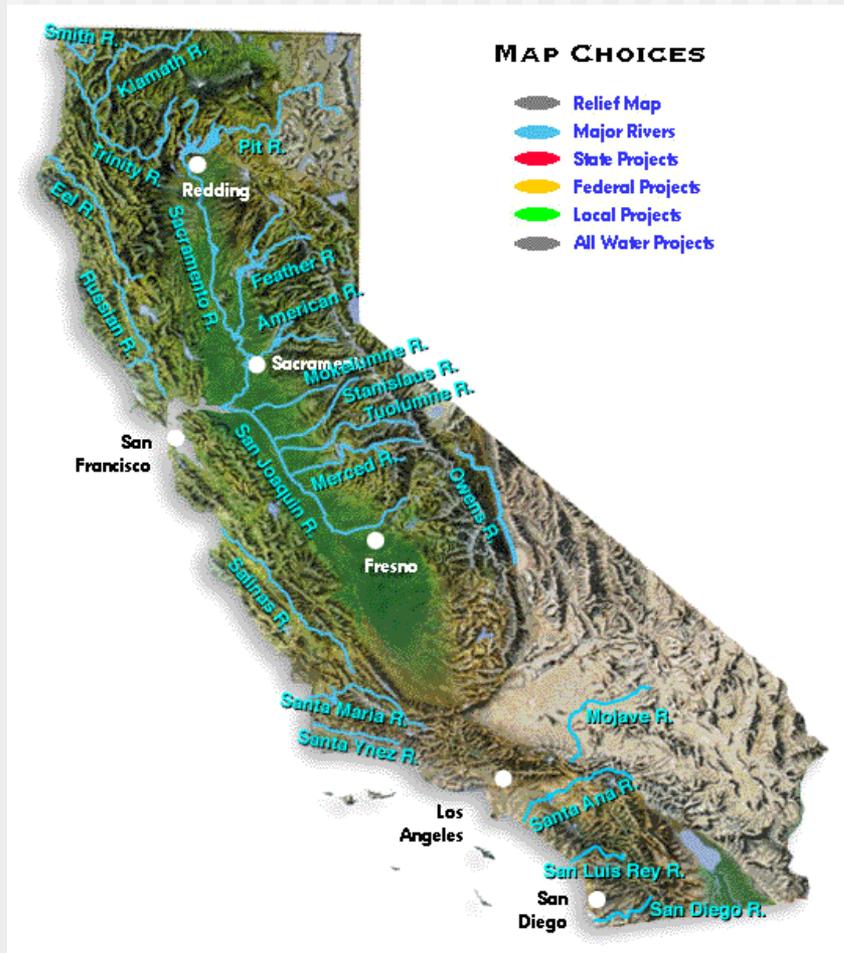


The Public Trust Doctrine: A Tool for Protecting In-Stream Flows



Waterscape
International
Group

Today's Water Quality Situation

- 200 MAF total (120 evapotranspiration, 80 runoff)
- 34 agriculture, 9 for domestic and industrial
- TDS, pesticides, and heavy metals
- Low flow, higher temperatures, obstructed flow
- Human-side issues: makes purification for drinking water more costly, recreation, fishing
- Ecosystem-side: anadromous fish, vegetative cover, natural ecosystems
- Solution: **Increase in-stream flows** (USGS, 1 DWR, etc)

Questions

- Who has the power to allocate water in California?
- How do we increase in-stream flows and protect these in-stream uses?
- What obstacles prevent this?
- What tools are available for meeting this need?

Goal

- Demonstrate the Public Trust Doctrine is this tool:
 - for placing a value on in-stream uses/flows
 - for empowering the SWRCB to protect those uses
 - for enabling the SWRCB to reset permit allocations without “takings” fears

Development of Water Rights in CA

- Large system of private rights, much of the water is already allocated
 - in a privatized system, in-stream or common uses will not be protected (there is no incentive to do so)
- Water rights are usufructuary, the State “owns” all of the water
- Real Property Rights, “takings” typically require **compensation**

Development of the Public Trust Doctrine

- Idea that the protection navigable waters is vitally important to fishing and commerce
- These resources are above private ownership and should be held in “trust” by the State for the People
- Oldest “environmental” law with roots in the Institutes of Justinian Book 2, Div. 1 (535 A.D.)
- Adopted by English Common Law

Development of the Public Trust Doctrine

- Upon Signing Declaration of Independence the U.S. adopted English Common Law where consistent with the Constitution of the U.S.
- Interpreted in Supreme Court Decision *Illinois Central Railroad v. State of Illinois* (146 U.S. 387)
 - State tried to abdicate trust responsibility over harbor
 - Chief Justice Taney in *Martin v. Waddell*, "When the Revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government."

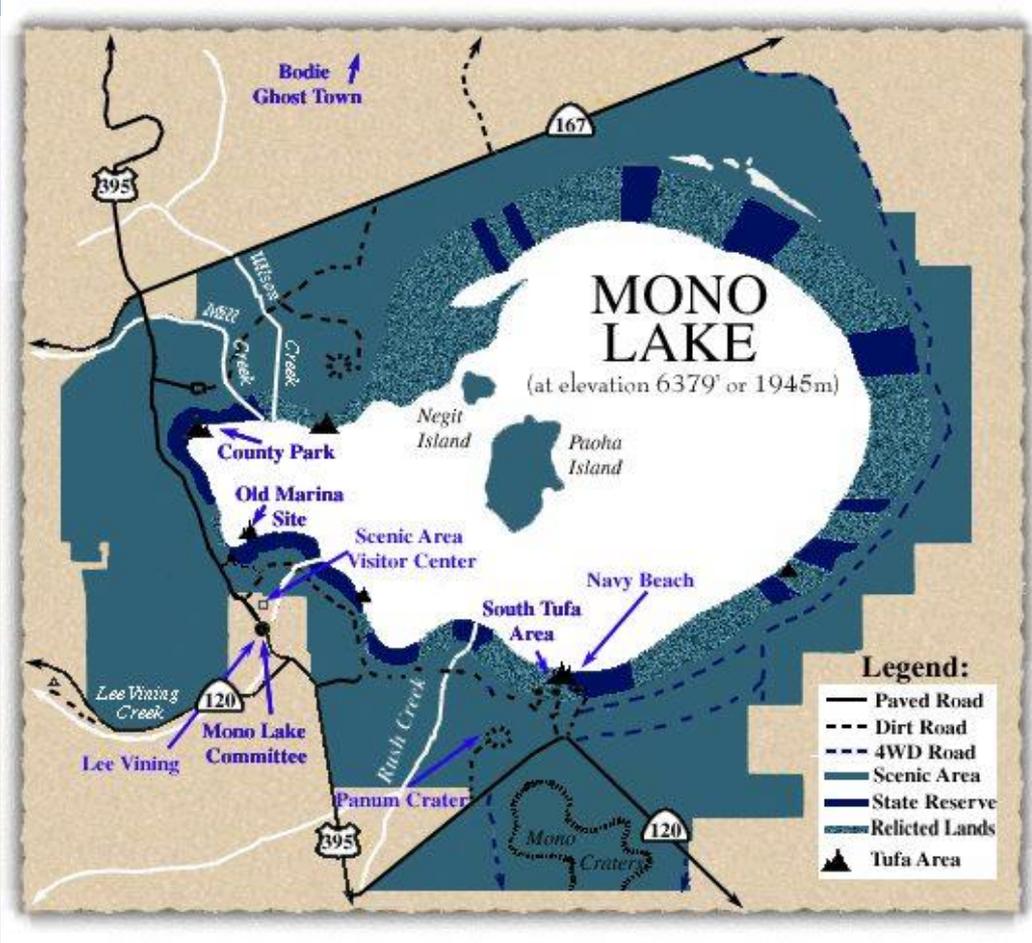
Characteristics Public Trust Doctrine

- Originally applied to commerce and fishing on navigable waterways, but has been expanded in both the places where it applies and the uses protected
- Places a high fiduciary responsibility on the State as Trustee for the People
- The burden of proof rests on those seeking to modify the trust (in fact, but not in practice).
- Can be thought of as an easement on private property rights, (e.g. w.r.t. water the right to use this water is subject to “reasonable and beneficial use”). In violating the easement the State can take away your right **without compensation**

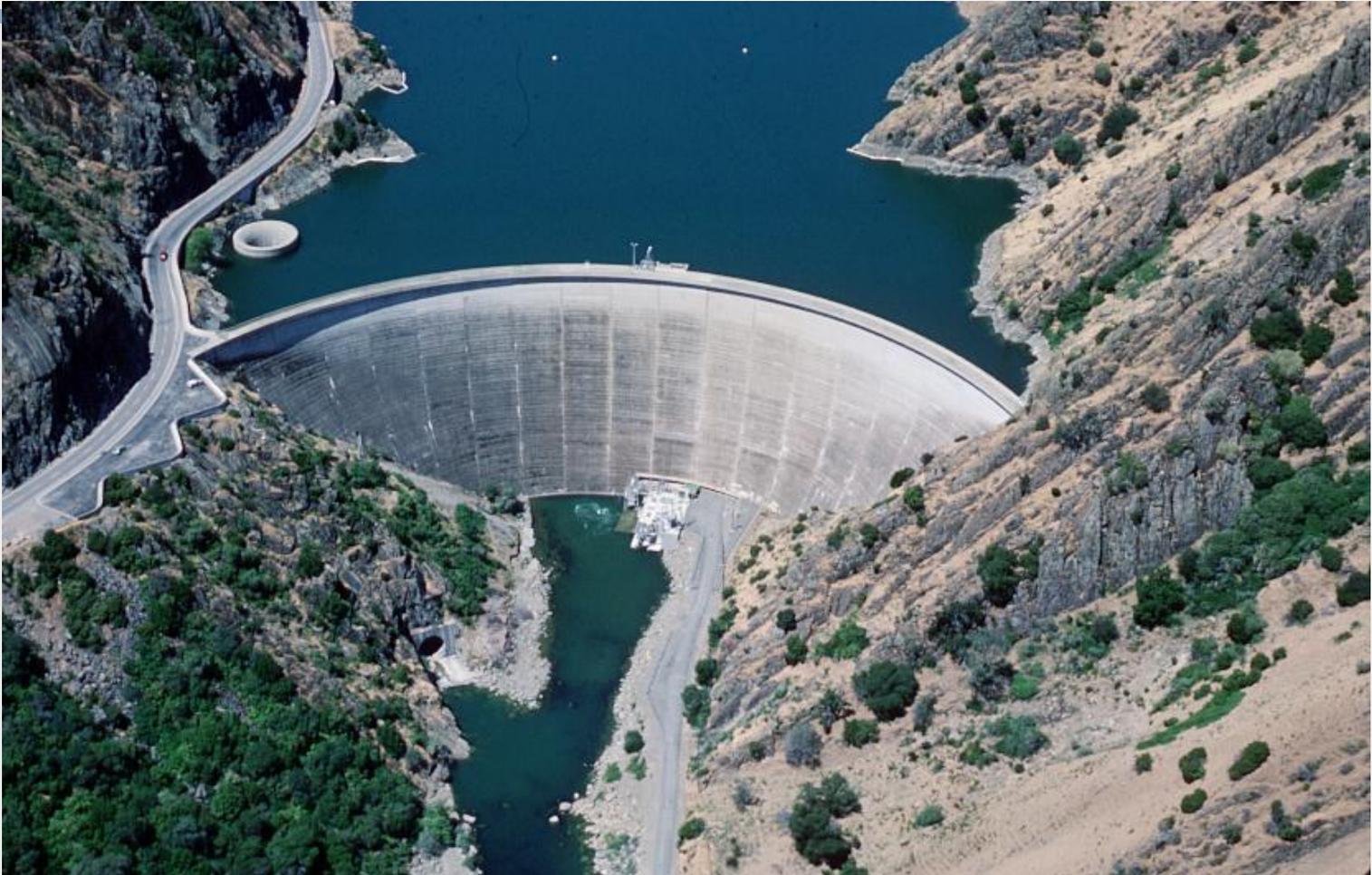
Why does the PTD apply in CA?

- The PTD also stands alone as a common law principle, meaning a judge could decide a case without specific reference to a statute
 - California Constitution Article 10 § 2, "reasonable and beneficial use"; and § 4 regarding navigation
 - California Endangered Species Act
 - California Fish & Game Code
 - California Water Code
- Additionally, the CWC reads that domestic use of water is the highest use and the next highest is for irrigation

Mono Lake Case



Putah Creek Case



Option for Reshaping Water Rights Law

- Recommendation:
 - Amend CA Water Code to clarify water rights and specify grounds for reallocating water (resetting permits) under the PTD
- Costs of clarifying rights and PTD applicability:
 - SWRCB might reallocate water and users of water may not receive as much as in the past leading to economic hardships, job loss, etc.
 - The PTD could affect “reasonable investment-backed expectations” and be construed as a “taking”, resulting in suits against SWRCB
- Benefits of clarifying rights and PTD applicability:
 - System would allow for changes in water rights to be reflective of changing needs and values of the state
 - Rights holders would have clearer expectations in the future
 - Protects fish and in-stream uses; improves water quality