Control Board (State Water Board) was required to consider modification of previously issued water diversion rights granted to the city of Los Angeles in light of evidence of the dire impacts of such diversions on instream public trust resources. The instream public resources involved in the litigation were Mono Lake and its tributary creeks in the eastern Sierras.

In *National Audubon*, the California Supreme Court held that the public trust imposes a duty of "continuing supervision" on trustee agencies to ensure that public trust resources are protected whenever feasible, and that the State Water Board had breached this duty by failing to consider impacts on instream public trust resources both at the time the water diversion rights were granted and subsequent to such issuance. The holding in *National Audubon* eventually resulted in the State Water Board's 1994 modification of the previously issued water diversion licenses to secure additional instream flows in Mono Lake's tributaries and to restore elevation levels and reduce salinity levels in Mono Lake.

As a result of California legislation signed into law in November 2009, the public trust is again at the center

of competing claims to the state's instream resources. Section 85086 of the 2009 Sacramento-San Joaquin Delta Reform Act (2009 Delta Reform Act) ordered the State Water Board to conduct proceedings to "develop new flow criteria for the Delta ecosystem necessary to protect public trust resources." The Sacramento-San Joaquin Delta (Bay Delta) is where the freshwater of the Sacramento and San Joaquin Rivers converges and flows down to meet the saltwater that enters through San Francisco Bay and the Carquinez Straits. The Bay Delta is the water diversion hub for California's two largest water distribution systems—the federal Central Valley Project and the State Water Project—that collectively provide irrigation to over 4.5 million acres of farmland and drinking water to over 20 million residents. The Bay Delta is also the largest estuary on the West Coast and a critical ecological resource, serving as fisheries habitat for smelt, steelhead trout, and salmon.

The California legislature's deployment of the public trust in the 2009 Delta Reform Act is both innovative and controversial, and merits careful study by other states attempting to more effectively address the problem of inadequate freshwater instream flows.

The Two-Step Public Trust Methodology Established in the Mono Lake Case

The origins of the public trust date back to the law of the Roman Empire, which recognized a category of common property (or *res communis* in Latin). England built upon and adapted the Roman legal concept of *res communis*. In 1215, King John of England signed the Magna Carta, which mandated the removal of fish weirs from rivers throughout England, imposing limits on the crown's ability to convey property rights to waterways. English common law also added the trustee component to *res communis*, holding that certain common resources were held by the crown for the benefit of the crown's subjects. Thus, the English crown held title to such common property in the capacity of a trustee for the public, which was the true beneficiary.

When the English crown conveyed certain property rights to the land encompassing the thirteen original

colonies in North America (that later became the United States of America), the crown conveyed this land subject to the royal obligation to preserve the colonies' public trust resources for the benefit of the people. With the American revolution, the royal public trust obligations to the colonies were conveyed to the new state legislatures of each of the former thirteen colonies. The Northwest Ordinance of 1787 then declared that new states were to be subsequently admitted (to the United States of America) on equal footing with the original thirteen colonies, ensuring the public trust's application to all states.

Two important early judicial precedents to the *National Audubon* decision by the California Supreme Court were *Illinois Railroad Company v. State of Illinois (Illinois Central)*, 146 U.S. 453 (1892), and *People v. California Fish Company (California Fish Company)*, 166 Cal. 576 (1854).

In *Illinois Central*, the Illinois state legislature had granted a railroad fee simple title to nearly the entire Lake Michigan waterfront in the city of Chicago. The U.S. Supreme Court found that such a conveyance was inconsistent with the state of Illinois' public trust obligations, explaining: "The State can no more abdicate its trust over the property in which the whole people are interested, like navigable waters and the soils under them, than it can abdicate its police powers."

In *California Fish Company*, the California Supreme Court held that government conveyances of interests in public trust resources were "impressed with the public trust." The litigation in *California Fish Company* involved the state's grant of certain lands submerged beneath San Francisco Bay. The California Supreme Court did not void the grant outright, but instead clarified that the "title to the soil" is "subject to the public right of navigation" in the waters above such submerged lands.

In terms of the California Supreme Court's *National Audubon* decision on Mono Lake, there are two unique ecological conditions that characterize this water body. First, the waters in Mono Lake are so saline that the only fish and insects that populate it are

the Mono Lake brine shrimp and the Mono Lake alkali fly. Second, there were two natural islands in the lake—Negit Island and Paoha Island. These two islands were home to a colony of California gulls representing 85 percent of the California gull breeding population.

In 1940, the California Division of Water Resources, a predecessor agency to the State Water Board, issued appropriative water right permits to the city of Los Angeles Department of Water and Power (LADWP) to divert nearly the entire flow of creeks that are tributary to Mono Lake. As the diversions of the tributary creeks accelerated in the 1970s, the level of Mono Lake dropped steadily. As its level fell, the waters of Mono Lake became increasingly saline so that brine shrimp and alkali fly populations began to decline. The drop in lake level also caused a land bridge to form between Negit Island and the lakeshore, providing coyotes with access to the California gull colonies.

In *National Audubon*, relying on *Illinois Central* and *California Fish Company*, the California Supreme Court issued the following four holdings in connection with the public trust: (1) that the power of state agencies to grant licenses for water diversion is conditioned on the affirmative duty of the state of California to consider the public trust in the allocation of water resources and to protect public trust uses whenever possible; (2) that this affirmative duty imposes a "continuing" obligation of supervision (extending beyond when the appropriative water diversion licenses are initially issued) to ensure that the exercise of such licenses provides proper protection of public trust resources; (3) that the California Division of Water Resources had not initially fulfilled its public trust obligation by approving LADWP's application to divert water from the Mono Lake tributaries without first assessing the impact of such proposed diversion on Mono Lake's public trust resources and uses; and (4) because the public trust is a "continuing" obligation the State Water Board must now review LADWP's diversion licenses to take proper account of the state's public trust obligations.

In its *National Audubon* decision, the California Supreme Court stopped short of itself determining the specific lake elevation levels for Mono Lake that would comport with public trust requirements, and also stopped short of itself adopting specific instream flow criteria for Mono Lake’s tributary creeks. Instead, the California Supreme Court opted to provide the State Water Board with an initial opportunity to craft this more specific instream flow and lake level criteria. In response to the *National Audubon* decision, in 1994, the State Water Board issued Decision 1631, which established a “two-step” public trust methodology to implement the *National Audubon* holding.

In the first step of its public trust analysis, the State Water Board would determine what levels of instream flow and lake elevation were needed to fully protect the public trust resources at issue. In the second step of its public trust analysis, the State Water Board would then evaluate the extent to which the measures required to achieve full protection of public trust resources were “feasible.”

Turning to the first step of its two-step public trust analysis, Decision 1631 concluded that a lake level of 6384 feet would protect the gulls from the coyote access to Negit Island by assuring inundation of the land bridge between Negit Island and the shore, and that a lake level at or near 6390 feet will restore salinity levels to maintain the aquatic productivity of the lake in good condition.

After completing the first phase of its public trust analysis, the State Water Board then turned to the second “feasibility” step of its two-step public trust methodology. In considering the question of feasibility of reducing LADWP’s diversions of Mono Lake’s tributary creeks, Decision 1631 evaluated LADWP’s water supply system as a whole, taking into account such aspects as opportunities for LADWP to improve water conservation, water reclamation, and the costs of replacing water diversions reduced to protect public trust resources. The State Water Board determined that, during the initial 20-year period to restore Mono Lake’s elevation level, protection of public trust resources would reduce LADWP’s Mono Lake tributary export by approximately 32,200 AF per year.

Based on its assessment of LADWP’s water supply as a whole, Decision 1631 found that the estimated additional water supply costs to LADWP did not “make it infeasible to protect public trust resources in the Mono Basin in accordance with the terms of this decision.”

As detailed below, the public trust provisions in California’s 2009 Delta Reform Act are rooted in the two-step public trust instream flow methodology employed by the State Water Board in Decision 1631 on Mono Lake.

California’s Bay Delta—Decades of Dispute over an Ecosystem in Decline

A full account of the Bay Delta water resource battles in recent decades is well beyond the scope of this article. However, a general sense of the key themes, stakeholders, and laws involved is needed to understand the frustrations and objectives that led to the inclusion in the California 2009 Delta Reform Act of statutory provisions mandating that the State Water Board conduct public trust proceedings to establish Delta flow criteria.

In terms of the main water diversion infrastructure and water diversion operations pertaining to the Delta, much of this infrastructure and these operations relate to the federal Central Valley Project (operated by the federal Bureau of Reclamation, a subagency of the U.S. Department of the Interior) and California’s State Water Project (operated by the California Department of Water Resources, a subagency of the California Resources Agency).

The federal Central Valley Project was authorized in the 1930s primarily to provide irrigation to farms in California’s Central Valley (which stretches north-south from Redding to Bakersfield). The bulk of Central Valley Project infrastructure was constructed in the 1940s and 1950s, and includes Shasta Dam on the Sacramento River (north of Redding) and Friant Dam on the San Joaquin River (near Fresno) and extensive pumping facilities in the Bay Delta (near Tracy).

California's State Water Project was authorized in the late 1950s primarily to provide water supply for municipal urban use, particularly for growing cities in central and southern California. The bulk of State Water Project infrastructure was constructed in the 1960s and early 1970s, and includes Orville Dam (on the Feather River, the largest tributary to the Sacramento River) and extensive pumping facilities in the Bay Delta (near Tracy).

In a 2001 law review article, Patrick Wright, a veteran of Bay Delta water allocation disputes and a former senior California water policy advisor to both the U.S. Environmental Protection Agency and the governor of California, observed:

For the previous two decades, water planning and politics have been characterized by conflict rather than cooperation. Each of the major interest groups have been powerful enough to block each other, in court or at the ballot box, but none have been powerful enough to enact their own agenda. Environmental groups, for example, have been successful in blocking new reservoirs, but unable to stop increased diversions from the Delta that have contributed to listings of several fish species under the federal Endangered Species Act . . . [T]he resulting stalemate has prevented progress in either restoring the San Francisco Bay Delta or improving the state's water supply reliability. (Patrick Wright, *Fixing the Delta: The CALFED Bay Delta Program and Water Policy Under the Davis Administration*, 31 GOLDEN GATE U. L. REV. 331, 332 (2001)).

During the late 1990s, under the leadership of California's Republican Governor Pete Wilson and President Clinton's Interior Department Secretary Bruce Babbitt, a comprehensive set of policies and programmatic priorities were developed pursuant to what became known as the CALFED Bay Delta Program to help better integrate environmental restoration and water supply objectives in the Bay Delta. The more cooperative CALFED Bay Delta process began to fracture and unravel in the mid-2000s, however, and litigation under the federal Endangered Species Act (ESA) took center stage. In

2004, the federal National Marine Fisheries Service (NMFS) adopted a biological opinion pursuant to the ESA in connection with a proposed plan for joint operation of the Bay Delta diversion pumps by the federal Central Valley Project and the State Water Project. In 2008, a federal district court invalidated NMFS' 2004 ESA Biological Opinion due to the absence of evidence to support the findings that the proposed diversion pumping adequately protected the endangered fisheries such as salmon, steelhead, and smelt.

In January 2008, Governor Schwarzenegger's Delta Vision Blue Ribbon Task Force released its report *Our Vision for the California Delta*. This report sought to articulate a common policy consensus between those interests pressing for continued water diversions from the Bay Delta and those interests seeking to curtail such diversions to restore the Bay Delta's fisheries. *Our Vision for the California Delta* noted:

Public trust principles, well established in the American legal system with roots back to England and parallel principles in other legal systems, provide a way to frame decisions about the use of water in the Delta and the Delta watershed. In our legal system, water is not owned by any user, but the State of California and public retain ownership. Users gain the right to use water in various ways (riparian, appropriative, etc.) but those rights are conditional as stated both in the term reasonable use and by the underlying public trust for protection of the resource. Public trust principles should provide an ethic and foundation for public policymaking regarding water resources in all of California and are especially relevant and important in the Delta. (Governor's Delta Vision Blue Ribbon Task Force, *Our Vision for the California Delta* (Jan. 2008)).

The Delta Vision Blue Ribbon Task Force's 2008 observations about the potential role of the public trust in Bay Delta water policymaking would soon find expression in the provisions of California's 2009 Delta Reform Act.

2010 State Water Board Public Trust Proceedings on Delta Flow Criteria

Statutory Language in 2009 Delta Reform Act

The 2009 Delta Reform Act added section 85086 to the California Water Code, which provides:

. . . [T]he board shall, pursuant to its public trust obligations, develop new flow criteria for the Delta ecosystem necessary to protect public trust resources. In carrying out this section, the board shall review existing water quality objectives and use the best available scientific information. The flow criteria for the Delta ecosystem shall include the volume, quality, and timing of water necessary for the Delta ecosystem under different conditions. The flow criteria shall be developed in a public process by the board within nine months of the enactment of this division.

Significantly, section 85086 also specified that the State Water Board public trust Delta flow criteria proceedings were “informational proceedings” that would not be considered “pre-decisional” in terms of any subsequent board actions. The statutory language in section 85086 therefore makes clear that, unlike State Water Board water right hearings such as the one that resulted in Decision 1631 for Mono Lake and its tributaries, the Delta flow criteria established pursuant to section 85056 would not by themselves result in any direct modification of existing California water diversion rights.

Section 85086’s intentional statutory bifurcation of the two-phased public trust analysis for instream water resources makes sense, as the first phase of the public trust analysis is essentially a scientific inquiry while the second phase of the public trust analysis is an inquiry that inherently involves political and economic considerations. Section 85086, by its very design, seeks to preserve the integrity of the State Water Board’s science-based findings regarding Delta flow criteria by expressly guaranteeing that water rights holders will have subsequent and separate opportunities to present evidence regarding the economic impacts of reduced diversions before such

Delta flow criteria are relied upon to modify existing water rights.

Points of Contention in Comments Submitted During Spring 2010 Proceedings

Two main points of contention surfaced in the spring 2010 comments submitted to the State Water Board in connection with section 85086: (1) economic feasibility of potential delta outflow criteria; and (2) qualitative versus quantitative flow criteria.

On the first point of contention (regarding economic feasibility), many Bay Delta water diverters submitted comments proposing that the State Water Board take into account such diverters’ economic reliance on Bay Delta diversions in developing public trust Delta flow criteria. For instance, in a comment letter to the State Water Board, the California Department of Water Resources stated:

The [Delta Reform] Act requires the State Water Board to “develop new flow criteria for the Delta ecosystem necessary to protect public trust resources” . . . DWR believes that if this mandate is to be achieved, the Board must develop the Delta flow criteria through a process that balances the benefits and costs to other beneficial uses of water and public trust resources.

The approach recommended by the California Department of Water Resources, which called for evaluation of second-phase “feasibility” consideration in the context of the section 85085-mandated public trust Delta flow criteria proceedings, was resisted by environmental conservation and fishery stakeholders. For example, the comment letter submitted by Environmental Defense Fund placed the section 85056 public trust Delta flow criteria proceedings in the context of the two-phased public trust analysis previously established in State Water Board Decision 1631:

At this stage the only “balancing” allowed is that between competing trust uses themselves . . . This is how the State Board proceeded in the Mono Lake case when the courts handed the matter back to it for application of the court’s ruling. The

SWRCB's initial analysis addressed the various trust resources of the Mono Basin and the water requirements necessary to ensure the future sustainability of those resources . . . The SWRCB's second step is to turn to the question of whether it is "feasible" to provide the water resources necessary to protect the trust values at issue, or whether accepting harm to those resources rises to the level of "practical necessity."

On the second point of contention (regarding qualitative versus quantitative Delta outflow criteria), some water users and water project operators argued that, due to scientific certainty, the public trust Delta flow criteria developed by the State Water Board should be limited to "narrative" flow criteria and should not include quantitative "numeric" flow criteria. This position was reflected in the comment letter submitted jointly by the San Luis & Delta-Mendota Water Authority, State Water Contractors, Westlands Water District, Santa Clara Valley Water District, Kern County Water Agency, and Metropolitan Water District of Southern California, which suggested:

. . . [T]he current state of the science clearly demonstrates numeric flow criteria cannot be properly established until flow is studied in a proper context that analyzes the ecological services it provides, and it is determined that flow is the proper mechanism to provide those services . . . [G]iven scientific uncertainties . . . the State Water Board cannot, at this time, reach any final quantitative conclusion on flow needs.

Environmental conservation and fishery organizations instead proposed that the State Water Board develop quantitative instream flow criteria pursuant to section 85086 of the 2009 Delta Reform Act. More specifically, detailed and numerically specific proposed Delta flow criteria were included in the State Water Board submissions of the following organizations: American Rivers, Natural Heritage Institute, California Sportfishing Protection Alliance, California Water Impact Network, Environmental Defense Fund, Bay Institute, and Natural Resources Defense Council. In its comments to the State Water Board as to why

narrative flow criteria were inadequate, the Environmental Defense Fund asserted:

A policy decision [by the State Water Board] to delay establishment of quantified and clear flow criteria until the science reaches this ideal level of predictability would be tantamount to a policy decision to tolerate the continued decline of the Bay-Delta ecosystem and its fishery resources.

August 2010 Final Public Trust Delta Flow Criteria

On August 3, 2010, the State Water Board adopted its *Delta Flow Criteria Report*. Section 1.1 of the *Delta Flow Criteria Report* was titled "Legislative Directive and State Water Board Approach." Under the subheading "State Water Board's Public Trust Responsibilities in this Proceeding," the *Draft Delta Flow Criteria Report* explained:

Under the public trust doctrine, the State Water Board must take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 446). Public trust values include navigation, commerce, fisheries, recreation, scenic and ecological value. "In determining whether it is 'feasible' to protect public trust values like fish and wildlife in a particular instance, the [State Water] Board must determine whether protection of those values, or what level of protection, is 'consistent with the public interest.'" (*State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 778). The State Water Board does not make any determination regarding the feasibility of the public trust recommendation and consistency with the public interest in this report.

In this forum, the State Water Board has not considered the allocation of water resources, the application of the public trust to a particular water diversion or use, water supply impacts . . . Any such application of the State Water Board's public trust responsibilities, including any balancing of public trust values and water rights, would be

conducted through an adjudicative or regulatory proceeding. Instead, the State Water Board's focus here is solely on identifying public trust resources in the Delta ecosystem and determining the flow criteria, as directed by Water Code Section 85086.

A comprehensive analysis of the contents of the *Delta Flow Criteria Report* is beyond the scope of this article, but of particular importance was the State Water Board's adoption of "quantitative" (numeric) rather than "qualitative" (narrative) flow criteria. More specifically, in section 1.2 titled "Summary Determinations," under a subheading titled "Flow Criteria and Conclusions," the *Delta Flow Criteria Report* provided:

In order to preserve the attributes of natural variable system to which native fish species are adapted, many of the criteria developed by the State Water Board are crafted as percentages of natural or unimpaired flows. These criteria include:

- 75% of unimpaired Delta outflow from January through June;
- 75% of unimpaired Sacramento River inflow from November through June; and
- 75% of unimpaired San Joaquin River inflow from February through June.

It is not the State Water Board's intent that these criteria be interpreted as precise flow requirements for fish under current conditions, but rather they reflect the general timing and magnitude of flows under the narrow circumstances analyzed in this report. In comparison, historic flows over the last 18 to 22 years have been:

- approximately 30% in drier years to almost 100% of unimpaired flows in wetter years as Delta outflows;
- about 50% on average from April through June for Sacramento River inflows; and
- about 20% in drier years to almost 50% in wetter years for San Joaquin River inflows.

Responses to the State Water Board Public Trust Delta Flow Criteria

Before adopting its final *Delta Flow Criteria Report* in August 2010, the State Water Board circulated a draft of its *Delta Flow Criteria Report* in July 2010. The Delta outflow criteria adopted in the final report were identical to those presented in the draft report.

Predictably, water users and water project operators were generally displeased with the State Water Board's ultimate approach to Delta flow criteria. Commenting on the July 2010 draft report, the California Department of Water Resources stated:

DWR understands that [the State Water Board] interpreted its charge in Water Code Section 85086 of the Delta Reform Act to produce recommendations for Delta outflow necessary to protect public trust resources . . . without considering the feasibility of implementing the flow recommendations.

...

[The State Water Board] acknowledges on page 12 of the Draft Report that the public trust doctrine required [the State Water Board] to "preserve, so far as consistent with the public interest, the uses protected by the trust." (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 447.) These public interest considerations are critical to [the State Water Board's] discharge of its public trust obligations. However, in developing the Draft Report, the [State Water Board] takes a much more limited approach. By not considering the public interest in this report, or determining whether the flow criteria are consistent with the public trust, [the State Water Board] fails to appropriately discharge its public trust obligations, as required by the Delta Reform Act.

In contrast, environmental conservation and fishery groups were generally pleased with the State Water Board's end product. As set forth in a comment letter submitted jointly by the Bay Institute, California Coastkeeper Alliance, California Sportfishing Alliance, California Water Impact Network, Defenders of

Wildlife, Environmental Defense Fund, Natural Resources Defense Council, Planning and Conservation League, and Sierra Club California:

Our organizations collectively represent hundreds of thousands of Californians concerned about keeping the Bay-Delta alive and healthy and restoring our dwindling salmon and other aquatic species. We applaud the draft that you have prepared identifying the flow needs of the Estuary's public trust resources, and particularly commend your careful analysis of the overwhelming scientific support that has demonstrated for many years that we are, and have been, extracting too much water from the estuary and its watershed to support those trust resources sustainably.

Conclusion—A Strategic Statutory Use of the Public Trust

Unlike in the case of the Mono Lake Basin with just one municipal diverter and user of instream water, in the case of the Bay Delta state and federal agencies operate multiple diversion facilities throughout the Sacramento River and San Joaquin River watersheds, and there are myriad agricultural and municipal interests throughout the state that use water diverted from the Bay Delta specifically and the Sacramento River and San Joaquin River watersheds more broadly.

These circumstances do not suggest that public trust protections are any less applicable or binding in the Bay Delta than they are in the Mono Lake Basin, but they do suggest that when it comes to the Bay Delta, the phase-two feasibility component of the two-phased public trust analysis is likely to be a contentious, politicized, and potentially protracted undertaking.

In adopting section 85086 of the 2009 Delta Reform Act, the California legislature took an honest and sober account of the complexities involved in application of the phase-two feasibility component of the public trust analysis to the Bay Delta, and wisely chose an approach that can best be described as “intentional decoupling.” That is, instead of waiting to have the State Board (or a court) attempt to address the first phase and second phase of the public trust analysis in

the context of a single water right proceeding seeking to modify Bay Delta diversion entitlements, the California legislature strategically used section 85086 to statutorily compel the State Water Board to complete the first phase of its Bay Delta public trust analysis within a specified time frame while reserving for another day and another proceeding the completion (by either the State Water Board or a court) of the second phase of the Bay Delta public trust analysis.

The August 2010 Bay Delta public trust flow criteria adopted by the State Water Board stayed true to this practical and well-conceived statutory framework.

Paul Stanton Kibel is associate professor at Golden Gate University (GGU) School of Law in San Francisco, where he teaches water law and co-directs the GGU Center on Urban Environmental Law. He is also of counsel to and a former partner with the water law practice group at Fitzgerald Abbott & Beardsley LLP. An expanded version of this article will be published in 2011 in the NATURAL RESOURCES JOURNAL as “The Public Trust Navigates California’s Bay Delta”