The Public Trust Doctrine,
Private Water Allocation, and Mono Lake:

The Historic Saga of
National Audubon Society v. Superior Court

--Professor Erin Ryan, FSU Law School
The Public Trust Doctrine,  
Private Water Allocation, and Mono Lake:  
The National Audubon Society Saga 

Objectives

▪ Introduce PTD & classic tale of E/P law
▪ Raise Qs re: role and scope of the PTD
▪ Re: public v. private rts in W resources
▪ Consider future doctrinal developments
The Common Law Public Trust Doctrine

- Byzantine law: “jus publicum” (Institutes of Justinian)
  “By natural law, these things are common property of all: air, running water, the sea, and with it the shores of the sea.”

- U.S., re: navigable waterways - state holds in trust for public
  “The state holds the title to the lands under navigable waters… in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.” (-IL Cntrl RR)

- Acts as limit on gov’t power, enforceable by citizens in court
PTD vs. Private Water Allocation

▶ **E: Riparian Rights**  ▶ **W: Prior Appropriation & Beneficial Use**
  - **Everyone shares**  - **First in time, first in right**
Prior Appropriations, the Public Trust, and Mono Lake
Water as “Wet Gold” in the City of Los Angeles…

Los Angeles

LA River (channelized)
Moving Water to Los Angeles:

A CA state priority since 1906, when LA’s groundwater had been all but pumped dry…
The Owens River & Valley, Owens (Toxic) Dry Lake
Mono Lake & the Yosemite-Inyo Sierra Crest

- 2x size of San Francisco
- 3 million years old
- 3x saltier than Pacific
- Unique ecosystem
- Scientific research
- Stunning natural beauty
- Culture & community
Artemia Monica: Unique Mono Lake Brine Shrimp

Brine shrimp, known as “Sea-Monkeys” to kids who could once order them from comic books (John George photo courtesy FRIENDS of Great Salt Lake)

(photos of a related Great Salt Lake species)
Mono Lake & The Pacific Flyway

- Over 300 species, including millions of Eared Grebes, Wilson’s & Red-Necked Phalaropes, Snowy Plovers, Sandpipers, Avocets, Ibises
The Freshwater Mono Basin creeks that feed Mono Lake

- Critical regional fisheries
- Riparian habitat
- Local cultural values
Lee Vining (elev. 6400’, pop. 315)
Local Industry, Part I:
The Mono Craters Pumice Mine
Local Industry, Part II: The Brine Shrimp Plant
Part III: National & State Park Public Lands

“The Hard Working Rangers of the Eastern Sierra Public Lands”
Mono Basin National Forest Scenic Area

▶ USFS Mono Lake District Ranger Station
Across the Street from the Mono Lake Ranger Station…

“City of Los Angeles Private Property”
No Trespassing!
1940: Acquiring the Mono Basin Water Rights

- Less notorious than Owens Valley
- State Water Board still worries…
- But concludes: ‘Hands Are Tied!’
- Beneficial use claim trumps all.
1972: The “Second Barrel”

- LA importing @ 12 % of its water supply from Mono Basin.
Mono Lake Loses Half its Volume, 45 Vertical Feet

**Benchmark Tufa**

In 1962… ...1968… ...1995
(had already lost 25 feet) (by now lost 40 feet)
Mono Lake & the Mono Basin, @ 1983
The Fall of Mono Lake…

- Impacts to Ecosystem
- Salinity Doubles
- Impacts to Shrimp
- Impacts to Birds
- Land Bridge to Negit
- Creeks Dessicated (Fish)
- Air Quality Problems
- Local Economic Impacts
Local NGO plaintiffs: The Mono Lake Committee

Others:
Nat’l Audubon Society, Cal Trout
Sierra Club Legal Defense Fund
US Forest Service (MBNFSA)
US Fish & Wildlife Service
CA Dept. Fish & Game
CA Dept. Parks & Recr.
State Lands Commission
Concerned Landowners

▶ Also: Prof. Joe Sax’s Michigan L. Rev. article...
**Audubon Society v. Alpine County Superior Court**
33 Cal. 3d 419 (1983) (‘The Mono Lake Case’)

▶ **Plaintiffs’ Claim:** PTD trumps all other considerations
  ▪ LA’s diversion license was granted in violation of PTD, b/c state failed to even consider harmed values

▶ **L.A. Defense:** Prior appropriation trumps all
  ▪ Statutory prior appropriations and beneficial use doctrine preempt, and ours is highest beneficial use!

▶ **CA SCT:** CA law merges both; PA does not displace PTD.
  ▪ State cannot neglect trust duties; must reconsider licensing to weigh development needs vs. environmental protection values.

▶ **Water Board:** 10 yrs of research later, strikes stabilizing balance
10 Years of Research Later, Water Board Strikes a Balance

**Designated Recovery Level**
*(dotted line)*

6392’ elevation
(up from 6372’,
down from 6417’)

Stabilizes salinity,
(ecosystem values);
covers salt flats (health);
protects scenic and
recreational values
Los Angeles Citizens Force a Change:

New City Leadership, & A New Approach…

…Conservation

(12% Mono loss recovered)
Public Trust and Distrust?

-The Property Rights Critique
  - Private vs. public rights
  - Limiting Principle?

-The Environmental Critique
  - Property vs. stewardship model?
  - Wrong tools? Wrong vocabulary?

-The Legal Process Critique
  - Separation of powers?
  - CL evolution vs. stability?
Future Developments?

▶ After Mono, PTD use surges--but mostly limited to waterways
  ▪ Application to groundwater? ▪ Hydraulic fracturing (fracking)?

▶ But why not apply PTD to other critical commons resources also susceptible to private appropriation and/or monopoly?
  ▪ Fisheries? ▪ Biodiversity? ▪ Atmosphere?

▶ Prof. Mary Woods’ ‘Atmospheric Trust Project’
  ▪ State & federal violations for failure to regulate GHGs?
  ▪ 2016: Mass. EO #569 - Integrated Climate Change Strategy