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# Forging Public Rights in Montana's Waters

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# ARTICLES

## FORGING PUBLIC RIGHTS IN MONTANA'S WATERS

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This article's title is suggested by Robert G. Dunbar's fine book on the historical development of water rights in the west, FORGING NEW RIGHTS IN WESTERN WATERS (1983). Dunbar is emeritus professor of history at Montana State University.

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## I. INTRODUCTION

Culture, as much as climate, was responsible for the development of water law in the West. Through more frequent recognition of public rights by western state courts, culture is once again becoming a principal author of western water rights. The rewriting of these laws is intertwined with controversy and uncertainty.

Widespread aridity is commonly credited with creating the need for the prior appropriation doctrine, a water management regime uniquely fashioned to the western states. While this interpretation of the development of the prior appropriation doctrine is fundamentally correct, it ignores the intervening but important influence of history and culture upon the water allocation and management systems that arose in the West.

The prior appropriation doctrine was developed in response to the physical need to transport water out of streambeds and lake beds to service mining claims, to irrigate farms, and to support nearby communities. The doctrine, however, was also a judicial recognition of the customary practices that had developed in those mining and farming communities: that appropriators are entitled to capture and convey water for beneficial uses; that those appropriators who are first in time have seniority in right. Thus, even though early California miners were often trespassers, the California Supreme Court, in *Irwin v. Phillips*,[1] adopted prevailing customary practices concerning water on public lands, stating that "courts are bound to take notice of the political and social condition of the country

1. 5 Cal. 140 (1855).

which they judicially rule."[2]

Americans now—particularly those in the West—are placing greater emphasis on cultural values: the aesthetic, environmental, and recreational importance of their waters. This change in emphasis is calling into question the substance of established water policies and the viability of the institutions that implement those policies. The public trust doctrine, which requires protection of publicly important natural resources, is becoming one vehicle for the expression of such cultural influences. This development has been notable in California where the state supreme court recently gave broad recognition to public rights, articulated as the public trust doctrine, in *National Audubon Society v. Superior Court (Mono Lake)*.[3] In that decision, the court held that water rights cannot be obtained without reference to the public trust doctrine and that even existing water rights can be reexamined under the doctrine.[4]

Similar developments are also underway in other western states. The North Dakota Supreme Court, for instance, has recognized the public trust doctrine in requiring some planning before the commitment of public resources.[5] The Idaho Supreme Court has recognized the doctrine,[6] and recent litigation between Idaho and the Idaho Power Company was based in part on the potential application of the doctrine to hydroelectric rights.[7] New Mexico has relied on carefully crafted "public interest criteria" in its permit procedure to evaluate proposals to export groundwater out of state.[8]

As western states in general (and for the purposes of this article, Montana specifically) face the challenges of a major transformation of water law based on the growing pressure to recognize broader public rights in water, it is important to understand that the law historically adapts to such cultural progressions. Such areas as marital and family relationships, civil rights, and economic relationships have all seen recent changes; and the law has adapted by recognizing "no fault" divorces, the right of privacy, remedies for racial and sexual discrimination, rights of unionization, and by modifying rules of civil liability and the measure and extent of damages. Because of Americans' increased concern for the protection of natural resources and the environment, the courts have responded by

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2. *Id.* at 146.

3. 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, *cert. denied*, 104 S. Ct. 413 (1983).

4. *Id.* at 447, 189 Cal. Rptr. at 365, 658 P.2d at 728.

5. United Plainsmen Ass'n. v. North Dakota State Water Conserv. Comm'n, 247 N.W.2d 457 (N.D. 1976).

6. Kootenai Envtl. Alliance v. State Bd. of Land Comm'rs, 105 Idaho 622, 671 P.2d 1085 (1983).

7. Idaho Power Co. v. Idaho Dep't Water Resources, No. 62237 (4th Dist. Idaho) (settled in Oct. 1984).

8. N.M. STAT. ANN. § 72-12-3 (Cum. Supp. 1984).

broadening standing requirements, making new use of the law of trespass and nuisance, and filling in the details of such major statutory schemes as the Clean Air Act.[9] Water managers, legislators and courts in western states face the challenge of integrating this new emphasis on public rights into the longstanding system of prior appropriation.

Montana serves as an excellent case study of the difficult integration of cultural change and an expanded concept of public rights in water into a longstanding, traditional system of prior appropriation. California's *Mono Lake* decision expressed the theoretical basis for this integration, but Montana's experience illustrates the difficulties of achieving this integration, especially because Montana has applied the doctrine to virtually all the waters of the state.[10]

Formal recognition of the public trust doctrine by the Montana Supreme Court, at least to protect recreational uses of most of the surface waters[11] of the state, occurred on May 15 and June 21, 1984, in the cases of *Montana Coalition for Stream Access v. Curran*[12] and *Montana Coalition for Stream Access v. Hildreth.*[13] Related developments have been the contentious two-year public debate that both preceded and followed the court's decisions and the efforts of the legislature to apply the doctrine both to recreational uses and to broader water policy issues facing the state. These developments are challenging the general perception of established water rights and the extent of those rights.

This article is a limited case study of Montana's recent experience with public rights in water, particularly with the public trust doctrine. The article begins with a brief review of the origins and content of the public trust doctrine. The Montana constitutional basis for public rights in water is then examined. Thereafter, the article proceeds to trace two major manifestations of the doctrine in Montana over the last two years: first, attempts by the courts and the legislature to define the scope of public recreational use of the state's waters; and second, the legislature's efforts to frame an overall policy for the management of the state's waters in the future. The article closes with an examination of the implications, both for Montana and the West, that can be drawn from Montana's experience.

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9. 42 U.S.C. § 7401-7642 (1982).

10. The *Mono Lake* decision applied the public trust doctrine to the tributaries of a navigable body of water. Its impact may ultimately reach most California waterways on a case-by-case basis. In contrast, the Montana Supreme Court decisions discussed in this section apply the doctrine to all of the waters of the state which have the capability of recreational use.

11. *See infra* notes 167-91 and accompanying text.

12. ___ Mont. ___, 682 P.2d 163 (May 15, 1984).

13. ___ Mont. ___, 684 P.2d 1088 (June 21, 1984).

## II. PUBLIC TRUST DOCTRINE

Judicial response to increasing public use in waters has been based in many instances on the public trust doctrine—even though the doctrine may not have been specifically articulated. This section examines the origin and development of the doctrine, recent applications, its major components, and some of the difficult issues it presents.

### A. *Origin and Development*

#### 1. *Civil and Common Law Roots*

The public trust doctrine has its roots in both civil and common law.[14] The doctrine requires a high level of care (in essence, a fiduciary obligation) by government as it deals with the resources of "common heritage" or of "special character" within its jurisdiction. Historically, the doctrine has been applied to protect public uses and access to and upon navigable waters for passage, commerce, and fisheries.[15] These roots are important in understanding the origin and development of the doctrine, but they do not limit its current reach. While the doctrine evolved with reference to navigable and tidal waters (and in some instances to non-navigable fresh waters in England) and to economic and subsistence uses, it is now being applied more frequently to other natural resources.[16]

The Institutes of Justinian, in restating Roman law, provided the civil law origins of the doctrine: "By the law of nature these things are common to man—the air, running water, the sea and consequently the shores of the sea."[17]

The same principles were recognized in early English law; but, because the common law rejects the concept of non-ownership, the common property notions of the Roman law had to be adapted to allow for public use. A solution was found, therefore, by attributing ownership to the King or Queen—thus, "all things which relate peculiarly to the public good

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14. *See, e.g.*, Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195 (1980). The interpretation of the antecedents of the public trust doctrine that have been set forth in case law is considered overly romantic and somewhat inaccurate by one observer. *See* Deveney, *Title, Jus Publicum and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13 (1976).

15. *Id.*

16. *See, e.g.*, Sierra Club v. Department of Interior, 376 F. Supp. 90 (N.D. Cal. 1974); Sierra Club v. Department of Interior, 398 F. Supp. 284 (N.D. Cal. 1975); Sierra Club v. Department of Interior, 424 F. Supp. 172 (N.D. Cal. 1976). In this litigation, the Sierra Club alleged that the National Park Service had the duty to prevent damage allegedly caused by logging on lands adjacent to and upstream of Redwood National Park. *See also* Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. D. L. REV. 269 (1980). *See also* cases cited at notes 12 & 13.

17. INSTITUTES OF JUSTINIAN 2.1.1 (T. Cooper trans. & ed. 1841).

cannot be given over or transferred . . . to another person, or separated from the Crown."[18] One author describes the English developments in this way:

> All rivers and ports were public, and the right of fishing was common to all men. Any person was at liberty to use the seashore to the highest tide, to build a cottage or retreat on it or to dry his nets on it, so long as he did not interfere with use of the sea or beach by others. Although the banks of a river were subject to private ownership, all persons had the right to bring vessels to the river, to fasten to them by ropes and to place any part of their cargo there.[19]

2. *American Applications*

Applications of public trust considerations in America have been made since the early days of the colonies. Massachusetts' "great pond" ordinance[20] of 1641 guaranteed rights to the fish and fowl in ponds of ten acres or more, as well as access through private property to enjoy that right. In enacting the Northwest Ordinance of 1787, Congress guaranteed "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free. . . ."[21] The New Jersey Supreme Court in 1821 recognized that the states had succeeded to the rights of the British Crown in publicly important waters and their underlying beds. The court further indicated:

> [T]he sovereign power itself . . . cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right.[22]

This same principle was recognized by the U.S. Supreme Court in the 1842 case of *Martin v. Waddell*.[23] It involved a dispute over use of an oyster fishery located in the tidelands of New Jersey, one of the 13 original states. The Supreme Court ruled that ownership of the land underlying tidal waters had been an attribute of English sovereignty and that

> when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surren-

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18. 1 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 16-17 (S. Thorne trans. 1980).

19. Stevens, *supra* note 14, at 197.

20. Massachusetts Bay Colony Ordinance, Body of Liberties (1641-1647), *quoted in* Slater v. Gunn, 170 Mass. 509, 49 N.E. 1017 (1898). A contemporary version of the ordinance is codified at MASS. ANN. LAWS ch 131, § 45 (Michie Law. Co-op 1981).

21. Ch. 8, 1 Stat. 50 (1789).

22. Arnold v. Mundy, 6 N.J.L. 1, 78 (1821).

23. 41 U.S. (16 Pet.) 367 (1842).

dered by the constitution to the general government.[24]

Thus, when the colonies became independent, they succeeded to ownership of the lands under tidal waters. In a dispute reaching the Supreme Court three years later, the question arose whether such tidal land ownership extended to states not numbering among the original 13 colonies. In *Pollard's Lessee v. Hagan*,[25] the Court ruled that states other than the original 13 entered the Union on an "equal footing" with the original colonies. Thus, these states, too, succeeded to ownership of the lands underlying navigable waters and, with that ownership, succeeded to sovereign control of those lands.

The most important U.S. Supreme Court statement of a state's obligation under the public trust doctrine is found in *Illinois Central Railroad v. Illinois*.[26] In 1869, the Illinois legislature granted to the Illinois Central Railroad a tract of 1,000 acres of tidal and submerged land, representing virtually all of Chicago's Lake Michigan waterfront. The railroad was only limited in that it could not obstruct the harbor or impair the public's right of navigation. Also, the legislature retained the right to regulate wharfage fees when docks were built.

Rethinking the transaction, the legislature later rescinded the grant; and the legality of the rescission (with no more than incidental compensation) was upheld by the U.S. Supreme Court in 1892. The Court declared that one legislature may neither "give away nor sell the discretion of its successor" to "exercise the powers of the State"[27] in the execution of the trust, and that legislation "which may be needed one day for the harbor may be different from the legislation that may be required at another day."[28] The Court indicated that "[s]uch abdication [of state control] is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public."[29] The Court did recognize, however, that some parcels on the waterfront could be granted free of the public trust so long as they furthered trust purposes.[30]

Applications of public trust considerations have been made in many states. In Massachusetts, litigation resulted in the invalidation of excessive delegations of authority to a private company to develop and operate a state park and ski area.[31] In Wisconsin, a ruling invalidated legislation which

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24. *Id.* at 410.
25. 44 U.S. (3 How.) 212 (1845).
26. 146 U.S. 387 (1892).
27. *Id.* at 460.
28. *Id.*
29. *Id.* at 453.
30. *Id.*
31. Gould v. Greylock Reservation Comm'n, 350 Mass. 410, 215 N.E.2d 114 (1966).

had authorized a private developer to drain a lake.[32] Another Wisconsin decision prevented a local government from using a fishing stream for electric power generation.[33] A Pennsylvania court has ruled that, where destruction of a public resource is justified because of an overriding public purpose, there should be reasonable efforts of mitigation.[34] In North Dakota, the supreme court prevented the issuance of water appropriation permits for coal generation facilities in the absence of a comprehensive water use plan taking into account instream uses such as navigation, commerce, and fishing.[35] A recent New Jersey Supreme Court decision recognized in some instances the public's ancillary rights of both reasonable access to and use of privately owned portions of beach areas to enjoy tidelands.[36] In a 1983 decision noted above, the Idaho Supreme Court recognized the public trust doctrine, but upheld the lease of an area of a navigable lakebed by the state lands department for the construction of a private docking facility because a fee interest was not being conveyed, and the facility would serve recreational interests.[37]

### 3. Mono Lake *Litigation*

While the public trust doctrine has been recently applied in other states, the California Supreme Court's decision in *National Audubon Society v. Superior Court (Mono Lake)*[38] is the most sweeping declaration of public trust considerations. Referred by the federal district court to the state courts for resolution of a state law issue,[39] the case (decided in February 1983[40] and slightly modified in April 1983[41]) signals an important integration of the public trust doctrine with the prior appropriation doctrine.

The facts of *Mono Lake* are the water history of Los Angeles itself.[42] In 1913, Los Angeles completed its first aqueduct from the Owens Valley north of the city and eventually dried up Owens Lake. In 1933, the city

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32. Priewe v. Wisconsin State Land & Improvement Co., 93 Wis. 534, 67 N.W. 918 (1896).

33. Muench v. Public Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514, *aff'd on reh.*, 261 Wis. 515, 55 N.W.2d 40 (1952).

34. Payne v. Kassab, 11 Pa. Commw. Ct. 14, 312 A.2d 86 (1973), *aff'd*, 468 Pa. 226, 361 A.2d 263 (1976).

35. United Plainsmen Ass'n v. North Dakota State Water Conserv. Comm'n, 247 N.W.2d 457 (N.D. 1976).

36. Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 471 A.2d 355 (1984).

37. Kootenai Envtl. Alliance v. State Bd. of Land Comm'rs, 105 Idaho 622, 671 P.2d 1085 (1983). *See supra* note 6 and accompanying text.

38. 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, *cert. denied*, 104 S. Ct. 413 (1983).

39. *Id.* at 432, 658 P.2d at 717, 189 Cal. Rptr. at 353-54.

40. *Id.* at 419, 658 P.2d at 709, 189 Cal. Rptr. at 346.

41. *Id.*

42. *See, e.g.*, KAHRL, WATER AND POWER (1982).

applied for and in 1940 received a state permit to divert more distant unappropriated waters in four of the five tributary streams serving Mono Lake, lying east of Yosemite. The state water management agency apparently knew environmental damage would occur from the granting of the water permit, but the agency believed that it had no authority to prevent or minimize that damage. For the next 20 years, however, Los Angeles made little use of these waters.[43]

In the early 1960's, the state warned Los Angeles that its Mono Lake right would have to be put to use or it would be lost. By 1970, Los Angeles completed a second aqueduct, enabling it to take its full Mono Lake entitlement. The result was that, over the next ten years, the surface of the lake diminished by about 30 percent and the surface level dropped approximately 40 feet. The brine shrimp of the lake, upon which numerous bird species depend, became threatened by increased salinity. Many birds, including a large breeding colony of California gulls, lost safe habitat because a once-protected island became connected with the main shore. Air quality deteriorated as alkaline flats became exposed to the wind.[44] The pace of this environmental degradation, however, has slowed in the last few years due to increased precipitation. In 1979, the National Audubon Society and other plaintiffs filed an action in California state court to enjoin the city from diversion of the tributaries on the ground that the diversions were in conflict with the public trust doctrine's protection of the shore, bed and waters of Mono Lake.

In its February 1983 decision, the California Supreme Court held that the public trust doctrine applies to protect the navigable waters of Mono Lake from harm caused by diversion of non-navigable tributaries.[45] The court indicated that the doctrine protects evolving public needs for ecological preservation, open space maintenance, and aesthetics, as well as the traditional concerns of navigation, commerce, and fishing. The state, as public trustee, has a *continuing* duty to protect the people's common heritage of streams and lakes through continuing administration of the trust.[46] The courts of the state have concurrent jurisdiction with administrative agencies to exercise this duty, although the judiciary should defer to agency expertise whenever possible.[47] The decision may also stand for the proposition that this continuing obligation would allow the state to revoke existing water rights without compensation to the holder.[48]

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43. *Id.* at 430-36.

44. As alleged in the original complaint, National Audubon Soc. v. Department of Water & Power, No. Civ S-80 127 LKK (E.D. Cal. filed Nov. 16, 1981).

45. 33 Cal. 3d at 437, 658 P.2d at 721, 189 Cal. Rptr. at 357.

46. *Id.* at 440, 658 P.2d at 723, 189 Cal. Rptr. at 360.

47. *Id.* at 426, 658 P.2d at 713, 189 Cal. Rptr. at 349-50.

48. *See, e.g.*, Rossmann, *Public Trust in Appropriated Waters: California Supreme Court*

Read broadly, the decision indicates that water rights under California's appropriation system cannot be acquired independently of the public trust. Water rights are never vested; they can and should be reconsidered on the basis of public interest which includes economic uses such as irrigation and municipal supply as well as intangible and recreation values.

The actual litigation, however, is far from over. Currently the case continues before the U.S. District Court in Sacramento where Judge Lawrence Karlton recently ruled that plaintiff's public trust claims, being based on state law, will again be remanded to state court for resolution.[49]

## B. *Components of the Doctrine*

### 1. *Legal Basis*

The basis of the public trust doctrine is not clearly common, constitutional, or statutory law. The common law origins of the doctrine have been previously reviewed.[50] In addition, there are many examples of western states giving constitutional recognition to public rights in waters. For instance, several states provide that water is the "property" of the people.[51] Other state constitutions provide that water "belongs to" the people.[52] A third group affirms that a water use is a "public use" subject to state control and regulation.[53]

Arguably, these provisions incorporate public trust concerns, and they have provided the basis for statutory provisions requiring state water agencies to consider environmental values in water permit applications and to retain jurisdiction over the permits. For instance, the California Water Resources Control Board is required to consider recreational, aesthetic, fish and wildlife, and other environmental values in reviewing permit applications,[54] and the board must specifically find that the proposed use is consistent with the public interest in view of all competing needs.[55] Similarly, for the last two years, Montana has applied "public interest

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*Decides Mono Lake Case*, WNRL COMMENTARY 13 (Spring 1983).

49. In a recent decision on motions for summary judgment, Judge Karlton has ruled that: (1) plaintiffs state a federal common law nuisance action in alleging interstate air pollution from the alkaline flats exposed as a result of Los Angeles' water diversions; (2) the Clean Water Act, 33 U.S.C. § 1251-1376 (1982), preempts plaintiff's federal common law action based on damage to the lake's biota brought about by increased salinity; and (3) plaintiff's public trust claims, being based on state law, will again be remanded to state court for resolution. National Audubon Soc. v. Department of Water & Power, No. CIV S-80 127 LKK (E.D. Cal. filed Nov. 11, 1981).

50. *See supra* notes 14-19 and accompanying text.

51. *E.g.*, California, Colorado, and South Dakota.

52. *E.g.*, Arizona, Nevada, New Mexico, and Oregon.

53. *E.g.*, Idaho, Montana, North Dakota, Texas, and Wyoming.

54. CAL. WATER CODE § 1243 (West Supp. 1985).

55. *Id.*

criteria" to new permit applications on a temporary basis.[56] In addition to being justified by the public trust doctrine, the use of such provisions has been upheld as a valid exercise of state police power—even when applied to modify existing water rights.[57]

The public trust doctrine apparently is not displaced by such constitutional and statutory affirmations, and it appears that the doctrine exists independently of such provisions. As one author has indicated, "the public trust doctrine appears to be an expression of the inherent prerogative of the sovereign to restrict or reallocate property rights to protect the integrity of the 'special' or 'common heritage' natural resource."[58] With reference to the *Mono Lake* decision, another commentator stated:

> The [California Supreme] Court could have held that the water rights laws require consideration of environmental values. Instead, the Court held that this obligation is imposed by the public trust doctrine, and that the water right laws are essentially irrelevant for this purpose. But if the people have adopted a constitutional water rights system, it would seem that the state's responsibilities for water allocations must be measured by the water rights system itself, not by the common law principles of the public trust doctrine. The usual rule is that constitutional law displaces the common law, not the other way around.[59]

Thus, there is some indication that the public trust doctrine is not simply common, constitutional, or statutory law.[60] Early American cases imply that state authority over certain publicly important waters and adjacent lands is an integral element of sovereignty. Some authorities justify the doctrine on the basis of the universal and elemental importance of water.[61] Still other authorities indicate that the public trust doctrine is fundamental to the Anglo-American legal system: "to protect . . . public expectations [as to important natural resources] against destabilizing changes, just as we protect conventional private property from such changes."[62] These interpretations indicate that the doctrine may be extra-

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56. MONT. CODE ANN. § 85-2-311 (1983). These criteria require an examination of potential effects of the proposed use on present and future water supply, instream flows, water quality, saline seep, and other environmental values. These considerations were modified and made permanent by the 1985 legislature. 1985 Mont. Laws ch. 573. *See infra* notes 225-39 and accompanying text.

57. In re Guadalupe River Basin, 642 S.W.2d 438 (Tex. 1982).

58. Dunning, *The Mono Lake Diversion: Protecting a Common Heritage Resource from Death by Diversion*, 13 ENVTL. L. REV. 10144, 10147 (May 1984).

59. Presentation of Roderick E. Walston, Cal. Deputy Attorney Gen., before Am. Bar Ass'n Natural Resources Section (Jan. 8, 1985).

60. Dunning, *supra* note 58, at 10146: The doctrine "expresses an inherent aspect of sovereignty, and thus is in some ways beyond modification by the legislature."

61. *See, e.g.*, Stevens, *supra* note 14, at 231.

62. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. D. L. REV. 185, 188 (1980).

constitutional. In that case, neither a state constitution or statute could immunize the purported absolute conveyance of publicly important waters or other "common heritage" natural resources from subsequent judicial reexamination.[63]

2. *Navigability Requirement*

The public trust doctrine has been linked from its origin to navigable and tidal waters. That linkage, complicated by the use of the navigability concept for other purposes, has resulted in a confusing set of principles and sometimes has masked the underlying public policy need. Even though the doctrine seems to be moving beyond the need for strict adherence to a navigability requirement, this original linkage should be understood.

The concept of "navigability" with reference to a waterway generally is used for one of three purposes:

(1) to determine title to the streambed;

(2) to justify the exercise of federal authority over the waterway; or

(3) to determine, through application of the public trust and similar concepts, the rights of the public to use the surface of the water, the streambed, and the land adjacent to the waterway for recreational and other public purposes.

In the previously discussed case of *Martin v. Waddell*, the U.S. Supreme Court determined that the 13 original states, rather than the federal government, succeeded to the British Crown's title to tidelands and the foreshore. In *Pollard's Lessee v. Hagan*,[64] the Court held that each new state also took title to the streambeds of navigable waters. Thus, with the exception of any pre-statehood land grants specifically passing title to the grantee (an interpretation which is disfavored by the courts), states hold title to the lands beneath the navigable waters.

The standard for determining navigability was set forth in the 1870 U.S. Supreme Court decision, *The Daniel Ball*[65] as being waters "used or . . . susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted. . . ."[66] The characteristics of a waterway at the time of statehood are determinative in a test for title, whether or not it was used for commerce at the time.

"Navigability" is also used to determine the scope of the congressional commerce power over the nation's waters.[67] Congress' power under the

63. *See infra* notes 73 to 106 and accompanying text.
64. 44 U.S. (3 How.) 212 (1845). *See supra* note 25 and accompanying text.
65. 77 U.S. (10 Wall.) 557 (1870).
66. *Id.* at 563.
67. U.S. CONST. art 1, § 8.

Commerce Clause has been broadly construed; and, in certain cases, the waterway need only "have an 'effect' upon interstate commerce."[68] Thus, the non-navigable tributaries of waters supporting interstate commerce may fall under federal control. Navigability for commerce may arise after statehood; and waterways may be made "susceptible" to navigation with reasonable improvements.

Finally, navigability is also used to determine recreational and other uses.[69] Unlike the previous two applications, "navigability" for determining these uses is a state law question. Some states have used a "pleasure boat" test.[70] Others, like Montana,[71] have passed specific "angling" statutes to define public recreational rights to the states' waters. Recently the Montana Supreme Court has held: "The capability of use of the waters for recreational purposes determines their availability for recreational use by the public."[72] This holding avoids defining navigability and it provides little guidance on what recreational uses are permissible.

While the public trust doctrine has most often been linked from its origins to navigable and tidal waters, recent holdings such as *Mono Lake* seem to indicate that navigability is simply an indicator for a more important and basic concern: Is the resource vested with major public importance? If so, the courts appear ready to strain to apply public trust protection even though the linkage to navigability may be tenuous. In *Mono Lake*, the court applied the doctrine because diversions from non-navigable tributaries affected the navigable lake. Thus, it would not be surprising to see the navigability requirement dropped entirely by the courts in favor of a more accurate and focused examination of the extent of the public's interest in the continued use of a resource.

### 3. *Legislative Authority*

An important aspect of the public trust doctrine, its apparent precedence over statutory law,[73] leads to the question of legislative authority within the parameters of the doctrine.

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68. Natural Resources Defense Council v. Callaway, 392 F. Supp. 685 (D. D.C. 1975); *see also* Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters*, 5 LAND & WATER L. REV. 391, 427 (1970).

69. 1 WATERS AND WATER RIGHTS § 37.4(A) (Clark ed. 1967); *see generally*, Comment, *Recreational Use of Montana's Waterways: An Analysis of Public Rights*, 3 PUBLIC LAND L. REV. 133 (1982); Stone, *The Background on Recreational Use of Montana Water*, 32 MONT. L. REV. 1 (1971).

70. Lamprey v. State (Metcalf), 52 Minn. 181, 53 N.W. 1139 (1893).

71. MONT. CODE ANN. § 87-2-305 (1983).

72. Montana Coalition for Stream Access v. Curran, ___ Mont. ___, 682 P.2d 163, 170 (May 15, 1984). *See infra* notes 167-91 and accompanying text.

73. *See supra* notes 58-63 and accompanying text.

The public trust doctrine encompasses legislative authority to make decisions necessary to the wise management of the trust. There are basic elements of the doctrine to which the states and their legislatures must adhere, but the legislatures do retain substantial authority within the doctrine. The legislature has an affirmative duty to preserve the trust.[74] What the legislature cannot do is relinquish governmental control over the trust;[75] it may not be "placed entirely beyond the direction and control of the state."[76] Regulation of the trust for the benefit of the citizens is an aspect of governmental sovereignty that the legislature is not empowered to annul.[77]

The public trust doctrine is not static.[78] Enforcement of the trust requires a balancing and accommodation of sometimes conflicting public interests. The pressures of a changing world have resulted in decisions altering and expanding the areas and uses protected by the trust,[79] but the outer limits of the doctrine remain unchanged.[80] The people's common right in the trust may not be absolutely conveyed free of the trust to a private entity except when the conveyance itself serves a public purpose or when the conveyance does not impair the property remaining in trust. Legislative action that appears to impair or extinguish the trust will be

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74. Milwaukee v. Wisconsin, 193 Wis. 423, 214 N.W. 820 (1927). *See also* Ashwaubenon v. Public Serv. Comm'n, 22 Wis. 2d 38, 125 N.W.2d 647 (1963).

75. Exceptions to this general rule are: a conveyance of public trust property for a public trust purpose or a conveyance of public trust property that can be made without damaging the remaining trust property. Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 455-56 (1892), Appleby v. City of New York, 271 U.S. 364, 393-396 (1926).

76. Illinois Cent. R.R., 146 U.S. at 454.

77. Arnold v. Mundy, 6 N.J. L.1 (1821). Case law indicates, however, that there may be instances in which a conveyance for a purely private purpose may be authorized. In Opinion of the Justices, the court stated, "Our conclusion is simply that the transfer or relinquishment of all the Commonwealth's and the public's rights in tidelands is not constitutionally beyond the power of the Legislature . . . . although a gross or egregious disregard of the public interest would not survive constitutional challenge." 424 N.E.2d 1092, 1099 (Mass. 1981) (footnote omitted). It is not well settled what conveyances of trust property are egregious or would result "in such substantial impairment of the public's interest as would be beyond the power of the legislature to authorize." Morse v. Division of State Lands, 285 Or. 197, 203, 590 P.2d 709, 712 (1979). In fact, the New Hampshire Supreme Court recently ruled in Appeal of Committee, 466 A.2d 1308 (N.H. 1983), that there are no such conveyances. The question may be a matter for legislative determination, but it is beyond the scope of an overview of legislative authority in this area.

78. Neptune City v. Avon-By-The-Sea, 61 N.J. 296, 294 A.2d 47 (1972).

79. *See* National Audubon Soc. v. Superior Court (*Mono Lake*), 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, *cert denied*, 104 S.Ct. 413 (1983), Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); *but see* Bott v. Comm'n of Natural Resources, 415 Mich. 45, 327 N.W.2d 838 (1982).

80. "Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." *Mono Lake*, 33 Cal. 3d at 441, 658 P.2d at 724, 189 Cal. Rptr. at 360-61.

carefully examined by a reviewing court.[81]

a. Contours of Legislative Activity

In formulating its approach to the implementation of the public trust doctrine in Montana, the legislature may look at the experiences of other jurisdictions that have a longer history of explicit recognition of the doctrine. Not surprisingly, a number of the cases review a particular legislative action that has been challenged or questioned as being in violation of the public trust doctrine. Grounding their decisions on *Illinois Central Railroad v. Illinois*,[82] courts regularly apply, among others, three concepts: (1) legislative enactments affecting the public trust must be for a public purpose; (2) no single interest in the use of the trust is absolute; and (3) legislative enactments affecting the trust will be carefully scrutinized.

(i) Public purpose

It is generally agreed that legislative enactments affecting or impairing the public trust must be for a public purpose.[83] Legislatures have been given considerable latitude in their determinations of the existence of or manner of implementation of a public purpose even though these determinations are subject to careful scrutiny by the courts. Property in the public trust cannot be absolutely conveyed for a private purpose.[84] Yet, conveyances that benefit private individuals have been upheld when a related public benefit is found.[85] In California, legislation authorizing the conveyance of tidelands to private parties without consideration of the public trust

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81. *See infra* notes 99-105 and accompanying text.

82. 146 U.S. 387 (1892). *See supra* notes 26-30 and accompanying text.

83. 1 WATERS AND WATER RIGHTS § 37.4(A) (Clark ed. 1967). Traditionally, it has been required that public trust property be held for particular water-related purposes, i.e., navigation, commerce and fishing but the permissible uses of trust property have been expanded in many instances. *See generally* Stevens, *supra* note 14, at 201-223. *See supra* notes 15-16 and accompanying text.

84. *See* People ex rel. Scott v. Chicago Park Dist., 66 Ill.2d 65, 360 N.E.2d 773 (1976) (invalidated a grant to a private steel company of submerged lands beneath Lake Michigan).

85. *See* People ex rel. Moloney v. Kirk, 162 Ill. 138, 45 N.E. 830 (1897) (upheld filling in portion of Lake Michigan for extension of Chicago's Lake Shore Drive and sale of reclaimed land between highway and shore to defray costs of highway since road provided direct public benefit and the project caused only limited impairment of navigation and fishing); Milwaukee v. State, 193 Wis. 423, 214 N.W. 820 (1927) (state's authorization to city to convey a portion of bed of navigable lake to private steel company upheld when conveyance was part of city plan to improve harbor); New Jersey Sports & Exposition Auth. v. McCrane, 61 N.J. 1, 292 A.2d 545 (1972), *aff'g as mod.* 119 N.J. Super. 457, 292 A.1d 580, 615-622 (1971), *appeal dismissed*, 409 U.S. 943 (1972) (legislative authorization of conveyance of land, including tidelands, for sports complex and racetrack found not in violation of public trust doctrine since conveyance would promote public purpose and proceeds of conveyance would be used for public schools); Opinion of the Justices, 437 A.2d 597 (Me. 1981) (advisory opinion to governor on bill awaiting his signature found release of state ownership of filled submerged and intertidal lands to private adjacent owners valid promotion of public interest in commercial development through clearing up uncertainty of title).

has been construed as a conveyance of the land subject to a public easement which cannot be interfered with by the grantee or his successors in interest.[86]

Similar results have been reached in Massachusetts.[87] In 1979, the Massachusetts Supreme Judicial Court ruled in *Boston Waterfront Development Corp. v. Commonwealth*[88] that a parcel of filled land in the Boston Harbor, situated at the end of a wharf built pursuant to a nineteenth century statutory grant, was owned by the successors in interest of the original grantees "in fee simple, but subject to the condition subsequent that it be used for the public purpose for which it was granted."[89] This case illustrates a problem faced by courts when they must interpret long-standing legislation that has created certain expectations in property owners.

An interesting accommodation of various interests was made by the California Supreme Court in *City of Berkeley v. Superior Court*,[90] a case involving interpretation of very old conveyances of tidelands. The balancing in this case was done by the California Supreme Court, not the California legislature, but it illustrates the demands that may be placed on a legislature. The case involved a dispute over ownership of tidelands on the shore of San Francisco Bay. In the 1870's, the tidelands had been granted to private parties free of the public trust by a state land board under legislative authorization. The supreme court, overruling two earlier cases,[91] ruled that the grants had been made subject to the public trust. The difficulty in the case was whether or not to make the decision retroactive, since some of the tidelands had been filled or improved by their owners. The court ruled that properties that had been filled, whether or not they had been substantially improved, are free of the trust to the extent they are not subject to tidal action. But with respect to lands that had been neither filled nor improved, the court ruled that since they are the lands most suitable for the continued exercise of trust uses and because there is only a remote likelihood that the parcels may be filled, these lands are subject to the trust.

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86. People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913); Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971). *But see* Summa Corp. v. California, 104 S. Ct. 1751 (1984) in which the U.S. Supreme Court ruled that California's failure to assert an interest in tidelands that were the subject of federal patent proceedings after the Mexican-American War barred the state from later asserting a public trust easement over the property.

87. *See* Butler v. Attorney General, 195 Mass. 79, 84, 80 N.E. 688 (1907); Michaelson v. Silver Beach Improvement Ass'n, 342 Mass. 251, 173 N.E.2d 273 (1961); Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 393 N.E.2d 356 (1979).

88. 378 Mass. 629, 393 N.E.2d 356 (1979).

89. *Id.* at 649, 393 N.E.2d at 367 (footnote omitted).

90. 26 Cal. 3d 515, 606 P.2d 361. 162 Cal. Rptr. 327, *cert. denied*, 449 U.S. 840 (1980).

91. Knudson v. Kearney, 171 Cal. 250, 152 P. 541 (1915); Alameda Conserv. Ass'n v. City of Alameda, 264 Cal. App. 2d 284, 70 Cal. Rptr. 264 (1968), *cert. denied*, 394 U.S. 906 (1969).

The court reasoned that the economic loss to the grantees of these parcels was speculative at best and was clearly outweighed by the interests of the public.[92]

(ii) No single purpose

Often, the legislature must also balance competing and sometimes conflicting trust purposes. A 1911 case in Wisconsin addressed this issue. *In re Trempealeau Drainage District*[93] involved the validity of an act authorizing a project to drain 7000 acres of bottomland along the Mississippi River and to alter the course of a river. The court upheld the proposal, finding that the drainage project would alleviate unsanitary conditions in an area of a swamp and marshland and that it would improve navigation by straightening the Trempealeau River. The court recognized that the project would have an adverse effect on fishing and hunting, but held that this negative impact was minimal and had to yield to the greater public interests involved.[94]

Filling in estuarial waters for the purposes of extending an airport runway was held consistent with the public trust doctrine in Oregon, perhaps in part because the land to be filled had supported only "very casual navigation of the recreational kind."[95] The Wisconsin Supreme Court ruled a statute restricting to riparian landowners eligibility for a permit to construct a water ski jump on a navigable lake not violative of the public trust doctrine because a permit could only be granted if the structure would not interfere with navigation or be otherwise detrimental to the public interest.[96]

A related legislative determination made in the area of conflicting purposes is whether the use of public trust property should be altered. Here too, a balancing must be made of the existing public use against the new use, which must be for a public purpose.[97] In Massachusetts, when the type of use for which public land is needed changes over time, very specific

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92. 26 Cal. 3d at 338-39, 606 P.2d at 373-74, 162 Cal. Rptr. at 338-39.

93. 146 Wis. 398, 131 N.W. 838 (1911). *See also* In re Crawford County Levee & Drainage Dist. No. 1, 182 Wis. 404, 196 N.W. 874 (1924).

94. 146 Wis. at 410, 131 N.W. at 841-42.

95. Morse v. Division of State Lands, 285 Or. 197, 200, 590 P.2d 709, 711 (1979). The permit was ruled invalidly issued on other grounds.

96. State v. Bleck, 114 Wis. 2d 454, 338 N.W.2d 492 (1983). *See also* Wisconsin v. Village of Lake Delton, 93 Wis. 2d 78, 286 N.W.2d 622 (Wis. Ct. App. 1979).

97. *See* Madison v. State, 1 Wis. 2d 252, 83 N.W.2d 674 (1957) (city allowed to build auditorium and civic center on previously filled portion of navigable lake); Paepke v. Public Bldg. Comm'n, 46 Ill. 2d 330, 263 N.E.2d 11 (1970) (city allowed to use portion of land dedicated to park purpose for use for construction of school); Wade v. Kramer, 121 Ill. 3d 377, 459 N.E.2d 1025 (1984) (was proper for State Department of Transportation, under legislative authorization, to build highway through county conservation area).

legislative approval of the change is required.[98]

(iii) Careful judicial scrutiny

Courts have seriously reviewed the legislative enactments affecting public trust property. Recognizing that it is in the domain of the legislature to determine whether or not a particular action serves a public purpose and that a legislative decision in this area is entitled to deference, the courts have ruled that the decision is not beyond judicial scrutiny.[99] Thus, in *Priewe v. Wisconsin State Land and Improvement Co.*, the Wisconsin Supreme Court invalidated an act authorizing drainage of a navigable lake even though the act was purportedly for a public purpose, stating "the legislature had no power, under the guise of legislating for the public health, to authorize the destruction of the lake . . . for private purposes and for the sole benefit of private parties."[100] The Illinois Supreme Court has stated that, while ordinarily it is for the legislature to decide what is a public purpose, the "self-serving recitation of a public purpose within a legislative enactment is not conclusive of the existence of such purpose."[101]

As previously stated, in California, conveyances of trust property to private individuals not made for trust purposes do not pass title to the property free of the trust but are instead subject to a public easement. To be effective, the legislative intention to abandon such public uses must be clearly expressed in the statute; and if any interpretation of the statute is reasonably possible that would not terminate a trust use, the courts will give it that interpretation.[102]

According to Professor Joseph Sax of the University of Michigan, this careful scrutiny by courts can have the beneficial effect of opening up the legislative decisionmaking process to the people whose resources are affected by those decisions.[103]

Legislative authority in the public trust area can be delegated to an administrative agency,[104] but any action taken by an administrative agency is subject to even closer scrutiny than is legislative action.[105]

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98. *See* Gould v. Greylock Reservation Comm'n, 350 Mass 410, 215 N.E.2d 114 (1966); Robbins v. Department of Pub. Works, 355 Mass. 328, 330, 244 N.E.2d 577, 579 (1969).

99. Opinion of Justices, 383 Mass. 895, 424 N.E.2d 1092 (1981). *See also* Blakely v. Gorin, 365 Mass 590, 313 N.E.2d 903 (1974).

100. 93 Wis. 534, 67 N.W. 918 (1896), *aff'd on rehearing*, 103 Wis. 537, 79 N.W. 780 (1899).

101. People ex rel. City of Salem v. McMackin, 53 Ill.2d 347, 291 N.E.2d 807, 812 (1972).

102. People v. California Fish Co., 166 Cal. 576, 138 P. 79, 88 (1913).

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

104. Kootenai Envt'l Alliance v. State Bd. of Land Comm'rs, 105 Idaho 622, 671 P.2d 1085 (1983).

105. *Id.* at 628, 671 P.2d at 1091.

### b. Future Legislative Decisionmaking

Of the three areas emphasized in this section, perhaps the second, (no public trust purpose is absolute) is the most demanding for legislators. The first area, the public purpose requirement, is not so complex, and the third, the review of the judiciary, is but a check. The difficult task for the future is weighing the competing interests of individuals and groups against the backdrop of the public trust doctrine.[106]

The public trust doctrine has been applied to various situations and government decisions. The cases indicate that beyond the basic prohibitions of unrestrained alienation of public trust property or total disregard of public trust principles, the public trust doctrine is a vehicle for considering the public interest in decisions affecting property held for public use. Although the legislature must consider public trust principles, the weight given to public values and interests is largely reflective of societal values and is a policy determination within the proper domain of the legislature.

## III. CONSTITUTIONAL BASIS FOR PUBLIC RIGHTS IN MONTANA'S WATERS

The adoption in 1972 of a new Montana constitution provided an opportunity for the state's citizens to re-examine their relationship to their natural resources and the environment. Discussions of public rights and the public trust doctrine occupied part of the review. While specific incorporation of the public trust doctrine was ultimately rejected by the constitutional convention delegates, an increased public interest was recognized generally with reference to the environment[107] and specifically with reference to water.[108] This section reviews the convention's consideration of the public trust doctrine as well as the water policy provisions which were ultimately approved by the voters and which provide the constitutional basis for public rights in Montana's waters.

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106. For an interesting discussion of issues involved in application of the public trust doctrine in an appropriative water rights setting, *see* Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C. D. L. REV. 233 (1980).

107. MONT. CONST. art. IX, § 1 provides:

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

108. *Id.* at art. IX, § 3.

### A. *Public Trust Debate*

During the 1971-72 Montana Constitutional Convention, the Natural Resources and Agriculture Committee considered two public trust proposals for the constitutional article on the environment. Proposal 12 declared the "environmental life support system upon which the health and welfare of the people . . . [depend]" to be a public trust for present and future generations.[109] Proposal 162 declared a public trust for "all aspects of environmental quality including, but not limited to, air, water, land, wildlife, minerals, forests, and open space" for the benefit of the citizens.[110] The committee rejected both proposals because:

> The majority felt it unnecessary to have the state hold in trust all land, including of course privately owned real property, for the benefit of all the people of the state in order to accomplish the protection of our environment. In addition the majority felt it unwise to experiment by incorporating into the Constitution a "Public Trust" which was not clearly defined to the committee, which is not contained in the Constitution of any other state, and which exists in its infancy in only two states by legislation.[111]

The entire convention discussed the public trust doctrine in considering a proposed amendment to the report of the Natural Resources and Agriculture Committee. The amendment read:

> The State of Montana shall maintain and enhance a clean and healthful environment as a public trust. The sole beneficiary of the trust shall be the citizens of Montana, who shall have the duty to maintain and enhance the trust, and the right to protect and enforce it by appropriate legal proceedings against the trustees.[112]

A long debate occurred before the amendment was finally rejected by a vote of 58-34.[113] Supporters of the amendment urged that its adoption would make the best statement about the convention's seriousness in addressing environmental concerns. Utilizing the public trust doctrine, citizens would be able to enforce the trust in suits against the state, and thereby assist government agencies' work toward a clean and healthful environment.[114] Delegates speaking in opposition to the amendment stressed that:

(1) the public trust concept would extend to all lands in

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109. I Transcript, MONTANA CONSTITUTIONAL CONVENTION, 96 (1971-72) [hereinafter cited as MONT. CONST. CONV.]

110. 1 MONT. CONST. CONV. 308-09.

111. 2 MONT. CONST. CONV. 555.

112. The text of the amendment, introduced by Delegate Jerome J. Cate of Yellowstone County, appears at 5 MONT. CONST. CONV. 1214.

113. *Id.* at 1228.

114. *Id.* at 1215, 1217-18, 1221.

Montana and thus there would be an infringement of private property rights;[115]

(2) while a constitutional article should address the protection of the environment, flexibility in implementation was needed, and legislative action was preferable to the constitutional adoption of the public trust doctrine;[116]

(3) including a constitutional provision on the public trust doctrine would mean that courts would determine the meaning and application of the doctrine, and the legislature would be unable to alter the judiciary's interpretation;[117]

(4) the public trust doctrine was not clearly understood; it was much maligned, and it would be better to state the convention's purposes and policy regarding the environment in different words.[118]

The convention did not consider applying the public trust doctrine specifically to the waters of the state. In at least two instances, however, in discussing the application of the doctrine in the broader context of environmental protection, delegates suggested that they were aware that the constitutional provision on water proposed to the convention would place the waters of the state in public trust.[119]

### B. *Water Policy Provisions*

The importance of the appropriation system to Montanans is clear from its treatment in Montana's 1889 Constitution. Midway in Article III, the constitution's declaration of rights, section 15 states:

> The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution, or other beneficial use, and the right of way over the lands of others, for all ditches, drains, flumes, canals, and aqueducts, necessarily used in connection therewith, as well as sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use.[120]

When Montana's constitution was rewritten in 1972, the use of the state's water commanded close attention and caused spirited debate. Agreement was readily reached on an initial provision in the water rights section of Article IX, "Environment and Natural Resources," recognizing and confirming all existing rights to the use of any waters for any useful or

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115. *Id.* at 1214, 1216-17.

116. *Id.* at 1223 (part of an extended argument by Geoffrey L. Brazier, delegate from Broadwater, Jefferson, and Lewis and Clark Counties).

117. *Id.* at 1225.

118. *See* the statement of Dorothy Eck, delegate from Gallatin and Park Counties at 5 MONT. CONST. CONV. 1221-22.

119. 5 MONT. CONST. CONV. 1215.

120. MONT. CONST. OF 1889, art. III, § 15.

beneficial purpose.[121]

The water rights section next carried forward the statement on appropriation rights, substantially as it appeared in the 1889 constitution.[122] Convention delegates also accepted the proposal from the Natural Resources and Agriculture Committee that clearly stated the interests of the people of the state in Montana's waters. Crucial to Montana constitutional law governing water rights since 1972 is this declaration in Article IX, section 3, subsection 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 and are subject to appropriation for beneficial uses as provided by law.[123]

The primary underlying rationale for a clear statement of Montana's property rights in water was to strengthen the state's claims in relation to downstream states.[124] It was suggested in debate that it would be sufficient to declare that the water belonged to the state, and an unsuccessful amendment was proposed to delete the phrase, "for the use of its people," and to declare:

> Waters within the boundaries of the State of Montana are declared to be the property of the state and subject to appropriation for beneficial uses as provided by law.[125]

Debate related to recreational rights and to the impact of constitutional language on strengthening Montana's claims to water in litigation with other states or with the federal government. Strong statements in support of the subsection were made by Miles Romney, delegate from Ravalli County, and Ben E. Berg, Jr., delegate from Gallatin and Park Counties. Delegate Romney spoke of stockwatering and recreational interests:

> I'd like to see the stockmen have a right to water their stock, and I'd like to see people who wish to fish and boat use our streams. I think that the water is the water of the people. I don't think you can say that it belongs to the state and doesn't belong to the people. And, my goodness, if the people can't use what belongs to their state, this is a mockery, a travesty. . . .[126]

Delegate Berg also urged that the convention adopt the subsection as proposed by the committee, because it had a great deal to say about the

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121. MONT. CONST. art. IX, § 3(1); 5 MONT. CONST. CONV. 1302-03.

122. MONT. CONST. art. IX, § 3(2); 5 MONT. CONST. CONV. 1303.

123. MONT. CONST. art. IX, § 3(3).

124. *See* the statement of Delegate Charles B. McNeil of Lake County at 5 MONT. CONST. CONV. 1301, 1304.

125. The amendment was proposed by Cedor B. Aronow, delegate from Teton, Glacier, Toole, and Pondera Counties. 5 MONT. CONST. CONV. 1303.

126. 5 MONT. CONST. CONV. 1306.

character of the ownership of water in Montana. He argued that it would be erroneous to state that Montana owns the water without reference to the rights of the people to use the water. He feared that if the constitution merely provided that the state owned the water, the state could negotiate for the sale of the water. The section as proposed was important because if the state were the trustee of water for the use and benefit of the people, it could not enter into negotiations and sale of water without the consent and approval of its beneficiary, the people.[127] Berg emphasized that the phrase, "for the use of its people," reinstated the theory under which water had always been administered in Montana because "water rights are never owned; nobody owns water. All that you ever acquire is the right to the use of the water."[128]

Fear was expressed that if the constitution stated that the water belonged to the people, the people could not be kept from it and they would assume they had access across private lands to reach the waters.[129] Other delegates stressed, however, that access rights across private lands were not implied by the proposed subsection and the convention voted down an amendment related to trespass.[130] When a final vote was taken, there was unanimous agreement on subsection 3 as it originally was proposed by the Natural Resources and Agriculture Committee.[131]

Two committee proposals did not fare as well, and the convention's most prolonged water rights debate was directed to a provision that would have detailed beneficial uses for the state's waters and specified that diversions or developments would not be necessary to acquire a water right. The recommended subsection stated:

> Beneficial uses include, but are not limited to, domestic, municipal, agriculture, stockwatering, industry, recreation, scenic waterways, and habitat for wildlife, and all other uses presently recognized by law, together with future beneficial uses as determined by the legislature or courts of Montana. A diversion or development work is not required for future acquisition of a water right for the foregoing uses. The legislature shall determine the method of establishing those future water rights which do not require a diversion and may designate priorities for those future rights if necessary.[132]

In proposing the subsection, Delegate Charles B. McNeil of Lake

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127. *Id.* at 1308.

128. *Id.*

129. *See* statement of Delegate Aronow at 5 MONT. CONST. CONV. 1304.

130. 5 MONT. CONST. CONV. 1310.

131. *Id.* at 1312.

132. Proposal of the Natural Resources & Agriculture Comm., 2 MONT. CONST. CONV. 552; 5 MONT. CONST. CONV. 1312.

County emphasized that its adoption was in the best interests of the people of the state because it would permit Montana to claim a use for all of its water presently flowing out of the state. He noted that the determination of methods for establishing water rights without a diversion and the designation of priorities for those rights were purposely left to the legislature so that "recreation and the traditional water users can live together for our future water rights."[133]

The debate on the proposal prompted amendments specifying that water rights established without a diversion would be junior and subordinate to traditional appropriations.[134] A strong argument was made that agricultural use of water by diversion must under all circumstances have a superior right to recreation, scenic waterways, and habitat for wildlife.[135] Others warned that adoption of the proposal would halt further irrigation projects and future economic development in Montana.[136] Counter arguments predicted that recreation might be Montana's principal industry in the future.[137] Ultimately, the convention delegates entirely deleted the proposed subsection. Important to their decision were arguments that the provision was statutory in nature, and that specific beneficial uses and priorities were matters best left to the legislature.[138] The same rationale led to the defeat of a proposed subsection stating that priority of appropriation would give the better right.[139]

A final subsection proposed by the Natural Resources and Agriculture Committee stated:

> The Legislature shall provide for the administration, control and regulation of water rights and shall establish a system of centralized records.[140]

Continuity with traditional practices prevailed when convention delegates successfully appended to the subsection language perpetuating the existing system of local records in addition to the system of centralized records.[141]

From an overall perspective, the water rights section of the 1972 Montana Constitution can be viewed as drawing on past experience and pointing to the future. There is protection for existing rights and a

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133. 5 MONT. CONST. CONV. 1312.

134. The amendments were proposed by Archie O. Wilson, delegate from Garfield, Rosebud, McCone, Prairie and Treasure Counties, and by Carl M. Davis, delegate from Madison and Beaverhead Counties. 5 MONT. CONST. CONV. 1313, 1322-23.

135. *See* the statement of Delegate Ben E. Berg, Jr., of Gallatin and Park Counties at 5 MONT. CONST. CONV. 1327.

136. 5 MONT. CONST. CONV. 1314, 1317.

137. *Id.* at 1332.

138. *Id.* at 1334-35, 1339-40, 1342-43.

139. *Id.* at 1346-48.

140. *Id.* at 1349.

141. *Id.* at 1350-51.

restatement of the right of appropriation. There is express authorization for the legislature to regulate and administer water rights. There is a declaration that the waters of the state are the property of the state for the use of its people. In making the declaration, the convention delegates opened the way for judicial interpretation and legislative implementation of new fundamental law relating to water rights.

## IV. Forging Public Rights in Montana's Waters

By the early 1980's, increased applications of the public trust doctrine in other states, coupled with the 1972 constitution, provided the context for Montana to recognize, expand and enforce public rights in waters. Over the last two years, Montana has struggled with the question of public rights in waters in two different circumstances. The first of these, which resulted in judicial recognition of (and legislative response to) the public trust doctrine, involved public access to the streams and lakes of the state for recreational purposes. The second instance concerned the legislature's efforts to incorporate public trust considerations into a substantial restatement of Montana water law. The following sections trace each of these struggles.

### A. *Stream Access*

Montanans' recreational use of the state's waters has dramatically increased in recent years. For instance, recent studies by the Montana Department of Fish, Wildlife and Parks indicate that the Missouri River and its tributaries were fished a total of 1.4 million fishing days in the 1982-83 season; and fishing in other parts of the state equaled that amount. Usage by other recreationists, including canoeists and other "floaters," has significantly increased.[142] Waters of the Yellowstone River have been reserved for instream as well as other uses under the state's water reservation system, and efforts are underway to reserve waters on the mainstem and tributaries of the Missouri.[143] In these and other ways, the people, with support from the state, have exercised more contemporary uses of the waters.

Increased public uses have not been easily accepted in some parts of the state. In particular, conflicts between floaters and adjoining landowners have been intense on two waterways: the Dearborn and the Beaverhead Rivers. Some landowners feared that recreational users would litter the rivers and the banks, trespass on private property, interfere with livestock, and damage fences and other structures. Some landowners believed that

142. Telephone interview with Mont. Dep't Fish, Wildlife & Parks (Mar. 26, 1985).
143. 1985 Mont. Laws ch. 573.

the public had no right to be on streams considered non-navigable.[144] Many recreationists, however, maintained that they were simply exercising rights guaranteed to them under the state constitution: that the waters of the state are the property of the state for the use of its people.[145] These conflicts resulted in the filing of two cases by a group of recreational users, the Montana Coalition for Stream Access.

1. Curran *and* Hildreth: *Trial Court Proceedings*

In the first case, *Montana Coalition for Stream Access v. Curran*,[146] the First Judicial District Court found three statutory grounds for the public access to the Dearborn River claimed by the recreationists: (1) Montana Code Annotated Section 87-2-305, declaring navigable rivers, sloughs and streams to be public waters for the purpose of angling; (2) Section 85-1-112, providing that all rivers and streams which are navigable in fact are navigable; and (3) Section 85-1-111, providing that navigable waters and all streams of sufficient capacity to transport the products of the country are public ways for the purposes of navigation and such transportation. In its summary judgment, the court found that the Dearborn was navigable for recreational purposes and stated that the practical rule should be:

> A Montana stream is navigable and accessible for recreational purposes over so much of its entire course as is navigable by recreation craft at any given time. Over the length of such course, the stream may be utilized between ordinary high water levels by aquatic recreationists without interference from riparian proprietors. Once recreational navigability is established, access is not limited to water craft. The angler may wade between the high water lines, and if there is adequate dry footage below such lines the hiker may walk.[147]

The Dearborn River was also found to be navigable for title purposes according to the federal commercial use test[148] because at the time of statehood, the river had been used for moving logs and railroad ties downstream. Consequently, under well-established doctrine, the bed of the river had belonged to the State of Montana since 1889.[149] In a subsequent

144. Minutes, Joint Interim Subcommittee No. 2 (July 30, 1984).

145. MONT. CONST. art. IX, § 3(3).

146. No. 45148 (1st Dist. Ct. Mont., Dec. 7, 1982).

147. *Id.* at 4.

148. *Id.* at 16.

149. Under federal law, each state acquired title to the bed and banks of navigable streams up to the high water mark upon admission to the Union. *See* discussion at text notes 64 to 72. While under MONT. CODE ANN., § 70-1-202 (1983), state ownership is asserted to all land below the water of a navigable stream, under § 70-16-201, Montana (as a matter of state law) only owns the bed between the low water marks; and the adjacent landowner owns the strip of land between the high and low water

section of the opinion, the district court reemphasized reliance on statutes and declined to find constitutional grounds for recreational access to the Dearborn or other waters of the state.[150] The district court approvingly cited the Montana Supreme Court's 1925 decision in *Herrin v. Sutherland*[151] that "the public have no right to fish in a non-navigable body of water, the bed of which is owned privately,"[152] but having determined navigability on the basis of recreational use, the reach of *Herrin* was sharply limited.

The Fifth Judicial District Court addressed similar issues in *Montana Coalition for Stream Access v. Hildreth.*[153] This case arose from the conflicting views of Hildreth and recreationists as to floating rights on a stretch of the Beaverhead River running through Hildreth's property. After hearing evidence of the extensive use of the Beaverhead for recreational purposes (fishing, floating, hunting) and for contemporary commercial uses (outfitters and trappers), the court found the Beaverhead to be navigable under both a pleasure boat test and a commercial activity test.[154] The court concluded that members of the public have the right to use the waters and banks of the Beaverhead up to the ordinary high water mark, free from interference, and also the right to portage around obstacles in the least intrusive manner.[155]

### 2. *Legislative Responses: 1983-84*

These two decisions, each handed down on December 7, 1982, focused the attention of the 1983 legislature on the recreational use of the state's waters. One reaction to the district court decisions was the introduction of seven bills on the subject.[156] The bills represented a variety of interests and

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marks. *See also* Gibson v. Kelly, 15 Mont. 417, 39 P. 517 (1895).

150. No. 45148 at 16-18 (1st Dist. Ct. Mont.).

151. 74 Mont. 587, 241 P. 328 (1925).

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

153. No. 9604 (5th Dist. Ct. Mont., Dec. 7, 1982).

154. *Id.* at 14-15.

155. *Id.* at 15, 17.

156. (1) H.B. 799, A Bill for an Act Entitled: "AN ACT TRANSFERRING TITLE TO THE BED OF NAVIGABLE STREAMS, BETWEEN LOW-WATER MARKS, TO THE ADJOINING LANDOWNERS; AMENDING SECTIONS 70-1-202 AND 70-16-201, MCA" (Introduced by Neuman).

(2) H.B. 801, A Bill for an Act Entitled: "AN ACT ALLOWING AN OWNER OR LESSEE OF LAND ADJOINING A NAVIGABLE STREAM TO FENCE OR BRIDGE ACROSS THE STREAM; REQUIRING THE OWNER OR LESSEE TO POST AND MAINTAIN ONE OR MORE WARNING SIGNS OR DEVICES" (Introduced by Neuman).

(3) H.B. 877, A Bill for an Act Entitled: "AN ACT TO REQUIRE THAT DECALS BE DISPLAYED ON CRAFT FLOATING ON STREAMS AND TO PROVIDE FOR USE OF DECAL FEES COLLECTED FOR STREAM MANAGEMENT ACTIVITIES; AND PROVIDING A DELAYED EFFECTIVE DATE" (Introduced by Ream and others).

(4) H.B. 888, A Bill for an Act Entitled: "AN ACT TRANSFERRING TO THE ADJOINING

covered a wide range of issues related to stream access. For example, House Bill (HB) 799 would have conveyed title to the beds of navigable streams to the adjacent landowners. HB 877 would have required acquisition of decals by recreational boat owners with the revenues from decal sales earmarked to enhance recreational activities and to alleviate their impact on waterways.

One of these seven bills, HB 888, introduced well after the opening of the session, was characterized as a compromise and was one of only two stream access[157] bills to pass one of the houses. HB 888 would have permitted recreational use of streams floatable by small craft, limited the liability of adjacent landowners for injuries to floaters, permitted limited portaging around obstructions on floatable streams; and established that a prescriptive easement for use of waters may not be acquired by recreational use. But HB 888 was not successful. It died in the Senate Agriculture Committee. The minutes of the meetings at which HB 888 was considered and then tabled[158] do not indicate precisely why the bill failed. It may have failed because some of those opposed to an expansion of public recreational use rights were able to persuade committee members that the district court decisions would be overturned or restricted by the Montana Supreme Court.[159]

In the aftermath of the defeat of the compromise bill, the 1983 legislature passed House Joint Resolution (HJR) No. 36,[160] authorizing an interim study of recreational stream access and related issues. In June

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LANDOWNERS TITLE TO THE BED OF A NAVIGABLE STREAM BETWEEN THE LOW WATERMARKS; ALLOWING PUBLIC USE OF NAVIGABLE STREAMS BY CERTAIN CRAFT; LIMITING THE LIABILITY OF CERTAIN LANDOWNERS; MAKING USERS OF CERTAIN LAND LIABLE FOR DAMAGES; PROVIDING THAT A PRESCRIPTIVE EASEMENT CANNOT BE ACQUIRED BY RECREATIONAL USE WHEN PERMISSION HAS BEEN GRANTED; AMENDING SECTIONS 70-1-202, 70-16-201, 70-19-405, AND 85-1-112, MCA" (Introduced by Marks and others).

(5) S.B. 347, A Bill for an Act Entitled: "AN ACT PROVIDING THAT A PRESCRIPTIVE EASEMENT CANNOT BE ACQUIRED BY RECREATIONAL USE; AMENDING SECTION 70-19-405, MCA." (Introduced by Galt and others).

(6) S.B. 358, A Bill for an Act Entitled: "AN ACT TO AMEND THE DEFINITION OF "NAVIGABLE STREAM"; AMENDING SECTION 85-1-112, MCA." (Introduced by Galt and others).

(7) S.B. 357, A Bill for an Act Entitled : "AN ACT ESTABLISHING A RIVER LITTER CLEAN-UP PROGRAM IN THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS; REQUIRING RIVER USERS TO BE LICENSED; SETTING FEES; AND PROVIDING PENALTIES." (Introduced by J. Jacobson and others).

157. The other was S.B. 347.

158. Minutes of the Senate Agriculture Comm., Mar. 11, 1983; Mar. 14, 1983.

159. Conversation with Representative Robert L. Marks, sponsor of H.B. 888, Feb. 26, 1985.

160. H.J. Res. 36, "A JOINT RESOLUTION OF THE SENATE AND HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING AN INTERIM STUDY TO IDENTIFY AND PROVIDE FOR PRESERVATION OF THE RIGHTS OF LANDOWNERS ADJACENT TO PUBLIC LAND AND WATERWAYS AND TO IDENTIFY AND PROVIDE FOR RIGHTS OF THE PUBLIC TO ACCESS AND USE PUBLIC LAND AND WATERWAYS; REQUIRING A REPORT OF THE FINDINGS OF THE STUDY TO THE LEGISLATURE" (Introduced by Keyser and others).

1983, the Montana Legislative Council assigned the study to Joint Interim Subcommittee No. 2.[161]

The subcommittee met five times during the interim.[162] At its first meeting in August 1983, the subcommittee adopted a study plan to organize its work.[163] In the next two meetings, the subcommittee devoted a great deal of time to exploring the concept of "navigability" and its implications for the public use of waterways. In January 1984, the subcommittee attended oral arguments before the Montana Supreme Court in the *Curran* case. A public hearing took up most of the subcommittee's third meeting in March 1984, during which the subcommittee received testimony from interested persons for nearly eight hours. Much of the testimony indicated a willingness on the part of representatives of many different interests to work toward a common solution.[164] After public testimony, the subcommittee, with encouragement from the audience, recommended that interested groups and individuals organize on the local level to attempt to identify the floatable and nonfloatable waterways in their area. The soil conservation districts agreed to help organize and facilitate these meetings.[165] Before any of these meetings were held, however, the supreme court issued its *Curran* and *Hildreth* decisions.[166] The decisions burst the bubble of hope for cooperation and compromise that was carrying forward the idea for local public meetings, and they were never held.

### 3. *Montana Supreme Court Decisions*

On appeal, the Montana Supreme Court affirmed the results of the lower court decisions in *Curran* and *Hildreth* but departed significantly

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161. A report of the findings of Joint Interim Subcomm. No. 2, entitled "Recreational Use of Montana's Waterways," is available from the Montana Legislative Council.

162. Meetings were held: Aug. 30-31, 1983, Jan. 13-14, 1984, Mar. 31, 1984, July 30, 1984 and Sept. 28, 1984. Minutes of the meetings of Joint Interim Subcomm. No. 2 as well as testimony and materials presented to the committee during the course of the interim are available from the Montana Legislative Council.

163. The main thrust of the study plan can be summarized as follows: (1) What are the rights and responsibilities of the public related to recreational use of Montana waterways, including rights and responsibilities peripheral to the use of the waterways? (2) What are the rights (including title interests) and responsibilities of landowners of land under and adjacent to Montana waterways, related to recreational use of the waterways? (3) What is the nature of the conflict: who are the parties, what are the issues, and what is its extent? (4) What can be done to resolve the conflict, what is the best forum or method for its resolution (i.e. judicial, legislative, executive, voluntary cooperation, education)?

164. *See* minutes of Joint Subcommittee No. 2, Mar. 31, 1984, 22-23, 26-31.

165. A soil conservation district is a governmental subdivision of the state created by petition of electors whose purpose is to enhance the conservation of soil and water resource. *See* MONT. CODE ANN. §§ 76-15-101 to -701 (1983).

166. *See supra* notes 169-91 and accompanying text.

from the reasoning in those earlier decisions. In *Curran*, the supreme court affirmed the district court's application of the federal test of navigability for title and, consistently with the district court, drew a sharp line between the federal law tests of navigability for title and the state law tests of navigability based on public recreational use.[167]

Unlike the district court, the supreme court found the bases for its decision in the public trust doctrine and in the 1972 Montana Constitution. The court drew its explanation of the public trust doctrine from U.S. Supreme Court decisions relating to the transfer of navigable waters and the soils under them from the federal government to the states at the time of statehood.[168] Central to those cases was the proposition (the "equal footing doctrine") that during the territorial period, the waters and streambeds of navigable waterways were held in trust for the future states to be "dealt with for the public benefit"[169] by the states after their admission to the Union.

Although the Montana Supreme Court paired the public trust doctrine with the equal footing doctrine as considerations in determining navigability-for-title questions, the court did not confine its treatment of the public trust doctrine to waters found navigable under the federal test. The development of the court's broader application of the public trust doctrine encompassed (1) recognition of the increased tendency for state courts to find navigability for recreational use as well as for commercial purposes, and (2) the substitution of an inquiry as to whether water was susceptible to public use for earlier inquiries into navigability and title to streambeds.[170]

After discussing these national developments, the Montana Supreme Court set forth the language of the 1972 Montana Constitution:

> 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.[171]

As for rights on the Dearborn, the supreme court found that Curran had no right of ownership to the riverbed or surface waters because ownership was held by the federal government prior to statehood in trust

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167. ___ Mont. at ___, 682 P.2d at 168.

168. *Id.* at ___, 682 P.2d at 167-68.

169. *Id.* at ___, 682 P.2d at 167.

170. *Id.* at ___, 682 P.2d at 169-170. In addition to citing cases from other state supreme courts, the Montana Supreme Court noted the commentary, as had the First Judicial District Court, of Prof. Albert W. Stone. The district court cited Stone, *Legal Background on Recreational Use of Montana Waters*, 32 MONT. L. REV. 1 (1971); the supreme court cited Stone, MONTANA WATER LAW FOR THE 1980S (1981).

171. ___ Mont. at ___, 682 P.2d at 170, citing MONT. CONST. art. IX, § 3(3).

for the people, and title was transferred to the state upon statehood "burdened by this public trust."[172] Under the Montana Constitution, Curran had 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."[173] Looking beyond the Dearborn situation, the court stated:

> In essence, the question is whether the waters owned by the State under the Constitution are susceptible to recreational use by the public. *The capability of use of the waters for recreational purposes determines their availability for recreational use by the public. Streambed ownership by a private party is irrelevant. If the waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people.* 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.[174]

To the Montana Supreme Court in the spring of 1984, the portion of the 1925 *Herrin v. Sutherland*[175] decision prohibiting fishing in waters over a streambed in private ownership appeared to be irrelevant. The earlier case concerned a stream regarded as non-navigable, and the court stated that the "holding is purely dicta"[176] and contrary to the public trust doctrine and the 1972 Constitution.[177]

Drawing on both statutes and caselaw,[178] the court held that the public has a right to use state-owned waters to the point of the high water mark.[179] In case of obstructions in the water, the public is allowed to portage around the barriers in the least intrusive way possible. Despite the breadth of the declaration of public rights in the state's waters, the court's order states unequivocally that the public does not have the right to enter into or trespass across private property in order to enjoy the recreational use of state-owned waters.[180]

Although the question of the navigability of the Dearborn River under the federal test was analyzed and determined in *Curran*, the supreme court's opinion ultimately subordinated the issue. The court might have

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172. *Id.* at ___, 682 P.2d at 170.
173. *Id.*
174. *Id.* (emphasis added).
175. 74 Mont. at 596, 241 P. at 328.
176. ___ Mont. at ___, 682 P.2d at 171.
177. *Id.*
178. *Id.* at ___, 682 P.2d at 172, citing MONT. CODE ANN. §§ 70-16-201, 87-2-305 (1983), and Gibson v. Kelly, 15 Mont. 417, 39 P. 517 (1895).
179. ___ Mont. at ___, 682 P.2d at 172.
180. *Id.*

based its holding on the conclusion that the Dearborn was navigable under the federal test. If it had done so, it could have held that under the public trust doctrine as traditionally applied, the state was obligated to manage the riverbed and overlying water so that they would not pass into private ownership or control, but remain open to public use.

The Montana Supreme Court instead detached its treatment of streambed title on the Dearborn from the issue of the public's right to use the river under the Montana Constitution and the public trust doctrine. The court thus articulated a test for determining the availability of waterways for public recreational use that is not linked to streambed ownership.

Within little more than a month, the breadth of the *Curran* holding was underscored by the court's decision in *Hildreth*. Drawing from the *Curran* decision, the court emphasized that "the capability of use of the waters for recreational purposes determines whether the water can be so used."[181] There are no limitations in the Montana constitutional provision that the state owns the water for the benefit of its people.[182] The only possible limitation of use must arise from the characteristics of the waters themselves. No owner of property adjacent to state-owned water has the right to control the use of those waters as they flow through his property. The pleasure boat test is not adopted in Montana as it is "unnecessary and improper to determine a specific test under which to find navigability for recreational use."[183] Neither was there a need for the district court to employ a commercial use test, as that federal test is used to determine navigability for title purposes and not navigability for use.

Also carried forward from *Curran* was an enunciation of the public's right to portage around barriers[184] (although not specifying artificial or natural) in a manner that will avoid damage to the adjacent landowner's property.[185] Again, too, the supreme court declared that the public had no right to enter upon or cross over private property to reach state-owned water held available for recreational purposes.[186]

As part of his appeal, Hildreth contended that the district court should have determined title to the streambed of the Beaverhead which he

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181. ___ Mont. at ___, 684 P.2d at 1091.

182. *Id.*

183. *Id.*

184. *Id.*

185. One of the issues in initial proceedings before the Fifth Judicial District Court concerned a fence that Hildreth had placed on the downstream side of a bridge crossing the Beaverhead River on his property. The fence was removed as a result of a preliminary injunction and the court's final order specifically referred to the right to portage around an artificial obstacle in a manner least intrusive to the landowner. No. 9604 at 16.

186. ___ Mont. at ___, 684 P.2d at 1091.

asserted belonged to him because it ran through its property. The supreme court dismissed this contention, again drawing from *Curran* to reemphasize that the question of title to the underlying streambed is immaterial in determining navigability for recreational use of state-owned waters.[187] There is also consistency with *Curran* in the court's restatement of the holding that "under 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."[188]

In *Curran*, the Montana Supreme Court dismissed a contention that property was being taken without compensation because the court found that Curran had no claims to the waters of the Dearborn, and hence there could be no taking.[189] In *Hildreth*, a similar claim was dismissed because rights of public *use* of the waters of the Beaverhead had been determined, not title.[190]

While affirming a district court opinion in *Curran* that referred to an angler's right to wade and a hiker's right to walk between high water marks on a stream available for public use, the Montana Supreme Court had emphasized a recreationist's use of surface waters, more than the bed and banks of a stream. In *Hildreth*, the court expressly addressed both issues in its declaration that "the public has the right to use the waters and the bed and banks up to the ordinary high water mark."[191]

### 4. *Legislative Responses: 1984-85*

The initial reaction of the interim legislative subcommittee to first the *Curran* decision, and then the sweeping *Hildreth* decision, was uncertainty as to what, of the subcommittee's original charge, was left for it to perform. Further, of special import to the subcommittee was the supreme court's use of the Montana Constitution and the public trust doctrine as bases for its decisions and the effect that this might have on legislative authority.

At the first meeting following the decisions, the subcommittee turned its attention to the public trust doctrine by reviewing two presentations on its meaning.[192] The presentations indicated to the subcommittee that the legislature's authority in the area was limited but not eliminated by application of the public trust doctrine. The subcommittee also heard

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187. *Id.* at ____, 684 P.2d at 1092.
188. *Id.* at ____, 684 P.2d at 1093.
189. ____ Mont. at ____, 682 P.2d at 171.
190. ____ Mont. at ____, 684 P.2d at 1093 (emphasis in original).
191. *Id.* at ____, 684 P.2d at 1091.
192. The papers presented: "The Public Trust Chautauqua Comes to Town: Implications for Montana's Water Future," by John E. Thorson and ". . .The Doctrine is Out There Awaiting Recognition." by Margery H. Brown are available from the Montana Legislative Council.

presentations on and discussed the following issues that had been raised repeatedly during the interim: trespass and damage caused by recreationists; the possibility of acquisition of prescriptive easements through recreational use; and the extent, if any, of landowners' liability for injuries incurred by recreationists on waterways or on adjacent private land.

Ultimately, the subcommittee recommended two bills to the 1985 legislature. HB 16[193] was relatively restrictive of recreational use in that, on waterways deemed non-navigable under the federal title test, the bill allowed use of the bed of the waterway only when unavoidable and incidental to use of the waters.[194] The remainder of the bill restated several elements of the stream access decisions and addressed a variety of problems associated with recreational activities. The bill defined "ordinary high-water mark," defined "barrier" for the purpose of clarifying the scope of the public's portage rights, eliminated recreational use of land or water as a basis for acquisition of a prescriptive easement, and restricted landowner liability to recreational users of adjacent waterways. HB 17[195] created a new strict liability crime of trespass to land. The bill would have also eliminated the "posting requirement," *i.e.*, the precondition for criminal trespass of communication by the property owner that entry is not permitted.

In addition to the interim subcommittee's two bills, nine bills concerning stream access were introduced into the 1985 legislature.[196]

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193. A Bill for an Act Entitled: "AN ACT TO GENERALLY DEFINE LAWS GOVERNING RECREATIONAL USE OF STATE WATERS; PROHIBITING RECREATIONAL USE OF DIVERTED WATERS; PROHIBITING, WITH CERTAIN EXCEPTIONS, USE OF PRIVATE LAND BENETH WATERS; RESTRICTING THE LIABILITY OF LANDOWNERS WHEN WATER IS BEING USED FOR RECREATION OR LAND IS BEING USED AS AN INCIDENT OF WATER RECREATION; PROVIDING THAT A PRESCRIPTIVE EASEMENT CANNOT BE ACQUIRED BY RECREATIONAL USE; AMENDING SECTION 70-19-405, MCA; REPEALING SECTION 87-2-305, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE." The bill draft was approved by a vote of 6-2.

194. The committee intended this aspect of the bill to be patterned after the Supreme Court of Wyoming's decision in Day v. Armstrong, 362 P.2d 137 (Wyo. 1961).

195. A Bill for an Act Entitled: "AN ACT ELIMINATING THE REQUIREMENT THAT NOTICE BE POSTED OR OTHERWISE COMMUNICATED FOR THE COMMISSION OF THE OFFENSE OF CRIMINAL TRESPASS TO LAND; IMPOSING ABSOLUTE LIABILITY FOR CERTAIN CRIMINAL TRESPASSES TO LAND; EXPANDING THE AUTHORITY OF WARDENS TO ENFORCE THE CRIMINAL MISCHIEF, CRIMINAL TRESPASS, AND LITTER LAWS ON PRIVATE LANDS BEING USED FOR RECREATIONAL PURPOSES; AMENDING SECTIONS 10-1-612, 45-6-201, 45-6-203, AND 87-1-504; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE." The bill draft was approved by a vote of 6-2.

196. (1) H.B. 265, A Bill for an Act Entitled: "AN ACT GENERALLY DEFINING LAWS RELATING TO RECREATIONAL USE OF STATE WATERS; PROHIBITING RECREATIONAL USE OF DIVERTED WATERS; RESTRICTING THE LIABILITY OF LANDOWNERS WHEN WATER IS BEING USED FOR RECREATION; ESTABLISHING THE RIGHT TO PORTAGE; PROVIDING THAT A PRESCRIPTIVE EASEMENT CANNOT BE ACQUIRED BY RECREATIONAL USE OF SURFACE WATERS; AMENDING SECTION 70-19-405, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE" (Introduced by Ream and Marks).

(2) H.B. 275, A Bill for an Act Entitled: "AN ACT GENERALLY DEFINING LAWS RELATING TO

Three of the bills, HB 265, HB 275 and HB 498, were attempts to address the issues in a comprehensive manner. The three bills were modeled in part on HB 16; and each bill contained some elements of HB 16. House Bill 265, which ultimately was successful, was regarded as the "compromise bill;" it was the work product of a coalition of recreational and agricultural groups. The bill as introduced provided for the division of the state's waterways into two classes, largely based on size; the extent and type of public use permitted on a particular waterway would be determined by the class into which it falls. HB 265 also provided for increased regulation of recreational uses of waterways by the Montana Fish and Game Commission which would be required to establish a procedure for receiving and determining requests that recreational use of a particular waterway be limited for the protection of the waterway.[197]

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RECREATIONAL USE OF STATE WATERS; PROHIBITING RECREATIONAL USE OF DIVERTED WATERS; RESTRICTING THE LIABILITY OF LANDOWNERS WHEN WATER IS BEING USED FOR RECREATION; ESTABLISHING THE RIGHT TO PORTAGE; PROVIDING THAT A PRESCRIPTIVE EASEMENT CANNOT BE ACQUIRED BY RECREATIONAL USE OF SURFACE WATERS; AMENDING SECTION 70-19-405, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE." (Introduced by Cobb).

(3) H.B. 498, A Bill for an Act Entitled: "AN ACT TO GENERALLY DEFINE LAWS GOVERNING THE RIGHTS AND RESPONSIBILITIES OF PROPERTY OWNERS AND THE PUBLIC RELATED TO RECREATIONAL USE OF STATE WATERS; PROVIDING DEFINITIONAL TERMS; PROHIBITING RECREATIONAL USE OF DIVERTED WATERS; RESTRICTING THE LIABILITY OF LANDOWNERS WHEN WATER IS BEING USED FOR RECREATION OR LAND IS BEING USED AS AN INCIDENT OF WATER RECREATION; PROVIDING THAT A PRESCRIPTIVE EASEMENT CANNOT BE ACQUIRED BY RECREATIONAL USE; GRANTING POWERS TO PROTECT AQUATIC ECOSYSTEMS THROUGH LIMITATIONS OF PUBLIC USE UPON SURFACE WATERS; AMENDING SECTION 70-19-405, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE" (Introduced by Ellison).

(4) H.B. 520, A Bill for an Act Entitled: "AN ACT CLARIFYING THAT THE PUBLIC DOES NOT HAVE THE RIGHT TO MAKE RECREATIONAL USE OF WATERS THAT HAVE BEEN DIVERTED FOR PURPOSES OF APPROPRIATION" (Introduced by Grady and others).

(5) H.B. 911, A Bill for an Act Entitled: "AN ACT PROVIDING SPECIFIC REQUIREMENTS FOR POSTING OF LAND FOR THE PURPOSES OF THE CRIMINAL TRESPASS LAW; EXPANDING THE AUTHORITY OF WARDENS TO ENFORCE THE CRIMINAL MISCHIEF, CRIMINAL TRESPASS, AND LITTER LAWS ON PRIVATE LANDS BEING USED FOR RECREATIONAL PURPOSES; AMENDING SECTIONS 45-6-201 AND 87-1-504, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE" (Introduced by Hannah and Brown).

(6) S.B. 418, A Bill for an Act Entitled: "AN ACT DEFINING 'ORDINARY HIGH-WATER MARK'" (Introduced by Boylan and others).

(7) S.B. 421, A Bill for an Act Entitled: "AN ACT PROVIDING FOR LIMITATION OF LIABILITY OF A LANDOWNER OR TENANT TOWARD PERSONS MAKING RECREATIONAL USE OF SURFACE WATERS ADJACENT TO THE LANDOWNER'S OR TENANT'S LAND" (Introduced by Story).

(8) S.B. 424, A Bill for an Act Entitled: "AN ACT DEFINING 'PRESCRIPTIVE EASEMENT'; PROVIDING THAT A PRESCRIPTIVE EASEMENT MAY NOT BE ACQUIRED THROUGH RECREATIONAL USE OF LAND OR WATER; AMENDING SECTION 70-19-405, MCA" (Introduced by B. Williams and others).

(9) S.B. 435, A Bill for an Act Entitled: "AN ACT PROVIDING THAT PERMISSION OF THE LANDOWNER MUST BE OBTAINED PRIOR TO USING PRIVATE LAND FOR RECREATIONAL PURPOSES; AMENDING SECTIONS 87-1-504 AND 87-1-505, MCA" (Introduced by Galt).

Ultimately, three of the bills were passed and approved: H.B. 265, 1985 Mont. Laws ch. 556; H.B. 520, 1985 Mont. Laws ch. 429; and H.B. 911, 1985 Mont. Laws ch. 599.

197. The Statement of Intent attached to H.B. 265 which is required under MONT. CODE ANN. § 5-4-404 (1983), because the bill delegates authority to an administrative agency, states in part: "In its

House Bills 16, 265 and 275 were heard by the House Agriculture, Fish and Game, and Judiciary Committees[198] at a well-attended joint hearing on January 22, 1985.[199] The House Judiciary Committee heard HB 498 ten days later.[200] The chair of the House Judiciary Committee assigned the four bills to a subcommittee; and, after several meetings, the subcommittee recommended to the full Judiciary Committee that HB 265 be approved with amendments proposed by the subcommittee. The full committee approved the bill with the subcommittee's amendments incorporated into it. The bill was approved unchanged by the House of Representatives on February 16.[201] House Bill 265 was heard by the Senate Judiciary Committee on March 8, 1985. It again was assigned to a subcommittee which met four times but was unable to reach agreement on a bill.[202] On March 27, the full Senate Judiciary Committee considered the bill and attached to it substantial amendments that were very restrictive of recreational use. The full Senate removed some of the most restrictive amendments, but then amended the bill further to prohibit the use of beds and banks of streams. A conference committee removed this prohibition and agreed on a bill that was signed by the Governor on April 19, 1985.[203]

House Bill 17, the interim committee's criminal trespass bill, was heard by the House Judiciary Committee on February 14, 1985. Opponents of the bill were very critical of its elimination of notice requirements and of its provisions creating a strict liability trespass crime.[204] The House Judiciary Committee, dissatisfied with HB 17 but desiring to address the trespass issue, requested a committee bill, HB 911.[205] This bill provided for posting of land either by written notice or by marking an object, such as a tree, with fluorescent orange paint at entries to property.[206] House Bill 911

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implementation of this bill, the long-range goal of the commission must be to preserve, protect, and enhance the surface waters of this state while facilitating the public's exercise of its recreational use rights on surface waters. The commission shall strive to permit broad exercise of public rights, while protecting the water resource and its ecosystem."

198. The bill had been referred to the House Judiciary Committee which was the only one of the three committees that would vote on the bills.

199. Minutes of the House Judiciary Comm. (Jan. 22, 1985). The other three bills considered by the subcommittee were eventually tabled by the House Judiciary Committee.

200. Minutes of the House Judiciary Comm. (Feb. 14, 1985).

201. An unsuccessful attempt was made by Representative Dave Brown to amend the bill to permit big game hunting on large (Class I) waterways. House Journal, Feb. 16, 1985, pages 14-15.

202. Minutes of the Senate Judiciary Comm. (Mar. 27, 1985).

203. H.B. 265 was altered significantly during its passage through the legislature. The final version retained the classification system, but specifically excepted lakes from the bill's coverage. The bill set up a somewhat complicated procedure for the establishment of public portage routes around barriers in waterways and limited the application of the portage provision to artificial barriers.

204. Minutes of the House Judiciary Comm. (Feb. 14, 1985).

205. Minutes of the House Judiciary Comm. (Feb. 14, Feb. 22, 1985).

206. Utah has a similar posting law, UTAH CODE ANN. 23-20-14 (1981).

was signed by the Governor on April 22, 1985.

In enacting HB 265 and HB 911, the Forty-Ninth Legislature made a serious effort to come to terms with the stream access controversy. The Fiftieth Legislature, and those that follow, will continue to work toward achieving and maintaining a just resolution of the interests of all affected parties. Public trust principles are certain to play a significant role in that work.

### B. *State Water Policy*

While the stream access controversy occupied Montana's courts and legislature between 1982 and 1985, public trust considerations (though not denominated as such) were being played out in a different setting. The Montana legislature reacted in late 1982 to three events: the U.S. Supreme Court decision in *Sporhase v. Nebraska*[207] (which held that states cannot impose an absolute ban on the exportation of water and cast doubt on the legality of Montana's coal slurry ban[208]); the resulting possibility of interstate coal slurry pipelines originating in the state (such as the Energy Transportation Systems, Inc. (ETSI) coal slurry pipeline project in South Dakota that promised lucrative financial rewards from the purchase of the state's water[209]); and the release by the Montana Department of Natural Resources and Conservation (DNRC) of an important report[210] (the "Trelease Report") setting forth a strategy to protect Montana's options for future instate use of the waters of the Missouri River in the face of expanding use by downstream states.

By the commencement of the 1983 legislature, these three events converged. Montana needed to protect its waters, principally on the Missouri, from potentially harmful appropriations in downstream states. State control over its waters had been significantly weakened by the holding in *Sporhase*, and its long-term effects were uncertain. South Dakota had turned the damage done by *Sporhase* to state water jurisdiction into a huge, potential $1.4 billion bonanza.[211] Other states were likely to follow, with uncertain effects on the allocation of Missouri River water. Montana needed to develop its water through projects such as the improvement of the Tongue River Dam in the southeastern part of the state, but substantial funds were needed. Therefore, the conclusion seemed

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207. 458 U.S. 941 (1982).

208. Until H.B. 680 was passed in the 1985 legislative session, the use of water for coal slurry purposes was not a beneficial use of the water. MONT. CODE ANN. § 85-2-104 (1983).

209. U.S. DEP'T INTERIOR, FINAL ENVIRONMENTAL IMPACT STATEMENT ON ENERGY TRANSPORTATION SYSTEM, INC. COAL SLURRY PIPELINE TRANSPORTATION PROJECT (2 vol. July 1981).

210. MONT. DEP'T NATURAL RESOURCES & CONSERV., WATER PROTECTION STRATEGY FOR MONTANA (Sept. 1982).

211. Great Falls Tribune, Nov. 25, 1982, at 4-D, cols. 1-3.

logical at the time: sell water to produce revenues to fund the water development projects necessary to save Montana's water. Increasingly, the refrain became "use it or lose it!"

In the weeks before the convening of the 1983 legislature, water marketing was much discussed. The Powder River Pipeline Company expressed interest in the purchase of water for a coal slurry pipeline from eastern Montana to the Midwest.[212] Governor Ted Schwinden announced his own interest in investigating the possible sale of Montana's surplus waters. He indicated that he would prefer a thorough study of the issue, but that the state might not be able to wait that long because "[n]one of the old rules apply anymore."[213] The director of the DNRC drew a relationship between water marketing and the implementation of the Trelease strategy on the Missouri. He described the option of selling 200,000 acre-feet per year (ac-ft/yr) of stored and surplus water as a means of funding water development projects which had been identified by the Trelease study as the most certain means to secure water from downstream claims.[214]

During the 1983 legislative session, three bills were introduced concerning water marketing.[215] Only one, HB 908, was eventually passed, with substantial amendments. The bill was originally intended to strengthen water permit criteria, repeal the anti-export ban, and place large pipelines under the Major Facility Siting Act.[216] The bill as passed accomplished two very different things. First, the measure authorized a temporary water marketing program which broadened the authority of DNRC to purchase or acquire water from any federal reservoir (not just Fort Peck, as under the then-existing law[217]) for the purposes of "sale, rent, or distribution for industrial or other purposes."[218] The anti-export ban was repealed, and detailed public interest criteria for the issuance of permits (retaining ultimate legislative approval of certain large diversions) were placed into law. These provisions were to expire on June 30, 1985, and the pre-existing law would be revived [219] unless the Forty-Ninth Legislature acted.

The second accomplishment of HB 908 was the creation of a Select Committee on Water Marketing to "undertake a study of economic, tax,

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212. *Id.*, Jan. 12, 1983, at 8-A, cols. 1-6.
213. *Id.*, Jan. 9, 1983, at 7-A, cols. 3-6.
214. *Id.*, Jan. 12, 1983, at 8-A, cols. 1-6.
215. H.B. 893, 894 & 908, 48th Leg. (1983).
216. MONT. CODE ANN. § 75-20-101 to 75-20-1205 (1983).
217. *Id.* § 85-1-205 (1981).
218. *Id.* § 85-1-205 (1983).
219. The constitutionality of such automatic revision has been put in question by Immigration & Naturalization Serv. v. Chadha, 103 S. Ct. 2764 (1983), concerning the legislative veto. *See* Sullivan, *The Power of Congress Under the Property Clause: A Potential Check on the Effects of the Chadha Decision on Public Land Legislation*, 6 Pub. Land L. Rev. (1985).

administrative, legal, social, and environmental advantages and disadvantages of water marketing."[220] Over the course of the two-year study, the Select Committee met for nine official meetings, two seminars, and three public hearings. In the course of its work, the committee received extensive testimony, both written and oral, from numerous individuals and organizations.

In its final report,[221] the Select Committee emphasized the importance of a comprehensive state water policy to maximize and reserve for the present and future use of its citizens Montana's fair share of the water in interstate rivers and streams—particularly those of the Missouri. To articulate this policy, the committee authored a bill, HB 680.[222] The bill passed both the House and Senate with relatively minor amendments and was signed into law by the Governor on April 19, 1985.[223]

In the development of this bill by the Select Committee, there was infrequent mention of the public trust doctrine as a basis for legislative action. But, in two major respects, Montana has now uniquely codified the public interest considerations guaranteed in the state constitution and recognized by the state supreme court in *Curran* and *Hildreth*. These two major legislative public interest provisions require the analysis of public interest criteria for future water use and the limitation on the volume of water a private user can appropriate.

### 1. *Public Interest Criteria for Water Use*

Since 1973, persons have had to apply for a permit from the DNRC to appropriate surface water (except for certain stockwatering purposes).[224] The DNRC has based its decision for the issuance of a permit on the criteria contained in Section 85-2-311 of the Montana Code. The requirements include: the existence of unappropriated waters in the source of supply; no adverse effect on the water rights of prior appropriators; and the adequacy of the proposed means of diversion or construction. In addition, the proposed use of water must be a beneficial use which will not interfere unreasonably with other planned water uses or development for which a permit has been issued or a reservation has been made.

In HB 908, the 1983 legislature modified Section 85-2-311 by including two additional requirements: (1) for appropriations of 10,000 ac-ft/yr or more, or 15 cubic feet per second (cfs) or more, the DNRC must

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220. 1983 Mont. Laws ch. 706, § 4(2).

221. MONT. SELECT COMM. ON WATER MARKETING, REPORT TO THE 49TH MONTANA LEGISLATURE (Dec. 1984).

222. H.B. 680, 49th Leg. (1985).

223. 1985 Mont. Laws ch. 573 [subsequent references are to H.B. 680].

224. MONT. CODE ANN. § 85-2-306 (1983).

"affirmatively find" that the foregoing criteria are met and must consider additional factors such as economic and environmental impacts and benefits to the state; and (2) consumptive uses of 10,000 ac-ft/yr or more, or 15 cfs or more, must be approved by the Legislature. As previously noted, these last two requirements were enacted on a temporary two-year basis.

The addition of economic and environmental criteria marked the first successful incorporation of public trust considerations into Montana's statutes.[225] Specifically, the Legislature required consideration of the following factors before a new water permit could be issued:

1. Other demands on the state water supply, including such other needs as water reservations for future beneficial use, municipal water needs, irrigation needs, and the need for minimum streamflows to protect existing water rights and aquatic life;
2. The benefits of the proposed water use to the applicant and the state, including a consideration of the economic feasibility of the proposed use.[226]
3. Water quality;
4. The possible creation of saline seep; and
5. Other probable significant environmental effects as identified through the environmental impact statement process.

With this set of criteria, the legislature tentatively accepted the proposition that, at least as to future water appropriations, water permits would be issued only after the systematic and serious consideration of public interest concerns. It was left to the Select Committee on Water Marketing to determine whether this integration of the appropriation and public trust concerns would be made permanent.

The Select Committee recommended, and the 1985 Legislature undertook, a substantial revision of the water permit requirements. This revision requires the application of increasingly stringent public interest criteria to applications for new water permits. But because the drafters of the legislation feared that these permit criteria would encourage potential appropriators to circumvent the criteria by purchasing existing water rights (and subsequently changing the type or location of use) or by securing water under the state's reservation system,[227] the public interest criteria have also been written into the "change in appropriation right" and reservation provisions of the law.

Essentially, HB 680, as passed by the Legislature, creates three levels

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225. *Id.* § 85-2-311.

226. A consideration of economic feasibility was deleted by the 1985 Legislature. H.B. 680, 49th Leg. § 4.

227. MONT. CODE ANN. § 85-2-316 (1983).

of public interest criteria and a special set of "out-of-state" conservation criteria for evaluating permit applications, change of appropriation applications, and reservation of water applications.

When applying for new water permits, potential appropriators must satisfy either "Level 1" or "Level 2" criteria, regardless of whether the water will be used in or out-of-state and the special conservation criteria if water is to be moved out-of-state. The most innovative feature of the legislation, however, is the requirement that water be leased from the state in the event that (1) water in excess of 4000 ac-ft/yr and 5.5 cfs will be consumed; or (2) water in any amount will be moved outside six specified basins.[228]

"Level 1" public interest criteria roughly parallel pre-1983 criteria. These criteria apply to appropriations less than 4000 ac-ft/yr and 5.5 cubic feet per second (cfs)[229] and require only the traditional examination of the potential effect of a new water use on other appropriators in a basin (*e.g.*, whether there is sufficient unappropriated water, whether there will be adverse effect on prior appropriators, whether the diversion will be properly constructed, whether the proposed use is beneficial).

"Level 2" public interest criteria, applying to diversions in excess of 4000 ac-ft/yr and 5.5 cfs, are a restatement of the temporary criteria added in 1983. By permanently adopting these criteria, the Legislature has made clear that large diversions will be carefully evaluated on the basis of a broader, statewide public interest. The legislature reduced the threshold for the application of "Level 2" public interest criteria because the statistical data generated by DNRC indicated that the temporary 10,000 ac-ft/yr, 15 cfs, threshold was too high. Additionally, DNRC again recommended making the annual and per second volume a conjunctive requirement (*i.e.*, ac-ft/yr *and* cfs) because the "either-or" requirement (*i.e.*, ac-ft/yr *or* cfs) was picking up appropriators who had high seasonal uses due to irrigated agriculture but relatively small annual uses.

The legislature added a unique set of public interest criteria to provide an especially careful review of applications to move water out-of-state. These special conservation criteria were designed to provide the state with constitutionally permissible means to regulate and review out-of-state movement of water. They stem from the opportunity left by the U.S. Supreme Court in *Sporhase* for states to prefer their own citizens for water if necessary for "health and safety" purposes.[230] The language of the criteria is based on a New Mexico statute[231] that was passed in response to

228. H.B. 680, § 3.
229. *Id.* at § 4(1).
230. 458 U.S. 941, 956 (1982).
231. N.M. STAT. ANN. § 72-12-3 (Cum. Supp. 1984).

*El Paso v. Reynolds*,[232] a federal district court decision that struck down New Mexico's ban of the exportation of groundwater. The revised statute was substantially approved by the same court.[233]

The new Montana conservation requirements include a general statement of legislative intent that "under appropriate conditions, the out-of-state transportation and use of [Montana's] waters are not in conflict with the public welfare of its citizens or the conservation of its waters, . . ."[234] The section thereafter requires the applicant to satisfy "by clear and convincing evidence" specific criteria as to (1) whether the water subject to the application could be used within Montana to alleviate water shortages; and (2) whether the water is available to the applicant in the state to which he seeks to export Montana water.[235]

As indicated in the following sections, applicants must now lease water from the state when they seek to consume water in excess of 4000 ac-ft/yr and 5.5 cfs or to move water in any amount out of six specified water basins located principally within the state.[236] The legislation also requires applicants to satisfy the relevant public interest criteria and the requirements of the Montana Environmental Policy Act.

As explained above, drafters of the legislation were concerned that potential appropriators would seek to avoid the public interest criteria and the state leasing program by acquiring existing rights and securing a change in type of use, place of use, or place of diversion from the department. HB 680 prevents this by incorporating the "Level 1," "Level 2," and special conservation standards in a substantially revised Section 85-2-402, "Change in appropriation rights." The specialized requirement ("Level 3") is set forth for change applications that would result in consumption of water in excess of 4000 ac-ft/yr and 5.5 cfs. These change applications must be approved by the legislature.

Finally, and for similar reasons, the special conservation public interest criteria have been added to the reservation of waters procedures set forth in Section 85-2-316. While it has not been used for this purpose, the reservation of water system does allow water to be reserved for *existing*, as well as future beneficial uses.[237] The final language reflects the legislative conclusion that the pre-1985 language allows the Board of Natural Resources and Conservation to protect the public interest in the process. Also, the Legislature concluded that requiring the leasing of water for

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232. El Paso v. Reynolds, 563 F. Supp. 379 (D.N.M. 1983).
233. El Paso v. Reynolds, 597 F. Supp. 694 (D.N.M. 1984).
234. H.B. 680 at § 4(3).
235. *Id.* at § 4(3)(b).
236. *Id.* at § 12.
237. MONT. CODE ANN. § 85-2-316(1) (1983).

reservations in excess of 4000 ac-ft/yr and 5.5 cfs would be a disincentive to establishing water reservations.

### 2. *Water Leasing and Curtailment of the Private Ability to Appropriate Water*

The second major feature of the 1985 water policy legislation is an innovative limitation on the private ability to appropriate water. The underlying rationale for this program is conservation and fair consideration for the use of the state's water resources—those water users who consume large amounts of water must pay. The DNRC administers the program. Fifty thousand acre-feet of water have been authorized for leasing by the legislature. The department can differentiate in pricing, and the legislature made clear its intent to prefer agricultural uses. In the future, a person will be unable to appropriate water (and the state will be unable to issue a permit) when either (1) water would be consumed in excess of 4000 ac-ft/yr and 5.5 cfs, or (2) water would be moved in any amount out of certain river basins.[238] The specified river basins (including tributaries) are those of the Clark Fork, Kootenai, St. Mary, Little Missouri, Yellowstone, and Missouri Rivers.[239] Many of these basins extend into adjoining states, and the St. Mary and Kootenai extend into Canada. In these two instances, water must be leased from the state for terms not to exceed 50 years (the terms can be renewed).[240]

The Select Committee promoted these significant changes for several reasons.[241] First, the Committee was reluctant to continue the ability of private parties to secure perpetual rights to large quantities of water. Second, the Committee believed that users of large amounts of water should pay fair consideration for the resource (with the additional result that there would be an incentive for greater conservation of the resource). And third, the Committee believed that the threat of environmental harm is greatest when water is moved out of ecologically defined watersheds. While not expressed as such, these justifications parallel closely the concerns and legislative obligations that are at the foundation of the public trust doctrine.

The leasing program that passed as a part of HB 680 offers the state the opportunity to exercise diligent stewardship over the important waters of the state. The state can require environmentally sound terms and conditions in leases for water. Fair payment for the waters can be required,

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238. H.B. 680 § 3.
239. *Id.* at § 3(2).
240. *Id.* at § 12(4).
241. *See generally* MONT. SELECT COMM. ON WATER MARKETING, *supra* note 221.

although DNRC is authorized to differentiate in pricing.[242] Also, because the state will be a proprietor as to the leased water,[243] the DNRC may be able to regulate the interstate movement of water in a fashion that would be otherwise impermissible under the dormant Commerce Clause of the U.S. Constitution.[244]

## V. CONCLUSION

As has been reviewed in the preceding sections, Montana has recently undertaken major efforts to recognize and enforce public rights in water. The courts and legislature have recognized that, as the cultural use and importance of water changes, so must water policies, laws, and institutions, yet, judicial and legislative efforts have been controversial.

The legislative and judicial actions discussed previously are recent but they are manifestations of an evolution in cultural attitude that has been developing for many years.[245] As has been traced here, historically, the nature of property rights in water has differed from that of property rights in other kinds of property. Thus, traditionally it has been impermissible for an adjacent landowner to impede the flow of commerce on certain publicly important waterways or, in some instances to prevent the public from fishing in those waters. Similarly, in the American West and in Montana, rights in water have never been entirely private. An appropriator of water does not own the water but rather has a right to use it. The 1889 Montana constitution provided that the use of water is a public use and recognized a public right of way across private property for the transporting of water.[246]

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242. H.B. 680, § 8.

243. *Id.* at § 10.

244. This possibility is suggested by the "market participation" concept which exempts state actions with respect to state-owned resources from dormant Commerce Clause violation. It was first used by the U.S. Supreme Court to uphold a Maryland law which discriminated against out-of-state scrap dealers. Justice Powell wrote: "Nothing in the purposes animating the Commerce Clause prohibits a state, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976). *See also* South Cent. Timber Dev. v. LeResche, 42 U.S.L.W. 4631 (U.S. May 22, 1984); Reeves, Inc. v. Stake, 447 U.S. 429 (1980).

245. For analysis and discussion of changes and the need for changes in Montana water law, *see Modern Western Legislation as a Pattern for Changes in the Montana Law of Water Rights*, 28 MONT. L. REV. 95 (1966); Stone, *Problems Arising Out of Montana's Law of Water Rights*, 27 MONT. L. REV. 1 (1965); Stone, *Improving Montana Water Law*, 20 MONT. L. REV. 60 (1958); Dunbar, *The Search for a Stable Water Right in Montana*, 28 AGRICULTURAL HISTORY (Oct., 1954); Mont. Depart. of Natural Resources & Conserv., *The Framework Report: A Comprehensive Water and Related Land Resources Plan for the State of Montana* (1976).

246. *See supra* note 120 and accompanying text. Shortly before the 1889 Constitution was approved, in 1885, the legislature enacted the first statute providing for notice and recording of notice as a prerequisite of an appropriative water right, as opposed to mere use. This was later held not to be the exclusive means of acquisition of a water right on nonadjudicated streams; however, it can be seen as one step toward organization of water rights.

The original "angling statute" (now section 87-2-305, MCA) was enacted in 1933 granting an easement to the public for fishing on navigable streams.[247] In 1972 the Montana Constitutional Convention approved a provision requiring a centralized system for recording water rights and directing the legislature to provide for the "administration, control, and regulation of water rights."[248] The legislature responded with the 1973 Water Use Act and later with the 1979 amendments to that act. In *Hildreth* and *Curran*, drawing in part on the 1972 Constitution, the Montana Supreme Court held public rights in water to be very broad. The more strict requirements for acquisition of water rights enacted in the 1985 Water Policy Act demonstrates an increasing willingness to delegate decisions on management of water to an administrative agency rather than permitting them to be made by private citizens.

With each step in this development of the public nature of water and its use comes the necessary adjustment of the private rights affected. It can easily be said that the individual property owner loses nothing with each change, that because the change is based on broad concepts such as the public trust doctrine, the individual's prior belief as to the extent of his property right was simply erroneous. This explanation makes sometimes difficult adjustments no less disruptive or confusing to the individual. Further change, while sometimes valuable and necessary, conflicts with the certainty that is a goal of individual water users and water policy planners. Public water rights are here to stay. The future refinement of these rights will have to be accomplished by careful decisions on the proper balance to be maintained between public and private rights in water and water use.

Recent legislation and court decisions have answered some questions, and left others unanswered. Important questions that have been addressed include:

1. Are public trust criteria the same as the public interest criteria set forth in state statutes?
2. Who has the burden of proof in demonstrating that the public interest in waters will not be harmed?
3. Will the legislature, the courts, administrative agencies, or a combination of these branches of government enforce the public interest?

The 1985 legislature has made definitive and detailed statements as to public rights in water—both on the issue of stream access and in fashioning broader state water policy. Specific public interest criteria will now be applied to new appropriations as well as to water rights transfers. Public

247. 1933 Mont. Laws ch. 95.
248. MONT. CONST. art. IX § 3(4).

recreational rights on the rivers and streams of the state have also been specifically defined. This legislative elaboration of public rights, coupled with some public criticism of judicial activism in *Curran* and *Hildreth*, will likely result in judicial deference to what the legislature has done.

In both the stream access and water policy legislation, the 1985 legislature has specified a strong presumption for the protection of the public interest. In water rights applications, changes, and leasing, the proponent of change carries the burden of proof in demonstrating that the public interest has been met. In certain instances, the burden is that of demonstrating "clear and convincing evidence" that the public interest criteria have been satisfied.[249] In cases of proposed uses of water out of the six specified river basins or for consumption in excess of 4000 ac-ft/yr and 5.5 cfs, there is a conclusive presumption that the public interest cannot be served unless the state remains involved as lessor of the water.[250] Even in the controversial area of stream access, the legislature established a means for the Fish and Game Commission to limit the incidence or types of recreational use of streams in the interests of protecting the aquatic ecosystem.[251]

The Montana Legislature has made apparent that, within the contours left by the court, it will be an active participant in articulating, as a matter of policy, public rights in water. The implementation of those principles will be delegated to the administrative agencies, the DNRC for the implementation of the water policy act and the Department of Fish, Wildlife and Parks for the implementation of the stream access legislation.

Left unanswered or unaddressed at this time, however, are other questions. There is uncertainty about the application of the public trust doctrine to federally reserved water rights in Montana. Expectedly, the legislature's acts will be scrutinized to determine if there has been a retreat from the state constitutional mandate to make water available to the people and subject to appropriation. Doubtless, the question of most general interest relates to the long-range integration of the public trust doctrine and appropriative rights.

The history and culture of Montana are integrally linked to its natural resources, and this is especially true with respect to its waters. The future of Montana will also be tied to its water resources. In the years to come, the culture will place increasing value on recreational and other instream uses of these waters. Also, Montana's water resources will have important regional importance as there may be economic pressures to move water out-of-state for such purposes as recharging the groundwater resources of

249. H.B. 680, §§ 4(2), 4(3), 7(5)(b).
250. *Id.* at § 3.
251. 1985 Mont. Laws ch. 556.

the Midwest, conveying natural resources, or supplying growing municipal needs elsewhere in the West.

Recent efforts by the Montana courts and legislature demonstrate how one state is adapting its water law and policy to changes that are being manifested elsewhere in the West. The 1972 Montana Constitution and the public trust doctrine are the vehicles for the greater recognition of public rights. In the framework of these adaptations, the law will continue to respond to Montanans' changing relationship to water.