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An Analysis of the Potential Conflict between the Prior Appropriation and Public Trust Doctrines in Montana Water Law

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COMMENTS

AN ANALYSIS OF THE POTENTIAL CONFLICT BETWEEN THE PRIOR APPROPRIATION AND PUBLIC TRUST DOCTRINES IN MONTANA WATER LAW

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I. INTRODUCTION

Montana water law is characterized by the prior appropriation doctrine. The doctrine arose from the need to provide an orderly system of distributing water for the settlement and development of the arid land.[1] Historically, the doctrine did not address "public rights" in water because of the emphasis placed on private development of natural resources. Yet recognition of public rights in water has increased as values associated with the aesthetic, environmental and recreational uses of water gain more

1. The prior appropriation doctrine originally grew out of custom, primarily in the western mining camps. Later the doctrine became entrenched in federal expansionist policy. For example, the Desert Land Act of 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. §§ 321-339 (1982)), allowed an appropriator to use water upon the appropriator's desert land entry. The Desert Land Act also declared all surplus nonnavigable waters on public lands available for appropriation. *See* 1 WATERS AND WATER RIGHTS 74-83, 95 (R. Clark ed. 1967). For a discussion of the importance of the Desert Land Act of 1877 and the prior appropriation doctrine to the development of the West, see C. P. WEBB, THE GREAT PLAINS 412-18, 439-52 (1931).

emphasis in our culture.[2] Consequently, the public's interest in the allocation of water increases as the competition for Montana's water resources increases. An important question then is whether the prior appropriation doctrine can accommodate these changing public needs and interests in water use and allocation.

In three recent Montana Supreme Court decisions, *Montana Coalition for Stream Access v. Curran*,[3] *Montana Coalition for Stream Access v. Hildreth*[4] and *Galt v. State*,[5] the court used the public trust doctrine to protect the public's right to use Montana streams for recreational purposes. With *Curran, Hildreth* and *Galt*, Montana joined a growing number of western states that use the public trust doctrine to analyze and determine water resource conflicts.

At issue in *Curran* and *Hildreth* was the extent to which the public could recreationally use Montana streams. The controversy centered on whether the adjacent landowner could exclusively control the recreational use of certain streams running through private property. The Montana Supreme Court found the public had a right to use recreationally any stream capable of recreational use.[6]

The Montana decisions did not directly address a conflict between the public interest in using water recreationally and the prior appropriation doctrine, but such a conflict is likely to occur. A foreseeable claim by recreationists is that a landowner's legal use of a legally acquired water right for irrigation[7] deprives the stream of so much water that the recreational use of the stream is hindered or eliminated. The question arises whether the legally appropriated water right is absolute against the public's right of recreation. This conflict could also be labelled a confrontation between public and private interests or between the public trust and prior appropriation doctrines.

This comment explores the outcome of a confrontation between the prior appropriation doctrine and public rights in water. The prior appropriation doctrine is reviewed first, and a possible resolution of a dispute between recreational and appropriative uses is provided through the application of that doctrine. The comment then develops the history of the public trust doctrine, surveys the Montana cases addressing the public

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2. Thorson, Brown & Desmond, *Forging Public Rights in Montana's Waters*, 6 PUB. LAND L. REV. 1, 3 (1985) [hereinafter *Forging*].

3. ___Mont.___, 682 P.2d 163 (1984).

4. ___Mont.___, 684 P.2d 1088 (1984).

5. ___Mont.___, 731 P.2d 912 (1987).

6. *Curran*, ___Mont. at ___, 682 P.2d at 171; *Hildreth*, ___Mont. at ___, 684 P.2d at 1091. *See also infra* text accompanying notes 72-115.

7. Irrigation consumes nearly 90 percent of all water in the West. Wilkinson, *Western Water Law in Transition*, 56 U. COLO. L. REV. 317, 321 (1985).

trust doctrine, and examines how other states have applied the doctrine. Finally, the comment analyzes the outcome of a collision in Montana between the prior appropriation and public trust doctrines.

II. PRIOR APPROPRIATION DOCTRINE IN MONTANA

The prior appropriation doctrine grew in the arid West from a practical need to transport scarce water supplies for use in mining, irrigation and municipal activities. The doctrine established an orderly distribution of water so that it could be most beneficially used.[8] To acquire a water right, an appropriator must divert a specific quantity of water for a beneficial and reasonable purpose. As among appropriators, the principle of "first in time, first in right" controls the distribution of water by prioritizing water rights according to the time of their original acquisition. Thus, an appropriator from a given watercourse gains the exclusive right to use the water necessary to fulfill that appropriation over any subsequent appropriators. This priority holds even in periods of short water supply when an appropriator's right consumes all of the water in a watercourse to the exclusion of subsequent appropriators. An appropriative right is good only to the extent of the amount of water originally intended to be beneficially used and only so long as that use is properly exercised.[9]

Before 1973 a water right was acquired in Montana one of two ways: by use or by filing. An appropriator acquired a water right by use by simply diverting[10] water and putting it to a beneficial use.[11] Under an 1885 statute[12] a water right could also be acquired by filing a notice of appropriation with the county clerk, posting a notice at the diversion site, and proceeding to complete the diversion with reasonable diligence.[13] In 1973, the Montana legislature passed the 1973 Water Use Act.[14] This Act mandates that the exclusive method of appropriating water is to obtain a permit from the Montana Department of Natural Resources and Conservation.[15]

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8. *See* 1 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 157-80 (1971).

9. *See id.*; T. DONEY, MONTANA WATER LAW HANDBOOK 5-8 (1981); A. STONE, MONTANA WATER LAW FOR THE 1980's 20 (1981).

10. In Montana, a diversion may not be an essential element for an appropriative water right. *See* DONEY, *supra* note 9, at 28-30.

11. *Id.* at 40-44; STONE, *supra* note 9, at 47.

12. REV. CODE MONT. §§ 89-810 to -812 (1947), *repealed by* 1973 Water Use Act, MONT. CODE ANN. §§ 85-2-101 to -807 (1987).

13. DONEY, *supra* note 9, at 44-53; STONE, *supra* note 9, at 47-52. The Montana Supreme Court held in Murray v. Tingley, 20 Mont. 260, 50 P. 723 (1897) that, despite the statutory language, filing was not the exclusive way of acquiring a water right. *Id.* at 268-69, 50 P. at 725.

14. MONT. CODE ANN. §§ 85-2-101 to -807 (1987).

15. *Id.* §§ 85-2-301 and -302.

Once acquired, two key elements, beneficial use and priority, characterize an appropriative water right in Montana. Under Montana law, the concept of beneficial use demands that a water right must be put to a legal, beneficial purpose. The concept of beneficial use also limits the amount of water which can be reasonably used for that legal purpose at the time the water right is acquired.[16] As previously discussed, a water right receives a priority date when acquired by an appropriator which makes that right superior against all subsequent appropriators. The priority date gives a water right its chief value in times of scarce water resources.[17] Therefore, an appropriator's water right in Montana consists of a right to use a specific amount of water for a legal, beneficial purpose with a priority over subsequent appropriators for that specific amount. An appropriator does not own the water itself; an appropriator owns a legally protected property right to use the water.[18]

The appropriation doctrine is the foundation of Montana water law.[19] Even before Montana became a state in 1889, the Montana Supreme Court fully recognized the appropriation doctrine with the support of the United States Supreme Court.[20] Montana's 1889 Constitution expressly adopted the system by stating that "[t]he use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution, or other beneficial use. . . shall be held to be a public use. . . ."[21] The 1972 Montana Constitution provides that "[a]ll existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed."[22] The Montana Supreme Court construed the 1972 language

16. McDonald v. State, ____Mont.____, 722 P.2d 598 (1986), is the most recent case reaffirming the concept of beneficial use as the basis, measure, and limit of all appropriative water rights in Montana. *Id.* at 601-02. Historically, practically any use was beneficial. DONEY, *supra* note 9, at 24-25. Currently, the definition of beneficial use seems almost limitless: "Beneficial use. . . means a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural . . . domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;. . ." MONT. CODE ANN. § 85-2-102(2)(a). *See also* DONEY, *supra* note 9, at 25-28 for a detailed discussion of the problem of quantifying the amount of water used for a beneficial purpose.

17. DONEY, *supra* note 9, at 69.

18. *Id.* at 7. Montana's waters are *publici juris* under the 1972 Constitution and pre-1972 case law. *See, e.g.*, Allen v. Petrick, 69 Mont. 373, 222 P. 451 (1924); Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074 (1933).

19. DONEY, *supra* note 9, at 5. For a detailed discussion of the appropriation doctrine see generally *id.* at 5-84 and STONE, *supra* note 9, at 18-96.

20. In Atchison v. Peterson, 1 Mont. 561 (1872), *aff'd*, 87 U.S. 507 (1874), the Montana Supreme Court stated: "The doctrine that the first appropriator of water. . . is entitled to the waters of a stream as against subsequent appropriators without material interruption in the flow thereof, or in quantity or quality, is fully recognized. . . ." *Id.* at 569. *See also* Gallagher v. Basey, 1 Mont. 457 (1872), *aff'd*, 87 U.S. 670 (1875).

21. MONT. CONST. art. III, § 15 (1889).

22. MONT. CONST. art. IX, § 3(1) (1972).

as reaffirming the public policy of the 1889 Constitution and confirming all water rights acquired under the 1889 Constitution.[23] The prior appropriation doctrine also served as the foundation for the 1973 Water Use Act[24] even though that Act introduced radical procedural changes in Montana water law.[25]

By adhering to the appropriation doctrine, Montana law embraces stable priority for historic uses, concern for private rights over public rights, and preference for consumptive uses.[26] Given this background, the question arises whether the prior appropriation doctrine itself could be used to resolve conflicts arising from competing public and private uses such as recreation and irrigation.

A. *A Prior Appropriation Doctrine Solution*

The 1889 Montana Constitution allowed appropriation of water for beneficial uses.[27] However, recreational use as a beneficial use was not expressly recognized until 1973 in the Water Use Act.[28] Also, Montana case law and the appropriation statutes adopted under the 1889 Constitution apparently required an actual diversion from the stream to perfect an appropriated water right for a beneficial use.[29] However, a diversion may not be a requirement[30] as the following case suggests.

In *Paradise Rainbows v. Fish and Game Commission*,[31] a Montana Supreme Court decision, the Fish and Game Commission ignored the possible diversion requirement and claimed that the public had acquired a water right by beneficially using a stream for fishing.[32] Given the facts of the case, the court rejected the Commission's argument, but stated that

> [u]nder the proper circumstances we feel that such a public interest should be recognized. This issue will inevitably grow more pressing as increasing demands are made on our water resources. An abundance of good trout streams is unquestionably

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23. General Agriculture Corp. v. Moore, 166 Mont. 510, 515, 534 P.2d 859, 862 (1975).

24. MONT. CODE ANN. §§ 85-2-101 to -807. *See id.* § 85-2-301(1) ("A person may only appropriate water for a beneficial use."); *id.* § 85-2-401(1) ("As between appropriators, the first in time is the first in right").

25. DONEY, *supra* note 9, at 5, 10-11.

26. Wilkinson, *supra* note 7, at 321.

27. MONT. CONST. art. III, § 15 (1889).

28. MONT. CODE ANN. § 85-2-102(2)(a); *see also supra* note 16.

29. STONE, *supra* note 9, at 51-53; DONEY, *supra* note 9, at 28-30.

30. STONE, *supra* note 9, at 51-53; DONEY, *supra* note 9, at 29-30.

31. 148 Mont. 412, 421 P.2d 717 (1966).

32. *Id.* at 419, 421 P.2d at 721. The appropriator challenging the Commission's argument was using his water right to fill a series of private fish ponds. *Id.* at 418-19, 421 P.2d at 720-21. The validity of the appropriator's water right was not at issue. The Commission had granted the appropriator several licenses over a period of years to operate the ponds. *Id.* at 414-15, 721 P.2d at 718-19. The court also impliedly assumed the private fish ponds were of a beneficial use. *Id.* at 420, 421 P.2d at 721.

an asset of considerable value to the people of Montana.[33]

The court in *Paradise Rainbows* implied that an actual diversion of water was not required to perfect a water right and suggested that the absence of fishing or recreation as a beneficial use before 1973 did not specifically preclude that use as a legal, beneficial use. The court further suggested that given the proper circumstances, a public fishing right should be allowed.[34] Therefore, an in-stream water right could be claimed by proving the date the right was acquired and how much stream water was beneficially used for fishing or recreation. However, the claimant would also have to show that, before 1973, fishing or recreation was a beneficial use even though neither use had ever been declared beneficial.[35]

Arguably, under *Paradise Rainbows*, recreational fishing was a permitted beneficial use by private appropriators before 1973. It could thus be an allowable beneficial use upon which to base a public water right in certain situations. A court could simply declare which appropriated right had priority in a confrontation between a public fishing or recreational right and an irrigation right. This solution has limits however. The date the public right was acquired by use and how much water was necessary for that recreational use would be difficult to prove. If an appropriative public right was acquired, the amount of water would be limited to that used at the date the water right was acquired. The public's expanding and changing needs could not be considered except as newly appropriated rights with later priority dates. Further, since the 1973 Water Use Act established a permit system as the only way to acquire a water right,[36] this analysis could only apply to recreational use rights claimed and acquired before 1973. The Water Use Act also put in doubt whether a private person can acquire

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33. *Id.* at 419-20, 421 P.2d at 721. The Commission was trying to prevent the diversion of an entire creek under a valid appropriation by requiring the appropriator to release some water by installing a fish ladder in his dam. The Commission argued the ladder was necessary to maintain the prior water right the public had acquired in the stream for fishing. The court rejected the claim because the Commission had known about the appropriation for more than seven years and had not previously requested a fish ladder. *Id.*

34. *Id.* at 419-20, 421 P.2d at 721.

35. However, recreation has never been declared not to be a beneficial use. DONEY, *supra* note 9, at 24.

36. Currently, Montana is undergoing a state-wide court adjudication of all existing Montana water rights as required by the 1979 amendments to the 1973 Water Use Act pursuant to the adjudicative mandate found in MONT. CONST. art. IX, § 3(4) (1972). Consequently, after the current adjudication process in Montana is completed, this analysis applying the prior appropriation doctrine will be unusable. Under this state-wide adjudication, MONT. CODE ANN. § 85-2-223 allows only the Department of Fish, Wildlife, and Parks to represent the public in claiming public appropriative rights for recreational use. Therefore, only the department is a valid claimant under the *Paradise Rainbows* analysis. Incidentally, MONT. CODE ANN. § 85-2-223 specifically disclaims any determination of whether recreation was a beneficial use before 1973.

an in-stream water right for recreation,[37] even though recreation is a beneficial use under the Water Use Act.[38] One way courts have overcome these types of limits is to ground public rights in the public trust doctrine.

III. PUBLIC TRUST DOCTRINE

The public trust doctrine evolved to protect the public's interest in certain unique, valuable and irreplaceable natural resources.[39] Historically, the doctrine's purpose was to preserve public ownership of navigable waters and the underlying beds to protect public rights of navigation, commerce and fishery.[40] Courts in various states have expanded both the public rights and the waters protected by the doctrine.[41]

In *Martin v. Waddell*,[42] the United States Supreme Court held that after the American Revolution the peoples of each of the original thirteen states became sovereign.[43] Thus, the people through their respective states held the absolute right to all the states' navigable waters and soils underneath the navigable waters for their own common use.[44] Three years later, the Court in *Pollard's Lessee v. Hagan*[45] deemed that states admitted after the original thirteen also took title to lands underlying navigable waters.[46] The Court reasoned that the federal government held such lands in trust for new states to ensure their admittance on an equal footing with the original states.[47] Although the issue in each of these cases actually concerned land underlying navigable waters, the Court subse-

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37. MONT. CODE ANN. § 85-2-316(1) permits public agencies to make in-stream reservations of water for "existing or future beneficial uses or to maintain a minimum flow, level, or quality of water . . . ." Therefore, apparently only public agencies may acquire an in-stream water right or reservation for recreational purposes, especially given MONT. CODE ANN. § 85-2-223. *See supra* note 36. *But cf.* STONE, *supra* note 9, at 51-53 and DONEY, *supra* note 9, at 28-29 (suggesting that a private person may acquire an in-stream water right).

38. Although MONT. CODE ANN. § 85-2-102(2)(a) includes recreation as a beneficial use, MONT. CODE ANN. § 85-2-102(1) defines "appropriate" to mean "divert, impound, or withdraw (including by stock for stock water) a quantity of water or, in the case of a public agency, to reserve water in accordance with 85-2-316."

39. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C.D.L. REV. 233, 240 (1980). For general background on the public trust doctrine see the various papers on *The Public Trust Doctrine in Natural Resources Law and Management: A Symposium*, in 14 U.C.D.L. REV. 181-316 (1980).

40. Johnson, *supra* note 39, at 240.

41. *Id.* at 240-41.

42. 41 U.S. (16 Pet.) 367 (1842).

43. *Id.* at 410.

44. *Id.*

45. 44 U.S. (3 How.) 212 (1845).

46. *Id.* at 230.

47. *Id. See also* Shively v. Bowlby, 152 U.S. 1, 57-58 (1894) (holding that the federal government held territorial navigable waters and the underlying beds in trust for the states admitted from the western territories).

quently applied the concept to include the navigable waters themselves.[48]

Illinois Central Railroad Co. v. Illinois[49] constitutes the premier expression of the public trust doctrine by the United States Supreme Court. In that case the Illinois legislature granted nearly all of Chicago's Lake Michigan waterfront to the railroad.[50] The legislature rescinded the grant several years later and the Court upheld the rescission on the basis of the public trust doctrine.[51]

The Court reasoned that under *Pollard* the state of Illinois held title to the lands underlying the navigable waters of Lake Michigan. This title empowered the state of Illinois to control the waters above.[52] The Court stated the title was "held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."[53] The trust imposed upon the state over property in which the public had an interest "[could not] be relinquished by a transfer of the property."[54] The Court concluded a state can not abdicate the trust by placing the navigable waters and underlying beds entirely in the hands of private parties as this would be inconsistent with preserving the public uses.[55] The state may give up control of trust property only where the grant by the state to a private party either improved or did not impair the trust purposes.[56] The *Illinois Central* decision thus states unequivocally that a state has a public trust duty to preserve and protect navigable waters and the underlying beds so as to ensure the public's continued enjoyment of navigation, commerce and fishery over these navigable waters.[57]

The definition of "navigable waters" determines the lands and waters over which a state has public trust responsibilities. The basic test defining navigability under federal law was laid down first in *The Daniel Ball*.[58] The United States Supreme Court stated that waters which are navigable in fact are navigable in law.[59] "And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as

48. WATERS AND WATER RIGHTS, *supra* note 1, at 207 & n.25 (citing among 17 United States Supreme Court cases: Barney v. City of Keokuk, 94 U.S. 324 (1876); Illinois Cent. RR Co. v. Illinois, 146 U.S. 387 (1892); and Shively v. Bowlby, 152 U.S. 1 (1894)).

49. 146 U.S. 387 (1892).

50. *Id.* at 438-43, 448-49.

51. *Id.* at 448-49.

52. *Id.* at 435-36, 452.

53. *Id.*

54. *Id.* at 453.

55. *Id.* at 452-53.

56. *Id.*

57. *Id.* at 452.

58. 77 U.S. (10 Wall.) 557 (1870).

59. *Id.* at 563.

highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[60] This test for navigability determines the lands and waters to which a state takes title upon the "equal footing" rationale of *Pollard*.[61] The title to the navigable waters and the underlying beds taken by the state are subject to the public trust principles expressed in *Illinois Central*.

While the *Daniel Ball* test for navigability determines which waters are public for purposes imposed by federal law under *Pollard* and *Illinois Central*, states are free to adopt their own test of navigability or other standard to define what rights the public may have under state law and in which waters those rights may be exercised.[62] State courts must contend with two separate, yet related, sets of trust principles when utilizing the public trust doctrine to evaluate resource allocation and use decisions. One set of principles, laid down by the United States Supreme Court in *Illinois Central*, involves those lands and waters which are navigable under the *Daniel Ball* test. The other set of trust principles is determined by the law of the individual state.

States have used their distinct power to expand the public uses and extend the types of waters protected under the public trust doctrine. On waters deemed navigable under the federal test, some state courts have expanded the protected public uses beyond navigation, commerce and fishery to purposes such as recreation and ecology.[63] California extended public trust protection to include nonnavigable tributaries of waters that are deemed navigable under the federal test.[64] Other states have expanded the uses and extended the waters covered under the doctrine by asking simply whether the waters are suitable for public use regardless of their navigability under the federal test.[65]

State courts have used the public trust doctrine to evaluate transfers

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60. *Id.*

61. This test also determines over which waters Congress' commerce power extends. WATERS AND WATER RIGHTS, *supra* note 1, at 205-06.

62. *Id.* at 212-17. *See also* STONE, *supra* note 9, at 89-95. "[W]hat shall be deemed a navigable water within the meaning of the local rules of property is for the determination of the several States." Donnelly v. United States, 228 U.S. 243, 262 (1913), *reh'g denied*, 228 U.S. 708 (1913).

63. Lamprey v. State, 52 Minn. 181, 53 N.W. 1139 (1893) (recreation); Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971) (ecology, scientific study and aesthetics).

64. National Audubon Soc'y v. Superior Court of Alpine County, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983), *cert. denied*, 464 U.S. 977 (1983). *See infra* text accompanying notes 144-61.

65. WATERS AND WATER RIGHTS, *supra* note 1, at 214-17. *See* Day v. Armstrong, 362 P.2d 137 (Wyo. 1961) (floating and recreational use irrespective of navigability concept); Muench v. Public Service Comm'n, 261 Wis. 492, 53 N.W. 2d 514 (1952) (adopting a navigability test determined by the water's susceptibility to recreational floating); Montana Coalition for Stream Access v. Curran, ___Mont.___, 682 P.2d 163 (1984) (capability of waters for recreational use determines whether they can be so used).

of public trust property and changes in the public uses of trust property both under principles expressed in *Illinois Central* and under the states' individual expressions of the trust principles.[66] In a relatively recent development, discussed later in this comment, three state courts indicated that the public trust doctrine acts as a limit on water allocation decisions made under the appropriation doctrine.[67] In light of these decisions, the question arises whether Montana should use the public trust doctrine to evaluate and possibly limit water appropriations. A review of the current status of the public trust doctrine in Montana is helpful in answering this question.

A. *The Montana Cases*

Although the Montana Supreme Court did not refer expressly to the public trust doctrine until 1984 in *Montana Coalition for Stream Access v. Curran*,[68] an earlier Montana case recognized the rudiments of public rights which the doctrine purports to protect. In *Gibson v. Kelly*,[69] an 1895 title dispute case, the Montana Supreme Court stated that "while the abutting owner owns to the low-water mark on navigable rivers, still the public have certain rights of navigation and fishery upon the river. . . ."[70] The court did not consider the scope of these public rights, but the court did follow the strict federal test of navigability.[71] Presumably, the public rights to which the court referred were those rights protected by the public trust doctrine enunciated in *Illinois Central* and applicable to Montana as a matter of federal law.

The Montana Supreme Court has explicitly addressed the public trust doctrine in three recent cases.[72] Those cases are *Montana Coalition for Stream Access v. Curran*,[73] *Montana Coalition for Stream Access v. Hildreth*[74] and *Galt v. State*.[75] The discussion of the public trust doctrine in these cases revolved around the following provision from article IX, section 3(3) of the 1972 Montana Constitution:

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66. *See* Johnson, *supra* note 39, at 242-44; Desmond, *The Public Trust Doctrine: Scope of Legislative Power*, in WATER RIGHTS ADJUDICATION/STREAM ACCESS FOR RECREATIONAL USE (THE PUBLIC TRUST DOCTRINE) ch. VIII (1984) (provides a catalog of specific cases). State courts have generally been lax in expressing the distinct differences in the two sets of trust principles.

67. *See infra* text accompanying notes 134-65.

68. ___Mont.___, 682 P.2d 163 (1984).

69. 15 Mont. 417, 39 P. 517 (1895).

70. *Id.* at 423, 39 P. at 519.

71. *Id.* at 421-23, 39 P. at 519.

72. There was an attempt to get public trust language explicitly in the 1972 Constitution. *See Forging*, *supra* note 2, at 20-21.

73. ___Mont.___, 682 P.2d 163 (1984).

74. ___Mont.___, 684 P.2d 1088 (1984).

75. ___Mont.___, 731 P.2d 912 (1987).

> All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.[76]

The Montana court in both *Curran* and *Hildreth* used this provision and considerations of the public trust doctrine to find broad public recreational rights in Montana waters.[77] In response to these cases, the legislature passed the "Stream Access" bill[78] in an attempt to codify the *Curran* and *Hildreth* decisions. Recently, in *Galt* the court struck down as unconstitutional certain provisions of the stream access statute and further defined the public trust doctrine in Montana.

In *Curran*, the first public trust doctrine case in Montana, a conflict arose between recreationists and adjacent landowners over the use of the Dearborn River.[79] Though recreationists used the river for fishing and floating, Curran, the abutting landowner, claimed the right to restrict the use of the river on those portions which flowed though his land based on his claimed ownership of those portions of the river's banks and beds.[80] The recreationists asserted a constitutional right to use the river free from interference or harassment from Curran.[81]

The Montana Supreme Court first upheld the district court's finding that the Dearborn River was navigable in fact under the federal test.[82] The court then traced the history of federal cases which held that the United States government held navigable waters in trust for future states in order to admit those states on an equal footing with the original thirteen states.[83] Upon statehood, title to navigable waters and the underlying beds passed to the states to be "held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have [the] liberty of fishing therein . . . ."[84] The court noted these considerations applied to waters determined navigable under the federal test for title.[85]

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76. MONT. CONST. art. IX, § 3(3) (1972). *See Forging*, *supra* note 2, at 19-25 for a history of this constitutional provision.

77. *Forging*, *supra* note 2, at 29-33.

78. Codified at MONT. CODE ANN. §§ 23-2-301 to -322 (1987).

79. *Curran*, ___Mont. at ___, 682 P.2d at 165.

80. *Id.*

81. *Id.*

82. *Id.* at ___, 682 P.2d at 166-68. The Montana Supreme Court upheld the district court's application of the log floating test to determine the navigability of the Dearborn River under federal law. In *Curran*, two competent historians testified that before and around the time of Montana's admission to the Union, the Dearborn River had been used for commercial log drives. *Id.* The log floating test for navigability was authorized by the United States Supreme Court in The Montello, 87 U.S. (20 Wall.) 430 (1874).

83. *Curran*, ___Mont. at ___, 682 P.2d at 166-68. *See supra* text accompanying notes 42-48.

84. *Id.* at ___, 682 P.2d at 168 (citing *Illinois Central*, 146 U.S. at 452).

85. *Id.* at ___, 682 P.2d at 168.

However, the controversy in *Curran* centered on navigability for *use* of the Dearborn River, not for title, and navigability for use is a question of state, not federal, law.[86]

In determining the proper test for public use of waters in Montana, the court noted other states either defined navigability to include recreational uses or abandoned the concept of navigability in favor of an inquiry into whether a waterway is susceptible to public use.[87] Turning to Montana law, the court held, based on article IX, section 3(3) of the Montana Constitution quoted above,[88] that "Curran has no right to control the use of the surface waters of the Dearborn to the exclusion of the public except to the extent of his prior appropriation of part of the water for irrigation purposes, which is not at issue here."[89] The court also stated that Curran had no rights of ownership to the riverbed because title to the riverbed, burdened by the public trust, was transferred upon statehood to the state.[90] In sum, the court held the following:

> The Constitution and the public trust doctrine do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters. . . . [U]nder the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes.[91]

While the court recognized that Montana law grants private ownership of the adjacent lands to the low-water mark,[92] the "angling statute"[93]

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86. *Id.* at ____, 682 P.2d at 168, 170.

87. *Id.* at ____, 682 P.2d at 169-70.

88. *See supra* text accompanying note 76.

89. *Curran*, ____Mont. at ____, 682 P.2d at 170.

90. *Id.* However, this statement by the court addressing riverbed ownership is questionable for several reasons. First, the public trust burdening the waters and underlying lands upon statehood in 1889 probably did not include the broad uses allowed by the 1972 Montana Constitution. *See infra* notes 180-93 and accompanying text. Second, Montana law for state purposes grants the adjacent landowner the strip of land between the high and low water marks on waters deemed navigable under the federal test. *See* Gibson v. Kelly, 15 Mont. 417, 39 P. 517 (1895); MONT. CODE ANN. § 70-16-201 (1987) (enacted 1885) (granting the adjacent landowner of nonnavigable waters the bed to the middle of the stream). Third, this statement is inconsistent with the court's holding in *Curran* that as to use of the waters "[s]treambed ownership by a private party is irrelevant." *Curran*, ____Mont. at ____, 682 P.2d at 170. *See also infra* note 126.

91. *Curran*, ____Mont. at ____, 682 P.2d at 170-71. Consequently, in *Curran* the Montana Supreme Court declared irrelevant Herrin v. Sutherland, 74 Mont. 587, 241 P. 328 (1925). In *Herrin*, the court declared that anyone wading up a nonnavigable stream was a trespasser. The court stated *Herrin* was irrelevant for at least three reasons: (1) the creek involved in *Herrin* was nonnavigable whereas the Dearborn River was navigable; (2) the *Herrin* holding is dicta; and (3) *Herrin* is contrary to the 1972 Montana Constitution and the public trust doctrine. *Curran*, ____Mont. at ____, 682 P.2d at 170-71.

92. MONT. CODE ANN. § 70-16-201.

93. *Id.* § 87-2-305. For further discussion on the angling statute see *infra* notes 185-88 and

gives the public the right to fish within the high-water marks.[94] The court noted that in *Gibson* it previously recognized a public right to fishing and navigation up to the high-water mark.[95] Thus, the court established the boundary of the public's right to use state owned waters to the high-water mark along with the right to portage unintrusively around barriers that prevent passage within the high-water marks.[96]

Montana Coalition for Stream Access v. Hildreth involved the Beaverhead River under facts similar to those in *Curran*.[97] The court in *Hildreth* reaffirmed the holdings of *Curran*. In stating that adjacent landowners have no right to control the use of state owned waters, the court stressed that the 1972 Constitution and the *Curran* holding demand any waters capable of recreational use may be so used without regard to streambed ownership or the federal navigability test.[98] Since the 1972 Constitution does not limit the use of waters, the only possible limitation on use can be the characteristics of the waters themselves.[99] The court made clear that the 1972 Constitution requires the capability of use test to determine which waters may be recreationally used by the public.[100] While the court in *Curran* only referred to the use of water up to the high-water mark, the court in *Hildreth* expressly declared that the public has a right to use not only the waters but also the beds and banks up to the high-water mark.[101] As in *Curran*, the court in *Hildreth* stated the public could portage around barriers.[102]

The *Curran* and *Hildreth* decisions came at a time when an interim Montana legislative subcommittee was studying recreational stream access to recommend legislation to the 1985 legislature.[103] The interim committee recommended two bills. Those two bills, along with nine others, were introduced in response to *Curran* and *Hildreth*.[104] After much debate, the 1985 legislature passed the stream access bill in an effort to settle the stream access controversy.[105]

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accompanying text.

94. *Curran*, ___Mont. at ___, 682 P.2d at 172.

95. *Id.*

96. *Id.* Interestingly, both the statute and case cited by the Montana Supreme Court to extend the public's right to the high-water mark historically addressed navigable waters only as defined by the federal test.

97. ___Mont. at ___, 684 P.2d at 1090-91.

98. *Id.* at ___, 684 P.2d at 1091-92, 1094.

99. *Id.* at ___, 684 P.2d at 1091.

100. *Id.* at ___, 684 P.2d at 1091, 1094.

101. *Id.* at ___, 684 P.2d at 1091.

102. *Id.*

103. *See Forging*, *supra* note 2, at 25-37.

104. *Id.* at 34.

105. *Id.* at 34-37.

The stream access statute[106] actually addresses the recreational use of streams more than it does access to streams.[107] The statute provides that subject to certain limitations, "all surface waters[108] that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters."[109] The statute also allows the public to portage around barriers in the least intrusive manner.[110]

The stream access statute separates Montana streams into two classes and delineates the specific uses allowed in each class. Class I streams are all those streams deemed navigable under the federal navigability test.[111] Uses originally permitted on Class I waters included big game hunting with a long bow or shotgun, camping out of sight or further than 500 yards from an occupied dwelling, and the placement of duck blinds, boat docks and other permanent objects out of sight or further than 500 yards from an occupied dwelling.[112] The statute defines Class II waters as all those streams that are not Class I waters,[113] which basically means streams nonnavigable under the federal test. On Class II waters only water related pleasure activities are permitted, not including big game hunting, overnight camping or the placement of any seasonal object.[114] Although the statute permits broad public recreational use of streams, the Montana Fish and Game Commission may limit, restrict or prohibit completely the recreational use of a stream in the interest of public health, public safety or the protection of public and private property.[115]

In *Galt v. State*,[116] the stream access statute was challenged as an unconstitutional taking of private property without just compensation. Galt, a landowner, requested that the district court declare certain

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106. MONT. CODE ANN. §§ 23-2-301 to -322 (1987).

107. The bill does provide that the public's right of use does *not* give the public the right of access across private land to get to the public water. *Id.* § 23-2-302(4).

108. The statute also includes beds and banks up to the ordinary high-water mark. *Id.* § 23-2-301(12)

109. *Id.* § 23-2-302(1).

110. *Id.* § 23-2-311(1).

111. *Id.* § 23-2-301(2). Judicial decision has declared the Missouri, Gallatin, Flathead, Yellowstone, Big Horn and the Dearborn Rivers navigable. *See* Comment, *Recreational Use of Montana's Waterways: An Analysis of Public Rights*, 3 PUB. LAND L. REV. 133, 153 (1982); *Curran*, ___Mont. at ___, 682 P.2d at 166. Other waters are included in Class I waters because they are officially meandered in a federal government survey or are capable of meeting the federal navigability test. MONT. CODE ANN. § 23-2-301(2). Navigable waters are defined by MONT. CODE ANN. § 85-1-112 to include those waters meandered and returned as navigable in a federal survey, however, MONT. CODE ANN. § 23-2-301(2) contains no such "returned as navigable" provision for inclusion in Class I waters.

112. MONT. CODE ANN. § 23-2-302(2)(d), (e) & (f).

113. *Id.* § 23-2-301(3).

114. *Id.* § 23-2-302(3).

115. *Id.* § 23-2-302(5).

116. ___Mont.___, 731 P.2d 912 (1987).

provisions of the statute an unconstitutional taking.[117] The district court

117. Id. at ____, 731 P.2d at 913. Galt challenged the following sections:
MONT. CODE ANN. § 23-2-301. Definitions. For purposes of this part, the following definitions apply: . . .
(2) "Class I waters" means surface waters, other than lakes that:
(a) lie within the officially recorded federal government survey meander lines thereof;
(b) flow over lands that have been judicially determined to be owned by the state by reason of application of the federal navigability test for state streambed ownership;
(c) are or have been capable of supporting the following commercial activities: log floating, transportation of furs and skins, shipping, commercial guiding using multiperson watercraft, public transportation, or the transportation of merchandise, as these activities have been defined by published judicial opinion as of April 19, 1985; or
(d) are or have been capable of supporting commercial activity within the meaning of the federal navigability test for state streambed ownership.
(3) "Class II waters" means all surface waters that are not class I waters, except lakes. . . .
(12) "Surface water" means, for the purpose of determining the public's access for recreational use, a natural water body, its bed, and its banks up to the ordinary high-water mark.
MONT. CODE ANN. § 23-2-302. Recreational use permitted—limitations—exceptions.
(1) Except as provided in subsections (2) through (5), all surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters.
(2) The right of the public to make recreational use of surface waters does not include, without permission or contractual arrangement with the landowner:
(a) the operation of all-terrain vehicles or other motorized vehicles not primarily designed for operation upon the water;
(b) the recreational use of surface waters in a stock pond or other private impoundment fed by an intermittently flowing natural watercourse;
(c) the recreational use of waters while diverted away from a natural water body for beneficial use pursuant to Title 85, chapter 2, part 2 or 3, except for impoundments or diverted waters to which the owner has provided public access;
(d) big game hunting except by long bow or shotgun when specifically authorized by the commission;
(e) overnight camping within sight of any occupied dwelling or within 500 yards of any occupied dwelling, whichever is less;
(f) the placement or creation of any permanent duck blind, boat moorage, or any seasonal or other objects within sight of or within 500 yards of an occupied dwelling, whichever is less; or
(g) use of a streambed as a right-of-way for any purpose when water is not flowing therein.
(3) The right of the public to make recreational use of class II waters does not include, without the permission of the landowner:
(a) big game hunting;
(b) overnight camping;
(c) the placement or creation of any seasonal object; or
(d) other activities which are not primarily water-related pleasure activities as defined in 23-2-301(10). . . .
MONT. CODE ANN. § 23-2-311. Right to Portage—establishment of portage route.
(1) A member of the public making recreational use of surface waters may, above the ordinary high-water mark, portage around barriers in the least intrusive manner possible, avoiding damage to the landowner's land and violation of his rights. . . .
(3)(e) The cost of establishing the portage route around artificial barriers must be borne by the involved landowner, except for the construction of notification signs of such route, which is the responsibility of the department. The cost of establishing a portage route around artificial barriers not owned by the landowner on whose land the portage route will be placed

upheld the constitutionality of the provisions and awarded summary judgment for the state.[118] The Montana Supreme Court reversed and held some of the provisions unconstitutional,[119] and further expounded upon the public trust doctrine in Montana.

At issue in *Galt* were certain uses of the beds and banks of streams, namely, the public's right pursuant to the stream access statute to build permanent structures, camp overnight, hunt big game and portage around artificial barriers at the landowners' expense.[120] The Montana Supreme Court framed the issues as follows: (1) "[w]hether the public trust doctrine relating to water includes the use of adjoining land?"[121] and (2) whether the stream access statute permits "uses of the bed and banks and adjoining land beyond the scope of the public trust doctrine?"[122]

The court began by declaring that the "public trust doctrine is found at Article IX, Section 3(3), of the Montana Constitution . . . ."[123] This constitutional provision makes no distinction among waters; "*[a]ll* waters are owned by the State for the use of its people."[124] Reiterating the holding in *Curran*, the court reaffirmed that the recreational capability of waters determines their availability for public recreational use regardless of streambed ownership.[125] The court stated that even though the adjoining landowners hold fee title to the land, the public's right included use of the beds and banks up to the high-water mark.[126]

However, the court stated that the "public trust doctrine in Montana's

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must be borne by the department. . . .

118. *Galt*, ___Mont. at ___, 731 P.2d at 913.

119. *Id.* at ___, 731 P.2d at 913, 916. *See infra* note 133.

120. *Galt*, ___Mont. at ___, 731 P.2d at 915-16.

121. *Id.* at ___, 731 P.2d at 913.

122. *Id.*

123. *Id.* at ___, 731 P.2d at 914.

124. *Id.* at ___, 731 P.2d at 915 (emphasis in the original).

125. *Id.*

126. *Id.* MONT. CODE ANN. § 70-16-201 provides:

> Owner of land bounded by water. Except where the grant under which the land is held indicates a different intent, the owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.

Presumably, on streams deemed navigable under the federal test, the strip of land between the low and high-water marks is burdened by the public trust principles set out in *Illinois Central*. However, this statute granting ownership to adjoining landowners to the low-water mark was enacted in 1895. In 1895, the public trust, which attached to the state by virtue of *Illinois Central*, included only protection of navigation, commerce and fisheries. The 1895 statutory grant, therefore, was only burdened by these uses. As a result, the court in *Galt*, in effect, held that adding additional trust purposes in 1985, such as building permanent structures and permitting big game hunting, constituted an unconstitutional taking by placing restrictions upon the land grant not originally burdening the grant. As the court in *Galt* discussed, the public trust doctrine in the 1972 Constitution concerned both public ownership and use of water, but not the use of the lands underlying the waters. *Galt*, ___Mont. at ___, 731 P.2d at 915.

Constitution grants public ownership in water not in beds and banks of streams."[127] The use of the beds and banks up to the high-water mark "must be of minimal impact" and "only such use as is necessary to utilization of the water itself."[128] Therefore, overnight camping, big game hunting and the building of permanent objects are not necessary to the utilization of the water itself.[129]

Reaffirming "well established constitutional principles protecting property interests from confiscation," the court found that "minimal impact" by the public did not include the landowner paying for portage routes around artificial barriers.[130] The state must pay the expense since the benefit of the portage flows only to the public even though the landowner's fee interest is "impressed with a dominant estate in favor of the public."[131] The court reasoned that such a holding was necessary to resolve the competing interests of the public and the landowner, both of which are constitutionally protected.[132]

Accordingly, the court held unconstitutional those provisions which allowed uses not necessary to the public's utilization of water and which required the landowner to pay for portage routes.[133] The court's holding in *Galt* further defined and limited the application of the public trust doctrine in Montana. However, how other states have applied the doctrine in resolving water resource conflicts is helpful in analyzing the future of the public trust doctrine in Montana.

B. *Other States*

In *United Plainsmen Association v. North Dakota State Water Conservation Commission*,[134] the North Dakota Supreme Court held that the public trust doctrine limits water rights.[135] The plaintiffs in that case sought an injunction to prevent the state from issuing water permits for coal related energy production until comprehensive plans for conservation

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127. *Galt*, ___Mont. at ___, 731 P.2d at 915. In *Curran*, the court stated the public trust doctrine *and* the 1972 Constitution demanded the broad recreational use of Montana waters. *Curran*, ___Mont. at ___, 682 P.2d at 171. In *Hildreth* the court used language similar to that in *Curran*, but stated that the 1972 Constitution requires broad recreational uses because the constitutional provision does not limit the waters' use. *Hildreth*, ___Mont. at ___, 684 P.2d at 1091.

128. *Galt*, ___Mont. at ___, 731 P.2d at 915.

129. *Id.* at ___, 731 P.2d at 915-16.

130. *Id.* at ___, 731 P.2d at 916.

131. *Id.*

132. *Id.*

133. *Id.* Specifically, the court found MONT. CODE ANN. § 23-2-302(d), (e) and (f) and § 23-2-311(3)(e) unconstitutional. *See supra* note 117.

134. 247 N.W. 2d 457 (N.D. 1976).

135. *Id.* at 460.

and development had been completed.[136] The plaintiffs claimed a North Dakota statute and the public trust doctrine required the making of such plans before issuing water permits.[137] The court ruled that the North Dakota statute was not mandatory, but only an advisory policy statement.[138] However, the court stated the discretionary authority of the state to allocate water was circumscribed by the public trust doctrine.[139]

The court confined the public trust doctrine to traditional concepts and held that before water could be allocated the doctrine "requires, at a minimum, a determination of the potential effect of the allocation of water on the present water supply and future water needs" of the state.[140] The court indicated that the doctrine only applied to navigable waters.[141] The court stated that until the North Dakota legislature spoke more forcefully, all that was required under the public trust doctrine was evidence of some appropriation planning.[142] Whether the North Dakota Supreme Court was merely using the public trust doctrine to help resolve competing appropriations or using the doctrine as broad protection of the public's interest in water against the appropriation doctrine is unclear.[143]

The California Supreme Court made it shockingly clear that California would take the latter position.[144] In *National Audubon Society v. Superior Court of Alpine County*,[145] more commonly known as the *Mono Lake* decision, the California Supreme Court made the broadest declaration of public trust principles yet.[146] In that case, the prior appropriation and public trust doctrine clashed outright for the first time.[147]

In *Mono Lake*, the City of Los Angeles had acquired appropriated rights to four of the five tributary streams of Mono Lake.[148] Los Angeles' diversions from the nonnavigable tributaries had seriously degraded Mono Lake by 1979.[149] The lake's surface area had decreased by one-third,

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136. *Id.* at 459.

137. *Id.*

138. *Id.* at 460.

139. *Id.*

140. *Id.* at 462.

141. *Id.* at 461.

142. *Id.* at 463.

143. Dunning, *The Public Trust Doctrine and Western Water Law: Discord or Harmony?*, 30 ROCKY MTN. MIN. L. INST. 17-1,17-34 to -35 (1984).

144. *Id.* at 17-2.

145. 33 Cal. 3d. 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983), *cert. denied*, 464 U.S. 977 (1983).

146. *Forging*, *supra* note 2, at 8.

147. Note, *National Audubon Society v. Superior Court: The Expanding Public Trust Doctrine*, 14 ENVTL. L. 617, 618 (1984).

148. *National Audubon Soc'y*, 33 Cal. 3d. at 424, 658 P.2d at 711, 189 Cal. Rptr. at 348.

149. *Id.* at 424-31, 659 P.2d at 711-16, 189 Cal. Rptr. at 348-53.

causing aesthetic and serious ecological damage.[150] The National Audubon Society sued for injunctive relief on the theory the lake was protected by the public trust doctrine and Los Angeles' diversions violated the public's rights in Mono Lake's navigable waters.[151] The city claimed the appropriated rights were legally acquired and protected under the California water rights system, thus precluding an application of the public trust doctrine to those rights.[152]

The California Supreme Court purportedly integrated the prior appropriation and public trust doctrines rather than holding exclusively for one. However, the court stated the public trust doctrine expands to protect changing public needs, including scenic views and wildlife habitat preservation.[153] The court also stated the doctrine protects against harmful actions in nonnavigable tributaries that affect trust values in navigable waters.[154] The court noted the state as trustee has a continuing duty to reevaluate water uses in light of changing public needs and is not confined by past allocation decisions.[155] The state has the power under the doctrine to revoke previously granted water rights when those rights are harmful to the trust because all rights acquired in trust property are taken subject to the trust.[156] Therefore, the court suggested a revocation of rights would not be a taking for which compensation was required.[157]

The California Supreme Court determined that public trust rights inhere in all waters deemed navigable under the federal test and in all tributaries affecting navigable waters. The court ruled that to protect the public trust rights the state has a continuing duty to reconsider consumptive water rights granted subject to the public trust. In effect, no vested water rights can bar the state's reconsideration of those public rights.[158]

The *Mono Lake* decision ordered no particular allocation of water.[159] The court did require the state to weigh the public interest in protecting public trust values in Mono Lake against the public interest in continuing diversions for Los Angeles' water needs before allocating water resources.[160] The court claimed this result was necessary to integrate the competing appropriation and public trust doctrines.[161]

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150. *Id.*
151. *Id.* at 425-33, 659 P.2d at 712-18, 189 Cal. Rptr. at 348-55.
152. *Id.*
153. *Id.* at 434-35, 452, 658 P.2d at 719, 732, 189 Cal. Rptr. at 356, 369.
154. *Id.* at 435-37, 658 P.2d at 720, 189 Cal. Rptr. at 357.
155. *Id.* at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365.
156. *Id.* at 437, 658 P.2d at 721, 189 Cal. Rptr. at 358.
157. *Id.* at 440, 658 P.2d at 723, 189 Cal. Rptr. at 360.
158. *Id.* at 447-48, 658 P.2d at 729, 189 Cal. Rptr. at 365-66.
159. *Id.* at 452, 658 P.2d at 732, 189 Cal. Rptr. at 369.
160. *Id.*
161. *Id.*

The Idaho Supreme Court in *Kootenai Environmental Alliance v. Panhandle Yacht Club*[162] stated emphatically that it would follow the California approach.[163] In *Kootenai Environmental Alliance*, the Alliance challenged a yacht club lease to part of Lake Coeur d'Alene as a violation of the public trust doctrine. The Idaho Supreme Court found the lease did not violate the public trust. However, the court stated that the state may reconsider in the future the compatibility of the lease with the public trust since the lease remained subject to the trust.[164] Although *Kootenai Environmental Alliance* did not involve appropriated water rights, the Idaho Supreme Court declared in adopting the California rule that the "public trust doctrine takes precedent . . . over vested water rights . . . ."[165]

Colorado appears unlikely to follow the trend of expanding the scope and influence of the public trust doctrine on its water law.[166] The Colorado Supreme Court in *People v. Emmert*[167] upheld a criminal conviction of trespass for floating on a nonnavigable stream across a privately owned ranch. The court held that the Colorado constitutional provision declaring stream waters the property of the public simply establishes the right of appropriation.[168] The court stated that the provision did not extend a public right to use recreationally all waters of Colorado and further stated that the riparian landowner retained exclusive control of the waters bounded by the lands of nonnavigable streams.[169]

The Colorado Supreme Court recognized the various rationales used by other states to allow recreational use, but did not follow the trend separating bed title from public recreational use.[170] The court found the common law rule allowing landowner control of the waters of "more force and effect, especially given its long-standing recognition" in Colorado[171] through legislative enactments limiting public access.[172] Any change in the rule was a legislative, not a judicial, function.[173] In *Emmert*, the Colorado

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162. 105 Idaho 622, 671 P.2d 1085 (1983).

163. *Id.* at 631, 671 P.2d at 1094.

164. *Id.* at 631-33, 671 P.2d at 1095-96.

165. *Id.* at 631, 671 P.2d at 1094.

166. Dunning, *supra* note 143, at 17-38 to -39.

167. 198 Colo. 137, 597 P.2d 1025 (1979).

168. *Id.* at 142, 597 P.2d at 1028. COLO. CONST. art. XVI, § 5 reads: "The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided."

169. *Emmert*, 198 Colo. at 141-44, 597 P.2d at 1027-29.

170. *Id.* at 141, 597 P.2d at 1027.

171. *Id.*

172. *Id.* at 143-44, 597 P.2d at 1029-30.

173. *Id.* at 141, 597 P.2d at 1027 (citing Smith v. People, 120 Colo. 39, 51, 206 P.2d 826, 832 (1949)).

Supreme Court reaffirmed its adherence to traditional concepts of prior appropriation law in the face of a challenge by the public trust doctrine.

Montana's application of the public trust doctrine currently falls between the extremes of California's *Mono Lake* and Colorado's *Emmert*. In *Curran*, *Hildreth* and *Galt* the court held that under Montana's Constitution the public's right to use Montana's waters includes recreation on any stream capable of recreational use. Although both the Montana and Colorado Supreme Courts were faced with similar constitutional provisions, Montana separated the public's right of recreational use from ownership of the underlying beds and banks. Unlike the California Supreme Court in *Mono Lake*, however, the Montana Supreme Court in *Galt* grounded Montana's expression of public trust doctrine in the constitution and in *Curran* suggested the public's right to use a stream under the public trust doctrine is subject to the landowner's prior appropriated water right.

Montana has yet to consider a direct challenge to the prior appropriation doctrine by public trust principles. Such a challenge is considered in the analysis below.

IV. Analysis of a Confrontation Between the Public Trust Doctrine and the Prior Appropriation Doctrine in Montana Water Law

The 1972 Montana Constitution's expression of the public trust doctrine extended the public use of waters to any waters capable of recreational use. This extension expanded the protected uses to include recreation as well as navigation, commerce and fisheries. The constitution also extended this protection to waters other than waters deemed navigable under the federal test. The success of a public trust doctrine challenge to a prior appropriated water right depends upon the strength of the Montana Supreme Court's interpretation of the public trust doctrine in Montana.

The court in *Curran* stated that Curran had no right to control waters to the exclusion of the public except to the extent of his prior appropriations.[174] In *Hildreth*, the court stated the 1972 Constitution required the expansive definition of public uses in state owned waters.[175] The court reiterated in *Galt* that Montana's expression of the public trust doctrine is found in the 1972 Constitution.[176] If it were to take the most narrow view of the public trust doctrine, the court could hold that Montana waters are subject only to the traditional public trust principles. Therefore, the waters

174. *Curran*, ___Mont. at ___, 682 P.2d at 170.
175. *Hildreth*, ___Mont. at ___, 684 P.2d at 1091.
176. *Galt*, ___Mont. at ___, 731 P.2d at 914-15.

are protected against an appropriation only when they are needed for the public uses of commerce, navigation and fisheries on waters deemed navigable under the federal test. A valid water right could not be challenged on public trust doctrine principles unless the water right threatened the traditional uses on navigable waters. This narrow interpretation would dictate that a recreational use is subject to appropriated water right uses.

The court should not adopt this narrow interpretation without further analysis. The caveat on recreational use stated in *Curran* needs closer examination for several reasons. The essence of finding that property is held in trust, including a public trust, is that anyone who acquires interests in trust property does so subject to the trust.[177] Therefore, the court should look beyond the federal trust principles to determine whether Montana adopted its own principles before 1972 which either expanded the traditional uses or extended the public trust doctrine to nonnavigable waters. Both of these determinations must be answered in the negative before the court can absolutely state that recreational use is subject to prior appropriations before 1972.

The suggestion has also been made that the public trust doctrine is extra-constitutional, protecting publicly important waters despite constitutional and statutory provisions allowing their allocation.[178] One commentator suggests the public trust doctrine is needed to prevent serious environmental damage caused by the use of vested water rights in order to avoid federal intervention over state control of water resources.[179] Thus, the court should address all of the above considerations before subjecting recreational uses, allowed by Montana's expression of the public trust doctrine, to all prior appropriations. As argued below, the court should adopt the narrow interpretation despite these considerations for two reasons: (1) the strength of the prior appropriation doctrine in Montana water law, and (2) the lack of a pre-1972 expansion of the public trust doctrine.

A. *Pre-1972 Considerations*

As mentioned above, the Montana Supreme Court in *Gibson* in 1895 recognized that the public had certain rights of navigation and fishery upon navigable rivers.[180] However, the issue of public rights in *Gibson* was not central to the case and the court's analysis was couched in traditional

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177. State v. Pettibone, ___Mont.___, 702 P.2d 948, 956-57 (1985) (citing *National Audubon Soc'y*, 33 Cal. 3d at 440, 658 P.2d at 723, 189 Cal. Rptr. at 360).

178. *Forging*, *supra* note 2, at 10-12.

179. Dunning, *supra* note 143, at 17-44 to -45.

180. *Gibson*, 15 Mont. at 423, 39 P. at 519; *see supra* text accompanying notes 69-71.

public trust doctrine terms. Whether the court was considering general rights of recreation upon navigable waters is doubtful.

In *Herrin v. Sutherland*,[181] a 1925 Montana decision, the court held that the defendant fisherman trespassed when he waded up a nonnavigable stream flowing through private property.[182] The court stated that the public had no right to fish a nonnavigable body of water.[183] While the court in *Curran* held *Herrin* irrelevant,[184] arguably, *Herrin* stands for the proposition that until 1972 no public rights were protected or allowed by the public trust doctrine upon nonnavigable waters.

In 1933, the Montana legislature enacted the "angling" statute which authorized the public use of navigable waterways for recreational fishing.[185] Montana has not determined whether this statute is merely a codification of the public rights allowed under the *Illinois Central* term "fishery." At least one state, Idaho, interpreted its similar statute to include not only fisheries, but all recreational uses.[186] Likewise, Montana in its 1933 angling statute may have extended the permitted public uses on navigable waters to include recreational uses not traditionally contemplated under the term "fishery." The statute states that "any rights of title to [navigable] streams or the land between the high water flow lines . . . shall be *subject* to the right" of any licensed Montana angler to fish.[187] If the angling statute includes broad recreational rights, then the language of the statute may work to burden prior appropriated water rights. Therefore, the public trust doctrine would protect broad recreational uses if an appropriated water right, acquired on a navigable stream after 1933, would interfere with the recreational uses.[188] However, because the statute limits its application to holders of fishing licenses, the statute is probably

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181. 74 Mont. 587, 241 P. 328 (1925).

182. *Id.* at 596, 241 P. at 331.

183. *Id.*

184. *Curran*, ___Mont. at ___, 682 P.2d at 170-71. *See also supra* note 91.

185. MONT. CODE ANN. § 87-2-305 (1987) provides:

> Navigable rivers, sloughs, or streams between the lines of ordinary high water thereof the state of Montana and all rivers, sloughs, and streams flowing through any public lands of the state shall hereafter be public waters for the purpose of angling, and any rights of title to such streams or the land between the high water flow lines or within the meander lines of navigable streams shall be subject to the right of any person owning an angler's license of this state who desires to angle therein or along their banks to go upon the same for such purpose.

186. Southern Idaho Fish and Game Ass'n v. Picabo Livestock, Inc., 96 Idaho 360, 362-63, 528 P.2d 1295, 1297 (1974).

187. MONT. CODE ANN. § 87-2-305 (emphasis added); *see Galt*, ___Mont. at ___, 731 P.2d at 922 (Sheehy, J., dissenting).

188. However, the majority in *Galt* restricted recreational uses allowed on navigable rivers. *Galt*, ___Mont. at ___, 731 P.2d at 915-16. *See supra* text accompanying notes 116-33. This suggests that the angling statute was not intended to protect broad recreational uses from interference with the use of appropriated water rights.

only a codification of the right to fish upon navigable waters and not a creation of broad recreational use rights which take precedent over prior appropriations.

In 1966 the Montana Supreme Court suggested that in *Paradise Rainbows*, that public rights for fishing may be recognized given the proper circumstances.[189] As discussed previously, the Commission in *Paradise Rainbows* unsuccessfully claimed an appropriated water right for public fishing despite an appropriator's entire diversion of the stream.[190] The court, in upholding the appropriator's water right, stated that "[i]ndividuals who have put water to a beneficial use should not have their rights arbitrarily diluted, under claim of sovereign rights or otherwise."[191] Apparently, the court in *Paradise Rainbows* did not establish or address any sort of public trust protection for fishing or recreation on waters navigable or nonnavigable.[192]

The above cases and angling statute do not acknowledge that an appropriator's water right is burdened by any public uses other than navigation, commerce and fishery.[193] Water rights appropriated before 1972, then, were only burdened by the public trust protections attaching under *Illinois Central* to navigable waters. Nonnavigable waters were not trust property before 1972. A recreational user could not claim that the public trust doctrine prior to 1972 specifically protected the waters, and therefore could not exercise a public recreational use right over an appropriated right.

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189. 148 Mont. at 419-20, 421 P.2d at 721. *See supra* notes 31-35 and accompanying text.

190. *Paradise Rainbows*, 148 Mont. at 418-20, 421 P.2d at 720-21.

191. *Id.* at 420, 421 P.2d at 721.

192. The creek involved in *Paradise Rainbows* appeared nonnavigable. 148 Mont. at 415-16, 420, 421 P.2d at 718-19, 721. To read *Paradise Rainbows* as an extension of public rights of fishing in nonnavigable waters under the public trust doctrine would contradict the 1925 *Herrin* decision. *See supra* text accompanying notes 181-84. And at least before the 1972 Constitution and *Curran*, which held *Herrin* irrelevant, the precedent established by *Herrin* could not be ignored. *See supra* note 91.

193. While the angling statute may arguably extend public trust protection to recreational uses on navigable rivers, an express declaration of the doctrine's extension to nonnavigable waters appears needed before sufficiently burdening a water right on a nonnavigable waterway. Such a declaration is needed because in California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935), the United States Supreme Court held that "following the [Desert Land Act] of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states . . . with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain." *Id.* at 163-64. The Court further held that the Act "simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation." *Id.* at 164. The only express Montana law applicable to nonnavigable waters are the laws and cases allowing the appropriation of nonnavigable waters and *Herrin*, in which the court suggested that no public recreational right existed on nonnavigable streams.

A recreational user[194] would have to rely on a rationale similar to that used by the California Supreme Court in *Mono Lake* to challenge an appropriated right[195] acquired before 1972. More specifically, a recreational user would claim that "the public trust imposes a duty of continuing [state] supervision over the taking and use of the appropriated water . . . [in the state's exercise of] . . . its sovereign power to allocate water resources in the public interest . . . ."[196] Key to the recreational user's claim would be the assertion that the duty of continuing supervision allows the state to reconsider and change past allocation decisions "which may be incorrect in light of current knowledge or inconsistent with current needs."[197] The recreational user must argue that in light of current needs the public interest demands water be kept in the stream instead of withdrawn by an appropriator to fulfill a water right that was acquired before 1972.

The Montana Supreme Court should reject the above claim for three related reasons. First, the California rule applying a duty of continuing supervision to grants of trust property was developed under that state's judicial decisions.[198] While a state has the power to extend public trust protection beyond the mandates of *Illinois Central*, this is a matter of state law.[199] As noted above, Montana, at least before 1972, apparently did not extend a public trust duty of continuing supervision over waters other than navigable waters for the purpose of navigation, commerce and fishery.

Second, even if the public trust language applies retroactively to virtually all waters and includes considerations for recreational use, both the 1889 and 1972 Constitutions declare an appropriated, beneficial use to be a public use.[200] Some courts have determined that legislative acts

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194. While this comment focuses on the recreational user, any other person seeking public trust protection of a use other than navigation, commerce or fishery against a pre-1972 appropriation may also be able to apply the rationale used by the California Supreme Court in the *Mono Lake* decision.

195. The use of the term appropriated right assumes that the right is a legally acquired and used water right with a beneficial purpose.

196. *National Audubon Soc'y*, 33 Cal. 3d at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365.

197. *Id.*

198. *Id.* at 433-41, 658 P.2d at 718-24, 189 Cal. Rptr. at 355-61.

199. *Id. See supra* text accompanying notes 62-67. The proposition that state law controls what rights inhere in waters beyond the protection of navigation, commerce and fishery on navigable waters is also supported by Oregon *ex rel.* State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977). The Court in *Corvallis* addressed the ownership of land which became the bed of a navigable river after Oregon's admission to the United States. The Court stated that state law governs dispositions of land under navigable waters subject only to the rights of navigation on the waters. *Id.* at 372-78. While this case addressed ownership of land under navigable waters, the proposition can easily be extended to navigable waters in other cases. *See supra* note 48 and accompanying text.

200. *See supra* notes 19-23 and accompanying text. MONT. CONST. art. IX, § 3(2) further provides: "The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use."

declaring a use of public trust property to be a public use are subject to judicial review.[201] However, the Montana Supreme Court has stated that the constitutional provisions declaring appropriated uses to be public uses have "the effect of foreclosing all inquiry into the question whether or not the enumerated uses are public, both by the Legislature and the judiciary."[202]

Further, the rationale used in *Mono Lake* would require the Montana Supreme Court to weigh the interests between a recreational in-stream use and an appropriated use. The court would then have to decide, based on the current public interest, the allocation of water between these two public uses. While other courts have taken such a balancing approach,[203] the Montana Supreme Court is not in a position to decide which public use is more appropriate. Since the 1972 Montana Constitution recognized and confirmed all existing appropriated water rights,[204] the court would be hard pressed to hold under a public trust doctrine theory that the water needed for a recreational use of public trust property was more in the public interest than the water needed for the constitutionally protected appropriated use. In other words, the public through the 1972 Constitution impliedly declared that an appropriated water right is in the public interest and a valid use of trust property.[205]

Third, the California Supreme Court stated that under its development of the public trust doctrine, the doctrine takes precedent over vested water rights.[206] The court also suggested that because the public trust doctrine imposes the duty of continuing supervision, a reallocation of water

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201. *See, e.g.*, Opinions of the Justices, 383 Mass. 895, 424 N.E. 2d 1092 (1981); People *ex rel.* City of Salem v. McMackin, 53 Ill. 2d 347, 291 N.E. 2d 807 (1972); Priewe v. Wisconsin State Land & Improvement Co., 93 Wis. 534, 67 N.W. 918 (1896), *aff'g on rehearing*, 103 Wis. 537, 79 N.W. 780 (1899).

202. General Agriculture Corp. v. Moore, 166 Mont. 510, 514-15, 534 P.2d 859, 862 (1975) (citing State v. Aitchison, 96 Mont. 335, 341, 30 P.2d 805, 808 (1934)).

203. *See, e.g., National Audubon Soc'y*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983), *cert. denied*, 464 U.S. 977 (1983) (weighing appropriations of trust property against environmental concerns); City of Berkeley v. Superior Court of Alameda, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 449 U.S. 840 (1980) (filling of public trust property versus returning it to its original state); Morse v. Oregon Div. of State Lands, 285 Or. 197, 590 P.2d 709 (1979) (filling of trust property for airport runway versus recreational use of the property); and Trempealeau Drainage Dist.: Merwin v. Houghton, 146 Wis. 398, 131 N.W. 838 (1911) (weighing the alteration of trust property against recreational use).

204. MONT. CONST. art. IX, § 3(1).

205. The California Supreme Court rejected an argument by the California Attorney General that all public uses of water are "trust uses." Consequently, an appropriation of water by a private person is not considered a public use under the public trust doctrine. The court assumed "trust uses" were only those relating to activities in the vicinity of the waters in issue. *National Audubon Soc'y*, 33 Cal. 3d at 440, 658 P.2d at 723, 189 Cal. Rptr. at 360. However, this assumption was based on California state law on the public trust doctrine.

206. *Id.* at 447, 658 P.2d at 729, 189 Cal. Rptr. at 365.

from an appropriated use to meet current public interests would not be a taking of property for which compensation was required.[207]

In Montana, however, a legally acquired and used appropriated water right is a valuable property right constitutionally protected.[208] The Montana Supreme Court stated in *State v. Pettibone*[209] that the 1972 Montana constitutional provision recognizing and confirming existing water rights "prevents the State from affecting rights vested at the time the Constitution was adopted other than through the exercise of Constitutionally provided powers such as eminent domain . . . or the general police power, and without affording due process of law . . . ."[210] Therefore, the court could not now declare that the public trust language found in the 1972 Constitution addressing the public's use of state waters gives the state

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207. *Id.* at 440, 658 P.2d at 723, 189 Cal. Rptr. at 360. At least one commentator suggested the *Mono Lake* decision constituted a taking without just compensation under the Fifth Amendment of the United States Constitution because the uses and waters protected, and the duties which the court in *Mono Lake* stated were required by the public trust doctrine, were not enunciated as law until after the water rights at issue were appropriated. Therefore, retroactive application to property rights which were not previously burdened by such public trust considerations requires compensation under the Fifth Amendment because holding a water right subject to the public trust, which includes the ability of the state to revoke that right based on current public needs, renders that water right valueless. Comment, *The Fifth Amendment as a Limitation on the Public Trust Doctrine in Water Law*, 15 PAC. L.J. 1291 (1984). Note that this discussion addresses a taking of the water right itself. The California Supreme Court recognized that a water right owner has a vested right to any improvements erected. *National Audubon Soc'y*, 33 Cal. 3d at 440, 658 P.2d at 723, 189 Cal. Rptr. at 360. Also, the United States Supreme Court in *Illinois Central* stated that a state must pay for any improvements a grantee makes in reliance upon a grant of trust property. 146 U.S. at 455.

208. *See General Agriculture Corp.*, 166 Mont. at 516-18, 534 P.2d at 863-64 (stating that the priority as well as the amount of an appropriated right is a valuable property right). *See also* WATERS AND WATER RIGHTS, *supra* note 1, at 83 which reads:

> [I]t is appropriate to note that each valid right to the use of water is a real property right, under the protective aegis of federal and state constitutional guarantees which prohibit the deprivation of private property without due process of law.
>
> Whatever may be the effect of water doctrinal restraints on free transfers of water rights in a given area, this fact stands out clearly: the Fifth Amendment was added to the United States Constitution at the beginning of our national history, and the Fourteenth Amendment was added in 1868; therefore, every subsequent statute, court decision, or acquired right of appropriation carried with it this fundamental constitutional inhibition regarding due process—an inhibition which applies to rights in land and other property as well as in water.

U.S. CONST. amend. V provides: "No person shall be. . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The just compensation requirement is made applicable to the states through the Fourteenth Amendment of the United States Constitution. Chicago, Burlington and Quincy RR Co. v. Chicago, 166 U.S. 226, 235-41 (1897).

209. ___Mont.___, 702 P.2d 948 (1985).

210. *Id.* at ___, 702 P.2d at 957. MONT. CONST. art. II, § 17 provides: "Due process of law. No person shall be deprived of life, liberty, or property without due process of law." The constitution also provides: "Eminent domain. Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into the court for the owner. . . ." *Id.* § 29.

or the court the power to protect the waters needed for recreational use to the detriment of a vested appropriated water right without constituting a taking and requiring just compensation.

To hold that the 1972 Constitution's public trust language retroactively applies to burden vested appropriated water rights with a state duty of continuing supervision in light of current public needs would render the above language requiring due process useless and essentially make appropriated water rights valueless. Such an interpretation would also open up the argument that the 1972 Montana Constitution itself violates the Fifth and Fourteenth Amendments of the United States Constitution by allowing the state to reallocate without compensation an appropriated water right which was obtained without notice of expanded public trust principles.[211] Whether the framers of the 1972 Montana Constitution

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211. *See* Comment, *supra* note 207. Although beyond the scope of this comment, an argument could be made that the 1972 Montana Constitution and the interpretation given it by the Montana Supreme Court and legislature violate Fifth Amendment standards of the United States Constitution. In *Curran*, the Montana Supreme Court rejected an inverse condemnation claim because under the 1972 Constitution "the question of title to the bed is irrelevant to determination of navigability for use, and Curran has no claim to the waters." *Curran*, ___Mont. at ___, 682 P.2d at 171. The court also found the Dearborn River to be navigable under the federal test. *Id.* at ___, 682 P.2d at 166. However, in *Hildreth* the court found the federal navigability test inapplicable and declined to decide whether the Beaverhead River was navigable for title purposes. *Hildreth*, ___Mont. at ___, 684 P.2d at 1092. In *Hildreth*, the court also rejected an inverse condemnation claim. *Id.* at ___, 684 P.2d at 1093. In *Galt*, the court balanced the right to use streams, as established under the 1972 Constitution, with the impact upon the beds and banks as constitutionally protected property. *Galt*, ___Mont. at ___, 731 P.2d at 914-16. *See also supra* notes 116-32 and accompanying text. However, *Galt* may not go far enough given the status of nonnavigable streams in Montana before the 1972 Constitution. *See supra* notes 180-93 and accompanying text.

Although the court could base its *Curran* decision in part on the fact that the Dearborn River was indeed navigable under the federal test, thus giving Curran no right to control the stream, the court in *Hildreth* indicated this was irrelevant. Navigability under the federal test may not be irrelevant when considering whether the increased right to use nonnavigable streams under the 1972 Constitution violates the Fifth Amendment. The Fifth Amendment may be violated if two difficulties in finding a taking are overcome. First, property owners abutting a nonnavigable stream would have to show that their pre-1972 control over the use of nonnavigable streams was somehow a constitutionally protected property right. In this regard, the United States Supreme Court in Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987), stated the following in striking as unconstitutional the Coastal Commission's grant of a building permit upon the condition a public easement to the beach be provided by the landowner:

> We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " . . . [W]e observed that where governmental action results in "[a] permanent physical occupation" of the property, by the government itself or by others, . . . "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." . . . We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

intended the language allowing public use of state waters to have this effect is doubtful when given the framers' intent to carry over the public policy developed under the 1889 Constitution and their intent to protect water rights acquired under that document.[212]

In a recent Ninth Circuit decision, *Robinson v. Ariyoshi*,[213] the Hawaii Supreme Court had overruled over a century of appropriation water law and declared the common law doctrine of riparian ownership the law of Hawaii.[214] Landowners challenged this decision as a threat to their irrigation water rights.[215] The state asserted that the court's decision declared that the water rights acquired before the decision had not vested.[216] The Court of Appeals for the Ninth Circuit held that while a state has the sovereign power to change its water law and create new definitions of property rights, the "[n]ew law . . . cannot divest rights that were vested before the court announced the new law."[217] Thus, the state could not divest the plaintiffs of their water rights without just compensation and the state had to bring condemnation proceedings before interfering with water rights vested before the change in the law.[218]

In Montana, a recreational user would have to claim the public trust doctrine protection existed at the time a water right was acquired, thus preventing the right from vesting. As shown above, there is little indication in Montana law that Montana, as a matter of its own state law, ever

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Id. at 3145 (citations omitted). Arguably, in Montana the right to exclude others from even "minimally impacting" the beds and banks of a nonnavigable stream before 1972 may be a property right.

The second difficulty that must be overcome so as to find a taking would be a showing that the interference with the property right rises to the level of a "taking" and that just compensation has been denied. *See id.* at 3156-62 (Brennan, J., dissenting); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 2386-89 (1987). For a detailed discussion of the issues involved in a "taking" argument such as the one above, see Laitos & Westfall, *Government Interference with Private Interests in Public Resources*, 11 HARV. ENVTL. L. REV. 1 (1987).

212. *See supra* notes 19-26 and accompanying text.

213. 753 F.2d 1468 (9th Cir. 1985), *vacated and remanded*, 106 S. Ct. 3269 (1986).

214. 753 F.2d at 1474.

215. *Id.* at 1469.

216. *Id.* at 1473.

217. *Id.* at 1474.

218. *Id.* at 1474-75. The United States Supreme Court vacated and remanded Robinson v. Ariyoshi, 106 S. Ct. 3269 (1986), to be decided in light of Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). In *Williamson*, the Court held that a Fifth Amendment taking claim was premature if the property owner had not obtained a final administrative decision regarding the effect of a government regulation on the property or utilized available state procedures for obtaining just compensation. *Id.* at 185-97. In *Robinson*, the defendant state officials had not yet tried to apply the Hawaii Supreme Court's change of water law to the plaintiffs. *Robinson*, 753 F.2d at 1471. Therefore, one can reasonably conclude that the Ninth Circuit Court of Appeals' discussion in *Robinson* of the taking issue is still applicable if a state took action based upon new law to interfere with a water right legally acquired before the new law was announced. For the proposition that *Williamson* merely concerned a ripeness question see *First English*, 107 S. Ct. at 2384 n.6, 2389 n.10.

extended the public trust doctrine beyond the protection of navigable waters for commerce, navigation and fishery. Therefore, a change in Montana water law would result if Montana either by its 1972 constitutional public trust language or by a judicially created public trust theory claimed that the public trust doctrine allows a reallocation of appropriated water rights without it being a taking and requiring just compensation.[219] Consequently, if the state, based on the public trust doctrine, ordered an actual interference with a water right acquired before the change in law, then the state would be required to pay just compensation under the rationale of *Robinson* as a way of balancing the competing interests of the public trust doctrine and the owner of an appropriated water right.[220]

B. *Post-1972 Considerations*

The next issue to consider is whether the public trust language found in the 1972 Constitution would allow the court to subject appropriated water rights, acquired under the 1972 Constitution, to recreational uses. The express language of the 1972 Constitution indicates just the opposite by stating that all waters of the state "are the property of the state for the use of its people and subject to appropriation for beneficial uses as provided by law."[221] This language, combined with the intent to carry over the water policy of the 1889 Constitution, suggests that the use of a waterway by recreational users are subject to water rights acquired under the 1972 Constitution. Therefore, a recreational user would have to resort to the rationale applied in *Mono Lake* to make a public trust doctrine challenge upon a post-1972 water right. As shown above, this analysis is not supported by the current Montana Constitution or case law and, in essence, would require the court to create a new legal theory in Montana which would raise the taking issue outlined above.[222]

The 1972 Constitution does require, however, the legislature to protect the environment and provide adequate remedies to prevent damage to natural resources.[223] Regarding water, the Montana legislature in the

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219. Except, of course, if the purpose of the reallocation was to protect commerce, navigation or fisheries on waters deemed navigable under the federal test.

220. The Montana Supreme Court's decision in *Galt* supports this proposition. Even though the decision in *Galt* addressed landowners' interests in the beds and banks of streams, the court "reaffirm[ed] well established constitutional principles protecting property interests from confiscation." *Galt*, ___Mont. at ___, 731 P.2d at 916. The court stated that "[t]he real property interests of private landowners are important as are the public's property interest[s] in water. Both are constitutionally protected." *Id.*

221. MONT. CONST. art. IX, § 3(3).

222. *See supra* notes 208-20 and accompanying text.

223. MONT. CONST. art. IX, § 1 (1972) provides:

Protection and improvement.

(1) The state and each person shall maintain and improve a clean and healthful

1973 Water Use Act[224] provided several provisions protecting the public's interest in the development and allocation of the state's water resources.

For example, the Water Use Act for the first time defines "beneficial use"— required for a valid appropriation—to include specific uses for fish, wildlife and recreation.[225] Applications for certain larger in-state appropriations and out-of-state appropriations must meet environmental and public interest criteria by "clear and convincing" evidence before a permit will be issued.[226] Before changing the purpose or place of use of larger appropriations, environmental and public interest criteria must be met by substantial credible evidence.[227] Similarly, larger lease applications under the state water leasing program require an environmental impact statement and must meet similar criteria as the larger appropriation applications.[228] Also, Montana allows both state and federal political subdivisions and agencies to reserve waters for the protection of in-stream flows.[229]

These provisions of the Water Use Act allow the state substantial control in the planning and allocation of appropriations. As mentioned above, the North Dakota Supreme Court in *United Plainsmen* held that the public trust doctrine required some minimum appropriation planning until the legislature spoke more forcefully.[230] The Montana Supreme Court has no need to turn to the public trust doctrine to accomplish this planning because the Montana legislature has already addressed the issue by statute.

V. CONCLUSION

The demands placed upon Montana's scarce water resources, particularly in dry years, will undoubtedly force the Montana Supreme Court to

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environment in Montana for present and future generations.

(2) The legislature shall provide for the administration and enforcement of this duty.

(3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

224. MONT. CODE ANN. §§ 85-2-101 to -807.

225. *Id.* § 85-2-102(2)(a).

226. *Id.* § 85-2-311(2) & (3). For example, appropriation applications for over 4,000 acre-feet per year or over 5.5 cubic feet per second must meet the environmental and public interest criteria by clear and convincing evidence. *Id.* § 85-2-311(2).

227. *Id.* § 85-2-402(2).

228. *Id.* § 85-2-141(6) & (7). Note that MONT. CODE ANN. § 85-2-402(4) requires that a change in purpose or place of use of these larger lease diversions must meet the environmental and public interest criteria by clear and convincing evidence and must also pass legislative approval.

229. *Id.* § 85-2-316. Note however that the date of a water reservation is determined by the date the reservation is adopted and does not affect prior existing rights. *Id.* § 85-2-316(8). For a discussion of the importance of such reservations, see Peterman, *The Clark Fork Legacy*, MONTANA OUTDOORS, March/April 1985, at 27.

230. *See supra* text accompanying notes 134-43.

consider a direct public trust challenge upon the appropriation doctrine. While it has been suggested the prior appropriation doctrine is outmoded,[231] the doctrine is firmly entrenched in Montana's Constitution and statutes. Therefore, the court must carefully analyze any direct public trust doctrine challenge upon the prior appropriation doctrine.

The court should distinguish between those public trust principles which attach to the states under the *Illinois Central* rationale as a matter of federal law and the public trust principles which may attach to water rights as developed under state law.[232] The court should also distinguish between public trust protection of public uses of water and protection of the water needed for the public use.

Prior to 1972, the only public trust principles which attached to a water right validly appropriated were those enunciated in *Illinois Central* and which protected the water necessary to accomplish navigation, commerce and fishery on waters deemed navigable under the federal test.[233] In *Galt*, the Montana Supreme Court held that Montana's expression of the public trust doctrine was found in the 1972 Constitution.[234] The constitutional provision by its express language only protects the public's use of waters on waters capable of recreational use. The court correctly stated in *Curran* that the public's use of the water was subject to the prior appropriation of water for irrigation.[235] Under Montana's current expression of the public trust doctrine no ground exists for the court to effect a reallocation of a vested water right in favor of a broad recreational use without requiring just compensation.

Adoption of the *Mono Lake* rationale in Montana would violate federal and state constitutional provisions if it actually reallocated,

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231. Wilkinson, *supra* note 7, at 344.

232. *See supra* text accompanying notes 62-67. Courts and commentators in general have not clearly made this distinction. A state may define navigability in an expansive way or eliminate any navigability requirement to expand the uses protected or the waters protected. However, just because a state expands its definition of navigability or eliminates the requirement does not mean that the federal principles of the public trust doctrine (which protect an *amount* of water needed for commerce, navigation, and fishery on waters navigable under the federal test) *necessarily* attach to the expanded uses or waters. This jump in logic is made by a particular state under its legal processes. Therefore, in a state such as Montana where no expanded definitions of the public trust existed before the 1972 Constitution, the concept of navigability as defined under the federal test is still important to determine for which uses and on which waters an actual reallocation can be accomplished without a taking of a vested water right requiring compensation.

233. Thus, for these principles the question of title to a streambed is still relevant to determine which uses and which waters needed for those uses were protected under the public trust doctrine before 1972. In *Curran* the court referred to the question of title as irrelevant to navigability for use. *Curran*, ___Mont. at ___, 682 P.2d at 170. That the 1972 Constitution demands this result for use and not necessarily for protection of an amount of water should be kept clear.

234. *Galt*, ___Mont. at ___, 731 P.2d at 914.

235. *Curran*, ___Mont. at ___, 682 P.2d at 170.

without compensation, an amount of water from a vested water right in favor of a broad recreational use. The court "should not resort to creating or finding legal theories when a result can be reached from express constitutional language."[236] As shown in the above analysis, the law as it now exists under constitutional principles dictates the outcome of a recreational user's public trust challenge to an appropriated water right.

The Montana Supreme Court in *Galt* correctly grounded the public trust doctrine in constitutional terms. To say the public trust doctrine is extra-constitutional or to say the public trust doctrine necessitates, without compensation, a change in property rights according to current public interest is not enough. "The supremacy of constitutional mandates is too well established" to ignore.[237]

The conflict between the interests desired to be protected under the public trust doctrine and those protected by the prior appropriation doctrine can be reduced to the question of who pays for changing public interests. The legislature through the 1973 Water Use Act provided for ways within the prior appropriation doctrine to protect changing public interests in the future allocations of water and in changes of present allocations of water.[238] The state should also consider new legislation to fund protection of environmental and public interests from the damage or conflict vested appropriated uses may pose.[239] Such legislation would work a practical balance within the appropriation doctrine between protected property rights and desired public goals.

The people of the state of Montana reaffirmed their adherence to the appropriation doctrine in the 1972 Constitution and the values that doctrine protects in allowing the valid appropriations of water for public uses such as irrigation.[240] The 1972 Constitution also placed upon the legislature a broad duty to protect and preserve the environment and

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236. *Galt*, ___Mont. at ___, 731 P.2d at 916 (Turnage, C. J., concurring).

237. *General Agricultural Corp.*, 166 Mont. at 515-16, 534 P.2d at 862-63. The court further stated:

> A written constitution is not only the direct and basic expression of the sovereign will, it is also the absolute rule of action and decision for all departments and offices of government with respect to all matters covered by it, and must control as it is written until it is changed by the authority which established it. No function of government can be discharged in disregard of or in opposition to the fundamental law. The state constitution is the mandate of a sovereign people to its servants and representatives. No one of them has a right to ignore or disregard its mandates, and the legislature, the executive officers, and the judiciary cannot lawfully act beyond its limitations.

Id. at 517-18, 534 P.2d at 862-63 (quoting 16 AM. JUR. 2D *Constitutional Law* § 56).

238. *See supra* notes 224-27 and accompanying text.

239. For example, the state should consider specific legislation giving authority to create a pool of funds which could be used by the state to lease rights from an appropriator on a "stand-by" basis in times of critical need to protect stream flows and prevent environmental degradation.

240. MONT. CONST. art. IX, § 3 (1972).

natural resources in the public interest.[241] These provisions require a balance of societal and cultural values reflecting a range of public interests from agricultural to environmental protection. Determining the exact balance and what is in the public interest is a decision best left to the legislature unless the court has clear principles to apply.

241. *Id.* art. IX, § 1.