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How Law Mattered to the Mono Lake Ecosystem

Sherry A. Enzler, University of Minnesota

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Mono Lake lies in a lifeless, treeless, hideous desert, eight thousand feet above the level of the sea... This solemn, silent, sailless sea—this lonely tenant of the loneliest spot on earth—is little graced with the picturesque... The lake is two hundred feet deep, and its sluggish waters are so strong with alkali that if you only dip the most hopelessly soiled garment into them once or twice, and wring it out, it will be found as clean as if it had been through the ablest of washerwoman’s hands... Half a dozen little mountain brooks flow into Mono Lake, but not a stream of any kind flows out of it. It neither rises nor falls, apparently, and what it does with its surplus water is a dark and bloody mystery.

--Mark Twain

In the West, it is said, water flows uphill toward money. And it literally does, as it leaps three thousand feet across the Tehachapi Mountains in gigantic siphons to slake the thirst of Los Angeles... It still isn’t enough.

-- Marc Reisner

Abstract

The 2005 Millennium Ecosystem Assessment reported unprecedented degradation of ecosystems and the services they provide to human well being which, if allowed to continue would adversely affect human health, security and welfare. Our environmental legal authorities, however, are not designed to protect the health of our nation’s ecosystems focusing instead on clean air, clean land and clean water as single medium, often referred to as the silo approach to environmental protection. Protecting ecosystems requires a systemic approach to the environment in both policy and law; this in turn requires a change in our approach to environmental protection. How do we motivate such a change in our legal constructs and political systems? This is a question posed by a number of communities and states struggling with the concept of ecosystem protection. This article postulates that the strategic use of

1 Michael McCann argues that the key empirical question about the relationship between law and social change is “[h]ow law does and does not matter” to social change. Michael McCann, Law and Social Movements: Contemporary Perspectives, 2 Ann. Rev. L. Soc. Sci. 17, 19 (2006) (McCann (2006)).
2 1 Mark Twain, Roughing It 259, 262 (Harper & Row 1913) (1871).
litigation by environmental social movements can destabilize established legal constructs to protect ecosystems. Using the case study of Mono Lake I examine the role law played in the struggle to change the political and social systems necessary to protect the Mono Lake Ecosystem – that is how and if law mattered to the protection of the Mono Lake Ecosystem. It further hypothesizes how other social movements might use law to protect ecosystems.

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Introduction – Why Ecosystems Matter

In preparing this article I am indebted to both Craig Anthony (Tony) Arnold and John Hart for their detailed case studies of the events surrounding the restoration of the Mono Lake Ecosystem. See generally, Craig Anthony (Tony) Arnold, Leigh A. Jewell and John Hart all of whom undertook extensive case studies of the events surrounding the recovery of the Mono Lake Ecosystem. See generally, Craig (Anthony (Tony) Arnold and Leigh Jewell, Litigation’s Bounded Effectiveness: The Aftermath of the Mono Lake Case, 8 Hastings W.-Nw. J. Envtl L. & Pol’y 1 (2001-02); John Hart, Storm Over Mono: The Mono Lake Battle and the California Water Future (1996). I would also like to thank Prof. Dorothy Anderson, North Carolina State University; Prof. Brad Karkkainen, Mondale School of Law, University of Minnesota and Prof. Kristen Nelson, Department of Forest Resources, University of Minnesota, for taking the time to explore the mesh of the social science and legal concepts explored in this article and for reviewing multiple drafts of this article. Your guidance and support with this project has been immeasurable. I would also like to thank Prof. J. David Prince and Prof. Marcia Gelpe, William Mitchell College of Law, for their thoughtful review and comments on earlier drafts of this article. I would also like to thank the Consortium on Law and Values in Health, Environment and the Life Sciences for providing financial support for this project.
In 2005 the Millennium Ecosystem Assessment Board reported “[h]uman activity is putting such strain on the natural functions of the Earth that the ability of the planet’s ecosystem to sustain future generations can no longer be taken for granted.” Ecosystems provide extensive services to human wellbeing. These services can be divided into four categories:

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

The destruction of watershed ecosystems and their services can adversely affect human health, security, and general human welfare. For example destruction of ecosystems within watersheds may affect the ability of an ecosystem to purify water (a regulating function) which in turn may increase disease and decrease the amount of water available for human consumption (a

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


7 Ecosystem services are the benefits humans obtain from ecosystems. Millennium Ecosystem Assessment Board, *Ecosystems and Human Well-Being Wetlands and Water: A Synthesis V* (Jose Sarukhan and Anne Whyte ed., 2005) (Millennium Assessment Wetlands and Water).

8 Id. at 40.

9 Ecosystems exist in hierarchies, thus a pond may support a localized ecosystem that exists within the context of a larger ecosystem situated within a watershed system that supports numerous interacting ecosystems. Kenneth N. Brooks, Peter F. Ffolliot, Hans M. Gregersen and Leonard F. DeBano, *Hydrology and the Management of Watersheds*, xii (3ed. 2003). A watershed is defined by Brooks et al as a “[t]opographical delineated area drained by a stream system; that is, the total land area above some point on a stream or river that drains past that point. The watershed is a hydrologic unit often used as a physical-biological unit and a socioeconomic-political unit for the planning and management of natural resources.” Id.
provisioning service) which in turn may decreases personal security and social cohesion (a cultural service).\(^\text{10}\)

To preserve ecosystems the scientific community has moved to a systems approach to environmental management.\(^\text{11}\) This approach focuses on natural systems within geographic parameters such as watersheds, wildlife habitat or airshed and on maintaining the integrity of interdependent natural systems within those parameters to “insure sustainable resource development opportunities” and to preserve valuable resources.\(^\text{12}\) “Effective ecosystem management requires … land managers identify and analyze the full impact, both cumulatively and geographically, of management proposals on existing resource systems to minimize the disruption or fragmentation of ecosystem processes.”\(^\text{13}\)

This systems approach to environmental management is not reflected in our traditional approach to environmental policy that developed in the early 1970’s. Environmental policy and law historically sought to minimize human impacts on the environment.\(^\text{14}\) These historic constructs addressed human-environment interactions from the perspective of individual environmental medium (e.g. air, land and water) resulting in individual statutory schemes to eradicate air, land and water pollution.\(^\text{15}\) These statutes were designed to limit environmental

\(^{10}\) Id. at 50; see also, Lynton K. Caldwell, The Ecosystem as a Criterion for Public Land Policy, 10 Nt. Resource J. 203, 207 (April 1970).
\(^{11}\) Ecosystem management is a “regional” or “resource system” approach to environmental management. Robert B. Keiter, NEPA and the Emerging Concept of Ecosystem Management on the Public Lands, 25 Land & Water L. Rev. 43, 45-46 (1990).
\(^{12}\) Id.
\(^{13}\) Id.
\(^{14}\) Modern environmental law and policy was premised on the theory that there was a natural “equilibrium between organisms and the environment” that could sustain itself absent human interference. Fred P. Bosselman and A. Dan Tarlock, The Influences of Ecological Science on American Law: An Introduction, 69 Chic.-Kent L. Rev. 847, 866-67 (1994).
\(^{15}\) Id. at 867-68. For example the Clean Air Act was enacted to “protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population” while the Clean Water Act had as it’s purpose the “restoration and maintenance of the chemical, physical and biological integrity of the nation’s waters”. 42 U.S.C. § 7041(b)(1)(2005); 33 U.S.C. § 1251 (2005).
degradation through complex permitting and/or regulation schemes managed by divisions within federal agencies such as the U.S. Environmental Protection Agency (EPA) which resisted a cross-functional or systems approach to the environment – these division focused on single issues or functions such as air pollution, water pollution and the management of solid or hazardous wastes.  The result was a silo approach to environmental protection, which fails to assess the overall health of ecosystems. The Clinton Administration highlighted the shortcoming of this system when it concluded:

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

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

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

Grumbine, in his review of ecosystem management literature suggests that this shift requires political and legal constructs that work across political and administrative boundaries

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18 Id.; see also, Millennium Ecosystem Assessment Board, Living Beyond Our Means: Natural Assets and Human Well-Being a Statement from the Board, 12 Jose Sarukhan and Anne Whyte ed. 2005).
that are reflexive and adaptive and capable of modification as new data is developed, that involve multiple levels of government and stakeholders that encompass organizational change and that infuse ecosystem values into human systems. 19 How might this change occur? The case history of the struggle of the citizens of California to protect and restore the Mono Lake ecosystem offers an opportunity to explore how social movements have used the law and litigation to protect ecosystems and the resulting change in the governance structures charged with the allocation of California’s water resources. 20

The Demise of the Mono Lake Ecosystem

The Mono Lake Ecosystem

Mono Lake is situated at the base of the Sierra Nevada Mountains near the eastern entrance of Yosemite National Park. 21 See, Figure 1, Mono Lake and Los Angeles Aqueduct. The lake is 190 miles east of San Francisco and 300 miles north of Los Angeles. 22 Once part of the Great Basin stretching from the Great Salt Lake south-west to the Owens Valley and north to Klamath Lake, the Mono Lake watershed is a confined system. 23

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20 Bradley C. Karkkainen, Getting to “Let’s Talk”: Legal and Natural Destabilizations and the Future of Regional Collaboration, 8 Nev. L. J. 1, 814-817 (2007). Karkkainen argues that Mono Lake and Everglades ecosystem restoration are prime examples of the use of destabilizing litigation to foster both environmental and institutional change to protect ecosystems.
23 Hart, supra note 4, at 9. Approximately three million years ago the Mono Lake watershed became isolated from the remainder of the Great Basin. Mono Lake reached its present size approximately 9,000 years ago. Id. at 9-13.
When Twain visited Mono Lake in 1870, the watershed was approximately 695 square miles and the lake itself was over 70 square miles. See, Figure 2, Mono Lake Watershed. The historic elevation of Mono Lake prior to diversion ranged from 6,404 to 6,428 feet above sea level. See, Figure 3, Mono Lake Water Levels. Mono Lake is fed by four tributaries that carry snowmelt from the Sierra Mountains. Because Mono Lake is a terminal lake with no natural outlet, water leaves the system solely through evaporation, resulting in a high mineral concentration – currently three times saltier than the ocean.

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25 The primary tributaries of Mono Lake are Lee Vining Creek and Rush Creek, which is augmented by Parker and Walker Creeks, and Mill Creek. Hart, supra note 4, at 7.
26 Gordon Young, The Troubled Waters of Mono Lake, 160 Nat'l Geographic 504 (October 1981). Mono Lake is a “triple-water lake: it is saline; it is alkaline; and, due to its volcanic surroundings, it is sulfurous.” Hart, supra note 4, at 14.
Historically, the Mono Lake watershed supported a unique and vibrant ecosystem.

Although Mono Lake was too alkaline to support most fish species it produced both algae and microscopic plants “by the millions of tons.”27 These miniscule organisms fed the brine shrimp and the alkali flies in numbers that astounded Twain who reported:

There are no fish in Mono Lake – . . . no living thing exists under the surface, except a white feathery sort of worm, one half an inch long, which looks like a bit of white thread frayed out at the sides. If you dip a gallon of water, you will get about fifteen thousand of these. . . . Then there is a fly, which looks something like our house-fly. These settle on the beach to eat the worms that wash ashore – and any time, you can see there a belt of flies an inch deep and six feet wide, and this belt extends clear around the lake—a belt of flies one hundred miles long. . . . You can hold them under water as long as you please – they do not mind it – they are only proud of it. When you let them go, they pop up to the surface as dry as a patent office report . . . 28

27 Hart, supra note 4, at 15.
28 Twain, supra note 2, at 261(emphasis in original).
The Mono Lake alkali fly (*Ephydra Hians*) and brine shrimp (*Artemia Monica*) are the primary food source of the more than 100 bird species that historically frequented Mono Lake, as many as 800,000 birds have been counted on Mono Lake in a single day.²⁹ Mono Lake is the primary nesting area for the California gull³⁰ and other migratory birds use Mono Lake as a stop between their breeding grounds in North America and their wintering grounds in Central and South America.³¹ The Lake also serves as a stop over in the migratory flight path of numerous

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³⁰ *National Audubon*, 658 P.2d at 714, 716 (citing 1979 Task Force Study Report jointly prepared by the U.S. Department of Interior and the California Department of Water Resources). Ninety-five percent of California’s California gull population and 25 percent of the nation’s California gull population nest at Mono Lake. *Id.* at 716.
³¹ Hart, supra note 4, at 16-20. The Wilson’s Phalarope is an example of the many species dependent upon Mono Lake. The Wilson’s Phalarope (phalarope) breeds in May in the northern Great Plains. In late June, the phalarope begins migration to its wintering grounds in the Central Andes. The first leg of this journey is the flight from the Great Plains to Mono Lake where phalaropes feast on brine shrimp preparing to journey south. Ornithologist, Joseph Jehl in 1981 reported: “by the end of July, when migration began [from Mono Lake] the skies were thick with birds. The first females departed, to be followed by the fattened-up males by mid-August. Before leaving Mono Lake, the adults may double their weight, storing enough fat to power their non-stop flight to the northern coast-line
duck species in such quantities that in the 1940’s hunters and birders reported millions of
waterfowl fed at Mono Lake.\textsuperscript{32} Prior to diversion, the Mono Lake tributaries also supported a
vibrant fish population. At the 1993-94 California State Water Resources Control Board
(SWRCB) hearing to amend the Los Angeles’ water diversion permit local residents and experts
testified that the Mono Lake tributaries supported catchable brown trout and occasional eastern
brook trout.\textsuperscript{33} Mono Lake was also recognized for its scenic attributes. Muir described the area
as “[a] country of wonderful contrasts, hot deserts bordered by snow-laden mountains, cinders
and ash scatter on glacier-polished pavement, frost and fire working together in the making of
beauty.” \textsuperscript{34}

This is not to say that the Mono Lake ecosystem was unimpaired prior to Los Angeles’
water diversion from the Mono Lake tributaries. Mono Lake tributaries flowed year round often
overtopping their banks during the spring depositing soils and sediment on the flood plains.\textsuperscript{35}
Both Hart and the SWRCB report that the flood plains of the Mono Lake tributaries supported
local grazing and irrigation for decades prior to the Los Angeles diversion.\textsuperscript{36} However, during
this period local water extractions had a negligible impact on Mono Lake’s pre-diversion water
levels. See Figure 3, Mono Lake Water Levels.

As evidenced by this overview, over time the Mono Lake ecosystem provided a number
of ecosystem services. It served as a major rookery and migration stop for a vast array of bird
species including waterfowl. This provisioning service contributed to extensive biological
diversity not only in Northern California, but also within North America. Annual flooding of the

\textsuperscript{32} \textsuperscript{32}Hart, \textit{supra} note 4, at 20.
\textsuperscript{33} \textsuperscript{33}1994 Water Right Decision, at 22, 38-39, 53-54.
\textsuperscript{34} \textsuperscript{34}Id. at 133.
\textsuperscript{35} \textsuperscript{35}See generally, id. at 21-76 (discussing the historic hydrology of Lee Vining, Parker, Walker and Rush Creeks).
\textsuperscript{36} \textsuperscript{36}Hart, \textit{supra} note 4, at 22-30, 39-42; \textit{1994 Water Resources Board Decision}, at 21-76 (discussing historic
hydrology and uses of Lee Vining, Parker, Walker and Rush Creeks).
tributaries provided supporting services such as nutrient cycling system. Cultural services provided a unique sense of place recognized by luminaries such as Twain, Muir and Adams. And then there were regulating services, services that only became apparent as Mono Lake levels began to plummet and air quality deteriorated after the Los Angeles diversion.\(^{37}\)

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

Three hundred miles southwest of Mono Lake is the City of Los Angeles whose growth has long exceeded the available supply of local water.\(^{38}\) See, Figure 1, Mono Lake and the Los Angeles Aqueduct. As early as 1904 the Los Angeles Department of Water and Power (LADWP) cast its eyes eastward for water, to the Owens River Valley and by 1913 the LADWP had completed construction of an aqueduct to transport water from Owens Valley to Los Angeles.\(^{39}\) Massive for its day, the aqueduct extended 223 miles and climbed 4,000 feet uphill from the Owens Valley to Los Angeles.\(^{40}\) By 1925 the Owens River was virtually dry and the Los Angeles population had exploded beyond expectations.\(^{41}\) The City of Los Angeles began casting around for another water source, which became Mono Lake and its tributaries.

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\(^{37}\) 1994 Water Right Decision, at 120-123. As lake levels declined larger swaths of Mono Lake’s bed were exposed and a white ring of playa began to form around the lake. Wind erosion of the playa caused suspended particulate matter in quantities not seen at pre-diversion levels. *Id.* at 122. These suspended particulates were smaller than 10 pm and exceed national ambient air quality standards. *Id.* at 123-24.


\(^{39}\) See generally, Kahl, supra note 38; Reisner, supra note 3 at 52-103 and Hoffman, supra note 38, at 3-173 (containing a general history of the LADWP’s acquisition of water in the Owens Valley and construction of the Los Angeles Aqueduct).

\(^{40}\) Reisner, supra note 3, at 61, 84-85. Hoffman reports that when the Los Angeles Aqueduct was dedicated on November 5, 1913, and the first waters from Owens Valley spilled out LADWP Chief Engineer, William Mulholland was reported to have uttered only five words: “There it is. Take it.” Hoffman, *supra* note 38, at 172.

\(^{41}\) By 1900 the population of Los Angeles was 100,000. Reisner, *supra* note 3, at 62. By 1913 when the Los Angeles Aqueduct opened the population of Los Angeles had risen to 500,000. *Id.* at 73. And by the early 1920’s Los Angeles’ population had increased to such a degree that Mulholland decided that the only option was to dry up the Owens Valley and search for alternate water sources. *Id.* at 89. Reisner reports that in 1925 Mulholland had expected 350,000 people “but had 1.2 million on his hands instead.” *Id.* at 87. And Kahl notes that by 1920 growth in Los Angeles had upset all the calculations on which Mulholland had predicated the Los Angeles Aqueduct. *Kahl*, *supra* note 38, at 260.
Between 1912 and 1913 the LADWP began purchasing land and water rights in the Mono Lake watershed. These acquisitions included land for a reservoir in which to store water from the Mono Lake tributaries. Water could then be transported from the Mono Lake tributaries to the reservoir for storage and then to the Owens River and the Los Angeles aqueduct. In 1919 William Mulholland, Chief Engineer of the LADWP entered into a contract with the United States Reclamation Service (Bureau of Reclamation), an Agency of the Interior Department, to prepare plans, surveys and cost estimates for an expansion of the aqueduct from Owens Valley north into the Mono Lake Watershed. Mulholland and Bureau of Reclamation Chief Arthur Powell Davis also entered into a secret agreement to withdraw extensive public lands in the Mono Basin from private settlement or claims in effect reserving these lands for acquisition by the LADWP facilitating the Mono Lake diversion. This agreement would eventually backfire on Reclamation Chief Davis leading to his resignation, however, his successor Elwood Mead refused to overturn the Davis’ decision noting “[t]here seems no question that the water of this region will soon be needed for domestic and industrial purposes in the City of Los Angeles, and its value for these purposes is far greater than for agriculture” or

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42 Hart, supra note 4, at 37
43 Id.
44 The majority of land in the Mono Basin was federally owned. Id. at 38. Through the 19th century the primary public land policy of the U.S. Government was one of disposal of public lands into private ownership to encourage settlement and development. Public Land Law Review Commission, One Third of the Nation’s Land: A Report to the President and Congress, 28 (June 20, 1970). Beginning in 1900 public lands began to be withdrawn from disposal. Id. Public land is considered withdrawn if a statute, executive order or administrative order designates a parcel as unavailable for disposal or resource exploitation. Jan G. Laitos, Natural Resource Law § 5.01(D)(3) at 161-62 (2002). Kahrl observes that the Bureau of Reclamation had a history of setting aside land for future reclamation projects to prohibit private parties from acquiring land that might be needed or used for water projects. Kahrl, supra note 38, at 40-41. A more detailed discussion of the withdrawal of federal lands for future construction of the Mono Lake project is outline in Kahrl’s book on the construction of the Los Angeles Aqueduct. Id. at 330-338. Kahrl also notes that the Bureau of Reclamation made the withdrawal despite the fact that Los Angeles had no definite plans for the Mono Lake project at the time of the withdrawals. Id. at 337.
45 Hart, supra note 4, at 37.
46 Id. (quoting statement of Dr. Elwood Mead, Head Reclamation Service 1924 - 36)
for that matter the Mono Lake ecosystem. In 1923, the LADWP applied for a permit to
appropriate the entire flow of the Mono Lake tributaries for domestic use and power generation.  

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

And in 1926 the California
Constitution was amended to provide:

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

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47 Hart, supra note 4, at 38.
48 Historically California had a dual water rights system recognizing both riparian and prior appropriation doctrines. National Audubon Society v. Superior Court of Alpine County, 658 P.2d 709, 724 (Cal. 1983). Under California’s riparian doctrine the owner of land abutting a watercourse had the right to “reasonable and beneficial use” of water on his or her land. Id. In contrast, the appropriation doctrine requires the taking or diversion of water from the water body for “useful and beneficial purposes.” Id. An appropriative rights system is grounded in the belief that the greatest public good arises out of placing water rights in private hands.
49 The Water Commission Act formalized the procedure by which a party could acquire appropriative water rights. Id. Only water that was not being applied to “useful and beneficial purposes” was eligible for appropriation. Appropriative rights acquired under the Water Commission Act were inferior to pre-existing rights including riparian rights. Id. at 725. See also, Cal. Water Code Annotated § 1201 (West 2009).
50 National Audubon, 658 P.2d at 713; see also, Cal. Water Code Annotated § 1255 (West 2009).
51 National Audubon, 658 P.2d at 713; see also, Cal. Water Code Annotated § 1254 (West 2009).
Not only did the amendment abolish certain rights of riparian owners to use water, it required that all uses of water in California, including public trust water uses, “conform to the standard of reasonable use.” While under this amendment in-stream uses such as recreation were considered a beneficial use, in-stream uses were not the highest use of the water. The highest beneficial uses were extractive uses. The door was open for the LADWP’s appropriation of water from the Mono Lake Watershed.

To appropriate water from the Mono Lake tributaries the LADWP had to meet three requirements. It had to obtain project financing, acquire riparian lands with pre-existing water rights, and obtain a permit from the SWRBC. In 1930 after an extensive public campaign initiated by the LADWP proclaiming a forthcoming “water famine” the citizens of Los Angeles passed a $38.8 million bond to finance the Mono Lake water project. The LADWP then condemned the private property necessary for the project, a process that in 1935 culminated in a

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53 Id.
54 City of Los Angeles v. Aitken, 58 P.2d 585, 591 (Cal. Ct. App. 1935)(Aitken); see also, National Audubon, 658 P.2d at 726 (citing Aitken for the principle that in stream-uses are reasonable and beneficial uses of water).
55 The process for acquiring water rights through appropriation is set out in California’s Water Code. The process is initiated by application to the SWRCB for a “permit to put unappropriated water to beneficial use.” California Trout, Inc. v. State Water Resources Control Board, 207 Cal. App. 3d 585, 610 (Cal. Ct. Ap. 1989) (Cal. Trout I)(citing Cal. Water Code §1252). The application must include the nature and amount of the water request, the location and a description of the physical infrastructure needed for the diversion, the anticipated infrastructure completion date and must affirmatively state when all of the requested water will be put to its beneficial use. Cal. Water Code Annotated § 1260 (West 2009). If the application is approved by SWRCB a permit is issued giving the permitee the right to take and use water but “only to the extent and for the purpose granted”. Cal. Water Code Annotated §§ 1380-81 (West 2009). The right to appropriate water under the permit is a conditional right and must be perfected by the permitee. Perfecting the right requires the permitee to diligently commence and complete infrastructure construction and apply the water to beneficial use in accordance with the terms of the permit. Cal Trout I, 207 Cal. App. 3d at 610 (citing Cal. Water Code Annotated §§1395-97 (West 2009)). The California water code provides that “[a] permit shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose . . . but no longer.” Id. at 611 (quoting Cal. Water Code Annotated § 1390 (West 2009). If a permitee fails to make beneficial use of all or any part of the “water claimed by him, for which a right of use has vested . . . for a period of three years, such unused water reverts to the public and shall be regarded as unappropriated water.” Id. (quoting 1943 Cal. Stat. ch. 368 section 1241 (Cal. Water Code § 1241 has since been amended to permit a five year time frame to use appropriated water). Additionally the California Water Code requires a permit to be revoked if the infrastructure necessary for diversion is not undertaken and completed with due diligence. Cal. Water Code Annotated§ 1410 (West 2009). If, however the infrastructure is diligently completed and the water is diverted and put to beneficial use then the SWRCB will issue a license confirming the permitee’s rights to appropriate the water. Cal. Water Code Annotated § 1610 (West 2009).
56 Hart, supra note 4, at 38.
condemnation action in Tuolumne County Superior Court. Experts in the condemnation action testified that the diversions from the Mono Lake tributaries, would reduce the lake “to one-tenth of its present volume of water within five to ten years leaving the bed of the Lake and the exposed mud flats covered with a thick crust of mineral salt … which will pulverize and fly with every breeze that blows over the surrounding land, ruining all vegetation and destroying the fertility of the soil” draining Mono Lake and creating a desert. While the Court required the City of Los Angles to pay riparian owners for desertification and the taking of riparian water rights, the court found that the diversion itself met the public necessity requirement. The LADWP immediately began infrastructure construction for the diversion.

In 1938 the SWRCB commenced hearings on the LADWP’s appropriation request. Locals opposed the appropriation alleging the diversion would reduce property values, destroy tourism and “lay waste and desert” to large areas of the Mono Lake Basin. Despite opposition,

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57 *Aitken*, 58 P.2d at 587. In *Aitken*, the City of Los Angeles and the LADWP brought suit to condemn riparian water rights and divert all of the water of Rush and Lee Vining Creeks for use by the City of Los Angeles. The court determined the taking of water for domestic use in Los Angeles was a public necessity. *Id.* at 586. At trial, the LADWP argued that the finding of necessity and California’s constitutional requirement of beneficial use precluded payment of riparian owners for the taking of their littoral property rights or considering those rights in property valuation. LADWP argued that valuation should be premised on the assumption that Mono Lake did not add value to the adjacent properties. The Court disagreed, holding that although California’s Constitution favored the beneficial use of water it did not obviate an adjacent owner’s riparian rights. Thus the LADWP was required to pay the landowners property damage assuming the benefits to property value provided by Mono Lake. *Id.* at 592.

58 *Id.* at 587.

59 *Id.*

60 The infrastructure necessary to transfer water from the Mono Lake tributaries to the Owens Valley included construction of a diversion dam on Lee Vining Creek; construction of a buried pipeline from Lee Vining designed to divert water from Rush Creek, Parker Creek and Walker Creek to Grant Lake Reservoir; construction of Grant Lake Reservoir for storage of the water from the Mono Lake tributaries; construction of a buried pipeline from Grant Lake to the Mono Craters; and construction of the Mono Craters Tunnel, an 11.5 mile tunnel carrying the water from Grant Lake to a discharge point on the upper Owens River. Once in the Owens River the water would flow into the Long Valley reservoir where it would be funneled through a series of power plants prior to rejoining the Owens riverbed to be funneled into the Los Angeles aqueduct. Hart, *supra* note 4, at 42 – 43.

61 *Id.*

62 *Id.* at 45.
the SWRCB, on June 1, 1940, granted the LADWP a permit to appropriate the entire flow of water from the Mono Lake tributaries. In granting the permit the SWRCB stated:

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

The permit allowed the LADWP to divert the full flow of the Mono Lake tributaries despite the fact that the LADWP did not have the capacity to use all of the appropriated water. In 1940 the Los Angeles aqueduct could only carry one half of the flow of the Mono Lake tributaries – the Los Angeles aqueduct would not have capacity to carry the full flow until 1970 when a second barrel of the Los Angeles aqueduct was constructed. The 1940 permit was, on its face, inconsistent with California’s appropriation system, which required that appropriated water be put to beneficial use as a condition of the permit.

The 1940 Mono Lake Permit decision was also inconsistent with the 1940 Rock Creek ruling in which the SWRCB ruled that the California Water Commission Act required the State to protect streams in recreational areas by “guarding against depletion below some minimum amount consonant with the general recreational conditions and character of the stream.” That the Rock Creek ruling reasoning was not applied to the Mono Lake appropriation, is yet another illustration of the special relationship between the SWRCB and the LADWP – when it came to

63 \textit{Id.}\n
64 \textit{National Audubon}, 658 P.2d at 714 (quoting Division of Water Resources Decision 7053, 7055, 8042 & 8043 at 26 (April 11, 1940)).\n
65 Hart, \textit{supra} note 4, at 56. The infrastructure necessary to extract the total volume of water from the Mono Lake tributaries and store it in Grant Lake Reservoir was completed in 1940. \textit{Id.}\n
66 \textit{Supra} note 55 (discussing the requirements of California’s water appropriation scheme).\n
67 \textit{National Audubon}, 658 P.2d at 714, note 6 (quoting Division of Water Resources decision 3850 at 24(April 11, 1940)).
water appropriations what the LADWP wanted it got regardless of applicable law. A point further illustrated by the state’s treatment of the “fishway rules” in case of the Mono Lake project.

Prior to the LADWP’s Mono Lake project the Mono Lake tributaries supported “good trout populations.” Historically, California law required new dam constructions to include fish passages or “fishways.” In lieu of a fishway the project proponent could substitute a hatchery. In 1935 the Fish and Game Commission conducted a hearing on the LADWP’s proposed Grant Lake dam, part of the infrastructure needed to transport water from the Mono Lake tributaries south to the Owens Valley, and found that a fishway was not practicable and would not be required. A second hearing reconsidering the issue was held in 1936 – the tentative resolution: the LADWP and the Fish and Game Commission were to work out the possibilities for a fish hatchery at Hot Creek. Then, in 1937 the California Legislature imposed a requirement that “all dams, old or new . . . must let enough water pass to maintain, in good condition the fish in the streams below” the dam. There appeared to be no way the LADWP could bypass this minimum flow requirement. By 1937 the LADWP had yet to complete construction of Grant Lake dam. To comply with the fishway requirements the LADWP agreed to construct a hatchery on Hot Creek but made no provision to meet the minimum flow requirements below Grant Lake dam as required by law. Then on November 25, 1940, the Chairman of the California Game and Fish Commission entered into an agreement with the LADWP exempting

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68 Trout I, 207 Cal. App. 3d at 596.
69 See generally, id. at 594 (citing Cal. Fish & Game Code § 5937 and noting that the predecessor to § 5937 was first enacted in 1933).
70 Id.
71 Id. at 594-95.
72 Id.
73 Trout I, 207 Cal. App. at 600 (discussing 1937 amendment to Cal. Fish & Game Code § 5937). See also, Cal. Fish & Game Code Annotated § 5937 (West 1998).
74 Hart, supra note 4, at 45.
the Grant Lake dam from the 1937 statutory minimum flow requirements. This meant that the LADWP could run the creeks dry below the Grant Lake dam, certain death for the trout in the Mono Lake tributaries.

Impoundment of waters from the Mono Lake tributaries began shortly after the LADWP received its appropriation permit and on April 1941 the LADWP began shipping water south to the Owens River. Because the LADWP was only able to send half of the water appropriated from the Mono Basin tributaries through the aqueduct to Los Angeles the remaining portion of the Mono Lake diversion sat in Grant Lake. The effect of the project on the Mono Basin tributaries was almost immediate. On March 10, 1941, a California Game and Fish, fisheries biologist Elden Vestal wrote to the LADWP reporting that Rush Creek had been dry since October 1940 and requesting that the LADWP maintain a minimum flow in Rush Creek to maintain fish hatcheries as required by statute. Vestal received a letter from the LADWP advising him to consult with the terms of the Hot Creek Agreement. Upon further inquiry with the Chief of the Bureau of Fish Conservation Vestal received a “thinly veiled warning to stop my investigations into what was apparently a very sensitive political question.”

The impact of the diversion on Mono Lake itself was also devastating. Between 1940 and 1970 the LADWP diverted an average of 57,067 acre-feet of water per year from the Mono Lake Watershed. The lake’s surface level receded on average 1.1 feet per year. See, Figure 3, Mono Lake Water Levels. Los Angeles’ demand for water from the Mono Lake tributaries

75 Id. at 45-46.
76 Id. at 46.
77 National Audubon, 658 P.2d at 714.
74 Hart, supra note 4, at 47 (quoting letter to the Los Angeles Department of Water and Power from Elden Vestal, Fisheries Biologist, California Board of Game and Fish dated March 10, 1940).
75 Id. at 47 (quoting letter from the Los Angeles Department of Water and Power to Elden Vestal, Fisheries Biologist, California Board of Game and Fish).
76 Id. (quoting Elden Vestal).
71 National Audubon, 658 P.2d at 714.
intensified in 1964 when the U.S. Supreme Court issued a decree limiting California’s water allocation under the Colorado River Compact.\(^{82}\) The amount of water the LADWP was able to transport to Los Angeles escalated in 1970 when it completed the second barrel of the Los Angeles aqueduct.\(^{83}\) Completion of the aqueduct meant the LADWP could perfect its permit. In 1974, thirty-four years after granting the original permit to appropriate the full flow of water from the four Mono Lake tributaries, the SWRCB found that the LADWP “had perfected its appropriative right by the actual taking and beneficial use of water” and issued the LADWP two permanent licenses authorizing the LADWP to “divert up to 167,000 acre-feet annually” (far more than the average annual flow) of the Mono Lake tributaries. The SWRCB viewed this action as a ministerial action, based on the 1940 decision and held no hearings on the matter.\(^{84}\) By 1979 the Mono Lake ecosystem supplied approximately twenty percent of Los Angeles’ water supply.\(^{85}\)

Between 1970 and 1980 LADWP was diverting on average 99,580 acre-feet per year from the Mono Lake watershed. By 1979 Mono Lake’s surface level dropped from 6,435 feet above sea level to 6,373 feet above sea level.\(^{86}\) \textit{See,} Figure 3, Mono Lake Water Levels. The impacts of the LADWP diversion on the Mono Lake watershed ecosystems have been extensively documented in both the scientific and popular literature.\(^{87}\) The four major Mono

\(^{82}\) \textit{Arizona v. California,} 376 U.S. 340 (1964). In 1952 the State of Arizona filed suit against the State of California regarding the volume of California’s water appropriations from the Colorado River system. \textit{Arizona v. California,} 373 U.S. 546, 551 (1963). Eventually the states of Nevada, New Mexico and Utah and the United States were added as parties in a case that ultimately was intended to apportion the waters of the Colorado River system. \textit{See generally,} id. at 564-590 (discussing the allocation and apportionment of water of the Colorado River system among the states and other users).

\(^{84}\) 1994 Water Rights Decision at 5-6.

\(^{86}\) \textit{National Audubon,} 658 P.2d at 714, note 8.

\(^{87}\) A comprehensive discussion of the environmental impacts of the LADWP diversion from the Mono Lake Basin is contained in the Mono Basin Environmental Impact Report prepared between 1989 and 1993 at the request of the SWRCB. The entire document may be accessed electronically at the Mono Basin Clearing House \url{http://www.monobasinresearch.org/onlinereports/mbeir.htm} last visited at April 1, 2009.
Lake tributaries were dry most if not all year round and fish populations disappeared.\textsuperscript{88} Without fresh water input Mono Lake receded 43 feet below pre-diversion levels. \textit{See}, Figure 3, Mono Lake Water Levels, exposing a mile wide ring of powdery alkali flats around the lake that as early as 1965 gave rise to a new phenomena in the Mono Basin, alkali dust storms.\textsuperscript{89} These dust storms violated the ambient air standards of the Federal Clean Air Act.\textsuperscript{90}

The lack of fresh water input also caused an increase in Mono Lake’s salinity levels,\textsuperscript{91} which in turn adversely affected the symbiotic populations of alkali flies and brine shrimp.\textsuperscript{92} The closest alternative food source for migratory birds was the Salton Sea, 350 miles south of Mono Lake. Bird populations began to plummet.\textsuperscript{93} And the receding waters exposed land bridges to Negit and Paoha Islands, primary nesting sites for California Gulls.\textsuperscript{94} Between 1979 and 1994, coyotes crossed these land bridges feeding on nesting gulls and in 1979 coyote intrusions on Negit Island caused the California Gull to experience total reproductive failure.\textsuperscript{95} Additionally, prior to the diversions Mono Lake was surrounded by extensive wetland and delta lagoon systems.\textsuperscript{96} As the tributaries of Mono Lake dried up and lake levels dropped these systems were drained.\textsuperscript{97} The loss of this habitat particularly affected waterfowl,\textsuperscript{98} whose populations too began to dwindle.\textsuperscript{99}

\textsuperscript{88} 1994 Water Rights Decision, at 21-76.
\textsuperscript{89} Young, \textit{supra} note 26, at 506.
\textsuperscript{90} 1994 Water Rights Decision, at 120; and Hart, \textit{supra} note 4, at 52-53.
\textsuperscript{91} 1994 Water Rights Decision, at 77.
\textsuperscript{92} \textit{Id.} at 77-82.
\textsuperscript{93} Young, \textit{supra} note 26, at 510.
\textsuperscript{94} Ninety-five percent of the state of California’s California gulls, one in five of all California gulls in the world, nest at Mono Lake. \textit{Id.} at 509.
\textsuperscript{95} 1994 Water Rights Decision, at 102-103.
\textsuperscript{96} Of the 617 acres of wetlands fringing Mono lake there were 260 acres of brackish lagoons, 175 acres of dune lagoons, over 60 acres of delta lagoons, and 356 acres of marsh, wet meadow and wetland willow scrub. \textit{Id.} at 94.
\textsuperscript{97} \textit{Id.} at 97-98.
\textsuperscript{98} \textit{Id.} at 100.
\textsuperscript{99} Local residence reported that pre-diversion the sky was thick with ducks and geese; since diversion “its hard to find even one out there.” Young, \textit{supra} note 26, at 510. Current data indicates that duck populations at Mono Lake dropped from a pre-diversion level of 175,000 – 400,000 ducks per day to 11,000-15,000 ducks per year. 1994 Water Rights Decision, at 113 – 115.
In short the Mono Lake ecosystem was dying – a death made possible by the political power of the LADWP facilitated by its established relationships with the State of California, the SWRCB and its publically stated position that the taking of water from Mono Lake was necessary for the continued health and well being of the citizens of Los Angeles. The issue was framed as an either or scenario, either water is provided for human survival and economic growth or the water is used to protect the ecosystem. It was presumed that the citizens of California could not have it both ways. Saving the Mono Lake ecosystem would require a different approach to water allocation – a structural change in the water allocation decision-making process. Ultimately the task of changing this structure would fall upon the shoulders of graduate students turned activists who would use both social movements and litigation to facilitate change.

**Litigation and Social and Political Change – A Theory**

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

**Public law litigation and legal theorists**

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100 Editorial, *Water and Power in Our Future*, L.A. Times, Feb. 11, 1980, §II at 6 (arguing continued extractions from Mono Lake were needed for city’s future). Los Angeles has a long history of framing the water issue as one of economic viability. Reisner reports that as early as 1905 LADWP officials were crafting a message of water scarcity and the need for water if Los Angeles was to thrive. Reisner, supra note 3, at 70-72.


It is often argued that environmental law is an example of how litigation can cause social and political change. Environmental law was born in the 1960’s out of the common law as a means to “discipline public agencies, through ‘public interest’ litigation.” This evolution was made possible by the rise of “public law litigation” in the latter part of the nineteenth century and the relaxation of constraints on equitable remedies that permitted courts to examine controversies about future probabilities such as the impact of government agency policies.

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

On the environmental front, Sax argued that the administrative agency:

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

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105 Chayes, *supra* note 101, at 1284. The rise of public law litigation coincided with the increase of reform legislation at the close of the nineteenth century; the relaxation of rules governing pleadings, standing and class action litigation and the relaxation of constraints on equitable remedies. *Id.* at 1283-89, 1292.

106 *Id.* at 1292-93.

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

108 *Id.* at 1295.


110 Sax (1970), *supra* note 102, at xvii.
And those who knew best were the agency experts and those they regulated. Citizens with an interest in resource preservation lacked the political power to be meaningful players in the agency—developer decision-making process and were relegated to the position of outsider.\textsuperscript{111}

Citizens, Sax argued, should have the right to use litigation to access the policy decision making process: “[t]he availability of a judicial forum means that access to government is a reality for the ordinary citizen – that he can be heard and that, in a setting of equality, he can require bureaucrats and even the biggest industries to respond to his questions and to justify themselves before a disinterested auditor. . .[t]he citizen asserts rights, which are entitled to enforcement: he is not a mere supplicant.”\textsuperscript{112}

More recently Professor’s Sabel and Simon, drawing on the work of Chayes and Roberto Unger’s destabilization theory, argue that public law litigation can not only affect the outcome of bureaucratic policy decision-making but can also affect the manner in which public institutions make policy decisions.\textsuperscript{113} Unger, in his examination of democratic societies observed that privileged members of societies or elites\textsuperscript{114} exercised control over political resources including law,\textsuperscript{115} that permit them to control public policy decisions to their benefit\textsuperscript{116} creating the

\begin{footnotesize}
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\item[\textsuperscript{111}] Id. at 82-88.
\item[\textsuperscript{112}] Id. at 111-112.
\item[\textsuperscript{114}] For purposes of this paper the concept of elite is as defined by C. Wright Mills in his classic text, The Power Elite. Mill’s argues that the “power elite is composed of men whose positions enable them to transcend ordinary men and women: they are in positions to make decisions having major consequences . . . they are in command of the major hierarchies and organizations of modern society. They rule the big corporations. They run the machinery of the state and claim its prerogatives . . . They occupy the strategic command posts of the social structure, in which are now centered the effective means of the power and the wealth and the celebrity which they enjoy.” C. Wright Mills, The Power Elite, 3-4(1956).
\item[\textsuperscript{115}] McCann notes that law is a resource that is used by citizens to “structure relations with others, to advance goals in social lie, to formulate rightful claims, and to negotiate disputes where interests, wants or principle collide.” McCann, supra note 1, at 22. Austin T. Turk, Law as a Weapon in Social Conflict, 23 Soc. Prob. 276, 280 (Feb. 1976). Turk argues that there are five types of political resources embodied in law. These resources are: an enforcement power or the implied threat of legal, physical coercion to enforce a legal decision to your benefit; economic/resource power which is the use of law to allocate or reallocate economic wealth or natural resources; political power which is access to the public decision making process in a manner that permits you to control how
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phenomenon of political blockage.\textsuperscript{117} Political blockage occurs when the public policy decision making infrastructure “is substantially immune . . . [to] conventional political mechanisms of correction” and therefore becomes steeled to non-elite political pressures.\textsuperscript{118} There are three types of political blockage:

1. Majoritarian political control -- which occurs when the political system is unresponsive to the interest of a vulnerable, stigmatized minority.\textsuperscript{119}

2. The “logic of collective action” – in which a concentrated group with large stakes exploits or disregards a more numerous but more diffuse group with collectively larger but individually smaller stakes.\textsuperscript{120}

3. A hybrid of the two.\textsuperscript{121}

Sabel and Simon suggest that the logic of collective action is the primary form of political blockage that affects environmental decision-making.\textsuperscript{122}


\textsuperscript{118} Sabel and Simon, \textit{supra} note 113, at 1062.

\textsuperscript{119} \textit{Id.} at 1064.

\textsuperscript{120} Id. at 1062, 1064.

\textsuperscript{121} \textit{Id.} at 1064. This second type of political blockage encompasses the concept of traditional “agency capture”. Chayes and Sax both identify agency capture as a concentrated minority (elites) with large stakes in the agency decision capturing the agency decision-making process to the detriment of a larger public concern. Sax (1970), \textit{supra} note 102, at 189 and Chayes, \textit{supra} note 101 at 1313.

\textsuperscript{122} Sabel and Simon, \textit{supra} note 113, at 1065.
The exertion of political power by the LADWP\textsuperscript{123} in the acquisition of water from both the Owens Valley and the Mono Lake tributaries is a classic example of collective action “political blockage”. The LADWP had a long history of using its political resources to manipulate water allocation decisions to its benefit – when it came to water the LADWP got what it wanted. When it appropriated the water of the Owens Valley at the turn of the twentieth century it relied on its political relations with the Bureau of Reclamation and state agencies as Kahrl observed: “[t]he fate of the Owens Valley was sealed the moment President Roosevelt determined that the greater public interest would be served by a greater Los Angeles. . . [opponents] lost without even having had the opportunity to have their representative present.”\textsuperscript{124}

The LADWP then proceed to exercise its political muscle and special relationships with both Federal and state governments to appropriate water from the Mono Lake tributaries. It

\textsuperscript{123} Although some might argue that a public agency, such as the LADWP is not in and of itself an elite, those within the LADWP in decision making positions “occup[ied] . . . strategic command posts”. They effectively commanded power through their position within the agency, their celebrity, wealth and relationships with powerful elites within the City of Los Angeles and as such fall within the classic definition of an elite. C. Wright Mills, supra note 114, at 3-4. And even if not defined as elites those managing the LADWP had historically exercised significant political power. The LADWP dating back to 1899 and for at least three generations there after, was run by a group of wealthy business leaders and other professionals operating in their own self interest. See generally, Mike Davis, City of Quartz, Excavating the Future in LA, 110-115 (1992); see also, Kevin Starr, Material Dreams: Southern California: Through the Twenties, 120 (1990)(Starr argues that Los Angeles at the turn of the century had a discernible class of elites – “the Oligarchy”) and Kahrl, supra note 38, at 13-15. Mulholland through his celebrity and in his position as Chief Engineer of the LADWP was closely linked to and some would argue was part of the Los Angeles “Oligarchy”. See generally, Kahrl, supra note 38, at ch1 and Catherine Mulholland, William Mulholland and the Rise of Los Angeles, 59-60, 80-92 (2000)(discussing Mulholland’s rise to power and relationships with Los Angeles’ business leaders). The Oligarchy played a pivotal role in exerting their money, influence and political power to develop water resources in Los Angeles to promote business and urban development. See generally, Fion MacKillop, The Influence of the Los Angeles “Oligarchy” on the Governance of the Municipal Water Department, 1902-1930: A Business Like Any other or a Public Service? 2 Business and Economic History on line 1 (2004)(discussing the role of the Los Angeles Oligarchy and Mulholland in the development of the of the Los Angeles water system).

\textsuperscript{124} Kahrl, supra note 38, at 142. The history of Owens Valley and the construction of the Los Angeles aqueduct is illustrative of the political power of the City of Los Angeles and the LADWP. Even Hoffman, who gives the LADWP a more favorable treatment than most in the Owens Valley history observed: “[a]lthough the city needed water, it by no means needed the amount that would be coming down the aqueduct [from Owens Valley] once it was finished. Mulholland argued that the city’s water rights were at stake in the matter; to obtain less than what was allowed might set undesirable precedents. At the same time, not needing a storage reservoir at Long Valley in the immediate future, Mulholland ignored Owens Valley needs.” Hoffman, supra note 38, at 275. See also, Kahrl, supra note 38 (containing an excellent discussion of the LADWP’s leveraging of political power in the construction of the Los Angeles Aqueduct).
convinced the Bureau of Reclamation to secretly withdraw public lands from public sale and to convey them to City of Los Angeles for future construction of the reservoir for the Mono Lake Project. It convinced the SWRCB to issue a temporary permit for the full flow of the Mono Lake tributaries despite the fact that it did not have the capacity to use the entire flow and would not have the capacity to use the flow for thirty years. And when the LADWP completed the second phase of the Los Angeles aqueduct in 1970 the Water Resource Board issued the LADWP a final license without so much as a public hearing. Finally, the California Game and Fish Commissioner ignored the requirements of California’s Fish and Game Code permitting the LADWP to run the Mono Lake tributaries dry devastating fish populations. In the words of Elden Vestal “the City of Los Angeles was God Almighty.” Restoring the Mono Lake ecosystem would require a re-crafting of the LADWP’s water permit a feat that required meaningful access to the Water Resource Board’s decision-making process – access that was blocked by the LADWP.

Political blockage is counter to democratic accountability. Destabilization theory is premised on the argument that citizens in democratic societies not only have the right to correct bureaucratic policy decisions made for the benefit of the politically powerful or elite but they also have the right to create structural changes in the social and political institutions necessary to reduce the elites’ political power. In destabilization theory a “destabilization right” is the right of citizens to make “claims to unsettle and open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal process of

125 See discussion, supra at 11-12.
126 See discussion, supra at 15-16.
127 See discussion, supra at 19.
128 See discussion, supra at 16-18.
129 Hart, supra note 4, at 47 (quoting interview statement of Elden Vestel).
130 Unger, supra note 115 at 530.
131 Unger, supra note 115 at 532. See also, Sabel and Simon, supra note 113, at 1020.
political accountability.”

The court and public law litigation is a venue and means by which destabilization rights may legitimately be exercised – litigation provides citizens access to decision-making processes closed by political blockage. And as Sax and Chayes note such a venue in paramount where bureaucratic agencies play a major role in setting public policy.

In the case of most modern social legislation Congress sets general policy objectives or orientations but leaves a fair degree of discretion to the bureaucratic agency to accomplish the statute’s social objectives. The agency is charged with administration of these social programs. This sometimes requires filling policy gaps left by Congress. These same gaps also provided an opening for the court to act if the agency is not accountable to the statute’s objective or, more importantly, if the agency has closed the decision making process to the public or acted without deference to “the levers of power in the system.”

The court’s attention does not focus on policy making per se – it assures democratic accountability in a decision making process which is easily captured by the politically powerful or elite. The court’s role in public law litigation is thus twofold: to assure that the agency action comports with Congressional intent and to assure some modicum of democratic accountability.

The courts “pry open the democratic process and provoke consequences that are responsive to the merits of the controversy and [that are] more reflective of the variety of public constituencies which have an interest in the dispute.” The lawsuit is used to force the

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132 Sabel and Simon, supra note 113, at 1020.
133 Id. at 532. See also, Sabel and Simon, supra note 113, at 1020, Chayes, supra note 101, at 1313; Sax (1970), supra note 102, at 189 (discussing the right of citizen’s to use the court system to gain access to bureaucratic agency decision making forums).
134 Chayes, supra note 101, at 1314.
135 Id.
136 Id. at 1315
138 Sax, supra note 102, at 180-81.
administrative agency to reconsider its decision under the hard questioning eye of the court putting the agency’s discretion “to the test.” Additionally, the litigation alerts the legislature to differences of public opinion about the use and allocation of common pool natural resources. It becomes a cue to the legislature that wider debate and policy discussions are needed about the allocation of common resources.

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

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139 Id. at 181
140 Id. at 182.
141 Sabel & Simon, supra note 113, at 1020.
142 See, Chayes, supra note 101, at 1282-83. (discussing the characteristics of private litigation and comparing private litigation to public law litigation) Chayes argues that public law litigation substantially differs from public law litigation in its focus on the balance of competing interests in the implementation of broad public policy. Id. at 1288; see also, J. Hurst, Law and the Condition of Freedom in Nineteenth Century United States, 88-89 (1956).
143 Chayes, supra note 101, at 1285.
144 Sabel & Simon, supra note 113, at 1057.
145 Id. at 1058.
146 See generally, Michael J. Rusted, How the Common Good is Served by the Remedy of Punitive Damages, 64 Tenn. L. Rev. 793 (1997)(outlining the beneficial societal impacts of punitive damage awards in private litigation on industry norms and product safety).
The imposition of liability on product manufacturers has caused modifications of industry norms such as the requirement that industry should not sacrifice public safety for private gain as illustrated by the case of the Ford Pinto, *Grimshaw v. Ford Motor Co.*\(^{147}\) where the court concluded that Ford Motor Company could not trade correcting a life threatening product defect for profit.\(^{148}\) The outcome of the *Grimshaw* case was twofold. It provided a monetary remedy settling the legal dispute and it indirectly changed the duty of care owed by the industry to the public because the rationale of the *Grimshaw* court was applied by courts across the nation in cases ranging from the safety of tires to breast implants and resulted in a new industry norm.\(^{149}\)

The *Grimshaw* case illustrates the process of “creative destruction” in which new common law norms can reform institutions. In effect the rule of the case and the damage award, including in the *Grimshaw* case punitive damages, was a shot across the bow warning manufacturers to modify their behavior. By holding the manufacture liable for the “consequences of socially unreasonable practices [the court] puts pressure on weaker, less adept firms [s]ome will improve their practices; some will go out of business. When a court raises standards for the industry it puts pressure on all firms. The reasonableness norm is continuously revisable; it is elaborated in the context of current social circumstances.”\(^{150}\)

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\(^{148}\) *Grimshaw* involved the design of the Ford Pinto’s fuel system, which exploded in impacts in excess of 20-30 mph. *Id.* at 384. Fixing the design defect was a relatively simple and inexpensive process, however, after conducting a cost benefit analysis Ford opted to forgo the correction reasoning the compensation it would pay in damages was less than the cost of a product recall. *Id.* at 397-99. The Grimshaw family sued Ford after a stalled Pinto was rear-ended and exploded killing Mrs. Gray and disfiguring a thirteen-year-old passenger (Grimshaw youth). *Id.* at 360-62. The jury awarded actual damages and punitive damages in excess of $3.5 million. Rusted, *supra* note 149, at 825. The appellate court upheld the trial courts award and reasoning that Ford could not trade public safety for profit. *Grimshaw*, 174 Cal. Rpt. at 391.

\(^{149}\) Rusted, *supra* note 149, at 825-28.

\(^{150}\) *Id.* at 825-28.
In public law litigation this creative destructive\textsuperscript{151} process takes on an added dimension in the embodiment of destabilization rights. Public law litigation can be used in democratic societies to “disentrench or unsettle a public institution when . . . it . . . fail[s] to satisfy minimum standards of adequate performance and . . . it is substantially immune from conventional political mechanisms of correction.”\textsuperscript{152} It can alter the manner in which bureaucratic agencies make decisions. Thus the question presented at Mono Lake is whether public law litigation could be used to: (1) alter the LADWP’s license to protect the ecosystem and (2) change the decision making structure of the SWRCB compelling it to recognize ecosystem concerns in future water allocations.

\textit{Essential Elements and Outcomes of Destabilizing Litigation}

Sable and Simon identify two elements essential to successful destabilization litigation: the failure to satisfy some minimum legal standard\textsuperscript{153} and the experimentalist remedy.\textsuperscript{154}

At the outset effective destabilizing public law litigation requires the failure of the administrative agency to satisfy some minimum performance standard.\textsuperscript{155} Generally these legal standards are uncontroversial or based on “industry standards” developed through custom and

\textsuperscript{151} The concept of “creative destruction” was developed by Joseph Schumpeter and refers to the process by which abrupt institutional “subversion and redeployment” disrupt market process and generate new economic development. Sabel and Simon, \textit{supra} note 113, at 1059-60, (quoting Joseph A. Schumpeter, \textit{Capitalism, Socialism and Democracy}, 81-86 (3rd ed. 1950)). Sabel and Simon argue that common law norms such as those developed in the \textit{Grimshaw} case can play an important role in this disruption process creating room for new opportunities and new performance paradigms. \textit{Id.} at 1060.

\textsuperscript{152} \textit{Id.} at 1062.

\textsuperscript{153} \textit{Id.} at 1063.

\textsuperscript{154} \textit{Id.} at 1065.

\textsuperscript{155} \textit{Id.} at 1063.
practice. The court looks to these standards to define minimum performance standards for the public agency.

A second essential element of destabilization is the experimentalist remedy. Because the remedy in public law litigation addresses policy decisions made by the public agency the legal issue is not easily resolved by the award of damages, rather the remedy looks to modification of the agency decision. In the traditional command and control decree the court designs a remedy, generally with some assistance from the parties, to correct the agency action and commands the agency to implement the remedy. The experimentalist remedy differs from the command and control decree in that it: is negotiated by stakeholders, takes the form of a “rolling rule regime” and is transparent.

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

Often negotiations between stakeholders are provisional and dependent upon unknown future contingencies, thus stakeholders continually reassess and reposition themselves as their

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156 Sabel and Simon sight as an example of minimum performance standards prison standards adopted by the Federal Bureau of Prisons such as when Arkansas’ prison administrator encouraged public law litigation to promote prison reform in the institutions he managed. Id. at 1063-64.
157 Id. at 1063.
158 See generally, Sax (1970), supra note 102, at 113-14.
159 See generally, Chayes, supra note 101, at 1298-1300 (discussing the nature of the judicial decree).
160 Sabel and Simon, supra note 113, at 1067-72.
161 Id. at 1067.
162 Negotiation among stakeholders is deliberative in nature requiring face-to-face interaction and good faith negotiation to build consensus. Id. at 1068.
163 Id. at 1068.
knowledge becomes deeper and time reveals more information. Because the complexities and futuristic nature of the issue requires stakeholders to make decisions based on incomplete information the stakeholder negotiations focus on: performance outcome norms and goals, monitoring and assessment of norms and goals and reassessment of norms and goals, knowledge is increased as a result of the success or failure of the negotiated remedy to meet performance measures. This “rolling rule regime” requires the parties to interact and renegotiate over time and assumes the court will maintain ongoing oversight over the litigation until the goals and implementation can be assessed over time.

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

Sable and Simon identify six destabilizing effects of public law litigation: the veil effect, the status quo effect, the deliberative effect, the publicity effect, the stakeholder effect, and the web effect. Together these effects alter the relationship between the public

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164 Id. at 1069.
165 Id.
166 Id. at 1069-70.
167 Id. at 1070.
168 Id. at 1071.
169 Id. at 1071-72.
170 The negotiation of the remedy places the agency in an “uncertain” position in which the agency can no longer rely on past patterns. This requires the agency to reorient its goals, its partners and its understanding of how to solve problems. Id. at 1074-75.
171 Although the form of the negotiated remedy is unknown the parties realize that that the outcome will, by necessity, be different than the status quo. The negotiation stigmatizes the status quo reducing the risk of change – change becomes a forgone conclusion. Id. at 1075-76.
172 Because the status quo is no longer an option the parties are forced to more fully explore alternatives developed by all of the stakeholders. Id.
173 Vindication of the plaintiffs claim increases public scrutiny of the problem. Id. at 1077.
174 The liability determination empowers the plaintiff and legitimizes their claim giving the plaintiff a viable position at the negotiation table. Id. at 1077. The liability determination and remedy negotiation also causes an internal
agency and its traditional constituency, the relationship between the blocked citizen and the agency and may alter the manner in which the agency implements public programs.

**Public Law Litigation, Social Movements and Social Science Scholarship**

Social scientists, too, have explored the extent to which litigation can cause social and political change with a substantial amount of disagreement.\(^{176}\) Stuart Scheingold in his groundbreaking work *The Politics of Rights*, posited that law and litigation could alter public policy but only if players were willing to abandon conventional legal perspectives in favor of a political approach to law.\(^{177}\)

Scheingold argues that there are two prevailing views of law in American society: the “myth of rights” and the “politics of rights.”\(^{178}\) The “myth of rights”\(^{179}\) has at its core a “legal paradigm – a social perspective which perceives and explains human interactions largely in terms of rules and the rights and obligations inherent in rules.”\(^{180}\) American’s tend to believe that public policy development “is and should be conducted in accordance with the patterns of rights

power shift increasing the influence of the plaintiff and decreasing the influence of the traditional agency stakeholders or power elites. \(\text{Id. at 1077-78.}\)

\(^{175}\) The negotiated remedy may spill back and forth between public and private realms in a process of “iterative disequilibration and readjustment.” \(\text{Id. at 1081.}\) Thus for example, a concern about discrimination may lead to a concern about the quality of services to the disadvantaged. \(\text{Id.}\)

\(^{176}\) Rosenberg has characterized the two schools of thought about the ability of the court to instigate social change as the dynamic court view and the constrained court view. \(\text{See generally, Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change (1991).}\) The constrained court view argues that courts are not effective tools of social reform because of the “limited nature of constitutional rights”, the lack of judicial independence and the inability of the court to develop and implement appropriate policies. \(\text{Id. at 10.}\) Proponents of the dynamic court view argue that courts can produce significant social change through social movements. \(\text{Id. at 22.}\) \(\text{See also, Michael McCann (2006), supra note 1, at 19.}\)

\(^{177}\) Scheingold, \textit{supra} note 103, at 4-7. Scheingold was the “first to develop a systematic argument for the proposition that litigation and court decisions could be used as part of a broader strategy to organize and mobilize political action.” \(\text{Michael Paris, The Politics of Rights: Then and Now, 31 Law & Soc. Inq. 999, 1006 (2006).}\)

\(^{178}\) \textit{Id.}\)

\(^{179}\) The “myth of rights” has been the dominant view of law in American. Grounded in the Constitution it provides American democracy and politics with symbolic legitimacy.” \(\text{Scheingold, \textit{supra} note 103 at 13. Symbolic rights such as the right to own property, the right to contract freely “reflect [the] values which are the building blocks of [American] political ideology.” Id.}\)

\(^{180}\) \textit{Id.}\)
and obligations established under law.”181 Reform lawyers, who are students of this view, tend to distrust political processes in favor of exclusively “legal” approaches to policy change such as litigation and in so doing “grossly overestimate the political impact of court rulings.”182 This legal frame “[t]unnel[s] the vision . . . of activists leading to an oversimplified approach ... that grossly exaggerates the role that lawyers and litigation can play in a strategy for change. The assumption is that litigation can evoke a declaration of rights from courts”183 a declaration that can be used to realize rights, the realization of which causes social and political change.184 Thus the belief that litigation alone can cause social reform.

In truth, using litigation to promote social change is much more complex.185 Litigation can be successful in promoting social only if it is directed “to the redistribution of power”186 – if it is used politically. Scheingold characterizes this use of law as the “politics of rights” in which litigation becomes a “political resource [] of unknown value in the hands of those who want to alter the course of public policy”187 no different than any other political resource. The value of the resource is dependent upon the manner in which the resource is used. For law and litigation to be used successfully to promote change two essential elements come into play: (1) a preexisting group of political activists promoting social change and (2) legal mobilization or the use of law or in Scheingold’s words “rights” to develop political resources that can be used by activists in a larger context to promote social change.188

181 Id.
183 Scheingold, supra note 103, at 5.
184 Id.
186 Scheingold, supra note 103, at 6.
187 Id. at 5.
188 McCann (2006), supra note 1, at 21-22.
Social science scholars since Scheingold have argued that if law and litigation are to result in reform change they must be mobilized by an organized social movement. The term social movement has been given a variety of definitions by social science scholars a discussion of which is beyond the scope of this paper. It is, however, useful to employ the definitions of Tilly and Tarrow. Tilly defines a social movement as “[a] sustained series of interactions between power holders and persons successfully claiming to speak on behalf of a constituency lacking formal representation” in which these activists make public demands for changes in the distribution and exercise of political power and “back those demands with public demonstrations of support.” Tarrow expands this definition further characterizing a social movement as “sequences of contentious politics that are based on underlying social networks and resonate collective action frames, . . . which . . . maintain sustained challenges against powerful opponents. . . . Collective action . . . is used by people who lack regular access to institutions, who act in the name of new or unaccepted claims, and who behave in ways that fundamentally challenge others or authorities.” In the context of political blockage a social movement is a group of citizens blocked from the political decision making process by concentrated elites and administrative agencies engaged in attempts to destabilize or challenge established political blockage to gain meaningful access to public decision-making forums and who have mobilized to make demands for access to political decision making forums.

189 See generally, Charles R. Epp, The Rights Revolution: Lawyers, Activists and Supreme Court in Comparative Perspective, 21 (U. of Chi. Press, 1988) and Michael McCann, Rights at Work, Pay Equity Reform and the Politics of Legal Mobilization, 279-80 (1994)(McMann (1994)). Even Scheingold, in the preface of the second edition of The Politics of Rights notes that McMann clearly articulates an important element to public law litigation, which he, Scheingold presumes, that is the existence of a social movement organization. Scheingold, supra note 103, at xxx.
191 Id.
McCann, in his overview of the use of litigation by social movement organizations (SMOs) to facilitate social and political change observes that SMOs seek both an immediate political decision to redress a past wrongs and structural change that eliminates political blockage opening policy decision making structures for the benefit of the politically disenfranchised. Additionally SMOs seek to build the movement itself, to increase its power and thereby the likelihood of change. Thus the desired outcome of an SMO is threefold: (1) short term political gains (policy outcome), (2) meaningful structural change that provides access to policy-making forums (policy structural outcome) and (3) movement building. In the context of social movement theory law and litigation is a political resource that can be mobilized to accomplish some or all of these outcomes.

Law is a political resource, which can be used by elites or SMOs to control or to promote their own interests or ideas over those of another. It is generally conceded among SMO scholars that law as a political resource generally supports prevailing social relationships of the politically powerful or elites. Political power is the control of political resources

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

194 McCann (1994), supra note 190, at 282.


196 What constitutes a resource in the context of a social movement is to some degree dependent upon the social movement theory used by the scholar. Scholars of the rational choice or resource mobilization theory of social movements focus on the means available to collective actors to facilitate mobilization of social movements. Resources include money, time and human capital. These resources are internal to the SMO. Tarrow, supra note 192, at 15. Tarrow, in his synthesis of social movement theory argues that people engage in contentious politics when political opportunities are presented to them and that in this context a resource may be either internal to the SMO in the case of money or power leveraged to create change, or may be external to the SMO in the form of an external opportunity – an opening or access point such as the Three Mile Island nuclear accident’s impact on the anti-nuclear power movement in the United States. Id. at 19-20.

197 Turk, supra note 115, at 280 and McCann (2006), supra note 1, at 21.

198 McCann (2006), supra note 1, at 23.
including law and the exercise of political power is the mobilization of these resources to control the outcome of political conflicts or conflicts over public policy outcomes.  

In the context of Mono Lake, California’s legislative water appropriation scheme became a political resource used by the LADWP’s to access the Mono Lake tributaries. The California Constitutional provision “that the water resources of the State be put to beneficial use to the fullest extent of which they are capable” was intended to stretch scarce water resources to ensure settlement. Thus California’s prior appropriation water system incorporated a beneficial use doctrine that equated to the “duty of water.” This historic definition of beneficial use weighed heavily in favor of an extractive and economic use of water. In this context the LADWP could use California water law as a political resource to justify the extraction of water from the Mono Lake tributaries to support economic and urban development in Los Angeles.

The LADWP could also and did use law as a resource to help frame the water issue for the citizens of California. The framing power of law can impose limitations, perceived or real on alternative approaches to policy determinations. In the case of Mono Lake the beneficial use doctrine linked the need for water with the human and financial wellbeing of the citizens of Los

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199 See, Turk, supra note 115 (analyzing the five types of political resources represented by law).
200 Id. at 280.
201 National Audubon, 658 P.2d at 725 (quoting California Constitution Article X, section 2 enacted in 1928 as Article XIV, section 3).
204 A “frame” is a “schemata of interpretation” that permits individuals to “locate, perceive, identify, and label” events and occurrences in their lives and in the larger world. Framing permits individuals to organize their experiences and information and serves to guide actions. Frames permit the individual to simplify and condense information. Robert D. Benford and David A Snow, Framing Processes and Social Movements: an Overview and Assessment, 26 Annu. Rev. Soc. 611, 614 (2000).
205 Turk, supra note 115, at 281. Law plays a significant role in shaping the frames people use to give meaning to situations. Id. The fact that law supports one view can diminish the legitimacy of other views. Id.
Los Angeles. As early as 1905 the LADWP and Mulholland used framing to paint “bleak visions of water famines, drought and economic collapse” to support Los Angeles’ quest for water and to gain support for the bonds necessary to fund the Los Angeles Aqueduct.\(^{206}\) The Mono Lake project was presented to the citizens of Los Angeles “as a vitally important interim device to save Los Angeles from a water famine until the aqueduct to the Colorado could be completed.”\(^{207}\) Even the court in *City of Los Angeles v. Aitkens*, adopted this frame acknowledging that while the diversion would have a devastating impact on Mono Lake and the surrounding communities it was uncontroverted that the “condemnation of the waters of Rush and Leevining (sic) creeks by the City of Los Angeles [for municipal purposes] was a necessity.”\(^{208}\)

If, however, law is to matter in the struggle for political and social change then the power of law – the political resources it affords – must be made available to the SMO as a resource in the struggle for change. Through legal mobilization the SMO translates it’s desire into an assertion of a lawful claim of right, to transform or to reconstitute the terms of the social and power relationships within polities.\(^{209}\) But legal mobilization and court orders alone are insufficient to motivate political change.\(^{210}\) Social Movement scholars argue that litigation matters only if it is part of a broader strategy to organize and mobilize political action resulting in the redistribution of political power.\(^{211}\)

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\(^{206}\) Kahrl, *supra* note 38, at 84-84.

\(^{207}\) *Id.* at 342.

\(^{208}\) *City of L.A. v. Aitkens*, 52 P.2d at 586.

\(^{209}\) McCann (2006), *supra* note 1, at 21-22.

\(^{210}\) Social scientists argue that there are a number of factors which impact whether a court order will be enforced, let alone whether the order will result in political change. Those factors include but are not limited to whether the SMO is permitted to participate in the decision making process, whether the court exercises ongoing oversight over the matter, and whether the remedy fixes responsibility for and monitors the impact of organizational change and its outcome. Beth Harris, *Representing Homeless Families: Repeat Player Implementation Strategies*, 33 Law & Soc’y Rev. 911, 933 (1999) and Stryker, *supra* note 182, at 90.

\(^{211}\) Stryker, *supra* note 182, at 76.
examining the relationship between social movements and litigation: “maximizing real world inequality reduction through law requires combining a number of factors or conditions. Law interpretation and enforcement must be subject to sustained social movement pressure from below through a combination of litigation and mass political mobilization.”

What role can litigation play in the process to change political structures? Both legal theorists and social scientists identify a number of elements that appear to be necessary for successful destabilizing litigation that sustains political and social change. These elements include: an established social movement organization (SMO); a minimum legal standard that forms the basis for litigation; political and legal mobilization; the ability to use the litigation to frame the issue for bystanders and potential movement members; ongoing court oversight; and a decree that encompasses an experimental remedy which is negotiated by stakeholders in a transparent process subject to ongoing oversight by the court and flexible enough to permit modification as new information becomes available.

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

**Methods**

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212 *Id.* at 88 (emphasis added).
214 *See generally,* Stryker, *supra* note 182, at 76-78.
215 Bendford and Snow, *supra* note 204, at 614.
216 *See generally,* Stryker, *supra* note 182, at 85.
217 *See generally,* discussion *supra* at 30-32.
How then to explore the role of litigation in Mono Lake ecosystem restoration? In the context of historic events surrounding social change, the tool of narrative \(^{218}\) is used by historical sociologists to explore both what happened and to explain why events unfolded the way they did. \(^{219}\) Using the history of events to explain how social change occurs permits the researcher to marry both theory and operating assumptions about how the world operates. \(^{220}\) The narrative can also be used to build and test theories. \(^{221}\)

Theory building from case histories involves the use of one or more cases “to create theoretical constructs, propositions and/or midrange theory from case-based empirical evidence” – theory is developed by recognizing patterns of relationships among constructs. \(^{222}\) This is an iterative process – “an *over-time process involving a continual interplay and mutual adjustment between theory and history*. Concrete and specific historic events and configurations are conceptualized in terms of abstract concepts and sensitizing frameworks. These concepts and frameworks are used to select, to order and to interpret . . . data.” \(^{223}\) From the narrative and its comparison to the theoretical frame and other cases the researcher can begin to make preliminary causal generalizations – to deductively explore how and why a given action does or does not produce another action in a causal sequence: \(^{224}\)

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\(^{218}\) A narrative is an analytical construct that unifies past and contemporaneous actions into a “coherent relational whole that gives meaning to and explains each of its elements and is, at the same time constituted by them.” Larry J. Griffen, *Narrative, Event Structure Analysis, and Causal Interpretation in Historical Sociology*, 99 Am. J. Soc. 1094, 1097 (1993). A narrative is how we describe, reconstitute and describe events. *Id.* at 1098.


\(^{222}\) *Id.*

\(^{223}\) Stryker, *supra* note 219, at 310-11 (emphasis in original).

\(^{224}\) *Id.* at 311.
Using a theoretical lens constructed from Sabel and Simon’s destabilization model modified to reflect the findings of social scientists such as Scheingold, McCann, and Stryker this article examines the narrative of the Mono Lake restoration to explore the role of law and litigation in changing the political and social structures necessary to protect and restore the Mono Lake ecosystem. In undertaking this research I have relied heavily on the narrative of the Mono Lake restoration constructed by Hart\textsuperscript{225} supplemented by government documents, court decisions, media accounts and the work of other legal scholars as noted herein.

\textbf{Lessons Learned From Mono Lake}

\textit{Lesson 1: Social Movement Organizations (SMOs) Matter}

Although legal scholars recognize that one of the primary goals of public law litigation is to provide citizens access to the public policy forum\textsuperscript{226} social movement scholars argue that change litigation is most successful if it is brought by a SMO because SMO’s aim for broader social and political transformations than do traditional litigants and thus while SMOs may achieve short term gains their primary push is for structural change to political and social institutions.\textsuperscript{227} Additionally, SMOs that use litigation as a regular strategy are more adept at using litigation for social change because they are more likely to have pre-existing networks,\textsuperscript{228} including activists and other organizations, capable of mobilizing the resources necessary to

\textsuperscript{225} Hart, \textit{supra} note 4.

\textsuperscript{226} See generally, Sax (1970), \textit{supra} note 102, at 175-180. Sax posits that the purpose of public law litigation in the context of natural resource policy management is to provide citizens blocked from the policy realm an opportunity to challenge an agency in court on behalf of the public to stop a project that infringes on the public’s rights to a common resource. \textit{Id.} at 175. Likewise Sabel and Simon argue that one of the primary functions of destabilizing public law litigation is to give disenfranchised stakeholders access to policy decision making forums that have become politically steeled to consumers of citizen groups. Sabel & Simon, \textit{supra} note 113, at 1064.

\textsuperscript{227} McCann (2006), \textit{supra} note 1, at 23-24.

\textsuperscript{228} There is an extensive body of social science literature surrounding the concept of networks and the use of social networks by SMOs and others to accomplish change. For purposes of this article a social network is a social structure made up of individuals and/or organizations (nodes) connected by one or more types of interdependency. Nancy Katz, David Lazer, Holly Arrow and Nashir Contractor, \textit{Network Theory and Small Groups}, 23 Small Group Research 307, 308-310 (June 2004)(discussing the structure of social networks).
bring the litigation and take advantage of its outcomes.\textsuperscript{229} These SMOs are “repeat players” in the litigation game. Repeat players are more likely to view litigation as a strategy increasing the likelihood that litigation will result in “redistributive change.”\textsuperscript{230} Further, research suggests that if SMOs are represented throughout the litigation courts are more likely to favor the interests they represent.\textsuperscript{231} For Mono Lake SMOs were central to restoration and these SMOs relied heavily on a litigation strategy.

Although there were some early attempts\textsuperscript{232} to initiate interest in the restoration of Mono Lake, restoration of Mono Lake would ultimately fall on the shoulders of graduate students turned activists: David Gains\textsuperscript{233} David Winkler\textsuperscript{234} and Tim Such.\textsuperscript{235} In 1976 Gaines and Winkler formed the Mono Basin Research Group to study the degradation of the Mono Lake ecosystem.\textsuperscript{236} Both Gaines and Winkler were passionate about Mono Lake ecosystem restoration but neither was particularly interested in political activism – however, when in November 1977 Lake

\textsuperscript{229} Stryker (2007), supra note 182, at 81.
\textsuperscript{230} Joel B. Grossman, Stewart Macaulay and Herbert M. Kritzer, Do the “haves” Still Come Out Ahead?, 33 Law & Soc’y Rev. 803, 808 (1999)(discussing the difference between those who access the courts on a regular basis and those who are “one shotters”). See also, Marc Galanter, Why the “Haves” Come Out Ahead: Speculation on the limits of Legal Change, 9 Law & Soc’y Rev. 95 (1974). Galanter analyzed the impact of litigation based on the nature of the litigant. He posited that individuals or organizations that have only occasional recourse to courts (one shot players) are less successful in leveraging litigation to bring about social and political change than are repeat players, litigants who are engaged in similar pieces of litigation over time. One-shot players have higher costs, are more focused on the outcome of the individual lawsuit than the long-term picture, and are more likely to settle without obtaining redistributive relief. As a result institutions generally have an advantage in the litigation game.
\textsuperscript{231} See generally, Harris, supra note 210, at 923-24.
\textsuperscript{232} In 1961 David Mason, a limnology graduate student undertook a limnological study of the area. Mason tried to enlist Ansell Adams to use his influence to preserve Mono Lake. Mason also approached several environmental groups – they were sympathetic but showed little interest in taking on the Mono Lake cause. Hart, supra note 4, at 52. Mason was, however, able to stir the interest of local shoreline owners who joined together to form Friends of Mono Lake. Id. at 59
\textsuperscript{233} In 1972 David Gaines, a U.C. Davis ecology graduate student was hired by the California Natural Resources Coordinating Council to do an inventory of Mono County and became alarmed by the state of Mono Lake. Id. at 65-66.
\textsuperscript{234} In 1975 Gaines recruited Winker, then a student, to do research at Mono Lake. Id.
\textsuperscript{235} Tim Such an undergraduate at UC Berkeley discovered Mono Lake as part of an assignment in his environmental studies class. Id. at 61.
\textsuperscript{236} See, Id. at 66-71 (for a detailed outline of the biological research of the Mono Basin Research Group).
Levels dropped to 6,375 permitting Winkler to walk to Negit Island. Winkler and Gaines saw no alternative to political action.

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

In March 1978, the California National Guard blasted a moat between Negit Island and the shores of Mono Lake and in that same month the Mono Lake Committee opened an office in a print shop in Oakland, California. In its first publication the Mono Lake Committee called for restoration of Mono Lake water elevations to 6,378 – the 1976 level. The LADWP didn’t even acknowledge the proposal. Hart characterized the pending battlefield:

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

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237 Historically Negit Island was separated from the mainland and provided a primary nesting site for the California Gull. Hart, supra note 4, at 16-17. As early as 1972 American Bird magazine documented the creation of a land bridge between Negit Island and the mainland and predicted the total destruction of the California gull nesting population. Id. at 59 – 60. As a symbolic response the Bureau of Land Management declared Negit Island an Outstanding National Area. Id.

238 Id. at 71.

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

240 Id.

241 Id.

242 Id. at 72-74.

243 This was the minimum level the Committee believed necessary for ecosystem restoration. Id. at 74. When criticized by the national environmental groups for not calling for an end to all diversion the committee retorted that it did not intend to overreach. It would seek the minimum they believed Mono Lake needed to survive based on evidence compiled to date. Id.

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

While Winkler and Gaines were building the Mono Lake Committee Tim Such, independently, took a different track. Such began contacting established NEOs and government agencies urging them to litigate to halt the diversion. Such recalls: “[t]hey [NEOs] thought the Mono issue was too complex…you couldn’t fight Los Angeles.” They suggested he come back “if you find a good legal theory.” Such suspended his undergraduate studies at Berkeley and began searching for a legal theory ultimately landing on the public trust doctrine when he read Joseph Sax’s 1970 Law Review Article: The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention.

Such made a second round of the NEOs in 1978 with this new theory. Only the Friends of the Earth (the Friends) were receptive and, in a classic example of social networking, took the case to its attorney Andy Baldwin who in turn called his contacts in the law firm of Morrison and Foerster (MoFo). MoFo agreed to take the case pro bono but it needed a plaintiff. In its search for a plaintiff MoFo looked not to an individual but to three SMOs: the Friends, the Mono Lake Committee and the National Audubon. One participant at that first meeting between MoFo and the three Mono Lake plaintiffs observed: “[it was] the Children’s Crusade at the court of

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245 *Id* at 74 (cites omitted).
246 *Id.* at 61 (quoting interview with Tim Such between March 22 and March 29, 1994).
247 *Id.*
248 Sax (1969-70), *supra* note 137.
249 Hart, *supra* note 4, at 65, 81. Most of the NEOs rejected Such’s plea – they were gearing up for a fight over the Sacramento/San Joaquin Delta, and the Peripheral Canal. *Id.* at 65. Saving Mono Lake, these NEOs believed would only put more pressure on the Sacramento River and other Northern California water sources. *Id.*
250 *Id.* at 81. While all three organizations were named parties in the litigation, National Audubon was the first named plaintiff primarily because of its national stature and its financial resources. *Id.* at 82. Both Friends of the Earth and National Audubon contributed an initial $10,000 to cover costs and expenses. *Id.* at 82-83.
some Eastern potentate. Trail mix and backwoods idealism confronted pinstripes across a corporate table.”

The processes of initiating and financing the Mono Lake litigation are illustrative of the advantages of the SMO as litigant. Here the Friends’ social network was used to locate an attorney, the financial resources of the Friends and the National Audubon were used to launch the litigation, and the national stature of the National Audubon was used to give the litigation credibility.

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

Lesson 2: Minimum Performance Standards may not be Essential

Sabel and Simon argue that effective destabilizing litigation requires the failure of the administrative agency to satisfy some minimum performance standard. A minimum performance standard is uncontroversial or based on “industry standards” developed through

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251 Id. at 82 (quoting interview of Gray Brechin, May 26, 1994).
252 Id. at 81-83.
253 Id. at 83 (Interview with Bruce F. Dodge, Counsel to National Audubon Society, April 12, 1994).
254 Sabel & Simon, supra note 113, at 1063
custom and practice. The court looks to these standards to define the minimum performance standards in destabilizing litigation. Yet arguably the public trust doctrine relied on by Such and the Mono Lake Committee is one of the more elusive and controversial legal standards in environmental law.

The public trust doctrine, an ancient legal doctrine originating under Roman and English common law, is premised on the theory that certain types of public property, most notably the seashore, tidal waters, fisheries, highways, and waterways, are dedicated to perpetual public use and must be held in trust for the public by the sovereign. Historically, the sovereign could not convey trust lands to private interests although Parliament had the authority to enlarge of diminish trust rights for a “legitimate public purpose.” The U.S. Supreme Court recognized the application of the public trust doctrine in the United States as early as 1868. And the ability of a state legislature to convey trust properties to private interests was most famously addressed by the U.S. Supreme Court in Illinois Central Railroad Co. v. Illinois where the court ruled that the public trust doctrine extended to navigable waters and streams and that the Illinois legislature could not convey the Lake Michigan water front and the associated control over commerce to a private enterprise. 

\[\text{255 Id. at 1063-64. Federal prison standards are illustrative of this type of uncontroverted legal standard. Id. Sabel and Simon cite to a number of cases where senior prison officials encouraged litigation by outsiders to promote prison reform. Id. at 1063.} \]

\[\text{256 Sax 1969-1970, supra note 137, at 475-76. See also, Sax (1970), supra note 102, at 163-64. These public trust properties were distinguishable from general public property which the sovereign could grant to private owners. Sax 1969-1970, supra note 137, at 475.} \]

\[\text{257 Sax 1969-70, supra note 137, at 476.} \]

\[\text{258 Railroad Company v. Shurmeir, 74 U.S. (7 Wall.) 272 (1868). See also, Shively v. Bowlby, 152, U.S. 1, 9-10 (1894) (recounting of the history of the public trust doctrine in the United States).} \]

\[\text{259 Illinois Central Railroad Company v. Illinois, 146 U.S. 387 (1892). Illinois Central involved a state grant of land under Lake Michigan to the Illinois Central Railroad. The grant extended one mile out and across the Chicago Harbor and comprised most of Chicago’s commercial waterfront. Id. at 433-34. The Illinois legislature, regretting its decision, voted to repeal the grant and sued to have the grant declared invalid. Id. at 454. The Supreme Court upheld the revocation finding that the waters of Lake Michigan were “different in character from that which the state holds in lands intended for sale . . . [i]t is title held in trust for the people of the state.” Id. at 452. For a more detailed history of the Illinois Central case see Joseph D. Kearney & Thomas W. Merill, The Origins of the} \]
not “abdicate its trust over property in which the whole people are interested . . . so as to leave them entirely under the use and control of private parties.”

Sax, in his now famous law review article on the public trust doctrine argued the public trust doctrine should be extended beyond tide waters to form the basis of a legal theory which would enable private citizens to protect the public’s interest in common pool resources such as air and water. Sax noted that because the public trust doctrine rests upon the principle that the public’s interest in certain natural resources is so important that these resources could not be transferred to private hands but should remain freely available to the entire citizenry, the role of the government must be to “promote the interests of the general public [in the common pool resource] rather than to redistribute public goods [intended] for broad public uses to restricted private benefit.” The transfer of trust assets into private hands, if permitted at all, must be accompanied by “substantial evidence that some compensating public benefit is being achieved thereby.” The trust obligation was not unlimited but, where applicable, assured that “the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; . . . the property may not be sold, even for a fair cash equivalent; and . . . the property must be maintained for particular type[s] of uses” that benefit the larger public. Citizens, Sax concluded, should be permitted to sue government to compel it to comply with its trust obligations.

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262 Id. at 165.
263 Id.
264 Sax (1969-70), supra note 137, at 477.
265 See generally, Sax (1970), supra note 102, at 175-192 (discussing the use of litigation to enforce trust obligations).
California itself had a long history of using the public trust doctrine to protect shoreline resources and navigable waters. Since the mid 1860’s California courts had regularly invalidated public-private conveyances of tidelands valued for navigation and fishing even where the legislature appeared to authorize the conveyances to private interests. The California court observed that “‘[n]othing short of a very explicit provision [in statute] … would justify us in holding that the legislature intended to permit the shore of the ocean … to be converted into private ownership.’” Even where the legislature explicitly authorized the conveyance of trust property to private interests California courts were loath to find that the legislature had conveyed all public interest in the property. The grantee of trust lands was presumed to have obtained title subject to the public’s right to navigation.

In 1971 the California Court expanded the scope of the public trust doctrine in *Marks v. Whitney* a quiet title action to clarify title prior to development. Mark’s property had been acquired under a 1974 patent from California. Mark’s claimed he had the right as owner of shoreline to fill and develop the property. Whitney, who owned property inland from Mark’s opposed the shoreline fill arguing that it would cut off his rights to the tidelands, rights he held as a member of the public under the public trust doctrine.

The trial court found that Whitney had “no standing to raise the public trust issue” – the California Supreme Court reversed. The California Supreme Court’s decision in *Marks v. Whitney* was important to the development of a legal theory for Mono Lake for three reasons.

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266 Sax (1969-70), *supra* note 137, at 524-545 (discussing the California Courts use of the public trust doctrine prior to 1970).
267 *Id.* at 525-26.
268 *Id.* at 527 (quoting *Kimball v. MacPherson*, 46 Cal. 104, 108 (1873)).
269 *Id.* at 528 (quoting *People v. California Fish Company*, 166 Cal. 576, 588 (1913)).
271 *Id.* at 377.
272 *Id.*
First, the court recognized that Whitney, as a member of the public could bring an action to enforce the public trust interest and furthermore, had Whitney not raised the issue the court itself could take judicial notice of the public trust burdens and raise the issue on its own.\textsuperscript{273} This meant that any citizen could bring suit to protect the public’s interests in trust assets.

Second, the court held that the public trust burden is both flexible and fluid. While historically the trust burden was limited to navigation and commerce over time the trust obligation had expanded to include hunting, fishing, boating and recreating.\textsuperscript{274} Here the court noted:

\begin{quote}
The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. There is growing public recognition that one of the most important public uses of the tidelands – a use encompassed within the tidelands trust – is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.\textsuperscript{275}
\end{quote}

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

Finally, the court concluded, that while the legislature could remove the trust burden from traditional trust lands it was up to the legislature “to take the necessary steps” to free trust lands of their trust burdens.\textsuperscript{276} The natural conclusion of this holding is that put forth by Sax who argued: “Any action which will adversely affect traditional public rights in trust lands is a matter of general public interest and should therefore be made only if there has been full

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\textsuperscript{273} \textit{Id.} at 378, 381-82.
\textsuperscript{274} \textit{Id.} at 380.
\textsuperscript{275} \textit{Id.}
\textsuperscript{276} \textit{Id.} at 380-81.
\end{flushright}
consideration of the state’s public interest in the matter; *such actions should not be taken in some fragmentary and publicly invisible way.*”

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

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

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

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277 Sax (1969-70), *supra* note 137, at 531 (emphasis added)(It should be noted that at the time Sax wrote his public trust article in the Michigan Law Review the California Supreme court had not yet issued a final ruling in *Marks v. Whitney.* Sax had reviewed the appellate court decision and criticized the appellate court for not taking up the public trust issue).

278 *National Audubon Society,* 658 P. 2d at 714 (quoting Div. Wat. Resources Dec. 7053, 7055, 8042 & 8043 at 26 (Apr. 11, 1940) (emphasis added by the court)). The SWRCB reiterated this argument in the lower court. *Id.* at 718.

279 The California Supreme Court observed that the *National Audubon* case brought together “for the first time two systems of legal thought: the appropriative water rights system which since the days of the gold rush has dominated California water law, and the public trust doctrine.” *Id.* at 712.
Initially the prospect of litigation playing any role in Mono Lake ecosystem restoration seemed fairly bleak. Almost four years and several early defeats were to elapse before the Supreme Court of California issued its now landmark decision in *National Audubon Society v. Superior Court of Alpine County.* The filing of the lawsuit in the spring of 1979 was followed by a flurry of motions and counter motions. The venue of the Mono Lake litigation was not resolved until July 1980 when the Federal District Court for the Eastern District of California ordered the removal of the matter from California State Court to Federal District Court. Removal was followed by further jurisdictional wrangling and an abstention order instructing Audubon and the Mono Lake Committee to file an action in state court to address: (1) the relationship between the public trust doctrine and California’s water rights system and (2) whether Audubon was required to exhaust its administrative remedies prior to filing suit challenging the LADWP allocation permit. Thus the matter was sent down to California’s Alpine Superior Court.

On November 9, 1981, Judge Hilary Cook of the Alpine Superior Court dealt the Mono Lake Committee a devastating blow ruling that the plaintiffs – Audubon and the Mono Lake Committee – must exhaust their administrative remedies before the SWRCB prior to filing suit. More importantly she found that California’s prior appropriation system “is a comprehensive and

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281 The lawsuit was originally filed in Mono County. The court granted the LADWP’s first request for change of venue moving the matter to Alpine County but denied a second request for change of venue. Hart, *supra* note 4, at 89. The LADWP filed a cross claim against 117 residents of the Mono Basin alleging that they had contributed to the decline in lake elevation. *Id.* See also, *National Audubon Society v. Department of Water & Power of the City of Los Angeles* 496 F. Supp. 499, 502 (E.D. Cal. 1980) (*National Audubon v. LADWP*). Not to be outdone the SWRCB filed a cross claim against Audubon and the Mono Lake Committee arguing that they had failed to exhaust their administrative remedies. *Id.* And the SWRCB filed a cross complaint naming the United States as a defendant which resulted in a petition to remove the case to Federal District Court. *National Audubon v. LADWP*, 496 F.Supp. at 502.
282 *Id.*
283 *National Audubon v. Department of Water*, 858 F.2d 1409, 1411 (9th Cir. 1988)(*National Audubon v. SWRCB*).
284 *National Audubon*, 658 P.2d at 729.
exclusive system for determining the legality of the diversions for the City of Los Angeles in the 
Mono Basin . . . . The Public Trust Doctrine does not function independently of that system . . . 
the Public Trust Doctrine is subsumed in the water rights system of the state.”

Audubon and 
the Mono Lake Committee immediately appealed requesting expedited review to the California 
Supreme Court – even with expedited review the matter would not be resolved until 1983.

Meanwhile Mono Lake’s levels continued to fall dropping to 6,373 feet in 1980. See, Figure 3, Mono Lake Elevation Levels. By June 1981 Negit Island was “solidly fused” to the 
mainland, brine shrimp and gull hatches where at an all time low and many of those gulls that 
did hatch suffered massive die offs or were hunted by predators reaching nesting islands. To 
many it seemed that the Mono Lake ecosystem was on the verge of collapse with no relief in 
sight. Then in the winters of 1981-82 the snow and the rains began. There was more water 
than the reservoir could handle and Mayor Bradley was forced to order a reduction of Los 
Angeles’ diversion, sending water down into Mono Lake giving the Lake a temporary reprise 
while the litigation plodded forward.

On February 17, 1983, the California Supreme Court issued its now landmark decision 
holding the public trust interest in navigable waters and the lands beneath the navigable waters 
had not been subsumed by the California’s appropriative water rights system. Furthermore, the

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285 Id. at 718 (quoting district court order dated November 9, 1981).
286 Id.
287 Hart, supra note 4, at 93-97
288 Id. at 100. The winter of 1981-82 had been extremely wet and the 1982-83 winter was the wettest winter of the 
century. Id.
289 Id. This rapid rise of the lake levels caused meraomixis or the separation of salt water and fresh water into layers 
in Mono Lake. Under normal conditions, fresh water came into Mono Lake in a fairly steady even flow allowing 
the fresh and salt water to mix. The quick release of water by the LADWP was too much for Mono Lake’s 
hydrological system. The fresh water settled on top of the salt water rather than mixing. This phenomenon persisted 
for six years from 1981 through 1987. Id. at 100-101.
290 National Audubon Society, 658 P.2d at 727. See also, Cynthia L. Koehler, Water Rights and the Public Trust 
Doctrine: Resolution of the Mono Lake Controversy, 22 Ecology L. Q. 541, 564-568 (1995)(for an overview of the 
court’s National Audubon decision).
court held that the public trust obligation extended to non-navigable tributaries to the extent that
damage to those tributaries damaged the navigable water body into which they flowed.\textsuperscript{291} The
state had an ongoing public trust interest in these assets that prevented the LADWP from
acquiring a vested right to appropriate water “in a manner harmful to the interests protected by
the public trust.”\textsuperscript{292} Although the SWRCB had the authority to permit appropriation of the Mono Lake tributaries for beneficial use, it also had “an affirmative duty to take the public trust
interest in Mono Lake] into account in the planning and allocation of water resources and to
protect the public trust uses whenever feasible.”\textsuperscript{293} Once the SWRCB approved an appropriation,
the SWRCB had a continuing duty to supervise the taking and assess the impact on trust assets.\textsuperscript{294}

Furthermore, the court ruled the state’s duty to protect trust assets is subject to
modification over time\textsuperscript{295} and was more expansive than either the LADWP or the SWRCB had
envisioned: “[t]he objective of the public trust has evolved in tandem with the changing public
perception of the values and uses of waters.”\textsuperscript{296} The doctrine was “sufficiently flexible to
encompass changing public need”\textsuperscript{297} and could expand to include inland waterways and
tributaries flowing into navigable waters\textsuperscript{298} and ecosystems in their natural state.\textsuperscript{299} The court
concluded: “One of the most important public uses of tidelands . . . is the preservation of those
lands in their natural state, so that they may serve as ecological units for scientific study, as open
space, as environments which provide food and habitat . . . which favorably affect the scenery
and climate of the area.”\textsuperscript{300} The public trust doctrine is, “an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.”\textsuperscript{301} This duty is a continuing duty imposed on the state in the allocation of the state’s water resources,\textsuperscript{302} a duty that the SWRCB failed to undertake in the initial allocation of water from the Mono Lake tributaries.\textsuperscript{303} The Court concluded that “some responsible body ought to reconsider the allocation of the waters of the Mono Basin” to take into account the impact of the LADWP’s diversion on the Mono Lake ecosystem.\textsuperscript{304} The ruling did not vacate the LADWP permit but it did impose a new requirement on the SWRCB, a requirement that was ongoing and which applied to all water allocations past, present and future made by the SWRCB which affected a navigable water body including the allocation from the Mono Lake tributaries.\textsuperscript{305} The matter was sent back to the Federal Court where it sat for another eighteen months.\textsuperscript{306}

From the perspective of destabilization theory the Mono Lake Committee had won with an unconventional legal theory, however, neither the filing of the lawsuit nor the California Supreme Court’s ruling resulted in an alteration of the SWRCB’s permitting decision.

\textsuperscript{300} Id. (quoting Marks, 491 P. 2d at 259-60).
\textsuperscript{301} Id. at 724. The court did, however, note that consistent with California water law all uses of water in California “including trust uses, must now conform to the standard of reasonable use.” Id. at 725. However, the “‘use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water.’” Id. at 726 (quoting Cal. Water Code §1243).
\textsuperscript{302} Id. at 732
\textsuperscript{303} Id. at 728-29.
\textsuperscript{304} Id. at 729. The court observed that both the California District Court and the SWRCB had concurrent original jurisdiction over the matter and declined to state which body should be the body to assess the impact of the LADWP’s diversion on the public trust interest. Id. at 729-32. In any event the case was to continue in Federal District court, which had retained jurisdiction during the pendency of the state court actions. National Audubon v. SWRCB, 869 F. 2d at 1199.
\textsuperscript{305} National Audubon, 658 P. 2d at 728. The LADWP immediately appealed the decision to the U.S. Supreme Court and the Mono Lake Committee filed a motion for injunctive relief in the Federal District Court to maintain flows to the Mono Lake tributaries. Hart, supra note 4, at 162. And the State of California requested that the matter be remanded to state court in its entirety. Id.
\textsuperscript{306} Hart, supra note 4, at 103.
There was no equitable relief for Mono Lake nor was there a “flexible remedy” bringing the parties together to negotiate a solution for the dying ecosystem. This was not due so much to the legal theory as it was to the fact that, as Rosenberg notes, court orders are not, in and of themselves, self-executing, execution may depend upon a number of variables including the availability of political support within the administrative agency and broad political support beyond the administrative agency, the existence of public support, and the existence of incentives to comply. Uncontroversial legal theories might be easier to implement when the theory has broad based support as Rosenberg notes but this does not mean that controversial theories cannot form the basis for structural change. For Mono Lake, it would simply take more than the court order to move the parties but in the end game, the litigation and the court’s holding would play a major role in reconstructing water allocation in California, not only in the Mono Lake case but in all of California’s water appropriation cases going forward.

In many respects the far reaching nature of the National Audubon decision, was in part due to the innovative theory applied by the plaintiffs suggesting that “a minimum performance standard” is less important than a legal standard which is fluid and flexible enough to give the court latitude to bring the parties together to craft a remedy as was the case here where the California Supreme Court noted that it was incumbent upon either the California District Court or the SWRCB to incorporate trust principles into the LADWP allocation permit.

Lesson 3: The Ongoing Power of Framing

In the end, however, the National Audubon ruling facilitated change because it was used as an important political resource by the Mono Lake Committee to build a new collective action.

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307 Rosenberg, supra note 176, at 19.
308 Id. at 31.
309 Id. at 32.
310 Id. at 33-34.
frame for the Mono Lake extraction. While there are many types of frames from the perspective of SMOs “collective action frames” are the most meaningful. Collective action frames are used by SMOs for two important functions: 1) to mobilize “potential adherents and constituents” thereby building the SMO and 2) to garner “bystander support” to increase the legitimacy of the SMO and its views and to demobilize antagonists.311 In the context of framing, law can be a resource used by the SMO to both build the SMO and to garner public support increasing the legitimacy of preferred policy outcomes through the framing process.

Framing played an important role in both the demise and restoration of the Mono Lake ecosystem. For years the LADWP controlled the framing game, it framed the water issue as one of water scarcity – water was scarce but essential to economic growth, without it Los Angeles and California could not prosper. 312 When opponents objected to water appropriations from Mono Lake the LADWP, resorting to its frame, simply noted that the water would have to come from somewhere, perhaps the Sacramento San Joaquin river Delta.313 This frame was a dilemma for the Mono Lake Committee, saving the Mono Lake ecosystem would mean the destruction of the Delta ecosystem. Other environmental groups were reluctant to support the Mono Lake Committee if it meant taking water from the Sacrament San Joaquin River Delta.314 Nor could the Mono Lake Committee ignore Los Angeles’ perceived need for more water without raising the ire of the citizens of Los Angeles and their political leaders. The citizens of Los Angeles

311 Benford and Snow, supra note 204, at 614.
312 Supra at 37-38 (discussing the LADWP’s use of framing in the context of the construction of Los Angeles Aqueduct and the Mono Lake project).
313 Hart, supra note 4, at 76. This frame was successful in deterring efforts by the Mono Lake Committee to garner support from other environmental interest groups. These groups feared supporting Mono Lake would simply result in less water for Los Angeles and greater pressure for the Peripheral Canal a project to divert water from the Sacramento River around the San Joaquin Delta to supply Los Angeles. Id. and Kelly Zito, Peripheral Canal Urged to Save the Delta, San Fran. Chron. July 18, 2008 at A1 (available at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/07/17/BA3911QA9U.DTL). The Peripheral Canal proposal was ultimately defeated in the 1980s but has become an issue again as pressure has built on California’s water system. Id.
314 Id.
might support saving the Mono Lake ecosystem but would they do so at the expense of their morning shower?

Because frames spotlight events and their underlying causes and consequences for bystanders and direct attention away from other consequences the Mono Lake Committee had to find and build a new frame to replace the LADWP frame, a frame that captured the attention of the citizens of Los Angeles and Californians if they were to restore the Mono Lake ecosystem. Thus, David Gaines began to traverse the state in earnest delivering lectures on the dying Mono Lake ecosystem to anyone who would listen and the Mono Lake Committee began publishing scientific studies documenting the impact of water extractions on the Mono Lake ecosystem health. Their work attracted the attention of the national news media. Between 1978 and 1980 articles about the demise of the Mono Lake ecosystem appeared in the Smithsonian, Sports Illustrated, National Geographic, and Outside Magazine boasting headlines such as “Elegy for a Dying Lake”, “Mono Lake: Silent, Sailess, Shrinking Sea”, “The Destruction of Mono Lake is on Schedule”, “The Troubled Waters of Mono Lake” and “Is this a Holy Place?” In 1981 a picture of Mono Lake “would drive the marriage of Prince Charles and Lady Diana off the cover of Life” magazine.

315 In general social movement parlance the citizens of California and Los Angeles are bystanders. Citizens generally construct their opinions based on cues flowing from issue framing or the relevance of the issue to their individual life. William A. Gansson, Bystanders, Public Opinion and the Media in The Blackwell Companion to Social Movements, 242, 245 (David A. Snow, Sarah A. Soule and Hanspeter Kriesi, ed. 2004).
316 Hart, supra note 4, at 84.
317 Id. at 80.
318 Id. at 79.
319 Gary Brechin, Elegy for a Dying Lake” San Fran. Examiner, October 1, 1978 Calif. Living Magazine
320 Gallen Rowell, Mono Lake: Silent, Sailess, Shrinking Sea, Audubon, March 1978 at 102-06.
322 Young, supra note 26, at 504.
The importance of mainstream national media coverage of the impact of the LADWP water extraction on the Mono Lake ecosystem cannot be over estimated. The ability of an SMO to promote change is dependent upon the SMO's ability to leverage resources to forward collective action.\textsuperscript{325} One of the primary means of accomplishing change is by “mobilizing consensus” among the general population – “turning bystanders and opponents into adherents to the goals of the social movement.”\textsuperscript{326} “[P]rivate conflicts are taken into the public arena precisely because someone wants to make certain that the power ratio among the private interests shall not prevail.”\textsuperscript{327} Thus the SMO uses the media to convince bystanders to become engaged in the struggle for change in ways that alter the power dynamics among existing players.\textsuperscript{328} The goal of the SMO in “framing” the issue in the mass media is to: (1) strengthen the readiness of SMO members to act, (2) increase the volume and intensity of bystander support, and (3) neutralize or discredit the framing efforts of adversaries and rivals.\textsuperscript{329} The mass media not only affects how bystanders frame an issue but how an issue is portrayed in the mass media reflects the success or failure of the SMO’s press for political and social change.\textsuperscript{330} Journalists decide which SMOs should be taken seriously – they are players who comment on the position of other players shaping and framing the discussion. A change in how the media portrays an issue challenges old frames and signals and spreads new frames. For an SMO to have its “preferred labels used [in the media] . . . is both an important outcome in itself and carries a strong promise of ripple effect.”\textsuperscript{331} The appearance of favorable media coverage on

\begin{flushleft}
\textsuperscript{326} \textit{Id.} at 140.
\textsuperscript{328} Gamson, supra note 315, at 242.
\textsuperscript{329} \textit{Id.} at 250.
\textsuperscript{330} \textit{Id.} at 243.
\textsuperscript{331} \textit{Id.}
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the devastating impacts of the water extraction on the Mono Lake ecosystem gave the Mono Lake Committee credibility among bystanders both nationally and in California, it was a signal to bystanders that the Mono Lake Committee’s position should be taken seriously.

Despite growing credibility, the Mono Lake Committee still faced a conundrum – yes destruction of the ecosystem was sad but where was replacement water going to come from and what was the environmental cost to the ecosystem providing replacement water. The Mono Lake Committee had to face the water scarcity issue head on – the Mono Lake diversions represented twelve percent of Los Angeles’ water supply. So the Mono Lake Committee began a search for replacement waters that would not damage another ecosystem.\footnote{\textit{Hart, supra} note 4, at 76-76. The Committee had to face the replacement issue head on because LADWP’s historical response to calls for reductions in diversions from Mono Lake was to demand compensation in excess of $30 million a year, the cost of replacing the water from another source most likely the Sacramento/San Joaquin Delta which was facing environmental challenges of its own. \textit{Id.} at 76.} Then the 1976-77 drought hit and Los Angeles cut its water consumption by nineteen percent with minimal conservation efforts. The Mono Lake Committee seized the moment – the city could reduce its water consumption and save the Mono Lake ecosystem without sacrifice by installing more efficient plumbing, reducing water main pressure, using drought tolerant plants on lawns and altering lawn irrigation systems.\footnote{\textit{Id.} at 76-77.} The Mono Lake Committee used the opportunity to convert the frame from one of water scarcity to one of waste. A frame picked up by \textit{Life} in 1981 – \textit{Life} reported: “The sad irony is that minimal conservation could save Mono Lake and better water – demand management might obviate future aqueduct projects.”\footnote{\textit{America the Dry: The Booming Sunbelt is Drinking its Share of Water – and Much, Much More, 38 Life. July 1981.}}

By late 1978 the Mono Lake Committee had increased support among bystanders and political leaders across the state to such an extent that the Brown administration formed an Interagency Task Force on Mono Lake to “‘develop and recommend a plan of action to preserve
and protect the natural resources in Mono Basin, considering economic and social factors.\textsuperscript{335}

While the primary focus of the Task Force was to find a new source of water for Los Angeles the Task Force also had extensive discussions about target lake levels\textsuperscript{336} – an apparent acknowledgement that the Mono Lake ecosystem should not be permitted to crash.\textsuperscript{337} When in mid-1979 the Task Force recommended raising lake levels\textsuperscript{338} the LADWP was quick to veto the recommendation.\textsuperscript{339} Despite the veto the Task Force Report provided legitimacy to the Mono Lake Committee’s position that elevated Lake levels were needed to save a dying ecosystem, this legitimacy was important to growing bystander support.\textsuperscript{340}

Despite national and statewide gains the Mono Lake Committee’s attempts at framing in the City of Los Angeles did not fare quite as well as evidenced by a review of editorials in the \textit{L.A. Times}. When the 1979 Task Force Report recommended increased lake levels the \textit{L.A. Times} was quick to back the position of the LADWP characterizing the proposed reductions as a “harsh penalty” imposed by the Task Force on Los Angeles rate payers.\textsuperscript{341} And in February 1983 when the California Supreme Court issued its landmark public trust decision the \textit{L.A. Times}

\textsuperscript{335} Hart, \textit{supra} note 4, at 85 (quoting Interagency Task Force on Mono Lake Minutes). Although the Task Force received information from a variety of sources its membership was limited to government agencies including: the California Department of Water Resources, the California Department of Fish and Game, the U.S. Forest Service, the U.S. Bureau of Land management, the U.S. Fish and Wildlife Service, the County of Mono and the LADWP. \textit{Id.} Non-governmental stakeholders had no formal voice on the Task Force.

\textsuperscript{336} \textit{Id.}

\textsuperscript{337} This view appeared to have significant statewide support as evidenced by the response during the May 1979 Task Force public hearings on target lake levels. A quarter of the participants supported a lake level of 6,378 feet – the level formerly supported by the Mono Lake Committee. Hart \textit{supra} note 4, at 85. And over half of the attendees supported a target lake level of 6,388 feet. \textit{Id.}

\textsuperscript{338} The Task Force recommended increasing lake levels to 6,388 feet. The 6,388-foot elevation would require the LADWP to cut its exports from the Mono Lake Tributaries by 15,000 acre-feet per year. \textit{Id.} at 88.

\textsuperscript{339} \textit{Id.} at 89.

\textsuperscript{340} \textit{Id.} at 88.

\textsuperscript{341} Editorial, \textit{Water and Power in our Future}, \textit{L.A. Times}, Feb. 11, 1980, § II at 6. The editorial alleges that the Task Force’s proposed elevations were based on speculative data and argues that the City could not recoup the resulting 17% reduction in its water supply with conservation measures. \textit{Id.}
characterized the court’s decision as “a far reaching reinterpretation of California water law” which would deprive the City of Los Angeles of seventeen percent of its water supply.\textsuperscript{342}

But the litigation had also provided the Mono Lake Committee with a powerful framing resource.\textsuperscript{343} Law, litigation, and court rulings have the potential to affect bystanders by legitimizing SMO’s policy preferences when accompanied by sustained social movement pressure from mass political mobilization,\textsuperscript{344} which is accomplished in part through the framing process. The very process of crafting a complaint in effect mobilizes the law into an assertion of a lawful claim of right – a claim that can be used to transform or reconstitute the terms of the social and power relationships within politics.\textsuperscript{345} This certainly was true in the case of Mono Lake.

The use of the public trust argument in the complaint gave rise to a claim of right on behalf of the public – the public had a right to have its trust interest in Mono Lake at least recognized by the SWRCB. The legitimacy of the Mono Lake Committee argument and claim of right was formally recognized when less than a year after MoFo served and filed the compliant in the \textit{National Audubon} case U.C. Davis held a two-day conference on “The Public Trust Doctrine in Natural Resources Law and Management”\textsuperscript{346} featuring the Mono Lake legal team.\textsuperscript{347} A claim of right that was further legitimized when the California Supreme Court, the highest court in the State of California, ruled that the citizens of California had a public trust

\textsuperscript{343} Turk, \textit{supra} note 115, at 281; McCann (2006), \textit{supra} note 1, at 23.
\textsuperscript{344} Stryker (2007), \textit{supra} note 182, at 76; \textit{see also}, McCann, \textit{supra} note 1, at 23.
\textsuperscript{345} McCann (2006), \textit{supra} note 1, at 21-22.
\textsuperscript{346} Harrison C. Dunnning, \textit{The Public Trust Doctrine in Natural Resources Law and Management: A Symposium: Forward}, 14 U.C. Davis L. Rev. 181 (1980).
interest in lakes and their ecosystems which must be considered by the SWRCB in the allocation of the state’s waters.\textsuperscript{348}

These legal successes were coupled with the Mono Lake Committee’s “Save Mono Lake” campaign – the “campaign that spawned a thousand bumper stickers”\textsuperscript{349} including: “Save Mono Lake”, “I save water for Mono Lake” and “Restore Mono Lake”.\textsuperscript{350} By the mid-1980s the Mono Lake Committee had grown to 20,000 members\textsuperscript{351} evidence of a growing environmental ethic.\textsuperscript{352} Educational campaigns were conducted across the state including information programs for Los Angeles youth.\textsuperscript{353} Arnold reports that this educational campaign had an impact “on the attitudes of Southern California residents” – the primary water consumers.\textsuperscript{354} Even the LADWP ultimately conceded that the Mono Lake Committee was a “well organized, effective group . . . [that had] done a pretty good job mobilizing public option” -- an effort one Los Angeles Times reporter characterized as “selling the lake.”\textsuperscript{355} By 1981 the State of California had established a tufa reserve around the lake.\textsuperscript{356} And in March 1983 the U.S. House of Representatives held hearings to create a national Monument at Mono Lake under the jurisdiction of the U.S. Forest Service.\textsuperscript{357}

The Mono Lake Committee’s work was furthered advanced by the water releases necessitated by heavy snows in the high Sierras in 1982-83. The LADWP’s reservoir aqueduct

\textsuperscript{348} National Audubon Society, 658 P. 2d 709.

\textsuperscript{349} Koehler, supra note 290, at 564.

\textsuperscript{350} Arnold, supra note 4, at 16.

\textsuperscript{351} Id.

\textsuperscript{352} Koehler, supra note 290, at 564.

\textsuperscript{353} Arnold, supra note 4, at 16.

\textsuperscript{354} Id.

\textsuperscript{355} Kevin Roderick, Selling a Lake: Tenacious Mono Backers Use Sophisticated Tactics to Beat DWP to its Knees, L. A. Times, Sept. 24, 1989, 3.

\textsuperscript{356} Id.

\textsuperscript{357} Hart, supra note 4, at 103. By 1989 250,000 people a year were visiting Mono Lake. Roderick, supra note 355, at 3.
system was full to overflowing and Mayor Bradley was forced to order a release of water into Mono Lake. Although release of the water was a physical necessity given the limitations of the extraction infrastructure, both sides used the release to their political advantage. Bradley, who at the time was running for governor, used the release to appeal to voters in Northern California and the Mono Lake Committee “played along” praising the city. And when Mono Lake levels began to rise even the *L.A. Times* editorial board grudgingly noted that although the Court’s public trust decision abrogates the City’s water rights the resumption of the City’s extraction could “destroy a resource that is unique as it is vulnerable.” The veneer in Los Angeles was beginning to crack.

In the fall of 1983, the *Los Angeles Times*’ editorial board began to call for the flexible remedy the court had yet to grant arguing: “obviously, a prudent balance must be struck and it is better to strive for it through good-faith negotiations than through a renewal of long and contentious actions in the courts.” In March 1984 this suggestion was picked up by the University of California Los Angeles’ (UCLA) Public Policy Program which, at the urging of the Mono Lake Committee, brought the parties together to discuss resolution of the Mono Lake controversy. Although nothing substantive was to come of this preliminary meeting the LADWP was finally at the table and talking.

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358 Hart, *supra* note 4, at 100. See also, *supra* at 52.
359 *Id.*
360 Editorial, *Mono Lake: Coming Back*, Los Angeles Times, May 29, 1983 § IV at 4. In 1985 one can detect further cracks in the veneer. In an editorial dated April 30, 1985, the Times praised the LADWP for hiring a new General Manager committed to pursuing innovative water development and conservation programs that would reduce Los Angeles’s dependence on existing water sources. Editorial, *Melting Snows, Melting Hearts*, L.A. Times April 30, 1985 § II at 4. Up until this time the LADWP and the *L.A. Times* had taken the position that conservation or water rationing would not come close to meeting the shortfall that would result should the City be deprived of the Mono Lake water. See e.g., Editorial, *Water and Power in our Future*, Los Angeles Times, Feb. 11, 1980, § II at 6.
362 Hart, *supra* note 4, at 105. The parties came together in a jointly sponsored conference “Mono Lake: Beyond the Public Trust Doctrine”. *Id.*
363 *Id.*
The LADWP’s new willingness to talk rather than bully its way forward is evidence of the shifting power of the LADWP as litigation and framing began to change public sentiment in Los Angeles about the importance of the Mono Lake ecosystem. The relationship between the LADWP and the SWRCB had now been called into question by the court’s decision in National Audubon, the national media, California citizens and the Los Angeles Times itself. And although the SWRCB had yet to implement the National Audubon decision, it knew that if it did not do so the court could.\(^{364}\) Here then is evidence of both the veil effect and status quo effect of destabilizing litigation. No longer can the LADWP rely on past partners and patterns of doing business. And what is now becoming clear to the LADWP is that these past business practices are becoming stigmatized, forcing the LADWP into a new operational paradigm. But it is important to recognize that it was the combination of litigation together with ongoing framing that brought the LADWP to this point.

It would, however, take two more pieces of litigation before the Los Angeles City Council would break rank with the LADWP and SWRCB and the LADWP would become fully engaged in finding a remedy for the Mono Lake ecosystem. The LADWP were on the verge of exploring alternatives together with the Mono Lake Committee (the deliberative effect of destabilizing litigation) but they scales were not tipped until the City of Los Angeles and the LADWP came face to face with the trout fishermen.\(^{365}\)

**Lesson 4: The Importance of Secondary Litigation**

\(^{364}\) Hart, *supra* note 4, at 105.

The gates to the Grant Lake reservoir remained open through the winter of 1984 pouring water down the Mono Lake tributaries into Mono Lake. With the water came the trout and the trout fishermen but by fall 1984 the LADWP was ready to shut off the flow to Mono Lake so Dick Dahlgren, an avid fisherman, wrote to Mayor Bradley “congratulating” him for restoring the flow and the fish to Rush Creek. The letter found its way into the press. While there was no response from Bradley’s office, Dahlgren, in yet another example of the use of social networks created by the Mono Lake Committee, enlisted the support of CalTrout and the Mono Lake Committee to entice City Councilman John Ferraro, chair of the Los Angeles City Council’s Energy and Natural Resources Committee, to hold immediate hearings in the Energy and Natural Resources Committee. At the hearing the Council ordered a fish study, appointed a citizen’s advisory committee and requested that the LADWP keep water flowing into the Mono Lake tributaries. The LADWP would bend but it would not break; it acquiesced to the study and the advisory committee but there would be no water. While this was certainly bad news for the Mono Lake ecosystem, in the context of political blockage there was light – there was no longer a unified “city” position on Mono Lake – the LADWP and the Los Angeles City Council had split ranks.

When on November 14, 1984, the LADWP threatened to turn off the water to Rush Creek, the California Department of Fish and Game began a one-day trout rescue operation, CalTrout and the Mono Lake Committee organized a demonstration at Highway 395 at the Rush

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366 Hart, supra note 4, at 109.
367 Id. at 108
368 Id. at 109.
369 Id.
370 Id.
371 Id.
372 Id.
Creek Bridge and Dahlgren and CalTrout filed suit in California District court to compel the LADWP to maintain water flow in Rush Creek to maintain trout populations. The court issued a temporary restraining order and on November 14, 1984, the Mono Lake County District Attorney and Sheriff went to Rush Creek court order in hand to arrest any person that would close the water valve. One cannot underestimate the power of the presence of law enforcement upholding the rights of the ecosystem in the framing of the Mono Lake controversy. What the citizens of Los Angeles saw that night on the evening news was law enforcement upholding the rights of Rush Creek and Mono Lake against the LADWP. This judicial relief provided an important framing tool to the Mono Lake Committee as well as a temporary reprieve for both the trout and Mono Lake while the litigation marched on.

Dahlgren’s initial suit was followed by a series of lawsuits brought by Dahlgren, CalTrout and the Mono Lake Committee to keep the water flowing in the Mono Lake tributaries. The litigation relied on the vagaries of the California Fish and Game Code. Since 1933 California’s Fish and Game Code had prohibited the dewatering of creeks below dams and required that “[t]he owner of any dam shall allow sufficient water at all times ... to pass over,  

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373 Id. at 110-111.  
374 Id. at 111, 114.  
375 Arnold, supra note 4, at 15. The temporary retraining order became a preliminary injunction in 1985. Id. In 1986 the California superior court issued a temporary restraining order to maintain flows into Lee Vining Creek. Id. A preliminary injunction for Lee Vining Creek was issued in 1987. Id.  
376 Hart, supra note 4, at 111, 114. The Mono Lake Committee and the National Audubon petitioned the court and were granted amicus status in the Dahlgren case. Id. Five days later the California District Court issued a temporary restraining order requiring the LADWP to maintain a flow of 19 cubic feet per second in Rush Creek. Id. A flow of 19 cubic feet per second would mean 14,000 acre feet in Mono Lake – not enough to stabilize the lake, but enough to create a “real crack in the dam” Hart, supra note 4, at 111, (quoting Mono Lake Committee newsletter.)  
377 Id. Five days later the California District Court issued a temporary restraining order requiring the LADWP to maintain a flow of 19 cubic feet per second in Rush Creek. Id. A flow of 19 cubic feet per second would mean 14,000 acre feet in Mono Lake – not enough to stabilize the lake, but enough to create a “real crack in the dam” Hart, supra note 4, at 111, (quoting Mono Lake Committee newsletter.)  
378 Id. at 113.  
around or through the dam, to keep in good condition any fish that may be planted or exist below the dam.” 381 The Code was amended in 1953 to prohibit the SWRCB from issuing any water appropriation permit or license after September 9, 1953, unless the permit or license was “conditioned upon full compliance” with the requirement to allow sufficient waters to pass below the dam to maintain fish populations. 382 CalTrout and the Mono Lake Committee argued 383 that these provisions were applicable to the LADWP and its Grant Lake Dam and requested that the court issue a writ of mandamus compelling SWRCB to rescind the LADWP’s current permit and reissue it together with a requirement that the LADWP maintain sufficient water flow in the Mono Lake tributaries to support fish populations. 384

The California Court of Appeals took a slightly different tact. 385 Relying heavily on California’s water allocation scheme the court observed that under California law a permitee must act diligently to undertake and complete any construction necessary to perfect its water claim and must apply the water to beneficial use. 386 If a permitee fails to put appropriated water to beneficial use within three years the unused water reverts to the public and is considered unappropriated. 387 In the case of the Mono Lake appropriation the LADWP had received a

382 *Id.*
383 The LADWP argued that the provisions of the Fish and Game Code only applied to the construction of a dam and not to the appropriation of water. Thus it reasoned that because the dam was constructed for the appropriation of water there was no requirement to permit enough water to pass to maintain fish populations. *Id.* at 599. The LADWP also argued that the Fish and Game Code did not apply to a license that was predicated upon a permit issued prior to September 9, 1953. *Id.* at 603. Finally, the LADWP argued that application of the statute to the LADWP’s license constituted a retroactive application of law. *Id.* at 609-10.
384 *Id.* at 592. The trial court denied the petition on the grounds that the Grant Lake dam had been built prior to 1953. *Id.* All of the trout cases were consolidated and appealed to the California Court of Appeals. *Id.*
385 Cal Trout and the Mono Lake Committee had argued that the 1933 requirement that an owner of a dam was required to permit sufficient water to pass to support existing fish populations applied to the LADWP and required it to maintain flowage for fish populations. The California Court of Appeals did not rule on this issue finding it unnecessary in light of the history of the LADWP’s appropriation of the waters from the Mono Lake tributaries. *Id.* at 601.
386 *Id.* at 610.
387 *Id.* at 611.
permit to appropriate the entire flow of the Mono Lake tributaries in 1941. Although the
LADWP could divert and store the water in 1941 it was incapable of putting the full volume of
water to beneficial use until construction of the second barrel of the Los Angeles aqueduct in the
early 1970s—nearly twenty years after the effective date of the 1953 Fish and Game code
amendment. Thus in 1953 when the Fish and Game code was amended to apply to water
appropriations the water to be carried by the second aqueduct had not yet been appropriated and
could not be appropriated for another twenty years. Therefore, the LADWP was required to
leave enough water in the Mono Lake tributaries to support existing trout populations.

The Court ordered the trial court to issue the appropriate writs to compel the SWRCB “to attach the
conditions required by section 5946” to the LADWP’s appropriation license. When the
SWRCB failed to attach these conditions in a timely manner the California Court of Appeals
issued a second opinion ordering the trial court to issue a writ to the SWRCB ordering it to
“exercise its ministerial duty [to set minimum flows] without delay” and to attach language to
the LADWP’s appropriation license providing that pursuant to “Fish and Game Code section
5946, this license is conditioned upon full compliance with section 5937 of the Fish and Game

\[^{388}\text{Id. at 612.}\]
\[^{389}\text{Id.}\]
\[^{390}\text{Id. at 612-13. The Court also rejected the LADWP’s argument that the SWRCB’s numerous extensions to the
1940 permit vitiated the requirements of the 1953 Fish and Game Code Amendment. Id. at 614. Between 1948 and
1960 the SWRCB gave the LADWP no fewer than five permit extensions to “Complete Use of Water.” Id. at 615
note 18. In each permit extension application the LADWP was asked “Have you used as much water as you expect
to use under this permit?” and in each case the LADWP responded “NO.” Id. at 615. When asked when beneficial
use would be perfected the LADWP responded, “When required by municipal needs.” Id. at 616. It was not until
the 1968 permit extension that there is any indication that the second aqueduct would be constructed. That
extension asserts that the second aqueduct would be completed on or before December 1 1971 and that application
of the water to be carried by that aqueduct “shall be completed on or before December 1, 1975.” Id. at 615.}\]
\[^{391}\text{Id. at 632-33.}\]
code. The licensee shall release sufficient water into the streams from its dams to reestablish and maintain the fisheries which existed in them prior to its diversion of water.”

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

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

Lesson 5: Court Sanctioned Temporary Relief and the Decree

393 While the releases into Rush Creek and Lee Vining Creek were not enough to stabilize the lake the Mono Lake Committee argued it was “the first real crack in the dam.” Hart, supra note 4, at 111.
394 Id. at 120. And by 1988 even some members of LADWP Board of Commissioners recognized that the Mono Lake Ecosystem was worth saving. Id. at 132.
395 Editorial, Mono Issue Can be Negotiated, Los Angeles Times, Aug. 26, 1986, § II at 4. The editorial board argued “[b]arring catastrophic drought...California should have enough water, used wisely, to meet all reasonable needs including environmental protection.” Id.
The rise of public law litigation was, in part, enabled by the relaxation of constraints on equitable remedies, which enabled courts to examine controversies surrounding future probabilities and allowed litigants and courts to realize the potential policy function of litigation in the context of public issues and in a manner not permitted by purely private litigation. In the context of environmental litigation the equitable remedy of injunction, essentially a judicially imposed prohibition, is fundamental for indeed, how would it benefit Mono Lake if, during the course of litigation – litigation which was to extend almost fifteen years – the LADWP extractions continued unabated causing the Mono Lake ecosystem to collapse. Injunctive relief permits the court to place a hold on an agency decision pending the termination of the litigation and creates the space needed to develop a flexible remedy – a remedy driven by the parties.

Ironically it was the trout litigation and not the National Audubon case that gave the Mono Lake ecosystem the moratorium and water it needed to survive. In 1988, the National Audubon litigation was consolidated with the trout cases by the California Supreme Court and assigned to Judge Finney of Eldorado County Superior Court. On August 29, 1989 Judge Finney issued a temporary injunction “prohibiting respondent DWP from causing the level of Mono Lake to fall below 6,377 feet as a result of its diversions for the remainder of the current –

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396 Chayes notes that by the turn of the century “the old sense of equitable remedies as ‘extraordinary’ has faded.” Chayes, supra note 101, at 1292.
397 Sax (1970), supra note 102, at 198.
398 The Mono Lake litigation commenced in 1979 when MoFo filed the National Audubon complaint. Hart, supra note 4, at 82-83. The litigation was effectively concluded in 1994 when the SWRCB issued the 1994 Water Rights Decision.
399 Sabel & Simon, supra note 113, at 1057.
400 The National Audubon litigation continued to bounce around federal court until 1988, when the 9th Circuit district court dismissed the federal air pollution claims sending the original public trust litigation back to state court. National Audubon Society v. Department of Water, 658 F. 2d 1409, 1417 (9th Cir. 1988).
401 Hart, supra note 4, at 130.
runoff year ending March 30, 1990.”\textsuperscript{402} This left the court to resolve how to implement both the California Supreme Court’s directive in the original \textit{National Audubon} case and the Court of Appeals directive in the trout cases.

\textbf{Lesson 6: The Experimental Remedy}

The purpose of the remedy in any legal action is to give affect to the judgment made by the court.\textsuperscript{403} The “remedy arises from a reflective effort to give meaning to the right . . . [it] is an elaboration of the rights in question: it is not a technical effort to execute an already defined norm, as rights essentialism implies; nor is it an exercise of instrumental discretion, as crude positivism suggests.”\textsuperscript{404} However in public law litigation the right is more ambiguous than in private litigation – seeking as it does the modification of public policy.\textsuperscript{405}

Likewise, the remedy in public law litigation differs substantially from private litigation where the remedy is retrospective and intended to correct past legal wrong – the remedy in public law litigation it prospective designed to “modify a course of [agency] conduct.”\textsuperscript{406} The remedy is embodied in the decree, a legal order that prescribes how the agency must modify its present and future actions to comply with the policy directives set forth in statute.\textsuperscript{407} Historically in public law litigation the decree is prescriptive – often referred to as the “command-and-control decree”.\textsuperscript{408} This is no less true in the case of environmental public law litigation.\textsuperscript{409}

\textsuperscript{402} \textit{Id.} at131. This preliminary injunction was extended until completion of the the SWRCB public trust hearing process was completed. \textit{See, In re Mono Lake Water Rights Case}, No. 2284 and 2288, slip op. at 2 (El Dorado Co. Superior Ct. Apr 17, 1991).

\textsuperscript{403} Sabel & Simon, \textit{supra} note 113, at 1054.

\textsuperscript{404} \textit{Id.} at1055.

\textsuperscript{405} Chayes, \textit{supra} note 101, at 1282 -83.

\textsuperscript{406} \textit{Id.} at 1296.

\textsuperscript{407} \textit{Id.} at 1296, 1298.

\textsuperscript{408} Sabel & Simon, \textit{supra} note 113, at 1019. Sabel and Simon suggest that the command and control decree has three characteristics: (1) it attempts to “anticipate and express . . . key directives to induce compliance in a single, comprehensive, and hard to change” order; (2) it requires compliance which is measured by the degree of the defendant’s conformity to the prescriptions of the decree; and (3) it is directive in that the court undertakes a strong role in forming the redial norm. \textit{Id.} at 1021-22.
Destabilization legal theorists argue that successful destabilizing litigation requires the court to abandon the traditional command and control decree for a decree that is both “flexible” and “ongoing”.\(^{410}\) Although the court uses the decree to impose a legal standard and to grant temporary injunctive relief, the court leaves the second part of the remedy – implementation of the legal standard – to the parties to negotiate subject to ongoing oversight. It is, destabilization theorists argue, the flexible or experimental remedy that holds the greatest possibility for social and political change or destabilization because it is not the court’s “legal determination” that causes social or political change but, as McCann notes, the manner in which the litigants and stakeholders assess how the court decision “indirectly create[s] important expectations, endowments, incentives and constraints” toward reform agendas that leads to social and political change.\(^{411}\) Thus social scientists suggest that the remedy is more likely to result in social change if:

\(^{409}\) The case of *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) is illustrative. In *Overton Park* an SMO sued the Department of Transportation (DOT) to stop construction of an interstate highway through Overton Park, a 342-acre public park in Memphis Tennessee. *Id.* at 406. The SMO alleged that the highway construction violated section 4(f) of the Transportation Act of 1966 which prohibits the use of federal funds to construct highways through public parks unless there is no “feasible and prudent” alternative to construction through the park. *Id.* at 405. The case landed in the U.S. Supreme Court where the court held that in passing section 4(f) Congress intended “that protection of parkland was to be given paramount importance . . . parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reach extraordinary magnitudes.” *Id.* at 413. The Court clarified the policy analysis that the Secretary was required to undertake under section 4(f) and sent the matter back down to the district court. On remand, the federal district court issued a decree (remedy): (1) adopting the Supreme Court’s interpretation of section 4(f), (2) enjoining the highway construction, and (3) ordering the DOT Secretary to make a route determination in compliance with the section 4(f) interpretation adopted by the court. *Citizen’s to Preserve Overton Park v. Volpe*, 335 F. supp. 873, 885 (W.D. Tenn. 1972). In effect the decree set out the applicable legal standard and a two-part remedy. The first part of the remedy, the injunction halts the implementation of the contested agency policy – highway construction. The second part of the remedy requires the agency to modify its policy to conform to the court order after which the injunction will be lifted.

\(^{410}\) Chayes, *supra* note 101, at 1298-1308 (discussing ongoing court oversight and negotiated decrees).

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

Many of these elements are incorporated in the experimentalist remedy.  

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

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412 Rosenberg notes that there are two prevailing views among social scientist about the ability of the court to instigate social reform. Rosenberg, supra note 176, at 32-33. Proponents of the Dynamic Court view argue that courts can produce social reform when used effectively by SMOs. Id. at 21-22. Even then there are several contributing factors, which affect the effectiveness of litigation in stimulating social and political change including whether there is a benefit to elites and bureaucrats to comply with the court’s order. Id. at 32-33. These benefits may but need not be monetary.  
413 Id. at 33.  
414 Id. at 35.  
415 Id. at 33. Stryker in her review of research on the politics of enforcement notes that corporate organizations are traditionally successful at defending against implementation of court orders where they are able to argue that enforcement interferes with economic viability. Stryker, supra note 182 at 84 (referencing studies by Melnick, Yeager, and Nelson and Bridges)  
416 Harris, supra note 210, at 933.  
417 Id.  
418 Sable & Simon, supra note 113, at 1065.  
419 Sable & Simon, supra note 113, at 1067.  
420 Harris, supra note 210, at 933 and Chayes, supra note 101, at 1298-1308.  
421 Sable & Simon, supra note 113, at 1067.
process the stakeholders build relationships that had, heretofore, been non-existent, these relationships facilitate the creation of trust.\textsuperscript{422}

Harris highlighted the importance of the negotiated remedy in her analysis of litigation’s impact on the ability of poverty lawyers to redistribute public resources for the benefit of homeless populations.\textsuperscript{423} In her analysis of three homeless cases Harries observed that the court through the negotiated decree creates an avenue for those blocked from the agency decision making process (outsiders) to become insiders – players within the decision making process.\textsuperscript{424} In effect the court uses its legal authority to create room in the agency decision-making process for the previously excluded voice of the poverty lawyer. In turn the poverty lawyer is able to mobilize judicial support to “induce” policy reform.\textsuperscript{425} The negotiation itself permits the poverty lawyer to act as an insider to help shape and reform the agency process. Sabel and Simon refer to this as the \textit{stakeholder} effect noting that the liability determination empowers the outside player and legitimizes their claim giving the plaintiff a viable position at the negotiating table.\textsuperscript{426} This in turn increases the power of the outsider and decreases the influence of traditional agency stakeholders or power elites.\textsuperscript{427}

Harris contends, however, that the ability to participate in negotiation alone is not sufficient to cause change. Her analysis suggests that ongoing involvement of the poverty lawyer was only meaningful so long as the court itself maintained continued oversight of the

\textsuperscript{422} Id. at 1068.
\textsuperscript{423} Harris, supra note 210, at 911.
\textsuperscript{424} Id. at 933-34.
\textsuperscript{425} Id.
\textsuperscript{426} Sabel & Simon, supra note 113, at 1031.
\textsuperscript{427} Id. at 1077-78. Note that in terms of the power structure identified by Turk the court’s liability determination increases the SMO’s enforcement power – that is the SMO has the backing of the court to enforce its view of the law as applied to the policy context at issue. Turk, supra note 115 (discussing the types of power associated with law).
The presence of court oversight assures that the parties continue to give legitimacy to outsiders. Such was the case with the Mono Lake negotiations although matters did not evolve in the manner in which Professors Sabel and Simon or Harris might have anticipated.

By 1989 the California Supreme Court had issued its landmark *National Audubon* decision ruling that the state had an ongoing obligation to protect the public’s trust interest in public waters and to “take such uses into account in allocating water resources.” The Court also held that the superior court of California had concurrent original jurisdiction with the SWRCB over the issue. Thus when the matter was remanded to state court and consolidated in Judge Finney’s court with the trout cases Judge Finney could have immediately held a hearing, taken evidence and issued a decree directing the SWRCB to apply the trust doctrine to the LADWP allocation license. Additionally, in the trout cases, Judge Finney had the option of either issuing a writ that “commanded the immediate imposition of the conditions” of Fish and Game Code § 5937 and requiring the SWRCB to conduct a study to establish flow rates or of conducting its own hearing and issuing a decree specifying flow rates necessary to comply with California Statute. Rather than hold a hearing on the public trust and trout issues Judge Finney ordered the SWRCB to review Los Angeles’ water rights in the context of the public trust doctrine and Fish and Game Code § 5937, staying the litigation until September 1993 pending the SWRCB determination, but Judge Finney also retained jurisdiction over the case, refusing to dismiss the cases, until the SWRCB had submitted its completed the work to the court for

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428 Harris, *supra* note 210, at 933-34.
429 *Id.*
431 *Id.* at 731.
432 See, discussion *supra* page 73 (discussing consolidation of the Mono Lake cases).
433 *California Trout II*, 218 Cal. App. 3d at 211; see also, *California Trout I*, 207 Cal. App. at 632.
434 *Id.*
This was not the traditional command and control decree nor was it, however, an order for formal negotiation as envisioned by destabilization theorists.

Application of the court’s orders required the SWRCB to determine how much water was needed to support trout populations and public trust assets. To support this analysis the SWRCB was required to prepare an Environmental Impact Report (EIR) and hold public hearings on the LADWP license a process that would take five years. During this five year hiatus the Mono Lake Committee and the LADWP were in a state of limbo, neither could be certain of the final outcome of the SWRCB process, though it was certain that both the landscape and the rules of the game had changed. Thus the court, by its order, established the foundations for the flexible remedy. In issuing the order the court effectively gave notice to the parties that the status quo was dead. No longer could the LADWP rely upon its “traditional relationship” with the SWRCB to assure receipt of the entire flow of the Mono Lake tributaries – indeed it could not be certain of how the SWRCB would rule. The LADWP could either sit back and wait or try to negotiate an alternate remedy. And public sentiment was encouraging the negotiation option as evidence by the shifting tides on the L.A. Times editorial page which by 1989 was urging the LADWP to change its strategy.


Editorial, Halt the Decline at Mono Lake, L.A. Times, June 17, 1989, §II at 4. By July 1986 the L.A. Times editorial board was pushing for a negotiated solution to the Mono Lake controversy noting “[n]egotiation of the Los Angeles-Mono Lake issue is bound to produce a more practical solution than protracted litigation that always carries the potential for surprising consequences not desired by either party.” Editorial, Mono Issue can be Negotiated, L.A. Times, July 26, 1986, § II at 4. And by 1989 the Editorial Board observed that “Los Angeles should realize by now that it never will win its dogged legal battle to continue its historic diversion of eastern Sierra streams that naturally flow into Mono Lake . . . At some point the decline must be halted.” Editorial, Halt the Decline at Mono Lake, L.A. Times, June 17, 1989, §II at 4.
Additionally, the court’s decision to maintain jurisdiction over the litigation meant that the LADWP could no longer ignore the claims of the Mono Lake Committee – the Committee now had the legitimacy of two court orders and the ongoing oversight of the court. This oversight, assured that the Mono Lake Committee would continue to have meaningful voice in the ultimate resolution of the Mono Lake dilemma. Finally, the length of time required to prepare the EIR gave the parties the space needed to negotiate the flexible remedy.

By necessity, negotiating a remedy is grounded in uncertainty and nowhere is this truer than in the arena of ecosystem management, which is grounded in the scientific uncertainty of the operation of biological systems.\(^{439}\) Added to this is the fact that the negotiating process itself places the stakeholders in a position of uncertainty.\(^{440}\) Parties can no longer rely on traditional relationships and as such must reorient their goals, their partners and even their understanding of the problem.\(^{441}\) The status quo is no longer a possibility because the liability determination has stigmatized the status quo making it risky\(^{442}\) and forcing the stakeholders to explore and develop new options previously politically unavailable.\(^{443}\)

But the new remedy and the effectiveness of the remedy is itself unknown as are the new relationships between stakeholders forcing stakeholders to continually reassess and reposition themselves as knowledge about the issue becomes deeper and time reveals more information.\(^{444}\) Often the complexities and futuristic nature of the issue requires the stakeholders to make

\(^{439}\) Mary Doyle, *Introduction in Large-Scale Ecosystem Restoration: Five Case Studies from the United States*, xii-xiii (Mary Doyle and Cynthia A. Drew, ed. 2008). Doyle notes that an ecosystem approach to environmental problem solving “is by definition comprehensive” and grounded in “scientific uncertainty and emerging scientific understanding” requiring an adaptive management approach. *Id.* Adaptive management assumes that policy makers and policies will be flexible enough to permit course changes as new scientific knowledge becomes available. *Id.* at xiii.

\(^{440}\) Sabel and Simon refer to this as the veil effect. Sabel and Simon, *supra* note 113, at 1074.

\(^{441}\) *Id.*

\(^{442}\) *Id.* at 1075-76. Sabel and Simon refer to this as the status quo effect.

\(^{443}\) *Id.* at 1075-76. Sable and Simon refer to this as the deliberative effect.

\(^{444}\) *Id.* at 1068.
decisions with incomplete knowledge forcing the stakeholders into a “rolling rule regime. To address this issue the stakeholders focus on: (1) outcome norms and goals; (2) monitoring and assessment of norms and goals as a rolling remediation plan is implement; and (3) reassessment of norms and goals based on information gleaned from previous attempts to realize norms and goals and from the success or failure of the negotiated remedy to meet performance measures. This process of developing the remedy results in a remedy that is more fully explored and developed increasing the likelihood of its success and its acceptability across multiple stakeholders.

Sabel and Simon argue that the negotiation process forces decisions that were previously made in non-public forums to be made in public as the parties work toward establishing, implementing and revising implementation strategies to meet the goals or performance measures established by the stakeholders in the decree. The negotiation process also results in public vindication of the plaintiff’s claim, brings public attention to the problem and caused increased public scrutiny. The very public nature of the remedy, its design and implementation in accord with the legal standard established by the court ripples out beyond the litigation and the litigants into other private and public realms in a process of “iterative disequilibrium and readjustment.” While this is ultimately what happened at Mono Lake, it did not happen in the manner envisioned by Sabel and Simon.

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445 Id. at 1069-70.
446 Sable and Simon characterize this outcome of the negotiated remedy as the deliberative effect of destabilized litigation. Id. at 1075-76.
447 Id. at 1071-72.
448 Sabel and Simon refer to this as the publicity effect and suggest that it is a natural outcome of the experimental remedy. Id. at 1077. But social scientists argue that the publicity effect is a combination of the court legitimizing the plaintiff’s position and the plaintiff’s willingness to use the outcome of the litigation as one of many political resources in the process of framing, an important part of social mobilization. See discussion, supra at 55-64.
449 Id. at 1081. The ripple or web affect of the litigation affects how agencies make decisions in the future. Id.
Once it was clear that the LADWP water allocation license would be subject to revision both the Mono Lake Committee and the LADWP had a significant incentive to negotiate a remedy. And the five year process undertaken by the SWRCB to prepare the EIR gave them the space they needed to negotiate a remedy. For the Mono Lake Committee this was an opportunity to at last participate in the decision making process, for the LADWP it had become a necessity – for it had no way of predicting the outcome of the SWRCB process. Thus it was that in the early 1990’s the Mono Lake Committee, the LADWP, the City of Los Angeles, Mono County and the U.S. Forest Service (collectively known as the Mono Lake Group)\(^{450}\) collectively came together in earnest to wrestle with the major ecosystem restoration questions at Mono Lake. And while the negotiations did not take place in the public forum of the courts the Mono Lake Committee not only continued to report negotiation progress to its membership but it was able, through ongoing framing to keep the process in the media, which kept the pressure on the LADWP to find a resolution or to submit to the uncertainties of the outcome of the SWRCB deliberations that were under the court’s oversight.

There were two central ecosystem restoration questions that the parties needed to resolve: (1) what was the appropriate lake level and (2) how would the City of Los Angeles make up for the lost water from the Mono Lake tributaries without stressing other ecosystems.\(^{451}\) Although the parties had yet to determine how to accomplish this latter feat, meeting Los Angeles’ water needs without damaging another ecosystem became an initial goal of the negotiation process. Discovering solutions for Los Angeles’ water dilemma was an iterative process.

\(^{450}\) In fact the Mono lake Committee and the LADWP had been meeting quietly since the 1984 UCLA policy forum. In the summer of 1987 they broadened their discussions to include the U.S. Forest Service and Mono County forming the Mono Lake Group. Hart supra note 4, at 131. In late 1987 this group hired Tom Graff of the Environmental Defense Fund to find an alternative water source for Los Angeles. Id.

\(^{451}\) Id. at 146-48.
The seeds for a negotiated remedy would come from a number of sources. In 1988 California suffered yet another drought and Los Angeles instituted mandatory water rationing.\textsuperscript{452} Water rationing created financial problems for the LADWP – as less water was used by citizens the per gallon cost of running the Los Angeles water system increased. Customers, however, paid a flat fee for water, which meant those customers that conserved water or cut their water use paid a higher per gallon rate than customers that did not limit water use.\textsuperscript{453} To resolve this inequity Mayor Bradley appointed a new water rate committee to develop a new water rate scheme for Los Angeles and he invited the Mono Lake Committee to appoint a member to the committee, an invitation that was unimaginable just 10 years earlier.\textsuperscript{454} The new rate scheme was a two-tiered system with reduced rates for small or moderate users while heavy users would pay a higher rate intended to finance the cost of developing new water sources.\textsuperscript{455} The system was designed to both encourage conservation and explore alternative water sources.

In conjunction with the new rate scheme, the Los Angeles Urban Water Conservation Council issued a list of Best Management Practices for household water conservation including subsidized installation of ultra-low-flush toilets and showerheads.\textsuperscript{456} The Mono Lake Committee, in yet another example of framing in the heart of Los Angeles, reinforced these practices with a series of television spots linking water use in Los Angeles to ecosystem destruction at Mono Lake and in the Santa Monica Bay (which received polluted waste water from Los Angeles) and

\textsuperscript{452} Id. at 149. Hart reports that during the 1990-91 drought Los Angeles undertook a mandatory rationing program and experienced a larger than expected drop in water use. Per capita water use dropped by 30 percent. Id.

\textsuperscript{453} Id.

\textsuperscript{454} Id.

\textsuperscript{455} Id. The two tiered rate scheme was adopted by the City of Los Angeles in February 2003.

reduced water use to reduced water rates and ecosystem restoration. The new frame: what is good for your pocket book (decreased water use) was also good for the Mono Lake and Santa Monica Bay ecosystems. And when in July 1992 water rationing ended and people continued to conserve, Los Angeles’ water consumption dropped by 15-25 percent it became clear to the Mono Lake Committee that some part of the water needed to restore the Mono Lake ecosystem could come through water conservation. The LADWP Assistant General Manager admitted as much in a letter in the LA Times but was apparently unwilling to formally concede the issue in negotiations until a lake level agreement was reached.

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

The California Legislature was also the source of a potential financial incentive for change. In 1989 a number of Legislator’s seeking resolution to the Mono Lake controversy approached the Mono Lake Group with a proposal to fund replacement water for Los Angeles. Under the proposal the legislature would provide $60 million to develop new water for Los Angeles from grey water or from sources in the Central Valley with the proviso that money would only be allocated upon joint application of the LADWP and the Mono Lake Committee.

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457 Hart supra note 4, at 149.
458 Id.
460 Rosenberg, supra note 176, at 32-33.
461 Id. at 35.
462 This proposal went through a myriad of forms as it moved through the California Legislature but as passed AB44 allocated $60 million in state funding to develop replacement water. Id. at 132. The LADWP was skeptical of the proposal but now even the Los Angeles Times was prodding the LADWP to find an alternative solution that would preserve the Mono Lake Ecosystem. See, Editorial, At Last: A Solution for Mono Lake, Los Angeles Times, Aug. 23, 1980, § II at 6. Part ii, Page 6.
But the Mono Lake Committee was reluctant to proceed forward until resolution of the lake level issue.\(^463\) Despite the reluctance of the parties to jump at the legislative proposal, the proposal is an example of the impact of the deliberative effect of the negotiation process. Here was a potential alternative source of water for Los Angeles that did not depend on depriving either Mono Lake or any other natural system of water. If and how the parties would apply for and use this appropriation was unknown but what was clear was that there was some tentative agreement among the parties that any alternate replacement water source for Mono Lake waters, would not come at the expense of another ecosystem.

Setting the appropriate lake level proved to be the more difficult task and by 1991 it appeared that the parties were at an impasse.\(^464\) Proposals for an acceptable lake level went back and forth without resolution and the money provided by the California Legislature sat pending the outcome of the lake level debate.\(^465\) In 1992 Mayor Bradley’s office suggested that the parties apply for the legislative funding without resolving the lake level question but with the proviso that any water developed with the legislative funding would be credited to the Mono Lake ecosystem.\(^466\) To sweeten the deal, the City of Los Angeles would agree to a moratorium of all diversions from the Mono Lake tributaries until the SWRCB reach its final resolution on the Los Angeles permit.\(^467\) Although the LADWP ultimately vetoed the proposal,\(^468\) this proposal made by the City of Los Angeles serves as yet another example of Sabel and Simon’s “rolling rule regime” in which the parties explored and developed a series of new options and tentative

\(^{463}\) Hart, \textit{supra} at note 4, 132-33.
\(^{464}\) \textit{Id.} at 144.
\(^{465}\) \textit{Id.} at 146. While the parties argued over the lake level, funding from the $60 million allocation were being diverted by the California Legislature for other purposes. \textit{Id.}
\(^{466}\) \textit{Id.}
\(^{467}\) \textit{Id.}
\(^{468}\) \textit{Id.} at 147.
agreements based on an ecosystem preservation outcome, outcomes, which just a few short years ago were beyond the realm of possibility. 469

Another factor that aided the search for replacement water for the Mono Lake ecosystem and ultimately the development of a remedy was Los Angeles’ growing interest in water reclamation spurred by the need for a sewage system upgrade. 470 Historically Los Angeles dumped wastewater effluent into the Pacific. Los Angeles was under continuous pressure to improve its sewage treatment to reduce effluent pollutants. By 1991 water from local sewage treatment plants was almost potable. 471 The combined reclamation projects could yield upwards of 100,000 acre-feet of water. 472 But using this water for irrigation, to recharge groundwater aquifers or for other non-consumptive uses required an increase in reclamation capacity and the construction of transmission infrastructure. 473

In a partnership, previously unimaginable in 1983, the LADWP and the Mono Lake Committee jointly, approached Congress for a federal appropriation to construct the necessary infrastructure to develop and transmit reclaimed water. An appropriation for the infrastructure project was included in the 1992 Federal Reclamation Projects Authorization and Adjustment Act. 474 Together the LADWP and the Mono Lake Committee found funding for the largest water reclamation project in the United States, 475 a project that would allow Los Angeles to meet its

469 Throughout the late 80’s and early 90’s a number of alternative water sources to replace waters from the Mono Lake tributaries were explored including exportation from the Sacramento/San Joaquin Delta, an option rejected by environmental groups. Id. Another option explored was water marketing, a scheme that involved purchasing water rights from farmers in the Central Valley where soil was “tainted with toxic selenium” and shifting that water to Los Angeles. Id. at 148.
470 Id. at 148.
471 Id.
472 Id.
473 Id.
475 Hart, supra note 4, at 148.
water needs without damaging other ecosystems while returning water to the Mono Lake ecosystem.

Within three years after the National Audubon and trout cases were consolidated in Judge Finney’s court the stakeholders had developed a series of viable, ecosystem neutral water options for Los Angeles, the Mono Lake Committee had been incorporated into the City of Los Angeles’ political decision making structure, and the LADWP, the City of Los Angeles and the Mono Lake Committee had developed enough trust in each other to jointly approach congress to find a partial resolution of the water supply issue – a prime example of the types of remedies developed through the rolling rule regime process and the modification of the political infrastructure in Los Angeles City Hall.

Resolution of the appropriate lake level, however, remained a roadblock. Then in May 1993 the SWRCB issued the Draft Environmental Impact Report for the Review of Mono Basin Water Rights of the City of Los Angeles (DEIR). The DEIR identified 6,383 feet as an “environmentally superior alternative” lake level for Mono Lake but concluded “[b]ased on an assessment of unmitigable cumulative impacts relative to pre-diversion conditions, the 6,390 foot alternative appears to be the environmentally superior [lake level] alternative.” The DEIR further concluded that the impact of the 6,390 lake level on the Los Angeles water supply would be “less-than-significant” if the LADWP adopted mitigation measures including conservation and best management practices to reduce water use. The finding was jolting to the LADWP,

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477 Id. at 3L28-29. Mitigation measures recommended in the DEIR included application for AB444 funding to develop replacement water through reclamation, use of HR 429 funding to develop reclamation projects, development of demand-side reductions from water conservation programs, monitor compliance with best management practices, and recovery of storm runoff. Id. at 3L-27-28.
which had continued to insist that 6,377 feet was the appropriate average lake level. But the LADWP had no allies. And even though the parties had not reached agreement about the appropriate lake level when the SWRCB commenced it’s hearing on the LADWP permit in the summer of 1993 even the LADWP now recognized that the law required sufficient water flows into Mono Lake to support fish hatcheries and the Mono Lake ecosystem. The fight had essentially devolved into a factual dispute over the needs of the ecosystem – could the ecosystem survive at a lake level of 6,377, the LADWP’s preferred lake level, or was 6,390 the appropriate level for the ecosystem.

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

478 In truth all of the parties always spoke of lake levels in ranges. The low level end of the range was the drought level and the upper level the wet year level but the focus of most lake level discussions was on the average lake level which was between the high and low levels. Hart supra note 4, at 160-163. The mid-level recommended by the LADWP (6,377 feet) would have maintained the status quo as it existed in 1992, the levels recommended by the DEIR would require returning Mono Lake to either 1989 or the 1940 lake levels. Id.

479 By July 1993, the EPA, U.S. Forest Service and California Department of Fish and Game all supported a 6,390-foot lake level. Id. at 162. The U.S. Fish and Wildlife announced that if lake levels dropped below 6,390 it would list the brine shrimp as a threatened species. Id. And even the Los Angeles City Council’s Commerce, Energy and Natural Resources Committee expressed concern about continuing to fund litigation when the money could be spent on water reclamation projects. Id. at 162.

480 The Water Resource Board Hearings on the Los Angeles Water Rights License was conducted in two phases. The first phase provided an opportunity for interested parties to present “non-evidentiary policy statements.” 1994 Water Rights Decision, at14-15 (Sept. 28, 1993). The second phase was a formal evidentiary hearing. Id. In total the Water Resources Board hearing included 40 days of testimony from over125 witnesses and 1,000 exhibits. Id. The five month evidentiary hearing commenced in October 1993 and concluded in February 1994 and was followed by a briefing schedule that extended into April 1994. Id.

481 Hart supra note 4, at 164-66.

482 Id. at 167.
over five months and this interaction further facilitated the building of relationships and trust between stakeholders.

Thus it was that when, shortly before Christmas 1993, the City pulled the Mono Lake Committee and the LADWP together to again try to broker a deal for the water development funding offered by the California Legislature the parties agreed to try to broker a deal without resolving the lake level issue. In the end the Mono Lake Committee agreed to make a joint reclamation funding request and the LADWP agreed to “abandon its claim to at least 41,000 acre feet per year of the Mono Basin water.” This was tantamount to the LADWP relinquishing approximately one half of its annual diversion from the Mono Lake tributaries allowing this water to flow into Mono Lake for restoration purposes. The issue of the appropriate lake level was left to the SWRCB for resolution through the hearing process.

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

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483 *Id.* at 168-69.
484 *Id.* at 169. Between 1974 and 1989 the LADWP diverted on average 83,000 acre-feet of water from the Mono Lake tributaries per year. 1994 Water Right Decision 1631, at 6.
485 *Id.* Although the LADWP had not agreed to a lake level, in hindsight it seems that the practical effect of the agreement to relinquish 41,000 acre feet of water per year was a concession by the LADWP that the lake level would be greater than 6,377 feet.
These changes also induced the City to encourage the LADWP and the Mono Lake Committee to explore together new paradigms that would assure water both to the Mono Lake ecosystem and to the City of Los Angeles. In this process not only was the Mono Lake Committee and ecosystem interests assured greater voice in how water would be allocated between the natural and human systems, but the Mono Lake Committee’s willingness to explore new paradigms while the LADWP came to the table reluctantly increased the Mono Lake’s credibility as a can do partner in the water allocation decision making process.

Indeed, political landscape had so significantly changed that when on September 28, 1994, the SWRCB issued its decision calling for a lake level of 6,390 feet the sticking point for the LADWP was not the lake level, which had indirectly been resolved in December 2003, but the restoration requirements. And although LADWP professional staff favored contesting the SWRCB Decision the LADWP had lost virtually all of its historic allies including the Los Angeles City Council, the Mayor’s office and the Water and Power Commissioners. Even LADWP executive staff were disinclined to contest the decision – LADWP professional staff and attorney’s stood alone in their desire to continue the contest. The once powerful LADWP was essentially politically isolated evidencing a change in the water allocation decision making structure. And in an ironic twist of events, it was the Mono Lake Committee that came forward to save the day for the LADWP when, the day after the SWRCB Decision was issued Martha

486 1994 Water Rights Decision 1631, at 155. In truth setting the lake level issue was more complex than simply setting a lake level. The lake had to be restored to the 6,390-foot level. To accomplish this the Water Resources Board established a complex diversion scheme that essentially prohibited the LADWP from diverting any water until the lake reached 6,377 feet; thereafter the LADWP was permitted limited diversions until the lake reached 6,391 feet. Id. at 156-157, 203-204. The Water Resources Board’s Decision also established dry and wet year flows for the Mono Lake tributaries. Id. at 196-200. These diversion limitations would essentially provide 30,800 acre-feet a year for Mono Lake. Hart, supra note 4, at 171. Finally, the Water Board’s Decision ordered the LADWP to undertake extensive habitat restoration on the Mono Lake tributaries and to develop a waterfowl restoration plan for the Mono Lake Water Basin. 1994 Water Rights Decision 1631, at 204-206
487 Hart, supra note 4, at 173.
488 Id.
489 Id.
Davis, Executive Director of the Mono Lake Committee, sat down with LADWP Commissioners and agreed to help the LADWP secure trout stream restoration funding in exchange for assurances that the LADWP would not appeal the SWRCB Decision\textsuperscript{490} an event that had seemed unimaginable in 1978 at the LADWP-Mono Lake Committee pretrial meeting. The agency that had once informed the Mono Lake Committee that it was prepared to outlast and out-litigate a group of “granola tree huggers” was now working with the Mono Lake Committee towards ecosystem restoration.

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

\begin{quote}
It is time to give up the Mono Lake battle, to move on and try to replace the lost water with reclaimed water and through conservation. The Metropolitan Water District says it can make up for much of the loss. But the possibility of more drought, federal and state requirements to increase fresh-water flows to repair environmental damage in the Sacramento Delta and other uncertainties mean the city should not lean too heavily on this old, reliable source [the LADWP]. As ever, water is the future of arid Southern California. But what is needed at the LADWP is not just more water, but more vision, leadership and courage.\textsuperscript{491}
\end{quote}

More importantly, the Mono Lake Committee had won a structural victory for not only did it have an ongoing voice in water allocation decisions in Los Angels but it had, through the \textit{National Audubon} decision and a changed public ethos assured that the ecosystem would be considered in the context of the state’s public trust obligation in future water allocation permitting decisions made by the SWRCB.\textsuperscript{492}

\textsuperscript{490} \textit{Id.} at 174.
\textsuperscript{491} \textit{Editorial, DWP’s Terrible Case of Mono Mayor Riordan Works to Bring City Water Policies in the Modern Age, L.A. Times Sept. 24, 1994 (Metro) B7.}
\textsuperscript{492} \textit{National Audubon Society, 658 P.2d at 719-21 (holding the state has an ongoing public trust interest in its navigable waters which prevents appropriation of water in a manner harmful to the interests protected by the public trust including the state’s interest in ecosystems in their natural state).}
Some Final Insights about Destabilizing Litigation & Ecosystem Restoration

Did law and litigation matter to the Mono Lake ecosystem and if so is litigation an effective tool to promote the protection and restoration of water based ecosystems? Today the elevation of Mono Lake is 6,382 feet, ten feet above its historic low, nine feet below the 6,391-foot level established by the SWRCB and nineteen feet below pre-diversion levels. Between 1990 and 1994, shortly after the court of appeals issued its decision in Cal Trout II the Restoration Technical Committee began restoration of Rush and Lee Vining Creeks. Restoration efforts intensified after the SWRCB issued its 1994 decision setting target lake levels, establishing minimum and annual peak flows for the Mono Lake tributaries and ordering the LADWP to commence restoration of both Mono Lake and its tributaries pursuant to an approved restoration plan. Today the parties have taken significant steps towards ecosystem restoration. What is even more remarkable is that restoration has been accomplished without extracting water from other ecosystems to replace the reduction in waters going to Los Angeles as a result of restoration. Thus it seems clear that the answer to the question “did law matter to the Mono Lake ecosystem” must be yes, but in a more complex manner than anticipated by destabilization theorists. While the Mono Lake Committee credits both the initial public trust litigation and the trout litigation for the restoration outcome in truth, as this analysis of the historic narrative and litigation history of the events leading to the Mono Lake ecosystem restoration suggests, the success of Mono Lake ecosystem restoration was dependent on far more than litigation alone.

496 Id., see also 1994 Water Board Decision, at 1631
So what does the Mono Lake case tell the environmental practitioner, the social scientist, and destabilization theorists about the ability of litigation to change political and social structures to protect ecosystems? At the outset, the lessons from Mono Lake suggest that if the Sabel and Simon destabilization litigation model is to be a successful tool for promoting the changes in political and social structures, which are necessary for ecosystem protection and restoration litigation must be approached as a political resource mobilized by environmental organizations as part of a larger strategy to promote ecological as well as political and social change. This requires a strategic litigant willing to look beyond the desired environmental outcome of the litigation -- to focus on the change in the underlying social and political structure that made the initial decision resulting in ecological degradation.

The case of Mono Lake suggests that the goal of change litigation should be twofold: (1) alteration of the ecological outcome and (2) alteration of underlying political and social environmental decision making structures. To accomplish this end, the litigant must look beyond correction of the “environmental wrong” through a consent decree to the necessary changes in political and social structures that would result in long term ecosystem protection. In short, accomplishing and sustaining long term ecosystem protection requires the litigant to explore how destabilizing litigation can be mobilized in conjunction with other strategies to facilitate meaningful change. For as the tale Mono Lake ecosystem restoration efforts tells us – had the Mono Lake Committee simply relied on the National Audubon litigation to motivate the LADWP to change it is far from certain what if anything would have been accomplished. It was the National Audubon decision in conjunction with resource mobilization including ongoing framing and the secondary trout litigation that pushed the parties to negotiate a flexible remedy in compliance with the National Audubon decision and which ultimately led to ecosystem
restoration for Mono Lake. More importantly, from the perspective of water-based ecosystems in California it was the use of the *National Audubon* court order as a political resource in the context of political mobilization of other resources that resulted in the development of a flexible remedy that modified California’s water allocation rules and decision making structures in a manner that gave voice to natural systems.

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

1. **The Litigant Matters.**

The Mono Lake case supports Scheingold and McCann’s argument that destabilizing, change litigation is most successful if brought by SMOs that aim for broader social and political transformation than do traditional litigants because SMOs are more likely to seek the structural changes that bring access to policy making forums. The observation that organizational litigants make a difference appears to be borne out by many of the cases sited by Sabel and Simon in support of destabilization theory. A brief overview of these cases indicates that many were
brought by either SMOs or groups of plaintiff’s represented by a single attorney indicating some
type of organized approach to the litigation and its underlying purpose.499

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

The Mono Lake case also supports Galanter’s theory500 that organizations with access to
ongoing resources are more successful at leveraging litigation to bring about structural social
change, especially where accomplishing change requires ongoing and repeated litigation and the
development of public support for a changed environmental paradigm. The characteristics of
the Mono Lake case study comport with the observation of social scientists that successful
litigants are generally those with a long term view that think strategically about the outcomes of

499 See e.g., Rizzo v. Goode, 423 U.S. 362 (1976)(class action brought by brought by individuals and organizations
alleging police brutality); Sheppard v. Phoenix, 210 F. Supp. 2d 450 (S.D.N.Y. 2002)(action brought by current and
former prison inmates to challenge use of force practices in New York City jails); and New York State Association
500 See, supra notes 230-31 (discussing the importance of repeat players in change litigation).
the litigation and implications of the litigation beyond the courthouse and those types of litigants tend for the most part to be organizations or litigants that regularly appear in court.\textsuperscript{501}

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

2. Framing – Fertilizing the Ground

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

These lessons were borne out at Mono Lake where the Mono Lake Committee intuitively prepared the field for successful destabilizing litigation by consciously building a new water

\textsuperscript{501} See discussion, supra note 233.
frame designed to shift the public understanding from an either/or frame of growth or ecosystem destruction to one of ecosystem destruction caused by water waste – a frame that found resonance in the national press. This frame supported the public trust claim of right – that the state had an affirmative duty to take the state’s public trust interest in the Mono Lake ecosystem into consideration in the water allocation scheme.

Arguably, early framing also permitted the SMO to make use of a more flexible, albeit more controversial legal standard. Sabel and Simon suggest that effective destabilization claims are claims premised on the failure of the public agency to meet an uncontroversial or widely accepted performance standard. In environmental law, a silo based system of laws, there are few performance standards designed to effectively protect ecosystems, and those that do exist, such as the public trust doctrine, are hardly non-controversial. Yet in the Mono Lake case, the destabilizing change litigation was premised on a legal theory, which though ancient, had never been extended to inland tributaries of navigable waters nor applied to ecosystem protection and which, in the view of Los Angeles was intended to deprive the city of “valid water rights it has held for more than a half a century.” Arguably, the acceptability of the public trust doctrine as a legal theory was premised on a claim of right to a healthy ecosystem on behalf of the citizens. Support for this claim of right was developed through extensive framing that built public acceptance in both the media and among the citizens of California citizens and was

502 Sabel & Simon, supra note 113, at 1063.
ultimately recognized by legal scholars when the University of California at Davis held a day long seminar on the use of the public trust doctrine featuring the Mono Lake attorneys. This framing helped build legitimacy for the Mono Lake Committee legal argument at the time the complaint was filed and suggests that framing can be used prior to litigation to build support for an otherwise controversial legal standard.

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

Nor does the importance of framing diminish after the court has issued its determination, for as Stryker and Harris note, the mere fact that the court has issued an order does not in and of
itself mean that the court order will be enforced or resulted in destabilizing change.\textsuperscript{505} The case of Mono Lake case supports the conclusion that post litigation, the ability and willingness of an SMO to use a court’s legal ruling and decree beyond the court house to support a new frame appears to be central to successful, destabilizing litigation. Like the proverbial mustard seed there is little advantage to an advantageous legal determination if nothing is done with it, it may sprout institutional change, it may not.

This need for ongoing framing post litigation is clearly illustrated by the Mono Lake case. For although the California Supreme Court issued its \textit{National Audubon} decision in 1983 the Federal District Court made no effort to enforce the determination, instead the matter languished in Federal Court for another six years. The transformation of the \textit{National Audubon} decision to a destabilization tool was a tribute to the Mono Lake Committee’s decision to use the court order as a framing tool to continue to build public support for a restored ecosystem and the Mono Lake Committee’s willingness to undertake the secondary trout litigation that would ultimately become the forum for implementation of the \textit{National Audubon} court order.

Conversely, even though the \textit{National Audubon} court order was not immediately implemented the court order gave significant legitimacy to the Mono Lake Committee’s frame. A legitimacy that was recognized by the \textit{L.A. Times}, an historical supporter of the LADWP, when in 1989 it observed “Los Angeles should realize by now that it never will win its dogged legal battle to continue its historic diversion of eastern Sierra streams that naturally flow into Mono Lake . . . At some point the decline must be halted.”\textsuperscript{506} It is doubtful that a court order alone could have instigated this shift absent active framing and acceptance of this new frame by Californians, particularly Los Angeles residents. But it is likewise true that the court order itself

\textsuperscript{505} See discussion, supra note 210. \\
\textsuperscript{506} Editorial, \textit{Halt the Decline of Mono Lake}, L.A. Times, June 17, 1989 Section II at 4.
validated the Mono Lake Committee’s claim of right giving important legitimacy to the Mono
Lake Committee’s frame and this legitimacy increased the Mono Lake Committee’s political
power and voice.

Additionally, in recognizing the Mono Lake Committee’s claim of right the *National
Audubon* Court ruptured the old water decision-making paradigm casting both the LADWP, the
SWRCB, and California water law into a state of state of uncertainty, for no longer can it be
presumed that trust interests are subsumed in California’s water allocation schemes, at the very
least the SWRCB had to separately consider the public trust interest in a healthy ecosystem in the
allocation process – and this required giving voice to the ecosystem, the very frame advocated by
the Mono Lake Committee.

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

3. Secondary Litigation – Once may not be enough

A third important lesson from the Mono Lake case is that once may not be enough. From
a legal perspective the Mono Lake Committee was wildly successful in its *National Audubon* litigation but the litigation did little to move the LADWP nor did it immediately change the
political landscape or provide temporary relief to the ecosystem. It took the trout litigation and

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the resulting temporary restraining order to move the LADWP to negotiate a resolution and to provide temporary relief to the ecosystem in the form of an order mandating the LADWP to maintain minimum flows in the Mono Lake tributaries.

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

Arguably it was the secondary trout litigation that prodded the California court and the parties into action when, in 1984, the Mono Lake Committee and California Trout sued to sustain water in the Mono Lake tributaries for trout populations. Only then did the Mono Lake Committee get its injunctive relief for the Lake. This injunctive relief had three immediate impacts: (1) it insured much needed water for Mono Lake, (2) it created actual impacts that the LADWP was forced to acknowledge – a reduction in its water allocation and (3) it gave rise to the uncertainty that made the status quo impact real for the LADWP. For the first time the LADWP was forced to accept reduced water allocations for the benefit of the environment – it could no longer be certain that it would receive its full allocation of water from the Mono Lake tributaries. This uncertainty was magnified when, in 1989, the matter was consolidated in Judge Finney’s court. Now there was both incentive to act in the face of uncertainty and ongoing court oversight insuring that if the parties did not act, the court would and did when it issued a

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508 Supra note 417.
509 Supra notes 419-424 and accompanying text.
510 Supra note 407.
decree to the SWRCB to apply both the public trust doctrine and the holding from the trout cases to the LADWP’s allocation license.\footnote{Supra notes 437-438 and accompanying text.}

The Mono Lake case also suggests that ongoing court oversight and time, in conjunction with uncertainty, may be more essential to destabilizing litigation than a court ordered negotiation. It is interesting to note that Judge Finney did not order the parties to negotiate a remedy, rather he ordered the SWRCB to implement the *National Audubon* and *Trout I* decisions by balancing the public trust interest with the water needs of the LADWP and the minimum stream flows needs of the trout populations. To support this decision-making process the SWRCB commenced a 3-4 year study followed by extensive permit hearings. The court maintained oversight over the process pending the SWRCB’s final decision. The court’s order left the LADWP in a state of uncertainty; it could no longer depend on the outcome of the water allocation process. And ongoing court oversight insured that the parties would not relapse to the status quo. In light of this uncertainty the LADWP entered into protracted negotiations with the Mono Lake Committee. The outcome of the negotiation included agreed upon lake levels and restoration of the Mono Lake ecosystem, a changed water use and acquisition paradigm for the city of Los Angeles that relied extensively on conservation and re-use, and the acceptance of new natural system values incorporated in California's water allocation system – a complex and flexible remedy as befitting a complex ecosystem. This outcome was essentially negotiated outside the courtroom while the SWRCB prepared its documentation and commenced the LADWP permit hearing. And while the Court or the SWRCB could have squelched the agreement it is noteworthy that the parties were not ordered to negotiate a resolution, rather it was the uncertainty – the knowledge that the status quo was no longer possible (status quo effect)
which brought with it an uncertain future (veil effect) that pushed the LADWP to the negotiating table.

4. Flexible Remedy – a necessity for ecosystem restoration

Ecosystems are complex systems and restoring an ecosystem requires working across large landscapes in the face of scientific uncertainty.\(^{512}\) Given that ecosystem science and management for complex systems is uncertain, a degree of policy flexibility is required as scenarios are tested and accepted or rejected. Decisions must be amenable to modification “as new scientific knowledge reveals that the previously established plan was misguided, is deficient or needs to be adjusted.”\(^{513}\)

Ecosystem restoration presents “metaproblems” intermingling both human and natural systems and reaches across a multitude of stakeholders some of who, like the Mono Lake Committee, have a vested interest in healthy ecosystems. These stakeholders are highly diverse and fragmented.\(^{514}\) Yet “no one organization, even in the case of the least complex ecosystems, can solve the problems of ecosystem management unilaterally.”\(^{515}\) Nor is there necessarily equal political power among stakeholders or agreement about the need for or nature of restoration. Thus, it appears that successful ecosystem restoration requires collaborative, flexible decision-making in a process designed to give meaningful voice to divergent stakeholders, that has public support and which provides a mechanism for resolving disputes amongst stakeholders.\(^{516}\)

\(^{512}\) Doyle, supra note 439, at xii-xiii.

\(^{513}\) Id. at xiii.


\(^{515}\) Id.

\(^{516}\) See generally, Id. 406-19 and Doyle, supra note 439, at 294-98.
As ecosystems go, one might argue that Mono Lake restoration was far less complex than restoring the Everglades or the Great Lakes ecosystems, but even in the Mono Lake case it was recognized that ecosystem restoration required managing the interaction of multiple systems and identifying appropriate water levels for trout and lake levels that support brine shrimp and protected nesting areas. Added to this complexity was the need to find replacement water supply or to reduce water needs in Los Angeles. And on top of this complexity, the existing California water appropriation structure, as managed by the SWRCB, did not recognize the need for restoration nor was its decision-making process designed to address restoration challenges or incorporate collaborative decision-making.

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

**Conclusion**

As this case study of the Mono Lake restoration indicates, the use of litigation to protect ecosystems can be an important and effective tool. To better understand the effectiveness of that
tool, however, requires a broader understanding of the interrelationship between Sabel and Simon’s destabilization theory and social movement theory in practice.

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

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

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519 *Id.* at 255-56.
520 *Supra* notes 177-188 and accompanying text.