Viewpoints: Restore public trust to water law

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Special to The Bee
Published: Sunday, Aug. 19, 2012 - 12:00 am | Page 5E

Trust. It's the most severely missing element in our public discourse. Goldman Sachs. Libor. Barry Bonds. Penn State.

And California water. Big Water engineered the crash of the Sacramento-San Joaquin Delta ecosystem by increasing Delta extractions through secretly negotiated contract amendments. When challenged in the courts, California's water "leaders" conducted scorched-earth litigation that postponed judgment against them until the damage was done. More recently, the state's Colorado River water districts have brought the Salton Sea to the edge of disaster, again adopting the courtroom tactics of Big Tobacco, to postpone judgment until the damage is done.

After two decades in which California's "water establishment" has abused nature, local governments and their advocates, Gov. Jerry Brown should not be surprised that his premature support of Peripheral Canal II has inspired a statewide expression of public distrust. While California's water plumbing is indeed overdue for restoration and improvement, few critical experts are willing to entrust any expansion to those who created the existing disaster. Any more than a burned public would turn financial reform over to the big banks, should California's citizenry now entrust the state's ecological health to Big Water.

What can be done to restore the public's trust in California water? A fundamental first step lies within my profession of law: restoring California's remarkable public trust doctrine. We need to do that, because just as our recent history has produced a loss of trust in water politics, so have recent and ill-advised judicial decisions eroded our state's venerable trust in water law.

California's public trust doctrine traces its roots to Roman law. From our Anglo American, Spanish and Mexican origins, our state has inherited its premises that the public's right to rivers, streams and submerged lands cannot be destroyed except for compelling reasons.

In reviewing Los Angeles' claim to the streams feeding Mono Lake, the California Supreme Court in its 1983 National Audubon decision ruled that exports from the Mono basin must be restrained by the public trust. Recognizing the state's need to appropriate for distant domestic and industrial uses, while maintaining the ecological integrity of the water resource itself, the California Supreme Court declared that trust values of environmental quality should be preserved "whenever feasible ... surrendering that right of protection only in rare cases."

As the Hawaii Supreme Court subsequently explained in applying Audubon to its state, while respecting allocations by regulatory water boards, courts reviewing their decisions must apply presumptions and burdens of proof in favor of public trust values, independently determining whether benefit justifies harm. In the words of the Hawaiian justices, public trust duties compel more than the state's mere "restatement of its prerogatives."

Thus, the Audubon decision rejected the California attorney general's argument there that the state's water board conduct no more than a "reasonable use" balancing of the competition between public trust and water appropriation, allowing damage so long as the board relied on "substantial evidence." Instead, the court presumed that the public trust doctrine imposes strict judicial scrutiny of state decision-making on water allocations – not because of any conceptual favoritism for environmental over developmental values, but because of the need to protect the state's water resource for *all* its users, including the appropriators themselves.

Within the past decade, however, two intermediate courts of appeal have eviscerated the Audubon public trust doctrine. A Sacramento-based tribunal opined that public trust protection amounts to nothing more than the state water board's preference. A San Francisco appeals court this year opined that if a state agency "evaluates" project impacts under the California Environmental Quality Act, or CEQA, "that is sufficient 'consideration' for public trust purposes"; the public trust imposes no protections above and beyond studying it.

In both cases, the courts decided these cases on other grounds, thereby writing gratuitously – but intentionally – to dilute the public trust. Without restoration of Audubon, the preference of a bare majority of water board members to allow water exports that harm the Delta's fishery will now be adjudicated as trivially as, for example, a zoning dispute comparing a shopping center's tax benefits to the traffic congestion it creates. That is not the protection that our rivers and estuaries need, and not the standard of judicial review to assure Californians that new water projects will not abuse nature.

Fortunately, California's history suggests a constitutional solution. In the early years of the 20th century, a riverfront owner claimed her right to undiminished flow, disabling any storage of water upstream to generate needed hydropower. When a 1926 California Supreme Court decision ratified that excess of riparian rights, the people enacted the 1928 constitutional amendment requiring all water use in the state to be reasonable.

Now, in the early years of the 21st century, with Big Water asserting its prerogative to Delta exports disrespecting the needs of nature, judicial opinions enable a similar excess of appropriate rights.

In response, the governor can propose, to ensure the sustainability of future water extractions, enactment of the Audubon decision into the California Constitution. That would restore California's public trust doctrine on equal footing with Hawaii's. The public trust constitutional amendment can appear on the same ballot as the multibillion-dollar bond act that has now been deferred to a 2014 statewide election.

Restoring the public trust in California water law can restore the public trust in California water administration, without which new potentially harmful water projects will prove unacceptable to California voters.

PUBLIC TRUST CONSTITUTIONAL AMENDMENT

The people of the State of California do amend the State Constitution as follows:

Section 1. Article X, Section 8 is added to the Constitution as follows: Section 8. All waters, tidelands, marshlands, and submerged lands of this State are impressed with the public trust of the people's common heritage. The public trust embraces navigation; fishing; commerce; and the preservation of waters, lands, and the air in their natural state, to serve as ecological units for scientific study, as open space, as environments that provide food and habitat for wildlife, and environments that favorably affect the State's scenery and climate. The State and its agencies as administrators of the public trust holds a continuing power that extends to the revocation of previously granted rights and to the enforcement of the trust against waters and lands long thought free of the trust.

The State and its agencies have an affirmative duty to take the public trust into account in the planning and allocation of water resources, to protect public trust uses whenever feasible, giving their protection paramount importance; and to preserve against needless destruction, so far as consistent with the public interest, the uses protected by the trust. In exercising their sovereign power to allocate water resources in the public interest, the State and its agencies are not confined by past allocation decisions that may be incorrect in light of current knowledge or inconsistent with current needs. The State and its agencies accordingly have the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust. This section shall be self- executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained. Judicial review of determinations under this section, in which presumptions and burdens of proof favor protection of the public trust, shall be conducted by the exercise of independent judgment.

Section 2. This measure expresses and restores the law as declared by the California Supreme Court in National Audubon Society v. Superior Court (1983) 33 Cal.3d 419.