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How the Law Mattered to the Mono Lake Ecosystem

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HOW LAW MATTERED TO THE MONO LAKE ECOSYSTEM¹

SHERRY A. ENZLER, J.D.*

M[ono] L[ake] lies in a lifeless, treeless, hideous desert, eight thousand feet above the level of the sea . . . This solemn, silent, sailless sea—this lonely tenant of the loneliest spot on earth—is little graced with the picturesque. . . .

The lake is two hundred feet deep, and its sluggish waters are so strong with alkali that if you only dip the most hopelessly soiled garment into them once or twice, and wring it out, it will be found as clean as if it had been through the ablest of washerwomen's hands. . . .

. . . .
Half a dozen little mountain brooks flow into Mono Lake, but not a stream of any kind flows out of it. It neither rises nor falls, apparently, and what it does with its surplus water is a dark and bloody mystery.²

—Mark Twain

In the West, it is said, water flows uphill toward money. And it literally does, as it leaps three thousand feet

¹ Michael McCann argues that the key empirical question about the relationship between law and social change is “[h]ow law does and does not matter” to social change. Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 ANN. REV. L. SOC. SCI. 17, 19 (2006) [hereinafter McCann (2006)].

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² 1 MARK TWAIN, ROUGHING IT 259, 262 (Harper & Bros. ed., P.F. Colier & Son Co. 1913) (1871) (emphasis omitted).

*across the Tehachapi Mountains in gigantic siphons to slake
the thirst of Los Angeles
It still isn't enough.*³

—Marc Reisner

ABSTRACT

The 2005 Millennium Ecosystem Assessment Board reported unprecedented degradation of ecosystems and the services they provide to human well-being which, if allowed to continue, would adversely affect human health, security, and welfare. Our environmental legal authorities, however, are not designed to protect the health of our nation's ecosystems, focusing instead on clean air, clean land, and clean water as a single medium, often referred to as the silo approach to environmental protection. Protecting ecosystems requires a systemic approach to the environment in both policy and law; this in turn requires a change in our approach to environmental protection. How do we motivate such a change in our legal constructs and political systems? This is a question posed by a number of communities and states struggling with the concept of ecosystem protection. This article postulates that the strategic use of litigation by environmental social movements can destabilize established legal constructs to protect ecosystems. Using the case study of Mono Lake, I examine the role law played in the struggle to change the political and social systems necessary to protect the Mono Lake Ecosystem—that is, how and if law mattered to the protection of the Mono Lake Ecosystem. I further hypothesize how other social movements might use law to protect ecosystems.

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³ MARC REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* 12 (Penguin Books rev. & updated ed. 1993).

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INTRODUCTION—WHY ECOSYSTEMS MATTER⁴

In 2005, the Millennium Ecosystem Assessment Board reported that “[h]uman activity is putting such strain on the natural functions of Earth that the ability of the planet’s ecosystem⁵ to sustain future generations can no longer be taken for granted.”⁶

⁴ See generally Craig Anthony (Tony) Arnold & Leigh A. Jewell, *Litigation’s Bounded Effectiveness and the Real Public Trust Doctrine: The Aftermath of the Mono Lake Case*, 8 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 1 (2001); JOHN HART, *STORM OVER MONO: THE MONO LAKE BATTLE AND THE CALIFORNIA WATER FUTURE* (1996).

⁵ What constitutes an ecosystem is much debated among ecologists, but for purposes of this article the definition provided by A.G. Tansley will suffice. Tansley defines an ecosystem as the ecological system or biological community that occurs in a given locale and the physical and chemical factors that make up the system’s non-living or abiotic environment. A.G. Tansley, *The Use and Abuse of Vegetational Concepts and Terms*, 16 ECOLOGY 284, 299 (1935).

⁶ MILLENNIUM ECOSYSTEM ASSESSMENT BD., *LIVING BEYOND OUR MEANS: NATURAL ASSETS AND HUMAN WELL-BEING* 5 (2005) [hereinafter MILLENNIUM ECOSYSTEM ASSESSMENT BD., *LIVING BEYOND OUR MEANS*].

Ecosystems provide extensive services to human well-being.⁷ These services can be divided into four categories:

1. Provisioning Services: products or commodities obtained from ecosystems and used for consumptive purposes including food, fiber, fuel, genetic medicinal, fresh water, energy, and ornamental;⁸
2. Regulating Services: including air quality, climate regulation, water regulation (i.e. timing of runoff, groundwater recharge, flooding), water purification and waste treatment, disease and pest regulation, pollination, and natural hazard regulation;⁹
3. Cultural Services: including contributions to spiritual and religious values; knowledge of systems; educational, inspirational and cultural heritage; our sense of place, and aesthetic and recreational values;¹⁰ and
4. Supporting Services: including soil formation, photosynthesis, nutrient cycling, water cycling and primary production.¹¹

The destruction of watershed-based ecosystems¹² and their services can adversely affect human health, security, and general human welfare.¹³

⁷ Ecosystem services are “the benefits people obtain from ecosystems.” MILLENNIUM ECOSYSTEM ASSESSMENT BD., ECOSYSTEMS AND HUMAN WELL-BEING: WETLANDS AND WATER: SYNTHESIS, at v (2005) [hereinafter MILLENNIUM ECOSYSTEM ASSESSMENT BD., SYNTHESIS].

⁸ *Id.* at 2 tbl.1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Ecosystems exist in hierarchies, thus a pond may support a localized ecosystem that exists within the context of a larger ecosystem situated within a watershed system that supports numerous interacting ecosystems. KENNETH N. BROOKS ET AL., HYDROLOGY AND THE MANAGEMENT OF WATERSHEDS 3–4 (3d ed. 2003). A watershed is defined by Brooks et al. as a

topographically delineated area drained by a stream system; that is, the total land area above some point on a stream or river that drains past that point. The watershed is a hydrologic unit often used as a physical-biological unit and a socioeconomic-political unit for the planning and management of natural resources.

Id. at xiii.

¹³ See MILLENNIUM ECOSYSTEM ASSESSMENT BD., LIVING BEYOND OUR MEANS, *supra* note 6, at 5.

For example, destruction of ecosystems within watersheds may affect the ability of an ecosystem to purify water (a regulating function), which in turn may increase disease and decrease the amount of water available for human consumption (a provisioning service), which in turn may decrease personal security and social cohesion (a cultural service).¹⁴

To preserve ecosystems, the scientific community has moved to a systems approach to environmental management.¹⁵ This approach focuses on natural systems within geographic parameters such as watersheds, wildlife habitat, or airshed and on “maintain[ing] the integrity of . . . interdependent natural systems” within those parameters to “insure [sic] sustainable resource development opportunities” and to “preserve . . . valuable resources.”¹⁶ “[E]ffective ecosystem management requires that land managers identify and analyze the full impact, both cumulatively and geographically, of management proposals on existing resource systems to minimize the disruption or fragmentation of ecosystem processes.”¹⁷

This systems approach to environmental management is not reflected in our traditional approach to environmental policy that developed in the early 1970s.¹⁸ Environmental policy and law historically sought to minimize human impacts on the environment.¹⁹ These historic constructs addressed human-environment interactions from the perspective of individual environmental media (e.g., air, land, and water) resulting in individual statutory schemes to eradicate air, land, and water pollution.²⁰

¹⁴ See BROOKS ET AL., *supra* note 12 at 3–4; Lynton K. Caldwell, *The Ecosystem as a Criterion for Public Land Policy*, 10 NAT. RESOURCES J. 203, 207 (1970).

¹⁵ Ecosystem management is a “regional” or “resource system” approach to environmental management. Robert B. Keiter, *NEPA and the Emerging Concept of Ecosystem Management on the Public Lands*, 25 LAND & WATER L. REV. 43, 45 (1990).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See Fred P. Bosselman & A. Dan Tarlock, *The Influence of Ecological Science on American Law: An Introduction*, 69 CHI.-KENT L. REV. 847, 866–69 (1994) (giving a detailed account of the evolution of ecosystem theory and regulation).

¹⁹ Modern environmental law and policy was premised on the theory that there was a natural “equilibrium between organisms and [the] environment” that could sustain itself absent human interference. *Id.* at 866–67.

²⁰ Joseph H. Guth, *Cumulative Impacts: Death-Knell for Cost-Benefit Analysis in Environmental Decisions*, 11 BARRY L. REV. 23, 30 (2008). For example, the Clean Air Act was enacted to “protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population,” while the Clean Water Act was enacted to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 42 U.S.C. § 7401(b)(1) (2006); 33 U.S.C. § 1251 (2006).

These statutes were designed to limit environmental degradation through complex permitting and/or regulation schemes managed by divisions within federal agencies such as the U.S. Environmental Protection Agency ("EPA").²¹ These agencies resisted a cross-functional or systems approach to the environment; instead, these divisions focused on single issues or functions such as air pollution, water pollution, and the management of solid or hazardous wastes.²² The result was a silo approach to environmental protection, which fails to assess the overall health of ecosystems.²³ The Clinton Administration highlighted the shortcoming of this system when it concluded that

[b]ecause EPA has concentrated on issuing permits, establishing pollutant limits, and setting national standards, the Agency has not paid enough attention to the overall environmental health of specific ecosystems. In short, EPA has been "program driven" rather than "place-driven."

Recently we have realized that, even if we had perfect compliance with all our authorities, we could not assure the reversal of disturbing environmental trends.²⁴

Protecting the nation's ecosystems and the services they provide requires a shift from a fragmented approach to environmental management to an approach that focuses on the "ultimate goal of healthy, sustainable ecosystems that provide us with food, shelter, clean air, clean water and a multitude of other goods and services. We [must] . . . move toward a goal of ecosystem protection."²⁵

²¹ John P. Dwyer, *The Role of State Law in an Era of Federal Preemption: Lessons from Environmental Regulation*, 60 L. & CONTEMP. PROBLEMS 203, 205 (1997).

²² Guth, *supra* note 20, at 30. For an excellent discussion of the creation of the EPA and the development of a silo approach to environmental management, see Alfred A. Marcus, *EPA's Organizational Structure*, 54 L. & CONTEMP. PROBLEMS 5 (1991).

²³ See Guth, *supra* note 20, at 30. See generally Marcus, *supra* note 22.

²⁴ ECOSYSTEM PROTECTION WORKGROUP, U.S. ENVTL. PROT. AGENCY, DRAFT, TOWARD A PLACE-DRIVEN APPROACH: THE EDGEWATER CONSENSUS ON AN EPA STRATEGY FOR ECOSYSTEM PROTECTION, at 1 (1994).

²⁵ *Id.*; see also MILLENNIUM ECOSYSTEM ASSESSMENT BD., LIVING BEYOND OUR MEANS, *supra* note 6, at 21; James Salzman et al., *Protecting Ecosystem Services: Science, Economics, & Law*, 20 STAN. ENVTL. L.J. 309, 309–10 (2001).

R. Edward Grumbine, in his review of ecosystem management literature, suggests that this shift requires political and legal constructs that work across political and administrative boundaries and that are reflexive, adaptive, and capable of modification as new data are developed.²⁶ Grumbine further suggests that the shift requires political and legal constructs that involve multiple levels of government and stakeholders, that encompass organizational change, and that infuse ecosystem values into human systems.²⁷ How might this change occur? The case history of the citizens of California's struggle to protect and restore the Mono Lake ecosystem offers an opportunity to explore how social movements have used the law and litigation to protect ecosystems and the resulting change in the governance structures charged with the allocation of California's water resources.²⁸

I. THE DEMISE OF THE MONO LAKE ECOSYSTEM

A. *The Mono Lake Ecosystem*

Mono Lake is situated "at the base of the Sierra Nevada [Mountains] near the eastern entrance of Yosemite National Park."²⁹ The lake is 190 miles east of San Francisco and 300 miles north of Los Angeles.³⁰ Once part of the Great Basin stretching from the Great Salt Lake southwest to the Owens Valley and north to Klamath Lake, the Mono Lake watershed is a confined system.³¹

²⁶ See R. Edward Grumbine, *What Is Ecosystem Management?*, 8 CONSERVATION BIOLOGY 27, 31 (1994).

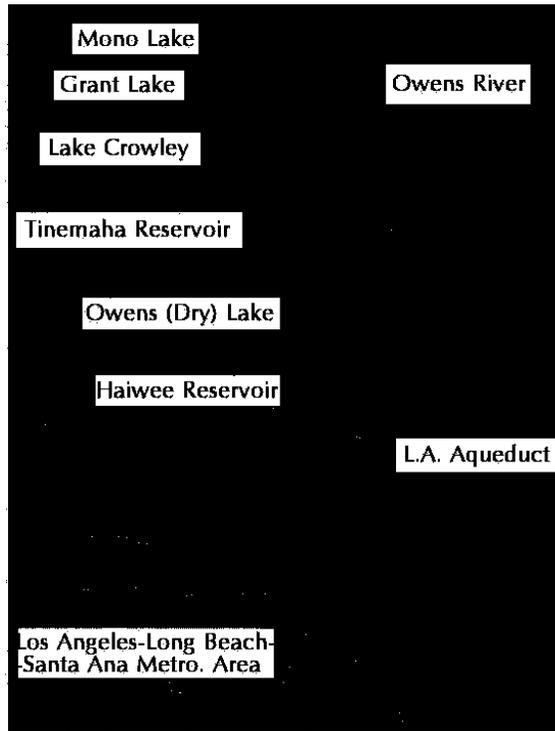
²⁷ See *id.*

²⁸ See Bradley C. Karkkainen, *Getting to "Let's Talk": Legal and Natural Destabilizations and the Future of Regional Collaboration*, 8 NEV. L.J. 811, 814–17 (2007) (arguing that the Mono Lake and Everglades ecosystem restorations are prime examples of the use of destabilizing litigation to foster both environmental and institutional change to protect ecosystems).

²⁹ *Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty. (Nat'l Audubon)*, 658 P.2d 709, 711 (Cal. 1983); see also *infra* Figure 1.

³⁰ Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701, 704 (1995).

³¹ HART, *supra* note 4, at 8–9. Approximately three million years ago the Mono Lake watershed became isolated from the remainder of the Great Basin. Mono Lake reached its present size approximately 9,000 years ago. *Id.* at 9–13.

Figure 1: Map of the Los Angeles Aqueduct System³²

When Mark Twain visited Mono Lake in 1870, the watershed was approximately 695 square miles and the lake itself was over seventy square miles.³³ The historic elevation of Mono Lake prior to diversion ranged from 6404 to 6428 feet above sea level.³⁴ Mono Lake is fed by four tributaries that carry snowmelt from the Sierra Mountains.³⁵ Because

³² *Mono Lake and Los Angeles Aqueduct*, HYDROLOGY FUTURES, http://www.hydrologyfutures.com/LAA_Map_1.gif (last visited Jan. 22, 2011).

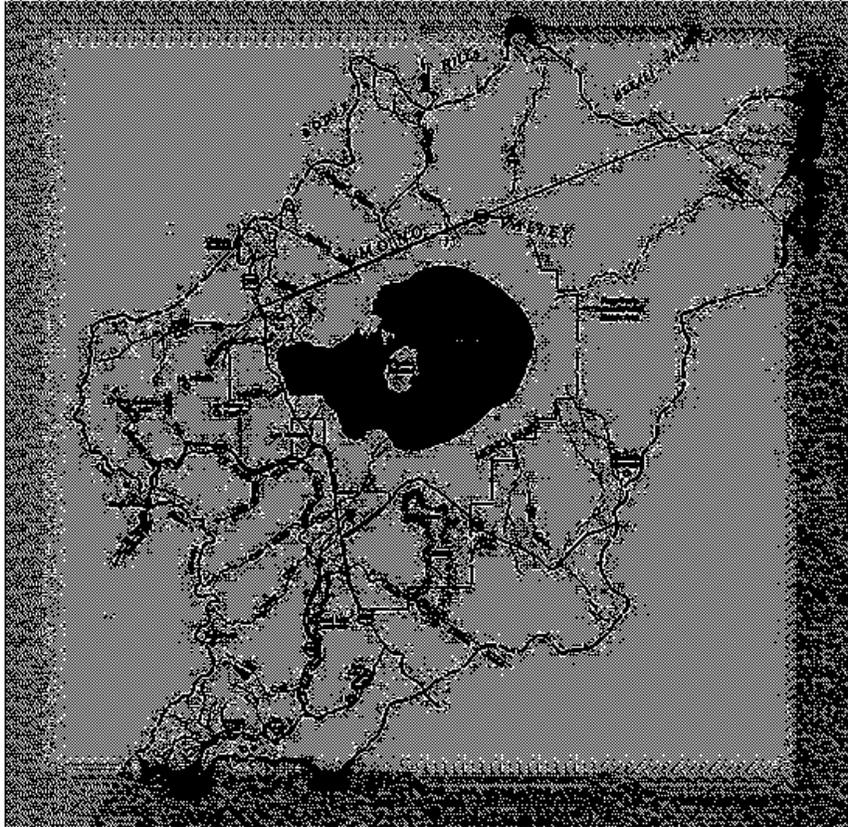
³³ CAL. DEP'T OF WATER RES., MONO LAKE BACKGROUND (2004), <http://www.water.ca.gov/saltonsea/historicalcalendar/ac/03.23.2004/MonoLakeValues.pdf>; *see also infra* Figure 2.

³⁴ JONES & STOKES ASSOCS., MONO BASIN ENVIRONMENTAL IMPACT REPORT, CHAPTER 3E: ENVIRONMENTAL SETTING, IMPACTS, AND MITIGATION MEASURES-AQUATIC PRODUCTIVITY OF MONO LAKE 3E-3 (1993), <http://www.monobasinresearch.org/images/mbeir/dchapter3/3e.pdf>; *see also infra* Figure 3.

³⁵ *See HART, supra* note 4, at 7. The primary tributaries of Mono Lake are Lee Vining Creek and Rush Creek, which is augmented by Parker and Walker Creeks, and Mill Creek. *Id.*; *see also infra* Figure 2.

Mono Lake is a terminal lake with no natural outlet, water leaves the system solely through evaporation, resulting in a high mineral concentration—currently two and a half times saltier than the ocean.³⁶

Figure 2: Mono Lake Basin³⁷



Historically, the Mono Lake watershed supported a unique and vibrant ecosystem.³⁸ Although Mono Lake was too alkaline to support

³⁶ Gordon Young, *The Troubled Waters of Mono Lake*, 160 NAT'L GEOGRAPHIC 504, 504 (1981). Mono Lake is a "triple-water lake: it is saline; it is alkaline; and, due to its volcanic surroundings, it is sulfurous." HART, *supra* note 4, at 14.

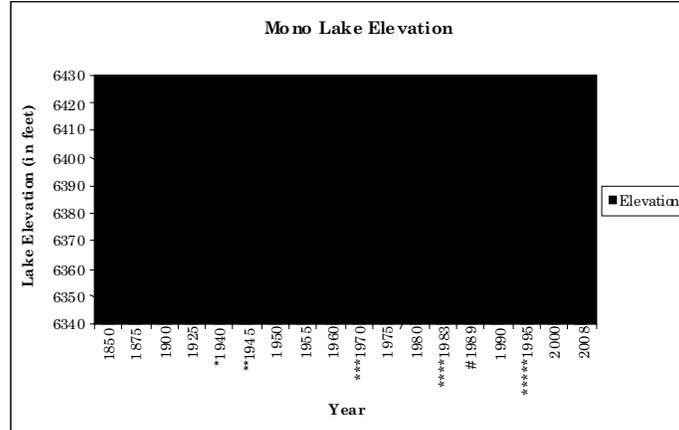
³⁷ *Mono Lake Watershed*, MONO LAKE COMM., <http://www.monolake.org/newsletter/images/99spmmap.gif> (last visited Jan. 22, 2011).

³⁸ See HART, *supra* note 4, at 15.

most fish species, it produced both “algae and other microscopic plants by the millions of tons.”³⁹ These minuscule organisms fed the brine shrimp and the alkali flies in numbers that astounded Twain, who reported:

There are no fish in Mono Lake . . . [N]o living thing exists *under* the surface, except a white feathery sort of worm, one-half an inch long, which looks like a bit of white thread frayed out at the sides. If you dip up a gallon of water, you will get about fifteen thousand of these. . . . Then there is a fly, which looks something like our house-fly. These settle on the beach to eat the worms that wash ashore—and any time, you can see there a belt of flies an inch deep and six feet wide, and this belt extends clear around the lake—a belt of flies one hundred miles long. . . . You can hold them under water as long as you please—they do not mind it—they are only proud of it. When you let them go, they pop up to the surface as dry as a patent-office report.⁴⁰

Figure 3: Mono Lake Elevation Levels⁴¹



³⁹ *Id.*

⁴⁰ TWAIN, *supra* note 2, at 261 (emphasis in original).

⁴¹ *Mono Lake Elevation Level*, MONO LAKE COMM. (on file with author).

*Water Board issues Los Angeles Department of Water and Power Water Permit.

**1942 Grant Lake Dam Completed.

***Second Barrel LA Aqueduct Completed.

*****National Audubon* Decision issued by Court and temporary injunction setting temporary lake level.

Agreed upon low level base line for the lake.

***** Settlement and California State Water Resource Control Board decision issued.

The Mono Lake alkali fly (*Ephydra hians*) and brine shrimp (*Artemia monica*) are the primary food source of the more than 100 bird species that historically frequented Mono Lake; as many as 800,000 birds have been counted on Mono Lake in a single day.⁴² Mono Lake is the primary nesting area for the California gull.⁴³ Other migratory birds use Mono Lake as a stop between their breeding grounds in North America and their wintering grounds in Central and South America.⁴⁴ The Lake also serves as a stopover in the migratory flight path of numerous duck species in such quantities that, in the 1940s, hunters and birders reported millions of waterfowl fed at Mono Lake.⁴⁵ Prior to diversion, the Mono Lake tributaries also supported a vibrant fish population.⁴⁶ At the 1993–94 California State Water Resources Control Board (“SWRCB”) hearing to amend Los Angeles’s water diversion permit, local residents and experts testified that the Mono Lake tributaries supported catchable brown trout and occasional eastern brook trout.⁴⁷ Mono Lake was also recognized for its scenic attributes.⁴⁸ John Muir described the area as “[a] country of wonderful contrasts, hot deserts bordered by snow-laden mountains, cinders

⁴² Mono Lake Basin, Decision 1631, Cal. State Water Resources Control Board, Sept. 28, 1994, at 180, *available at* http://www.swrcb.ca.gov/publications_forms/publications/general/docs/monolake_wr_dec1631_a.pdf [hereinafter Decision 1631]; Young, *supra* note 36, at 509.

⁴³ Nat’l Audubon Soc’y v. Super. Ct. of Alpine Cnty. (*Nat’l Audubon*), 658 P.2d 709, 716 (Cal. 1983) (citing a 1969 Task Force Report jointly prepared by the U.S. Department of Interior and the California Department of Water Resources). “Ninety-five percent of [California’s] gull population and 25 percent of the total species population nests at [Mono] Lake.” *Id.*

⁴⁴ HART, *supra* note 4, at 16–20. The Wilson’s Phalarope is an example of the many species dependent upon Mono Lake. *See id.* at 18. The Wilson’s Phalarope (*phalaropus tricolor*) breeds in May in the northern Great Plains. *Id.* In late June, the phalarope begins migration to its wintering grounds in the Central Andes. *Id.* The first leg of this journey is the flight from the Great Plains to Mono Lake where phalaropes feast on brine shrimp preparing to journey south. *Id.* at 19. In 1981, ornithologist Joseph Jehl reported

[b]y the end of July, when migration began [from Mono Lake], the skies were thick with birds The first females departed, to be followed by the fattened-up males by mid-August. Before leaving Mono Lake, the adults may double their weight, storing enough fat to power their non-stop flight to the northern coastline of South America.

Joseph R. Jehl, Jr., *Mono Lake: A Vital Way Station for the Wilson’s Phalarope*, 160 NAT’L GEOGRAPHIC 520, 524 (1981).

⁴⁵ HART, *supra* note 4, at 20.

⁴⁶ Decision 1631, *supra* note 42, at 22, 38–39, 53–54.

⁴⁷ *Id.* at 21, 53–54.

⁴⁸ *See id.* at 133.

and ashes scattered on glacier-polished pavement, frost and fire working together in the making of beauty.”⁴⁹

This is not to say that the Mono Lake ecosystem was unimpaired prior to Los Angeles’s water diversion from the Mono Lake tributaries.⁵⁰ Mono Lake tributaries flowed year round, often overtopping their banks during the spring and depositing soils and “rich sediment on the floodplain[s].”⁵¹ Both Hart and the SWRCB report that the floodplains of the Mono Lake tributaries supported local grazing and irrigation for decades prior to the Los Angeles diversion.⁵² However, during this period local water extractions had a negligible impact on Mono Lake’s pre-diversion water levels.⁵³

As evidenced by this overview, the Mono Lake ecosystem provided a number of ecosystem services over time.⁵⁴ It served as a major rookery and migration stop for a vast array of bird species including waterfowl.⁵⁵ This provisioning service contributed to extensive biological diversity not only in northern California, but also within North America.⁵⁶ Annual flooding of the tributaries provided supporting services such as a nutrient cycling system.⁵⁷ Cultural services provided a unique sense of place recognized by luminaries such as Twain, Muir, and Adams.⁵⁸ And then, there were regulating services, services that only became apparent as Mono Lake levels began to plummet and air quality deteriorated after the Los Angeles diversion.⁵⁹

⁴⁹ *Id.* (citation omitted).

⁵⁰ *See id.* at 83-85 (discussing pre-1941 hydrologic conditions of the Mono Basin).

⁵¹ *Id.* at 23.

⁵² *See* HART, *supra* note 4, at 22–30, 39–42; *see also* Decision 1631, *supra* note 42, at 83–85.

⁵³ *See* Decision 1631, *supra* note 42, at 84; *see also supra* Figure 3.

⁵⁴ *See, e.g.*, Decision 1631, *supra* note 42, at 86.

⁵⁵ *Id.* at 93–96.

⁵⁶ *See id.* at 94.

⁵⁷ *Cf.* MILLENNIUM ECOSYSTEM ASSESSMENT BD., LIVING BEYOND OUR MEANS, *supra* note 6, at 2 tbl.1 (explaining the important role water sources have in causing nutrient cycling); Richard Kattelman, Sierra Nev. Aquatic Research Lab., *Historic Floods in the Eastern Sierra Nevada*, in HISTORY OF WATER: EASTERN SIERRA NEVADA, OWENS VALLEY, WHITE-INYO MOUNTAINS 74 (1992).

⁵⁸ Nora Matell, *The Student Revolution that Saved Mono Lake: Los Angeles’ Diversion of Mono Basin Water in 1941 Threatened This 700,000-Year-Old Lake*, CAL. HISTORIAN, <http://www.californiahistorian.com/articles/mono-lake.html> (last visited Jan. 22, 2011).

⁵⁹ Decision 1631, *supra* note 42, at 120–24. As lake levels declined, larger swaths of Mono Lake’s bed were exposed, and a white ring of playa began to form around the lake. *Id.* at 122. Wind erosion of the playa caused suspended particulate matter in quantities not seen at pre-diversion levels. *Id.* These suspended particulates were smaller than PM-10 (an

B. *The Los Angeles Diversion and Demise of the Mono Lake Ecosystem*

Three hundred miles southwest of Mono Lake is the City of Los Angeles whose growth has long exceeded the available supply of local water.⁶⁰ As early as 1904, the Los Angeles Department of Water and Power (“LADWP”) cast its eyes eastward for water, to the Owens River Valley.⁶¹ By 1913, the LADWP had completed construction of an aqueduct to transport water from the Owens River Valley to Los Angeles.⁶² Massive for its day, the aqueduct extended 223 miles and climbed 4000 feet uphill from the Owens River Valley to Los Angeles.⁶³ By 1925, the Owens River was virtually dry, and the Los Angeles population had exploded beyond expectations.⁶⁴ The City of Los Angeles began casting around for another water source, which became Mono Lake and its tributaries.⁶⁵

Between 1912 and 1913, the LADWP began purchasing land and water rights in the Mono Lake watershed.⁶⁶ These acquisitions included land for a reservoir in which to store water from the Mono Lake tributaries.⁶⁷ Water could then be transported from the Mono Lake tributaries

inhalable aerodynamic diameter of fewer than ten microns) and exceeded national ambient air quality standards. *Id.* at 123–24.

⁶⁰ See ABRAHAM HOFFMAN, VISION OR VILLAINY: ORIGINS OF THE OWENS VALLEY—LOS ANGELES WATER CONTROVERSY 45 (1981); WILLIAM L. KAHRL, WATER AND POWER: THE CONFLICT OVER LOS ANGELES’ WATER SUPPLY IN THE OWENS VALLEY 270 (1982); REISNER, *supra* note 3, at 60–61; see *supra* Figure 1.

⁶¹ REISNER, *supra* note 3, at 62.

⁶² See generally HOFFMAN, *supra* note 60, at 3–173; KAHRL, *supra* note 60; REISNER, *supra* note 3, at 52–103 (containing a general history of the LADWP’s acquisition of water in the Owens Valley and construction of the Los Angeles Aqueduct).

⁶³ REISNER, *supra* note 3, at 61, 84–85. Hoffman reports that when the Los Angeles Aqueduct was dedicated on November 5, 1913, and the first waters from Owens Valley spilled out, LADWP Chief Engineer, William Mulholland was reported to have uttered only five words: “There it is. Take it.” HOFFMAN, *supra* note 60, at 172; see also HART, *supra* note 4, at 32.

⁶⁴ By 1900 the population of Los Angeles was 100,000. REISNER, *supra* note 3, at 62. By 1913, when the Los Angeles Aqueduct opened, the population of Los Angeles had risen to 500,000. *Id.* at 73. And by the early 1920s, Los Angeles’s population had increased to such a degree that Mulholland decided that the only option was to dry up the Owens Valley and search for alternate water sources. *Id.* at 89. Reisner reports that in 1925, “Mulholland had expected 350,000 people . . . but had 1.2 million on his hands instead.” *Id.* at 87. And Kahrl notes that by 1920, growth in Los Angeles had upset all the calculations on which Mulholland had predicated the Los Angeles Aqueduct. KAHRL, *supra* note 60, at 260.

⁶⁵ KAHRL, *supra* note 60, at 269.

⁶⁶ HART, *supra* note 4, at 37.

⁶⁷ See *id.*

to the reservoir for storage and then to the Owens River and the Los Angeles aqueduct.⁶⁸ In 1919, William Mulholland, Chief Engineer of the LADWP, entered into a contract with the United States Reclamation Service (Bureau of Reclamation), an agency of the Interior Department, to “prepare plans, surveys, and cost estimates” for an expansion of the aqueduct from Owens Valley north into the Mono Lake Watershed.⁶⁹ Mulholland and Bureau of Reclamation Chief Arthur Powell Davis also entered into a secret agreement to withdraw extensive public lands⁷⁰ in the Mono Basin from private settlement or claims, in effect reserving these lands for acquisition by the LADWP and facilitating the Mono Lake diversion.⁷¹ This agreement would eventually backfire on Bureau of Reclamation Chief Davis, leading to his resignation.⁷² His successor, Elwood Mead, refused to overturn Davis’s decision, noting “[t]here seems no question that the water of this region will soon be needed for domestic and industrial purposes in the City of Los Angeles, and its value for these purposes is far greater than for agriculture”⁷³ or, for that matter, the Mono Lake ecosystem.⁷⁴ In 1923, the LADWP applied for a permit to “appropriate the entire flow of the Mono [Lake tributaries] for *domestic* use and power generation.”⁷⁵

⁶⁸ *See id.*

⁶⁹ *Id.*

⁷⁰ The majority of land in the Mono Basin was federally owned. *Id.* at 38. Through the 19th century, the primary public land policy of the U.S. Government was one of “disposal” of public lands into private ownership to “encourage settlement and development.” PUB. LAND LAW REVIEW COMM’N, ONE THIRD OF THE NATION’S LAND: A REPORT TO THE PRESIDENT AND CONGRESS 28 (1970). Beginning in 1900 public lands began to be withdrawn from disposal. *Id.* Public land is considered withdrawn if a statute, executive order, or administrative order designates a parcel as unavailable for disposal or resource exploitation. JAN G. LAITOS, NATURAL RESOURCE LAW § 5.01(d)(3), at 161 (2002). Kahrl observes that the Bureau of Reclamation had a history of setting aside land for future reclamation projects to prohibit private parties from acquiring land that might be needed or used for water projects. KAHRL, *supra* note 60, at 40–41. A more detailed discussion of the withdrawal of federal lands for future construction of the Mono Lake project is outlined in Kahrl’s book on the construction of the Los Angeles Aqueduct. *Id.* at 330–338. Kahrl also notes that the Bureau of Reclamation made the withdrawal despite the fact that Los Angeles “had no definite plans for [the Mono Lake] project” at the time of the withdrawals. *Id.* at 337.

⁷¹ *See* HART, *supra* note 4, at 37.

⁷² *Id.*

⁷³ *Id.* at 38 (quoting the statement of Dr. Elwood Mead). Dr. Mead served as the Commissioner of the Bureau of Reclamation from 1924 to 1936. *Dr. Elwood Mead*, SUNSET CITIES, <http://www.sunsetcities.com/lake-mead/dr%20elwood%20mead.html> (last visited Jan. 22, 2011).

⁷⁴ *See* HART, *supra* note 4, at 38.

⁷⁵ *Id.* (emphasis in original).

During this same time period California water law was in flux.⁷⁶ Historically, California operated a dual water rights system recognizing both riparian and appropriative water rights,⁷⁷ but, in 1913, it passed the Water Commission Act making all water in the state that was not being applied to a “useful and beneficial purpose[.]” eligible for appropriation.⁷⁸ And in 1921, the Water Commission Act was amended allowing the SWRCB to reject an appropriation permit application when it determined the purpose of the appropriation was not in the public interest.⁷⁹ The 1921 amendment also admonished the SWRCB that “[i]n acting upon applications to appropriate water the board shall be guided by the policy that domestic use is the highest use . . . of water.”⁸⁰ And in 1928, the California Constitution was amended to provide:

[T]he general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.⁸¹

Not only did the amendment abolish certain rights of riparian owners to use water,⁸² it required that “[a]ll uses of water [in California], including public trust [water] uses . . . conform to the standard of reasonable

⁷⁶ See *Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty. (Nat'l Audubon)*, 658 P.2d 709, 724 (Cal. 1983).

⁷⁷ *Id.* Under California's riparian doctrine the owner of land abutting a watercourse had the right to “reasonable and beneficial use of water on his [or her] land.” *Id.* In contrast, the appropriation doctrine required the taking or diversion of water from the water body for “useful and beneficial purposes.” *Id.* An appropriative rights system is grounded in the belief that the greatest public good arises out of placing water rights in private hands. Cynthia L. Koehler, *Water Rights and the Public Trust Doctrine: Resolution of the Mono Lake Controversy*, 22 *ECOLOGY L.Q.* 541, 552 (1995).

⁷⁸ *Nat'l Audubon*, 658 P.2d at 724. The Water Commission Act formalized the procedure by which a party could acquire appropriative water rights. *Id.* Only water that was not being applied to “useful and beneficial purposes” was eligible for appropriation. *Id.* “[A]ppropriative rights acquired under the [Water Commission A]ct were inferior to pre-existing rights” including “riparian rights.” *Id.* at 725. See also CAL. WATER CODE § 1201 (West 2010).

⁷⁹ CAL. WATER CODE § 1255 (West 2010). See also *Nat'l Audubon*, 658 P.2d at 713.

⁸⁰ CAL. WATER CODE § 1254 (West 2010). See also *Nat'l Audubon*, 658 P.2d at 713.

⁸¹ *Nat'l Audubon*, 658 P.2d at 725 (quoting CAL. CONST. art. X, § 2).

⁸² *Id.*

use.”⁸³ While under this amendment in-stream uses, such as recreation, were considered beneficial uses,⁸⁴ in-stream uses were not the highest use of the water.⁸⁵ The highest beneficial uses were extractive uses.⁸⁶ The door was open for the LADWP’s appropriation of water from the Mono Lake Watershed.⁸⁷

To appropriate water from the Mono Lake tributaries, the LADWP had to meet three requirements. It had to obtain project financing, acquire riparian lands with pre-existing water rights, and obtain a permit from the SWRCB.⁸⁸ In 1930, after an extensive public campaign initiated by the LADWP proclaiming a forthcoming “water famine” the citizens of Los Angeles passed a \$38.8 million bond to finance the Mono Lake water

⁸³ *Id.*

⁸⁴ See *City of Los Angeles v. Aitken (Aitken)*, 52 P.2d 585, 592 (Cal. Dist. Ct. App. 1935); *Nat’l Audubon*, 658 P.2d at 725–26 (citing *Aitken* for the principle that in-stream uses are reasonable and beneficial uses of water).

⁸⁵ See *Aitken*, 52 P.2d at 592.

⁸⁶ See *Nat’l Audubon*, 658 P.2d at 713–14.

⁸⁷ See *id.*

⁸⁸ The process for acquiring water rights through appropriation is set out in California’s Water Code. See CAL. WATER CODE §§ 102, 1252 (West 2010). “The process is initiated by application to the [SWRCB] for a permit to put unappropriated water to beneficial use.” *Cal. Trout, Inc. v. State Water Res. Control Bd. (Cal. Trout I)*, 255 Cal. Rptr. 184, 198 (Cal. Ct. App. 1989) (citing CAL. WATER CODE § 1252 (West 2009)). The application must include the “nature and amount” of the water request, the “location and a description” of the physical infrastructure needed for the diversion, the anticipated infrastructure completion date, and must affirmatively state when *all* of the requested water will be put to its beneficial use. CAL. WATER CODE § 1260 (West 2010). If the application is approved by the SWRCB, a permit is issued giving the permittee “the right to take and use water [but] only to the extent and for the purpose granted.” *Id.* at §§ 1380–81. The right to appropriate water under the permit is a conditional right and must be perfected by the permittee. *Cal. Trout I*, 255 Cal. Rptr. at 198–99. Perfecting the right requires the permittee to “diligently commence and complete [infrastructure] construction . . . and apply the water to beneficial use in accordance with the . . . terms of the permit.” *Id.* at 198–99 (citing CAL. WATER CODE §§ 1395–97 (West 2009)). The California Water Code provides that “[a] permit shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose . . . but no longer.” *Id.* at 611 (quoting CAL. WATER CODE § 1390 (West 2009)). If a permittee “fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested . . . for a period of three years, such unused water reverts to the public and shall be regarded as unappropriated public water.” *Id.* (quoting 1943 Cal. Stat. ch. 368 section 1241, 1615–16) (Section 1241 of the California Water Code has since been amended to permit a five year time frame to use appropriated water). Additionally, the California Water Code requires a permit to be revoked if the infrastructure necessary for diversion is not undertaken and completed with due diligence. CAL. WATER CODE § 1410 (West 2010). If, however, the infrastructure is diligently completed and the water is diverted and put to beneficial use, then the SWRCB will issue a license confirming the permittee’s rights to appropriate the water. *Id.* at § 1610.

project.⁸⁹ The LADWP then condemned the private property necessary for the project, a process that in 1935 culminated in a condemnation action in Tuolumne County Superior Court.⁹⁰ Experts in the condemnation action testified that the diversions from the Mono Lake tributaries would reduce the lake

to one-tenth of its present volume of water within five to ten years leaving the bed of the lake and the exposed mud flats covered with a thick crust of mineral salt . . . which will pulverize and fly with every breeze that blows over the surrounding land, ruining all vegetation and destroying the fertility of the soil[.]⁹¹

thereby draining Mono Lake and creating a desert.⁹² Although the court required the City of Los Angeles to pay riparian owners for desertification and the taking of riparian water rights, the court found that the diversion itself met the public necessity requirement.⁹³ The LADWP immediately began infrastructure construction for the diversion.⁹⁴

⁸⁹ HART, *supra* note 4, at 38.

⁹⁰ *Aitken*, 52 P.2d at 586. In *Aitken*, the City of Los Angeles and the LADWP brought suit to condemn riparian water rights and divert all of the water of Rush and Lee Vining Creeks for use by the City of Los Angeles. *Id.* at 585–86. The court determined the taking of water for domestic use in Los Angeles was a public necessity. *Id.* at 586, 591. At trial, the LADWP argued that the finding of necessity and California’s constitutional requirement of beneficial use precluded payment of riparian owners for the taking of their littoral property rights or considering those rights in property valuation. *Id.* at 587. LADWP argued that valuation should be premised on the assumption that Mono Lake did not add value to the adjacent properties. *Cf. id.* The court disagreed, holding that although California’s Constitution favored the beneficial use of water it did not obviate an adjacent owner’s riparian rights. *Id.* at 588. Thus the LADWP was required to pay the landowners property damage assuming the benefits to property value provided by Mono Lake. *Id.* at 588, 592.

⁹¹ *Id.* at 587.

⁹² *Id.*

⁹³ *Id.* at 586.

⁹⁴ HART, *supra* note 4, at 42. The infrastructure necessary to transfer water from the Mono Lake tributaries to the Owens Valley included construction of a “diversion dam on Lee Vining Creek;” construction of a buried pipeline from Lee Vining designed to divert water from Rush Creek, Parker Creek, and Walker Creek to the Grant Lake reservoir; construction of Grant Lake reservoir for storage of the water from the Mono Lake tributaries; construction of “a buried pipeline running from Grant Lake to the . . . Mono Craters;” and construction of the Mono Craters Tunnel, an 11.5 mile tunnel carrying the water from Grant Lake to a “discharge point on the upper Owens River.” *Id.* Once in the Owens River, the water would flow into the Long Valley reservoir. *Id.* The water would then be

In 1938, the SWRCB commenced hearings on the LADWP's appropriation request.⁹⁵ Locals opposed the appropriation alleging the diversion would reduce property values, destroy tourism, and "lay waste and desert" to large areas of the Mono Lake Basin.⁹⁶ Despite opposition, the SWRCB, on June 1, 1940, granted the LADWP a permit to appropriate the entire flow of water from the Mono Lake tributaries.⁹⁷ In granting the permit the SWRCB stated:

It is indeed unfortunate that the City's proposed development will result in decreasing the aesthetic advantages of Mono Basin but there is apparently nothing that this office can do to prevent it. The use to which the City proposes to put the water under its Applications . . . is defined by the Water Commission Act as the highest to which water may be applied . . . This office therefore has no alternative but to dismiss all protests based upon the possible lowering of the water level in Mono Lake and the effect that the diversion of water from these streams may have upon the aesthetic and recreational value of the Basin.⁹⁸

The permit allowed the LADWP to divert the full flow of the Mono Lake tributaries despite the fact that the LADWP did not have the capacity to use all of the appropriated water.⁹⁹ In 1940, the Los Angeles aqueduct could only carry one half of the flow of the Mono Lake tributaries.¹⁰⁰ The Los Angeles aqueduct would not have capacity to carry the full flow until 1970 when a second barrel of the Los Angeles aqueduct was constructed.¹⁰¹ The 1940 permit was, on its face, inconsistent with California's appropriation

funneled through a series of power plants prior to "[r]ejoining the Owens [river]bed." *Id.* Finally, the water would be funneled into the Los Angeles aqueduct. *Id.* at 42-43. *See also supra* Figure 1.

⁹⁵ *Id.* at 45.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty.* (*Nat'l Audubon*), 658 P.2d 709, 714 (Cal. 1983) (emphasis omitted) (quoting Div. of Water Res. Dec. 7053, 7055, 8042 & 8043 at 26 (Apr. 11, 1940)).

⁹⁹ HART, *supra* note 4, at 56.

¹⁰⁰ *Id.* The infrastructure necessary to extract the total volume of water from the Mono Lake tributaries and store it in Grant Lake Reservoir was completed in 1940. *Id.*

¹⁰¹ *Id.*

system, which required that appropriated water be put to beneficial use as a condition of the permit.¹⁰²

The 1940 Mono Lake Permit decision was also inconsistent with the 1940 Rock Creek ruling in which the SWRCB ruled that the California Water Commission Act required the State to “protect streams in recreational areas by guarding against depletion below some minimum amount consonant with the general recreational conditions and the character of the stream.”¹⁰³ That the Rock Creek ruling reasoning was not applied to the Mono Lake appropriation is yet another illustration of the special relationship between the SWRCB and the LADWP. When it came to water appropriations, what the LADWP wanted, it got, regardless of the applicable law.¹⁰⁴ This point is further illustrated by the state’s treatment of the “fishway rules” in the case of the Mono Lake project.¹⁰⁵

Prior to the LADWP’s Mono Lake project, the Mono Lake tributaries supported “good trout populations.”¹⁰⁶ Beginning in 1953, California law required new dam constructions to include fish passages or “fishways.”¹⁰⁷ In lieu of a fishway, the project proponent could substitute a hatchery.¹⁰⁸ In 1935, the Fish and Game Commission conducted a hearing on the LADWP’s proposed Grant Lake dam, part of the infrastructure needed to transport water from the Mono Lake tributaries south to the Owens Valley, and found that “a fishway was not practicable and would not be required.”¹⁰⁹ A second hearing reconsidering the issue was held in 1936.¹¹⁰ The Fish & Game Commission’s tentative resolution was for the LADWP and the Fish and Game Commission to “work out the possibilities” of a fish hatchery at Hot Creek.¹¹¹ Then, in 1937, the California Legislature

¹⁰² See *supra* note 88 (discussing the requirements of California’s water appropriation scheme).

¹⁰³ *Nat’l Audubon*, 658 P.2d at 714 n.6 (quoting Div. of Water Res. Dec. 3850 at 24 (Apr. 11, 1940)).

¹⁰⁴ See, e.g., *City of Los Angeles v. Aitken (Aitken)*, 52 P.2d 585, 591 (Cal. Dist. Ct. App. 1935).

¹⁰⁵ See, e.g., *Cal. Trout, Inc. v. State Water Res. Control Bd. (Cal. Trout I)*, 255 Cal. Rptr. 184 (Cal. Ct. App. 1989) (discussing the LADWP’s and SWRCB’s arguments about why the State was exempted, in the Mono Lake case, from complying with a California law requiring that dam owners keep the dam in a condition such that fish may live below the dam).

¹⁰⁶ *Id.* at 189.

¹⁰⁷ See *id.* at 186–88 (citing CAL. FISH & GAME CODE § 5937 and noting that the predecessor to section 5937 was first enacted in 1933).

¹⁰⁸ *Id.* at 188.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Cal. Trout I*, 255 Cal. Rptr. at 188.

imposed a requirement that “all dams, old or new . . . must let enough water pass to maintain ‘in good condition’ the fish in the streams below” the dam.¹¹² There appeared to be no way the LADWP could bypass this minimum flow requirement.¹¹³ By 1937, the LADWP had yet to complete construction of Grant Lake dam.¹¹⁴ To comply with the fishway requirements, the LADWP agreed to construct a hatchery on Hot Creek but made no provision to meet the minimum flow requirements below Grant Lake dam as required by law.¹¹⁵ Then, on November 25, 1940, the Chairman of the California Game and Fish Commission entered into an agreement with the LADWP exempting the Grant Lake dam from the 1937 statutory minimum flow requirements.¹¹⁶ This meant that the LADWP could run the creeks dry below the Grant Lake dam,¹¹⁷ meaning certain death for the trout in the Mono Lake tributaries.

Impoundment of waters from the Mono Lake tributaries began shortly after the LADWP received its appropriation permit, and, in April 1941, the LADWP began shipping water south to the Owens River.¹¹⁸ Because the LADWP was only able to send half of the water appropriated from the Mono Basin tributaries through the aqueduct to Los Angeles, the remaining portion of the Mono Lake diversion sat in Grant Lake.¹¹⁹ The effect of the project on the Mono Basin tributaries was almost immediate.¹²⁰ On March 10, 1941, a California Game and Fish fisheries biologist, Elden Vestal, wrote to the LADWP reporting that Rush Creek had been dry since October 1940 and requesting that the LADWP maintain a minimum flow in Rush Creek to maintain fish hatcheries as required by statute.¹²¹ Vestal received a letter from the LADWP advising him to consult with the terms

¹¹² HART, *supra* note 4, at 45; *see also* CAL. FISH & GAME CODE § 5937 (West 2010); *Cal. Trout I*, 255 Cal. Rptr. at 191–92 (discussing the 1937 amendment to CAL FISH & GAME CODE § 5937).

¹¹³ *See* HART, *supra* note 44, at 45.

¹¹⁴ *See id.*

¹¹⁵ *See id.*

¹¹⁶ *Id.* at 45–46.

¹¹⁷ *Id.* at 47.

¹¹⁸ *See id.* at 46.

¹¹⁹ *Cf.* Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty. (*Nat'l Audubon*), 658 P.2d 709, 714 (Cal. 1983) (noting that Grant Lake was one of the reservoirs in use before the second aqueduct was completed).

¹²⁰ *Id.*; *see also* HART, *supra* note 4, at 47.

¹²¹ *See* HART, *supra* note 4, at 47 (quoting a letter to the LADWP from Elden Vestal, fisheries biologist for the California Board of Game and Fish, dated March 10, 1940).

of the Hot Creek Agreement.¹²² Upon further inquiry with the chief of the Bureau of Fish Conservation, Vestal received a “thinly veiled warning to stop [his] investigations into what was apparently a very sensitive political question.”¹²³

The impact of the diversion on Mono Lake itself was also devastating.¹²⁴ “Between 1940 and 1970, the [LADWP] diverted an average of 57,067 acre-feet of water per year” from the Mono Lake Watershed.¹²⁵ “[T]he lake’s surface level receded at an average of 1.1 feet per year.”¹²⁶ Los Angeles’s demand for water from the Mono Lake tributaries intensified in 1964 when the U.S. Supreme Court issued a decree limiting California’s water allocation under the Colorado River Compact.¹²⁷ The amount of water the LADWP was able to transport to Los Angeles escalated in 1970 when it completed the second barrel of the Los Angeles aqueduct.¹²⁸ Completion of the aqueduct meant the LADWP could perfect its permit.¹²⁹ In 1974, thirty-four years after granting the original permit to appropriate the full flow of water from the four Mono Lake tributaries, the SWRCB found that the LADWP “had perfected its appropriative right by the actual taking and beneficial use of water” and issued the LADWP two permanent licenses authorizing the LADWP to “divert up to 167,000 acre-feet annually

¹²² *Id.*

¹²³ *Id.* (quoting Elden Vestal).

¹²⁴ *See, e.g., Nat’l Audubon*, 658 P.2d at 714.

¹²⁵ *Id.*

¹²⁶ *Id.* at 714; *see supra* Figure 3.

¹²⁷ *Arizona v. California*, 376 U.S. 340 (1964), *amended by* 383 U.S. 268 (1966), *overruled in part by* 438 U.S. 645 (1978), *per curiam supplemental decree at* 439 U.S. 419 (1979), *supplemental opinion at* 460 U.S. 605 (1983), *supplemental opinion at* 464 U.S. 144 (1984), *supplemental opinion at* 531 U.S. 1 (2000), *amended by* 547 U.S. 150 (2006). In 1952, the State of Arizona filed suit against the State of California regarding the volume of California’s water appropriations from the Colorado River system. *Arizona v. California*, 373 U.S. 546, 550-51 (1963), *supplemental opinion at* 376 U.S. 340 (1964), *amended by* 383 U.S. 268 (1966), *overruled in part by* 438 U.S. 645 (1978), *per curiam supplemental decree at* 439 U.S. 419 (1979), *supplemental opinion at* 460 U.S. 605 (1983), *supplemental opinion at* 464 U.S. 144 (1984), *supplemental opinion at* 531 U.S. 1 (2000), *amended by* 547 U.S. 150 (2006). Eventually the states of Nevada, New Mexico, and Utah and the United States were added as parties in a case that ultimately was intended to apportion the waters of the Colorado River system. *See generally* 373 U.S. at 564-90 (discussing the allocation and apportionment of water of the Colorado River system among the states and other users).

¹²⁸ Decision 1631, *supra* note 42, at 5–6.

¹²⁹ *See supra* note 88 (explaining the requirement that a water permit be perfected); HART, *supra* note 4, at 43-44, 56 (detailing that LADWP’s permit allowed appropriation of the entire flow from the tributaries).

(far more than the average annual flow)” of the Mono Lake tributaries.¹³⁰ The SWRCB “viewed this action as a ministerial action, based on the 1940 decision, and held no hearings on the matter.”¹³¹ “By 1979, the Mono Lake feeder streams supplied almost twenty percent of Los Angeles’ water” supply.¹³²

Between 1970 and 1980, LADWP was diverting “an average of 99,580 acre-feet per year” from the Mono Lake watershed.¹³³ By 1979, Mono Lake’s surface level dropped from 6435 feet above sea level to 6373 feet above sea level.¹³⁴ The impacts of the LADWP diversion on the Mono Lake watershed ecosystems have been extensively documented in both the scientific and popular literature.¹³⁵ The four major Mono Lake tributaries were dry most—if not all—year, and fish populations disappeared.¹³⁶ Without fresh water input, Mono Lake receded forty-three feet below prediversion level,¹³⁷ exposing a mile-wide ring of powdery alkali flats around the lake that, as early as 1965, gave rise to a new phenomena in the Mono Basin: alkali dust storms.¹³⁸ These dust storms violated the ambient air standards of the federal Clean Air Act.¹³⁹

The lack of fresh water input also caused an increase in Mono Lake’s salinity levels,¹⁴⁰ which in turn adversely affected the symbiotic populations of alkali flies and brine shrimp.¹⁴¹ The closest alternative food source for migratory birds was the Salton Sea, 350 miles south of Mono Lake.¹⁴² Bird populations began to plummet.¹⁴³ And, the receding waters

¹³⁰ *Nat'l Audubon*, 658 P.2d at 714 n.8.

¹³¹ *Id.*

¹³² Arnold & Jewell, *supra* note 4, at 7.

¹³³ *Nat'l Audubon*, 658 P.2d at 714.

¹³⁴ *Id.*; *see supra* Figure 3.

¹³⁵ A comprehensive discussion of the environmental impacts of the LADWP diversion from the Mono Lake Basin is contained in the Final Environmental Impact Report for the Review of Mono Basin Water Rights of the City of Los Angeles, prepared between 1989 and 1993 at the request of the SWRCP. CAL. STATE WATER RES. CONTROL BD., FINAL ENVIRONMENTAL IMPACT REPORT FOR THE REVIEW OF MONO BASIN WATER RIGHTS OF THE CITY OF LOS ANGELES (1994), available at <http://www.monobasinresearch.org/online-reports/mbeir.htm>.

¹³⁶ Decision 1631, *supra* note 42, at 21–76.

¹³⁷ *Nat'l Audubon*, 658 P.2d at 714; *see supra* Figure 3.

¹³⁸ HART, *supra* note 4, at 52; Young, *supra* note 36, at 504, 506.

¹³⁹ Decision 1631, *supra* note 42, at 120.

¹⁴⁰ *Id.* at 77.

¹⁴¹ *See id.* at 77–82.

¹⁴² Young, *supra* note 36, at 510.

¹⁴³ *Id.*

exposed land bridges to Negit and Paoha Islands, primary nesting sites for California gulls.¹⁴⁴ Between 1979 and 1994, coyotes crossed these land bridges and fed on nesting gulls; in 1979 coyote intrusions on Negit Island caused the California Gull to experience “total reproductive failure.”¹⁴⁵ Additionally, prior to the diversions, Mono Lake was surrounded by extensive wetland and delta lagoon systems.¹⁴⁶ As the tributaries of Mono Lake dried up and lake levels dropped, these systems were drained.¹⁴⁷ The loss of this habitat particularly affected waterfowl,¹⁴⁸ whose populations began to dwindle.¹⁴⁹

In short, the Mono Lake ecosystem was dying—a death made possible by the political power of the LADWP facilitated by its established relationships with the State of California, the SWRCB, and its publically stated position that the taking of water from Mono Lake was necessary for the continued health and well-being of the citizens of Los Angeles.¹⁵⁰ The issue was framed as an either-or scenario: either water is provided for human survival and economic growth, or the water is used to protect the ecosystem.¹⁵¹ It was presumed that the citizens of California could not have it both ways.¹⁵² Saving the Mono Lake ecosystem would require a different approach to water allocation—a structural change in the water allocation

¹⁴⁴ *Id.* at 509. Ninety-five percent of the California gull population, including one in five of all California gulls in the world, nest at Mono Lake. *Id.*

¹⁴⁵ Decision 1631, *supra* note 42, at 103.

¹⁴⁶ *Id.* at 94. Of the 617 acres of wetlands fringing Mono Lake, there were “260 acres of brackish lagoons, 175 acres of dune lagoons,” over 60 acres of delta lagoons, and “356 acres of marsh, wet meadow, and wetland willow scrub.” *Id.*

¹⁴⁷ *See id.* at 97–98.

¹⁴⁸ *Id.* at 100.

¹⁴⁹ Local residents reported that prediversion, the sky was “thick with ducks and geese;” since diversion “[i]t’s hard to find even one out there.” Young, *supra* note 36, at 510. Current data indicate that duck populations at Mono Lake dropped from a prediversion level of 175,000-400,000 ducks per day to 11,000-15,000 ducks per year. Decision 1631, *supra* note 42, at 113-15.

¹⁵⁰ *See* Young, *supra* note 36, at 512-14; Editorial, *Water and Power in Our Future*, L.A. TIMES, Feb. 11, 1980, at D6. *See generally* Nat’l Audubon Soc’y v. Super. Ct. of Alpine Cnty. (*Nat’l Audubon*), 658 P.2d 709 (Cal. 1983) (discussing LADWP’s argument that taking water from Mono Lake was a necessity).

¹⁵¹ Editorial, *supra* note 150, at D6 (arguing that continued extractions from Mono Lake were needed for the city’s future). Los Angeles has a long history of framing the water issue as one of economic viability. REISNER, *supra* note 3, at 55, 60–62, 70–72. Reisner reports that as early as 1905, LADWP officials were crafting a message of water scarcity and the need for water if Los Angeles were to thrive. *Id.*

¹⁵² *See* Editorial, *supra* note 150, at D6.

decision-making process.¹⁵³ Ultimately, the task of changing this structure would fall upon the shoulders of graduate students-turned-activists who would use both social movements and litigation to facilitate change.¹⁵⁴

II. LITIGATION AND SOCIAL AND POLITICAL CHANGE—A THEORY

Lawyers and social scientists have long argued about the role of law and litigation in generating social and political change.¹⁵⁵ As early as the mid-seventies, legal scholars including Abram Chayes¹⁵⁶ and Joseph Sax¹⁵⁷ argued that “public law litigation” could facilitate social and political change, and social science scholars led by Stuart Scheingold argued that litigation could alter public policy if players were willing to take a political approach to law and social change.¹⁵⁸ However, legal and social science theorists approach the role of litigation in promoting social and political change from different vantage points.¹⁵⁹

A. *Public Law Litigation and Legal Theorists*

It is often argued that environmental law is an example of how litigation can cause social and political change.¹⁶⁰ Environmental law was born in the 1960s out of the common law as a means to “discipline public agencies, through . . . ‘public interest’ litigation.”¹⁶¹ This evolution was

¹⁵³ See *infra* Part II (discussing a shift in the approach to water allocation and public environmental litigation).

¹⁵⁴ See *infra* Part II. See generally HART, *supra* note 4, at 62-84 (describing the origins of new challenges to the LADWP).

¹⁵⁵ See *infra* Part II.A.

¹⁵⁶ See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

¹⁵⁷ See generally JOSEPH SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* (1970) [hereinafter SAX (1970)].

¹⁵⁸ See generally STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974).

¹⁵⁹ See discussion *infra* Part II.A. Compare SAX (1970), *supra* note 157, at xviii (viewing the courtroom and citizen-led public litigation as essential tools for effective participation in the governmental process), with SCHEINGOLD, *supra* note 158, at 4-9 (arguing that a legal frame of reference leads to an oversimplified approach to social and political change, and that a political approach that views courts as just one of a number of political resources for change is needed).

¹⁶⁰ See, e.g., SAX (1970), *supra* note 157.

¹⁶¹ A. Dan Tarlock, *The Future of Environmental “Rule of Law” Litigation*, 17 PACE ENVTL. L. REV. 237, 241 (2000) [hereinafter Tarlock (2000)]. See generally J. B. Ruhl, *Toward a Common Law of Ecosystem Services*, 18 ST. THOMAS L. REV. 1 (2005–2006).

made possible by the rise of “public law litigation” in the latter part of the nineteenth century¹⁶² and the relaxation of constraints on equitable remedies that permitted courts to examine controversies about future probabilities, such as the impact of government agency policies.¹⁶³

Unlike traditional common law litigation, which has at its heart the resolution of disputes between private individuals,¹⁶⁴ public law litigation focuses on “whether or how a government policy or program should be carried out.”¹⁶⁵ As more political and policy decisions were made by bureaucratic agencies, there was a recognition that agencies were locked in a symbiotic relationship with the very interests they sought to regulate—they were “captured.”¹⁶⁶

On the environmental front, Sax argued that the administrative agency

has supplanted the citizen as a participant [in the decision-making process] to such an extent that its panoply of legal strictures actually forbid members of the public from participating even in the complacent process whereby the regulators and the regulated work out the destiny of our air, water, and land resources. . . . The implementation of the public interest, he [the citizen] is told, must be left ‘to those who know best.’¹⁶⁷

And “those who [knew] best” were the agency experts and those they regulated.¹⁶⁸ Citizens with an interest in resource preservation lacked the political power to be meaningful players in the agency-developer

¹⁶² Chayes, *supra* note 156, at 1288–89. The rise of public law litigation coincided with the increase of reform legislation at the close of the nineteenth century; the relaxation of rules governing pleadings, standing, and class action litigation; and the relaxation of constraints on equitable remedies. *Id.* at 1283–89, 1292.

¹⁶³ *Id.* at 1292–93.

¹⁶⁴ *Id.* at 1282–88. Traditionally, the lawsuit was viewed as a mechanism for settling private disputes between individuals about private rights. *Id.* Legal liability was apportioned among litigants based on concepts of “intention” and “fault.” *Id.* at 1285. Through the litigation process, the parties received monetary relief (damages) for legal wrongs. *Id.* at 1282–83.

¹⁶⁵ *Id.* at 1295.

¹⁶⁶ See Robert Glicksman & Christopher H. Schroeder, *EPA and the Court: Twenty Years of Law and Politics*, 54 L. & CONTEMP. PROBLEMS 249, 264–68 (1991) (discussing the theory of agency capture prevalent in the early to late 1970s); see also SAX (1970), *supra* note 157, at 55–64.

¹⁶⁷ SAX (1970), *supra* note 157, at xvii.

¹⁶⁸ See *id.* at xvii–xix.

decision-making process and were relegated to the position of outsider.¹⁶⁹ Citizens, Sax argued, should have the right to use litigation to access the policy decision-making process.

The availability of a judicial forum means that access to government is a reality for the ordinary citizen—that he can be heard and that, in a setting of equality, he can *require* bureaucrats and even the biggest industries to respond to his questions and to justify themselves before a disinterested auditor The citizen asserts rights which are entitled to enforcement; he is not a mere supplicant.¹⁷⁰

More recently Professors Sabel and Simon, drawing on the work of Chayes and Roberto Unger's destabilization theory, argue that public law litigation can not only affect the outcome of bureaucratic policy decision-making but can also affect the manner in which public institutions make policy decisions.¹⁷¹ Unger, in his examination of democratic societies, observed that privileged members of societies or elites¹⁷² exercised control over political resources, including law,¹⁷³ that permit them to control

¹⁶⁹ See *id.* at 82–88.

¹⁷⁰ *Id.* at 112.

¹⁷¹ See generally Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004).

¹⁷² For purposes of this paper, the concept of elite is as defined by C. Wright Mills in his classic text, *The Power Elite*. Mills argues that the

power elite is composed of men whose positions enable them to transcend the ordinary environments of ordinary men and women; they are in positions to make decisions having major consequences. . . . [T]hey are in command of the major hierarchies and organizations of modern society. They rule the big corporations. They run the machinery of the state and claim its prerogatives. . . . They occupy the strategic command posts of the social structure, in which are now centered the effective means of the power and the wealth and the celebrity which they enjoy.

C. WRIGHT MILLS, *THE POWER ELITE* 3–4 (1956).

¹⁷³ McCann notes that law is a resource that is used by citizens to “structure relations with others, to advance goals in social life, to formulate rightful claims, and to negotiate disputes where interests, wants, or principle collide.” McCann (2006), *supra* note 1, at 21–22; see also Austin T. Turk, *Law as a Weapon in Social Conflict*, 23 SOC. PROBLEMS 276, 280 (1976). Turk argues that there are five types of political resources embodied in law. *Id.* These resources are: an enforcement power, or the implied threat of legal physical coercion to enforce a legal decision to your benefit; economic/resource power, which is the use of law to allocate or reallocate economic wealth or natural resources; political power, which is access to the public decision-making process in a manner that permits you to control how the decisions are made and the criteria applied to the decisions; ideological power which

public policy decisions to their benefit,¹⁷⁴ creating the phenomenon of political blockage.¹⁷⁵ Political blockage occurs when the public policy decision-making infrastructure “is substantially immune from conventional political mechanisms of correction” and therefore becomes “steeled to [non-elite] political pressures.”¹⁷⁶ There are three types of political blockage:

1. Majoritarian political control—which occurs when the political system is “unresponsive to the interests of a vulnerable, stigmatized minority.”¹⁷⁷
2. The “‘logic of collective action’—in which a concentrated group with large stakes exploits or disregards a more numerous but more diffuse group with collectively larger but individually smaller stakes.”¹⁷⁸
3. A hybrid of the two.¹⁷⁹

Sabel and Simon suggest that the logic of collective action may be the primary form of political blockage that affects environmental decision-making.¹⁸⁰

The exertion of political power by the LADWP¹⁸¹ in the acquisition of water from both the Owens Valley and the Mono Lake tributaries is a

is the use of law to help frame how the public gives meaning to a situation and how they define what is real and true; and diversionary power, which is the use of the law by the media to shape the manner in which the issue is relayed to the public. *Id.* at 280–81.

¹⁷⁴ ROBERTO MANGABEIRA UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY FROM POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY* 530–35 (Verso 2001) (1987).

¹⁷⁵ See Sabel & Simon, *supra* note 171, at 1062.

¹⁷⁶ *Id.* at 1062, 1064.

¹⁷⁷ *Id.* at 1064.

¹⁷⁸ Sabel & Simon, *supra* note 171, at 1064. This second type of political blockage encompasses the concept of traditional “agency capture.” Chayes and Sax both identify agency capture as a concentrated minority (elites) with large stakes in the agency decision, capturing the agency decision-making process to the detriment of a larger public concern. See SAX (1970), *supra* note 157, at 189; Chayes, *supra* note 156, at 1313.

¹⁷⁹ *Id.* at 1065.

¹⁸⁰ See Sabel & Simon, *supra* note 171, at 1064–65.

¹⁸¹ See *id.* at 1064 (explaining the role of political power used by agencies). Although some might argue that a public agency, such as the LADWP, is not in and of itself an elite, those within the LADWP in decision-making positions “occup[ie]d . . . strategic command posts.” MILLS, *supra* note 172, at 4. They effectively commanded power through their position within the agency, and their celebrity, wealth, and relationships with powerful elites within the City of Los Angeles; as such they fall within the classic definition of an elite. *Id.* at 3–4. Even if they are not defined as elites, those managing the LADWP had historically exercised significant political power. The LADWP dating back to 1899, and

classic example of collective action “political blockage.”¹⁸² The LADWP had a long history of using its political resources to manipulate water allocation decisions to its benefit—when it came to water, the LADWP got what it wanted.¹⁸³ When the LADWP appropriated the water of the Owens Valley at the turn of the twentieth century, it relied on its political relations with the Bureau of Reclamation and state agencies; as Kahrl observed: “[t]he fate of the Owens Valley was sealed the moment President Roosevelt determined that the greater public interest would be served by a greater Los Angeles. [Opponents] lost without even having had the opportunity to have their representative present.”¹⁸⁴

The LADWP then proceeded to exercise its political muscle and special relationships with both federal and state governments to appropriate

for at least three generations thereafter, was run by a group of wealthy business leaders and other professionals operating in their own self interest. See MIKE DAVIS, *CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES* 110–115 (1992); see also KEVIN STARR, *MATERIAL DREAMS: SOUTHERN CALIFORNIA THROUGH THE 1920S*, at 120 (1990) (arguing that Los Angeles, at the turn of the century, had a discernible class of elites: the Oligarchy); KAHRL, *supra* note 60, at 13–15. Mulholland, through his celebrity and in his position as Chief Engineer of the LADWP, was closely linked to, and some would argue was part of, the Los Angeles Oligarchy. See generally KAHRL, *supra* note 60, at ch. 1; CATHERINE MULHOLLAND, WILLIAM MULHOLLAND AND THE RISE OF LOS ANGELES 59–60, 80–92 (2000) (discussing Mulholland’s rise to power and his relationships with Los Angeles’s business leaders). The Oligarchy played a pivotal role in exerting its money, influence, and political power to develop water resources in Los Angeles to promote business and urban development. See generally Fionn MacKillop, *The Influence of the Los Angeles “Oligarchy” on the Governance of the Municipal Water Department, 1902–1930: A Business Like Any Other or a Public Service?* 2 BUS. & ECON. HIST. ON-LINE 1 (2004), <http://www.h-net.org/~business/bhweb/publications/BEHonline/2004/MacKillop.pdf> (discussing the role of the Los Angeles Oligarchy and Mulholland in the development of the Los Angeles water system).

¹⁸² See Sabel & Simon, *supra* note 171, at 1064.

¹⁸³ See *supra* Part I.B.

¹⁸⁴ KAHRL, *supra* note 60, at 142. The history of Owens Valley and the construction of the Los Angeles aqueduct is illustrative of the political power of the City of Los Angeles and the LADWP. Even Hoffman, who gives the LADWP a more favorable treatment than most in the Owens Valley history, observed that

[a]lthough the city needed water, it by no means needed the amount that would be coming down the aqueduct [from Owens Valley] once it was finished. Mulholland argued that the city’s water rights were at stake in the matter; to obtain less than what was allowed might set undesirable precedents. At the same time, not needing a storage reservoir at Long Valley in the immediate future, Mulholland ignored Owens Valley needs

HOFFMAN, *supra* note 60, at 275; see also, KAHRL, *supra* note 60 (containing an excellent discussion of the LADWP’s leveraging of political power in the construction of the Los Angeles aqueduct).

water from the Mono Lake tributaries.¹⁸⁵ It convinced the Bureau of Reclamation to secretly withdraw public lands from public sale and to convey them to the City of Los Angeles for future construction of the reservoir for the Mono Lake Project.¹⁸⁶ It convinced the SWRCB to issue a temporary permit for the full flow of the Mono Lake tributaries despite the fact that it did not have the capacity to use the entire flow and would not have the capacity to use the flow for thirty years.¹⁸⁷ When the LADWP completed the second phase of the Los Angeles aqueduct in 1970, the Water Resource Board issued the LADWP a final license without so much as a public hearing.¹⁸⁸ Finally, the California Game and Fish Commissioner ignored the requirements of California's Fish and Game Code permitting the LADWP to run the Mono Lake tributaries dry devastating fish populations.¹⁸⁹ In the words of Elden Vestal "the City of Los Angeles was God Almighty."¹⁹⁰ Restoring the Mono Lake ecosystem would require a re-crafting of the LADWP's water permit, a feat that required meaningful access to the SWRCB's decision-making process—access that was blocked by the LADWP.¹⁹¹

Political blockage is counter to democratic accountability.¹⁹² Destabilization theory is premised on the argument that citizens in democratic societies not only have the right to correct bureaucratic policy decisions made for the benefit of the politically powerful or elite, but they also have the right to create structural changes in the social and political institutions necessary to reduce the elites' political power.¹⁹³ In destabilization theory, a "destabilization right[]" is the right of citizens to make "claims to unsettle and open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal process of political accountability."¹⁹⁴ Public law litigation is a venue and means by which destabilization rights may legitimately be exercised; litigation provides citizens access to decision-making processes closed by political blockage.¹⁹⁵ And as Sax and Chayes note, such a venue

¹⁸⁵ See *supra* Part I.B.

¹⁸⁶ See *supra* Part I.B.

¹⁸⁷ See *supra* Part I.B.

¹⁸⁸ See *supra* Part I.B.

¹⁸⁹ See *supra* Part I.B.

¹⁹⁰ HART, *supra* note 4, at 47 (quoting statement of Elden Vestal).

¹⁹¹ See *supra* Part I.B.

¹⁹² See UNGER, *supra* note 174, at 530.

¹⁹³ See *id.* at 532; Sabel & Simon, *supra* note 171, at 1020.

¹⁹⁴ Sabel & Simon, *supra* note 171, at 1020.

¹⁹⁵ See *id.* at 1055-56.

is paramount where bureaucratic agencies play a major role in setting public policy.¹⁹⁶

In the case of most modern social legislation, Congress sets “general policy objective[s] or orientation[s]” but leaves a fair degree of discretion to the bureaucratic agency to accomplish the statute’s social objectives.¹⁹⁷ The agency is charged with administration of these social programs.¹⁹⁸ This sometimes requires filling policy gaps left by Congress.¹⁹⁹ These same gaps also provided an opening for the court to act if the agency is not accountable to the statute’s objective or, more importantly, if the agency has closed the decision-making process to the public or has acted without deference to “the levers of power in the system.”²⁰⁰ The court’s attention does not focus on policy making per se; it assures democratic accountability in a decision-making process which is easily captured by the politically powerful or elite.²⁰¹ The court’s role in public law litigation is thus twofold: to assure that the agency action comports with congressional intent and to assure some modicum of democratic accountability.²⁰²

The courts “pry open the democratic process and provoke consequences that are responsive to the merits of the controversy and [that are] more reflective of the variety of public constituencies which have an interest in the dispute.”²⁰³ The lawsuit is used to force the administrative agency to reconsider its decision under the hard questioning eye of the court, putting the agency’s discretion to the test.²⁰⁴ Additionally, the litigation alerts the legislature to differences of public opinion about the use and allocation of common pool natural resources.²⁰⁵ It becomes a cue to

¹⁹⁶ SAX (1970), *supra* note 157, at 189 (discussing the right of citizens to use the court system to gain access to bureaucratic agency decision making forums); Chayes, *supra* note 156, at 1313; accord UNGER, *supra* note 174, at 532-33; Sabel & Simon, *supra* note 171, at 1020.

¹⁹⁷ Chayes, *supra* note 156, at 1314.

¹⁹⁸ *Cf. id.* (explaining that judges may be called upon to examine the authority that legislatures pass on to other bodies).

¹⁹⁹ *See id.* at 1300, 1314.

²⁰⁰ *Id.* at 1315.

²⁰¹ *See id.*; cf. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 558-60 (1970) [hereinafter Sax, *Public Trust Doctrine*] (discussing the role of the court using the public trust doctrine to “promote equality of political power for a disorganized and diffuse majority”).

²⁰² *See* SAX, *Public Trust Doctrine*, *supra* note 201, at 558-60.

²⁰³ SAX (1970), *supra* note 157, at 180.

²⁰⁴ *Id.* at 181.

²⁰⁵ *Id.* at 182.

the legislature that wider debate and policy discussions are needed about the allocation of common resources.²⁰⁶

Beyond issue resolution, destabilization theorists argue that litigation can break open large-scale organizations that remain closed to ordinary citizens and operate in insulated hierarchies of power and advantage.²⁰⁷ To fully understand this perspective it is useful to examine the nature of private common law litigation. At common law “the lawsuit is a [mechanism] for settling disputes between private [individuals] about private rights” by apportioning legal liability based on concepts of “intention” and “fault.”²⁰⁸ Private litigation also performs an important social function through the doctrine of precedence—it clarifies “the law to guide future private actions.”²⁰⁹ The precedential function of law is inherently regulatory, reaching beyond the litigants;²¹⁰ it is both linear and web-like. It is linear to the extent that the legal decision guides the outcome of future cases;²¹¹ it is web-like to the extent that it influences markets, industry standards, or the allocation of public and private resources,²¹² as illustrated by the influence of product liability litigation on industry manufacturing standards.²¹³

The imposition of liability on product manufacturers has caused modification of industry norms, such as the requirement that industry should not sacrifice public safety for private gain, as illustrated by the case of the Ford Pinto, *Grimshaw v. Ford Motor Company*.²¹⁴ The court concluded that Ford Motor Company could not avoid correcting a life-threatening product defect in order to increase profits.²¹⁵ The outcome of

²⁰⁶ See *id.* at 182–83.

²⁰⁷ Sabel & Simon, *supra* note 171, at 1020.

²⁰⁸ See, Chayes, *supra* note 156, at 1282–83, 1285 (discussing the characteristics of private litigation and comparing private litigation to public law litigation). Chayes argues that public law litigation substantially differs from private law litigation in its focus on the balance of competing interests in the implementation of broad public policy. *Id.* at 1302; see also JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES 89 (1956).

²⁰⁹ Chayes, *supra* note 156, at 1285.

²¹⁰ See Sabel & Simon, *supra* note 171, at 1057.

²¹¹ See *id.*

²¹² See *id.* at 1058–59.

²¹³ See, e.g., Michael J. Rustad, *How the Common Good is Served by the Remedy of Punitive Damages*, 64 TENN. L. REV. 793, 801–02 (1997) (outlining the beneficial societal impacts of punitive damage awards in private litigation on industry norms and product safety).

²¹⁴ 174 Cal. Rptr. 348 (Cal. Ct. App. 1981).

²¹⁵ *Id.* at 388. *Grimshaw* involved the design of the Ford Pinto’s fuel system, which exploded in impacts in excess of 20–30 mph. *Id.* at 360. Fixing the design defect was a relatively simple and inexpensive process, however, and after conducting a cost benefit analysis,

the *Grimshaw* case was twofold. It provided a monetary remedy settling the legal dispute, and it indirectly changed the duty of care owed by the industry to the public.²¹⁶ The rationale of the *Grimshaw* court was applied by courts across the nation in cases ranging from the safety of tires to breast implants and resulted in a new industry norm.²¹⁷

The *Grimshaw* case illustrates the process of “creative destruction” in which new common law norms can reform institutions.²¹⁸ In effect, the rule of the case and the damage award—including in the *Grimshaw* case punitive damages—was a shot-across-the-bow warning manufacturers to modify their behavior.²¹⁹ By holding the manufacturer liable for the

consequences of socially unreasonable practices. . . . [The court] puts pressure on weaker, less adept firms. Some will improve their practices; some will go out of business. When a court raises standards for the industry, it puts pressure on all firms. The reasonableness norm is continuously revisable; it is elaborated in the context of current social circumstances.²²⁰

In public law litigation, this creative destructive²²¹ process takes on an added dimension in the embodiment of destabilization rights.²²² Public law litigation can be used in democratic societies to “disentrench or unsettle a public institution when . . . it is failing to satisfy minimum

Ford opted to forgo the correction reasoning that the compensation it would pay in damages was less than the cost of a product recall. *Id.* at 361–62. The Grimshaw family sued Ford after a stalled Pinto was rear-ended and exploded killing Mrs. Gray and disfiguring a thirteen-year-old passenger (Grimshaw youth). *Id.* at 359. The jury awarded actual damages and punitive damages in excess of \$3.5 million. *Id.* at 388. The appellate court upheld the trial courts award and reasoning that Ford could not trade public safety for profit. *Id.*

²¹⁶ *See id.* at 388.

²¹⁷ *See Rustad, supra* note 213, at 825–28.

²¹⁸ *See Sabel & Simon, supra* note 171, at 1059–60.

²¹⁹ *See Rustad, supra* note 213, at 845.

²²⁰ Sabel & Simon, *supra* note 171, at 1060.

²²¹ The concept of “creative destruction” was developed by Joseph Schumpeter and refers to the process by which “abrupt institutional subversion and redeployment” disrupt market process and “generate [new] economic development.” Sabel & Simon, *supra* note 171, at 1059–60 (quoting JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81–86 (3d ed. 1950)). Sabel and Simon argue that common law norms, such as those developed in the *Grimshaw* case, can “play an important role in this [disruption] process” creating room for new opportunities and new performance paradigms. *Id.* at 1060.

²²² *See id.* at 1062.

standards of adequate performance and . . . it is substantially immune from conventional political mechanisms of correction.”²²³ It can alter the manner in which bureaucratic agencies make decisions.²²⁴ Thus, the question presented at Mono Lake is whether public law litigation could be used to: (1) alter the LADWP’s license to protect the ecosystem and (2) change the decision-making structure of the SWRCB, compelling it to recognize ecosystem concerns in future water allocations.

1. Essential Elements and Outcomes of Destabilizing Litigation

Sabel and Simon identify two elements essential to successful destabilization litigation: the failure to satisfy some minimum legal standard²²⁵ and the experimentalist remedy.²²⁶

At the outset, effective destabilizing public law litigation requires the failure of the administrative agency to satisfy some minimum performance standard.²²⁷ Generally, these legal standards are uncontroversial or based on “industry standards” developed through custom and practice.²²⁸ “[T]he court looks to [these] standards to define minimum performance” standards for the public agency.²²⁹

A second essential element of destabilization is the experimentalist remedy.²³⁰ Because the remedy in public law litigation addresses policy decisions made by the public agency, the legal issue is not easily resolved by the award of damages; rather, the remedy looks to modify the agency decision.²³¹ In the traditional command-and-control decree, the court designs a remedy, generally with some assistance from the parties, to correct the agency action and commands the agency to implement the remedy.²³²

²²³ *Id.*

²²⁴ *See, e.g., id.* at 1063.

²²⁵ *Id.* at 1062.

²²⁶ Sabel & Simon, *supra* note 171, at 1067.

²²⁷ *See id.* at 1062–63.

²²⁸ Sabel and Simon cite, as an example of minimum performance standards, prison standards adopted by the Federal Bureau of Prisons such as when “Arkansas’s prison administrator encouraged” public law litigation to promote prison reform in the institutions he managed. *Id.* at 1063.

²²⁹ *Id.*

²³⁰ *See id.* at 1067.

²³¹ *See* SAX (1970), *supra* note 157, at 113–14.

²³² *See* Chayes, *supra* note 156, at 1298–1300 (discussing the nature of the judicial decree).

The experimentalist remedy differs from the command-and-control decree in that it is negotiated by stakeholders, “takes the form of a rolling-rule regime,” and is transparent.²³³

When the court uses the experimentalist remedy, it creates a space for the litigants and other stakeholders to “negotiate a remedial plan.”²³⁴ The negotiation process requires the stakeholders, often under the oversight of a special master, to gather and share information, set agendas and rules for deliberation and decision-making, set goals, and reach a consensus about a remedial regime that implements the remedial goals.²³⁵ Through the negotiation process, the stakeholders build relationships that facilitate the creation of trust.²³⁶

Often, negotiations between stakeholders are provisional and dependent upon unknown future contingencies; thus, stakeholders continually reassess and reposition themselves as their knowledge becomes deeper and time reveals more information.²³⁷ Because the complexities and futuristic nature of the issue requires stakeholders to make decisions based on incomplete information, the stakeholder negotiations focus on: performance outcome norms and goals, monitoring and assessment of norms and goals, and reassessment of norms and goals—knowledge is increased as a result of the success or failure of the negotiated remedy to meet performance measures.²³⁸ This rolling-rule regime requires the parties to interact and renegotiate over time²³⁹ and assumes the court will maintain ongoing oversight over the litigation until the goals and implementation can be assessed over time.²⁴⁰

A final essential element of the experimentalist remedy is transparency in the negotiation and remedy-assessment process.²⁴¹ The court, through the negotiated process, forces decisions that were once made in semi-public or non-public forums to be made publicly and subjects them to ongoing public scrutiny.²⁴²

²³³ Sabel & Simon, *supra* note 171, at 1067–72 (emphasis omitted).

²³⁴ *Id.* at 1067.

²³⁵ Negotiation among stakeholders is deliberative in nature, requiring face-to-face interaction and good faith negotiation to build consensus. *Id.* at 1068.

²³⁶ *See id.* at 1068.

²³⁷ *See id.* at 1069–70.

²³⁸ *See id.*

²³⁹ *See* Sabel & Simon, *supra* note 171, at 1069–70.

²⁴⁰ *See id.* at 1070.

²⁴¹ *Id.* at 1071.

²⁴² *See id.* at 1071–72.

Sabel and Simon identify six destabilizing effects of public law litigation: the veil effect,²⁴³ the status quo effect,²⁴⁴ the deliberative effect,²⁴⁵ the publicity effect,²⁴⁶ the stakeholder effect,²⁴⁷ and the web effect.²⁴⁸ Together, these effects alter the relationship between the public agency and its traditional constituency, the relationship between the blocked citizen and the agency, and may alter the manner in which the agency implements public programs.²⁴⁹

B. Public Law Litigation, Social Movements, and Social Science Scholarship

Social scientists, too, have explored the extent to which litigation can cause social and political change with a substantial amount of disagreement.²⁵⁰ Stuart Scheingold, in his groundbreaking work *The Politics*

²⁴³ *Id.* at 1074. The negotiation of the remedy places the agency in an uncertain position in which the agency can no longer rely on past patterns. *Id.* This requires the agency to reorient its goals, its partners, and its understanding of how to solve problems. *See id.* at 1074–75.

²⁴⁴ *Id.* at 1075. Although the form of the negotiated remedy is unknown, the parties realize that the outcome will, by necessity, be different than the status quo. *Id.* at 1075–76. The negotiation stigmatizes the status quo, reducing the risk of change. Change becomes a forgone conclusion. *Id.*

²⁴⁵ Sabel & Simon, *supra* note 171, at 1076. Because the status quo is no longer an option, the parties are forced to more fully explore alternatives developed by all of the stakeholders. *Id.* at 1076.

²⁴⁶ *Id.* at 1077. “[V]indication of the plaintiff’s claim” increases public scrutiny of the problem. *Id.*

²⁴⁷ *Id.* “[T]he liability determination empowers the plaintiff[]” and legitimizes the claim, giving the plaintiff a viable position at the negotiation table. *Id.* The liability determination and remedy negotiation also cause an internal power shift, increasing the influence of the plaintiff and decreasing the influence of the traditional agency stakeholders or power elites. *Id.* at 1077–78.

²⁴⁸ *Id.* at 1080. The negotiated remedy may impact actors beyond the litigation and “spill back and forth between public and private realms” in a “process of iterative disequilibrium and readjustment.” *Id.* at 1080–81. Thus, for example, a concern about discrimination may lead to a concern about the quality of services to the disadvantaged. *Id.* at 1081.

²⁴⁹ *See id.* at 1073–74.

²⁵⁰ Gerald Rosenberg has characterized the two schools of thought about the ability of courts to instigate social change as the dynamic court view and the constrained court view. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 9–10 (1991). The constrained court view argues that courts are not effective tools of social reform because of “the limited nature of constitutional rights, the lack of judicial independence, and the judiciary’s inability to develop [and implement] appropriate policies.” *Id.* at 10. Proponents of the dynamic court view argue that courts can produce significant social change. *See id.* at 22; McCann (2006), *supra* note 1, at 19.

of *Rights*, posited that law and litigation could alter public policy but only if players were willing to “abandon . . . conventional legal perspective[s]” in favor of “a political approach” to law.²⁵¹

Scheingold argues that there are two prevailing views of law in American society: the “myth of rights” and the “politics of rights.”²⁵² The “myth of rights”²⁵³ has at its core a “legal paradigm—a social perspective which perceives and explains human interactions largely in terms of rules and of the rights and obligations inherent in rules.”²⁵⁴ Americans tend to believe that public policy development “is and should be conducted in accordance with the patterns of rights and obligations established under law.”²⁵⁵ Reform lawyers, who are students of this view, tend to distrust political processes in favor of exclusively “legal” approaches to policy change such as litigation and, in so doing, “grossly overestim[ate] the political impact of court rulings.”²⁵⁶ This legal frame “tunnel[s] the vision of . . . activists . . . leading to an oversimplified approach . . . that grossly exaggerates the role that lawyers and litigation can play in a strategy for change. The assumption is that litigation can evoke a declaration of rights from courts.”²⁵⁷ This declaration can be used to realize rights, which causes social and political change,²⁵⁸ thus leading to the belief that litigation alone can cause social reform.²⁵⁹

In truth, using litigation to promote social change is much more complex.²⁶⁰ Litigation can be successful in promoting social change only

²⁵¹ SCHEINGOLD, *supra* note 158, at 4. Scheingold was the “first to develop a systematic argument for the proposition that litigation and court decisions could be used as part of a broader strategy to organize and mobilize political action.” Michael Paris, *The Politics of Rights: Then and Now*, 31 L. & SOC. INQUIRY 999, 1006 (2006).

²⁵² SCHEINGOLD, *supra* note 158, at 7.

²⁵³ The “myth of rights” has been the dominant view of law in America. Grounded in the Constitution, it provides American democracy and politics with symbolic legitimacy. *Id.* at 13. Symbolic rights, such as the right to own property and the right to contract freely, “reflect [the] values which are the building blocks of [American] political ideology.” *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* (emphasis omitted).

²⁵⁶ Robin Stryker, *Half Empty, Half Full, or Neither: Law, Inequality, and Social Change in Capitalist Democracies*, 3 ANN. REV. L. & SOC. SCI. 69, 77 (2007) [hereinafter Stryker (2007)].

²⁵⁷ SCHEINGOLD, *supra* note 158, at 5.

²⁵⁸ *Id.*

²⁵⁹ *See id.* at 4–5.

²⁶⁰ *See, e.g.*, Benedict Kingsbury, *Representation in Human Rights Litigation*, CARNEGIE COUNCIL (Apr. 6, 2000), http://www.carnegiecouncil.org/resources/publications/dialogue/2_02/articles/611.html (“In practice, however, the pursuit of human rights through litigation is vastly more complex.”)

if it is directed “to the redistribution of power,” if used politically.²⁶¹ Scheingold characterizes this use of law as the “politics of rights” in which litigation becomes a “*political resource*[] of unknown value in the *hands of those who want to alter the course of public policy*,”²⁶² no different from any other political resource.²⁶³ The value of the resource is dependent upon the manner in which the resource is used.²⁶⁴ For law and litigation to be used successfully to promote change, two essential elements come into play: (1) a preexisting group of political activists promoting social change and (2) legal mobilization or the use of law, or in Scheingold’s words “rights,” to develop political resources that can be used by activists in a larger context to promote social change.²⁶⁵

Social science scholars since Scheingold have argued that if law and litigation are to result in reform change, they must be mobilized by an organized social movement.²⁶⁶ The term “social movement” has been given a variety of definitions by social science scholars, a discussion of which is beyond the scope of this paper.²⁶⁷ It is, however, useful to employ the definitions of Tilly and Tarrow. Tilly defines a social movement as “a sustained series of interactions between power holders and persons successfully claiming to speak on behalf of a constituency lacking formal representation,”²⁶⁸ in which these activists make public demands for changes in the distribution and exercise of political power and “back those demands with public demonstrations of support.”²⁶⁹ Tarrow expands this definition by further characterizing a social movement as

²⁶¹ SCHEINGOLD, *supra* note 158, at 6.

²⁶² *Id.* at 6–7 (emphasis added).

²⁶³ *See id.* at 7.

²⁶⁴ *Id.*

²⁶⁵ *See* McCann (2006), *supra* note 1, at 21–22.

²⁶⁶ *See* CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 20–22 (1998); MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 279–80 (1994) [hereinafter MCCANN (1994)]. Even Scheingold, in the preface of the second edition of *The Politics of Rights* notes that McCann clearly articulates an important element of public law litigation that Scheingold assumes, that is, the existence of a social movement organization. STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE*, xxix–xxx (2d ed. 2004).

²⁶⁷ *See, e.g.*, David A. Snow et al., *Mapping the Terrain*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 3, 6–11 (David A. Snow et al. eds., 2004) (discussing various definitions of social movement and proposing a definition).

²⁶⁸ Charles Tilly, *Social Movements and National Politics*, in *STATEMAKING AND SOCIAL MOVEMENTS: ESSAYS IN HISTORY AND THEORY* 297, 305–06 (Charles Bright & Susan Harding eds., 1984).

²⁶⁹ *Id.*

sequences of contentious politics that are based on underlying social networks and resonant collective action frames, . . . which . . . maintain sustained challenges against powerful opponents.

. . . .
 . . . Collective action . . . is used by people who lack regular access to institutions, who act in the name of new or unaccepted claims, and who behave in ways that fundamentally challenge others or authorities.²⁷⁰

In the context of political blockage, a social movement is a group of citizens blocked from the political decision-making process by concentrated elites and administrative agencies, who are engaged in attempts to destabilize or challenge established political blockage in order to gain meaningful access to public decision-making forums, and who have mobilized to make demands for access to political decision-making forums.²⁷¹

McCann, in his overview on the use of litigation by social movement organizations (“SMOs”) to facilitate social and political change, observes that SMOs seek both an immediate political decision to redress past wrongs and structural change that eliminates political blockage, opening policy and decision-making structures for the benefit of the politically disenfranchised.²⁷² Additionally, SMOs seek to build the movement itself, to increase its power and thereby the likelihood of change.²⁷³ Thus, the desired outcome of an SMO is threefold: (1) short term political gains (policy outcome), (2) meaningful structural change that provides access to policy-making forums (policy structural outcome), and (3) movement building.²⁷⁴ In the context of social movement theory, law and litigation is a political resource that can be mobilized to accomplish some or all of these outcomes.²⁷⁵

²⁷⁰ SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* 2–3 (2d ed. 1998).

²⁷¹ See *id.* at 3 (explaining that “[c]ontentious collective action is the basis of social movements”).

²⁷² See McCann (2006), *supra* note 1, at 23–24. McCann argues that social movements “aim for a broader scope of social and political transformation” than do conventional activists. *Id.* While SMOs may press for short-term gains, their true aim is a better society. *Id.* These SMOs employ a wide range of tactics but tend to rely on media campaigns and destructive symbolic tactics that halt or upset ongoing social practices. *Id.*

²⁷³ See, e.g., MCCANN (1994), *supra* note 266, at 281–82.

²⁷⁴ See McCann (2006), *supra* note 1, at 23–24; MCCANN (1994), *supra* note 266, at 281–82.

²⁷⁵ See generally Bob Edwards & John D. McCarthy, *Resources and Social Movement Mobilization*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 116–152 (David A. Snow et al. eds., 2004) (discussing resources and their use in social movement mobilization).

Law is a political resource,²⁷⁶ which can be used by elites or SMOs to control or promote their own interests or ideas over those of another.²⁷⁷ It is generally conceded among SMO scholars that law as a political resource generally supports prevailing social relationships of the politically powerful or elites.²⁷⁸ Political power is the control of political resources, including law,²⁷⁹ and the exercise of political power is the mobilization of these resources to control the outcome of political conflicts or conflicts over public policy outcomes.²⁸⁰

In the context of Mono Lake, California's legislative water appropriation scheme became a political resource used by the LADWP to access the Mono Lake tributaries.²⁸¹ The California constitutional provision "that the water resources of the State be put to beneficial use to the fullest extent of which they are capable"²⁸² was intended to stretch scarce water resources to ensure settlement.²⁸³ Thus, California's prior appropriation water system incorporated a beneficial use doctrine that equated to the "duty of water."²⁸⁴ This historic definition of beneficial use weighed heavily in favor of an extractive and economic use of water.²⁸⁵ In this context, the

²⁷⁶ What constitutes a resource in the context of a social movement is to some degree dependent upon the social movement theory used by the scholar. For example, scholars of the rational choice or resource mobilization theory of social movements focus on the means available to collective actors to facilitate mobilization of social movements. TARROW, *supra* note 270, at 15–16. Resources include money, time, and human capital. See Edwards & McCarthy, *supra* note 195, at 118. These resources are internal to the SMO. See *id.* Tarrow, in his synthesis of social movement theory, argues that people engage in contentious politics when *political opportunities* are presented to them and that, in this context, a resource may be either internal to the SMO, in the case of money or power leveraged to create change, or may be external to the SMO in the form of an external opportunity—an opening or access point such as the Three Mile Island nuclear accident's impact on the anti-nuclear power movement in the United States. See TARROW, *supra* note 270, at 19–20.

²⁷⁷ See Turk, *supra* note 173, at 280–81; McCann (2006), *supra* note 1, at 21–22.

²⁷⁸ See, e.g., McCann (2006), *supra* note 1, at 22–23.

²⁷⁹ See, e.g., Turk, *supra* note 173, at 280 (analyzing the five types of political resources represented by law).

²⁸⁰ See *id.*

²⁸¹ See, e.g., Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty. (*Nat'l Audubon*), 658 P.2d 709, 713–14, 727–29 (Cal. 1983) (finding that the LADWP used California's water appropriation scheme to access Mono Lake's tributaries).

²⁸² *Id.* at 725 (quoting CAL. CONST. art. X, § 2 enacted in 1928 as art. XIV, § 3).

²⁸³ See Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 965–66 (1998) (providing a brief statement of the history and purpose of the beneficial use doctrine in western water law).

²⁸⁴ See Samuel C. Wiel, *What is Beneficial Use of Water*, 3 CAL. L. REV. 460, 462 (1915).

²⁸⁵ See Neuman, *supra* note 283, at 968–69, 975.

LADWP could use California water law as a political resource to justify the extraction of water from the Mono Lake tributaries to support economic and urban development in Los Angeles.²⁸⁶

The LADWP could also, and did, use law as a resource to help frame²⁸⁷ the water issue for the citizens of California.²⁸⁸ The framing power of law can impose limitations, perceived or real, on alternative approaches to policy determinations.²⁸⁹ In the case of Mono Lake, the beneficial use doctrine linked the need for water with the human and financial well-being of the citizens of Los Angeles.²⁹⁰ As early as 1905, the LADWP and Mulholland used an economic frame to paint “bleak visions of water famines, drought, and economic collapse” to support Los Angeles’s quest for water and to gain support for the bonds necessary to fund the Los Angeles aqueduct.²⁹¹ The Mono Lake project was presented to the citizens of Los Angeles “as a vitally important interim device to save Los Angeles from a water famine until the aqueduct to the Colorado could be completed.”²⁹² Even the court in *City of Los Angeles v. Aitken* adopted this frame, acknowledging that while the diversion would have a devastating impact on Mono Lake and the surrounding communities, it was uncontroverted that the “condemnation of the waters of Rush and Leevining (sic) creeks by the city of Los Angeles [for municipal purposes] was a necessity.”²⁹³

²⁸⁶ See Wiel, *supra* note 284, at 472 n.53.

²⁸⁷ A “frame” is a “‘schemata of interpretation’ that [permits] individuals ‘to locate, perceive, identify, and label’” events and occurrences in their lives and in the larger world. Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611, 614 (2000). Framing permits individuals to organize their experiences and information and serves to guide actions. *Id.* Frames permit the individual to simplify and condense information. *Id.* And Nisbet, in his discussion of framing and climate change, notes that a frame is an “interpretive storyline” that communicates “why an issue might be a problem, who or what might be responsible for it, and what should be done about it.” Matthew Nisbet, *Communicating Climate Change: Why Frames Matter for Public Engagement*, ENV’T MAG., Mar.-Apr. 2009, at 12, 15 (discussing the analysis of framing in social science disciplines). Frames convey why an issue matters. Matthew C. Nisbet & Dietram A. Scheufele, *What’s Next for Science Communication? Promising Directions and Lingering Distractions*, 96 AM. J. OF BOTANY 1767, 1770 (2009). They lend “weight to certain considerations and arguments over others.” *Id.*

²⁸⁸ See Andrew H. Sawyer, *Changing Landscapes and Evolving Law: Lessons from Mono Lake on Takings and the Public Trust*, 50 OKLA. L. REV. 311, 317–18, 324 (1997).

²⁸⁹ See Turk, *supra* note 173, at 281. Law plays a significant role in shaping the frames people use to give meaning to situations. *Id.* The fact that law supports one view can diminish the legitimacy of other views. *Id.*

²⁹⁰ See *supra* note 150 and accompanying text.

²⁹¹ KAHRL, *supra* note 60, at 84–85.

²⁹² *Id.* at 342.

²⁹³ *City of Los Angeles v. Aitken (Aitken)*, 52 P.2d 585, 586 (Cal. Dist. Ct. App. 1935).

If, however, law is to matter in the struggle for political and social change, then the power of law—the political resources it affords—must be made available to the SMO as a resource in the struggle for change.²⁹⁴ Through legal mobilization, the SMO translates its desire into an assertion of a lawful claim of right to transform or reconstitute the terms of the social and power relationships within polities.²⁹⁵ But, legal mobilization and court orders alone are insufficient to motivate political change.²⁹⁶ Social movement scholars argue that litigation matters only if it is part of a broader strategy to organize and mobilize political action, resulting in the redistribution of political power.²⁹⁷ It is the redistribution of political power and not litigation that brings about meaningful change. As Stryker explains in her overview of studies examining the relationship between social movements and litigation: “maximizing real world inequality reduction through law requires combining a number of factors or conditions. Law interpretation and enforcement must be subject to sustained social movement pressure from below through a combination of litigation *and* mass political mobilization.”²⁹⁸

What role then can litigation play in the process to change political structures? Both legal theorists and social scientists identify a number of elements that appear to be necessary for successful destabilizing litigation that sustains political and social change. These elements include: an established SMO; a minimum legal standard that forms the basis for litigation;²⁹⁹ political and legal mobilization;³⁰⁰ the ability to use the litigation to frame the issue for bystanders and potential movement members;³⁰¹ ongoing court oversight;³⁰² and a decree that encompasses an experimental

²⁹⁴ See, e.g., Beth Harris, *Representing Homeless Families: Repeat Player Implementation Strategies*, 33 L. & SOC'Y REV. 911, 913 (1999).

²⁹⁵ See McCann (2006), *supra* note 1, at 21–22.

²⁹⁶ See Harris, *supra* note 294, at 933; Stryker (2007), *supra* note 256, at 90. Social scientists argue that there are a number of factors which impact whether a court order will be enforced, let alone whether the order will result in political change. See Harris, *supra* note 294, at 933; Stryker (2007), *supra* note 256, at 90. Those factors include but are not limited to whether the SMO is permitted to participate in the decision-making process, whether the court exercises ongoing oversight over the matter, and whether the remedy fixes responsibility for and monitors the impact of organizational change and its outcome. See Harris, *supra* note 294, at 933; Stryker (2007), *supra* note 256, at 90.

²⁹⁷ See Stryker (2007), *supra* note 256, at 76.

²⁹⁸ *Id.* at 88 (emphasis added).

²⁹⁹ See Sabel & Simon, *supra* note 171, at 1063–64.

³⁰⁰ See Stryker (2007), *supra* note 256, at 76–78.

³⁰¹ See Benford & Snow, *supra* note 287, at 614.

³⁰² See Stryker (2007), *supra* note 256, at 85.

remedy, which is negotiated by stakeholders in a transparent process subject to ongoing oversight by the court, and is also flexible enough to permit modification as new information becomes available.³⁰³

What did this mean in the context of the Mono Lake ecosystem? As events would demonstrate, restoration and protection of the Mono Lake ecosystem would require not just a court order but a redistribution of political power that would change the criteria and method used to allocate California's water resources.³⁰⁴

III. METHODS

How then to explore the role of litigation in Mono Lake ecosystem restoration? In the context of historic events surrounding social change, the tool of narrative³⁰⁵ is used by historical sociologists to explore what happened and to explain why events unfolded the way they did.³⁰⁶ Using the history of events to explain how social change occurs permits the researcher to marry theory and operating assumptions about how the world operates.³⁰⁷ The narrative can also be used to build and test theories.³⁰⁸

Theory building from case histories involves the use of one or more cases "to create theoretical constructs, propositions and/or midrange theory from case-based empirical evidence."³⁰⁹ Theory is developed by recognizing patterns of relationships among constructs.³¹⁰ This is an iterative process,

an over-time process involving a continual interplay and mutual adjustment between theory and history. Concrete

³⁰³ See *supra* Part II.A.1.

³⁰⁴ See *infra* Part IV.

³⁰⁵ A narrative is an analytical construct that unifies past and contemporaneous actions "into a coherent relational whole that gives meaning to and explains each of its elements and is, at the same time constituted by them." Larry J. Griffin, *Narrative, Event-Structure Analysis, and Causal Interpretation in Historical Sociology*, 99 AM. J. SOC. 1094, 1097 (1993). A narrative is how we reconstitute and describe events. See *id.* at 1098.

³⁰⁶ Robin Stryker, *Beyond History Versus Theory: Strategic Narrative and Sociological Explanation*, 24 SOC. METH. & RES. 304, 305 (1996) [hereinafter Stryker (1996)]; CHARLES C. RAGIN, *THE COMPARATIVE METHOD: MOVING BEYOND QUALITATIVE AND QUANTITATIVE STRATEGIES* 19–20 (1989).

³⁰⁷ See Lee Teitelbaum, *An Overview of Law and Social Research*, 35 J. LEGAL EDUC. 465, 472–73 (1985).

³⁰⁸ See Kathleen M. Eisenhardt & Melissa A. Graebner, *Theory Building from Cases: Opportunities and Challenges*, 50 ACAD. MGMT. J. 25, 25 (2007).

³⁰⁹ *Id.*

³¹⁰ *Id.*

and specific historical events and configurations are conceptualized in terms of abstract concepts and sensitizing frameworks. These concepts and frameworks are used to select, to order, and to interpret . . . data³¹¹

From the narrative and its comparison to the theoretical frame and other cases, the researcher can begin to make preliminary causal generalizations to deductively explore how and why a given action does or does not produce another action in a causal sequence.³¹²

Using a theoretical lens constructed from Sabel and Simon's destabilization model modified to reflect the findings of social scientists such as Scheingold, McCann, and Stryker, this article examines the narrative of the Mono Lake restoration. This article will explore the role of law and litigation in changing the political and social structures necessary to protect and restore the Mono Lake ecosystem by using the narrative of the Mono Lake restoration constructed by Hart³¹³ and supplemented by government documents, court decisions, media accounts, and the work of other legal scholars as noted herein.

IV. LESSONS LEARNED FROM MONO LAKE

A. *Lesson One: Social Movement Organizations Matter*

Although legal scholars recognize that one of the primary goals of public law litigation is to provide citizens access to the public policy forum,³¹⁴ social movement scholars argue that change litigation is most successful if it is brought by a SMO because SMOs aim for broader social and political transformations than do traditional litigants.³¹⁵ Thus, while SMOs may achieve short term gains, their primary push is for structural

³¹¹ Stryker (1996), *supra* note 306, at 310–11.

³¹² *Id.* at 311.

³¹³ See generally HART, *supra* note 4.

³¹⁴ See generally SAX (1970), *supra* note 157, at 175–80. Sax posits that the purpose of public law litigation in the context of natural resource policy management is to provide citizens blocked from the policy realm an opportunity to challenge an agency in court on behalf of the public to stop a project that infringes on the public's rights to a common resource. See *id.* at 175. Likewise, Sabel and Simon argue that one of the primary functions of destabilizing public law litigation is to give disenfranchised stakeholders access to policy decision-making forums that have become politically steeled to consumer citizen groups. See Sabel & Simon, *supra* note 171, at 1064.

³¹⁵ McCann (2006), *supra* note 1, at 23–24.

change to political and social institutions.³¹⁶ Additionally, SMOs that use litigation as a regular strategy are more adept at using litigation for social change because they are more likely to have pre-existing networks,³¹⁷ including activists and other organizations capable of mobilizing the resources necessary to bring the litigation and take advantage of its outcomes.³¹⁸ These SMOs are “repeat players” in the litigation game.³¹⁹ Repeat players are more likely to view litigation as a broad strategy, increasing the likelihood that litigation will result in “redistributive change.”³²⁰ Further, research suggests that if SMOs are represented throughout the litigation, courts are more likely to favor the interests they represent.³²¹ For Mono Lake, SMOs were central to restoration, and these SMOs relied heavily on a litigation strategy.³²²

Although there were some early attempts³²³ to initiate interest in the restoration of Mono Lake, restoration of Mono Lake would ultimately

³¹⁶ *Id.*

³¹⁷ There is an extensive body of social science literature surrounding the concept of networks and the use of social networks by SMOs and others to accomplish change. For purposes of this article, a social network is a social structure made up of individuals and/or organizations (nodes) connected by one or more types of interdependency. Nancy Katz et al., *Network Theory and Small Groups*, 23 SMALL GROUP RES. 307, 308–310 (June 2004) (discussing the structure of social networks).

³¹⁸ See Stryker (2007), *supra* note 256, at 75–76.

³¹⁹ See *id.* (explaining the concept of “repeat players”).

³²⁰ See Joel B. Grossman, Stewart Macaulay & Herbert M. Kritzer, *Do the “Haves” Still Come Out Ahead?*, 33 L. & SOC'Y REV. 803, 803–04 (1999) (discussing the difference between those who access the courts on a regular basis and those who are “one shotters”). See also Marc Galanter, *Why the “Haves” Come Out Ahead: Speculation on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974). Galanter analyzed the impact of litigation based on the nature of the litigant. See *id.* at 97. He posited that individuals or organizations that have only occasional recourse to courts (one shot players) are less successful in leveraging litigation to bring about social and political change than are litigants who are engaged in similar pieces of litigation over time (repeat players). See *id.* at 97–99. One-shot players have higher costs, are more focused on the outcome of the individual lawsuit than the long-term picture, and are more likely to settle without obtaining redistributive relief. See *id.* at 97–103. As a result, institutions generally have an advantage in the litigation game. See *id.*

³²¹ See, e.g., Harris, *supra* note 294, at 929.

³²² See Craig Anthony (Tony) Arnold, *Working Out an Environmental Ethic: Anniversary Lessons from Mono Lake*, 4 WYO. L. REV. 1, 18 (2004).

³²³ In 1961, David Mason, a limnology graduate student, undertook a limnological study of the area. HART, *supra* note 4, at 52. Mason tried to enlist Ansel Adams to use his influence to preserve Mono Lake. *Id.* Mason also approached several environmental groups; they were sympathetic but showed little interest in taking on the Mono Lake cause. *Id.* Mason was, however, able to stir the interest of local shoreline owners who joined together to form Friends of Mono Lake. *Id.* at 59.

fall on the shoulders of graduate students-turned-activists: David Gaines,³²⁴ David Winkler,³²⁵ and Tim Such.³²⁶ In 1976, Gaines and Winkler formed the Mono Basin Research Group to study the degradation of the Mono Lake ecosystem.³²⁷ Both Gaines and Winkler were passionate about Mono Lake ecosystem restoration, but neither was particularly interested in political activism.³²⁸ When lake levels dropped to 6375 feet—permitting Winkler to walk to Negit Island³²⁹—in November 1977, however, Winkler and Gaines saw no alternative to political action.³³⁰

Together, Gaines and Winkler approached a number of national environmental organizations (“NEOs”) for support; the NEOs all expressed concern but were unwilling to take action.³³¹ Finally, Gaines received the support of the Santa Monica Bay Chapter of the Audubon Society to create the “Mono Lake Committee” as a subsidiary,³³² while Winkler appealed to the state and the Bureau of Land Management (“BLM”) to find a temporary solution for the elimination of the Negit Island land bridge.³³³

In March 1978, the California National Guard blasted a moat between Negit Island and the shores of Mono Lake, and in that same month the Mono Lake Committee opened an office in a print shop in Oakland, California.³³⁴ In its first publication, the Mono Lake Committee called for restoration of Mono Lake water elevations to 6378 feet, the 1976 level.³³⁵

³²⁴ In 1972, David Gaines, a U.C. Davis ecology graduate student, was hired by the California Natural Resources Coordinating Council to do an inventory of Mono County and became alarmed by the state of Mono Lake. *Id.* at 65–66.

³²⁵ In 1975, Gaines recruited Winkler, then a student, to do research at Mono Lake. *Id.* at 66.

³²⁶ Tim Such, an undergraduate at U.C. Berkeley, discovered Mono Lake as part of an assignment in his environmental studies class. *Id.* at 61.

³²⁷ See *id.* at 66–71 for a detailed outline of the biological research of the Mono Basin Research Group.

³²⁸ See HART, *supra* note 4, at 70–71.

³²⁹ Historically, Negit Island was separated from the mainland and provided a primary nesting site for the California Gull. *Id.* at 16–17. As early as 1972, *American Bird* magazine documented the creation of a land bridge between Negit Island and the mainland and predicted the “total destruction” of the California gull nesting population. *Id.* at 59–60. As a symbolic response, the Bureau of Land Management declared Negit Island an Outstanding National Area. *Id.* at 60.

³³⁰ See *id.* at 71.

³³¹ *Id.* at 72. Gaines and Winkler reported approaching the Sierra Club, the Friends of the Earth, and the Natural Resources Defense Council among others. *Id.*

³³² *Id.*

³³³ *Id.*

³³⁴ HART, *supra* note 4, at 72–74.

³³⁵ *Id.* at 74. This was the minimum level the Committee believed necessary for ecosystem restoration. *Id.* When criticized by the national environmental groups for not calling for an end to all diversion, the committee retorted that it did not intend to overreach. *Id.* It

The LADWP did not even acknowledge the proposal.³³⁶ Hart characterized the pending battlefield.

In this corner: the [LADWP]. Its annual budget, over one billion It had armies of lawyers, armies of engineers, armies of lobbyists. Its right to the waters it had tapped, however much resented by people in the source regions, seemed unassailable; it was anchored in a system of state water law that every water supplier in the state could be counted on to defend.

And in the other corner: the upstart Mono Lake Committee. It spent, in 1978, \$4,867.15. In the early days it could not be reached by phone. Its leaders worked out of "homes and tents scattered hither and yon" . . . "a small band of birdwatchers and graduate students . . . activated by nothing more complex than their deep affection for a place few Californians will ever see."³³⁷

While Winkler and Gaines were building the Mono Lake Committee, Tim Such independently took a different track.³³⁸ Such began contacting established NEOs and government agencies urging them to litigate to halt the diversion.³³⁹ Such recalls: "[t]hey [NEOs] thought the Mono issue was too complex [Y]ou couldn't fight Los Angeles."³⁴⁰ They suggested he come back "[i]f you find a good legal theory."³⁴¹ Such suspended his undergraduate studies at Berkeley and began searching for a legal theory, ultimately landing on the public trust doctrine when he read Joseph Sax's 1970 law review article: *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*.³⁴²

Such made a second round of the NEOs in 1978 with this new theory.³⁴³ Only the Friends of the Earth ("the Friends") was receptive

would seek the minimum they believed Mono Lake needed to survive based on evidence compiled to date. *Id.*

³³⁶ *Id.*

³³⁷ *Id.* (citation omitted).

³³⁸ *See id.* at 61.

³³⁹ *See id.* at 63.

³⁴⁰ Hart, *supra* note 4, at 63 (quoting interview with Tim Such between March 22 and March 29, 1994).

³⁴¹ *Id.*

³⁴² *Id.* at 63–64. *See generally* Sax, *Public Trust Doctrine*, *supra* note 201.

³⁴³ HART, *supra* note 4, at 65, 81.

and, in a classic example of social networking, took the case to its attorney, Andy Baldwin, who in turn called his contacts in the law firm of Morrison and Foerster (“MoFo”).³⁴⁴ MoFo agreed to take the case *pro bono*, but it needed a plaintiff.³⁴⁵ In its search for a plaintiff, MoFo looked not to an individual but to three SMOs: the Friends, the Mono Lake Committee, and the National Audubon.³⁴⁶ One participant at that first meeting between MoFo and the three Mono Lake plaintiffs observed: “[it was] the Children’s Crusade at the court of some Eastern potentate. Trail mix and backwoods idealism confronted pinstripes across a corporate table.”³⁴⁷ The processes of initiating and financing the Mono Lake litigation are illustrative of the advantages of the SMO as a litigant. Here, the Friends’s social network was used to locate an attorney, the financial resources of the Friends and the National Audubon were used to launch the litigation, and the national stature of the National Audubon was used to give the litigation credibility.³⁴⁸

The LADWP was, however, undaunted by the threat of litigation.³⁴⁹ The parties met in a pre-trial conference but no deal emerged.³⁵⁰ One LADWP representative was heard to remark: “[t]he last lawsuit we had like this took forty-three years.”³⁵¹ With that ominous warning, the parties filed suit.³⁵² The environmental goal of the litigation was clear: to save the Mono Lake ecosystem. In hindsight, it is also clear that this environmental outcome would require not only revisiting the 1940 SWRCB permitting decision but also for the SWRCB to consider the needs of the ecosystem in the permitting decision process and a change in the historic relationship between the LADWP and the SWRCB.³⁵³ Could the litigation accomplish this feat?

³⁴⁴ *Id.* Most of the NEOs rejected Such’s plea because they were gearing up for a fight over the Sacramento-San Joaquin Delta and the Peripheral Canal. *Id.* at 65. Saving Mono Lake, these NEOs believed, would only put more pressure on the Sacramento River and other Northern California water sources. *Id.*

³⁴⁵ *Id.* at 82.

³⁴⁶ *Id.* Although all three organizations were named parties in the litigation, National Audubon was the first named plaintiff primarily because of its national stature and its financial resources. *Id.* at 82–83. Both the Friends and National Audubon contributed an initial \$10,000 to cover costs and expenses. *Id.* at 83.

³⁴⁷ *Id.* at 82 (quoting interview of Gray Brechin, May 26, 1994).

³⁴⁸ *Id.* at 81–83.

³⁴⁹ See HART, *supra* note 4, at 83.

³⁵⁰ *Id.*

³⁵¹ *Id.* (quoting interview with Bruce F. Dodge, Counsel to National Audubon Society, April 12, 1994).

³⁵² *Id.*

³⁵³ See *supra* Part I.B.

B. *Lesson Two: Minimum Performance Standards May Not Be Essential*

Sabel and Simon argue that effective destabilizing litigation requires the failure of the administrative agency to satisfy some minimum performance standard.³⁵⁴ A minimum performance standard is uncontroversial or based on industry standards developed through custom and practice.³⁵⁵ The court looks to these standards to define the minimum performance standards in destabilizing litigation,³⁵⁶ yet arguably, the public trust doctrine relied on by Such and the Mono Lake Committee is one of the more elusive and controversial legal standards in environmental law.

The public trust doctrine, an ancient legal doctrine originating under Roman and English common law, is premised on the theory that certain types of public property—most notably seashores, tidal waters, fisheries, highways, and waterways—are dedicated to perpetual public use and must be held in trust for the public by the sovereign.³⁵⁷ Historically, the sovereign could not convey trust lands to private interests, although Parliament had the authority to enlarge or diminish trust rights for a “legitimate public purpose.”³⁵⁸ The U.S. Supreme Court recognized the application of the public trust doctrine in the United States as early as 1868.³⁵⁹ The ability of a state legislature to convey trust properties to private interests was most famously addressed by the U.S. Supreme Court in *Illinois Central Railroad Company v. Illinois*,³⁶⁰ where the Court ruled that because the public trust doctrine extended to navigable waters and streams, the Illinois legislature could not convey the Lake Michigan waterfront and the associated control over commerce to a private enterprise.³⁶¹

³⁵⁴ See Sabel & Simon, *supra* note 171, at 1062–63.

³⁵⁵ *Id.* Federal prison standards are illustrative of this type of uncontroverted legal standard. See *id.* at 1063. Sabel and Simon cite to a number of cases where senior prison officials encouraged litigation by outsiders to promote prison reform. See *id.*

³⁵⁶ *Id.* at 1063.

³⁵⁷ Sax, *Public Trust Doctrine*, *supra* note 201, at 475–76. See also SAX (1970), *supra* note 157, at 163–64. These public trust properties were distinguishable from general public property, which the sovereign could grant to private owners. Sax, *Public Trust Doctrine*, *supra* note 201, at 475.

³⁵⁸ Sax, *Public Trust Doctrine*, *supra* note 201, at 476.

³⁵⁹ See *R.R. Co. v. Shurmeir*, 74 U.S. (7 Wall.) 272, 287 (1868) (noting that navigable rivers are subject to the *jus publicum*). See also *Shively v. Bowlby*, 152 U.S. 1, 14–47 (1894) (recounting the history of the public trust doctrine in the United States).

³⁶⁰ 146 U.S. 387 (1892).

³⁶¹ *Id.* at 454. *Illinois Central* involved a state grant of land under Lake Michigan to the Illinois Central Railroad. *Id.* The grant extended one mile out and across the Chicago

The shores of Lake Michigan were a public trust asset,³⁶² and the state could not “abdicate its trust over property in which the whole people are interested . . . so as to leave them entirely under the use and control of private parties”³⁶³

Sax, in his now famous law review article on the public trust doctrine, argued the public trust doctrine should be extended beyond tide waters to form the basis of a legal theory which would enable private citizens to protect the public’s interest in common pool resources such as air and water.³⁶⁴ Sax noted that, because the public trust doctrine rests upon the principle that the public’s interest in certain natural resources is so important that these resources could not be transferred to private hands but should remain freely available to the entire citizenry, the role of the government must be to “promote the interests of the general public [in the common pool resource] rather than to redistribute public goods from broad public uses to restricted private benefit.”³⁶⁵ The transfer of trust assets into private hands, if permitted at all, must be accompanied by “substantial evidence that some compensating public benefit is being achieved thereby.”³⁶⁶ The trust obligation was not unlimited but, where applicable, assured that

the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; . . . the property may not be sold, even for a fair cash equivalent; and . . . the property must be maintained for particular types of uses [that benefit the larger public].³⁶⁷

Harbor and comprised most of Chicago’s commercial waterfront. *Id.* at 437–38. The Illinois legislature, regretting its decision, voted to repeal the grant and sued to have the grant declared invalid. *Id.* at 439. The Supreme Court upheld the revocation, finding that the title to the waters of Lake Michigan was “different in character from that which the State holds in lands intended for sale. . . . It is a title held in trust for the people of the State” *Id.* at 452. For a more detailed history of the *Illinois Central* case see Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799 (2004). See Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006) for a more detailed discussion of the history of the public trust doctrine in the United States since 1970.

³⁶² *Illinois Central*, 146 U.S. at 455–56.

³⁶³ *Id.* at 453.

³⁶⁴ See SAX (1970), *supra* note 157, at 172–73.

³⁶⁵ *Id.* at 165.

³⁶⁶ *Id.*

³⁶⁷ Sax, *Public Trust Doctrine*, *supra* note 201, at 477.

Citizens, Sax concluded, should be permitted to sue the government to compel it to comply with its trust obligations.³⁶⁸

California itself had a long history of using the public trust doctrine to protect shoreline resources and navigable waters.³⁶⁹ Since the mid-1860s, California courts had regularly invalidated public-private conveyances of tidelands valued for navigation and fishing even where the legislature appeared to authorize the conveyances to private interests.³⁷⁰ The California court observed that “[n]othing short of a very explicit provision [in statute] . . . would justify us in holding that the legislature intended to permit the shore of the ocean . . . to be converted into private ownership.”³⁷¹ Even where the legislature explicitly authorized the conveyance of trust property to private interests, California courts were loath to find that the legislature had conveyed all public interest in the property.³⁷² The grantee of trust lands was presumed to have obtained title subject to the public’s right of navigation.³⁷³

In 1971, the California Supreme Court expanded the scope of the public trust doctrine in *Marks v. Whitney*,³⁷⁴ a quiet title action.³⁷⁵ Marks’s property had been acquired under an 1874 patent from California.³⁷⁶ Marks claimed he had the right, as owner of the shoreline, to fill and develop the property.³⁷⁷ Whitney, who owned property inland from Marks’s property, opposed the shoreline fill, arguing that it would cut off his rights to the tidelands that he held as a member of the public under the public trust doctrine.³⁷⁸

³⁶⁸ See SAX (1970), *supra* note 157, at 173 (arguing that citizens are entitled to enforce the legal protection of common property resources). See generally *id.* at 175–92 (discussing the use of litigation to enforce trust obligations).

³⁶⁹ See Sax, *Public Trust Doctrine*, *supra* note 201, at 524–34, 538–44 (discussing the California courts’ use of the public trust doctrine prior to 1970).

³⁷⁰ See *id.* at 525–26.

³⁷¹ *Id.* at 527 (quoting *Kimball v. MacPherson*, 46 Cal. 104, 108 (1873)).

³⁷² See *id.* at 525–26 (noting the California Supreme Court’s narrow reading of statutes so as to invalidate or declare voidable certain conveyances of tidelands); *id.* at 528 (noting that, even when a grant was validated, the landowner was required to use the land subject to the public’s rights).

³⁷³ *Id.* at 528 (citing *People v. Cal. Fish Co.*, 138 P. 79, 87 (Cal. 1912)).

³⁷⁴ 491 P.2d 374 (Cal. 1971).

³⁷⁵ *Id.* at 377.

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.*

The trial court found that Whitney had “no ‘standing’ to raise the public trust issue.”³⁷⁹ The California Supreme Court reversed.³⁸⁰ The California Supreme Court’s decision in *Marks v. Whitney* was important to the development of a legal theory for Mono Lake for three reasons. First, the court recognized that Whitney, as a member of the public, could bring an action to enforce the public trust interest;³⁸¹ furthermore, had Whitney not raised the issue, the court itself could take judicial notice of the public trust burdens and raise the issue on its own.³⁸² This meant that any citizen could bring suit to protect the public’s interests in trust assets.

Second, the court held that the public trust burden is both flexible and fluid.³⁸³ While historically the trust burden was limited to navigation, fisheries, and commerce, over time the trust obligation had expanded to include hunting, boating, and recreating.³⁸⁴ Here the court noted:

The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.³⁸⁵

Accordingly, the public trust burden was sufficiently flexible to encompass changing values, including the preservation of the trust assets in their natural state. This opened the door for use of the public trust doctrine to protect ecosystems.³⁸⁶

³⁷⁹ *Id.*

³⁸⁰ 491 P.2d at 383.

³⁸¹ *Id.* at 381–82.

³⁸² *Id.* at 378, 381–82.

³⁸³ *Id.* at 380.

³⁸⁴ *Id.*

³⁸⁵ *Id.* (citation omitted).

³⁸⁶ *See, e.g.*, *State v. Super. Ct. of Placer Cnty.*, 625 P.2d 256, 259–60 (Cal. 1981) (using the public trust doctrine to protect an area of ecological significance).

Finally, the court concluded that while the legislature could remove the trust burden from traditional trust lands, it was up to the legislature "to take the necessary steps" to free trust lands of their trust burdens.³⁸⁷ The natural conclusion of this holding is that put forth by Sax who argued that

[a]ny action which will adversely affect traditional public rights in trust lands is a matter of general public interest and should therefore be made only if there has been full consideration of the state's public interest in the matter; *such actions should not be taken in some fragmentary and publicly invisible way.*³⁸⁸

The problem with the public trust doctrine from a destabilization perspective was that there was no agreement about the application of the public trust doctrine to water appropriations for the preservation of non-extractive trust assets;³⁸⁹ thus, the public trust doctrine was hardly an uncontroversial performance standard.³⁹⁰ The SWRCB had long argued that it had no alternative under California law but to permit the appropriation of the Mono Lake tributaries.³⁹¹ The SWRCB noted:

it is indeed unfortunate that the City's proposed development will result in decreasing the aesthetic advantages of Mono Basin but *there is apparently nothing that this office can do to prevent it.* The use to which the City proposes to put the water . . . is defined by the Water Commission Act

³⁸⁷ 491 P.2d at 381.

³⁸⁸ Sax, *Public Trust Doctrine*, *supra* note 201, at 531 (emphasis added). It should be noted that, at the time Sax wrote his public trust article in the Michigan Law Review, the California Supreme Court had not yet issued a final ruling in *Marks v. Whitney*. Sax had reviewed the appellate court decision and criticized the appellate court for not taking up the public trust issue. *See id.* at 530–31 (discussing *Marks v. Whitney*, 80 Cal. Rptr. 606 (Ct. App. 1969), *rev'd*, 491 P.2d 374 (Cal. 1971)).

³⁸⁹ *See* HART, *supra* note 4, at 64–65. *See generally* J.B. Ruhl, *Ecosystem Services and the Common Law of "The Fragile Land System"*, NAT. RESOURCES & ENV'T, Fall 2005, at 3, 5 (noting that most state courts have declined to apply the public trust doctrine to protect ecosystems).

³⁹⁰ *See supra* notes 354–55 and accompanying text (noting that destabilizing litigation typically involves an uncontroversial performance standard).

³⁹¹ *See, e.g.*, Nat'l Audubon Soc'y v. Super. Ct. of Alpine County (*Nat'l Audubon*), 658 P.2d 709, 714 (Cal. 1983).

as the highest to which water may be applied This office therefore has *no alternative but to dismiss all protests based upon the possible lowering of the water level in Mono Lake and the effect that the diversion of water from these streams may have upon the aesthetic and recreational value of the Basin.*³⁹²

To prevail in its legal challenge, the Mono Lake Committee would have to convince the court to apply the public trust doctrine to California's water rights/appropriation system for the benefit of the natural system.³⁹³ This feat would require the court to develop a new legal theory premised on the argument that California's water rights/appropriation system did not subsume the state's public trust obligations.³⁹⁴

Initially, the prospect of litigation playing any role in Mono Lake ecosystem restoration seemed fairly bleak.³⁹⁵ Almost four years and several early defeats were to elapse before the Supreme Court of California issued its now landmark decision in *National Audubon Society v. Superior Court of Alpine County*.³⁹⁶ The filing of the lawsuit in the spring of 1979 was followed by a flurry of motions and counter motions.³⁹⁷ The venue of the Mono Lake litigation was not resolved until July 1980 when the Federal District Court for the Eastern District of California ordered the removal of the

³⁹² *Id.* (emphasis in original) (quoting Div. Wat. Resources Dec. 7053, 7055, 8042 & 8043 at 26 (Apr. 11, 1940)). The SWRCB reiterated this argument in the lower court. *See id.* at 714 n.7 (quoting an interrogatory response made by the Water Board).

³⁹³ *See id.* at 712 (noting that the lower court had rejected this argument on summary judgment).

³⁹⁴ *Id.* The California Supreme Court observed that the *National Audubon* case brought together "for the first time two systems of legal thought: the appropriative water rights system which since the days of the gold rush has dominated California water law, and the public trust doctrine . . ." *Id.*

³⁹⁵ *See supra* note 337 and accompanying text.

³⁹⁶ 658 P.2d 709 (Cal. 1983).

³⁹⁷ *See HART, supra* note 4, at 83–89. The lawsuit was originally filed in Mono County. *Id.* at 83. The court granted the LADWP's first request for change of venue, moving the matter to Alpine County but denied a second request for change of venue. *Id.* at 89. The LADWP filed a cross claim against 117 residents of the Mono Basin alleging that they had contributed to the decline in lake elevation. *Id.*; *see also Nat'l Audubon Soc'y v. Dep't of Water & Power of Los Angeles*, 496 F. Supp. 499, 502 (E.D. Cal. 1980). Not to be outdone, the SWRCB filed a cross claim against Audubon and the Mono Lake Committee arguing that they had failed to exhaust their administrative remedies. HART, *supra* note 4, at 89; 496 F. Supp. at 502. The SWRCB filed a cross complaint naming the United States as a defendant which resulted in a petition to remove the case to federal district court. 496 F.Supp. at 502.

matter from California state court to federal district court.³⁹⁸ Removal was followed by further jurisdictional wrangling and an abstention order instructing Audubon and the Mono Lake Committee to file an action in state court to address: (1) “the relationship between the public trust doctrine and the California water rights system” and (2) whether Audubon was required to exhaust its administrative remedies prior to filing suit challenging the LADWP allocation permit.³⁹⁹ Thus, the matter was sent down to California’s Alpine Superior Court.⁴⁰⁰

On November 9, 1981, Judge Hilary Cook of the Alpine Superior Court dealt the Mono Lake Committee a devastating blow, ruling that the plaintiffs, Audubon and the Mono Lake Committee, must “exhaust their administrative remedies before the [SWRCB] prior to filing suit”⁴⁰¹ More importantly, she found that California’s prior appropriation system “is a comprehensive and exclusive system for determining the legality of the diversions for the City of Los Angeles in the Mono Basin The Public Trust Doctrine does not function independently of that system. . . . [T]he Public Trust Doctrine is subsumed in the water rights system of the state.”⁴⁰² Audubon and the Mono Lake Committee immediately appealed, requesting expedited review to the California Supreme Court, but even with expedited review, the matter would not be resolved until 1983.⁴⁰³

Meanwhile, Mono Lake’s levels continued to fall, dropping to 6373 feet in 1980.⁴⁰⁴ By June 1981, Negit Island was “solidly fused” to the mainland, brine shrimp and gull hatches where at an all time low, and many of those gulls that did hatch suffered massive die offs or were hunted by predators reaching nesting islands.⁴⁰⁵ To many, it seemed that the Mono Lake ecosystem was on the verge of collapse with no relief in sight.⁴⁰⁶ Then, in the winters of 1981 and 1982, the snow and the rains began.⁴⁰⁷ There was more water than the reservoir could handle, so Mayor Bradley

³⁹⁸ 496 F. Supp. at 509.

³⁹⁹ Nat’l Audubon Soc’y v. Dept. of Water (*Nat’l Audubon v. SWRCB*), 858 F.2d 1409, 1411 (9th Cir. 1988).

⁴⁰⁰ *Id.*

⁴⁰¹ Nat’l Audubon Soc’y v. Super. Ct. of Alpine Cnty. (*Nat’l Audubon*), 658 P.2d 709, 729 (Cal. 1983).

⁴⁰² *Id.* at 717–18 (quoting district court order dated November 9, 1981).

⁴⁰³ *Id.* at 718.

⁴⁰⁴ See *supra* Figure 3.

⁴⁰⁵ HART, *supra* note 4, at 93–95.

⁴⁰⁶ *Id.* at 2.

⁴⁰⁷ *Id.* at 100. The winter of 1981–82 had been extremely wet, and the 1982–83 winter was the wettest winter of the century. *Id.*

was forced to order a reduction of Los Angeles's diversion, sending water down into Mono Lake and giving it a temporary reprieve while the litigation plodded forward.⁴⁰⁸

On February 17, 1983, the California Supreme Court issued its now landmark decision, holding that the public trust interest in navigable waters and the lands beneath the navigable waters had not been subsumed by California's appropriative water rights system.⁴⁰⁹ Furthermore, the court held that the public trust obligation extended to non-navigable tributaries to the extent that damage to those tributaries damaged the navigable water body into which they flowed.⁴¹⁰ The state had an ongoing public trust interest in these assets that prevented the LADWP from acquiring a vested right to appropriate water "in a manner harmful to the interests protected by the public trust."⁴¹¹ Although the SWRCB had the authority to permit appropriation of the Mono Lake tributaries for beneficial use, it also had "an affirmative duty to take the public trust [interest in Mono Lake] into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible."⁴¹² Once the SWRCB approved an appropriation, the SWRCB had a continuing duty to supervise the taking and assess the impact on trust assets.⁴¹³

Furthermore, the court ruled the state's duty to protect trust assets is subject to modification over time⁴¹⁴ and was more expansive than either the LADWP or the SWRCB had envisioned: "[t]he objective of the public trust has evolved in tandem with the changing public perception of the values and uses of water-ways."⁴¹⁵ The doctrine was "sufficiently flexible to encompass changing public needs"⁴¹⁶ and could expand to include inland

⁴⁰⁸ *Id.* This rapid rise of the lake levels caused meromixis, or the separation of salt water and fresh water into layers, in Mono Lake. *Id.* at 101. Under normal conditions, fresh water came into Mono Lake in a fairly steady, even flow, allowing the fresh and salt water to mix. *Id.* The quick release of water by the LADWP was too much for Mono Lake's hydrological system. *Id.* The fresh water settled on top of the salt water rather than mixing. *Id.* This phenomenon persisted for six years from 1981 through 1987. *Id.* at 100–01.

⁴⁰⁹ *Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty.* (*Nat'l Audubon*), 658 P.2d 709, 727 (Cal. 1983); see also Cynthia L. Koehler, *Water Rights and the Public Trust Doctrine: Resolution of the Mono Lake Controversy*, 22 *ECOLOGY L.Q.* 541, 565–66, 568 (1995) (providing an overview of the court's *National Audubon* decision).

⁴¹⁰ *Nat'l Audubon*, 658 P.2d at 721.

⁴¹¹ *Id.* at 727.

⁴¹² *Id.* at 728.

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ *Id.* at 719.

⁴¹⁶ *Nat'l Audubon*, 658 P.2d at 719 (quoting *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971)).

waterways and tributaries flowing into navigable waters⁴¹⁷ and ecosystems in their natural state.⁴¹⁸ The court concluded:

one of the most important public uses of tidelands . . . is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat . . . which favorably affect the scenery and climate of the area."⁴¹⁹

The public trust doctrine is:

an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.⁴²⁰

This duty is a continuing duty imposed on the state in the allocation of the state's water resources,⁴²¹ a duty that the SWRCB failed to undertake in the initial allocation of water from the Mono Lake tributaries.⁴²² The Court concluded that "some responsible body ought to reconsider the allocation of the waters of the Mono Basin" to take into account the impact of the LADWP's diversion on the Mono Lake ecosystem.⁴²³ The ruling did not vacate the LADWP permit, but it did impose a new requirement on the SWRCB, a requirement that was ongoing and which applied to all water allocations past, present, and future made by the SWRCB which affected

⁴¹⁷ See *id.* at 724 (discussing the reach of the public trust doctrine beyond tidelands).

⁴¹⁸ *Id.* at 719.

⁴¹⁹ *Id.* (quoting *Marks*, 491 P. 2d at 380).

⁴²⁰ *Id.* at 724. The court did, however, note that consistent with California water law, all uses of water in California "including public trust uses, must now conform to the standard of reasonable use." *Id.* at 725. However, the "use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water." *Id.* at 726 (quoting Cal. Water Code § 1243).

⁴²¹ *Id.* at 732.

⁴²² See *Nat'l Audubon*, 658 P.2d at 728–29.

⁴²³ *Id.* at 729. The court observed that both the California District Court and the SWRCB had concurrent original jurisdiction over the matter and declined to state which body should be the body to assess the impact of the LADWP's diversion on the public trust interest. *Id.* at 729–32. In any event, the case was to continue in federal district court, which had retained jurisdiction during the pendency of the state court actions. *Nat'l Audubon Soc'y v. Dept. of Water*, 869 F.2d 1196, 1199 (9th Cir. 1989).

a navigable water body, including the allocation from the Mono Lake tributaries.⁴²⁴ The matter was sent back to the federal court where it sat for another eighteen months.⁴²⁵

From the perspective of destabilization theory, the Mono Lake Committee had won with an unconventional legal theory;⁴²⁶ however, neither the filing of the lawsuit nor the California Supreme Court's ruling resulted in an alteration of the SWRCB's permitting decision.⁴²⁷ There was no equitable relief for Mono Lake nor was there a "flexible remedy" bringing the parties together to negotiate a solution for the dying ecosystem.⁴²⁸ This was not due so much to the legal theory as it was to the fact that, as Rosenberg notes, court orders are not, in and of themselves, self-executing.⁴²⁹ Execution may depend upon a number of variables, including the availability of political support within the administrative agency,⁴³⁰ broad political support beyond the administrative agency,⁴³¹ the existence of public support,⁴³² and the existence of incentives to comply.⁴³³ Uncontroversial legal theories might be easier to implement when the theory has broad based support, as Rosenberg notes,⁴³⁴ but this does not mean that controversial theories cannot form the basis for structural change.⁴³⁵ For Mono Lake, it would simply take more than the court order to move the parties, but in the end game, the litigation and the court's holding would play a major role in reconstructing water allocation in California, not only in the Mono Lake case, but in all of California's water appropriation cases going forward.⁴³⁶

In many respects, the far reaching nature of the *National Audubon* decision was in part due to the innovative theory applied by the plaintiffs, suggesting that "a minimum performance standard" is less important than

⁴²⁴ See *Nat'l Audubon*, 658 P.2d at 728. The LADWP immediately appealed the decision to the U.S. Supreme Court, and the Mono Lake Committee filed a motion for injunctive relief in the federal district court to maintain flows to the Mono Lake tributaries. See HART, *supra* note 4, at 102. The State of California requested that the matter be remanded to state court in its entirety. *Id.*

⁴²⁵ HART, *supra* note 4, at 102–03.

⁴²⁶ See Karkkainen, *supra* note 28, at 812–15.

⁴²⁷ *Id.* at 815.

⁴²⁸ See HART, *supra* note 4, at 101–02.

⁴²⁹ See ROSENBERG, *supra* note 250, at 19.

⁴³⁰ See *id.*

⁴³¹ See *id.* at 31.

⁴³² See *id.* at 32.

⁴³³ See *id.*

⁴³⁴ See *id.* at 31.

⁴³⁵ See ROSENBERG, *supra* note 250, at 30.

⁴³⁶ See generally Hart, *supra* note 4, at 101–02.

a legal standard which is fluid and flexible enough to give the court latitude to bring the parties together to craft a remedy.⁴³⁷ The California Supreme Court applied this principle, holding that it was incumbent upon either the California District Court or the SWRCB to incorporate trust principles into the LADWP allocation permit.⁴³⁸

C. *Lesson Three: The Ongoing Power of Framing*

In the end, however, the *National Audubon* ruling facilitated change because it was used as an important political resource by the Mono Lake Committee to build a new collective action frame for the Mono Lake extraction.⁴³⁹ While there are many types of frames,⁴⁴⁰ from the perspective of SMOs, “collective action frames” are the most meaningful.⁴⁴¹ Collective action frames are used by SMOs for two important functions: (1) to “mobilize potential adherents and constituents” thereby building the SMO and (2) to “garner bystander support” to increase the legitimacy of the SMO and its views and to “demobilize antagonists.”⁴⁴² In the context of framing, law can be a resource used by the SMO to both build the SMO and to garner public support by increasing the legitimacy of preferred policy outcomes through the framing process.

Framing played an important role in both the demise⁴⁴³ and restoration⁴⁴⁴ of the Mono Lake ecosystem. For years, the LADWP controlled the framing game, and it framed the water issue as one of economics and water scarcity: water was scarce but essential to economic growth, and without it, Los Angeles and California could not prosper.⁴⁴⁵ When opponents objected to water appropriations from Mono Lake, the LADWP, resorting to its frame, simply noted that the water would have to come from somewhere, perhaps the Sacramento-San Joaquin River Delta.⁴⁴⁶ This

⁴³⁷ See *id.* at 101.

⁴³⁸ See *Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty. (Nat'l Audubon)*, 658 P.2d 709, 728–29 (Cal. 1983).

⁴³⁹ See *infra* notes 442–54 and accompanying text.

⁴⁴⁰ Nisbet, *supra* note 287, at 15–16 (discussing how journalists, policymakers, and experts use frames).

⁴⁴¹ Benford & Snow, *supra* note 287, at 614.

⁴⁴² *Id.* (quoting Benford & Snow, *Ideology, Frame Resonance, and Participant Mobilization*, 1 INT'L SOC. MOV'T RES. 197, 198 (1988)).

⁴⁴³ See discussion *supra* pp. 40–40.

⁴⁴⁴ See discussion *infra* pp. 61–62.

⁴⁴⁵ See discussion *supra* pp. 40–40 (discussing the LADWP's use of framing in the context of the construction of the Los Angeles Aqueduct and the Mono Lake project).

⁴⁴⁶ HART, *supra* note 4, at 76. This frame was successful in deterring efforts to garner support from other environmental interest groups. See *id.* These groups feared supporting

frame was a dilemma for the Mono Lake Committee; saving the Mono Lake ecosystem would mean the destruction of the Delta ecosystem.⁴⁴⁷ Other environmental groups were reluctant to support the Mono Lake Committee if it meant taking water from the Sacramento-San Joaquin River Delta.⁴⁴⁸ The Mono Lake Committee could not ignore Los Angeles's perceived need for more water without raising the ire of the citizens of Los Angeles and their political leaders.⁴⁴⁹ The citizens of Los Angeles might support saving the Mono Lake ecosystem, but would they do so at the expense of their morning shower?

Frames spotlight events and their underlying causes and consequences for bystanders and direct attention away from other consequences.⁴⁵⁰ The Mono Lake Committee had to find and build a new frame to replace the LADWP frame. If Mono Lake ecosystem restoration was to become possible, the Committee would need a frame that could capture the attention of the citizens of Los Angeles and California.⁴⁵¹ Thus, David Gaines began to traverse the state in earnest, delivering lectures on the dying Mono Lake ecosystem to anyone who would listen,⁴⁵² and the Mono Lake Committee began publishing scientific studies documenting the impact of water extractions on the Mono Lake ecosystem health.⁴⁵³ This frame carried a strong ethical component and attracted the attention of the national news media.⁴⁵⁴ Between 1978 and 1980, articles about the

Mono Lake would simply result in less water for Los Angeles and greater pressure for the Peripheral Canal, a project to divert water from the Sacramento River around the San Joaquin Delta to supply Los Angeles. Kelly Zito, *Peripheral Canal Urged to Save the Delta*, S.F. CHRON., July 18, 2008, available at http://articles.sfgate.com/2008-07-18/news/17172640_1_peripheral-canal-water-system-water-supply. The Peripheral Canal proposal was ultimately defeated in the 1980s but has become an issue again as pressure has built on California's water system. *Id.*

⁴⁴⁷ See HART, *supra* note 4, at 76, 77.

⁴⁴⁸ See *id.* at 76.

⁴⁴⁹ See *id.* at 76–77.

⁴⁵⁰ See Nisbet, *supra* note 287, at 15–16.

⁴⁵¹ See HART, *supra* note 4, at 77. In general social movement parlance, the citizens of California and Los Angeles are bystanders. See William A. Gamson, *Bystanders, Public Opinion, and the Media*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 242, 243–44 (David A. Snow, Sarah A. Soule & Hanspeter Kriesi eds., 2004). Citizens generally construct their opinions based on cues flowing from issue-framing or the relevance of the issue to their individual life. See *id.* at 245.

⁴⁵² HART, *supra* note 4, at 77.

⁴⁵³ *Id.* at 80.

⁴⁵⁴ See *id.* Nisbet, in his analysis of the framing of the climate change debate, notes that the climate change debate has been characterized by a number of frame typologies, at least three of which are apparent in the history of framing in the context of Mono Lake

demise of the Mono Lake ecosystem appeared in the *Smithsonian*, *Sports Illustrated*, *National Geographic*, and *Outside Magazine*⁴⁵⁵ boasting headlines such as “Elegy for a Dying Lake,”⁴⁵⁶ “Mono Lake: Silent, Sailess, Shrinking Sea,”⁴⁵⁷ “The Destruction Of Mono Lake Is on Schedule,”⁴⁵⁸ “The Troubled Waters of Mono Lake,”⁴⁵⁹ and “Is This a Holy Place?”⁴⁶⁰ In 1981, a picture of Mono Lake “would drive the marriage of Prince Charles and Lady Diana off the cover of *Life*” magazine.⁴⁶¹

The importance of mainstream national media coverage of the impact of the LADWP water extraction on the Mono Lake ecosystem cannot be overestimated. The ability of an SMO to promote change is dependent upon the SMO’s ability to leverage resources to forward collective action.⁴⁶² One of the primary means of accomplishing change is by “mobilizing consensus” among the general population, “turning bystanders and opponents into adherents to the goals of a social movement.”⁴⁶³ “Private conflicts are taken into the public arena precisely because someone wants to make certain that the power ratio among the private interests most immediately involved shall not prevail.”⁴⁶⁴ Thus, the SMO uses the media to convince bystanders to become engaged in the struggle for change in ways that alter the power dynamics among existing players.⁴⁶⁵ The goal of the SMO in framing the issue in the mass media is to: (1) strengthen the readiness of SMO members to act, (2) increase the volume and intensity of bystander support, and (3) “neutralize and discredit the framing efforts of adversaries and rivals.”⁴⁶⁶

ecosystem restoration: “economic development and competitiveness,” “morality and ethics,” and the “middle way/alternative path.” Nisbet, *supra* note 287, at 18–20.

⁴⁵⁵ HART, *supra* note 4, at 79.

⁴⁵⁶ Gray Brechin, *Elegy for a Dying Lake*, CAL. LIVING MAG., Oct. 1, 1978, at 10.

⁴⁵⁷ Gallen Rowell, *Mono Lake: Silent, Sailess, Shrinking Sea*, AUDUBON, Mar. 1978, at 102.

⁴⁵⁸ Harold Gilliam, *The Destruction of Mono Lake is on Schedule*, S.F. EXAM., Feb. 11, 1979, at 41.

⁴⁵⁹ Young, *supra* note 36, at 504.

⁴⁶⁰ Bill Gilbert, *Is This a Holy Place?*, SPORTS ILLUSTRATED, May 30, 1983, at 76, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1120887/index.htm>.

⁴⁶¹ HART, *supra* note 4, at 80; *America the Dry: The Booming Sunbelt is Drinking Its Share of Water—and Much, Much More*, LIFE, July 1981, at 36 [hereinafter *America the Dry*].

⁴⁶² Bob Edwards & John D. McCarthy, *Resources and Social Movement Mobilization*, in THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS 116, 116 (David A. Snow, Sarah A. Soule & Hanspeter Kriesi eds., 2004).

⁴⁶³ *Id.* at 140.

⁴⁶⁴ E. E. SCHATTSCHNEIDER, THE SEMI-SOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA 38 (1960).

⁴⁶⁵ See Gamson, *supra* note 451, at 242.

⁴⁶⁶ *Id.* at 250.

The mass media not only affects how bystanders frame an issue, but how an issue is portrayed in the mass media reflects the success or failure of the SMO's press for political and social change.⁴⁶⁷ "Journalists decide which . . . [SMOs] should be taken seriously [They are] players who comment on the position of other players, shaping and framing the discussion"⁴⁶⁸ A change in how the media portrays an issue challenges old frames and signals and spreads new frames.⁴⁶⁹ For an SMO to have its "preferred labels used [in the media] . . . is both an important outcome in itself and carries a strong promise of a ripple effect."⁴⁷⁰ The appearance of favorable media coverage on the devastating impacts of the water extraction on the Mono Lake ecosystem gave the Mono Lake Committee credibility among bystanders both nationally and in California, and it was a signal to bystanders that the Mono Lake Committee's position should be taken seriously.⁴⁷¹

Despite growing credibility, the Mono Lake Committee still faced a conundrum. Yes, destruction of the ecosystem was sad, but where was replacement water going to come from and what was the environmental cost to the ecosystem providing replacement water?⁴⁷² The Mono Lake Committee had to face the water scarcity issue head-on as the Mono Lake diversions represented twelve percent of Los Angeles's water supply.⁴⁷³ So, the Mono Lake Committee began a search for an "alternative path"⁴⁷⁴: finding replacement waters that would not damage another ecosystem.⁴⁷⁵ Then, the 1976–77 drought hit, and Los Angeles cut its water consumption by nineteen percent with minimal conservation efforts.⁴⁷⁶ The Mono Lake Committee seized the moment. The city could reduce its water consumption and save the Mono Lake ecosystem without sacrifice by instituting

⁴⁶⁷ *Id.* at 243.

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ See HART, *supra* note 4, at 80.

⁴⁷² See *id.* at 76.

⁴⁷³ *Id.*

⁴⁷⁴ See Nisbet, *supra* note 287, at 18.

⁴⁷⁵ See HART, *supra* note 4, at 76–77. The committee had to face the replacement issue head-on because LADWP's historical response to calls for reductions in diversions from Mono Lake was to demand compensation in excess of \$30 million a year, the cost of replacing the water from another source, most likely the Sacramento-San Joaquin Delta, which was facing environmental challenges of its own. *Id.* at 76.

⁴⁷⁶ *Id.*

efficient plumbing, reducing water main pressure, using drought tolerant plants on lawns, and altering lawn irrigation systems.⁴⁷⁷ The Mono Lake Committee used the opportunity to convert the frame from one of water scarcity to one of waste.⁴⁷⁸ The frame was picked up by *Life* in 1981 when the magazine reported: “The sad irony is that minimal conservation could save Mono Lake and better water-demand management might obviate future aqueduct projects.”⁴⁷⁹ Finding replacement water, together with demand and waste reduction, provided the basis for an “alternate path frame” for the Mono Lake issue.⁴⁸⁰

Using both the ecosystem destruction ethical frame and the alternate path frame, the Mono Lake Committee increased support among bystanders and political leaders across the state to such an extent that, in 1978, the Brown administration formed an Interagency Task Force on Mono Lake to “develop and recommend a plan of action to preserve and protect the natural resources in Mono Basin, considering economic and social factors.”⁴⁸¹ While the primary focus of the Task Force was to find a new source of water for Los Angeles,⁴⁸² the Task Force also had extensive discussions about target lake levels,⁴⁸³ an apparent acknowledgment that the Mono Lake ecosystem should not be permitted to crash.⁴⁸⁴ When, in mid-1979, the Task Force recommended raising lake levels,⁴⁸⁵ the LADWP was quick to veto the recommendation.⁴⁸⁶ Despite the veto, the Task

⁴⁷⁷ *Id.* at 76–77.

⁴⁷⁸ *See id.*

⁴⁷⁹ *America the Dry*, *supra* note 461, at 38.

⁴⁸⁰ *See* HART, *supra* note 4, at 76–77; *see also* discussion *supra* note 454.

⁴⁸¹ HART, *supra* note 4, at 85 (quoting Interagency Task Force on Mono Lake). Although the Task Force received information from a variety of sources, its membership was limited to government agencies including: the California Department of Water Resources, the California Department of Fish and Game, the U.S. Forest Service, the U.S. Bureau of Land Management, the U.S. Fish and Wildlife Service, the County of Mono, and the LADWP. *Id.* Non-governmental stakeholders had no formal voice on the Task Force. *Id.*

⁴⁸² *Id.*

⁴⁸³ *Id.*

⁴⁸⁴ *See generally id.* at 85. This view appeared to have significant statewide support as evidenced by the response during the May 1979 Task Force public hearings on target lake levels. *See* HART, *supra* note 4, at 85. Roughly a quarter of the participants supported a lake level of 6378 feet, the level formerly supported by the Mono Lake Committee. *Id.* And, over half of the attendees supported a target lake level of 6388 feet. *Id.*

⁴⁸⁵ *See id.* at 88. The Task Force recommended increasing lake levels to 6388 feet. *Id.* The 6388-foot elevation would require the LADWP to cut its exports from the Mono Lake tributaries by 15,000 acre-feet per year. *Id.*

⁴⁸⁶ HART, *supra* note 4, at 89.

Force Report provided legitimacy to the Mono Lake Committee's position that elevated lake levels were needed to save a dying ecosystem.⁴⁸⁷ This legitimacy was important in order to increase bystander support.⁴⁸⁸

Despite national and statewide gains, however, the Mono Lake Committee's attempts at framing in the City of Los Angeles did not fare quite as well, as evidenced by a review of editorials in the *L.A. Times*.⁴⁸⁹ When the 1979 Task Force Report recommended increased lake levels, the *L.A. Times* was quick to back the position of the LADWP using the old economic frame to characterize the proposed reductions as "harsh penalties" imposed by the Task Force on Los Angeles rate payers.⁴⁹⁰ Additionally, in February 1983, when the California Supreme Court issued its landmark public trust decision,⁴⁹¹ the *L.A. Times* characterized the court's decision as "a far-reaching reinterpretation of California water law," which would deprive the City of Los Angeles of seventeen percent of its water supply.⁴⁹²

The litigation had, however, provided the Mono Lake Committee with a powerful framing resource.⁴⁹³ Law, litigation, and court rulings have the potential to affect bystanders by legitimizing the SMO's policy preferences and frame when accompanied by sustained social movement pressure from mass political mobilization,⁴⁹⁴ which is accomplished in part through the framing process.⁴⁹⁵ The very process of crafting a complaint, in effect, mobilizes the law into an assertion of a lawful claim of right—a claim that can be used to transform or reconstitute the terms of the social and power relationships within politics.⁴⁹⁶ This certainly was true in the case of Mono Lake.

The use of the public trust argument in the complaint gave rise to a claim of right on behalf of the public.⁴⁹⁷ The public had a right to have

⁴⁸⁷ *Id.* at 88.

⁴⁸⁸ *See id.* at 88.

⁴⁸⁹ *See, e.g.*, Editorial, *Water and Power in Our Future*, L.A. TIMES, Feb. 11, 1980, § II, at 6 [hereinafter *Water and Power*].

⁴⁹⁰ *See id.* The editorial alleges that the Task Force's proposed elevations were based on speculative data and argues that the City could not recoup the resulting fifteen percent reduction in its water supply with conservation measures. *Id.*

⁴⁹¹ *Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty. (Nat'l Audubon)*, 658 P.2d 709 (Cal. 1983).

⁴⁹² Editorial, *Water Revolution*, L.A. TIMES, Feb. 20, 1983, § IV, at 4.

⁴⁹³ McCann (2006), *supra* note 1, at 23. *See generally* Turk, *supra* note 173, at 281.

⁴⁹⁴ *See* Stryker (2007), *supra* note 256, at 76; *see also* McCann (2006), *supra* note 1, at 23.

⁴⁹⁵ *See* McCann (2006), *supra* note 1, at 23.

⁴⁹⁶ *Id.* at 21–22.

⁴⁹⁷ *Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty. (Nat'l Audubon)*, 658 P.2d 709, 732 (Cal. 1983).

its trust interest in Mono Lake at least recognized by the SWRCB.⁴⁹⁸ The legitimacy of the Mono Lake Committee argument and claim of right was formally recognized when, less than a year after MoFo served and filed the complaint in the *National Audubon* case, U.C. Davis held a two-day conference on “The Public Trust Doctrine in Natural Resources Law and Management”⁴⁹⁹ that featured the Mono Lake legal team.⁵⁰⁰ The claim of right was further legitimized when the California Supreme Court, the highest court in the State of California, ruled that the citizens of California had a public trust interest in lakes and their ecosystems, which must be considered by the SWRCB in the allocation of the state’s waters.⁵⁰¹

These legal successes were coupled with the Mono Lake Committee’s “Saving Mono Lake” campaign, the “campaign that spawned a thousand bumper stickers,”⁵⁰² including: “Save Mono Lake,” “I Save Water For Mono Lake,” and “Restore Mono Lake.”⁵⁰³ By the mid-1980s, the Mono Lake Committee had grown to 20,000 members,⁵⁰⁴ evidence of a growing “environmental ethic.”⁵⁰⁵ Educational campaigns were conducted across the state, including information programs for Los Angeles youth.⁵⁰⁶ Arnold reports that this educational campaign had an “impact on the attitudes of Southern California residents,” the water consumers.⁵⁰⁷ Even the LADWP ultimately conceded that the Mono Lake Committee was a “well-organized, effective group . . . [that had] done a pretty good job mobilizing public opinion,” an effort one *L.A. Times* reporter characterized as “selling the lake’s charms.”⁵⁰⁸ By 1981, the State of California had established a

⁴⁹⁸ *Id.* at 712.

⁴⁹⁹ Harrison C. Dunning, *The Public Trust Doctrine in Natural Resources Law and Management: A Symposium*, 14 U.C. DAVIS L. REV. 181, 181 (1980).

⁵⁰⁰ HART, *supra* note 4, at 91. U.C. Davis dedicated an entire issue of its law review to topics surrounding use of the public trust doctrine in natural resource management, highlighting the work at Mono Lake. Dunning, *supra* note 499, at 181. Hart reports that Prof. Johnson’s session at the U.C. Davis conference focused on the blending of prior appropriation water rights systems and public trust interests and featured the *National Audubon* case and litigation team. HART, *supra* note 4, at 91; *see also* Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C. DAVIS L. REV. 233 (1980).

⁵⁰¹ *Nat’l Audubon*, 658 P.2d at 712.

⁵⁰² Koehler, *supra* note 409, at 564.

⁵⁰³ Arnold & Jewell, *supra* note 4, at 16.

⁵⁰⁴ *Id.*

⁵⁰⁵ Koehler, *supra* note 409, at 564.

⁵⁰⁶ Arnold & Jewell, *supra* note 4, at 16.

⁵⁰⁷ *Id.*

⁵⁰⁸ Kevin Roderick, *Selling a Lake: Tenacious Mono Backers Use Sophisticated Tactics to Beat DWP to Its Knees*, L.A. TIMES, Sept. 24, 1989, at 3, 32, available at <http://www.kevinroderick.com/monocomm.html>.

tufa reserve around the lake.⁵⁰⁹ And, in March 1983, the U.S. House of Representatives held hearings to create a national monument at Mono Lake under the jurisdiction of the U.S. Forest Service.⁵¹⁰

The Mono Lake Committee's work was further advanced by the water releases necessitated by heavy snows in the high Sierras in the winters of 1981–82 and 1982–83.⁵¹¹ The LADWP's reservoir aqueduct system was full, almost overflowing,⁵¹² and Mayor Bradley was forced to order a release of water into Mono Lake.⁵¹³ Although release of the water was a physical necessity given the limitations of the extraction infrastructure,⁵¹⁴ both sides used the release to their political advantage.⁵¹⁵ Bradley, who at the time was running for governor, used the release to appeal to voters in Northern California, and the Mono Lake Committee "play[ed] along," praising the city.⁵¹⁶ When Mono Lake levels began to rise, even the *L.A. Times* editorial board grudgingly noted that although the Court's public trust decision abrogates the City's water rights, the resumption of the City's extraction could "destroy a resource that is as unique as it is vulnerable."⁵¹⁷ The veneer in Los Angeles was beginning to crack.

In the fall of 1983, the *L.A. Times* editorial board began to call for the flexible remedy the court had yet to grant, arguing: "Obviously a prudent balance must be struck, and it is better to strive for it through good-faith negotiations than through a renewal of long and contentious actions in the courts . . ." ⁵¹⁸ In March 1984, this suggestion was picked up by the University of California Los Angeles's ("UCLA") Public Policy Program,

⁵⁰⁹ *Id.*

⁵¹⁰ HART, *supra* note 4, at 103. By 1989, 250,000 people a year were visiting Mono Lake. Roderick, *supra* note 508, at 32.

⁵¹¹ See HART, *supra* note 4, at 100.

⁵¹² *Id.*

⁵¹³ See *id.*

⁵¹⁴ *Id.*

⁵¹⁵ *Id.*

⁵¹⁶ *Id.*

⁵¹⁷ Editorial, *Mono Lake: Coming Back*, L.A. TIMES, May 29, 1983, § IV, at 4. In 1985, one could detect further cracks in the veneer. See, e.g., Editorial, *Melting Snows, Melting Hearts*, L.A. TIMES, April 30, 1985, § II, at 4. In this editorial, the Times praised the Metropolitan Water District for hiring a new General Manager committed to pursuing innovative water development and conservation programs that would reduce Los Angeles's dependence on existing water sources. See *id.* Up until this time, the LADWP and the *L.A. Times* had taken the position that conservation or water rationing would not come close to meeting the shortfall that would result should the City be deprived of the Mono Lake water. See, e.g., *Water and Power*, *supra* note 489, at 6.

⁵¹⁸ Editorial, *Water and the Public Trust*, L.A. TIMES, Nov. 10, 1983, § II, at 6; see also HART, *supra* note 4, at 105.

which, at the urging of the Mono Lake Committee, brought the parties together to discuss the resolution of the Mono Lake controversy.⁵¹⁹ Although nothing substantive was to come of this preliminary meeting, the LADWP was finally at the table and talking.⁵²⁰

The LADWP's new willingness to talk, rather than bully its way forward, is evidence of the diminishing power of the LADWP, as litigation and framing began to change public sentiment in Los Angeles about the importance of the Mono Lake ecosystem.⁵²¹ The relationship between the LADWP and the SWRCB had now been called into question by the court's decision in *National Audubon*,⁵²² the national media,⁵²³ California citizens,⁵²⁴ and the *L.A. Times* itself.⁵²⁵ And, although the SWRCB had yet to implement the *National Audubon* decision, it knew that if it did not do so, the court could.⁵²⁶ Here, then, is evidence of both the veil effect⁵²⁷ and *status quo* effect⁵²⁸ of destabilizing litigation. No longer could the LADWP rely on past partners and patterns of doing business.⁵²⁹ What now became clear to the LADWP was that these past business practices were stigmatized, forcing the LADWP into a new operational paradigm.⁵³⁰ It is important to recognize that it was litigation, together with ongoing framing, that brought the LADWP to this point.

It would, however, take two more pieces of litigation⁵³¹ before the Los Angeles City Council would break rank with the LADWP and SWRCB, and the LADWP would become fully engaged in finding a remedy for the Mono Lake ecosystem.⁵³² The LADWP was on the verge of exploring

⁵¹⁹ HART, *supra* note 4, at 105. The parties came together in a jointly sponsored conference titled "Mono Lake: Beyond the Public Trust Doctrine." *Id.*

⁵²⁰ *Id.*

⁵²¹ See generally *id.* at 105.

⁵²² See *Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty. (Nat'l Audubon)*, 658 P.2d 709, 712–13 (Cal. 1983).

⁵²³ See *supra* notes 454–61 and accompanying text.

⁵²⁴ See *supra* notes 481–84 and accompanying text.

⁵²⁵ See *supra* note 517 and accompanying text.

⁵²⁶ See HART, *supra* note 4, at 101–02, 105.

⁵²⁷ See *supra* note 243 and accompanying text.

⁵²⁸ See *supra* note 244 and accompanying text.

⁵²⁹ See *Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty. (Nat'l Audubon)*, 658 P.2d 709, 726 (Cal. 1983) (holding that the Water Board now had a statutory duty to "consider interests protected by the public trust" when approving the LADWP's requests for water appropriations). The court went on to hold that a reconsideration of the LADWP's rights to the entire flow of Mono Lake was possible. See *id.* at 729.

⁵³⁰ See HART, *supra* note 4, at 105.

⁵³¹ See discussion *infra* Part IV.D.

⁵³² See *infra* note 649 and accompanying text.

alternatives together with the Mono Lake Committee, because of the deliberative effect of destabilizing litigation, but the scales did not tip until the City of Los Angeles and the LADWP came face-to-face with trout fishermen.⁵³³

D. Lesson Four: The Importance of Secondary Litigation

The gates to the Grant Lake reservoir remained open through early 1984, pouring water down the Mono Lake tributaries into Mono Lake.⁵³⁴ With the water came the trout and the trout fishermen,⁵³⁵ but by the fall of 1984, the LADWP was ready to shut off the flow to Mono Lake.⁵³⁶ So, Dick Dahlgren, an avid fisherman, wrote to Mayor Bradley praising him for restoring the fish to Rush Creek.⁵³⁷ The letter found its way into the press.⁵³⁸ While there was no response from Bradley's office, Dahlgren, in yet another example of the use of the social networks created by the Mono Lake Committee, enlisted the support of CalTrout and the Mono Lake Committee to entice City Councilman John Ferraro, chair of the Los Angeles City Council's Energy and Natural Resources Committee, to hold immediate committee hearings.⁵³⁹ At the hearing, the Council requested a fish study,⁵⁴⁰ a citizens advisory committee,⁵⁴¹ and that the LADWP keep water flowing into the Mono Lake tributaries.⁵⁴² The LADWP would bend but would not break; it acquiesced to the study and the advisory committee,

⁵³³ Under the Los Angeles City Charter, the LADWP is governed by an independent board, the majority of which is appointed by the Mayor and confirmed by the City Council. Charter of the City of L.A., art. VI, § 70.1 (1999), available at http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:la_charter. Prior to 1996, the Los Angeles City Council had no oversight over the LADWP as noted by Councilman Ferraro who "acknowledged, 'DWP does not have to come to the council for permission for their actions.'" HART, *supra* note 4, at 110; Charter of the City of L.A., art. III, § 32.4 (1999).
⁵³⁴ Peter Vorster & G. Mathais Kondolf, *The Effect of Water Management and Land Use Practices on the Restoration of Lee Vining and Rush Creeks*, in PROCEEDINGS OF THE CALIFORNIA RIPARIAN SYSTEMS CONFERENCE: PROTECTION, MANAGEMENT, AND RESTORATION FOR THE 1990S 405, 405-07 (Dana L. Abell ed., 1989), available at http://www.fs.fed.us/psw/publications/documents/psw_gtr110/psw_gtr110_h_vorster.pdf; see also HART, *supra* note 4, at 109.

⁵³⁵ HART, *supra* note 4, at 109–10.

⁵³⁶ *Id.* at 109.

⁵³⁷ *Id.*

⁵³⁸ *Id.*

⁵³⁹ *Id.*

⁵⁴⁰ *Id.* at 110.

⁵⁴¹ See HART, *supra* note 4, at 110.

⁵⁴² *Id.*

“but there would be no water.”⁵⁴³ While this was certainly bad news for the Mono Lake ecosystem, in the context of political blockage there was light. There was no longer a unified “city” position on Mono Lake. The LADWP and the Los Angeles City Council had split ranks.

When on November 14, 1984, the LADWP reduced the water to Rush Creek down to a trickle,⁵⁴⁴ the California Department of Fish and Game began a one-day trout rescue operation.⁵⁴⁵ Soon after, the Mono Lake Committee organized a demonstration on Highway 395 at the Rush Creek Bridge,⁵⁴⁶ and Dahlgren and CalTrout filed suit in California District Court to compel the LADWP to continue water flow in Rush Creek to maintain trout populations.⁵⁴⁷ The court would later issue a temporary restraining order,⁵⁴⁸ but on November 15, 1984, a Mono Lake County Assistant District Attorney sent two sheriff’s deputies to Rush Creek to arrest any person that would close the water valve.⁵⁴⁹ One cannot underestimate the power of the presence of law enforcement upholding the rights of the ecosystem in the framing of the Mono Lake controversy. What the citizens of Los Angeles saw that night on the evening news was a sheriff upholding the rights of Rush Creek and Mono Lake against the LADWP.⁵⁵⁰ This judicial relief provided an important framing tool to the Mono Lake Committee, as well as a temporary reprieve for both the trout and Mono Lake while the litigation marched on.

Dahlgren’s initial suit was followed by a series of lawsuits brought by CalTrout and the Mono Lake Committee to keep the water flowing in the Mono Lake tributaries.⁵⁵¹ The litigation relied on the vagaries of the

⁵⁴³ *Id.*

⁵⁴⁴ *Id.*

⁵⁴⁵ *Id.*

⁵⁴⁶ *Id.* at 111.

⁵⁴⁷ HART, *supra* note 4, at 111.

⁵⁴⁸ *Id.* The temporary restraining order “became a preliminary injunction in 1985.” Arnold & Jewell, *supra* note 4, at 15. In 1986, the California superior court issued a temporary restraining order to maintain flows into Lee Vining Creek. *Id.* A preliminary injunction for Lee Vining Creek was issued in 1987. *Id.*

⁵⁴⁹ HART, *supra* note 4, at 111. The Mono Lake Committee and the National Audubon Society petitioned the court and were granted amicus status in the *Dahlgren* case. *Id.* at 115. Five days later, the California District Court “issued a temporary restraining order requiring [the LADWP to maintain] a flow of 19 cubic feet per second” in Rush Creek. *Id.* at 111. A flow of 19 cubic feet per second would mean “14,000 acre feet into Mono Lake,” not enough to stabilize the lake, but enough to create a “real crack in the dam.” *Id.* at 111 (quoting Mono Lake Committee newsletter).

⁵⁵⁰ *See id.* at 111.

⁵⁵¹ *See, e.g.,* Cal. Trout, Inc. v. State Water Res. Control Bd. (*CalTrout I*), 255 Cal. Rptr. 184 (Cal. Ct. App. 1989); *see also* JONES & STOKES ASSOCS., MONO BASIN ENVIRONMENTAL

California Fish and Game Code.⁵⁵² Since 1933, California's Fish and Game Code had prohibited the dewatering of creeks below dams⁵⁵³ and required that "[t]he owner of any dam shall allow sufficient water at all times . . . to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam."⁵⁵⁴ Plaintiffs argued that the Code was amended in 1953 to prohibit the SWRCB from issuing any water appropriation permit or license after September 9, 1953, unless the permit or license was "conditioned upon full compliance" with the requirement to allow sufficient waters to pass below the dam to maintain fish populations.⁵⁵⁵ CalTrout and the Mono Lake Committee argued⁵⁵⁶ that these provisions were applicable to the LADWP and its Grant Lake Dam and requested that the court issue a writ of mandamus compelling SWRCB to rescind the LADWP's current permit and reissue it together with a requirement that the LADWP maintain sufficient water flow in the Mono Lake tributaries to support fish populations.⁵⁵⁷

The California Court of Appeals took a slightly different tack.⁵⁵⁸ Relying heavily on California's water allocation scheme, the court observed that under California law a permittee must act diligently to undertake and complete any construction necessary to perfect its water claim and must

IMPACT REPORT app. R, R-2 to R-3 (1993) available at <http://www.monobasinresearch.org/onlinereports/mbeir.htm>.

⁵⁵² See generally *CalTrout I*, 255 Cal. Rptr. at 186 (describing vagaries and confusion in the trial court's decision between the two requirements of section 5946 with respect to construction of dams and appropriation of water).

⁵⁵³ See CAL. FISH AND GAME CODE § 5937 (West 1998).

⁵⁵⁴ *CalTrout I*, 255 Cal. Rptr. at 186 (quoting Cal. Fish and Game Code § 5937).

⁵⁵⁵ *Id.* (quoting Cal. Fish and Game Code § 5946).

⁵⁵⁶ Respondents, the LADWP, argued that the provisions of the Fish and Game Code only applied to the construction of a dam and not to the appropriation of water. See *id.* at 191. Thus, it reasoned that because the dam was constructed for the appropriation of water, there was no requirement to permit enough water to pass to maintain fish populations. *Id.* The LADWP also argued that the Fish and Game Code did not apply to a license that was "predicated upon a permit issued prior . . . to September 9, 1953." *Id.* at 194. Finally, the LADWP argued that application of the statute to the LADWP's license constituted a retroactive application of law. See *id.* at 197.

⁵⁵⁷ See *CalTrout I*, 255 Cal. Rptr. at 186. The trial court denied the petition on the grounds that the Grant Lake dam had been built prior to 1953. *Id.* All of the trout cases were consolidated and appealed to the California Court of Appeals. *Id.*

⁵⁵⁸ Cal Trout and the Mono Lake Committee had argued that the 1933 requirement that an owner of a dam must permit sufficient water to pass to support existing fish populations applied to the LADWP and required it to maintain flow for fish populations. *Id.* at 186. The California Court of Appeals did not rule on this issue, finding it unnecessary in light of the history of the LADWP's appropriation of the waters from the Mono Lake tributaries. *Id.* at 192.

apply the water to beneficial use.⁵⁵⁹ If a permittee fails to put appropriated water to beneficial use within three years, the unused water reverts to the public and is considered unappropriated.⁵⁶⁰ In the case of the Mono Lake appropriation, the LADWP had received a permit to appropriate the entire flow of the Mono Lake tributaries in 1941.⁵⁶¹ Although the LADWP could divert and store the water in 1941, it was incapable of putting the full volume of water to beneficial use until construction of the second barrel of the Los Angeles aqueduct in the early 1970s,⁵⁶² nearly twenty years after the effective date of the 1953 Fish and Game Code amendment.⁵⁶³ Thus, in 1953, when the Fish and Game Code was amended to apply to water appropriations, the water to be carried by the second aqueduct had not yet been appropriated and could not be appropriated for another seventeen years.⁵⁶⁴ Therefore, the LADWP was required to leave enough water in the Mono Lake tributaries to support existing trout populations.⁵⁶⁵ The Court ordered the trial court to issue the appropriate writs to compel the SWRCB “to attach the conditions required by section 5946” to the LADWP’s appropriation license.⁵⁶⁶ When the SWRCB failed to attach these conditions in a timely manner, the California Court of Appeals issued a second opinion ordering the trial court to issue a writ to the SWRCB ordering it to “exercise its ministerial duty” to set minimum flows without delay⁵⁶⁷ and to attach language to the LADWP’s appropriation license providing:

⁵⁵⁹ *Id.* at 198.

⁵⁶⁰ *CalTrout I*, 255 Cal. Rptr. at 199.

⁵⁶¹ *See id.* at 188, 203.

⁵⁶² *Id.* at 199–200.

⁵⁶³ *Id.*

⁵⁶⁴ *Id.* at 187.

⁵⁶⁵ *Id.* at 191, 205. The Court also rejected the LADWP’s argument that the SWRCB’s numerous extensions to the 1940 permit vitiated the requirements of the 1953 Fish and Game Code Amendment. *CalTrout I*, 255 Cal. Rptr. at 205. Between 1948 and 1960, the SWRCB gave the LADWP numerous extensions to “Complete Use of Water.” *Id.* at 201–02 n.18. In each permit extension application, the LADWP was asked “Have you used as much water as you expect to use under this permit?” and in each case the LADWP responded “No.” *Id.* at 202. When asked when beneficial use would be perfected, the LADWP responded, “When required by municipal needs.” *Id.* It was not until the 1968 permit extension that there was any indication that the second aqueduct would be constructed. *See id.* at 202 n.18. That extension asserts that the second aqueduct would be completed on or before December 1, 1971, and that application of the water to be carried by that aqueduct “shall be completed on or before December 1, 1975.” *Id.*

⁵⁶⁶ *CalTrout I*, 255 Cal. Rptr. at 213.

⁵⁶⁷ *Cal. Trout, Inc. v. Super. Ct. of Sacramento Cnty. (CalTrout II)*, 266 Cal. Rptr. 788, 803 (Cal. Ct. App. 1990).

In accordance with the requirements of Fish and Game Code section 5946, this license is conditioned upon full compliance with section 5937 of the Fish and Game code. The licensee shall release sufficient water into the streams from its dams to reestablish and maintain the fisheries which existed in them prior to its diversion of water.⁵⁶⁸

Water left in the tributaries to support trout populations meant water for Mono Lake and the Mono Lake ecosystem.⁵⁶⁹ While *National Audubon* resulted in groundbreaking legal precedent, compelling the SWRCB to consider public trust interests including ecosystem viability in the water appropriation process,⁵⁷⁰ the Mono Lake ecosystem might well have collapsed while waiting for the SWRCB to issue a new permit, a hollow victory indeed. It was the trout litigation that forced the LADWP to limit its extractions, and it also gave the Mono Lake Committee's claims further legitimacy in the press, among bystanders, and in Los Angeles's City Hall.⁵⁷¹

By 1986, the political atmosphere in Los Angeles had changed so significantly that in August there was a symbolic 100-mile run transporting water from the Los Angeles aqueduct intake to Mono Lake, which was co-sponsored by Mayor Bradley and four members of the Los Angeles City Council.⁵⁷² During that same month, the *L.A. Times* published an editorial urging a negotiated solution to the controversy—a push toward a deliberation—that afforded protection to the Mono Lake ecosystem.⁵⁷³ For all practical purposes, by 1986, there were significant fissures in the power relationships that were the foundation of the LADWP's water claims. The blockage was beginning to dissolve.

⁵⁶⁸ *Id.* at 803–04.

⁵⁶⁹ See HART, *supra* note 4, at 111. While the releases into Rush Creek and Lee Vining Creek were not enough to stabilize the lake, the Mono Lake Committee argued it was “the first real crack in the dam.” *Id.*

⁵⁷⁰ *Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty. (Nat'l Audubon)*, 658 P.2d 709, 732 (Cal. 1983).

⁵⁷¹ See HART, *supra* note 4, at 120, 129.

⁵⁷² *Id.* at 120. And, by 1988, even some members of the LADWP Board of Commissioners recognized that the Mono Lake Ecosystem was “worth saving.” *Id.* at 131–32.

⁵⁷³ Editorial, *Mono Issue Can Be Negotiated*, L.A. TIMES, Aug. 26, 1986, § II, at 4 [hereinafter *Mono Issue*]. The editorial board argued, “Barring catastrophic drought . . . California should have enough water, used wisely, to meet all reasonable needs including environmental protection.” *Id.*

E. Lesson Five: Court Sanctioned Temporary Relief and the Decree

The rise of public law litigation was, in part, enabled by the relaxation of constraints on equitable remedies,⁵⁷⁴ which enabled courts to examine controversies surrounding future probabilities and allowed litigants and courts to realize the potential policy function of litigation in the context of public issues and in a manner not permitted by purely private litigation.⁵⁷⁵ In the context of environmental litigation, the equitable remedy of injunction, essentially a judicially imposed prohibition, is fundamental.⁵⁷⁶ Indeed, how would it benefit Mono Lake if, during the course of litigation, litigation which was to extend almost fifteen years,⁵⁷⁷ the LADWP extractions continued unabated, causing the Mono Lake ecosystem to collapse. Injunctive relief permits the court to place a hold on an agency decision pending the termination of the litigation and creates the space needed to develop a flexible remedy, a remedy driven by the parties.⁵⁷⁸

Ironically, it was the trout litigation, and not the *National Audubon* case, that gave the Mono Lake ecosystem the moratorium and water it needed to survive. In 1988, the *National Audubon* litigation⁵⁷⁹ was consolidated with the trout cases by the California Supreme Court and assigned to Judge Finney of El Dorado County Superior Court.⁵⁸⁰ On August 29, 1989, Judge Finney issued a temporary injunction "prohibiting respondent DWP from causing the level of Mono Lake to fall below 6,377 feet as a result of its diversions for the remainder of the current run-off year, ending March 30, 1990."⁵⁸¹ This left the court to resolve how to implement both the California Supreme Court's directive in the original *National Audubon* case and the Court of Appeals' directive in the trout cases.⁵⁸²

⁵⁷⁴ Chayes notes that by the turn of the century "the old sense of equitable remedies as 'extraordinary' has faded." Chayes, *supra* note 156, at 1292.

⁵⁷⁵ *See id.* at 1292-95.

⁵⁷⁶ *See* SAX (1970), *supra* note 157, at 196.

⁵⁷⁷ *See generally* HART, *supra* note 4, at 183. The Mono Lake litigation commenced in 1979 when MoFo filed the *National Audubon* complaint. *Id.* at 83-84. The litigation was effectively concluded in 1994 when the SWRCB issued the Water Rights Decision. *See id.* at 171-73.

⁵⁷⁸ *See* Sabel & Simon, *supra* note 171, at 1067-69.

⁵⁷⁹ The *National Audubon* litigation continued to bounce around federal court until 1988 when the Ninth Circuit Court of Appeals dismissed the federal air pollution claims, sending the original public trust litigation back to state court. *Nat'l Audubon Soc'y v. Dep't of Water*, 858 F.2d 1409, 1417 (9th Cir. 1988).

⁵⁸⁰ HART, *supra* note 4, at 130.

⁵⁸¹ *Id.* at 131. This preliminary injunction was extended until completion of the SWRCB public trust hearing process. *See* JONES & STOKES ASSOCS., *supra* note 551, at R-2 to R-3.

⁵⁸² *See* JONES & STOKES ASSOCS., *supra* note 551, at R-2 to R-3.

F. Lesson Six: The Experimental Remedy

The purpose of the remedy in any legal action is to give effect to the judgment made by the court.⁵⁸³

[T]he remedy arises from a reflective effort to give meaning to the right. . . . The remedy is an elaboration of the rights in question: it is not a technical effort to execute an already defined norm, as rights essentialism implies; nor is it an exercise of instrumental discretion, as crude positivism suggests.⁵⁸⁴

However, in public law litigation, the right is more ambiguous than in private litigation, seeking, as it does, the modification of public policy.⁵⁸⁵

Likewise, the remedy in public law litigation differs substantially from private litigation in which the remedy is retrospective and intended to correct past legal wrong.⁵⁸⁶ In public law litigation, the remedy is prospective and designed to “modify a course of [agency] conduct.”⁵⁸⁷ The remedy is embodied in the decree, which is a legal order that prescribes how the agency must modify its present and future actions to comply with the policy directives set forth in statute.⁵⁸⁸ Historically, in public law litigation, the decree is prescriptive and often referred to as the “command-and-control” decree.⁵⁸⁹ This is no less true in the case of environmental public law litigation.⁵⁹⁰

⁵⁸³ Sabel & Simon, *supra* note 171, at 1054.

⁵⁸⁴ *Id.* at 1055.

⁵⁸⁵ Chayes, *supra* note 156, at 1302.

⁵⁸⁶ *Id.* at 1296.

⁵⁸⁷ *Id.*

⁵⁸⁸ *Id.* at 1296–1300.

⁵⁸⁹ Sabel & Simon, *supra* note 171, at 1019. Sabel and Simon suggest that the command and control decree has three characteristics: (1) it attempts to “anticipate and express . . . key directives needed to induce compliance in a single, comprehensive, and hard-to-change” order; (2) it requires compliance which is measured by the degree of the “defendant’s conformity to [the] detailed prescriptions” of the decree; and (3) it is a directive in that the court undertakes a strong role in forming the remedial norm. *Id.* at 1021–22.

⁵⁹⁰ See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe (Overton Park I)*, 401 U.S. 402 (1971). In *Overton Park I*, an SMO sued the Department of Transportation (“DOT”) to stop construction of an interstate highway through Overton Park, a 342-acre public park in Memphis, Tennessee. *Id.* at 405–06. The SMO alleged that the highway construction violated section 4(f) of the Transportation Act of 1966, which prohibits the use of federal funds to construct highways through public parks unless there is no “feasible and prudent” alternative to construction through the park. *Id.* at 404–05 (quoting the United States

Destabilization legal theorists argue that successful destabilizing litigation requires the court to abandon the traditional command-and-control decree for a decree that is both “flexible” and “ongoing.”⁵⁹¹ Although the court uses the decree to impose a legal standard and to grant temporary injunctive relief, the court leaves implementation of the legal standard to the parties to negotiate subject to ongoing oversight.⁵⁹² Destabilization theorists would argue that the flexible or experimental remedy holds the greatest possibility for social and political change or destabilization.⁵⁹³ It is not the court’s legal determination that causes social or political change; but, as McCann notes, it is the manner in which the litigants and stakeholders assess how the court decision “indirectly create[s] important expectations, endowments, incentives, and constraints” toward reform agendas that leads to social and political change.⁵⁹⁴ Thus, social scientists suggest that the remedy is more likely to result in social change if:

1. Implementing the order offers positive incentives to induce compliance.⁵⁹⁵

Code). The case landed in the U.S. Supreme Court where the court held that, in passing section 4(f), Congress intended “that protection of parkland was to be given paramount importance. [P]arks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes.” *Id.* at 412–13. The Court clarified the policy analysis that the Secretary was required to undertake under section 4(f) and sent the matter back down to the district court. *Id.* at 411, 420. On remand, the federal district court issued a decree (remedy): (1) adopting the Supreme Court’s interpretation of section 4(f); (2) enjoining the highway construction; and (3) ordering the DOT Secretary to make a route determination in compliance with the section 4(f) interpretation adopted by the Court. *Citizens to Preserve Overton Park v. Volpe*, 335 F. Supp. 873, 885 (W.D. Tenn. 1972). In effect, the decree set out the applicable legal standard and a two-part remedy: the first part of the remedy, the injunction, halts the implementation of the contested agency policy regarding highway construction, and the second part of the remedy requires the agency to modify its policy to conform to the court order after which the injunction will be lifted. *See id.* at 885.
⁵⁹¹ Chayes, *supra* note 156, at 1298–1302 (discussing ongoing court oversight and negotiated decrees).

⁵⁹² *See id.* at 1281.

⁵⁹³ *See id.* at 1281, 1304.

⁵⁹⁴ *See* Michael McCann, *How the Supreme Court Matters in American Politics: New Institutional Perspectives*, in *THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS* 68 (Cornell Clayton & Howard Gillman eds., 1999).

⁵⁹⁵ Rosenberg, *supra* note 250, at 32–33. Rosenberg notes that there are two prevailing views among social scientists about the ability of the court to instigate social reform. *Id.* at 30. Proponents of the Dynamic Court view argue that courts can produce social reform when used effectively by SMOs. *See id.* at 22–23. Even then, there are several contributing factors which affect the effectiveness of litigation in stimulating social and political change,

2. Some or all of the parties are willing to “impose costs to induce compliance.”⁵⁹⁶
3. The court’s order provides “leverage, or a shield, cover, or excuse” to persons in positions to implement the change who are willing but have been unable to act.⁵⁹⁷
4. The court order can be implemented through market mechanisms.⁵⁹⁸
5. There is ongoing court oversight.⁵⁹⁹
6. The members of the social movement are permitted to participate in the decision-making process.⁶⁰⁰
7. The remedy “fixes responsibility for” and monitors the impact of organizational change and its outcome.⁶⁰¹

Many of these elements are incorporated in the experimentalist remedy.⁶⁰²

The experimentalist remedy has three general characteristics: first, it is negotiated by the stakeholders; second, it “takes the form of a rolling rule regime;” and third, it is transparent.⁶⁰³ To this we might add a fourth requirement that the remedy is ongoing and subject to court oversight.⁶⁰⁴ A court, using the experimentalist remedy, requires the parties and stakeholders “to negotiate a remedial plan.”⁶⁰⁵ This negotiation process, often overseen by a special master, requires stakeholders to gather information, share data, acquire resources, set agendas and ground rules for discussion and decision-making, deliberate together, set remedial goals, and reach consensus about a regime that implements the remedial goals.⁶⁰⁶ Through

including whether there is a benefit to elites and bureaucrats to comply with the court’s order. *Id.* at 32. These benefits may, but need not, be monetary. *Id.*

⁵⁹⁶ *Id.* at 33.

⁵⁹⁷ See Rosenberg, *supra* note 250, at 35.

⁵⁹⁸ *Id.* at 33. In her review of research on the politics of enforcement, Stryker notes that corporate organizations are traditionally successful at defending against implementation of court orders when they are able to argue that enforcement interferes with economic viability. Stryker (2007), *supra* note 256, at 84 (referencing studies by Melnick, Yeager, and Nelson and Bridges).

⁵⁹⁹ Harris, *supra* note 294, at 933.

⁶⁰⁰ *Id.*

⁶⁰¹ Stryker (2007), *supra* note 256, at 90.

⁶⁰² See Sabel & Simon, *supra* note 171, at 1067–71.

⁶⁰³ *Id.*

⁶⁰⁴ Chayes, *supra* note 156, at 1302; Harris, *supra* note 294, at 933.

⁶⁰⁵ Sabel & Simon, *supra* note 171, at 1067.

⁶⁰⁶ See *id.* at 1067–69.

this process, the stakeholders build relationships, previously non-existent, which facilitate the creation of trust.⁶⁰⁷

Harris highlighted the importance of the negotiated remedy in her analysis of litigation's impact on the ability of poverty lawyers to redistribute public resources for the benefit of homeless populations.⁶⁰⁸ In her analysis of three homeless cases, Harris observed that through the negotiated decree, the courts created an avenue for "outsiders," those blocked from the agency decision-making process, to become "insiders."⁶⁰⁹ In effect, the court used its legal authority to create room in the agency decision-making process for the previously excluded voice of the poverty lawyer.⁶¹⁰ In turn, the poverty lawyers were able to mobilize judicial support to induce policy reform.⁶¹¹ The negotiation itself permitted the poverty lawyer to act as an insider to help shape and reform the agency process.⁶¹² Sabel and Simon refer to this as the *stakeholder* effect, noting that the liability determination empowers the outside player and legitimizes their claim giving the plaintiff a viable position at the negotiating table.⁶¹³ This, in turn, increases the power of the outsider and decreases the influence of traditional agency stakeholders or power elites.⁶¹⁴

Harris contends, however, that the ability to participate in negotiation alone is not sufficient to cause change.⁶¹⁵ Her analysis suggests that ongoing involvement of the poverty lawyer was only meaningful so long as the court itself maintained continued oversight of the process.⁶¹⁶ The presence of court oversight assures that the parties continue to give legitimacy to outsiders.⁶¹⁷ Such was the case with the Mono Lake negotiations, though matters did not evolve in the manner in which Professors Sabel and Simon or Harris might have anticipated.

By 1989, the California Supreme Court had issued its landmark *National Audubon* decision, which held that the state had an ongoing

⁶⁰⁷ See *id.* at 1068.

⁶⁰⁸ Harris, *supra* note 294, at 911–12.

⁶⁰⁹ *Id.* at 933–34.

⁶¹⁰ *Id.*

⁶¹¹ *Id.* at 933.

⁶¹² *Id.* at 933–34.

⁶¹³ Sabel & Simon, *supra* note 171, at 1077–78.

⁶¹⁴ See *id.* Note that in terms of the power structure identified by Turk, the court's liability determination increases the SMO's enforcement power; the SMO has the backing of the court to enforce its view of the law as applied to the policy context at issue. See Turk, *supra* note 173, at 279–83 (discussing the types of power associated with law).

⁶¹⁵ See Harris, *supra* note 294, at 934.

⁶¹⁶ *Id.*

⁶¹⁷ See *id.*

obligation to protect the public trust interest in public waters and to “take such uses into account in allocating water resources.”⁶¹⁸ The Court also held that the Superior Court of California had concurrent original jurisdiction with the SWRCB over the issue.⁶¹⁹ Thus, when the matter was remanded to state court and consolidated in Judge Finney’s court with the trout cases,⁶²⁰ Judge Finney could have immediately held a hearing, taken evidence, and issued a decree directing the SWRCB to apply the trust doctrine to the LADWP allocation license. Additionally, in the trout cases, Judge Finney had the option of either issuing a writ that “commanded the immediate imposition of the conditions” of Fish and Game Code section 5937 and requiring the SWRCB to conduct a study to establish flow rates or conducting his own hearing and issuing a decree specifying flow rates necessary to comply with California statute.⁶²¹ Rather than hold a hearing on the public trust and trout issues, Judge Finney ordered the SWRCB to review Los Angeles’s water rights in the context of the public trust doctrine and Fish and Game Code section 5937 and stayed the litigation until September 1993 pending the SWRCB determination, but Judge Finney also retained jurisdiction over the case until the SWRCB had submitted its completed work to the court for review.⁶²² This was not the traditional command-and-control decree. Nor was it, however, an order for formal negotiation as envisioned by destabilization theorists.

Application of the court’s orders required the SWRCB to determine how much water was needed to support trout populations and public trust assets.⁶²³ To support this analysis, the SWRCB was required to prepare an Environmental Impact Report (“EIR”) and hold public hearings on the LADWP license, a process that would take several years to complete.⁶²⁴ During this hiatus, the Mono Lake Committee and the LADWP were in a

⁶¹⁸ Nat’l Audubon Soc’y v. Super. Ct. of Alpine Cnty. (*Nat’l Audubon*), 658 P.2d 709, 732 (Cal. 1983).

⁶¹⁹ *Id.* at 731.

⁶²⁰ HART, *supra* note 4, at 130.

⁶²¹ Cal. Trout, Inc. v. Super. Ct. of Sacramento Cnty. (*CalTrout II*), 266 Cal. Rptr. 788, 802 (Cal. Ct. App. 1990); *see also* Cal. Trout, Inc. v. State Water Res. Control Bd. (*Cal Trout I*), 255 Cal. Rptr. 184, 213 (Cal. Ct. App. 1989).

⁶²² HART, *supra* note 4, at 131, 139, 144.

⁶²³ CAL. STATE WATER RES. CONTROL BD., FINAL ENVIRONMENTAL IMPACT REPORT FOR REVIEW OF MONO BASIN WATER RIGHTS OF THE CITY OF L.A. 2-1 (1994), available at <http://www.monobasinresearch.org/images/mbeir/fch2.pdf>.

⁶²⁴ *Profile of the Mono Basin EIR*, MONO BASIN CLEARINGHOUSE, <http://www.monobasinresearch.org/onlinereports/eirprofile.htm> (last visited Jan. 22, 2011) [hereinafter *Profile of Mono*].

state of limbo. Neither could be certain of the final outcome of the SWRCB process, although it was certain that both the landscape and the rules of the game had changed.⁶²⁵ Thus, the court, by its order, established the foundations for the flexible remedy.⁶²⁶ In issuing the order, the court effectively gave notice to the parties that the *status quo* was dead.⁶²⁷ No longer could the LADWP rely upon its traditional relationship with the SWRCB to ensure receipt of the entire flow of the Mono Lake tributaries because it could not be certain of how the SWRCB would rule.⁶²⁸ The LADWP could either sit back and wait or try to negotiate an alternate remedy.⁶²⁹ Evidenced by the shifting tides on the *L.A. Times* editorial page, by 1989, the public was urging the LADWP to change its strategy and encouraging negotiation.⁶³⁰

Additionally, the court's decision to maintain jurisdiction over the litigation meant that the LADWP could no longer ignore the claims of the Mono Lake Committee, who now had the legitimacy of two court orders and the ongoing oversight of the court.⁶³¹ This oversight ensured that the Mono Lake Committee would continue to have a meaningful voice in the ultimate resolution of the Mono Lake dilemma.⁶³² Finally, the length of time required to prepare the EIR gave the parties the space needed to negotiate the flexible remedy.⁶³³

By necessity, negotiating a remedy is grounded in uncertainty, and nowhere is this truer than in the arena of ecosystem management, which is grounded in the scientific uncertainty of the operation of biological

⁶²⁵ See HART, *supra* note 4, at 131.

⁶²⁶ See *supra* notes 425–35 and accompanying text (explaining why the court order was insufficient). The order established foundations by its resulting five-year hiatus and uncertainty, which would prompt negotiations.

⁶²⁷ See HART, *supra* note 4, at 131.

⁶²⁸ See *id.* at 145–47.

⁶²⁹ See *id.*

⁶³⁰ See Editorial, *Halt the Decline at Mono Lake*, L.A. TIMES, June 17, 1989, § II, at 8 [hereinafter *Halt the Decline*]. By July 1986, the *L.A. Times* editorial board was pushing for a negotiated solution to the Mono Lake controversy noting that “[n]egotiation of the Los Angeles-Mono Lake issue is bound to produce a more practical solution than protracted litigation that always carries the potential for surprising consequences not desired by either party.” *Mono Issue*, *supra* note 573, § II, at 4. And, by 1989, the Editorial Board observed that “Los Angeles should realize by now that it never will win its dogged legal battle to continue its historic diversion of eastern Sierra streams that naturally flow into Mono Lake. . . . At some point, the decline must be halted.” *Halt the Decline*, *supra*, § II, at 8.

⁶³¹ See *supra* notes 606–22 and accompanying text.

⁶³² See HART, *supra* note 4, at 139–40.

⁶³³ See *supra* note 624 and accompanying text.

systems.⁶³⁴ Added to this is the fact that the negotiating process itself places the stakeholders in a position of uncertainty.⁶³⁵ Parties can no longer rely on traditional relationships and, as such, must reorient their goals, their partners, and even their understanding of the problem.⁶³⁶ The status quo is no longer a possibility because the liability determination has stigmatized the status quo, making it risky,⁶³⁷ which forces the stakeholders to explore and develop new options previously politically unavailable.⁶³⁸

The new remedy and the effectiveness of the remedy is itself unknown, and new relationships between stakeholders force them to continually reassess and reposition themselves as their knowledge about the issue becomes deeper and time reveals more information.⁶³⁹ Often, the complexities and futuristic nature of the issue requires the stakeholders to make decisions with incomplete knowledge, forcing the stakeholders into a “rolling rule regime.”⁶⁴⁰ To address this issue, the stakeholders focus on: (1) outcome norms and goals; (2) monitoring and assessment of norms and goals as a rolling remediation plan is implemented; and (3) reassessment of norms and goals based on information gleaned from previous attempts to realize norms and goals and from the success or failure of the negotiated remedy to meet performance measures.⁶⁴¹ This process results in a remedy that is more fully explored and developed, which increases the likelihood of its success and acceptability among multiple stakeholders.⁶⁴²

Sabel and Simon argue that the negotiation process forces decisions that were previously made in non-public forums to be made in public as the parties work toward establishing, implementing, and revising implementation strategies to meet the goals or performance measures established

⁶³⁴ Mary Doyle, *Introduction: The Watershed-Wide, Science-Based Approach to Ecosystem Restoration*, in *LARGE-SCALE ECOSYSTEM RESTORATION: FIVE CASE STUDIES FROM THE UNITED STATES*, ix, xii–xiii (Mary Doyle & Cynthia A. Drew eds., 2008). Doyle notes that an ecosystem approach to environmental problem-solving “is by definition comprehensive,” and grounded in “scientific uncertainty and emerging scientific understanding,” requiring an adaptive management approach. *Id.* at xii–xiii. Adaptive management assumes that policymakers and policies will be flexible enough to permit course changes as new scientific knowledge becomes available. *Id.* at xiii.

⁶³⁵ Sabel & Simon, *supra* note 171, at 1074 (explicating the “veil effect”).

⁶³⁶ *Id.* at 1074–75.

⁶³⁷ *Id.* at 1075–76 (explicating the “status quo effect”).

⁶³⁸ *Id.* at 1076–77 (explicating the “deliberation effect”).

⁶³⁹ *Id.* at 1069.

⁶⁴⁰ Sabel & Simon, *supra* note 171, at 1069.

⁶⁴¹ *See id.* at 1069–70.

⁶⁴² *See id.* at 1076. Sabel and Simon characterize this outcome of the negotiated remedy as the deliberative effect of destabilized litigation. *Id.* at 1076–77.

by the stakeholders in the decree.⁶⁴³ The negotiation process also results in public vindication of the plaintiff's claim, brings public attention to the problem, and causes increased public scrutiny.⁶⁴⁴ The very public nature of the remedy, its design, and implementation ripples out beyond the litigation and the litigants into other private and public realms in a process of "iterative disequilibrium and readjustment."⁶⁴⁵ While this is ultimately what happened at Mono Lake, it did not happen in the manner envisioned by Sabel and Simon.

Once it was clear that the LADWP water allocation license would be subject to revision, both the Mono Lake Committee and the LADWP had a significant incentive to negotiate a remedy.⁶⁴⁶ The process undertaken by the SWRCB to prepare the EIR gave them the space they needed to negotiate a remedy.⁶⁴⁷ For the Mono Lake Committee, this was an opportunity to, at last, participate in the decision-making process, but for the LADWP, it had become a necessity since it had no way of predicting the outcome of the SWRCB process.⁶⁴⁸ Thus, it was in the early 1990s that the Mono Lake Committee, the LADWP, the City of Los Angeles, Mono County, and the U.S. Forest Service, collectively known as the Mono Lake Group,⁶⁴⁹ came together in earnest to wrestle with the major ecosystem restoration questions at Mono Lake.⁶⁵⁰ And, while the negotiations did not take place in the public forum of the courts,⁶⁵¹ the Mono Lake Committee not only continued to report negotiation progress to its membership, but it was able, through ongoing framing, to keep the process in the media.⁶⁵² This

⁶⁴³ See *id.* at 1071–72.

⁶⁴⁴ *Id.* at 1077. Sabel and Simon refer to this as the "publicity effect" and suggest that it is a natural outcome of the experimental remedy. See Sabel & Simon, *supra* note 171, at 1077. But, social scientists argue that the publicity effect is a combination of the court legitimizing the plaintiff's position and the plaintiff's willingness to use the outcome of the litigation as one of many political resources in the process of framing, which is an important part of social mobilization. See *supra* Part II.A.1.

⁶⁴⁵ See Sabel & Simon, *supra* note 171, at 1081. The "web effect" of the litigation affects how agencies make decisions in the future. See *id.* at 1082.

⁶⁴⁶ See *supra* notes 618–30 and accompanying text.

⁶⁴⁷ See *supra* note 624 and accompanying text.

⁶⁴⁸ See *supra* notes 618–30 and accompanying text.

⁶⁴⁹ HART, *supra* note 4, at 131. In fact, the Mono Lake Committee and the LADWP had been meeting quietly since the 1984 UCLA policy forum. *Id.* at 121. In the summer of 1987, they broadened their discussions to include the U.S. Forest Service and Mono County, which formed the Mono Lake Group. *Id.* at 131. In late 1987, this group hired Tom Graff of the Environmental Defense Fund to find an alternative water source for Los Angeles. *Id.*

⁶⁵⁰ See *id.* at 144.

⁶⁵¹ See *id.* at 131.

⁶⁵² See *supra* note 630 and accompanying text.

kept pressure on the LADWP to find a resolution or submit to the uncertainties of the SWRCB deliberations under the court's oversight.⁶⁵³

There were two central ecosystem restoration questions that the parties needed to resolve: (1) what was the appropriate lake level and (2) how would the City of Los Angeles make up for the lost water from the Mono Lake tributaries without stressing other ecosystems.⁶⁵⁴ Although the parties had yet to determine how to accomplish the latter, meeting Los Angeles's water needs without damaging another ecosystem became an initial goal of the negotiation process.⁶⁵⁵

Discovering solutions for Los Angeles's water dilemma was an iterative process. The seeds for a negotiated remedy would come from a number of sources.⁶⁵⁶ In 1988, California suffered yet another drought, and in 1990, Los Angeles instituted mandatory water rationing.⁶⁵⁷ Water rationing created financial problems for the LADWP: As less water was used by citizens, the per gallon cost of running the Los Angeles water system increased.⁶⁵⁸ Customers, however, paid a flat fee for water, which meant those customers who conserved water paid a higher per-gallon rate than customers who did not limit their water use.⁶⁵⁹ To resolve this inequity, Mayor Bradley appointed a committee to develop a new water rate scheme for Los Angeles, and he invited the Mono Lake Committee to appoint a member to the committee, an unimaginable action just ten years earlier.⁶⁶⁰ The new rate scheme was a two-tiered system with reduced rates for small or moderate users and raised rates for heavy users to finance the cost of developing new water sources.⁶⁶¹ The system was designed to both encourage conservation and explore alternative water sources.⁶⁶²

In conjunction with the new rate scheme, the statewide Urban Water Conservation Council issued a list of Best Management Practices for household water conservation, which included subsidized installation

⁶⁵³ See *supra* note 630 and accompanying text.

⁶⁵⁴ See HART, *supra* note 4, at 146–48.

⁶⁵⁵ *History of the Mono Lake Committee*, MONO LAKE COMM., <http://www.monolake.org/mlc/history> (last visited Jan. 22, 2011).

⁶⁵⁶ See HART, *supra* note 4, at 148–49.

⁶⁵⁷ *Id.* Hart reports that during the 1990–91 drought, Los Angeles undertook a mandatory rationing program and experienced a larger than expected drop in water use with per capita water use dropping by thirty percent. *Id.* at 149.

⁶⁵⁸ *Id.*

⁶⁵⁹ See *id.*

⁶⁶⁰ See *id.*

⁶⁶¹ HART, *supra* note 4, at 149.

⁶⁶² See *id.*

of ultra-low-flush toilets.⁶⁶³ The Mono Lake Committee, in yet another example of framing, reinforced these practices with a series of television spots linking water use in Los Angeles to ecosystem destruction at Mono Lake and in the Santa Monica Bay.⁶⁶⁴ The new frame: what was good for your pocket book (decreased water use) was also good for the Mono Lake and Santa Monica Bay ecosystems.⁶⁶⁵ When, in July 1992, water rationing ended and people continued to conserve and Los Angeles's water consumption dropped by fifteen to twenty-five percent,⁶⁶⁶ it became clear to the Mono Lake Committee that some of the water needed to restore the Mono Lake ecosystem could come through conservation.⁶⁶⁷ The LADWP Assistant General Manager admitted as much in a letter in the *L.A. Times* but was apparently unwilling to formally concede the issue in negotiations until a lake level agreement was reached.⁶⁶⁸

The reduced water rates associated with conservation and the resulting perspective that saving the Mono Lake ecosystem could be accomplished without substantial financial burden to the citizens of Los Angeles is illustrative of Rosenberg's observation that legal remedies promoting change are more likely to be implemented when they are supported by market mechanisms and offer incentives for compliance.⁶⁶⁹

The California Legislature was also the source of a potential financial incentive for change. In 1989, a number of legislators seeking resolution to the Mono Lake controversy approached the Mono Lake Group with a proposal to fund replacement water for Los Angeles.⁶⁷⁰ Under the proposal, the legislature would provide \$60 million to develop new water for Los Angeles from reclaimed water or from sources in the Central Valley

⁶⁶³ *Id.*; see also CAL. STATE WATER RES. CONTROL BD., DRAFT ENVIRONMENTAL IMPACT REPORT FOR THE REVIEW OF MONO BASIN WATER RIGHTS OF THE CITY OF L.A., 3L8 to 3L9 (1993), available at <http://www.monobasinresearch.org/onlinereports/mbeir.htm>.

⁶⁶⁴ HART, *supra* note 4, at 149. The Santa Monica Bay received polluted water from Los Angeles. *Id.*

⁶⁶⁵ *See id.*

⁶⁶⁶ *Id.*

⁶⁶⁷ *See id.*

⁶⁶⁸ See Duane L. Georgeson, Letter to the Editor, *Water Shortage*, L.A. TIMES, Aug. 7, 1987, § II, at 4; HART, *supra* note 4, at 145–47.

⁶⁶⁹ See ROSENBERG, *supra* note 250, at 32–33.

⁶⁷⁰ Hart, *supra* note 4, at 132–33. This proposal went through a myriad of forms as it moved through the California Legislature, but, as passed, AB444 allocated \$60 million in state funding to develop replacement water. *Id.* The LADWP was skeptical of the proposal, but now even the *L.A. Times* was prodding the LADWP to find an alternative solution that would preserve the Mono Lake ecosystem. See Editorial, *At Last: A Solution for Mono Lake*, L.A. TIMES, Aug. 23, 1989, § II, at 6.

with the proviso that money would only be allocated upon joint application of the LADWP and the Mono Lake Committee.⁶⁷¹ But, the Mono Lake Committee was reluctant to proceed forward until resolution of the lake level issue.⁶⁷² Despite the reluctance of the parties to jump at the legislative proposal, the proposal is an example of the impact of the deliberative effect of the negotiation process. Here was a potential alternative source of water for Los Angeles that did not depend on depriving either Mono Lake or any other natural system of water, which was a central goal of the committee.⁶⁷³ If and how the parties would apply for and use this appropriation was unknown, but what was clear was that there was some tentative agreement among the parties that any alternate replacement water source for Mono Lake would not come at the expense of another ecosystem.⁶⁷⁴

Setting the appropriate lake level proved to be the more difficult task, and by 1991, it appeared that the parties were at an impasse.⁶⁷⁵ Proposals for an acceptable lake level went back and forth without resolution, and the money provided by the California Legislature sat pending the outcome of the lake level debate.⁶⁷⁶ In 1992, Mayor Bradley's office suggested that the parties apply for the legislative funding without resolving the lake level question with the provision that any water developed with legislative funding be credited to the Mono Lake ecosystem.⁶⁷⁷ To sweeten the deal, the City of Los Angeles would agree to a moratorium of all diversions from the Mono Lake tributaries until the SWRCB reached its final resolution on the Los Angeles permit.⁶⁷⁸ Although the LADWP ultimately vetoed the proposal,⁶⁷⁹ this proposal made by the City of Los Angeles serves as yet another example of Sabel and Simon's "rolling rule regime" in which the parties explored and developed a series of new options and tentative agreements based on an ecosystem preservation outcome.⁶⁸⁰ Such outcomes, a few short years ago, were beyond the realm of possibility.⁶⁸¹

⁶⁷¹ HART, *supra* note 4, at 132–33, 147–48.

⁶⁷² *See id.* at 132–33.

⁶⁷³ *History of the Mono Lake Committee*, *supra* note 655.

⁶⁷⁴ *See id.*; HART, *supra* note 4, at 147–48.

⁶⁷⁵ *See* HART, *supra* note 4, at 144.

⁶⁷⁶ *See id.* at 146. While the parties argued over the lake level, funding from the \$60 million allocation was being diverted by the California Legislature for other purposes. *Id.*

⁶⁷⁷ HART, *supra* note 4, at 147.

⁶⁷⁸ *See id.*

⁶⁷⁹ *Id.*

⁶⁸⁰ *See supra* notes 233, 237–40 and accompanying text.

⁶⁸¹ *See* HART, *supra* note 4, at 147. Throughout the late 1980s and early 1990s, a number of alternative water sources to replace waters from the Mono Lake tributaries were explored. *See id.* An option rejected by environmental groups was exportation from the

Another factor that aided the search for replacement water for the Mono Lake ecosystem, and ultimately the development of a remedy, was Los Angeles's growing interest in water reclamation spurred by the need for a sewage system upgrade.⁶⁸² Historically, Los Angeles dumped wastewater effluent into the Pacific.⁶⁸³ Los Angeles was under continuous pressure to improve its sewage treatment to reduce effluent pollutants.⁶⁸⁴ By the early 1990s, water from local sewage treatment plants was almost potable.⁶⁸⁵ The combined reclamation projects could yield upwards of 100,000 acre-feet of water.⁶⁸⁶ But, using this water for irrigation, to recharge groundwater aquifers, or for other non-consumptive uses required an increase in reclamation capacity and the construction of transmission infrastructure.⁶⁸⁷

In a partnership, previously unimaginable in 1983, the LADWP and the Mono Lake Committee jointly approached Congress for a federal appropriation to construct the necessary infrastructure to develop and transmit reclaimed water.⁶⁸⁸ An appropriation for the infrastructure project was included in the 1992 Federal Reclamation Projects Authorization and Adjustment Act.⁶⁸⁹ Together, the LADWP and the Mono Lake Committee found funding for the largest water reclamation project in the United States.⁶⁹⁰ This project would allow Los Angeles to meet its water needs without damaging other ecosystems while returning water to the Mono Lake ecosystem.⁶⁹¹

Within several years after the *National Audubon* and trout cases were consolidated in Judge Finney's court, the stakeholders had developed a series of viable, ecosystem neutral water options for Los Angeles.⁶⁹² The Mono Lake Committee had been incorporated into the City of Los Angeles's political decision-making structure.⁶⁹³ The LADWP, the City of Los Angeles,

Sacramento-San Joaquin Delta. *Id.* Another option explored was water marketing, which involved purchasing water rights from farmers in the Central Valley where soil was "tainted with toxic selenium" and shifting that water to Los Angeles. *Id.* at 148.

⁶⁸² *Id.*

⁶⁸³ *See id.* at 149.

⁶⁸⁴ HART, *supra* note 4, at 148.

⁶⁸⁵ *Id.*

⁶⁸⁶ *Id.*

⁶⁸⁷ *See id.*

⁶⁸⁸ *See id.*

⁶⁸⁹ *Id.* at 147; *see also* Reclamation Projects Authorization and Adjustment Act of 1992, H.R. 429, 102d Cong. § 1606 (1992).

⁶⁹⁰ HART, *supra* note 4, at 148.

⁶⁹¹ *See id.* at 147; *History of the Mono Lake Committee*, *supra* note 655.

⁶⁹² *See* HART, *supra* note 4, at 147-49.

⁶⁹³ *See id.* at 148.

and the Mono Lake Committee had developed enough trust in each other to jointly approach Congress to find a partial resolution of the water supply issue.⁶⁹⁴ This is a prime example of the types of remedies developed through the rolling rule regime process and the modification of the political infrastructure in Los Angeles City Hall.

Resolution of the appropriate lake level, however, remained a roadblock.⁶⁹⁵ Then, in May 1993, the SWRCB issued the *Draft Environmental Impact Report for the Review of Mono Basin Water Rights of the City of Los Angeles* (“DEIR”).⁶⁹⁶ The DEIR identified 6383 feet as an “environmentally superior alternative” lake level for Mono Lake, but noted that “[b]ased on an assessment of unmitigable cumulative impacts relative to prediversion conditions . . . , the 6,390-Ft Alternative appears to be the environmentally superior [lake level] alternative”⁶⁹⁷ The DEIR further concluded that the impact of the 6390-foot lake level on the Los Angeles water supply would be “less-than-significant” if the LADWP adopted mitigation measures, including conservation and best management practices to reduce water use.⁶⁹⁸ The finding was jolting to the LADWP, which had continued to insist that 6377 feet was the appropriate average lake level.⁶⁹⁹ But, the LADWP had no allies.⁷⁰⁰ And, even though the parties had not reached agreement about the appropriate lake level when the SWRCB

⁶⁹⁴ See *id.* at 148–49.

⁶⁹⁵ See *id.* at 147, 156.

⁶⁹⁶ *Id.* at 157; CAL. STATE WATER RES. CONTROL BD., *supra* note 663.

⁶⁹⁷ CAL. STATE WATER RES. CONTROL BD., *supra* note 663, at S-11.

⁶⁹⁸ *Id.* at 3L28 to 3L29. Mitigation measures recommended in the DEIR included application for AB 444 funding to develop replacement water through reclamation, use of HR 429 funding to develop reclamation projects, development of demand-side reductions from water conservation programs, monitoring compliance with best management practices, and recovery of storm runoff. *Id.* at 3L27 to 3L28.

⁶⁹⁹ See HART, *supra* note 4, at 158–63. In truth, the parties always spoke of lake levels in ranges. See *id.* at 162. The low level end of the range was the drought level and the upper level the wet year level, but the focus of most lake level discussions was of the average lake level. See *id.* at 160–63. The mid-level recommended by the LADWP (6377.7 feet) would have maintained the status quo, but the levels recommended by the DEIR would require returning Mono Lake to either 1989 or the 1940 lake levels. *Id.* at 157, 162.

⁷⁰⁰ See *id.* at 162–63. By July 1993, the EPA, the U.S. Forest Service, and the California Department of Fish and Game all supported a 6390-foot lake level. See *id.* at 163–64. The U.S. Fish and Wildlife Service announced that if lake level selection dropped below 6390, it would list the brine shrimp as a threatened species. HART, *supra* note 4, at 163. Even the Los Angeles City Council’s Commerce, Energy and Natural Resources Committee expressed concern about continuing to fund litigation when the money could be spent on water reclamation projects. *Id.* at 162.

commenced its hearing on the LADWP permit in the summer of 1993,⁷⁰¹ the LADWP now recognized that the law required sufficient water flows into Mono Lake to support fish hatcheries and the Mono Lake ecosystem.⁷⁰² The fight had essentially devolved into a factual dispute over the needs of the ecosystem: could the ecosystem survive at a lake level of 6377, the LADWP's preferred lake level, or was 6390 the appropriate level for the ecosystem?⁷⁰³

The SWRCB hearing had an interesting side benefit. Hart reports that "[a]s the testimony trundled on toward Christmas, with no end in sight, a curious thing happened: the contending lawyers and witnesses, board staffers and onlookers, began to form a community, a sort of village."⁷⁰⁴ Although the hearings did not constitute the traditional negotiation process envisioned by Sabel and Simon, it was the means by which Judge Finney proposed resolving the underlying litigation.⁷⁰⁵ The hearing process itself forced daily interaction among stakeholders over several months, and this interaction likely further facilitated the building of relationships and trust between stakeholders.⁷⁰⁶

Shortly before Christmas 1993, the City pulled the Mono Lake Committee and the LADWP together to again try to broker a deal for the water development funding offered by the California Legislature.⁷⁰⁷ In the end, the Mono Lake Committee agreed to make a joint reclamation funding request without resolving the lake level issue, and the LADWP agreed to "abandon its claim to at least 41,000 acre feet per year of the Mono Basin water."⁷⁰⁸ This was tantamount to the LADWP relinquishing approximately one-half of its annual diversion from the Mono Lake tributaries,

⁷⁰¹ See Decision 1631, *supra* note 42, at 14–15. The SWRCB hearing on the Los Angeles Water Rights License was conducted in two phases. HART, *supra* note 4, at 164. The first phase provided an opportunity for interested parties to present "non-evidentiary policy statements." Decision 1631, *supra* note 42, at 15. The second phase was a formal evidentiary hearing. *Id.* In total, the Water Resources Board hearing included forty days of testimony from over 125 witnesses and 1000 exhibits. *Id.* The five-month evidentiary hearing commenced in October 1993, concluded in February 1994, and was followed by a briefing schedule that extended into April 1994. *Id.* at 15.

⁷⁰² See HART, *supra* note 4, at 164–66.

⁷⁰³ See *id.* at 165–66. See generally Decision 1631, *supra* note 42.

⁷⁰⁴ HART, *supra* note 4, at 167.

⁷⁰⁵ *Id.* at 131.

⁷⁰⁶ See *id.* at 169.

⁷⁰⁷ See *id.*

⁷⁰⁸ *Id.* Between 1974 and 1989, the LADWP diverted, on average, 83,000 acre-feet from the Mono Lake tributaries per year. Decision 1631, *supra* note 42, at 6.

allowing this water to flow into Mono Lake for restoration purposes.⁷⁰⁹ The issue of the appropriate lake level was left to the SWRCB for resolution through the hearing process.⁷¹⁰

In retrospect, both the growing public opposition to the LADWP, or water scarcity frame, and the court's *National Audubon* decision made it apparent to the City of Los Angeles, and to some lesser degree to the LADWP, that the status quo was dead and that Los Angeles was moving into uncharted political waters.⁷¹¹ This is evidence of the *veil* and *status quo* effects of the litigation and political mobilization of the litigation.⁷¹² The uncertainty created an incentive for the City of Los Angeles to explore alternate methods to meet its water needs that would not entail ecosystem degradation.⁷¹³ The status quo effect of the litigation, resulting mobilization, and changed constituency perspectives induced the City's political structure to pressure the LADWP to recognize a changed reality.⁷¹⁴

These changes also induced the City to encourage the LADWP and the Mono Lake Committee to explore together new paradigms that would assure water for both the Mono Lake ecosystem and the City of Los Angeles.⁷¹⁵ In this process, not only was the Mono Lake Committee assured greater voice in how water would be allocated between the natural and human systems,⁷¹⁶ but the Mono Lake Committee's willingness to explore new paradigms, while the LADWP came to the table reluctantly, increased the Mono Lake Committee's credibility as a can-do partner in the water allocation decision making process.⁷¹⁷

Indeed, the political landscape had so significantly changed that when, on September 28, 1994, the SWRCB issued its decision calling for a lake level of 6390 feet,⁷¹⁸ "the sticking point" for the LADWP was not

⁷⁰⁹ See Hart, *supra* note 4, at 169; Decision 1631, *supra* note 42, at 6. By only diverting 41,000 acre-feet of water, 42,000 acre-feet would be left to flow into Mono Lake. See Hart, *supra* note 4, at 169; Decision 1631, *supra* note 42, at 6.

⁷¹⁰ See *supra* notes 701–03, and accompanying text.

⁷¹¹ See *supra* notes 429–36, 627–30 and accompanying text.

⁷¹² See Sabel & Simon, *supra* note 171, at 1074–76.

⁷¹³ See *History of the Mono Lake Committee*, *supra* note 655.

⁷¹⁴ See Sabel & Simon, *supra* note 171, at 1075–76.

⁷¹⁵ HART, *supra* note 4, at 169.

⁷¹⁶ See *id.*

⁷¹⁷ See *id.*

⁷¹⁸ *Id.* at 172. In truth, setting the lake level issue was more complex than simply setting a lake level. The lake had to be restored to the 6390-foot level. *Id.* To accomplish this, the SWRCB established a complex diversion scheme that essentially prohibited the LADWP from diverting any water until the lake reached 6377 feet, and thereafter, the LADWP was permitted limited diversions until the lake reached 6391 feet. Decision 1631, *supra* note

the lake level, which had indirectly been resolved in December 1993, but the restoration requirements.⁷¹⁹ And, although LADWP professional staff favored contesting the SWRCB Decision, the LADWP had lost virtually all of its historic allies, including the Los Angeles City Council, the Mayor's office, and the Water and Power Commissioners.⁷²⁰ Even LADWP executive staff were disinclined to contest the decision, so the LADWP professional staff and attorneys stood alone in their desire to continue the contest.⁷²¹ The once powerful LADWP was essentially politically isolated—clear evidence of a change in the water allocation decision-making structure.⁷²² And, in an ironic twist of events, it was the Mono Lake Committee that came forward to save the day when Martha Davis, Executive Director of the Mono Lake Committee, sat down with LADWP Commissioners and agreed to help the LADWP secure trout stream restoration funding in exchange for assurances that the LADWP would not appeal the SWRCB Decision.⁷²³ Such an event had seemed unimaginable in 1978 at the LADWP-Mono Lake Committee pretrial meeting.⁷²⁴ The agency that had once informed the Mono Lake Committee that it was prepared to outlast and out-litigate a group of tree huggers⁷²⁵ was now working with the Mono Lake Committee towards ecosystem restoration.

But, what of the political power that permitted the LADWP to dominate water allocation determinations in California and that led to the decision permitting the LADWP to divert all waters from the Mono Lake ecosystem? In the words of the *L.A. Times* editorial board:

It is time to give up the Mono Lake battle, to move on and try to replace the lost water with reclaimed water and through conservation. The Metropolitan Water District says it can make up for much of the loss. But the possibility of more drought, federal and state requirements to increase

42, at 156–57, 202–03. The SWRCB's decision also established dry and wet year flows for the Mono Lake tributaries. *Id.* at 196–200. These diversion limitations would essentially provide 30,800 acre-feet a year for Mono Lake. HART, *supra* note 4, at 171. Finally, the SWRCB's Decision ordered the LADWP to undertake extensive habitat restoration of the Mono Lake tributaries and to develop a waterfowl restoration plan for the Mono Lake Water Basin. Decision 1631, *supra* note 42, at 204–06.

⁷¹⁹ HART, *supra* note 4, at 173.

⁷²⁰ *See id.* at 162–63, 173.

⁷²¹ *Id.* at 173–74.

⁷²² *See supra* notes 700, 711–13, 720 and accompanying text.

⁷²³ *See id.* at 174.

⁷²⁴ *See supra* notes 335–41, 349–50 and accompanying text.

⁷²⁵ *See* HART, *supra* note 4, at 83.

fresh-water flows to repair environmental damage in the Sacramento Delta and other uncertainties mean the city should not rely too heavily on this old, reliable source [the LADWP]. As ever, water is the future of arid Southern California. But what is needed at the [LADWP] is not just more water, but more vision, leadership and courage.⁷²⁶

More importantly, the Mono Lake Committee had won a structural victory. Not only did it have an ongoing voice in water allocation decisions in Los Angeles, but through the *National Audubon* decision and a changed public ethos, it had ensured that the ecosystem would be considered in the context of the state's public trust obligation in future water allocation permitting decisions made by the SWRCB.⁷²⁷

V. SOME FINAL INSIGHTS ABOUT DESTABILIZING LITIGATION & ECOSYSTEM RESTORATION

Did law and litigation matter to the Mono Lake ecosystem, and if so, is litigation an effective tool to promote the protection and restoration of water-based ecosystems? Today, the elevation of Mono Lake is about 6382 feet,⁷²⁸ ten feet above its historic low, eight feet below the 6390-foot level established by the SWRCB,⁷²⁹ and thirty-five feet below pre-diversion levels.⁷³⁰ Between 1990 and 1994, shortly after the court of appeals issued its decision in *CalTrout II*,⁷³¹ the Restoration Technical Committee began restoration of Rush and Lee Vining Creeks.⁷³² Restoration efforts intensified after the SWRCB issued its 1994 decision setting target lake levels, establishing minimum and annual peak flows for the Mono Lake tributaries and ordering the LADWP to commence restoration of both Mono Lake and its tributaries pursuant to an approved restoration plan.⁷³³ Today, the parties

⁷²⁶ Editorial, *DWP's Terrible Case of Mono*, L.A. TIMES, Sept. 24, 1994, at B7.

⁷²⁷ *Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty. (Nat'l Audubon)*, 658 P.2d 709, 719–21 (Cal. 1983) (holding the state has an ongoing public trust interest in its navigable waters, which prevents appropriation of water in a harmful manner to the interests protected by the public trust, such as ecosystems in their natural state).

⁷²⁸ MONO LAKE COMM., <http://www.monolake.org> (last visited Jan. 22, 2011).

⁷²⁹ See HART, *supra* note 4, at 171-73.

⁷³⁰ MONO LAKE COMM., <http://www.monolake.org> (last visited Jan. 22, 2011).

⁷³¹ *Cal. Trout, Inc. v. Super. Ct. of Sacramento Cnty. (CalTrout II)*, 266 Cal. Rptr. 788 (Cal. Ct. App. 1990).

⁷³² See *Restoration Chronology 1982–2009*, MONO LAKE COMM., <http://www.monolake.org/mlc/restochr> (last visited Jan. 22, 2011).

⁷³³ *Id.*; see also Decision 1631, *supra* note 42.

have taken significant steps towards ecosystem restoration.⁷³⁴ What is even more remarkable is that restoration has been accomplished without extracting water from other ecosystems to replace the reduction in water going to Los Angeles as a result of restoration.⁷³⁵ Thus, it seems clear that the answer to the question “did law matter to the Mono Lake ecosystem” must be yes, but in a more complex manner than anticipated by destabilization theorists. While the Mono Lake Committee credits both the initial public trust litigation and the trout litigation for the restoration outcome,⁷³⁶ as this analysis of the historic narrative and litigation history of the events leading to the Mono Lake ecosystem restoration suggests, the success of Mono Lake ecosystem restoration was dependent on far more than litigation alone.⁷³⁷

So what does the Mono Lake case tell environmental practitioners, social scientists, and destabilization theorists about the ability of litigation to change political and social structures to protect ecosystems? The lessons from Mono Lake suggest that if the Sabel and Simon destabilization litigation model is to be a successful tool for promoting changes in political and social structures necessary for ecosystem protection and restoration, litigation must be approached as a political resource mobilized by environmental organizations as part of a larger strategy.⁷³⁸ This requires a strategic litigant willing to look beyond the desired environmental outcome of the litigation—a litigant willing to focus on the change in the underlying social and political structure that made the initial decision resulting in ecological degradation.⁷³⁹

The case of Mono Lake suggests that the goal of change litigation should be twofold: (1) alteration of the ecological outcome and (2) alteration of the underlying political and social environmental decision-making structures. To accomplish this end, the litigant must look beyond correction of the environmental wrong through a consent decree to the necessary changes in political and social structures that would result in long-term ecosystem protection.⁷⁴⁰ In short, accomplishing and sustaining long-term

⁷³⁴ See *Restoration Chronology*, *supra* note 732, for a chronology of the restoration of the Mono Lake ecosystem.

⁷³⁵ See *supra* notes 654–55, 708–09 and accompanying text; see also *Restoration Chronology*, *supra* note 732.

⁷³⁶ *Restoration: Repairing a Damaged Ecosystem*, MONO LAKE COMM., <http://www.monolake.org/mlc/restoration> (last visited Jan. 22, 2010) [hereinafter *Restoration*].

⁷³⁷ See HART, *supra* note 4, at 175.

⁷³⁸ See *supra* notes 192–94 and accompanying text.

⁷³⁹ See *supra* notes 331–37 and accompanying text.

⁷⁴⁰ See *supra* Part IV.E-F.

ecosystem protection requires the litigant to explore how destabilizing litigation can be mobilized in conjunction with other strategies to facilitate meaningful change.⁷⁴¹ The tale of the Mono Lake ecosystem restoration efforts tells us that had the Mono Lake Committee simply relied on the *National Audubon* litigation to motivate the LADWP to change, it is far from certain what, if anything, would have been accomplished.⁷⁴² It was the *National Audubon* decision in conjunction with resource mobilization, including ongoing framing and the secondary trout litigation, that pushed the parties to negotiate a flexible remedy in compliance with the *National Audubon* decision⁷⁴³ and which ultimately led to ecosystem restoration for Mono Lake.⁷⁴⁴ More importantly, from the perspective of water-based ecosystems in California, it was the use of the *National Audubon* court order as a political resource that resulted in the development of a flexible remedy and modified California's water allocation rules and decision-making structures in a manner that gave voice to natural systems.⁷⁴⁵

Thus, the primary lessons from Mono Lake indicate that effective use of Sabel and Simon's destabilization theory to promote change requires an intermingling of legal strategy and political mobilization.⁷⁴⁶ More specifically, Mono Lake suggests that effective destabilization in environmental litigation is facilitated by: (1) the existence of an active social movement;⁷⁴⁷ (2) the ability of the social movement to effectively use framing to build support for the litigation and the willingness and ability to use the litigation as a framing resource to foster ecosystem and political outcomes;⁷⁴⁸ (3) the use of secondary litigation to complete the job;⁷⁴⁹ and (4) the ability to develop flexible performance standards that permit a systems approach to environmental management.⁷⁵⁰

A. *The Litigant Matters*

The Mono Lake case supports Scheingold and McCann's argument that destabilizing change litigation is most successful if brought by SMOs

⁷⁴¹ See *supra* Part IV.E-F.

⁷⁴² See generally Hart, *supra* note 4 (discussing the Mono Lake ecosystem and litigation history).

⁷⁴³ See *Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty. (Nat'l Audubon)*, 658 P.2d 709 (Cal. 1983); Benford & Snow, *supra* note 287, at 611; *Restoration*, *supra* note 736.

⁷⁴⁴ See *Restoration*, *supra* note 736.

⁷⁴⁵ See *Nat'l Audubon*, 658 P.2d at 709, 719.

⁷⁴⁶ See Sabel & Simon, *supra* note 171, at 1055–56; Stryker (2007), *supra* note 256, at 88.

⁷⁴⁷ See McCann (2006), *supra* note 1, at 19; Sabel & Simon, *supra* note 171, at 1055.

⁷⁴⁸ See *supra* Part IV.C.

⁷⁴⁹ See *supra* Part IV.D.

⁷⁵⁰ See *supra* Part IV.B.

that aim for broader social and political transformation than traditional litigants because SMOs are more likely to seek the structural changes that bring access to policymaking forums.⁷⁵¹ The observation that organizational litigants make a difference appears to be borne out by many of the cases discussed by Sabel and Simon in support of destabilization.⁷⁵² A brief overview of these cases indicates that many were brought by either SMOs or groups of plaintiffs represented by a single attorney, which indicates some type of organized approach to the litigation and its underlying purpose.⁷⁵³

The importance of the SMO as a litigant is illustrated by the Mono Lake case. The complex strategy that led to ecosystem restoration at Mono Lake required extensive financial resources, the development of and access to complex networks, ongoing framing to develop support from both bystanders and supporters, and a leadership succession plan to accommodate the changing interests and availability of early Mono Lake Committee leaders Winkler and Gaines.⁷⁵⁴ Not only was it necessary to garner these resources, but these resources had to be maintained over the twenty years it took to negotiate a restoration agreement and to accomplish the changes in California's water allocation scheme.⁷⁵⁵ This would eventually result in the recognition of water ecosystem values in water appropriation decisions, which would have been difficult for a single citizen litigant.⁷⁵⁶

The Mono Lake case also supports Galanter's theory that organizations with access to ongoing resources are more successful at leveraging litigation to bring about structural social change.⁷⁵⁷ This is especially true when accomplishing change requires ongoing and repeated litigation and the development of public support for a changed environmental paradigm.⁷⁵⁸ The characteristics of the Mono Lake case study comport with

⁷⁵¹ See SCHEINGOLD, *supra* note 158, at 4–5, 8–10; McCann (2006), *supra* note 1, at 23–24.

⁷⁵² See Sabel & Simon, *supra* note 171, at 1022–53.

⁷⁵³ See *id.*; see, e.g., *Rizzo v. Goode*, 423 U.S. 362 (1976) (class action brought by individuals and organizations alleging police brutality); *Sheppard v. Phoenix*, 210 F. Supp. 2d 450 (S.D.N.Y. 2002) (action brought by current and former prison inmates to challenge use of force practices in New York City jails); *New York State Ass'n for Retarded Children v. Carey*, 393 F. Supp. 715 (E.D.N.Y. 1975) (class action brought on behalf of mentally disabled children and adults against a state institution).

⁷⁵⁴ See HART, *supra* note 4, at 71–72, 81–83; TARROW, *supra* note 270, at 2; Benford & Snow, *supra* note 287, at 614.

⁷⁵⁵ See *Restoration*, *supra* note 736.

⁷⁵⁶ See *id.*

⁷⁵⁷ See Galanter, *supra* note 320, at 97–98; Grossman et al., *supra* note 320, at 803, 808; Harris, *supra* note 294, at 923–24.

⁷⁵⁸ See Galanter, *supra* note 320, at 97–98; Grossman et al., *supra* note 320, at 803, 808; Harris, *supra* note 294, at 923–24.

the observation by social scientists that successful litigants are generally those with a long-term view, who think strategically about the outcomes of the litigation and implications of the litigation beyond the courthouse, and tend to be organizations or litigants who regularly appear in court.⁷⁵⁹

However, the existence of an SMO as a litigant does not, standing alone, ensure that successful destabilizing litigation will occur.⁷⁶⁰ It is equally apparent that how the SMO leverages its resources, including litigation, has a signification bearing on whether litigation will result in destabilization.⁷⁶¹ Furthermore, as the discussion of framing suggests below, the type of SMO bringing the litigation may also play a role in the ability of the SMO to leverage destabilizing change.⁷⁶² The use of framing in the Mono Lake case raises the question: to what resources must the SMO have access to successfully mobilize litigation in support of destabilizing change?

B. *Framing—Fertilizing the Ground*

The Mono Lake experience also demonstrates that destabilizing change is facilitated when litigation is accompanied by political mobilization brought about by resource mobilization and framing.⁷⁶³ The framing process is a reflexive process that occurs when resources are mobilized to frame an issue for bystanders and potential supporters.⁷⁶⁴ As McCann observed, framing plays a vital function, not only in building the environmental movement or SMO, but also in preparing the field for successful litigation by increasing public support.⁷⁶⁵ Pre-litigation, it appears that framing plays three important functions essential to preparing the way for destabilization. At these early stages framing can: (1) build support for ecosystem restoration across the population; (2) discredit historic frames that lead to ecosystem degradation; and (3) provide preliminary legitimacy to the SMO's legal claim of right.⁷⁶⁶

⁷⁵⁹ See Galanter, *supra* note 320, at 97–98; Grossman et al., *supra* note 320, at 803, 808; Harris, *supra* note 294, at 923–24.

⁷⁶⁰ See McCann (2006), *supra* note 1, at 19, 21–22; see also *supra* notes 746–50 and accompanying text for elements needed for successful destabilizing litigation.

⁷⁶¹ See McCann (2006), *supra* note 1, at 19, 21–22.

⁷⁶² See Galanter, *supra* note 320, at 97–98.

⁷⁶³ See Benford & Snow, *supra* note 287, at 612; see also *supra* notes 743–44 and accompanying text.

⁷⁶⁴ See Benford & Snow, *supra* note 287, at 613–14, 625.

⁷⁶⁵ See McCann (2006), *supra* note 1, at 25–26, 28.

⁷⁶⁶ See HART, *supra* note 4, at 84–85; Nisbet, *supra* note 287, at 15–16.

These lessons were borne out at Mono Lake when the Mono Lake Committee intuitively prepared the field for successful destabilizing litigation. By consciously building a new water frame designed to shift the public understanding from a frame of economic growth or ecosystem destruction to an ethical/alternate path frame premised on ecosystem destruction caused by water waste, the Committee found resonance in the national press.⁷⁶⁷ This frame supported the public trust claim of right that the state had an affirmative duty to take the state's public trust interest in the Mono Lake ecosystem into consideration in the water allocation scheme.⁷⁶⁸

Early framing also permitted the SMO to make use of a more flexible, albeit more controversial, legal standard. Sabel and Simon suggest that effective destabilization claims are claims premised on the failure of the public agency to meet an uncontroversial or widely accepted performance standard.⁷⁶⁹ In environmental law, there are few performance standards designed to effectively protect ecosystems; those that do exist, such as the public trust doctrine, are hardly non-controversial.⁷⁷⁰ Yet, in the Mono Lake case, the destabilizing change litigation was premised on a legal theory that had never been extended to inland tributaries of navigable waters nor applied to ecosystem protection. And, in the view of Los Angeles, this was intended to deprive the city of "valid water rights that it has held for more than a half a century."⁷⁷¹ Arguably, the acceptability of the public trust doctrine as a legal theory was premised on a claim of right to a healthy ecosystem on behalf of the citizens. Support for this claim of right was developed through extensive framing that built public acceptance in the media, among the citizens of California, and was ultimately recognized by legal scholars when U.C. Davis held a one-day seminar on the

⁷⁶⁷ See *supra* notes 478–81 and accompanying text.

⁷⁶⁸ See HART, *supra* note 4, at 105.

⁷⁶⁹ Sabel & Simon, *supra* note 171, at 1062–63.

⁷⁷⁰ See Keiter, *supra* note 15, at 45–46; Sabel & Simon, *supra* note 171, at 1063–64. One need only peruse the range of law review articles published on the public trust doctrine since 1970 to glimpse the degree of controversy surrounding the public trust doctrine. See, e.g., Hope M. Babcock, *The Public Trust Doctrine: What a Tall Tale They Tell*, 61 S.C. L. REV. 393 (2009); Michael C. Blumm et al., *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794*, 24 ECOLOGY L.Q. 461 (1997); Thomas A. Campbell, *The Public Trust, What's It Worth?*, 34 NAT. RESOURCES J. 73 (1994); Darren K. Cottriel, Comment, *The Right to Hunt in the Twenty-First Century: Can the Public Trust Doctrine Save an American Tradition?*, 27 PAC. L.J. 1235 (1996); Barton H. Thompson, Jr., *The Public Trust Doctrine: A Conservative Reconstruction & Defense*, 15 SOUTHEASTERN ENVTL. L.J. 47 (2006).

⁷⁷¹ See *Water and Power*, *supra* note 489; see also *Water Revolution*, *supra* note 492 (discussing the controversial nature of the court's public trust ruling).

use of the public trust doctrine featuring the Mono Lake attorneys.⁷⁷² This framing helped build legitimacy for the Mono Lake Committee legal argument at the time the complaint was filed and suggests that framing can be used prior to litigation to build support for an otherwise controversial legal standard.⁷⁷³

The Mono Lake case also highlights the importance of using the litigation itself as a framing resource. As McCann notes, simply crafting a complaint can mobilize the law into an assertion of a lawful claim of right that can be used to transform power relationships within politics and can legitimize the SMO's legal claim.⁷⁷⁴ And, indeed, it might be argued that the destabilizing effect of litigation for Mono Lake was as much a result of using the litigation as a framing tool throughout the life of the litigation as was the destabilizing impact of the litigation itself. The Mono Lake Committee began using the litigation as part of its framing process to illustrate a legitimate claim of right as soon as the litigation was filed.⁷⁷⁵ By the time the California Supreme Court issued its landmark *National Audubon* decision in 1983, the Mono Lake Committee's claim of right had received legitimacy in the national press, in major portions of the legal community, among political forces in Sacramento, and among citizens across the state.⁷⁷⁶ Although inroads in the City of Los Angeles were harder to find, even the LADWP grudgingly admitted that the Mono Lake Committee's framing efforts had done a decent job of mobilizing the public and creating public acceptance of a claim of right to a healthy Mono Lake ecosystem.⁷⁷⁷

Nor does the importance of framing diminish after the court has issued its determination. As Stryker and Harris note, the mere fact that the court has issued an order does not, in and of itself, mean that the court order will be enforced or result in destabilizing change.⁷⁷⁸ The case of Mono Lake supports the conclusion that, post-litigation, the ability and willingness of an SMO to use a court's legal ruling and decree to support a new frame appears to be central to successful, destabilizing litigation. Like the proverbial mustard seed, there is little advantage to an advantageous legal determination if nothing is done with it. It may sprout institutional change; it may not.

⁷⁷² See HART, *supra* note 4, at 105.

⁷⁷³ See Arnold & Jewell, *supra* note 4, at 6.

⁷⁷⁴ See McCann (2006), *supra* note 1, at 21–22, 29.

⁷⁷⁵ See HART, *supra* note 4, at 81–91.

⁷⁷⁶ *Id.* at 120, 131–32.

⁷⁷⁷ See Roderick, *supra* note 508.

⁷⁷⁸ See Harris, *supra* note 294, at 933; Stryker (2007), *supra* note 256, at 90.

This need for ongoing framing, post-litigation, is clearly illustrated by the Mono Lake case. For although the California Supreme court issued its *National Audubon* decision in 1983, the federal district Court made no effort to enforce the determination. Instead, the matter languished in federal court for several more years.⁷⁷⁹ The transformation of the *National Audubon* decision into a destabilization tool was a tribute to the Mono Lake Committee's decision to use the court order as a framing tool to continue to build public support for a restored ecosystem, and its willingness to undertake the secondary trout litigation that became the forum for implementation of the order.⁷⁸⁰

Even though the *National Audubon* court order was not immediately implemented, the court order gave significant legitimacy to the Mono Lake Committee's frame.⁷⁸¹ A historical supporter of the LADWP, the *L.A. Times* recognized this legitimacy in 1989, observing, "Los Angeles should realize by now that it never will win its dogged legal battle to continue its historic diversion of eastern Sierra streams that naturally flow into Mono Lake. . . . At some point, the decline must be halted."⁷⁸² Absent active framing and acceptance of this new frame by Californians, particularly Los Angeles residents, it is doubtful that a court order alone could have instigated this shift. But, it is likewise true that the court order itself validated the Mono Lake Committee's claim of right giving important legitimacy to the Mono Lake Committee's frame, and this legitimacy increased the Mono Lake Committee's political power and voice.⁷⁸³

Additionally, in recognizing the Mono Lake Committee's claim of right, the *National Audubon* court ruptured the old water decision-making paradigm and cast the LADWP, the SWRCB, and California water law into a state of uncertainty.⁷⁸⁴ No longer could it be presumed that trust interests are subsumed in California's water allocation schemes. At the very least, the SWRCB had to separately consider the public trust interest in a healthy ecosystem in the allocation process. This required giving voice to the ecosystem—the very frame advocated by the Mono Lake Committee.

⁷⁷⁹ Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty. (*Nat'l Audubon*), 658 P.2d 709, 709 (Cal. 1983); Nat'l Audubon Soc'y v. Dep't of Water, 858 F.2d 1409, 1409 (9th Cir. 1988).

⁷⁸⁰ See generally Cal. Trout, Inc. v. Super. Ct. of Sacramento Cnty. (*CalTrout II*), 266 Cal. Rptr. 788 (Cal. Ct. App. 1990); Cal. Trout, Inc. v. State Water Res. Control Bd. (*CalTrout I*), 255 Cal. Rptr. 184 (Cal. Ct. App. 1989).

⁷⁸¹ See *supra* notes 526–30 and accompanying text.

⁷⁸² See *Halt the Decline*, *supra* note 630.

⁷⁸³ See *supra* notes 626–32 and accompanying text.

⁷⁸⁴ See *supra* note 625 and accompanying text.

In short, these events suggest that the success of litigation in destabilizing change that transforms environmental outcomes, and the structures that create them, is dependent, not only on successful litigation, but on the SMO's willingness to use litigation outcomes to frame the environmental demands for movement members and bystanders as a claim of right, thereby maintaining pressure on political and social structures to adopt a changed paradigm in their operating structures—the transformation of the structure that made the challenged environmental decision.

C. *Secondary Litigation—Once May Not Be Enough*

A third important lesson from the Mono Lake case is that once may not be enough. From a legal perspective, the Mono Lake Committee was wildly successful in its *National Audubon*⁷⁸⁵ litigation. But, the litigation did little to move the LADWP nor did it immediately change the political landscape or provide relief to the ecosystem.⁷⁸⁶ It took the trout litigation and the resulting temporary injunction to encourage the LADWP to negotiate a resolution and provide temporary relief to the ecosystem in the form of an order mandating the LADWP to maintain minimum flows in the Mono Lake tributaries.⁷⁸⁷

The Mono Lake case supports the observation that a court order may provide important expectations and incentives for reform,⁷⁸⁸ but court orders are not, in and of themselves, self-executing.⁷⁸⁹ The court orders that are most effective in promoting change are executed, provide some inducement (either positive or negative) to the parties to perform, and are accompanied by ongoing court oversight.⁷⁹⁰ One method for providing negative inducement, as illustrated by the Mono Lake case, is secondary litigation.

Arguably, it was the secondary trout litigation that prodded the California court and the parties into action when, in 1984, the Mono Lake Committee and CalTrout sued to sustain water in the Mono Lake tributaries for trout populations.⁷⁹¹ Only then did the Mono Lake Committee get its injunctive relief for the Lake.⁷⁹² This injunctive relief had three

⁷⁸⁵ *Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty. (Nat'l Audubon)*, 658 P.2d 709 (Cal. 1983).

⁷⁸⁶ See *supra* notes 569–71 and accompanying text.

⁷⁸⁷ See *supra* note 567 and accompanying text.

⁷⁸⁸ See *supra* note 597 and accompanying text.

⁷⁸⁹ See *supra* note 429 and accompanying text.

⁷⁹⁰ See *supra* notes 599–605 and accompanying text.

⁷⁹¹ See *supra* note 571 and accompanying text.

⁷⁹² See *supra* note 571 and accompanying text.

immediate impacts: (1) it insured much needed water for Mono Lake; (2) it created actual impacts that the LADWP was forced to acknowledge, such as the reduction in its water allocation; and (3) it gave rise to the uncertainty that made the status quo impact real for the LADWP.⁷⁹³ For the first time, the LADWP was forced to accept reduced water allocations for the benefit of the environment, and it could no longer be certain that it would receive its full allocation of water from the Mono Lake tributaries.⁷⁹⁴ This uncertainty was magnified when the matter was consolidated in Judge Finney's court.⁷⁹⁵ Now, there was both incentive to act in the face of uncertainty and ongoing court oversight. If the parties did not act, the court would, and it ultimately did when it issued a decree to the SWRCB to apply both the public trust doctrine and the holding from the trout cases to the LADWP's allocation license.⁷⁹⁶

The Mono Lake case also suggests that ongoing court oversight and time, in conjunction with uncertainty, may be more essential to destabilizing litigation than a court ordered negotiation.⁷⁹⁷ It is interesting to note that Judge Finney did not order the parties to negotiate a remedy. Rather, he ordered the SWRCB to implement the *National Audubon* and *CalTrout I* decisions by balancing the public trust interest with the water needs of the LADWP and the minimum stream flow needs of the trout populations.⁷⁹⁸ To support this decision-making process, the SWRCB commenced a three to four year study followed by extensive permit hearings.⁷⁹⁹ The court maintained oversight over the process pending the SWRCB's final decision.⁸⁰⁰ The court's order left the LADWP in a state of uncertainty, and it could no longer depend on the outcome of the water allocation process.⁸⁰¹ Ongoing court oversight ensured that the parties would not relapse to the status quo.⁸⁰² In light of this uncertainty, the LADWP entered into protracted negotiations with the Mono Lake Committee.⁸⁰³ The outcome of the negotiation included agreed upon lake levels and restoration of the Mono Lake ecosystem, a changed water use and acquisition paradigm

⁷⁹³ See *supra* notes 410–15, 526–30 and accompanying text.

⁷⁹⁴ See *supra* note 424 and accompanying text.

⁷⁹⁵ HART, *supra* note 4, at 130.

⁷⁹⁶ See *supra* note 623 and accompanying text.

⁷⁹⁷ See *supra* notes 631–33, 647 and accompanying text.

⁷⁹⁸ See *supra* notes 621–23 and accompanying text.

⁷⁹⁹ See *supra* note 624 and accompanying text.

⁸⁰⁰ See *supra* notes 631–33, 647 and accompanying text.

⁸⁰¹ See *supra* notes 625–28 and accompanying text.

⁸⁰² See *supra* notes 628–34 and accompanying text.

⁸⁰³ See *supra* notes 631–33, 647 and accompanying text.

that relied extensively on conservation and re-use, and the acceptance of new natural system values incorporated in California's water allocation system.⁸⁰⁴ This outcome was essentially negotiated outside the courtroom while the SWRCB prepared its documentation and commenced the LADWP permit hearing.⁸⁰⁵ And, while the Court or the SWRCB could have squelched the agreement, it is noteworthy that the parties were not ordered to negotiate a resolution. Rather, it was the uncertainty, the knowledge that the status quo was no longer possible (status quo effect), with an uncertain future (veil effect), that pushed the LADWP to the negotiating table.

D. Flexible Remedy—A Necessity for Ecosystem Restoration

Ecosystems are complex systems and restoring an ecosystem requires working across large landscapes in the face of scientific uncertainty.⁸⁰⁶ Given that ecosystem science and management of complex systems is uncertain, a degree of policy flexibility is required as scenarios are tested and accepted or rejected.⁸⁰⁷ Decisions must be amenable to modification as “new scientific knowledge reveals that the previously established plan was misguided, is deficient, or needs to be adjusted.”⁸⁰⁸

Ecosystem restoration presents “metaproblems” intermingling both human and natural systems and reaches across a multitude of stakeholders, some of whom, like the Mono Lake Committee, have a vested interest in healthy ecosystems.⁸⁰⁹ These stakeholders are highly diverse and fragmented.⁸¹⁰ Yet, “no one organization, even in the case of the least complex . . . ecosystems, can solve the problems of ecosystem management unilaterally.”⁸¹¹ Nor is there necessarily equal political power among stakeholders or agreement about the need for or nature of restoration.⁸¹² Thus, it appears that successful ecosystem restoration requires collaborative,

⁸⁰⁴ See *supra* note 691 and accompanying text. This was a complex and flexible remedy befitting of the complex ecosystem surrounding Mono Lake.

⁸⁰⁵ See *supra* notes 708–10 and accompanying text.

⁸⁰⁶ See *supra* note 634 and accompanying text.

⁸⁰⁷ See *supra* note 634 and accompanying text.

⁸⁰⁸ Doyle, *supra* note 634, at xiii.

⁸⁰⁹ Frances Westley, *Governing Design: The Management of Social Systems and Ecosystems Management*, in *BARRIERS AND BRIDGES: TO THE RENEWAL OF ECOSYSTEMS AND INSTITUTIONS* 391, 406–07 (Lance Gunderson, C.S. Holling & Stephen S. Light eds., 1995).

⁸¹⁰ *Id.* at 407.

⁸¹¹ *Id.*

⁸¹² See *id.*

flexible decision-making, in a process designed to give meaningful voice to divergent stakeholders, that has public support, and provides a mechanism for resolving disputes amongst stakeholders.⁸¹³

As ecosystems go, one might argue that Mono Lake restoration was far less complex than restoring the Everglades or the Great Lakes ecosystems. But, even in Mono Lake, it was recognized that ecosystem restoration required managing the interaction of multiple systems and identifying appropriate water levels for trout and lake levels for brine shrimp and protected nesting areas.⁸¹⁴ Added to this complexity was the need to find a replacement water supply or to reduce water needs in Los Angeles.⁸¹⁵ And, on top of this complexity, the existing California water appropriation structure, as managed by the SWRCB, did not recognize the need for restoration, nor was its decision-making process designed to address restoration challenges or incorporate collaborative decision-making.⁸¹⁶

And, although the Mono Lake Committee went to court to rectify an environmental wrong, it unwittingly used the flexible remedy of destabilizing litigation to help restore the Mono Lake ecosystem.⁸¹⁷ It used the court not only to give voice to its claimed wrong, but also to establish standing for its voice on behalf of the ecosystem and to increase its political power—a necessity for negotiation of the flexible remedy.⁸¹⁸ The Mono Lake Committee, together with the City of Los Angeles and the LADWP, used the time and uncertainty created by the court's decision to explore alternate water sources and restoration scenarios while the court provided the oversight necessary to keep the parties at the table.⁸¹⁹ Thus, Mono Lake serves as an illustration of how an SMO might strategically use the flexible remedy of destabilizing litigation as a political resource to promote the structural change necessary for successful ecosystem restoration.

CONCLUSION

As this case study of the Mono Lake restoration indicates, the use of litigation to protect ecosystems can be an important and effective tool. To better understand the effectiveness of that tool, however, requires a

⁸¹³ See *id.* at 406; Doyle, *supra* note 634, at 294–98.

⁸¹⁴ See CAL. STATE WATER RES. CONTROL BD., *supra* note 663, at S-1, S-11.

⁸¹⁵ See *supra* notes 444–46 and accompanying text.

⁸¹⁶ See *supra* notes 150–52 and accompanying text.

⁸¹⁷ Karkkainen, *supra* note 28, at 815.

⁸¹⁸ See *supra* notes 493–96 and accompanying text.

⁸¹⁹ See *supra* notes 477–80 and accompanying text.

broader understanding of the interrelationship between Sabel and Simon's destabilization theory and social movement theory in practice.

Recently, a colleague, an environmental litigator, bemoaned the fact that the day of "environmental change litigation" is gone, a view shared in part by Professor Tarlock in his much discussed article *The Future of Environmental "Rule of Law" Litigation*.⁸²⁰ Indeed, Tarlock suggests that the role of litigation in improving environmental performance is limited because "environmental lawyers may have thought Unger [and destabilization] but they have litigated H.L.A. Hart,"⁸²¹ and because environmental law is now a mature area of law that relies heavily on collaborative decision-making which is ill-suited to a rule-of-law approach to litigation.⁸²²

But, this argument assumes that we must continue to operate within present legal constructs. And, while Tarlock and others recognize that the complex ecosystem challenges we face call for new collaborative approaches to environmental decision-making based on a claim of right to shared environmental resources, and operating within complex human and natural systems, they do not see a role for law or litigation in fostering change.⁸²³ They have, as Scheingold suggests, approached the law from a conventional perspective and not as reform lawyers.⁸²⁴ But, the lessons from Mono Lake tell another story. They suggest that the strategic use of litigation by SMOs and reform lawyers can provide the tools and framework necessary to protect ecosystems and the services they provide to human well-being.

⁸²⁰ See A. Dan Tarlock, *The Future of "Rule of Law" Litigation and There Is One*, 19 PACE ENVTL. L. REV. 611 (2002); Tarlock (2000), *supra* note 161, at 237.

⁸²¹ Tarlock (2000), *supra* note 161, at 252. Tarlock describes how Unger advocated a non-formal, destabilizing approach, but because "environmentalism was perceived as a legitimate and non-radical . . . goal," environmental lawyers used the more formal method advocated by H.L.A. Hart. *Id.*

⁸²² See *id.* at 255–56.

⁸²³ See *id.* at 242.

⁸²⁴ See *supra* notes 251–53 and accompanying text.