

Statement of Michael Warburton.

1. My name is Michael Warburton and since 2002 I have been Executive Director of the Public Trust Alliance, a project of the Resource Renewal Institute (RRI), a national nonprofit organization that promotes comprehensive green planning on state and national levels, based on restoration and sustainable use of natural resources. The goal of The Public Trust Alliance is to build the capacity of the public and government representatives to use one of the most powerful tools available to preserve and defend valuable public resources. The Public Trust Alliance draws from the Public Trust Doctrine, a seldom taught and routinely neglected thread of our common law legal tradition. We work with communities to reclaim their public heritage, and with public agencies to be better stewards. We intervene in legal proceedings where ecological viability of resource systems or fundamental public trust rights are at stake.
2. In the Carmel River situation, which involves an unnecessary continuing threat to Endangered Species, it seems that local water providers need an external stimulus to motivate the implementation of an alternative water supply system because almost no meaningful progress toward WRO 95-10's explicit goal of termination of Cal Am's illegal diversions has been made since its enactment 13 years ago. We support the issuance of a well-crafted CDO to support the transition to developing feasible alternative water supplies.
3. We filed a Notice of Intent to Appear in this proceeding when we learned that evidentiary offers might be limited to conditions of the Carmel River before 1994 when the State Board was just preparing Order 95-10, a seemingly clear indication that something might be amiss in the public decision making process.
4. Since 1994, both the Carmel River Steelhead and Red Legged Frog have been listed as "threatened" under Endangered Species Act provisions, both clear indications that diversions from the river are having an unreasonable impact on fish and wildlife. The need for the extensive fish rescue and relocation activities that have been going on for decades because of the absence of adequate surface flows tell us quite plainly that the fundamental ecological functions in this river and its connection to the sea, the heritage of all Californians, have been profoundly injured.
5. I am here today to testify about the fundamental background legal principle of the California Public Trust Doctrine which obligates the state to protect the people's heritage in these natural systems whenever feasible.
6. The controversy at bar could be clearly resolved by objective enforcement of familiar provisions of California water law. Trespassory diversions could be ordered stopped. Yet professionals and agencies are appearing here seeming to say that shouldn't happen and people and businesses should be allowed to proceed "just a little longer" with business as usual. We are concerned that some sort of decision to "split the difference" or some similar accommodation involving an inappropriate give-away of fundamental public assets might be reached without our coming forward and reminding our trustees that there are indeed Constitutional limits to this sort of accommodation. These are the initial

limitations on all state water rights that they are subject to both the reasonable use doctrine and the public trust.

7. The State Water Board has been designated as a public trustee for the people of California, including future generations, and thus has affirmative and continuing duties to supervise the waters and the ecosystems associated with them and protect public trust assets and uses whenever feasible.
8. Despite a long set of misadventures, an emerging regional dialogue, involving a wide range of individuals and agencies, has identified a set of projects that could satisfy regional water demands and restore stressed aquifers and simultaneously provide enough water to make continuing illegal diversions from the Carmel River totally unnecessary.
9. My experience serving on the Public Advisory Committee supporting the Department of Water Resources in its last update of the California Water Plan convinces me that this regional process and the people involved are a totally credible alternative to the ongoing bickering that has characterized the project proposals which have arisen from narrower constellations of interests in water development. The wider perspective cultivated by the broad participation in the dialogue is by far a better guarantee of feasibility than narrow financial interests in parochial proposals that leave too many people out.
10. In many ways, the background principle of the public trust serves a very similar function in broadening the perspective, or final bottom line against which viable proposals can be measured.
11. The hydrologically isolated Monterey Peninsula is more like the island ecology of Hawaii than other parts of California where water is imported from other river basins. The fiction that river systems can somehow forever accommodate expanding needs of growing communities has to give at some point. Hawaii has recognized the framework of the public trust, with its inherent precautionary bias in favor of protecting the ecological systems that ultimately support us as the most appropriate framework for long term resource governance in that state.
12. Hawaii came to this basic recognition that excessive exploitation of property rights can sometimes exceed the limited productive capacity of natural systems to accommodate them. In the Mono Lake Case, the California Supreme Court long ago posited that no vested property right could be asserted to the harm of the trust.
13. Yet the words of the Hawaiian Supreme Court, in making the background principle of the public trust more articulate, are quite relevant to the situation on the Carmel River in California:

“We simply reaffirm the basic, modest principle that the use of the precious water resources of our state must ultimately proceed with due regard for certain enduring public rights. This principle runs as a common thread through the constitution, Code and common law of our state. Inattention to this principle may have brought short term convenience to some in the past. But the constitutional framers and Legislature understood, and others concerned about the proper functioning of our democratic system and the continued vitality of our island environment and community may also appreciate, that we can ill afford to continue down this garden path this late in the day.”

It really is too late in the day to just keep pretending that oversubscribed rivers are capable of supporting more diversions. The water that Cal Am is sending out for domestic use is already spoken for and needed to sustain fish and ecological functions that are the heritage of all Californians.