Denver Law Review

Volume 63
Issue 3 *Natural Resources Law Symposium*

Article 6

February 2021

The Public Trust Doctrine as a Source of State Reserved Water Rights

Peter A. Fahmy

THE PUBLIC TRUST DOCTRINE AS A SOURCE OF STATE RESERVED WATER RIGHTS*

INTRODUCTION

When Justice Holmes remarked that "[a] river is more than an amenity, it is a treasure,"[1] he captured the essence of society's relationship with water. Although water is especially important in the arid and semiarid lands of the West,[2] water has a special importance wherever it may be found. Whether found in the Great Ponds of Massachusetts or the prairie potholes of the northern Great Plains, along the lakefront of Chicago or amidst the tufa towers of Mono Lake, water is as vital as the air we breathe, as influential in the development of our national character as the land, and as evanescent as *ferae naturae*.[3] Having such singular and valuable characteristics, water has always been coveted by mankind and much sought after by men who wished to "own" it, especially when

---

* This note is exclusively concerned with the application of the public trust doctrine to inland waters in states lying on or west of the hundredth meridian. In large measure, the central theme of this note was inspired by Professor Harrison Dunning's thought-provoking article on the public trust doctrine and the central case in the Mono Lake litigation, National Audubon Soc'y v. Superior Court of Alpine County, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, *cert. denied*, 464 U.S. 977 (1983) [hereinafter cited as *Mono Lake*], in which he noted that the "[u]se of the public trust doctrine to limit water rights in a situation such as that at Mono Lake is strikingly similar to use of the Winters Doctrine to limit state-recognized water rights." Dunning, *The Public Trust Doctrine and Western Water Law: Discord or Harmony?*, 30 ROCKY MTN. MIN. L. INST. 17-1, 17-44 (1984). The author would like to thank Barrett W. McInerney, counsel for California Trout, for his invaluable assistance and Professors John A. Carver, Jr. and Edward J. Roche, Jr. of the University of Denver College of Law for their unrelenting critiques of the ideas advanced in this note. My thanks also to Professor John Rohr of the Center for Public Administration and Policy at Virginia Polytechnic Institute and State University for pointing out the objection discussed in and disposed of in footnote 80. Otherwise, the thoughts expressed herein as well as any errors, omissions, and inconsistencies are, of course, solely the responsibility of the author.

During the final stages of preparing this note, the author learned through Professor Dunning that the Superior Court of Mono County had issued a preliminary injunction in response to a request by the California-based fishermen's organization (California Trout) to maintain a minimum instream flow of nineteen cubic feet per second (cfs) in Rush Creek, a non-navigable tributary of Mono Lake. Telephone conversation with Professor Harrison Dunning (April 23, 1986). The preliminary injunction, effective since March 7, 1985, operates against the Grant Lake Dam, which is operated by the Department of Water and Power of the City of Los Angeles. Telephone conversation with Barrett W. McInerney, counsel for California Trout (May 5, 1986). This judicial order represents, to the best of my knowledge, the first instance of a judicially-created quantified public trust water right in a non-navigable stream.

1. New Jersey v. New York, 283 U.S. 336, 342 (1931).

2. "There is no more essential commodity in the western United States than water." WESTERN GOVERNORS' ASSOCIATION, NEW CHALLENGE, NEW DIRECTION: THE WATER POLICY REPORT OF THE WESTERN GOVERNORS' ASSOCIATION 5 (on file with the author). One state supreme court has noted, with reference to the waters of its state, that they "are the very life blood of its existence." Chow v. City of Santa Barbara, 217 Cal. 673, 702, 22 P.2d 5, 16 (1933).

3. *See* 1A J. GRIMES, THOMPSON ON REAL PROPERTY 318 (repl. ed. 1980); *see also* 1 S. WIEL, WATER RIGHTS IN THE WESTERN STATES 3 (3d ed. 1911).

it occurs in those areas that are "water-poor." "Ownership" of water has been a problematic concept for human societies precisely because of its unique characteristics.[4] Societal concerns about the ownership of water are manifestations of society's concerns over the right to use water resources, for ownership in its fullest sense obviously includes the right to control the use of that which is owned.[5] Throughout the history of Western civilization, the water law of every society has reflected the balance struck between proponents of public interests and rights in water and proponents of private interests and rights in water.[6]

This note will review the role that the public trust doctrine has had in the balances struck and restruck by societies between private ownership interests in water resources and public ownership interests in water resources. Following a brief historical review,[7] it will be suggested that the public trust doctrine can serve as the basis for a new species of water rights—state reserved rights, which would for the most part be analogous to federal reserved rights[8] in their scope and effect. This proposition will be buttressed by discussions about the doctrine of pre-existing title and state constitutional and statutory provisions on state or public ownership of state water resources. Finally, this note will argue that just compensation is not a constitutionally-required prerequisite to the infringement of existing water rights, except in those instances where the

4. "The water of a stream, lake, or pond cannot be dealt with as real property on account of its mobile and evanescent nature . . . ." 1A J. GRIMES, *supra* note 3, at 320.

5. *See* 1 J. GRIMES, THOMPSON ON REAL PROPERTY 3 (repl. ed. 1980).

6. *See* MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U.L. REV. 511, 515-87 (1975); Note, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 YALE L.J. 762, 772-73 (1970).

7. Because of its ancient origins, obscure development, and tremendous potential impact of private ownership interests in water, the public trust doctrine has been the subject of over 100 scholarly commentaries with the vast majority having appeared in the past decade. *See* Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 643-44 n.75 (1986) (extensive, albeit partial, listing of the voluminous materials on this subject).

8. The United States Supreme Court has concisely described the basis and scope of the doctrine as follows:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In doing so the United States requires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators . . . . The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.

Cappaert v. United States, 426 U.S. 128, 138 (1976) (citations omitted).

To date, the question of whether the public trust doctrine applies to the United States has yet to be directly addressed by either the Supreme Court or the federal courts of appeals. District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1083 (D.C. Cir. 1984). However, at least two federal district courts have explicitly held that the doctrine applies to the federal government. In *In re* Stuart Transportation Co., 495 F. Supp. 38 (E.D. Va. 1980), the court held that "[u]nder the public trust doctrine, . . . the United States [has] the right and duty to protect and preserve the public's interest in natural wildlife resources." *Id.* at 40. In the other federal case, Congress was held to be the trustee of public trust values "in the tideland and the land below the low water mark that relate to the commerce and other powers delegated to the federal government." United States v. 1.58 Acres of Land, 523 F. Supp. 120, 123 (D. Mass. 1981).

right affected was perfected prior to statehood, and that the correction of any inequity resulting from the absence of just compensation is a matter most properly addressed by state legislatures. It is the hope of the author that this note will contribute some new ideas about how the public trust doctrine can be used to advance the state management of inland water resources in the West and how the consequences of the "collision"[9] between the public trust doctrine and the appropriative water rights systems can best be managed.[10]

I. THE ORIGINS & EVOLUTION OF THE PUBLIC TRUST DOCTRINE

A. *Civil & Common Law Origins*

As a legal concept, the public trust doctrine can be traced to both Roman law and English common law. In Roman times, any person was free to use rivers, ports, and the seashore to the high tide level as long as such use did not interfere with other uses. This concept was first articulated in Justinian's maxim that "[b]y the law of nature . . . the air, running water, the sea and consequently the shores of the sea" are common to man.[11] This principle eventually found its way into French law and has also been cited as a source of Louisiana civil law on property.[12] Similar concepts were carried over into Spanish law, Mexican law, and ultimately California law. For instance, in a recent public trust case, the California Supreme Court cited a thirteenth century Spanish law, Las

9. *See infra* note 92.

10. The author is not unaware of the chilly reception that the public trust doctrine has received in some states, most notably in Colorado. In People v. Emmert, 198 Colo. 137, 141, 597 P. 2d 1025, 1027 (1979), that state's supreme court in an opinion, which has been criticized as poorly reasoned, Comment, People v. Emmert: *A Step Backward for Recreational Water Use in Colorado*, 52 U. COLO. L. REV. 247, 252-53, 270 (1981), and which provoked two sharp dissents, refused to recognize the public trust doctrine as a basis for permitting public recreational use of surface waters flowing over privately owned streambeds.

Furthermore, at a recent seminar on water law, one prominent member of Colorado's water law bar was heard to say that "[w]e don't need a broad public trust doctrine in Colorado." G. Hobbs, Presentation at a water law seminar, entitled "How the Rivers Run . . ." (Denver, Colorado April 19, 1986). Hobbs argued that the Colorado Water Conservation Board's power to appropriate water for public trust purposes, such as fish and wildlife enhancement and recreation, under existing state water law negated the need for the exercise of the public trust doctrine in Colorado. Hobbs, however, failed to mention that "public" water rights acquired by the Colorado Water Conservation Board are usually so junior in their priority that they would not satisfy the public uses for which they were appropriated during water-short years and are not adequately enforced. *See* Wilkinson, *Western Water Law in Transition*, 56 U. COLO. L. REV. 317, 334 n.73 (1985). Wilkinson also notes that Colorado "has never made a call to protect its instream appropriations." *Id.* (reporting information obtained from an interview with Steven J. Shupe, Assistant Attorney General, State of Colorado, on December 5, 1984).

11. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C.D. L. REV. 195, 196-97 (1980) (quoting from THE INSTITUTES OF JUSTINIAN 2.1.1 (T. Cooper trans. & ed. 1841)).

12. In Gulf Oil Corp. v. State Mineral Bd., 317 So.2d 576, 581-82 n.2 (La. 1975), the Louisiana Supreme Court cited several articles of the state civil code providing that such things as air, running water, and the sea and its shores are not susceptible to ownership, but are held in common for the use and benefit of all. These articles, according to the court, arise from various sources, including Justinian's Institutes, Article 538 of the Code Napoleon, and Toullier, Le droit civil francais, Tome Troisieme, Liv. II, tit. I, chap. III, n.38-39 at 27 (1839).

Siete Partidas, that had applied to California while it was a part of Mexico and thereafter under the Treaty of Guadalupe Hidalgo.[13] Las Siete Partidas states that the sea, seashores, rivers, harbors, and public highways "belong to all persons in common."[14]

While the civil law public trust doctrine is based upon the concept that ownership of such public areas is not possible, the common law public trust doctrine is predicated upon sovereign ownership of such shores and waterways.[15] The Crown was considered to own these areas; however, because the public enjoyed the right to use them, the Crown's ownership could not be transferred or separated from the sovereign.[16] This common law doctrine was expressly adopted in the United States at the time of independence on the theory that the rights held by the Crown accrued to the states, including sovereign ownership in trust of such public areas.[17] Although the precedential weight of these civil and common law rationales for the application of a public trust doctrine in the United States has been seriously questioned,[18] the doctrine's legal history is largely irrelevant in light of the American courts' acceptance of the principle that rights to use shores and streams should be held in trust for the benefit of the public.[19]

---

13. City of Los Angeles v. Venice Peninsula Properties, 31 Cal. 3d 288, 298 n.8, 644 P.2d 792, 797 n.8, 182 Cal. Rptr. 599, 604 n.8 (1982) (quoting Law III of Title XXVIII of Las Siete Partidas, CCH (Spain) (1931) pp. 820-21), *rev'd sub nom.* Summa Corp. v. California *ex rel.* State Lands Comm'n, 466 U.S. 198 (1984). In *Summa*, the United States Supreme Court reversed the California Supreme Court's approval of California's assertion of public trust rights in privately-held tidelands, which had originally been acquired under Mexican grants and validated following California statehood by federal patents. It should be noted that California did not acquire any ownership interests in Mexican and Spanish grant lands upon its admission to the Union. The Court's reversal was based upon the distinction between title acquired from the state and the species of title involved in the case, which was predicated upon federal legislation and federal patent. According to the Court, California should have participated in the patent proceedings, which confirmed the Mexican grant, if it desired to subject the grant lands to the public trust doctrine. 466 U.S. at 209. The Supreme Court, however, did not reach the issue as to whether Mexican law gave California a public trust easement over such lands. 466 U.S. at 201-02 n.1.

14. *Venice Peninsula*, 31 Cal. 3d 288, 298 n.8, 644 P.2d 792, 797 n.8, 182 Cal. Rptr. 599, 604 n.8. *See also* Knight v. United States Land Ass'n, 142 U.S. 161 (1891) (Hispanic rights guaranteed by the Treaty of Guadalupe Hidalgo serve as an independent basis for guaranteeing public rights to navigable waters); San Francisco v. LeRoy, 138 U.S. 656 (1891) (the United States acquired the duty to protect the tideland trust when it acquired California from Mexico); Comment, *California Beach Access: The Mexican Law and the Public Trust*, 2 ECOLOGY L.Q. 571 (1972).

15. *See* Stevens, *supra* note 11, at 197-98.

16. *Id.* (quoting 2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 39-40 (S. Thorne trans. 1968)).

17. *See infra* notes 18-32 and accompanying text.

18. One commentator has asserted that both Justinian's declaration and Bracton's writings were more likely their own "idealization[s]" in that they did not accurately reflect the Roman and English practice. Professor Lazarus has argued that the Romans "did not shy away from conveying private rights in coastal resources" and that English assertions of public rights held by the Crown were merely means to increase the treasury. Lazarus, *supra* note 7, at 634-35 & nn.12, 19. *See also* Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13 (1976); MacGrady, *supra* note 6, at 599.

19. "[W]hat is important is what was *perceived* to be the common law and what American courts chose to accept of it." Stevens, *supra* note 11, at 198; "The correct views on Roman and English law are of no more than historical interest today." Dunning, *The Sig-*

B. *American Developments*

Arnold v. Mundy,[20] in 1821, was the first American case to embrace the public trust doctrine.[21] The New Jersey Supreme Court addressed the issue of whether a conveyance of land that included oyster beds below the high water mark could operate to exclude the public. The court held that states, as successors to the interests that the Crown possessed, held rights to the beds of navigable waters in trust for their citizens.[22] Any grant purporting to divest the citizens of these rights was deemed void.[23] The "navigable waters" requirement arose from the Roman and common law test for distinguishing private from public waters.[24] As the use of the public trust doctrine increased in the United States, the navigable waters requirement acquired meanings that varied with its application. For example, the requirement differs when determining federal commerce clause jurisdiction as opposed to determining title to submerged lands.[25] Today, the navigable waters requirement, as a limitation upon the scope of the public trust doctrine, is becoming less important.[26]

Subsequent to *Arnold v. Mundy*, the United States Supreme Court recognized the public trust doctrine on several occasions during the nineteenth century. In *Martin v. Waddell*,[27] the Court held that Waddell's title to submerged lands in Raritan Bay, below the high water mark, did not give him the exclusive right to take oysters from the bay. The Court reasoned that if the surrender of lands from the Crown to the Duke of York, the source of Waddell's title, had been intended to sever from the sovereign the "right of dominion and ownership in the rivers, bays, and arms of the sea, and the soils under them," such a conveyance would have to be express and could not be implied.[28] The Court further held that upon the inception of state government in New Jersey,

---

nificance of California's Public Trust Easement For California Water Rights Law, 14 U.C.D. L. REV. 357, 363 (1980).

20. 6 N.J.L. 1 (1821).

21. Several colonies had previously, through ordinances, protected public access to ponds and lakes for the purpose of fishing and hunting. *See* Hardin v. Jordan, 140 U.S. 371, 393 (1891); *see also* Smith, *The Great Pond Ordinance—Collectivism in Northern New England*, 30 B.U.L. REV. 178 (1950).

22. 6 N.J.L. at 78.

23. *Id.*

24. *See* Lazarus, *supra* note 7, at 513-15 (quoting Lamprey v. Metcalf, 53 N.W. 1139, 1143 (Minn. 1893)).

25. *See* Stevens, *supra* note 11, at 202-09; *see, e.g.*, State v. Bunkowski, 88 Nev. 623, 503 P.2d 1231 (1972) (navigability used to determine title).

26. This is a result of the different nature of the public trust protection. For instance, the navigability test serves the purpose of determining whether title to land under water or tideland should be privately owned or owned by the state. This requirement becomes ineffectual in determining the right to use the water in the stream, whether for public recreation, irrigation, or environmental habitat maintenance. *See* Montana Coalition for Stream Access, Inc. v. Hildreth, 684 P.2d 1088 (Mont. 1984); Montana Coalition for Stream Access, Inc. v. Curran, 682 P.2d 163 (Mont. 1984).

27. 41 U.S. (16 Pet.) 367 (1842).

28. *Id.* at 416. Included in the sphere of such rights was "the right of common fishery for the common people." *Id.*

these "prerogatives" of the Crown became vested in the state.[29]

In 1892, the Supreme Court decided a case that has been described as the American "lodestar" of the public trust doctrine:[30] *Illinois Central Railroad v. Illinois*.[31] The case involved a grant of a 1,000 acre tract of tidal and submerged land on Chicago's waterfront to the railroad by the Illinois legislature. The legislature later rescinded the grant, which prompted a suit to determine the rights of the railroad company, the city and the state.[32] The Court upheld the legislative revocation, holding that the conveyance would have been essentially an "abdication" of state control over lands under navigable waters, inconsistent with the "trust which requires the government of the state to preserve such water for the use of the public."[33] The Court further held that such a trust cannot be affected by a transfer or conveyance and, therefore, the control of the state for the purposes of the trust can never be lost.[34]

Since *Illinois Central*, cases in numerous jurisdictions have relied upon the public trust doctrine in addressing public interests in waters and water-related lands.[35] Nowhere has the reliance upon and expansion of the doctrine been so extensive as in California.

Beginning with *People v. California Fish Co.*[36] in 1913, the California Supreme Court has held that certain tidelands, sold to private parties pursuant to various statutes, were subject to the public right of navigation and that the state reserved the right to make navigational improvements where necessary.[37] The court further held that, regardless of the effect of a conveyance upon title, a transferee cannot "destroy, obstruct, or injuriously affect the public right of navigation in the waters thereof."[38] In *City of Long Beach v. Mansell*,[39] the court reaffirmed its holding in *California Fish*, noting that only "bare legal title" was conveyed when private ownership in tidal lands was created.[40] However, the court did note that where the legislature determined that such lands were no longer useful for the trust purposes, they could be conveyed

29. 41 U.S. at 416. *See also* Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845) (newly admitted states had no less power to exert such a trust than the original states).

30. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489 (1970).

31. 146 U.S. 387 (1892).

32. *Id.* at 389-90.

33. *Id.* at 452-53.

34. *Id. See also* Shively v. Bowlby, 152 U.S. 1 (1894).

35. *See infra* note 74.

36. 166 Cal. 576, 138 P. 79 (1913).

37. 166 Cal. at 596, 138 P. at 87. Distinctions have been made in California between legislation that authorizes the conveyance of tideland for the purpose of furthering navigation or commerce ("special acts") and "general acts" that authorize conveyance of tideland not expressly for the purpose of navigation or commerce. The special acts have been deemed to convey absolute title, while the general acts convey title subject to the public trust. City of Berkeley v. Superior Court of Alameda County, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 449 U.S. 840 (1980).

38. 166 Cal. at 587-88, 138 P. at 84.

39. 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970).

40. 3 Cal. 3d at 482, 476 P.2d at 437, 91 Cal. Rptr. at 37.

into fee simple absolute private ownership.[41]

The scope of the public trust doctrine in California underwent a major expansion in *Marks v. Whitney*,[42] where the court extended the doctrine's protections to environmental and recreational values. The original defendant, Marks, had sought to fill and develop his tideland property. Claiming that such action would cut off his littoral ownership, Whitney had sought a declaration that Marks' property was subject to both a public trust easement and certain private easements held by Whitney.[43] In agreeing with Whitney, the court explained that the public trust right of navigation possessed by the public included the right to fish, hunt, bathe, swim, and boat.[44] Quoting *California Fish*, the court stated that the private right of a tideland owner extended only as far "as the public interests will permit."[45] On this basis and on the finding of a state interest in maintaining the tideland for the public, the court prevented Marks from filling and developing his tidal property.[46]

C. *The Mono Lake Decision and its Legal Progeny*

National Audubon Society v. Superior Court,[47] the seminal application of the public trust doctrine in the area of water rights, represents the current high water mark of the California experience with the public trust doctrine. The case involved a direct conflict between use of water for maintaining wildlife habitat and appropriations for the City of Los Angeles. In 1940, Los Angeles acquired the right to appropriate waters from streams tributary to Mono Lake.[48] The heaviest diversions occurred between 1970 and 1980 and resulted in a thirty percent reduction in the lake's surface area and a forty foot decrease in water level. The reduction in the lake's water level had a debilitating effect on its wildlife populations. For instance, a large number of California gulls lost safe habitat when an island became connected to the main shore, allowing coyotes to reach the island. The lake's brine shrimp population, a major source of food for waterfowl at the lake, was also threatened by the increased sa-

41. *Id.*

42. 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

43. 6 Cal. 3d at 256, 491 P.2d at 377, 98 Cal. Rptr. at 793.

44. 6 Cal. 3d at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796. As was later noted by the California Supreme Court, the traditional trust purposes of navigation, commerce and fisheries did not limit the public trust doctrine. *Mono Lake*, 33 Cal. 3d at 435, 658 P.2d at 719, 189 Cal. Rptr. at 356.

45. 6 Cal. 3d at 260, 491 P.2d at 379, 98 Cal. Rptr. at 795.

46. The court noted in passing that one of the most important public uses of the tidelands trust

> is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area. It is not necessary to here define precisely all the public uses which encumber tidelands.

6 Cal. 3d at 260-61, 491 P.2d at 380, 98 Cal. Rptr. at 796.

47. 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, *cert. denied*, 464 U.S. 977 (1983).

48. The rights were acquired through California Water Resources Control Board permits. 33 Cal. 3d at 424, 658 P.2d at 711, 189 Cal. Rptr. at 348.

linity of the lake water due to Los Angeles' depletions.[49]

In 1979, several plaintiffs, including the National Audubon Society, brought suit to enjoin Los Angeles from further diversions from the lake's tributaries, asserting that the public trust doctrine protected the lake.[50] In its decision, the California Supreme Court reviewed both the California public trust doctrine and the California system of water rights. The court stated that "[t]he objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways."[51] Against this background the court noted that, although Mono Lake was a navigable waterway, the issue was a new one: the extent to which the public trust doctrine applies to nonnavigable tributaries to navigable waterways. After reviewing several California cases on the issue of navigability, the court concluded that the doctrine would protect navigable waters from "harm caused by diversion of nonnavigable tributaries."[52]

After discussing the evolution of the public trust doctrine, the court stated that the cases demonstrate the power of the state, as trustee, to revoke rights granted by the state or to apply the trust to lands that had previously been considered free of the trust.[53] The court then noted that the California dual water rights system, encompassing both appropriative and riparian rights, had existed independent of the public trust doctrine.[54] After rejecting both the Audubon Society's argument that the public trust doctrine is antecedent to, and thus limits, all appropriative rights, and Los Angeles' argument that the doctrine has been " 'subsumed' into the appropriative" system, the court came to three conclusions.[55] First, the principle that the state as sovereign retains supervisory control over waters, tidelands, and shores prevents any party from "acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust."[56] Second, the court stated that the legislature, in some "necessary" situations, has the power to allow diversions that may "unavoidably harm" trust uses at the source of the stream.[57] Finally, the court held that "[t]he state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever

49. 33 Cal. 3d at 430-31, 658 P.2d at 715-16, 189 Cal. Rptr. at 352.

50. The case was transferred to a federal district court, which requested that the state courts rule on the relationship between the public trust doctrine and the appropriative water rights system and the issue of exhaustion of administrative remedies. The Superior Court of Alpine County held that the public trust doctrine did not constitute a basis for challenging the diversions and entered summary judgment for the defendant, the Department of Water and Power of the City of Los Angeles. 33 Cal. 3d at 431-33, 658 P. 2d at 716-18, 189 Cal. Rptr. at 353-54.

51. 33 Cal. 3d at 434, 658 P.2d at 719, 189 Cal. Rptr. at 356.

52. 33 Cal. 3d at 437, 658 P.2d at 721, 189 Cal. Rptr. at 357.

53. 33 Cal. 3d at 440, 658 P.2d at 723, 189 Cal. Rptr. at 360.

54. The court also noted, however, that by statute, beneficial use in California includes the use of water for recreation and preservation and enhancement of fish and wildlife resources. 33 Cal. 3d at 444, 658 P.2d at 726, 189 Cal Rptr. at 363.

55. 33 Cal. 3d at 445-46, 658 P.2d at 727-28, 189 Cal. Rptr. at 363-64.

56. 33 Cal. 3d at 445, 658 P.2d at 727, 189 Cal. Rptr. at 364.

57. 33 Cal. 3d at 446, 658 P.2d at 727, 189 Cal. Rptr. at 364.

feasible."[58] This final conclusion was based on the possibility that, in the absence of the consideration of public trust values, an appropriative system could result in unjustified harm to public trust interests.[59] Because neither the legislature, the Water Resources Control Board, nor the lower courts had determined the "impact of diversion on the Mono Lake environment" by balancing the water needs of Los Angeles against the public interest in Mono Lake, the case was reversed and remanded.[60]

The *Mono Lake* decision has elicited a significant amount of legal commentary about its potential impact upon the public trust doctrine.[61] The California cases, however, are not the only important public trust decisions in recent years. Several other jurisdictions have applied the public trust doctrine, some relying not only upon the common law theory of the public trust, but also upon statutory and constitutional provisions. For instance, in *United Plainsmen Association v. North Dakota State Water Conservation Commission*,[62] the North Dakota Supreme Court held that, prior to issuing future water permits for coal-fired power plants, the state engineer would be required to complete long and short term planning surveys, including weighing the potential effect of such permits on water supply and future water needs.[63] This holding was based upon the common law public trust doctrine, a state water policy statute providing that the public health, safety and welfare depends upon the protection and "wise utilization of all the water and related land resources," and another statutory section declaring that "all waters 'belong to the public' for the purpose of beneficial use."[64]

The Supreme Court of Hawaii, in *Robinson v. Ariyoshi*,[65] examined Hawaii's historical use of water in light of recent constitutional provisions in answering public trust questions certified by the Ninth Circuit Court of Appeals. According to the Hawaii court, at the time private

58. 33 Cal. 3d at 446, 658 P.2d at 728, 189 Cal. Rptr. at 364-65. The court also stated that

> [o]nce the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.

33 Cal. 3d at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365.

59. 33 Cal. 3d at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365.

60. 33 Cal. 3d at 447, 658 P.2d at 728-29, 189 Cal. Rptr. at 365.

61. Dunning, *The Mono Lake Decision: Protecting a Common Heritage Resource from Death by Diversion*, 13 ENVTL. L. REP. (ENVTL. L. INST.)10144 (1983); Note, National Audubon Society v. Superior Court: *The Expanding Public Trust Doctrine*, 14 ENVTL. L. 617 (1984); Note, National Audubon Society v. Superior Court: *A Watershed Case Integrating the Public Trust Doctrine and California Water Law*, 5 J. ENERGY L. & POL'Y 121 (1983); Note, *The Shadow of the Mono Lake Decision in Montana*, 6 PUB. LAND L. REV. 203 (1985); Note, *Reconciling the Public Trust Doctrine and Appropriative Water Rights in California*, 24 SANTA CLARA L. REV. 219 (1984); Comment, *Public Trust Doctrine Protects Navigable Waters From Harm Caused by Diversion of Nonnavigable Tributaries*: National Audubon Society v. Superior Court, 11 PEPPERDINE L. REV. 289 (1983).

62. 247 N.W.2d 457 (N.D. 1976).

63. *Id.* at 461-62.

64. *Id.* at 459, 461 (quoting N.D. CENT. CODE §§ 61-01-01, -26 (1960)).

65. 65 Hawaii 641, 658 P.2d 287 (1982).

ownership was introduced to the islands, the Hawaiian king reserved ownership of all surface waters, holding them in trust for the public.[66] Further, the court noted that the public trust doctrine was codified in 1978 by a constitutional provision stating that "[a]ll public resources are held in trust by the State for the benefit of the people."[67]

Public trust rights in recreational uses have also been recognized and upheld. For instance, in *Mathews v. Bay Head Improvement Association*,[68] the New Jersey Supreme Court extended the public trust doctrine to permit the public use of non-public dry sand beach areas for bathing, swimming, and other shore activities.[69] This holding was based, in part, upon the court's conclusion that the the public's right to swim and bathe below the high water mark might "depend upon a right to pass across the upland [privately owned] beach."[70] Similarly, the recreational use by the public of surface waters flowing over privately-owned streambeds has been held to be a protected right under the public trust doctrine.[71] Citing the Montana Constitution,[72] the Montana Supreme Court has twice held that "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."[73] Furthermore, the court stated that the issue of navigability was "immaterial to determining the question of navigability for recreational purposes under Montana state law."[74]

66. 658 P.2d at 310.

67. 658 P.2d at 311 n.34 (quoting HAWAII CONST. art. XI, § 1 (1978). *But see* Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985) (where parties' water rights had previously been determined by territorial court, a subsequent state judicial decision adopting common law of riparian rights to the detriment of the parties' rights would require condemnation proceeding), *petition for cert. filed*, 54 U.S.L.W. 3170 (U.S. Sept. 10, 1985) (No. 85-406).

68. 95 N.J. 306, 471 A.2d 355, *cert. denied*, 105 S. Ct. 93 (1984).

69. 471 A.2d at 363.

70. *Id.* at 364.

71. Montana Coalition for Stream Access, Inc. v. Hildreth, 684 P.2d 1088, 1093 (1984); Montana Coalition for Stream Access, Inc. v. Curran, 682 P.2d 163, 171 (1984).

72. MONT. CONST. art. IX (1972).

73. *Hildreth*, 684 P.2d at 1093; *Curran*, 682 P.2d at 171. *But see* Bott v. Comm'n of Natural Resources, 415 Mich. 45, 327 N.W.2d 838, 846 (1982) ("The public trust doctrine applies only to *navigable* waters and not to all waters of the state;" recreational boating is not determinative of navigability) (emphasis in original).

74. *Id.* at 171. For other recent cases upholding or recognizing the public trust doctrine with regard to water or water-related lands, see Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085 (1983) (public trust doctrine does not prohibit private dock from being built in public lake); People *ex rel.* Scott v. Chicago Park Dist., 66 Ill.2d 65, 360 N.E.2d 773 (1976) (conveyance of submerged Lake Michigan property by legislature violated public trust); James v. Inhabitants of Town of West Bath, 437 A.2d 863, 865 (Me. 1981) ("Maine's tidal lands and resources, including marine worms, are held by the State in public trust for the people of the State."); Opinion of the Justices, 437 A.2d 597 (Me. 1981) (standard of reasonableness is used in determining whether legislature's dealings with public trust are valid); Opinion of the Justices, 383 Mass. 895, 424 N.E.2d 1092 (1981) (state's vestigial interest could be eradicated after hearing); Superior Pub. Rights, Inc. v. State Dep't of Natural Resources, 80 Mich. App. 72, 263 N.W.2d 290 (1977) (Department of Natural Resources not obligated to find that every possible use of public trust land is in itself beneficial); State v. Forehand, 67 N.C. App. 148, 312 S.E.2d 247 (1984) (grant of submerged land for wharf purposes does not convey title); Thomas v. Sanders, 65 Ohio App. 2d 5, 413 N.E.2d 1224 (1979) (land reclaimed from Lake Erie is subject to public trust); Morse v. Oregon Div. of State Lands, 285 Or.

As the preceding historical review evidences, the public trust doctrine has undergone substantial development between its birthplace along the Mediterranean and its modern applications in the American West. The doctrine's pervasive presence in the governmental management of water resources makes it imperative that means for integrating the doctrine into modern legal systems of water allocation and management be identified, investigated and debated. The following proposal to convert public trust use requirements for water into a species of reserved rights represents a considered effort to initiate this much-needed process of resolution and integration.

II. THE PUBLIC TRUST DOCTRINE SHOULD BE VIEWED AS EFFECTING AN IMPLIED RESERVATION OF WATER FOR PUBLIC TRUST USES

A. *Preface*

The use of analogies as aids in legal analysis is an exercise fraught with peril. Often, they mislead because of the lack of precision with which they are used and seldom do authors state the limits of their analogies. Yet, for all their pitfalls, analogies can promote the understanding of obscure or complex concepts, especially when those concepts are unfamiliar or previously unknown, by relating them to well-established and well-understood concepts. Thus, despite the often questionable usefulness of analogies in legal analysis, the analogy of public trust doctrine water rights in inland waters to federal reserved water rights in such waters is offered as a means of reducing the destablizing effect that the renaissance of the public trust doctrine has had on the security of existing water rights[75] and to explain why states are not constitutionally required to compensate water rights holders who may be adversely affected by the exercise of public trust rights.[76]

197, 590 P.2d 709 (1979) (Director of Division of State Lands must weigh the public need for filling in estuary against the public interest in navigation, fishing, and recreation). For cases dealing with the public trust doctrine as it applies to non-water-related areas, see State v. Zimring, 58 Hawaii 106, 566 P.2d 725 (1977); Wade v. Kramer, 121 Ill. App. 3d 377, 459 N.E.2d 1025 (1984); Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So.2d 1152 (La. 1984). *See also* Summa Corp. v. California *ex rel.* State Lands Comm'n, 466 U.S. 198 (1984) (reversing California's assertion of public trust rights over certain tidelands; in order for state public trust interests to be recognized in federal confirmation (through special legislation) of Mexican land grant, state would have had to assert those rights at the patent confirmation hearing).

75. *See* Dunning, *The Public Trust Doctrine and Western Water Law: Discord or Harmony?*, 30 ROCKY MTN. MIN. L. INST. 17-1, 17-25. (noting the tension between the public trust doctrine and appropriative water rights). Professor Dunning notes that "[a]ll existing water rights which adversely impact public trust values are now subject to reconsideration and modification by either an agency or a court in the name of the public trust." *Id.* at 17-42. *See also* WESTERN WATER 3 (March/April 1983) (wherein the General Counsel of the Association of California Water Agencies is quoted as saying: "You wonder if any of the water rights in the state are that secure any more.").

76. The literature on the public trust doctrine reflects a vigorous debate on the question of whether compensation ought be paid to water right holders whose rights are infringed by the state's exercise of the public trust doctrine. *Compare* Smith, *The Public Trust Doctrine and National Audubon Society v. Superior Court: A Hard Case Makes Bad Law or the Consistent Evolution of California Water Rights*, 6 GLENDALE L. REV. 201, 203 (1984) ("As applied by the [*Mono Lake*] court the public trust doctrine does not frustrate expectations of appropri-

B. *The Public Trust Doctrine is an Integral Element of the Sovereign Powers of a State*

That the public trust doctrine is an incident of sovereignty is evident from its origins and evolution.[77] As such, it is always available to the judiciary of a state as a basis for scrutinizing the effects of administrative and legislative decisions to use or allocate public trust resources. Although the public trust doctrine has been characterized as merely a variant of a state's police power,[78] the two are only indirectly connected. While the police power of the state is usually exercised by the state in an affirmative manner to further the public health, safety, and welfare,[79] the public trust doctrine is essentially a constraint on state actions,[80] even those state actions that arguably further the public health, safety, and welfare.

While admittedly some affirmative action is necessary to invoke the doctrine,[81] the doctrine is essentially a dormant sovereign power[82] exercised, as is the dormant commerce clause power,[83] by the judicial arm of the sovereign. Moreover, the public trust doctrine and the police power may be distinguished by the public trust doctrine's dependence upon the state's retention of an ownership interest in the resource.[84] No such dependence exists for the police power as it can regulate public as well as wholly private resources in furtherance of the public interest.[85] Thus,

---

ative water right holders because the power to use an appropriative right has always been subject to the discretion of the State.") *with* Comment, *The Fifth Amendment as a Limitation on the Public Trust Doctrine in Water Law*, 15 PAC. L.J. 1291, 1319 (1984) ("The preexisting title theory of the public trust doctrine asserts retroactively that the water rights holder never possessed the property, therefore, compensation is not required when the state acts to protect public trust uses that conflict with the water rights. This contravenes the mandate of the fifth amendment." (footnote omitted)).

77. *See supra* notes 11-74 and accompanying text.

78. *See* Sax, *supra* note 30, at 484-85.

79. State *ex rel.* Carpenter v. City of St. Louis, 318 Mo. 870, 897, 2 S.W.2d 713, 722 (1928); *Ex parte* Tindall, 102 Okla. 192, 229 P. 125, 130 (1924).

80. Sax, *supra* note 30, at 473, 474, 477; Comment, *The Public Trust Doctrine in Maine's Submerged Lands: Public Rights, State Obligation and the Role of the Courts*, 37 MAINE L. REV. 105, 118 (1985). Although it may be objected that the public trust doctrine cannot be both an incident of sovereignty and a restraint on the state, this objection can be disposed of by the following clarification in terms: the sovereign in the American political system is the people and the public trust doctrine is an incident of that sovereignty. Thus, the duly constituted representative of the people — the state — may be constrained in its exercise of the powers that the sovereign has entrusted to it by the sovereign's resort to the public trust doctrine. Therefore, when I speak of the state as sovereign I do so as shorthand for describing the state's role as the people's vehicle for their sovereignty.

81. In the past, most public trust actions have been brought by private parties. *Mono Lake*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983); *United Plainsmen Ass'n*, 247 N.W.2d 457 (N.D. 1976). However, public bodies occasionally have relied upon the doctrine as a basis for some action. *See, e.g.*, *Illinois Central*, 146 U.S. 387 (1892) (legislative repeal of a grant of submerged lands upheld on the basis of the public trust doctrine).

82. *Contra* Walston, *The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy*, 22 SANTA CLARA L. REV. 63, 68 (1982) (noting that "[t]he public trust [doctrine] . . . is an active common law principle which, without more, protects the public interest in navigable waters.").

83. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 266-67 (2d ed. 1983).

84. *See* H. ALTHAUS, PUBLIC TRUST RIGHTS 85 (1978).

85. *Id.*

the police power can be used to regulate the use of a public trust resource where the legislature has extinguished its sovereign ownership interests in that resource and has terminated the application of the public trust doctrine to that resource. Furthermore, where the state has retained a sovereign ownership interest in a particular resource, a conversion from a wholly private use to a wholly public use effected through the exercise of the police power would constitute a taking under the fifth amendment requiring the payment of just compensation.[86] However, if the conversion was effected under the public trust doctrine no taking would occur, except in those instances where the private property interest predated statehood, because of the pre-existing title of the state in the public trust resource.[87]

The interrelationship between the public trust doctrine and the state's sovereign ownership of a particular trust resource, such as inland waters, is of central importance to the analogy that may be drawn between the reserved water rights of the federal government and the public trust water rights of a state. Although it may be objected that federal reserved water rights are inextricably linked to the federal government's ownership of land as a proprietor,[88] this objection is bottomed on a false premise: that the federal government can divorce itself of its sovereignty and own land in a strictly proprietorial sense. This unsound proposition has been expressly rejected by the Supreme Court in *Kleppe v. New Mexico*,[89] where the Court held that "Congress exercises the powers both of a proprietor and of a legislature over the public domain."[90]

Having disposed of the purported sovereign/proprietary distinction in government land ownership, it is thus clear that the true foundation for federal reserved water rights is the sovereign ownership interest that the United States holds to the waters reserved: an ownership interest

86. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

87. Title to state public trust ownership interests, which are a species of public property rights, "springs from the ownership of land conferred on the State of California upon admission to the United States." Dunning, *Public Trust Easement*, *supra* note 19, at 364. Note, *Environmental Law—Expanding the Definition of Public Trust Uses*, 51 N.C.L. REV. 316, 324 (1972).

At least one state supreme court has held that a state is not constitutionally required to provide compensation for the infringement of a private property right by the initiation of a public trust use on the theory that the state had impliedly reserved the right to use the property for public trust uses. Sage v. Mayor of New York, 154 N.Y. 61, 79-80, 47 N.E. 1096, 1101 (1897).

88. "The reserved water so withheld is the property of the United States, and the government, exercising its proprietary powers and rights, can put it to use without compliance with state law." F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW—LEGAL STUDY No. 5, at 114 (1972).

89. 426 U.S. 529 (1976).

90. *Id.* at 540. The repudiation of the proposition was foreshadowed almost two decades ago by a commentator who asserted "that all activities of the federal government in the land ownership field are sovereign, and nothing else." Sewell, *The Government as a Proprietor of Land*, 35 TENN. L. REV. 287, 288 (1968) (footnote omitted). This view was echoed in a student note, in which it was argued that "the judicially created dichotomy between governmental obligations and proprietary rights of the state as landlord or licensor is based on a mistaken premise that government can divorce itself from its sovereign responsibilities." Note, *The Government as Proprietor: The Private Use of Public Property*, 55 VA. L. REV. 1079, 1101 (1969).

good against all other public and private parties. This sovereign ownership interest is also the basis of state public trust doctrine water rights; however, a state's sovereign ownership interest is always subordinate to the federal government's sovereign ownership interest. Although it may be argued that federal reserved water rights differ from public trust doctrine water rights because the former are integrated into the prior appropriation system by way of stream-wide adjudications that assign to federal reserved rights a priority date and a quantity,[91] whereas public trust doctrine water rights to date have not been similarly integrated into state water allocation systems,[92] there is no good reason to believe that public trust doctrine water rights could not be similarly treated. Certainly a state could bring claims in a stream-wide adjudication for that water necessary to protect and preserve public trust uses of the stream at issue.[93] If successful, such claims would probably result in public trust uses having the benefit of a relatively senior right because the claimed priority would reflect the date the public trust obligation arose in the state, which would be the date of that state's admission into the Union.[94]

C. *Public Trust Interests in State Waters Have Been Recognized in State Constitutions and Water Codes*

To describe the numerous written histories of the origins and development of the public trust doctrine as varied and divergent is, perhaps, an understatement. Because of the antiquity of the events, circumstances, and documents involved, it is hardly surprising that commentators on the public trust doctrine have widely divergent views on the degree to which the modern public trust doctrine has a sound grounding in ancient and medieval jurisprudence. Yet, while this academic jousting can certainly promote caution in the use of historical analogies relating to the public trust doctrine, there is evidence that the American variant of the English common law public trust doctrine was accepted, without trepidation over the exact origins or development of the doctrine, throughout the West as an indispensible and salutary legal principle. The fundamental premise of the doctrine—that water is a common

---

91. *See* United States v. New Mexico, 438 U.S. 696 (1978).

92. This lack of intergration was expressly noted by the California Supreme Court in *Mono Lake*:

> This case brings together for the first time two systems of legal thought: the appropriative water rights system . . . and the public trust doctrine . . . . Ever since we first recognized that the public trust protects environmental and recreational values, the two systems of legal thought have been on a collision course.

Mono Lake, 33 Cal. 3d at 426, 658 P.2d at 712, 189 Cal. Rptr. at 349 (citations omitted).

93. *But see supra* note * (where it is suggested that such integration may be nearing). It would be preferable in the first instance to have state reserved rights claims brought by the state, rather than by private parties. The reasons supporting such a preference are the promotion of state-wide water planning by the state water resources agency for public trust uses and the desirability of having a single entity litigating for state reserved rights, instead of a variety of private parties, each of which may have sharply disparate private agendas.

94. Comment, *The Public Trust Doctrine and California Water Law: National Audubon Society v. Department of Water and Power*, 33 HASTINGS L.J. 653, 661 (1982).

resource belonging to the people—is evidenced in the constitutions of four western states.[95] These reservations of a sovereign ownership interest in the waters of the western states reflected a popularly felt need for governmental safeguards against the socially undesirable consequences that may have followed from the private monopolization of water supplies.[96] The judiciary of at least one western state has explicitly recognized that the incorporation of the public trust doctrine into the fundamental law of a state creates an affirmative obligation on the part of a state to safeguard public trust uses in the management, allocation, and development of public trust resources.[97]

The importance of public trust uses in western water resources is also evidenced by the numerous statutory provisions confirming state ownership interests in water resources. Ten western states have statutory provisions declaring their waters to be the property of the state,[98] the people of the state,[99] or the public.[100] The high courts of some of these states have recognized the public trust doctrine as a necessary corollary to state ownership.[101] Thus, the general rule is that the public trust doctrine is an inherent and fundamental element of the foundation of western water law: the state ownership of water resources.[102]

III. Pre-Existing State Ownership Interests, Federal Reserved Rights, and the Rule of No Compensation for the Infringement of Junior Water Rights

It is undisputed that the public trust doctrine, as an incident of sov-

95. Colo. Const. art. XVI, § 5 ("The water of every natural stream . . . 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."); Mont. Const. art. IX, § 3 ("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 . . . ."); N.M. Const. art. XVI, § 2 ("The unappropriated water of every natural stream . . . is hereby declared to belong to the public and to be subject to appropriation . . ."); Wyo. Const. art. 8, § 1 ("The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.").

96. *See, e.g.*, Proceedings of the Constitutional Convention of Colorado 44 (1907), where a convention delegate proposed that "[i]t shall be the duty of the legislature from time to time to pass such laws as may be necessary to secure a just and equitable distribution of the water . . . [and thereby] promote the greatest good to the greatest number of the citizens . . . ."

97. *United Plainsmen Ass'n*, 247 N.W.2d at 462. Dunning, *The Public Trust Doctrine and Western Water Law: Discord or Harmony?*, 30 Rocky Mtn. Min. L. Inst. 17-1, 17-33 ("The North Dakota court . . . treated state constitutional and statutory provisions on state and public ownership of water as expressions of the trust.").

98. Idaho Code Ann. § 42-101 (1977); Tex. Water Code Ann. § 5.021 (Vernon 1972).

99. Cal. Water Code § 102 (West 1971).

100. Ariz. Rev. Stat. Ann. § 45-131(A) (Supp. 1985); Neb. Rev. Stat. § 46-202 (1984); Nev. Rev. Stat. Ann. § 533.025 (1986); S.D. Codified Laws § 46-1-3 (1983); Or. Rev. Stat. § 537.110 (1985); Utah Code Ann. § 73-1-1 (1980); Wash. Rev. Code Ann. § 90.03.010 (Bancroft-Whitney & West 1962).

101. *See, e.g.*, State *ex rel.* Bliss v. Dority, 55 N.M. 12, 225 P.2d 1007, 1010 (1950), *appeal dismissed*, 341 U.S. 924 (1951); Motl v. Boyd, 116 Tex. 82, 286 S.W. 458, 468 (1926).

102. *Contra* Trelease, *Government Ownership and Trusteeship of Water*, 45 Cal. L. Rev. 638, 643-45 (arguing that the real basis of a state's control over its water resources is its police power).

ereignty, arises upon the formation of a sovereign government. It follows then that the doctrine becomes binding as of the date of a state's admission into the Union. Concurrently, a state also obtains the complete ownership of the inland waters within its boundaries, subject to superior federal ownership interests,[103] private ownership interests obtained directly or indirectly from the federal government,[104] and other ownership interests withheld by the federal government pursuant to treaties.[105] It is from this posture of ownership that the western states have allocated rights to use water resources to private parties.

That a water right is a usufructuary right is a fundamental legal maxim in western water law. Since the genesis of the prior appropriation doctrine, it has been universally recognized that the right to take and use water from a natural stream "is subject to the paramount right of the public to use or dedicate water for state purposes."[106] The fundamental character of a water right as merely a usufructuary right, rather than as a possessory right, is perhaps best highlighted by "the fact that the states, in granting appropriative water rights, issue only 'permits' or 'licenses' rather than 'deeds' or other documents which evidence 'ownership' of property."[107]

Although some commentators have pointed to the fifth amendment's prohibition against the taking of private property without the payment of just compensation[108] as a potential "limitation on the public trust doctrine,"[109] these arguments are dependent on the acceptance of

103. This category would include federal and Indian reserved rights as well as potential federal non-reserved rights.

104. This category would include ownership interests received by private parties directly from Congress or through the auspices of a territorial government, such as was the case in *Aroyoshi*, 65 Hawaii 641, 658 P.2d 287 (1982).

105. This category would include the lagoon tidelands involved in *Summa*, which were not passed to California by the federal government upon its admission into the Union, because under the Treaty of Guadalupe Hidalgo the federal government did not acquire any fee interest in those lands. The private owners of those lands, who had acquired them from the Mexican Government, subsequently had their title confirmed through federal patent proceedings. City of Los Angeles v. Venice Peninsula Properties, 31 Cal. 3d 288, 291, 644 P.2d 792, 794, 182 Cal. Rptr. 599, 601 (1982), *rev'd sub nom.* Summa Corp. v. California *ex rel.* State Lands Comm'n, 466 U.S. 198 (1984). Due to the complete absence of any state ownership interests in the lagoon tidelands and the acquisition of those lands by their original private owners prior to California statehood, the Supreme Court was correct in holding that the public trust doctrine could not be imposed upon the lagoon tidelands in the complete absence of notice to the tideland owners of California's claim. *Summa*, 466 U.S. at 209. *See also infra* notes 111-13 and accompanying text (sufficient notice given to appropriators of state waters of the public character of inland water resources).

106. Walston, *supra* note 82, at 83.

107. *Id.*

108. U.S. CONST. amend V. The takings clause of the fifth amendment has been held to be applicable to the states under the fourteenth amendment. Chicago B. & Q. R. Co. v. Chicago, 166 U.S. 226, 239 (1897).

109. *See, e.g.*, Comment, *The Fifth Amendment as a Limitation on the Public Trust Doctrine in Water Law*, 15 PAC. L.J. 1291 (1984); R. Walston, The Public Trust Doctrine and the Taking Clause: A Collision Course (February 13, 1986) (outline of presentation given to an ABA Section of Natural Resources water law seminar held in San Diego on February 13-14, 1986) (on file with the author).

In the *Mono Lake* litigation, Los Angeles, however, may be unable to claim that its

the premise that recipients of water rights from the states had no notice of the retention of sovereign ownership interests by the states and the accompanying public trust obligations.[110] That such a premise is untenable is evident when one recalls that the usufructuary principle of western water law is a universally recognized "expression of the state's trust responsibilities to its citizens in the water rights context."[111] Moreover, given the constitutional and statutory declarations of state or public ownership of water resources upon which western water law was founded,[112] the "no notice" premise of the takings argument is, at best, a strained appeal to equity for it also ignores the numerous judicial affirmations of the public nature of state inland water resources[113] and the common understanding, prevalent throughout the West, that the inland water resources of a state "belong" to all the people of the state.[114] Thus, the acquisition of water rights by a state under the public trust doctrine would, like federal reserved rights acquired by the federal government, not require the payment of just compensation for the infringement of privately-held water rights.

CONCLUSION

The proposition that a new species of public water rights ought to be created at a time when state water law systems in the West are just now painstakingly incorporating federal reserved rights into the fabric of the present weave of ownership rights in water[115] will undoubtedly strike many water rights holders, water lawyers, and legal scholars as undesirable, unwise, or worse. However, the public trust doctrine seems destined to remain a formidable influence on water law in the West because it serves the socially desirable function of permitting assessments and reassessments of past, present, and future legislative and administrative decisions affecting the management, allocation and development of a state's water resources.[116] Thus, the security of existing water rights, which already have been threatened by the potential de-

property has been unconstitutionally taken because the Supreme Court has held that municipalities may not bring such claims against an unwilling state. Trenton v. New Jersey, 262 U.S. 182 (1923).

110. *See, e.g.*, Comment, *supra* note 108, at 1306-07.

111. Walston, *supra* note 82, at 85. Walston also asserts that "[t]he usufructuary principle is both an outgrowth and an extension of the public trust doctrine." *Id.*

112. *Supra* notes 95, 98-100 and accompanying text.

113. *Supra* note 101 and accompanying text.

114. "[W]ater in the western states, and particularly in California, is owned by all the people in the state." Remarks of Ron Robie, Director of the California Department of Water Resources, in THE PUBLIC TRUST DOCTRINE IN NATURAL RESOURCES LAW AND MANAGEMENT: CONFERENCE PROCEEDINGS 132 (H. Dunning ed. 1981) [hereinafter cited as CONFERENCE PROCEEDINGS]. It has also been argued that "[t]he usufructuary principle provides a warning to holders of water rights that their rights are subject to modification as necessary to achieve more important social goals." Walston, *supra* note 82, at 88.

115. *See, e.g.*, United States v. City and County of Denver, 656 P.2d 1 (Colo. 1982).

116. *See Mono Lake*, 33 Cal. 3d at 445-47, 658 P.2d at 728, 189 Cal. Rptr. at 364-65; *see also* CONFERENCE PROCEEDINGS, *supra* note 114, at 134, where Ron Robie argues that "[w]e need the flexibility [provided by the public trust doctrine] to change things we have done wrong in the past."

mand for water necessary to satisfy federal and Indian reserved rights,[117] will probably be further undermined. This uncertainty could, however, be diminished if claims for the water necessary to preserve and protect public trust uses were pressed by the states in stream-wide adjudications.[118] By quantifying the water requirements of public trust uses in such a manner, water rights holders would gain important information about the relative security of their water rights. Thus, they could plan for and effect whatever measures, such as the acquisition of higher priority rights or the augmentation of supply through water conservation, were necessary to make available enough water to satisfy the requirements of public trust uses, while maintaining their current uses. There is no doubt that such changes in water allocation will cause some measure of hardship during this renaissance of public ownership interests in water resources. Yet, if a state reserved rights theory is chosen as the means for incorporating society's requirements for water necessary for public trust uses into the prevailing system of water allocation, the security of existing water rights can be enhanced with a modicum of time and expense by treating public trust doctrine water rights as a state version of federal reserved water rights.[119]

While the doctrine of federal reserved water rights offers a model, albeit a less than perfect one, for incorporating the water requirements of public trust uses into existing water rights systems, it must be remembered that state reserved rights for public trust uses should be subject to reassessment and contraction or expansion in light of changing circumstances, such as changes in environmental conditions or society's demand for a particular public trust use. This malleability, which principally distinguishes the suggested state reserved water right from its federal counterpart, derives from its basis in the American variant of the common law public trust doctrine.[120] That being the case, state re-

117. A recently issued report of the Western Governors' Association concludes that Indian water rights in the West may be as high as forty-five million acre-feet a year, an amount that is more than three times the Colorado River's annual flow. WESTERN GOVERNORS' ASSOCIATION, INDIAN WATER RIGHTS IN THE WEST 93 (1984).

118. The state's role in applying for public trust water rights in stream-wide adjudications would be analogous to the efforts of the federal government to obtain water rights for federal reservations in such adjudication. A major distinguishing feature, however, between the obligations of these two sovereigns is that while it seems probable that a state could be ordered to adjudicate claims for public trust water rights, *Mono Lake*, 33 Cal. 3d at 446, 658 P.2d at 728, 189 Cal. Rptr. at 364; *see* Sax, *supra* note 30, at 482-89, it appears that the federal government cannot be ordered to press potential claims to federal reserved water rights, at least not on a public trust doctrine theory. Sierra Club v. Block, 622 F. Supp. 842, 866 (D. Colo. 1985). However, such a duty may exist under various environmental protection statutes. *See id.* at 865.

Of course, in some instances such claims would already be present in the form of agency applications for water necessary to comply with statutory and administrative directives on minimum instream flows, fish and wildlife enhancement and water-related recreational uses.

119. There undoubtedly would be litigation over precise character of public trust uses and the amount of water sufficient to facilitate them. In this respect, the past and present litigation over the same issues under the doctrine of federal reserved rights can be viewed as having blazed a path and set out some meaningful guidelines.

120. Note, Lyon *and* Fogerty: *Unprecedented Extensions of the Public Trust*, 70 CAL. L. REV. 1138, 1141 (1982) (noting that "[e]arly cases brought the public trust doctrine to this

served rights should thus reflect the growth or diminution of the doctrine, which as a common law doctrine has as "its true glory, that it is flexible, and constantly expanding with the exigencies of society."[121]

Peter A. Fahmy[**]

country, but it has been adapted to American circumstances"); Note, *The Public Trust Doctrine: A New Approach to Environmental Protection*, 81 W. VA. L. REV. 455, 458 (1979) [hereinafter cited as Note, *A New Approach*] (noting that "[w]hile the American courts recognized the basic premises of the trust concept, certain modifications were made to reflect the social, economic and geographical conditions which existed at the time.").

121. THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 526 (W. Story ed. Boston 1852); *Accord* District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1083 (D.C. Cir. 1984) (noting that the public trust doctrine contains "a dynamic common-law principle flexible enough to meet diverse modern needs."); Neptune City v. Avon-By-The-Sea, 61 N.J. 296, 309, 294 A.2d 47, 54 (1972) (holding that "[t]he public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit."); Note, *A New Approach*, *supra* note 120, at 459 (noting that "[a]s a common law theory, the public trust doctrine has the inherent qualities of flexibilty and adaptability.").

** The author gratefully acknowledges the invaluable assistance of James R. Ghiselli in researching and writing section I of this note.