Private Enforcement of the Public Trust: Protecting Fish Passage in California
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I. Introduction

At first glance, California's water history often seems a relentless pursuit of more and more water, with no consideration of environmental impacts. The definitive history of California water calls the state "the nation's preeminent water seeker;"[1] others describe this history as "the story of a state inventing itself with water."[2] Under this view, "exploiting rivers was inherently desirable"[3] and the state's governing apparatus (legislature, courts, and administrative agencies) sought to ensure maximum use of the state's water.[4] The California Constitution announces, "the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable."[5] This history, predictably, produces a modern water system that has decimated California's fish populations. Eighty percent of California's native freshwater fish are likely to go extinct in the next 100 years.[6] Of California's 32 native salmon, trout,

[1] NORRIS HUNDLEY JR., THE GREAT THIRST: CALIFORNIANS AND WATER: A HISTORY, at xviii (2001).
[2] WILLIAM L. KAHRL, WATER AND POWER 1 (1982).
[3] Dave Owen, *Law, Environmental Dynamism, Reliability: The Rise and Fall of CALFED*, 37 ENVTL. L. 1145, 1193 (2007).
[4] *See* Harrison Dunning, *California Instream Flow Protection Law: Then and Now*, 36 MCGEORGE L. REV. 363, 364-69 (2005).
[5] CAL. CONST. art. X, § 2.
[6] Rebecca M. Quiñones & Peter B. Moyle, *California's Freshwater Fishes: Status and Management*, 2015 FISHMED FISHES IN MEDITERRANEAN ENV'T 1 (2015).

and whitefish species, 45% will likely go extinct in the next 50 years and 74% will likely disappear in the next 100 years.[7]

But there is a countervailing, untold history of California water development: from the very beginning of statehood, the California legislature has attempted to protect fish populations through increasingly precise and stringent laws.[8] These legislative efforts, if enforced and funded, would make great strides toward ensuring a sustainable future for California fish, but the state's halfhearted administration of these laws has frustrated their purpose.[9] California is hardly unique in this regard. Other states with salmon populations have a similar history – "Washington's first legislature passed a law in 1890 requiring fish passage facilities around dams 'wherever food fish are wont to ascend,'"[10] which was amended in 1893.[11] "The tenor of this legislation continues" in

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[7] Peter B. Moyle, Robert A. Lusardi, Patrick J. Samuel & Jacob V. E. Katz, *State of the Salmonids: Status of California's Emblematic Fishes 2017*, UC DAVIS CTR. FOR WATERSHED SCI. at 4 (Aug. 2017), https://watershed.ucdavis.edu/files/content/news/SOS%20II_Final.pdf.

[8] People v. Weaver, 147 Cal. App. 3d Supp. 23, 31 (1983) (collecting citations and noting that "it appears over the years, the Legislature, concerned with the decline in the fish population, enacted a number of laws [to address the issue]"); *see also* CALIFORNIA FISH COMMISSIONERS, FOURTEENTH BIENNIAL REPORT OF THE STATE BOARD OF FISH COMMISSIONERS OF THE STATE OF CALIFORNIA FOR THE YEARS 1895-1896 100 (1896) ("As early as 1854, the Legislature passed an Act for the preservation of fish (salmon), declaring any weir, dam, or obstruction in any bay, strait, river, stream, creek, or slough of this State to be a nuisance. From that time down to the present, the Legislature has passed numerous Acts all tending to the preservation of fish within the State.").

[9] *See generally* Karrigan S. Bork, Joseph F. Krovoza, Jacob V. Katz & Peter B. Moyle, *The Rebirth of California Fish & Game Code Section 5937: Water for Fish*, 45 UC DAVIS L. REV. 809 (2012).

[10] BRUCE BROWN, MOUNTAIN IN THE CLOUDS: A SEARCH FOR THE WILD SALMON 64 (1982).

[11] An act to protect the food fishes of the State of Washington, and amending section eight (8) of the law approved February 11, 1890, entitled "An act to protect salmon and other food fishes in the waters of Washington, and upon all waters of which this state has joint jurisdiction and concurrent, 1893 Wash. Sess. Laws 270 (Establishing that constructing, owning, or maintaining a dam or other obstruction to fish passage without providing fish passage was a misdemeanor.).

Washington statutes passed throughout the past century.[12] Similarly, in the original "Act to establish the Territorial Government of Oregon," lawmakers required "that the rivers and streams of water in said Territory of Oregon in which salmon are found, or to which they resort, shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams."[13] Similar legislation followed and is still in effect in Oregon.[14] On the East Coast of the United States, state legislatures faced with the pending extinction of the Atlantic Salmon "had passed laws to protect the salmon as the nineteenth century unfolded, but without the desired effect. . . . [T]here were 433 laws on the Main books pertaining to fisheries and their preservation at the time that salmon virtually disappeared from the state's rivers."[15] This untold history is not unique to California.

Understanding this history is important, both for protection of fishery resources and because it should inform Constitutional takings decisions in cases related to fish protection across the United States. But absent increased enforcement, this legislation will fail and the legislature's Sisyphean efforts to save the fish of California will come to nothing.

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[12] Dep't of Fisheries v. Chelan Cty. Pub. Util. Dist. No. 1, 18 Wash. App. 874, 878, *rev'd sub nom.* State Dep't of Fisheries v. Pub. Util. Dist. No. 1 of Chelan Cty., 91 Wash. 2d 378, 588 (1979) (citing "Laws of 1949, ch. 112, § 47 p. 272-73, and Laws of 1955, ch. 12 § 75.20.060, p. 42 (RCW 75.20.060, which is the statute in its present form)."); *see also* Wash. Stat. § 5172 (1910); Wash. Stat. § 5194 (1910); and Wash. Stat. § 5739 (1922).

[13] To establish the territorial government of Oregon., Chapter 177, 30 Congress, Public Law 30-177. 9 Stat. 323 (1848).

[14] *See, e.g.*, 1898 Or. Laws Spec. Sess. 41; OR. REV. STAT. ANN. § 509 (West 2019) (establishing "the policy of the State of Oregon to provide for upstream and downstream passage for native migratory fish" and creating a program to enforce that policy)(versions of the current law have been on the books since at least 1955)). *See* 1955 Or. Laws; 1963 Or. Laws; 1965 Or. Laws; 2001 Or. Laws.

[15] BROWN, *supra* note 10, at 65.

Increased enforcement is possible, and the people of California need not rely on the state to do the job. California case law permits private individuals and interest groups to sue to enforce state laws that protect the public trust, and courts and the water board have held that some California law is a legislative expression of the public trust.[16] These decisions have created a unique private right of action that enables private attorney generals to sue to enforce state laws that otherwise lack citizen suit provisions,[17] essentially borrowing the broad standing allowed under the public trust doctrine to create a free-floating citizen suit provision. In theory, this expanded standing would allow private parties to aggressively enforce California's fish protection laws. This essay advocates increased citizen enforcement of California environmental laws through private litigation in California, with an emphasis on Fish and Game Code Section 5948, a statute protecting fish passage.

California has long led the development of the doctrine in the United States, becoming the first state to allow citizen suits to protect the public trust in 1971.[18] A number of other states have followed suit, resulting in a significant expansion in environmental standing. Currently, California stands as the only state permitting enforcement of statues without citizen suit provisions under the public trust doctrine, and law commentators have largely ignored this phenomenon. Broader adoption of this method of standing analysis could greatly expand the public's ability to enforce

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[16] *Id.*
[17] *Id.*
[18] Marks v. Whitney, 491 P.2d 374, 261-62 (Cal. 1971).

environmental law in the face of unwilling state administrations across the United States and beyond.[19]

This essay begins by explaining the vital role of citizen enforcement of state law in environmental protection, then tells the story of California's longstanding efforts at protecting fish passage, that is, the ability of anadromous fish to pass up and down stream as necessary to complete their life cycle. The first fish protection statute in California addressed fish passage, and fish passage laws in California exemplify the legislature's seemingly quixotic quest to push the state's administrative apparatus into enforcing the law over the last 167 years. The essay next analyzes the language of 5948 and places the statute in the broader context of modern fish passage law in California. The essay then explores the method and importance of private enforcement of the public trust within the context of existing statutes and advocates for broader adoption of this approach to environmental protection. The essay concludes by explaining how improved enforcement of Section 5948 and other fish and game code sections can save California fish and fulfill the legislature's historic promises of fish protection.

I. Why Private Enforcement of State Law?

A California appellate court's 1989 recognition of private standing to enforce California Fish and Game Code Section 5937,[20] which requires that dam owners release

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[19] Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 UC DAVIS L. REV. 741, 745 (2013) (noting the "development of the public trust doctrine in ten diverse countries on four continents [and noting that, i]n these countries, the doctrine has become equated with environmental protection and is frequently entrenched in constitutional and statutory provisions."); Rhett Larson, *The New Right in Water*, 70 WASH. & LEE L. REV. 2181, 2267 (2013) (suggesting that "the participation rights doctrine is being integrated into international law via the public trust doctrine" and arguing that "this link has helped move environmental protection policies into the forefront of political debates in some countries").

enough water to keep fish downstream in good condition, invigorated a series of successful lawsuits and administrative actions.[21] Although the law had been on the books since 1915, California generally failed or actively refused to enforce the statute until private litigation, empowered by the appellate court's decision, forced the state's hand. The first decision, applying the statute to fish populations near Mono Lake, restored flows to four streams in an amount sufficient to support the "pre-diversion carrying capacity" of the streams.[22] A second suit followed, against the U.S. Bureau of Reclamation, which rewatered 60 miles of dry riverbed, the largest river restoration effort yet attempted.[23] Other private litigation followed,[24] and the California State Water Resource Control Board began enforcing the law in a limited way.[25] Private standing to enforce 5937 revolutionized the way dam owners address downstream flows and has significantly improved conditions for native fish.[26]

In spite of this success story, California codes address many other environmental issues where the state has failed to enforce the law. Prominent examples include fish passage over dams,[27] removal of barriers to fish migration,[28] minimum instream flows,[29]

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[20] Cal. Trout v. State Water Res. Control Bd., 207 Cal. App. 3d 585, 626, 629-31 (1989) (noting the water board argument that "Section 5937 is a legislative expression of the public trust protecting fish as trust resources when found below dams" and finding that California Trout had standing to enforce it).

[21] *See generally* Bork et al., *supra* note 9.

[22] Cal. Trout v. State Water Res. Control Bd., 266 Cal. Rptr. 788, 788 (Ct. App. 1990).

[23] Nat. Res. Def. Council v. Patterson, 333 F. Supp. 2d 906, 910 (E.D. Cal. 2004).

[24] *E.g.*, Ruling on Submitted Motion for Reconsideration at 4, Reynolds v. City of Calistoga, No. 26-46826 (Cal. Super. Ct. 2010).

[25] *See, e.g.*, Cal. State Water Res. Control Bd., No. WR 90-16, 1990 WL 263415, at *1 (Cal. State Water Res. Bd. 1990). *See generally* Bork et al., *supra* note 9, at 874.

[26] Michael P. Marchetti & Peter B. Moyle, *Effects of Flow Regime on Fish Assemblages in a Regulated California Stream*, 11 ECOLOGICAL APPLICATIONS 530, 538 (2001).

[27] CAL. FISH & GAME CODE § 5931 (West 2019).

lake or streambed alteration permit requirements,[30] and a state-level Wild and Scenic Rivers Act.[31] Several factors suggest a trend toward (or at least a need for) increased private enforcement of these laws.

First, these statutes apply broadly, to state, private, and some federal actors, but they remain un- or under-enforced by the state and underutilized by private litigants looking to improve river conditions for fish. Even in California, a state that prides itself on environmental protection, many environmental problems face an enforcement vacuum. As other commentators have noted, the federal government has deprioritized enforcement of environmental laws,[32] and much of the enforcement burden has fallen to states and private parties.[33] In light of this change, private enforcement of state law will play likely an increasingly important role in protecting wildlife.[34]

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[28] CAL. FISH & GAME CODE §§ 5948, 5901 (West 2019).

[29] *See, e.g.*, CAL. PUB. RES. CODE §§10000-10005 (West 2019); *see also* CAL. WATER CODE § 1259.4 (West 2019).

[30] CAL. FISH & GAME CODE §§ 1600- <other section #s> (West 2019).

[31] CAL. PUB. RES. CODE §§ 5093.54-5093.545 (West 2019).

[32] *See, e.g.*, Timothy Cama & Miranda Green, *EPA Polluter Enforcement Hit Historic Lows in 2018*, THE HILL (Feb. 8, 2019), https://thehill.com/policy/energy-environment/429184-epa-polluter-enforcement-hit-historic-lows-in-2018.

[33] Associated Press, *EPA Letting States Enforce Environmental Laws*, COURTHOUSE NEWS (May 20, 2019), https://www.courthousenews.com/epa-letting-states-enforce-environmental-laws/. *See* Jacques Leslie, *In the Face of a Trump Environmental Rollback, California Stands in Defiance*, E360 (Feb. 21, 2017), https://e360.yale.edu/features/in-the-face-of-trump-environmental-rollback-california-stands-in-defiance.

[34] Kirsten L. Nathanson, David Chung & Daniel Leff, *Practitioner Insights: Citizen Suit Enforcement—What to Expect and How to Prepare*, BLOOMBERG BNA: DAILY ENV'T REPORT, (Mar. 15, 2017), https://www.crowell.com/files/20170315-Practitioner-Insights-Citizen-Suit-Enforcement-What-to-Expect-and-How-to-Prepare-Nathanson-Chung-Leff.pdf.

Second, a series of takings cases originating in the federal circuit also suggest an increasing role for state law litigation.[35] In *Tulare Lake*, the federal government attempted to raise the public trust doctrine as a defense in an Endangered Species Act takings claim from a water right holder, arguing that the public trust constituted a background principle of state law under *Lucas*.[36] The federal government argued if it could show that the restrictions it enforced under the Endangered Species Act were the same as those required under the public trust doctrine, the court could not find that the regulation worked a taking of the water right, but rather that the water right holder never actually had a right to the water he or she had lost. This appears to be in keeping with the California Supreme Court's holding in *National Audubon*, where it noted "the continuing power of the state as administrator of the public trust, a power which extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust" and noted that it had always "rejected the claim that establishment of the public trust constituted a taking of property for which compensation was required."[37] But the U.S. Court of Federal Claims "determined that since the state of California failed to invoke available state rules imposing limits on water use … the

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[35] Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313 (2001); Casitas Mun. Water Dist. v. United States, 102 Fed. Cl. 443, 448-49 (2011), *aff'd*, 708 F.3d 1340 (Fed. Cir. 2013).

[36] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992) (holding that, even faced with government action that takes all value from a property, the action is not an unconstitutional taking if the it merely enforces limitations that already "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."). Thus "it [is] open to the State at any point to make the implication of those background principles of nuisance and property law explicit," *id.* at 1030. Laws or regulations that just bring background principles into the explicit foreground do not constitute a taking, *id.*(?)

[37] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 532, 521 (Cal. 1983).

federal government could not rely on them to defend its species regulation."[38] Similarly, in *Casitas*, the U.S. Court of Federal Claims rejected a public trust based argument against finding an unconstitutional taking of a water right when the litigation invoked federal law, not state law, to protect stream flow and fish passage.[39] The Court held that, because the federal government had not shown that their impositions on the plaintiff's water right were the same as what would have resulted from application of the background principles of state law, the court could not find that those laws provided a shield against a takings claim asserted against the federal government.[40] Although these cases may not correctly apply takings law,[41] they nevertheless make a strong case for resurgence of state-level litigation as a vital strategy for environmental protection.[42] The same defense, raised by the state to defend a state regulatory action, would likely succeed.

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[38] Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 329 (2005).

[39] *See* John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 UC DAVIS L. REV. 931 (2012).

[40] Casitas Mun. Water Dist. v. United States, 102 Fed. Cl. 443, 461 (2011) (holding that, because the court could not conclude "the operating restrictions imposed on plaintiff under the [ESA} duplicate the result that would have been achieved under state law," the "defense based on the public trust and reasonable use doctrines therefore must fail.").

[41] *See, e.g.*, Timothy M. Mulvaney, *Foreground Principles*, 20 GEO. MASON L. REV. 837, 860 (2013) (calling these decisions "a rather strained judicial construction of a common law principle to support a regulatory takings challenge"); A. Dan Tarlock, *Takings, Water Rights, and Climate Change*, 36 VT. L. REV. 731, 755 (2012) (arguing that the Court of Federal Claims "set an impossible standard to prove a trust violation").

[42] Justin Anthony Brown, *Uncertainty Below: A Deeper Look Into California's Groundwater Law*, 39 ENVIRONS ENVTL. L. & POL'Y J. 45, 90 (2016) (noting that "federal courts are - in the context of water rights takings claims - pro-plaintiff, as compared to California state courts"); Elise O'Dea, *Reviving California's Public Trust Doctrine and Taking a Proactive Approach to Water Management, Just in Time for Climate Change*, 41 Ecology L.Q. 435, 440 (2014) (arguing "case law does not provide definitive guidance as to when the federal government can validly assert the public trust defense in a takings case where the state has not acted").

In support of this trend toward private enforcement, this essay examines an under-enforced section of California Fish and Game Code, Section 5948, which protects fish passage:

> No person shall cause or having caused, permit to exist any log jam or debris accumulation or any other artificial barrier, except a dam for the storage or diversion of water, public bridges and approaches thereto, groins, jetties, seawalls, breakwaters, bulkheads, wharves and piers permitted by law, and debris from mining operations, in any stream in this State, which will prevent the passing of fish up and down stream or which is deleterious to fish as determined by the commission, subject to review by the courts.[43]

Although large dams prevent migratory fish from accessing most of their historical habitat in the Central Valley region of California, fish in many parts of the state face a wide array of smaller migration barriers, including log jams, road crossings, and impassable culverts, and Section 5948 targets these barriers.[44] A survey of barriers on California's coastal rivers and streams found that impassable road crossings created the majority of total barriers to fish migration, at 55%, followed by dams (35%) and logjams

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[43] CAL. FISH & GAME CODE § 5948 (West 2019). The legislature passed an earlier version of Section 5948 in 1951, focusing only on seven northern California counties. 1951 Cal. Stat. ch. 527. The text reads:

> "No person shall cause or permit to exist any log jam or debris accumulation or any other artificial barrier, except a dam for the storage or diversion of water, public bridges and approaches thereto, groins, jetties, seawalls, breakwaters, bulkheads, wharves and piers permitted by law, and debris from mining operations, in any stream in any district or part of a district in Del Norte, Siskiyou, Trinity, Humboldt, Mendocino, Sonoma, and Marin Counties, which will prevent the passing of fish up and down stream or which is deleterious to fish as determined by the commission, subject to review by the courts.

The legislature modified this text in 1957, expanding its coverage by removing the county-restriction, and the section has not changed since.

[44] STATE COASTAL CONSERVANCY, INVENTORY OF BARRIERS TO FISH PASSAGE IN CALIFORNIA'S COASTAL WATERSHEDS app. at 1 (2004); *Id.* at 1. The State Coastal Conservancy is a state agency dedicated to protection of the California's coastal resources. *Id.*

(5%).[45] These numbers appear to be roughly in line with known barriers throughout the state.[46] The state has been haphazardly addressing these barriers, generally through direct actions to remediate the barriers paid for by the state, but most barriers remain and still bar fish from crucial breeding habitat. Robust enforcement of Section 5948 would eliminate many of these barriers. Examining the history of California fish passage law and the potential for private enforcement of the statute elucidates the potential role that private enforcement of public trust law can play.

II. Historical Efforts to Protect Fish Passage in California

A. Legislation

The California legislature has consistently supported a robust suite of laws protecting fish passage, passing significant fish passage legislation in nearly every decade since California became a state in 1850.[47] When California's first legislature adopted English common law as the default in California,[48] the legislature brought into California law the common law bar on obstructions to fish passage.[49] California explicitly made

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[45] *Id*. at 17.

[46] Bob Pagliuco, *Fish Passage in California A Species Perspective*, PRESENTICA (Jan. 5, 2017), http://www.presentica.com/ppt-presentation/fish-passage-in-california-a-species-perspective. *See Statewide Barrier Inventory*, CAL. FISH PASSAGE F., https://www.cafishpassageforum.org/statewide-barrier-inventory (last visited Aug. 3, 2019).

[47] For the admission of the State of California into the Union., Chapter 50, 31 Congress, Public Law 31-50. 9 Stat. 452 (1850).

[48] 1850 Cal. Stat. 219 ("Common Law of England shall be the rule of decision in all the Courts of this State.").

[49] *See* Weld v. Hornby (1806) 103 Eng. Rep. 75, 76 (reflecting longstanding protection for salmon migration in England); Commonwealth v. Ruggles, 10 Mass. 391 (1813) (discussing English common law regarding salmon passage).

impeding salmon migration a crime in 1852,[50] expanded the law's coverage in 1854,[51] and then dramatically expanded it again in 1870,[52] creating a Fish Commission to implement the law and to allow some obstructions if the obstructions had a fishway permitting fish to swim around the obstruction.[53]

In 1872, California's first Penal Code integrated and expanded the fishway requirement as section 637,[54] with continued enforcement by the Commission.[55] The

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[50] An Act to Prohibit Erection of Weirs, or Other Obstructions to the Run of Salmon, 1852 Cal. Comp. Laws 62. Section 2 stated:

> "Any person who may erect, or in any manner directly or indirectly, aid in the erection of any weir or other obstruction aforesaid, to the passage of salmon, an any river of this state, shall be deemed guilty of a misdemeanor, and be fined by any court of competent jurisdiction, in a sum not less than one hundred dollars, nor exceeding one thousand dollars, and shall immediately destroy the impediment to the running of salmon aforesaid; in default of which the fine imposed by this act shall be doubled."

[51] *See* An Act to Amend an Act entitled 'Act to prohibit erection of Weirs, or other obstructions to the run of Salmon,' 70 Cal. Comp. Laws, § 1 (1854).

[52] An Act to Provide for the Restoration and Preservation of Fish in the Waters of this State, 1870 Cal. Stat. 663 [hereafter 1870 Fish Act]. Section 3 reads in full:

> It shall be the duty of the Commissioners to require, as far as practicable, all persons, firms and corporations who have erected mill-dams, water weirs or other obstructions on rivers or streams within the waters of this State, within six months after the passage of this Act, to construct and keep in repair fish ways or fish ladders at such mill-dams, water weirs or obstructions, so that, at all seasons of the year, fish may ascend above such dam, weir or obstruction to deposit their spawn. Any person, firm or corporation, owning such mill-dam or obstruction, who shall fail or refuse to construct or keep in good repair such fish way or fish ladder, after having been notified and required by the Commission to do so, shall be deemed guilty of a misdemeanor.

This act protected all fish and covered all manner of dams, weirs, and obstructions.

[53] 1870 Fish Act § 3; The Fish Commission became the Fish and Game Commission in 1909, 1909 Cal. Stat. § 344; JAMES HENRY DEERING, THE POLITICAL CODE OF THE STATE OF CALIFORNIA: ADOPTED MARCH 12, 1872, WITH AMENDMENTS UP TO AND INCLUDING THOSE OF THE THIRTY-EIGHTH SESSION OF THE LEGISLATURE 86 (1909). This essay will refer to both commissions as the "Fish and Game Commission" or "Commission," regardless of the time period.

[54] CAL. PENAL CODE § 637 (Gelwick 1871):

California legislature passed another fish passage law in 1880,[56] requiring the Commission to order the construction of fish passage at all dams then lacking fish passage.[57]

The legislature again modified Section 637 in 1903,[58] generally codifying the requirements in the 1880 Act.[59] In 1915, the California Legislature modified Section 637 to require minimum instream flows, building on a history of flow protection directly tied to the fish passage efforts.[60] The legislature softened the fish passage requirements somewhat in 1917, by allowing construction of a hatchery instead of a fishway on some dams, if the Commission found the dam too tall for a functional fishway,[61] but

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> Every owner of a dam or other obstruction in the waters of this state, who, after being requested by the Fish Commissioners so to do, fails to construct and keep in repair sufficient fishways or ladders on such dam or obstruction, is guilty of a misdemeanor.

[55] "It is the duty of the Fish Commissioners . . . to furnish plans for and direct the construction and maintenance of fish ladders and ways upon dams and obstructions." *Id.* at § 642 (Whitney 1881).

[56] An act to provide for the construction, maintenance, and regulation of fish ways in streams naturally frequented by salmon, shad, and other migratory fish. 1880 Cal. Stat. 121. Violations were a misdemeanor. *Id.*

[57] 1880 Cal. Stat. 121.

[58] An Act to Amend Sections 628, 629, 632, 635, and 637 of the Penal Code of the State of California, all Relating to the Preservation and Protection of Fish, and to Repeal all Acts and Parts of Acts in Conflict with this Act, 1903 Cal. Stat. 23 (1903).

[59] *See additional amendments in 1891 and 1901* an Act to amend section six hundred and thirty-seven of the Penal Code of the State of California, relating to the construction and repairing of fish ladders on dams and other obstructions on the running waters of the State. 1891 Cal. Stat. 93; 1901 Cal. Stat. 46.

[60] An Act to amend section six hundred thirty-seven of the Penal Code, providing for the construction and maintenance of fishways over or around dams and artificial obstructions, 1915 Cal. Stat. 820. *See* STATE OF CAL. FISH & GAME COMM'N, TWENTY-THIRD BIENNIAL REPORT FOR THE YEARS 1912-1914, at 23, 29, 30-33 (1914) (noting that effective fish passage required instream flow protection); *see generally* Karrigan Bork, Joseph Krovoza, Jacob Katz & Peter Moyle, *The Rebirth of California Fish & Game Code Section 5937*: *Water for Fish*, 45 UC DAVIS L. REV. 809 (2012).

[61] An Act to amend section six hundred thirty-seven of the Penal Code, relating to fishways, 1917 Cal. Stat. 1524.

maintained a passage requirement in most situations.

California's legislature moved most of the fish and game laws out of the penal code in 1933, creating a new fish and game code and reaffirming the legislative commitment to fish passage and fish protection generally.[62] The legislative efforts continued in the 1940s, with new laws requiring the water board to notify the Commission about applications to build new dams[63] and clarifying that fish passage requirements for dams applied to dams permitted by the water board.[64]

As noted, in 1951 the legislature passed F&GC Section 482.5, the first version of what later became this essay's statute of focus, Section 5948,[65] motivated in part by a dramatic increase in logging in Northern California, which resulted in massive log jams that completely blocked the movement of trout, salmon, and steelhead up or downstream.[66] The California Department of Fish and Wildlife (CDFW)[67] undertook

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[62] 1933 Cal. Stat. 394; CAL. PENAL CODE § 637 (became CAL. FISH & GAME CODE § 525 (Deerings 1954)); 1933 Cal. Stat. 443 (placing fishway requirement at section 525 of new Fish & Game Code). The legislature recodified the Fish and Game Code 1957. CAL. DIV. OF FISH & GAME, FORTY-FIFTH BIENNIAL REPORT FOR THE YEARS 1956-1958, at 10 (1958).

[63] CAL. WATER CODE § 6500 (2010).

[64] CAL. WATER CODE § 6501 (2010):

[65] An Act to add Section 482.5 to the Fish and Game Code, relating to obstructions in streams, 1951 Cal. Stat. 1674.

[66] CAL. DEPT. OF FISH & GAME, FORTY-THIRD BIENNIAL REPORT FOR THE YEARS 1952-1954, at 30 (1954) (noting that the majority of log jam removal focused on "the north-coastal area where log jams are generally conceived as a by-product of logging activities"). From 1948 to 1955, timber harvest in California's North Coast (Sonoma, Mendocino, Humboldt and Del Norte counties, all explicitly targeted by Section 482.5), more than doubled, from 1.25 billion board feet to 2.8 billion board feet. *See* Richard B Standiford, *Trends in Harvest Levels and Stumpage Prices in Coastal California*, UC ANR (Oct. 20, 2012), https://ucanr.edu/blogs/forestrymgmt/index.cfm?tagname=Douglas-fir%20prices.

[67] The 1951 Charles Brown Fish and Game Reorganization Act created the California Department of Fish & Game. 1951 Cal. Stat. 1613; CAL. DEPT. OF FISH & GAME, FORTY-SECOND BIENNIAL REPORT FOR THE YEARS 1950-1952, at 11 (1952). "The Commission sets policy for the Department, while the Department is the lead state agency charged with implementing, safeguarding and regulating the uses of wildlife." *Strategic Plan*, STATE OF CAL. FISH & GAME

enforcement of the new law almost immediately, noting arrests and successful prosecutions as early as 1954-1956.[68]

The legislature placed additional responsibilities in CDFW in 1953,[69] reiterating pre-existing flow requirements in an effort to ensure their enforcement in particularly sensitive areas. These flow requirements both ensured fish passage and that fish would have adequate water to survive. Perhaps recognizing the limited power of CDFW, the legislature also moved significant conservation responsibilities on to the Water Board in the 1950s-1960s. In 1957, the legislature required the water board to recognize preservation of fish life as a beneficial use of water.[70] In 1959, the legislature required the Water Board to protect instream water for "the preservation and enhancement of fish and wildlife resources,"[71] "whenever it is in the public interest."[72] In 1961, the legislature declared the protection of fish life to be state policy in all state water projects.[73]

COMM'N 12 (1998), http://www.fgc.ca.gov/strategic_plan/overview.pdf. The California Department of Fish and Game became the California Department of Fish and Wildlife effective Jan. 1, 2013. 2012 Cal. Legis. Serv. Ch. 559 (A.B. 2402). For clarity, this essay references the department as CDFW or the Department, regardless of the time period.

[68] CAL. DEPT. OF FISH & GAME, FORTY-FOURTH BIENNIAL REPORT FOR THE YEARS 1954-1956, at 99 (1956) ("In certain critical situations arrests were made for violations of 482.5 and successful prosecution followed.").

[69] 1953 Cal. Stat. 3388; CAL. FISH & GAME CODE § 5946 (2019):

> No permit or license to appropriate water in District 4 1/2 shall be issued by the State Water Rights Board after September 9, 1953, unless conditioned upon full compliance with Section 5937. Plans and specifications for any such dam shall not be approved by the Department of Water Resources unless adequate provision is made for full compliance with section 5937.

[70] 1957 Cal. Stat. 3699.

[71] 1959 Cal. Stat. 4742.

[72] *Id.*

[73] 1961 Cal. Stat. 2274.

Concerned by a lack of progress, in 1969, the legislature explicitly required the water board to consider leaving water unappropriated as required for instream beneficial uses.[74]

The legislature also addressed CDFW directly in 1961, requiring a new permitting process for any diversions, streambed alterations, and deposition of material that might substantially adversely affect an existing fish or wildlife resource.[75] The same legislation declared "[t]he protection and conservation of the fish and wildlife resources of this State . . . to be of utmost public interest."[76]

The California legislature continued its effort into the 1970s. In 1971, Republican Governor Ronald Reagan signed the California Wild and Scenic Rivers Act into law,[77] making it the "policy of the State of California that certain rivers which possess extraordinary scenic, recreational, fishery, or wildlife values shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state." This prevents new passage obstructions on a host of important California streams and explicitly recognizes and protects fisheries on many of those streams.[78] The legislature has periodically added new streams and rivers to the list for protection, including, for example, McCloud River in 1989[79] and Mill and Deer Creeks in 1995.[80]

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[74] 1969 Cal. Stat. 1048.
[75] 1961 Cal. Stat. 2532.
[76] 1961 Cal. Stat. 2532.
[77] 1972 Cal. Stat. 2510.
[78] CAL. PUB. RES. CODE §§ 5093.50–.70 (West 2019).
[79] 1989 Cal. Stat. 1224.
[80] 1995 Cal. Stat. 661.

In 1972, continuing the theme of protecting flows in support of fish passage, the legislature required CDFW to recommend instream flows for preservation and enhancement of fish and wildlife to the water board when it was considering any new appropriation permit.[81] By 1974, even the California Attorney General noted "the people of California acting through their Legislature have expressed very strong concern over the future existence of California's fishery resources."[82]

In 1982, the Legislature required CDFW to move beyond recommending limits to new appropriations and instead "identify and list those streams and watercourses throughout the state for which minimum flow levels need to be established in order to assure the continued viability of stream–related fish and wildlife resources."[83] Under the Streamflow Protection Standards, the department is to propose streamflow requirements for those streams for adoption by the California Water Board.[84] The initial legislation gave CDFW two years to prepare the list of target streams; unhappy with the pace, the legislature increased pressure on CDFW and set a target for initiating minimum flow studies in 1985.[85] Also in 1985, the legislature required the water board to consider any proposed streamflow requirements when making new water appropriations.[86] CDFW has largely failed to comply with these requirements,[87] although this is, in part, due to a lack

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[81] 1972 Cal. Stat. 671.
[82] 57 Ops. Cal. Att'y. Gen. 577, 582 (1974),
[83] 1982 Cal. Stat. 5688.
[84] *Id.* at 5689.
[85] 1985 Cal. Stat. 4327 ("It is the intent of the Legislature that the department develop a program that will initiate studies on at least 10 streams or watercourses in each fiscal year.").
[86] *Id.*
[87] As with many of these statutes, the state failed to comply with the statutory requirements and developed neither the list of target streams nor the instream flow requirements for more than 20 years after passage of the law. Verified Petition for Alternative Writ of Mandate, Writ of

of sufficient appropriations by the legislature.[88]

Finally, of particular significance for fish passage, in 2005 the California legislature charged CDFW and the California Director of Transportation with a new program to address barriers to fish passage caused by new or existing transportation projects;[89] the legislature amended the program in 2014 to require additional reporting, more vigorous monitoring by CDFW, and expedited remediation of some projects.[90] This effort is ongoing, but efforts have been slow. According to the legislatively mandated 2016 Fish Passage Annual Report, remediation of barriers is proceeding at a pace of roughly 4 barriers per year; well over 7,000 barriers remain on the state highway system alone. At this rate, remediation of existing barriers on the state highway system would be complete in 1,750 years.

Mandate, Order to Show Cause, or other Appropriate Relief, No. 07GS01353 (Cal. Super. Ct.). As of early 2008, the Water Board only had flow requirement information from CDFW for the Mono Basin and the Lower Yuba River, a far cry from the comprehensive program envisioned by the statute, Verified Petition for Alternative Writ of Mandate, Writ of Mandate, Order to Show Cause, or other Appropriate Relief at 16, No. 07GS01353 (Cal. Super. Ct.), and CDFW had completed instream flow studies for only twenty-three streams. Flow Recommendations to the State Water Resources Control Board, 2008. Perhaps due to this lack of progress, the legislature had already passed another statute requiring the water board to adopt minimum stream flows for particular northern California coastal streams in 2004. Assembly Bill 2121. North Coast Stream Flows. 2004. After a lawsuit in 2007 and its settlement in early 2008, CDFW transmitted its existing studies to the water board, listed twenty-two streams for instream flow work, and increased its study pace, Priority Streams List for Instream Flow Assessment Prepared by the Department of Fish and Game Pursuant to Public Resources Code (PRC) Section 10004, Aug. 2008, but to date has not begun to develop minimum flow recommendations seven of the streams, has begun work on flow recommendations for twelve streams, has draft recommendations for two streams with, and has completed only one final recommendation, for Big Sur River in Monterey County. CDFW Water Branch, *CDFW Instream Flow Studies*, Cal. Dep't. Fish and Wildlife, https://www.wildlife.ca.gov/Conservation/Watersheds/Instream-Flow/Studies (last visited Aug. 13, 2019).

[88] California Department of Fish and Game Instream Flow Program Annual Report 2011, at 8-12.

[89] 2005 Cal. Stat. 4424-4425.

[90] 2015 Cal. Stat. 885.

The foregoing legislative review provides an incomplete list of fish passage laws over the last 167 years, but it demonstrates the California legislature's deep commitment to fish passage. It also demonstrates a consistent pattern of more and more specialized legislation to address passage problems, generally in response to continued failures by the state administrative apparatus to achieve the aims of prior statutes.

The fish passage law moved from a generic law barring obstructions to salmon migration in 1852, to laws addressing low flow barriers to migration in the 1910-1920 era, to law addressing dams that were simply to big to allow fish passage, to laws forcing the water board to begin to consider fish in its allocation decisions, to Section 5948, initially focused on the new problem of large log jams (but broad enough to address other barriers), to additional minimum flow laws, to a systematic law addressing state highway barriers to fish passage. The old laws were not repealed; each successive layer of law suggests legislative finger wagging, a recurring "No, I really mean it" moment. Nevertheless, most of these laws have been ineffective. Private enforcement has the potential to put teeth into these many efforts.

B. Enforcement of Fish Passage Law

Unlike other fish and game codes,[91] enforcement of these various fish passage laws by the state has been consistent, if consistently insufficient to address the scope of the problem,[92] since at least the early 1870s. Biennial reports from the various

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[91] *See generally* Bork et al., *supra* note 9.

[92] *See* COMMISSIONERS OF FISHERIES, REPORT OF THE COMMISSIONERS OF FISHERIES FOR THE STATE OF CALIFORNIA FOR THE YEARS 1883-1884, at 15 (1884) (bemoaning the insufficient enforcement of fish passage laws); COMMISSIONERS OF FISHERIES, BIENNIAL REPORT OF THE STATE BOARD OF FISH COMMISSIONERS FOR THE YEARS 1886-1888, at 6 (1888); CAL. DEPT. OF FISH & GAME, THIRTY-SECOND BIENNIAL REPORT OF THE DIVISION OF FISH AND GAME FOR THE YEARS 1930-1932, at 34 (1932) (noting long term budgetary and staffing shortages related to fish

incarnations of the Fish and Game Commission mention enforcement cases in nearly every report from the 1870s, when the reports began, to 1966, when the reports conclude.[93] Tracking enforcement since 1966 is much more difficult, since many of the cases are handled via a ticket, with minimal court records, although some enforcement

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passage); and CAL. DEPT. OF FISH & GAME, FORTIETH BIENNIAL REPORT OF THE DIVISION OF FISH AND GAME FOR THE YEARS 1946-1948, at 46 (1948).

[93] *E.g.*, COMMISSIONERS OF FISHERIES, REPORT OF THE COMMISSIONERS OF FISHERIES FOR THE STATE OF CALIFORNIA FOR THE YEARS 1870 AND 1871, at 7 (1871) (noting that the law on fish ladders "appears to operate satisfactorily" and reporting on enforcement efforts); COMMISSIONERS OF FISHERIES, REPORT OF THE COMMISSIONERS OF FISHERIES FOR THE STATE OF CALIFORNIA FOR THE YEARS 1878 AND 1879, at 15 (1879) (reporting initiating suits to require fish passage); COMMISSIONERS OF FISHERIES OF THE STATE OF CALIFORNIA, REPORT OF THE COMMISSIONERS OF FISHERIES OF THE STATE OF CALIFORNIA FOR THE YEAR 1880, at 13 (1880) (When ever [sic] we have learned that the passages for fish are obstructed by artificial dams in any streams, we have notified the owners of such obstructions to remove them, or construct a fish-way, so as to permit the free passage of fish. When the owners neglect or refuse to comply with the law, we place the matter in the hands of the District attorney of the county for prosecution. The law controlling the subject is deemed wise and beneficial, and only in a few cases has it been found necessary to do more than call the attention of the offending parties to its requirements."); STATE BOARD OF FISH COMMISSIONERS OF THE STATE OF CALIFORNIA, BIENNIAL REPORT OF THE STATE BOARD OF FISH COMMISSIONERS OF THE STATE OF CALIFORNIA 1886-1888, at 6 (1888); STATE BOARD OF FISH COMMISSIONERS OF THE STATE OF CALIFORNIA, EIGHTEENTH BIENNIAL REPORT OF THE STATE BOARD OF FISH COMMISSIONERS OF THE STATE OF CALIFORNIA FOR THE YEARS 1903-1904, at 13 (1904) (noting many suits to enforce criminal fish passage laws); STATE OF CALIFORNIA FISH AND GAME COMMISSION, TWENTY -THIRD BIENNIAL REPORT FOR THE YEARS 1912-1914 53 (1914) (noting prosecution of power and irrigating companies for violating fish passage laws); STATE OF CALIFORNIA FISH AND GAME COMMISSION, TWENTY-SEVENTH BIENNIAL REPORT FOR THE YEARS 1920-1922, at 18, (1922) (describing lawsuits to enforce fish passage laws); STATE OF CALIFORNIA, DEPARTMENT OF NATURAL RESOURCES, DIVISION OF FISH AND GAME, THIRTY-SECOND BIENNIAL REPORT FOR THE YEARS 1930-1932, at 87 (1932); CALIFORNIA DIVISION OF FISH AND GAME, THIRTY-SIXTH BIENNIAL REPORT OF THE DIVISION OF FISH AND GAME FOR THE YEARS 1938-1940, at 52, 61 (1940); CALIFORNIA DEPARTMENT OF FISH AND GAME, FORTY-SECOND BIENNIAL REPORT, CALIFORNIA DEPARTMENT OF FISH AND GAME FOR THE YEARS 1950-1952, AT 153 (1954); CALIFORNIA DEPARTMENT OF FISH AND GAME, FORTY-SIXTH BIENNIAL REPORT, 1958-1960, AT 63 (1958) (noting 7 arrests for stream obstructions in 58-59 and 5 in 59-60); and STATE OF CALIFORNIA-RESOURCES AGENCY, DEPARTMENT OF FISH AND GAME FORTY-EIGHTH BIENNIAL REPORT, STATISTICAL SUPPLEMENT 1964-1966, at 2 (1966) (noting 22 arrests for stream obstruction in 1964-1965 and 78 arrests in 1965-1966).

continues.[94] Even those that are contested in court are generally not reported, and no Section 5948 cases have ever been reported.

The reported cases related to fish passage have upheld the state's authority and enforcement efforts to ensure that fish can migrate,[95] but the cases are few and far between. Enforcement seems to be at a very low level, and thousands of stream barriers continue to block fish passage in California. The California Coastal Conservancy, a state agency focused on protecting and improving California's coasts,[96] has documented 3,323 known passage barriers, with an additional 9,057 known sites requiring further examination and an untold number of streams yet to be examined.[97] Although no data break down habitat loss due to large dams, as opposed to obstructions targeted by Section 5948, overall estimates of habitat loss for migratory species like salmon and steelhead in California range as high as 80-95%.[98] Robust enforcement of fish passage laws could increase fish habitat and lower their odds of extinction.

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[94] Email from Stephen G. Puccini, Office of the General Counsel, California Department of Fish and Wildlife to Karrigan Bork, Acting Prof. of Law, UC Davis School of Law (on file with author).

[95] *E.g.* Taylor v. Hughes, 10 P.C.L.J. 327 (1882) (Supreme Court declined to overturn Samuel P. Taylor's conviction and fine for failure to install a fishway around a dam). People v. Truckee Lumber Co., 48 P. 374, 399-400 (1897). The case dealt directly with pollution from a lumber mill, but the Court noted in dicta that the property owner "cannot lawfully kill or obstruct the free passage of" fish in the stream on his land. *See also* California v. San Luis Obispo Sportsman's Ass'n, 584 P.2d 1088, 448-49 (1978).

[96] THE COASTAL CONSERVANCY, INVENTORY OF BARRIERS TO FISH PASSAGE IN CALIFORNIA'S COASTAL WATERSHEDS, at i (2004).

[97] *Id.* at 2.

[98] Peter B. Moyle, Joshua A. Israel & Sabra E. Purdy, *Salmon, Steelhead, and Trout in California: Status of an Emblematic Fauna*, UC DAVIS CTR. FOR WATERSHED SCI., 2008, at 68. *See also Salmon and Steelhead Habitat Loss in the Central Valley*, NOAA FISHERIES, https://www.arcgis.com/apps/MapJournal/index.html?appid=ceebefd9685143daa5bf30d5a7e0c7fa (last visited Aug. 5, 2019).

III. The Meaning of 5948

California's principles of statutory construction provide the framework for deciphering the meaning of 5948. We must "ascertain the intent of the Legislature so as to effectuate the purpose of the law,"[99] by "scrutiniz[ing] the actual words of the statute, giving them a plain and commonsense meaning."[100] "[We] seek to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose."[101] "Statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible,"[102] so Section 5948 must be read in conjunction with other statutes addressing fish passage and stream obstruction.

Section 5948 targets anthropogenic barriers to fish passage, those caused, directly or indirectly, by people.[103] The statute explicitly establishes the kinds of barriers potentially subject to the law: "any log jam or debris accumulation or any other artificial barrier, except a dam for the storage or diversion of water, public bridges and approaches thereto, groins, jetties, seawalls, breakwaters, bulkheads, wharves and piers permitted by law, and debris from mining operations."[104] Thus the law concerns logjams, non-mining debris accumulations, and other artificial barriers to fish migration, excepting water

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[99] California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist. (1997) 927 P.2d 1175, 632.

[100] People v. Valladoli (1996) 918 P.2d 999, 597.

[101] Harris v. Capital Growth Investors XIV (1991) 805 P.2d 873, 1159.

[102] Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 743 P.2d 1323, 1387.

[103] CAL. FISH & GAME CODE § 5948 (West 2019) ("No person shall cause or having caused, permit to exist…"). The statute explicitly addresses log jams, which, at the time of passage, resulted from logging practices that indirectly introduced huge amounts of woody debris into streams.

[104] *Id.*

storage and diversion dams, public bridges, and a short list of additional categories. The state has, by regulation identified some characteristics of log jams or debris accumulations that violate the statute.[105]

The dam term here is broad, including "all artificial obstructions,"[106] that is, obstacles that "block or close up" or "hinder from passage, action, or operation."[107] These need not be complete barriers to flow; the term includes obstacles that in some way impede water flow.[108] In context, then, the dam exclusion bars 5948 enforcement against obstacles that impede water flow for the purpose of storage or diversion of water. This reading fits with the rest of the codes in this section; water storage and diversion dams are addressed at some length under other portions of the code and including them here would contradict those efforts.[109] Instead, Section 5948 is focused on the many non-storage and diversion impediments to fish passage in California.

Section 5948 probably also does not cover devices or contrivances, because they are explicitly covered in many fish and game districts by Section 5901;[110] exactly what

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[105] CAL. CODE REGS. tit. 14, § 225.5 (West 2019) (Log jams or debris accumulations without a "well-defined channel through which all fish may pass upstream or downstream at any time without delay" or which reduce "the dissolved oxygen content below five parts of oxygen to one million parts of water, or causes any other condition toxic to fish or aquatic life" constitute a log jam or debris accumulation in violation of the statute.).

[106] CAL. FISH & GAME CODE § 5900 (West 2019).

[107] *Obstruction*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/obstruction?src=search-dict-hed; *Obstruct*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/obstruct. *See* People v. Siravo, 17 Cal. App. 4th 555, 561 (1993) ("The dictionary is the obvious starting point for our inquiry.").

[108] Goddard v. Dep't of Fish & Wildlife, 243 Cal. App. 4th 350, 365 (2015) (holding that a "dam remnant qualifies as an artificial obstruction" under Section 5900, where the dam remnant created a rapid in the river but still allowed water to pass).

[109] *See, e.g.*, CAL. FISH & GAME CODE §§ 5931, 5935, 5937-5938 (West 2019).

[110] CAL. FISH & GAME CODE § 5901 (West 2019) ("Except as otherwise provided in this code, it is unlawful to construct or maintain in any stream in Districts 1, 13/8, 11/2, 17/8, 2, 21/4, 21/2,

qualifies as a device or contrivance is unclear, although the section appears to be a recodification and amendment of a penal code section aimed at barring fish weirs, set nets, and fish traps, which direct fish into particular locations on their upstream journeys to facilitate spearing or netting the fish.[111] Such items should probably not be considered under Section 5948.

Finally, within the included barriers, the section targets any barrier "which will prevent the passing of fish up and down stream or which is deleterious to fish as determined by the commission, subject to review by the courts."[112] This is, on its face, unclear. Must the commission determine that a barrier will prevent the passing of fish before it is deemed an illegal barrier? Or does that clause, "as determined by the commission," require a commission determination only in cases where the barrier "is deleterious to fish," but not a barrier to fish passage? This is significant, because the first reading would suggest that a private party would first have to ask the fish commission to determine that a barrier would prevent the passage of fish. But California rules of statutory construction offer a clear answer. "A longstanding rule of statutory construction—the 'last antecedent rule'—provides that qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote."[113] "Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the

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23/4, 3, 31/2, 4, 41/8, 41/2, 43/4, 11, 12, 13, 23, and 25, any device or contrivance that prevents, impedes, or tends to prevent or impede, the passing of fish up and down stream.").

[111] *See* CAL. PENAL CODE § 636 (1909) ("Every person who shall set, use, or continue, or who shall assist in setting, using, or continuing, any pound, weir, set net, trap, or any other fixed or permanent contrivance for catching fish in the waters of this state is guilty of a misdemeanor." Other portions of the statute deal with devices like "Chinese sturgeon lines" or nets.).

[112] CAL. FISH & GAME CODE § 5948 (2019).

[113] White v. Cty. of Sacramento, 646 P.2d 191, 680 (1982).

immediately preceding one may be found in the fact that it is separated from the antecedents by a comma."[114] Here, where "as determined by the commission" is not set off by a comma, it applies only to the phrase "is deleterious to fish." In contrast, because "subject to review by the courts" is set off by a comma, it should be read to apply to the entire preceding phrase. This makes sense—whether a barrier prevents fish migration seems like an easier factual question than the more nebulous question of whether a barrier is otherwise deleterious to fish, and the legislature might have wanted to reserve that question to the fish commission in the more nebulous instance. Further, based on the California rules of construction, had the legislature wanted the commission to make the determination about both kinds of barriers, it could have placed a comma before "as determined by the commission." In sum, then, and subject to the exceptions above, 5948 makes illegal any barrier that prevents fish passage or that the fish commission determines is otherwise deleterious to fish.

Violations of 5948 fall under F&GC Section 12000, a catchall provision making violations of the code a misdemeanor.[115] As with Section 5937, successful litigation of 5948 by a private party should result in an order to the offender to comply with the provisions of the law. Here, the offender would be ordered by the court to remove the obstructions to fish passage.[116]

IV. Private Enforcement of the Section 5948

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[114] *Id.*

[115] CAL. FISH & GAME CODE § 12000 (Deering 2019).

[116] *See* Cal. Trout v. Superior Court, 218 Cal. App. 3d 187, 204 (1990) ("[C]ourts retain jurisdiction to fashion a judicial remedy for enforcement of the statutory mandate of section 5946 appropriate to the circumstances."); "The courts may employ any appropriate judicial remedies to [achieve the goals of section 5946]." *Id.* at 204 n.3. As seen with Section 5946, the courts have broad authority to enforce remedies for violations of the Fish and Game Code.

A. Private Enforcement of Public Law in California

Section 5948 appears amenable to private enforcement. Although private enforcement of a law like Section 5948 against private or public parties is unusual, California courts have already laid a firm foundation for this approach.[117] The reasoning goes like this: under California Supreme Court precedent, members of the public have the right to bring a private cause of action to enforce the public trust. This was directly addressed by the Court in the famous 1971 case *Marks v. Whitney*: "Does Whitney have 'standing' to request the court to recognize and declare the public trust easement on Marks' tidelands? Yes. The relief sought by Marks resulted in taking away from Whitney rights to which he is entitled as a member of the general public. . . . Whitney had standing to raise this issue. The court could have raised this issue on its own."[118] The Court reiterated this holding in *Nat'l Audubon Soc'y v. Superior Court*, noting that *Marks v. Whitney* "expressly held that any member of the general public has standing to raise a claim of harm to the public trust" and emphasizing that private "plaintiffs have standing to sue to protect the public trust."[119] The Court last addressed this standing

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[117] Violations of 5948 also probably constitute a public nuisance under California law. People v. Glenn-Colusa Irr. Dist., 15 P.2d 549 (1932) (holding that violation of the law requiring fish screens, now Cal. Fish & Game Code Sections 5980-6028, constituted a nuisance). But, as in most states, private suits to enjoin public nuisances in California can only proceed if the plaintiff shows that the conduct was somehow "specially injurious" to him or her. CAL. CIV. CODE § 3493 (Deering 2019) ("A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise.").

[118] Marks v. Whitney, 491 P.2d 374, 261-62 (1971).

[119] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 431 n.11 (1983). *See also* Geoffrey R. Scott, *The Expanding Public Trust Doctrine: A Warning to Environmentalists and Policy Makers*, 10 FORDHAM ENVTL. L. REV. 1, 48 n.140 (1998) (citing *Nat'l Audubon* as the prime example of the "small number of states" that "have permitted individuals to sue to enforce a public trust."). Dave Owen, *The Mono Lake Case, the Public Trust Doctrine, and the Administrative State*, 45 UC DAVIS L. REV. 1099, 1143 (2011) ("This court has also recognized the standing of public interest organizations to sue to enjoin unreasonable uses of water and of any member of the

in 1988, when it again found a private right of action in the public trust.[120] This kind of standing, with no requirement for a particularized interest, would fail in federal cases under the Constitutional case or controversy requirement.[121] But California law is different, with different standing requirements, and "California authority *supports* the conclusion that a suit by a citizen in the undifferentiated public interest is "justiciable," or appropriate for decision in a California court."[122]

Next, some sections of the California Fish and Game Code are legislative embodiments of the public trust doctrine. The California Water Board understands Section 5937 as "a legislative expression of the public trust protecting fish as trust resources when found below dams," and numerous California and federal courts have followed suit.[123] This comports with the general understanding of state authority to regulate fish and wildlife. As an 1897 California Supreme Court case noted, the

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general public to raise a claim of harm to the public trust.") (citations omitted); EDF v. E. Bay Mun. Util. Dist., 605 P.2d 1, 200 (1980) ("Private parties thus may seek court aid in the first instance to prevent unreasonable water use or unreasonable method of diversion.").

[120] *In re* Water of Hallett Creek Stream Sys., 749 P.2d 324, 472 n.16 (1988) ("This court has also recognized the standing . . of any member of the general public to raise a claim of harm to the public trust. Such claims may be brought in the courts or before the Board.") (citations omitted).

[121] Lujan v. Defenders of Wildlife, 504 U.S. 555, 650-61 (1992) (requiring a plaintiff demonstrate a "particularized" injury for standing).

[122] Nat'l Paint & Coatings Ass'n v. State of Cal., 58 Cal. App. 4th 753, 761 (1997) (emphasis in the original). *See also* Bilafer v. Bilafer, 161 Cal. App. 4th 363, 370 (2008) ("California courts are not bound by the 'case or controversy' requirement of article III of the United States Constitution").

[123] California Trout, Inc. v. State Water Res. Control Bd., 207 Cal. App. 3d 585, 631 (Ct. App. 1989) (holding that "the Legislature in section 5946 enacted a specific rule concerning the public trust interest in fisheries in District 4 ½"); San Luis & Delta-Mendota Water Auth. v. Jewell, 52 F. Supp. 3d 1020, 1026 (E.D. Cal. 2014), *aff'd in part, rev'd in part sub nom.* San Luis & Delta-Mendota Water Auth. v. Haugrud, 848 F.3d 1216 (9th Cir. 2017), as corrected (Mar. 23, 2017) ("California Fish & Game Code § 5937 codifies one aspect of the public trust doctrine"); Reynolds v. City of Calistoga, Nos. A134190, A135501, 2014 Cal. App. Unpub. LEXIS 4725, at *6 (July 3, 2014) ("Section 5937 is a legislative expression of the public trust."); Casitas Mun. Water Dist. v. United States, 102 Fed. Cl. 443, 462 n.20 (2011) (Relying for its reasoning on the idea that Section 5937 is a legislative expression of the public trust doctrine).

ownership of the fish and wild game inhered in the people of the state, "as in England it was in the king; and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law, and preserved and expressly provided for by the statutes of" the state.[124] A 1978 California Supreme Court case placed the power to enact "statutory provisions in the Fish and Game Code governing the damming of rivers and streams which are naturally frequented by fish [squarely on the] long-settled principle that the fish within the waters of the state are owned by the state in trust for the people and [on] the state's authority to regulate to protect and preserve this valuable public resource."[125] "It is beyond dispute that the State of California holds title to its tidelands and wildlife in public trust for the benefit of the people."[126] Beyond California, states generally find authority for protection of wildlife in some mixture of their general police powers and the public trust doctrine.[127] These code sections, then, become the state's expression of the

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[124] People v. Truckee Lumber Co., 48 P. 374, 399-400 (1897). The case dealt directly with pollution from a lumber mill, but the Court noted in dicta that the property owner "cannot lawfully kill or obstruct the free passage of" fish in the stream on his land.

[125] California v. San Luis Obispo Sportsman's Ass'n, 584 P.2d 1088, 448-49 (1978). *See also* Cal. Fish & Game Code § 711.7 (West 2019) ("The fish and wildlife resources are held in trust for the people of the state by and through the department.").

[126] People v. Harbor Hut Rest., 147 Cal. App. 3d 1151, 1154 (1983).

[127] Geer v. Connecticut, 161 U.S. 519 (1896) ("Aside from the authority of the state, derived from the common ownership of game, and the trust for the benefit of its people which the state exercises in relation thereto, there is another view of the power of the state in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the state of a police power to that end." *See also* Barrett v. State, 116 N.E. 99 (1917) (holding that wildlife "ownership is in the state in its sovereign capacity, for the benefit of all the people. Their preservation is a matter of public interest."). *See generally* Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 709 n.241 (2005). *But see* Hughes v. Oklahoma, 441 U.S. 322 (1970) (holding that the state trust responsibilities must yield to the commerce clause). *Hughes* does not affect this analysis; "Fairly read, the thrust of Hughes was simply that the state may not exercise its ownership of wildlife in a manner that conflicts with

public trust on a particular issue. This expression by the legislature removes the court from much of its traditional, if uncomfortable, role balancing public trust interests against competing priorities, and requires the court to protect the trust as dictated by the statute.[128] The courts cannot entirely abdicate this role of course; if the state legislature were inadequately protective of the public trust, the courts would likely have a role in reining it in.[129] The public trust provides a floor, not a ceiling.

Given that private parties have standing to protect the public trust, and that these code sections are legislative expressions of the public trust, California courts have concluded that private parties m Galvez v. Frields, 88 Cal.App.4th 1410, 1420 (Ca. Ct. App. 2001)ay bring suit when other parties violate these code sections, using the violation of these statutes as evidence of a public trust violation.[130] Conceptually, then, this is akin to negligence per se, where negligence can be shown by the defendant's violation of the

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federal prerogatives protected by the Constitution. Recent scholarly commentary overwhelmingly confirms this interpretation of Hughes." Blumm & Ritchie at 706-707. *See also* Oliver A. Houck, *Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings"?*, 80 IOWA L. REV. 297, 311 n.77 (1995) ("The trust analogy was not overruled in Hughes and remains the most accurate expression of this state interest: Wildlife belongs to everyone and the state has a special authority, and obligation, to ensure its perpetuation.").

[128] Nat. Res. Def. Council v. Patterson, 333 F. Supp. 2d 906, 918-19 (E.D. Cal. 2004) (noting that, in enacting Section 5937 "the Legislature has already balanced the competing claims for water . . . and determined to give priority to the preservation of their fisheries," leaving no balancing role for the court under that statute. (citing California Trout, Inc. v. Superior Court, 218 Cal. App. 3d 187 (Ct. App. 1990))).

[129] *See* Illinois Cent. R. Co. v. State of Illinois, 146 U.S. 387 (1892). Where this line might be is unclear, but in *Illinois Central*, the Court noted a near total "abdication is not consistent with the exercise of that trust which requires the government of the State to preserve [trust resources] for the use of the public." *Id.* at 453. The line certainly falls this side of causing "substantial impairment" to the trust.

[130] *See, e.g*, California Trout, Inc. v. State Water Res. Control Bd., 207 Cal. App. 3d 585, 626, 629-31 (1989); Ruling on Submitted Motion for Reconsideration at 4, Reynolds v. City of Calistoga, No. 26-46826 (Cal. Super. Ct. 2010). This adds a fourth way that violations of criminal law give rise to a civil cause of action under California law; Animal Legal Def. Fund v. Mendes, 160 Cal. App. 4th 136, 141 (2008) (recognizing "at least three different ways that alleged violations of criminal law can result in civil actions.").

law, not by showing that the defendant failed to meet a given standard,[131] or nuisance per se, where a state legislature determines what conditions constitute a nuisance and a plaintiff need only show that those conditions exist.[132] These statutes create a per se public trust violation—proving a violation of the statute proves a violation of the public trust—which can be corrected through suit by any party that could otherwise invoke public trust standing.

This approach has been successful with Section 5937, but no plaintiffs have sought to expand the approach to other California public trust laws. Nevertheless, nothing appears to limit the approach to Section 5937. Section 5937 is not a unique statute. It has a long history in California law, and enshrines protections typical to the public trust doctrine, but so do many of California's fish and game statutes. In a private enforcement context, Section 5937 cannot be meaningfully distinguished from many other California environmental laws, including Section 5948. When faced with the question, precedent requires California courts to permit this approach for other fish and game statutes.

B. Potential Barriers

The public trust approach does face some potential limits, both to the approach generally and to enforcement of 5948 specifically.

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[131] Galvin v. Frields, 88 Cal. App. 4th 1410, 1420 (Ca. Ct. App. 2001) ("The negligence per se doctrine . . . creates a presumption of negligence if four elements are established: (1) the [defendant] violated a statute, ordinance, or regulation of a public entity; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence of the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.")

[132] McClatchy v. Laguna Lands, Ltd., 32 Cal. App. 718, 725 (Cal. Ct. App. 1917) ("[T]he legislature has the power to declare certain uses of property a nuisance and such use thereupon becomes a nuisance *per se*. . . . Nuisances *per se* are so regarded because no proof is required, beyond the actual fact of their existence, to establish the nuisance.").

One might argue that enforcement of these statutes could only be possible within the traditional geographic scope of the public trust (tidelands and navigable rivers), but this argument fails. California courts have aggressively enforced the public trust doctrine on waters beyond the traditional public trust waters as required to protect traditional public trust resources,[133] including, most recently, in groundwater.[134] As the California Supreme Court has held, "the public trust doctrine, as recognized and developed in California decisions, protects navigable waters from harm caused by diversion of nonnavigable tributaries."[135] Suing to enforce fish passage on nonnavigable streams undoubtedly has the kind of downstream impacts anticipated as a basis for application of the public trust in *National Audubon*. The fish are, after all, attempting to pass through these waters on their way up- or downstream. More generally "it has long been recognized that wildlife are protected by the public trust doctrine," which allows the state to regulate conditions on private land that impact wildlife, including fish.[136]

Perhaps the most significant potential barrier comes from a 2008 California Court of Appeals decision that may limit the appropriate targets of a public trust suit.[137] In *FPL Group*, the Center for Biological Diversity filed suit against the owners and operators of a wind farm, alleging that operation of the turbines was killing birds in violation of the

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[133] California Trout, Inc. v. State Water Res. Control Bd., 207 Cal. App. 3d 585, 629-31 (1989) (". . . we conclude that a variety of public trust interests pertain to non-navigable streams which sustain a fishery.")

[134] Envtl. Law Found. v. State Water Res. Control Bd., 26 Cal. App. 5th 844 (Ct. App. 2018).

[135] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 437 (1983).

[136] Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., 166 Cal. App. 4th 1349, 1361 (2008), *as modified on denial of reh'g* (Oct. 9, 2008).

[137] *Ctr. for Biological Diversity*, 166 Cal. App. 4th 1349.

public trust.[138] The court dismissed the suit, finding that any "challenge to the permissibility of defendants' conduct must be directed to the agencies that have authorized the conduct," not against the private parties themselves.[139] This could present a serious challenge to private suits seeking, for example, to force the party that created an obstruction to fish passage to remove the obstruction under Section 5948. Suing an agency for failing to enforce the law is less direct and less effective than suing to stop a particular violation of that law.

In seeking to make *FPL Group* comport with the history of public trust litigation against private parties in California, several possibilities arise. First, the case may simply be wrongly decided. It is very difficult to make this decision fit with prior California cases addressing this same issue. Most problematically, in the first California case concerning the modern public trust doctrine, *Marks v. Whitney*, the Supreme Court explicitly allowed of Whitney, a private party, to assert the public trust against Marks, another private party.[140] Similarly, in *Nat'l Audubon*, the Supreme Court allowed the National Audubon Society to proceed with a lawsuit against the Los Angeles Department of Water and Power, a city department that did not appear to be acting as a public trust trustee.[141] A number of more recent cases similarly feature suits against private parties, or at least suits that are not against "the agencies that have authorized the conduct,"[142] as

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[138] *Id.*
[139] *Id.* at 1370.
[140] Marks v. Whitney, 491 P.2d 374, 261-62 (1971).
[141] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 431 n.11 (1983).
[142] Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., 166 Cal. App. 4th 1349, 1370 (2008), *as modified on denial of reh'g* (Oct. 9, 2008).

FPL Group seems to require.[143] This precedent suggests that *FPL Group* is simply wrong.[144] Such a reading might emphasize the difficult facts of the case (the responsible public agencies had already addressed the issue and continued to do so via additional administrative actions as the case progressed, putting the court in a difficult position of second guessing the ongoing work of an expert public agency) and the court's alternative basis for its decision, predicated on abstention, perhaps rendering much of the court's public trust discussion mere dicta.[145] Of note, another California Court of Appeal has explicitly narrowed the *FPL Group* holding, possibly in recognition of its outlier status in California law.[146]

Second, maybe the decision takes a very broad view of the appropriate agencies for a public trust suit. Under this reading, the reader must bend the decision's language a

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[143] *See, e.g.*, Reynolds v. City of Calistoga, No.: 26-46826 (Cal. Super. Ct. 2010); Nat. Res. Def. Council v. Patterson, 333 F. Supp. 2d 906, 918-19 (E.D. Cal. 2004); Putah Creek Water Cases, Jud. Coor. Coun. No. 2565 (Cal. Super. Ct. 1996); Golden Feather Cmty. Assn. v. Thermalito Irrigation Dist., 209 Cal. App. 3d 1276 (Ct. App. 1989).

[144] The lone federal court decision applying FLP Group on this issue, *Desert Protective Council v. United States DOI*, 927 F. Supp. 2d 949 (S.D. Cal. 2013), also appears to interpret the case incorrectly, citing it for the proposition that only a state agency can bring an action against a federal agency alleging that the federal agency failed "to comply with state substantive environmental standards." *Id.* at 974. This does not comport with *Nat. Res. Def. Council v. Patterson* or the myriad other cases seeking such compliance. *See* Nat. Res. Def. Council v. Patterson 333 F. Supp. 2d 906 (E.D. Cal. 2004)

[145] Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., 166 Cal. App. 4th 1349, 1371 (2008) ("Even if the court were to recognize a theoretical cause of action on behalf of the public against the wind farm operators, it would be appropriate for the court to abstain from adjudicating it in deference to the regulatory oversight being provided by public authorities."). The court noted that "administrative proceedings were underway in Alameda County in which consideration was being given to applications to extend … the … conditional use permits to operate the wind turbines … ." *Id.* at 1356. It is not clear that abstention is appropriate here, given that the permitting process concluded on Sept. 22, 2005. *Id.* at 1359.

[146] Ctr. for Biological Diversity v. Dep't of Forestry & Fire Prot., 232 Cal. App. 4th 931, 952 (2014) ("held only that members of the public may have standing to bring actions against public agencies to prevent those agencies from abandoning or neglecting the public's rights with respect to resources subject to the public trust. The court noted that it made no attempt to define the scope of public trust duties subject to individual enforcement. . . ." This is hard to square with the language in *FPL Group* and seems to be an effort to minimize that decision's impact.

little, allowing suits against any state government entity with decision-making authority, not only against the agency responsible for protecting the resource at interest. This reading allows suits against nearly any government entity and fits with some of the precedent on this issue. A recent California Court of Appeal decision held, for example, that "[a] county is a legal subdivision of the state and . . . [a]lthough the state as sovereign is primarily responsible for administration of the trust, the county, as a subdivision of the state, shares responsibility for administering the public trust and may not approve of destructive activities without giving due regard to the preservation of those resources."[147] If this applied similarly to irrigation districts, cities, and other non-private potential defendants, this would harmonize the *FPL Group* decision with much precedent. *Marks v. Whitney* would remain the outlier, given the lack of any decision-making body as a party to that suit. This reading also presents theoretical problems, in that it conflates agencies acting as regulators (a role that would include protection of the public trust) and agencies acting as resource users.[148] The *National Audubon* suit, as noted, targeted the Los Angeles Department of Water and Power.[149] That city department might be a trustee of the public trust under a broad conception of the trust, but in appropriating water from Mono Lake, it was acting only as a resource user; former state Division of Water

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[147] Envtl. Law Found. v. State Water Res. Control Bd., 26 Cal. App. 5th 844, 867-68 (2018).

[148] This theoretical problem also challenges the *FPL Group* decisions reliance on traditional trusts as a way to understand and constrain the public trust. If all public entities are trustees, and a public entity like the LADWP secures a water right for itself, acting as both a water user and as a trustee, that looks a lot like self dealing, which under California trust law "is a breach of trust regardless of good faith or lack of injury to the beneficiary." 13 Witkin, Summary 11th Trusts § 75 (2019). If a court treats entities like the LADWP or water districts as trustees, but allows them to act in ways that negatively affect the corpus of the trust (which, as the *Nat'l Audubon Court* notes, inheres in the use of water), the trust analogy begins to break down. This certainly suggests that such public resource users cannot themselves be trustees.

[149] Nat'l Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 431 n.11 (1983).

Resources held responsibility for approving their right to use the water. Nevertheless, this reading of the case is at least plausible, and leaves a broad swath of targets available for suit.

Third, the case could be read as limiting suits based on the public trust in wildlife, not the public trust more generally. The plaintiff in *FPL Group* sought to protect birds from windmills, and although the court found that a public trust in wildlife covered the birds, this falls outside of the traditional public trust doctrine addressing aquatic resources. As the *FPL Group* court noted, "the California Supreme Court . . . recently referred to 'two distinct public trust doctrines'—'the common law doctrine, which involves the government's 'affirmative duty to take the public trust into account in the planning and allocation of water resources'' and 'a public trust duty derived from statute.'"[150] The Supreme Court precedent with the expansive language on private suits all deals with water resources (including fish), and so, perhaps, the statutory public trust doctrine could have tighter restrictions on potential defendants. FPL Group, with the other defendants in this case, relied on this argument in their consolidated answer to the plaintiff's petition for Supreme Court review (ultimately denied by the Court).[151] But the *FPL Group* court itself explicitly disclaims this approach: "[f]or purposes of deciding the issues presented in this case, it matters not whether the obligations imposed by the public trust are considered to be derived from the common law or from statutory law, or from both."

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[150] Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., 166 Cal. App. 4th 1349, 1361 (2008), *as modified on denial of reh'g* (Oct. 9, 2008) (citing Envtl. Prot. Info. Ctr. v. California Dep't of Forestry & Fire Prot., 44 Cal. 4th 459 (2008)).

[151] Consolidated Answer to Petition for Review, Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., No. S167578 (Cal. Super. Ct.).

Fourth and finally, this case can be read as a joinder case, if the reader is again willing to overlook some of the broader language in the decision.[152] This reading instead emphasizes the court's statement that "[t]he defendants who have been authorized to carry on the activities that plaintiffs contend should be prohibited may well be proper parties"[153] in proceedings against the relevant agency and that "[i]n order to prevent loss of or prejudice to a claim, the beneficiary may bring an action in equity joining the third person and the trustee."[154] The court noted, "the county [the relevant regulator in this case] is unquestionably is a necessary party to the action. . . . The dismissal of the action, therefore, also may be justified by the absence of a necessary and indispensable party."[155] UC Davis Law Prof. Rick Frank, a prominent California law commentator, takes this view of the case.[156] And such a reading might hypothetically be harmonized with *Marks v. Whitney*, if one assumes that, in a case where no agency has yet taken any action, the plaintiff could proceed against the private party. Again, this does not entirely fit with the language of the case, but it seems to be the least strained reading of the case that best fits with California precedent, assuming the case is correctly decided.

Regardless of one's view of the case, it would still allow suits against private parties violating the public trust under an action in equity "[i]n order to prevent loss of or prejudice to a claim," provided that the appropriate trustee agency is made party to the

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[152] *E.g.*, Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., 166 Cal. App. 4th 1349, 1371-72 (2008), *as modified on denial of reh'g* (Oct. 9, 2008) ("there is no basis for recognizing an action that is not directed against the appropriate state agency responsible for authorizing the wind farm operations . . . [t]he dismissal of the action, therefore, also may be justified by the absence of a necessary and indispensable party.") (emphasis added).

[153] *Id.* at 1370-71.

[154] *Id.* at 1367.

[155] *Id.* at 1372.

[156] Rick Frank, *A Public Trust Renaissance*, S.F. DAILY J., Oct. 7, 2008, at 7.

suit as well.[157] Given careful party selection, then, this case does not bar private suits to enforce California laws enunciating the public trust.

Beyond the *FPL Group* case, and looking specifically at enforcement of Section 5948, some might argue that California Streets and Highway Code Sections 156 et seq., the 2005 statutes requiring CDFW and the California Director of Transportation to address barriers to fish passage caused by new or existing transportation projects, acts as a limit to their public trust obligations. Under this view, if the legislature has created a specific program to address one area of public trust obligation, then agency compliance with that program would constitute compliance with its public trust obligations. But this argument fails. Under California law, "[t]here is a presumption that a statute does not, by implication, repeal the common law. Repeal by implication is recognized only where there is no rational basis for harmonizing two potentially conflicting laws."[158] This applies when determining whether statutory law has supplanted the public trust.[159] Similarly, in California, "all presumptions are against a repeal [of a statute] by implication. . . . Absent an express declaration of legislative intent, [courts] will find an implied repeal only when there is no rational basis for harmonizing the two potentially conflicting statutes, and the statutes are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation."[160] In this case, Section 5948 and California Streets and Highway Code Sections 156 et seq. do not inherently conflict.

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[157] Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., 166 Cal. App. 4th 1349, 1367 (2008), *as modified on denial of reh'g* (Oct. 9, 2008).

[158] Verdugo v. Target Corp., 327 P.3d 774, 326 (2014).

[159] Envtl. Law Found. v. State Water Res. Control Bd., 26 Cal. App. 5th 844 (Ct. App. 2018).

[160] Garcia v. McCutchen, 940 P.2d 906, 476-77 (1997) (internal citations and quotation marks omitted).

Sections 156 et seq. require creation of a list of fish passage barriers;[161] development of an expedited permitting process for barrier remediation;[162] consideration, protection, and/or remediation of fish passage for new projects using state or federal funds;[163] and ongoing remediation of high priority stream crossings.[164] Section 5948, in a transportation context, bars any person from causing or, after causing, permitting to exist any artificial barrier to fish passage, except public bridges and approaches thereto.[165] Complying with both statutes is entirely possible, and compliance with the first statute does not inherently relieve the state from the more onerous requirements of the second. By way of comparison, the many California statutes requiring establishment and maintenance of minimum stream flows have not repealed Section 5937's requirements for minimum flows below dams, in spite of the overlapping responsibilities they have created.

Other bars to suits to enforcing Section 5948 will undoubtedly arise in practice. Enforcement on federal lands or against a federal agency might face sovereign immunity or preemption issues, for example, depending on the kind of land or the particular agency at issue. And questions may be raised about just how many of the Fish and Game Codes are amenable to enforcement as expressions of the public trust. Could a private citizen sue to enforce the angling catch and size limits established by the Fish and Game

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[161] CAL. STS. & HIGH. CODE § 156.1 (West 2019).
[162] CAL. STS. & HIGH. CODE § 156.2 (West 2019).
[163] CAL. STS. & HIGH. CODE §§ 156.3-156.4 (West 2019).
[164] CAL. STS. & HIGH. CODE § 156.5 (West 2019).
[165] CAL. FISH & GAME CODE § 5948 (West 2019) (Non-transporation barriers are not mentioned here.).

Commission?[166] But at a broad scale, none of the identified barriers should preclude enforcement of Section 5948 and other similar laws by private parties under a public trust theory.

IV. Conclusion

Since California invigorated the modern public trust, many states have followed suit, and most states embrace some form of the public trust doctrine.[167] Moreover, most states have some form of public standing to enforce the public trust, although the origin and extent of that right varies wildly.[168] But courts faced with enforcing the public trust doctrine often struggle to determine what the trust requires of the state or of private parties that fall under the trust. The per se public trust approach used by private parties in California to enforce Section 5937 can provide courts with the minimum requirements under the trust, although in some cases trust obligations may be much higher that what is found in state statutes. Nevertheless, this approach can provide a framework for citizen suits in the United States and abroad, and should certainly provide a successful approach for future litigation in California.

Litigation to enforce Section 5948 and other fish passage laws in California can bring the state into compliance with the ideals spelled out time and again by the California legislature. Removing barriers to fish migration can reopen habitat that salmon and steelhead need to survive. Most barriers have been illegal under California law since the state had laws; private litigation provides a mechanism to change California's legacy

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[166] Address other potential limits here? Only for ongoing violations? Only for certain kinds of remedies? Where would these limits come from?

[167] *See generally* Michael C. Blumm et al., *The Public Trust Doctrine in Forty-Five States* (March 18, 2014). Lewis & Clark Law School Legal Studies Research Paper. Available at SSRN: https://ssrn.com/abstract=2235329 or http://dx.doi.org/10.2139/ssrn.2235329.

[168] *Id.*

of illegal infrastructure. And the long history of fish protection in California and other western states demonstrates that fish protection is a background principle of state law, insulating those states against taking claims in the face of public or private enforcement. Living up to the law on the books will give migratory fish in California and throughout the west a fighting chance at survival.