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The Public Trust Doctrine: What It Is, Where It Came from, and Why Colorado Does Not (and Should Not) Have One

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THE PUBLIC TRUST DOCTRINE: WHAT IT IS, WHERE IT CAME FROM, AND WHY COLORADO DOES NOT (AND SHOULD NOT) HAVE ONE

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I. INTRODUCTION

A ballot initiative proposed in 2012 would have adopted, by constitutional amendment, a "public trust doctrine" for all water in Colorado. Since 1994, Richard Hamilton and others have proposed a series of similar initiatives to add a public trust doctrine to the state's constitution. Many lawyers and water experts, let alone most voters, are uncertain what that phrase means. This article reviews the roots and evolution of the public trust doctrine and the contrasting rejection of the doctrine as inconsistent with legally established water appropriation rights in Colorado. It concludes by examining the proposed public trust ballot initiatives in this framework.

A rancher on the dry Arizona Strip recounted the range wars fought over water on those desert lands north of the Grand Canyon. He summarized, "There are three scarce things of value out here—gold, women, and water. If the government has to take two of them, why then, leave the water." The rancher's words capture the essence of the continuing struggle over western water. First, without water, life itself, let alone development, is impossible in the West. Water development has been the foundation of Colorado's economy, from its early settlement continuing to its present cities and towns, farms, industry, and recreation economy. Second, Colorado's arid climate, in contrast with most other states, requires more intensive water development. The basic precept of economics—demand exceeds supply—applies acutely to water in the West. Competition for water is fierce; there is not enough to satisfy everyone's desires.

The Colorado Constitution recognized these realities in its provisions on water that were adopted at statehood in 1876. While the constitution declares water of natural streams "to be the property of the public," this water is "dedicated to the use of the people of the state," and is "subject to appropriation,"

both past and future.[1] Moreover, the right to divert such water for beneficial use "shall never be denied," so long as prior appropriations are satisfied.[2] These sections "establish an ascertainable and stable policy for allocation of a scarce and essential resource."[3] The Colorado Constitution's water rights principles have survived intact since statehood, despite repeated attempts since 1994 to impose a public trust in water by constitutional amendment through Colorado's initiative process.

Finally, and especially relevant to the public trust doctrine, water wars have lost none of their importance or intensity, and governments (local, state, and federal) are usually in the thick of the fray as combatants or arbiters. There may be no more notorious or enduring water war than that fought over Los Angeles' water diversions from California's Owens Valley, immortalized in the movie "Chinatown." In yet another battle of that continuing war, the California Supreme Court in 1983 provided a new "weapon," one ultimately more effective at stopping the flow of water to Los Angeles than the irate Owens Valley ranchers' dynamiting or occupation of the aqueduct decades before.[4] This new "weapon" is the archaic and once almost-forgotten public trust doctrine, given new life and force by the judiciary.

The public trust doctrine, originally of limited and circumscribed application, has been judicially expanded into a doctrine that could undermine the foundations of appropriative water rights in Colorado, as it has in California. Used as an environmental litigation tool in some states, this expansive public trust doctrine has become a trump card judges or regulators can play to deny new water rights or abrogate existing water rights in the name of environmental values, while hoping to avoid the constitutional mandate to pay just compensation for those water rights.

In a recent decision, the US Supreme Court reaffirmed that the doctrine is purely a matter of state law.[5] Thus, the Colorado Constitution controls whether Colorado will recognize a public trust in water. The Colorado Supreme Court soundly rejected the first modern attempt to apply the public trust doctrine to Colorado.[6] In two later cases, the state's highest court did not even consider a public trust doctrine in addressing questions of public interest and public duties with regard to water rights; in both cases parties had argued public trust without success in the trial court, but on appeal, the same parties shied away from advocating the public trust doctrine as such.[7] But while the

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1. COLO. CONST. art. XVI, § 5.

2. *Id.* § 6.

3. Gregory J. Hobbs, Jr. & Bennett W. Raley, *Water Rights Protection in Water Quality Law*, 60 U. COLO. L. REV. 841, 879 (1989).

4. Nat'l Audubon Soc'y v. Superior Court (Mono Lake), 658 P.2d 709, 732 (Cal. 1983) (en banc).

5. PPL Mont., LLC v. Montana, 132 S. Ct. 1215, 1234-35 (2012). *See* discussion *infra* Section II.C.

6. People v. Emmert, 597 P.2d 1025, 1027 (Colo. 1979) (en banc). *See* discussion *infra* Section III.B.

7. Aspen Wilderness Workshop v. Colo. Water Conservation Bd., 901 P.2d 1251, 1259-61 (Colo. 1995) (en banc) (addressing the Water Court's role and CWCB's statutory public duties regarding its instream flow water rights on Snowmass Creek); In re Bd. of Cnty.

Court has shown little inclination to reconsider its rejection of the doctrine, the voters may have an opportunity to consider addressing the issue by amending the constitution if some future version of the proposed initiative appears on the ballot.

II. ROOTS OF THE PUBLIC TRUST DOCTRINE

A. THE TRADITIONAL PUBLIC TRUST DOCTRINE–NAVIGABILITY

Defining the public trust doctrine is an elusive exercise, somewhat like trying to nail Jell-O to the wall. The University of Colorado's own Professor Charles Wilkinson, a proponent of the doctrine, describes it as "complicated," noting it comes in "many different forms."[8] Professor Joseph Sax, who first advocated an expanded role for the public trust doctrine, said, "Certainly the phrase 'public trust' does not contain any magic such that special obligations can be said to arise merely from its incantation."[9] Regardless of its alluring name, the public trust is hardly a trust at all.[10] In fact, it eludes classification.[11] It is "not so much a substantive set of standards . . . as it is a technique by which courts may mend perceived imperfections in the legislative and administrative process."[12] The doctrine is primarily a creation of the courts and has evolved into different forms in different jurisdictions. In a thorough study of the public trust doctrine's legal history, Professor James Huffman concluded that the doctrine's legal roots may be muddled because its proponents, to encourage judicial action, "have created a mythological history of the doctrine."[13]

The public trust doctrine is most easily understood in its "traditional" or "core" form.[14] Traditionally, the public trust doctrine was a common law restraint on government, preventing sovereign authority from defeating public access to *navigable* waters and the lands beneath them.[15] The doctrine, derived from Roman law, developed under England's monarchy to prevent the Eng-

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Comm'rs. v. United States, 891 P.2d 952, 971-73 (Colo. 1995) (en banc) (the "Union Park" case, rejecting arguments on appeal for broad consideration of "public values" in awarding new conditional water rights). *See* discussion *infra* Section II.B.

8. Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source & Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 426 (1989).

9. Joseph A. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 485 (1970).

10. George A. Gould, *The Public Trust Doctrine & Water Rights*, 34 ROCKY MTN. MIN. L. INST. 25-1, 25-10 (1988).

11. James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989) [hereinafter Huffman, *Fish Out of Water*].

12. Sax, *supra* note 9, at 509.

13. James L. Huffman, *Speaking of Inconvenient Truths–A History of the Public Trust Doctrine*, 18 DUKE ENVTL L. & POL'Y F. 1, 101 (2007) [hereinafter Huffman, *History of the Public Trust*].

14. *See* Wilkinson, *supra* note 8, at 426-27.

15. *See* Gould, *supra* note 10, at 25-11 to -13; Michael C. Blumm, *Public Property & the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 580 (1989).

lish Crown from transferring title in the submerged lands underlying navigable waters.[16]

English common law apparently did not trust the Crown to resist the temptation of bestowing favors on its supporters by deeding them title to submerged lands and thus control over the navigation of the overlying waters.[17] The Crown could convey its other holdings to its favored subjects,[18] but public navigation of English waters was so important, historic, and entrenched that the common law restraints on the Crown, following the Magna Carta, included protection of public access to navigable waters by preventing conveyance of the underlying lands.[19]

The most prominent American case on the traditional public trust doctrine is the U.S. Supreme Court's 1892 decision in *Illinois Central Railroad Co. v. Illinois*.[20] In 1869, the State of Illinois granted to the Illinois Central Railroad Company its right and title to the submerged lands of Lake Michigan beneath Chicago's harbor.[21] This grant was made to allow the railroad to develop the harbor and waterfront.[22] Illinois later underwent a change of heart and sued the railroad, claiming the state still held title to the submerged lands and the right to develop the harbor.[23] Illinois relied on the public trust doctrine to argue that it had never truly granted title and exclusive control of the Chicago harbor and waterfront to the railroad.[24]

The Supreme Court agreed:

> It is the settled law of this country that the ownership of and dominion and sovereignty over *lands covered by tide waters*, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters.[25]

The Court then held that this same doctrine applied to "public, *navigable* water, on which *commerce is carried on between different states or nations*" be-

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16. *See* Huffman, *Fish Out of Water*, *supra* note 11, at 541; *see also* Kemper v. Hamilton, 274 P.3d 562, 572 (Colo. 2012) (Hobbs, J., dissenting).

17. *See* Huffman, *Fish Out of Water*, *supra* note 11, at 550.

18. *See* Wilkinson, *supra* note 8, at 430-31.

19. *See* Huffman, *Fish Out of Water*, *supra* note 11, at 550. There is controversy over whether the Crown could actually divest itself of title to lands underlying navigable waters. *See* Wilkinson, *supra* note 8, at 430-31, n. 31. One authority states that alienation of title to submerged lands was categorically prohibited, while another states that transfer of title was prohibited only if the effect was to impede public access to the navigable waters. *See id.* Whatever the correct position, the cornerstone of the doctrine was preserving public access to navigable waters.

20. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

21. *Id.* at 438.

22. *Id.* at 439.

23. *Id.* at 433-34.

24. *Id.* at 439.

25. *Id.* at 435 (emphasis added).

cause any distinction between tidal and such navigable waters would be "arbitrary and without any foundation."[26]

The Court explained that the state held title to lands submerged under navigable waters in a different fashion than other lands:

> It is a title held in trust for the people of the state, that they may enjoy the *navigation* of the waters, carry on *commerce* over them, and have *liberty of fishing* therein, freed from the obstruction or interference of private parties.[27]

The Court then delineated the constraints on a state conveying title to these lands:

> The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.[28]

Thus, under the traditional public trust doctrine, the state may convey title to lands beneath navigable waters, but must retain sufficient control to assure the purpose of the trust is not substantially impaired. Notwithstanding the language or intent of any conveyance of these submerged lands, "there always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes."[29]

"There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it."[30] Thus, the public trust doctrine is an extreme example of *caveat emptor* or "buyer beware." Every grant of title to lands beneath navigable waters is, whether or not the conveyance says so, subject to the state's inalienable power to revoke its conveyance for trust purposes.

It is a remarkable doctrine, to say the least, which prohibits a state from disposing of its own property as it wishes, and allows it to renege on conveyances even if at the time of conveyance the state fully intended to part with fee title to the property. It also places an enormous burden on parties dealing with the state: conveyances of property by the state cannot be taken at face value, but are continually subject to an implied and inalienable right of revocation.

Such a doctrine might cause private parties to cease dealing with a state unless the courts narrowly limit the application of the doctrine. Thus, the "navigability" requirement embedded within the traditional public trust doctrine limits it to obvious needs for navigation and commerce:

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26. *Id.* at 436 (emphasis added).
27. *Id.* at 452 (emphasis added).
28. *Id.* at 453.
29. *Id.* at 453-54.
30. *Id.* at 460.

> The principle of the common law to which we have adverted is found upon the most obvious principles of public policy. The sea and navigable rivers are natural highways, and any obstruction to the common right, or exclusive appropriation of their use, is injurious to commerce, and, if permitted at the will of the sovereign, would be very likely to end in materially crippling, if not destroying, it.[31]

Illinois Central was decided under Illinois law, not federal law.[32] It "was an exceptional case yielding an exceptional result."[33] Nevertheless, it has frequently been cited as precedent in the last forty years, often with little understanding of its unique facts and narrow holding.[34] Some form of this holding has been adopted by most state courts that have encountered similar issues. An Arizona court counted up to thirty-eight states that had concluded a state holds lands beneath navigable waterways in trust for the public.[35] However, it remains to the states to define which waters are "navigable,"[36] and to "recognize private rights in [public trust lands] as they see fit."[37]

B. WHO MADE THE PUBLIC TRUST KING?

An extraordinary characteristic of the public trust doctrine is that its legal basis and origins are unclear. Courts and commentators have struggled with this question.[38] This is remarkable considering the public trust doctrine can operate as an almost super-constitutional restraint on, or empowerment of, state governments in those jurisdictions where it has been held to apply. But neither the United States nor the state constitutions mention such a trust.[39] Neither has it been, except in rare instances, adopted by statute.[40] Absent ex-

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31. *Id.* at 458.

32. Appleby v. City of New York, 271 U.S. 364, 395 (1926) (reaching a contrary result under New York law); Gould, *supra* note 10, at 25-11.

33. Huffman, *History of the Public Trust*, *supra* note 13, at 67.

34. *Id.* at 54-67; *see also* Joseph D. Kearney & Thomas W. Merrill, *The Origins of the Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799 (2004).

35. Ariz. Ctr. for Law in Pub. Interest v. Hassell, 837 P.2d 158, 167 n.13 (Ariz. Ct. App. 1991).

36. Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 202 (1980).

37. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 475 (1988); *see also* PPL Mont., LLC v. Montana, 132 S. Ct. 1215, 1235 (2012).

38. *See* Wilkinson, *supra* note 8, at 428, 434, 437, 439; William D. Araiza, *The Public Trust Doctrine as an Interpretive Canon*, 45 U.C. DAVIS L. REV. 693, 699-701, 703 (2012) (exploring the doctrine's ambiguous legal foundation); Huffman, *Fish Out of Water*, *supra* note 11, at 539-42, 544-45; *see also* James L. Huffman, *Trusting the Public Interest to Judges: A Comment on the Public Trust Writings of Professors Sax, Wilkinson, Dunning & Johnson*, 63 DENV. U. L. REV. 565, 567 & n.16 (1986)(note cases cited therein).

39. *See* Huffman, *Fish Out of Water*, *supra* note 11, at 545; Blumm, *supra* note 15, at 576-77 & n.12 (lists of relevant state constitutional provisions but no express declarations of public trusts).

40. *See* Blumm, *supra* note 15, at 587-89 (discussing statutory construction with no citation to express adoptions of the public trust). Arizona has adopted a statute limiting waters consid-

press adoption, the doctrine still operates as a surprising limit on states' sovereign power to allow private rights in state property.

Various explanations have been offered for the source of its adoption.[41] One apparent source was suggested by the Supreme Court in the *Illinois Central* era: the common law of England preserved navigability of tidal waters, and upon independence, this constraint on title passed to the original thirteen states as sovereigns.[42] These principles were then applied in other states because they entered the Union "on equal footing," implicitly taking title to tidelands from the United States, but subject to the limits inherent in the United States' and original states' title.[43] However, "the Supreme Court will not impose the public trust doctrine on any state, even as to the beds of navigable waters."[44] State constitutions are commonly cited as potential sources, but only by inference from references to navigation or public ownership.[45]

Absent constitutional sources, many consider the doctrine to be a natural law or an inherent limitation on government that is commonly and mutually understood though unexpressed. For example, the Romans' Justinian Code is frequently cited for the imposition of the trust,[46] though no one seriously would argue that any US jurisdiction has adopted Roman law, even if some are influenced indirectly by it. Professor Wilkinson seems to support this concept of inherent limitation; he describes the "ancient roots" of several countries' "special treatment to major bodies of water."[47]

Professor Harrison Dunning probably stated this proposition accurately:

> What [the courts] may be saying . . . is that the public trust doctrine limits legislative freedom because it is implied state constitutional doctrine, one that springs from a fundamental notion of how government is to operate with regard to common heritage natural resources, that is, government must protect

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ered navigable for public trust purposes and limiting public trust values to commerce, navigation, and fishing. H.R. 2589, 41st Leg., 2d Reg. Sess. ch. 277, (Ariz. 1994).

41. For example, Professor Wilkinson says the public trust doctrine "derives from constitutional, statutory, and common-law sources." Wilkinson, *supra* note 8, at 426 n.6; *see also* Huffman, *Fish Out of Water*, *supra* note 11, at 528-29; Gould, *supra* note 10, at 25-5 to -7, 25-11 to -12.

42. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 434-37 (1892); Shively v. Bowlby, 152 U.S. 1, 16 (1894).

43. *Shively*, 152 U.S. at 27-28; Cinque Bambini P'ship v. Mississippi, 491 So. 2d 508, 511 (Miss. 1986), *aff'd sub nom.* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988); *see also* Huffman, *Fish Out of Water*, *supra* note 11, at 539; *but cf.* Wilkinson, *supra* note 8, at 439-48 (criticizing the "equal footing" rationale).

44. Gould, *supra* note 10, at 25-13; *see also* PPL Mont., LLC. v. Montana, 132 S. Ct. 1215, 1234-35 (2012).

45. *See* Huffman, *Fish Out of Water*, *supra* note 11, at 545-54; Blumm, *supra* note 15, at 574, 576.

46. "By the law of nature these things are common to mankind - the air, running water, the sea and consequently the shores of the sea." *Mono Lake*, 658 P.2d 709, 718 (Cal. 1983) (en banc) (quoting Institutes of Justinian 2.1.1).

47. Wilkinson, *supra* note 8, at 428-29.

public access to such resources unless there is a solemn decision to the contrary.[48]

The search for sources grows as the public trust doctrine expands beyond its traditional scope.[49]

Most of these explanations, however, are unpersuasive.[50] Moreover, they do not justify imposition of such a doctrine in Colorado, where the state constitution expressly guarantees the property right to appropriate waters of the state for beneficial use. Creative legal propositions cannot impose a public trust doctrine contrary to such an express constitutional guarantee.

C. *PPL V. MONTANA*: CLARIFYING THE LEGAL CONTEXT AND SCOPE OF THE PUBLIC TRUST DOCTRINE

The US Supreme Court recently revisited the public trust doctrine in *PPL Montana, LLC v. Montana* ("*PPL Montana*").[51] In *PPL Montana*, the Court more clearly defined the scope of the doctrine in the context of the equal footing doctrine and the federal common law that governs questions of navigability for state title. Both topics bear on the ongoing legal issues in Colorado and other Western states regarding not only the public trust doctrine, but also public stream access, as discussed below. Thus, *PPL Montana* clarifies the legal framework for evaluating the public trust doctrine and the legal basis on which Colorado has declined to impose the public trust on water rights.

PPL Montana, LLC ("PPL") owns ten hydroelectric generation facilities in Montana located on riverbeds underlying segments of the Clark Fork, Missouri, and Madison Rivers. Five PPL dams are located on the Great Falls reach of the Upper Missouri River. Four other dams, two located on the Stubbs Ferry stretch of the Missouri River and two on the Madison River, constitute the Missouri-Madison project, and the Thompson Falls Project is located on the Clark Fork River. In 2003, the parents of Montana school children sued PPL in federal court, seeking compensation for the utility company's use of what the parents characterized as "state-owned riverbeds" at its various facilities.[52] Those plaintiffs contended that under Montana law, the riverbeds were part of the state's school trust lands, and as such, PPL was obligated to compensate the State Land Board for its use of the land.[53] The State joined the

48. Harrison C. Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 ENVTL. L. 515, 523 (1989). Professor Wilkinson summarizes: "The real headwaters of the public trust doctrine, then, arise in rivulets from all reaches of the basin that holds the societies of the world." Wilkinson, *supra* note 8, at 431.

49. The type of law embodied in the public trust doctrine is also unclear. Some suggest what the name implies: it is trust law. Others contend it to be constitutional law, or administrative law. And some say it is a matter of property law: an implied easement for public navigation.

50. *See* Huffman, *Fish Out of Water*, *supra* note 11, at 534-60.

51. 132 S. Ct. 1215 (2012).

52. *Id.* at 1225.

53. *Id.*

lawsuit against PPL in 2004, seeking compensation under the school trust land theory.[54]

The federal suit was dismissed for lack of subject matter jurisdiction, but prior to dismissal, PPL filed suit in state court against the State of Montana.[55] PPL sought a declaratory judgment that the State could not seek compensation for its use of riverbeds in the Clark Fork, Missouri, and Madison Rivers.[56] The State then filed a counterclaim, seeking a declaration that PPL must compensate the state for the use of its lands as well as damages for what it alleged was PPL's unlawful past and ongoing use of those lands without compensation to the state.[57] Ultimately the trial court granted the State's Motion for Summary Judgment on the issue of navigability, holding that the rivers in question were navigable in fact at the time Montana became a state in 1889 for purposes of the equal-footing doctrine, and ordered PPL to pay forty-one million dollars in rent for use of the riverbeds from 2000-2007.[58] PPL appealed, and the Montana Supreme Court affirmed the trial court's decision.[59] PPL then appealed to the United States Supreme Court.[60]

The United States Supreme Court, in a unanimous opinion, reversed the Montana Supreme Court.[61] The Court held that the Montana Supreme Court misapplied longstanding precedent when it determined that the rivers in dispute in the case were navigable in fact at the time of statehood and that the Montana Supreme Court placed too much weight on evidence of present-day use of the rivers in its determination of navigability.[62] Finally, the Court addressed the State of Montana's argument that denying the state title to the riverbeds in question was a violation of the public trust, as conceived in Montana, by clarifying that navigability in fact with regard to title under the equal-footing doctrine is a matter of federal law, while the public trust doctrine is a creation of state law.[63]

1. Navigability in Fact

The Montana Supreme Court's decision was a departure from federal case law reaching back to the nineteenth century that established the "navigability in fact" test for determining state title under the equal-footing doctrine. The Supreme Court summarized the equal-footing doctrine in *PPL Montana*, explaining:

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54. PPL Mont., LLC v. State (*PPL v. State*), 229 P.3d 421, 427 (Mont. 2010), *rev'd*, 132 S. Ct. 1215 (2012).
55. *PPL Montana*, 132 S. Ct. at 1225.
56. *PPL v. State*, 229 P.3d. at 427.
57. *Id.* at 428.
58. *Id.* at 405.
59. *Id.* at 405, 432.
60. *PPL Montana*, 132 S. Ct. at 1226.
61. *Id.* at 1221, 1235.
62. *Id.* at 1233-34.
63. *Id.* at 1234-35.

> Upon statehood, the State gains title within its borders to the beds of waters then navigable. . . . It may allocate and govern those lands according to state law subject only to 'the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.' The United States retains any title vested in it before statehood to any land beneath waters not then navigable . . . to be transferred or licensed if and as it chooses.[64]

First articulated in *The Daniel Ball*, and relied upon since, the test for determining navigability in fact for purposes of the equal-footing doctrine is whether waters "are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[65] Courts have applied some variation of *The Daniel Ball* test to determine the navigability of waterways in multiple contexts. It is relevant to determinations of title to riverbeds, as well as in cases considering the navigability of waters in the regulatory context and under federal statutes addressing waterways and their underlying beds.[66] These three legal issues are distinct, however, in their respective definitions of navigability. The Montana Supreme Court mistakenly relied on case law addressing navigability in these other contexts when it determined the rivers in dispute in this case were navigable in fact at the time of statehood.[67]

The Supreme Court has always addressed the question of navigability in fact for purposes of title by analyzing a river in segments, "based on the 'natural and ordinary condition' of the water" at the time of statehood.[68] The Montana Supreme Court rejected this analysis, characterizing the segment approach as "a piecemeal classification of navigability—with some stretches declared navigable, and others declared non-navigable."[69] In place of the segment approach, the Montana Supreme Court took the view that "short interruptions" in navigability could not defeat the classification of an entire river as "navigable."[70] Under this theory, the court held that the seventeen-mile portion of the Upper Missouri River that is central to PPL's operations, the Great Falls reach, was navigable at the time of statehood.[71] The court explained that portages, or land routes to circumvent torrential portions of rivers, "are not sufficient to defeat a finding of navigability."[72] The Supreme Court disagreed, noting bluntly that portages do defeat navigability "because they require transportation over land rather than over the water."[73]

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64. 132 S. Ct. at 1227-28 (citing United States v. Oregon, 295 U.S. 1, 14 (1935); Montana v. United States, 450 U.S. 544, 551 (1981); United States v. Holt State Bank, 270 U.S. 49, 54-55 (1926)).
65. 77 U.S. 557, 563 (1870).
66. *PPL Montana*, 132 S. Ct. at 1228.
67. *Id.* at 1231-32.
68. *Id.* at 1228 (citing Oklahoma v. Texas, 258 U.S. 574, 591 (1922)).
69. *Id.* at 1229 (citing PPL Mont., LLC v. State, 229 P.3d 421, 448-49 (Mont. 2010)).
70. PPL Mont., LLC v. State, 229 P.2d 421, 441-42 (Mont. 2010).
71. *Id.* at 440.
72. *Id.* at 438.
73. *PPL Montana*, 132 S. Ct. at 1231.

The Court ultimately concluded the seventeen miles of riverbed that make up the Great Falls reach, "at least from the head of the first waterfall to the foot of the last, is not navigable for purposes of riverbed title under the equal-footing doctrine."[74] This proclamation is noteworthy because PPL had not previously moved for summary judgment on the question of navigability. Thus, although the Supreme Court reversed and remanded the Montana Supreme Court's decision, the Court's conclusion as to the navigability of the Great Falls reach limits the possible result on remand.

The Court also addressed the Montana Supreme Court's analysis of present-day use as an indication of navigability at the time of statehood.[75] The Court reaffirmed the longstanding principle that commercial use is synonymous with navigability for purposes of the equal-footing doctrine.[76] Indeed, navigability "concerns the river's usefulness for 'trade and travel,' rather than for other purposes."[77] Evidence from the time of statehood, that explorers or trappers may have portaged alongside the harsher stretches of river to stay on course, is not enough to establish navigability.[78] Past decisions have recognized that present-day recreational or other use may be indicative of whether the river was "susceptible of being used," depending on the nature of the present-day use.[79]

In order to rely on present-day use as evidence of the pre-statehood quality of a river, the proponent must show the following elements: "(i) the watercraft are meaningfully similar to those in customary use for trade and travel at the time of statehood; and (ii) the river's post-statehood condition is not materially different from its physical condition at statehood."[80] The Montana Supreme Court failed to make any findings as to what kinds of watercraft are currently utilized on the rivers in question.[81] It also failed to address PPL's evidence that the presence of its dams for the last several decades had changed the quality of rivers such that "the river has become 'less torrential' in high flow periods and less shallow in low flow periods."[82]

2. The Public Trust Doctrine

The Court also addressed Montana's arguments regarding the public trust doctrine. The State argued denying it title to the riverbeds in dispute undermined the public trust doctrine, as it "concerns public access to the waters above those beds for purposes of navigation, fishing, and other recreational

74. *Id.* at 1232.
75. *Id.* at 1233-34.
76. *Id.* at 1230.
77. *Id.* at 1233 (citing United States v. Utah, 283 U.S. 64, 76 (1931)).
78. *Id.* at 1233 (citing United States v. Oregon, 295 U.S. 1, 20-21(1935)).
79. *Id.* (quoting United States v. Appalachian Elec. Power Co., 311 U.S. 377, 416 (1940) ("[P]ersonal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.").
80. *Id.* (citing *Oregon*, 295 U.S. at 18).
81. *Id.* at 1234.
82. *Id.* at 1235.

uses."[83] The Court clarified that title pursuant to the equal-footing doctrine and the public trust doctrine are entirely separate concepts, with different legal bases.[84] The equal-footing doctrine is, as discussed above, "the constitutional foundation for the navigability rule of riverbed title," while "the public trust doctrine remains a matter of state law."[85] The Court further clarified that its holding in the seminal public trust case, *Illinois Central*,[86] was "necessarily a statement of Illinois law."[87] Accordingly, "the contours of that public trust do not depend on the Constitution . . . [and] the States retain residual power to determine the scope of the public trust over waters within their borders."[88]

The outcome of *PPL Montana* was significant for riparian landowners not only in Montana, but throughout the West. As a coalition of Colorado landowners with predominantly agricultural interests pointed out in an *amici* brief, the most disturbing aspect of the Montana Supreme Court's decision may have been its willingness to rule on navigability as a matter of summary judgment.[89] Justice Rice of the Montana Supreme Court was equally concerned, noting in his dissent that the majority had deprived PPL of its right to trial by the improper entry of summary judgment.[90] Having reviewed the substantial evidence produced in the case, Justice Rice further stated,

> PPL has satisfied its burden [on summary judgment] to produce substantial evidence that the disputed reaches of the rivers were, at the time of statehood, non-navigable. The Court's decision to the contrary makes one wonder just what evidence the Court would have considered sufficient for PPL to defeat summary judgment in this case.[91]

As long ago as 1922, the US Supreme Court recognized the danger identified by Justice Rice, warning that "[s]ome states have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control."[92] Stability is at the core of any defense to claims by the states to riverbeds that have long been under the control of private landowners or the federal government. As the Montana Supreme Court's award of "rents" to the state proved, not only would title to such lands be open to attack across the West, had the decision been affirmed, but owners of water rights put to economic uses also could have been subject to fees or rents imposed by state governments by assertion of a "public trust" and title through the courts. These concerns were echoed in

83. *Id.* at 1234.
84. *Id.* at 1235.
85. *Id.*
86. 146 U.S. 387 (1892).
87. *PPL Montana* at 1235 (citing Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 285 (1997); Appleby v. City of New York, 271 U.S. 364, 395 (1926)).
88. *PPL Montana*, 132 S. Ct. at 1235.
89. Brief for *Creekside Coal. et al.* as Amici Curiae Supporting Petitioner at *10, PPL Mont., LLC v. Montana, 132 S. Ct. 1215 (2012) (No. 10-218), 2011 WL 3947563 [hereinafter *Creekside Coal. Br.*].
90. PPL Mont., LLC v. State, 229 P.3d 421, 477 (Mont. 2010).
91. *Id.*
92. Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 89 (1922).

amici briefs filed by Colorado agricultural and livestock interests, Montana water and irrigation districts, and the US government.[93]

The Supreme Court left no doubt that navigability for title purposes is a federal question, and one that is answered through its longstanding and well established tests articulated in case law reaching back to the nineteenth century. The Court found it significant that, although PPL and its predecessor had operated several of the facilities at issue in the case for more than a century, the State had never previously sought to obtain rents for its use of supposed "state-owned riverbeds."[94] The Court closed with what may be interpreted as a commitment to the stability of long-settled property rights, by quoting its decision in *Brewer-Elliott*:

> It is not for a State by courts or legislature, in dealing with the general subject of beds or streams, to adopt a retroactive rule for determining navigability which . . . would enlarge what actually passed to the State, at the time of her admission, under the constitutional rule of equality here invoked.[95]

The Court's clarification of the public trust doctrine was just as forceful, rejecting the State's assertion that its public trust interest warranted deference to its determination of title, while establishing that the public trust doctrine is a creature of state, and not federal law.[96] The Court also clarified that the case most often relied on to support a federal public trust in water, *Illinois Central*,[97] was based on state law.[98] This is a significant affirmation of the legal basis on which the Colorado courts have long held (as discussed below) that the Colorado Constitution provides no basis for a public trust in water, and thus, no public trust may be imposed on the waters and water rights of the state.

The decision is significant for riparian landowners in the state as well. As discussed below, there is an ongoing debate amongst Coloradoans as to the existence of a public "right to float" Colorado streams. *PPL Montana* puts to rest some aspects of this debate, along with any question whether federal law may dictate a public trust doctrine.

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93. *Creekside Coal. Br., supra* note 89, at *1-2; Brief for Mont. Water Res. Ass'n et al. as Amici Curiae Supporting Petitioner at *4, PPL Mont., LLC v. Montana, 132 S. Ct. 1215 (2012) (No. 10-218), 2011 WL 4040422; Brief for United States as Amicus Curiae Supporting Petitioner at *7, PPL Mont., LLC v. Montana, 132 S. Ct. 1215 (2012) (No. 10-218), 2011 WL 3947562.

94. *PPL Montana*, 132 S. Ct. at 1235.

95. *Id.* (quoting Brewer-Elliot Oil & Gas v. United States, 260 U.S. 77, 88 (1922)).

96. *Id.* at 1234.

97. 146 U.S. 387 (1892).

98. *PPL Montana*, 132 S. Ct. at 1235.

III. A FISH OUT OF WATER:[99] DIFFERENT NEEDS AND DIFFERENT PRINCIPLES FOR THE WEST

A. BEYOND THE 100TH MERIDIAN: NAVIGABILITY AND WESTERN RIVERS

On a fine July day in 1869, "Captain" Samuel Adams stood on the banks of the Blue River near Breckenridge, congratulating the forward-looking people of that town for helping him ready his expedition with four boats and ten men.[100] Adams purportedly had spent time boating the Lower Colorado River in a small steam-powered stern wheeler, and was convinced that reports of large chasms and impassable churning waves upstream on the Colorado were fanciful tales of unfaithful spies sent to examine the Promised Land.[101] Captain Adams was convinced the Colorado River was to become the Mississippi River of the West, connecting Western States in a grand continual stream of commerce.[102] Adams also believed that smooth water covered the Colorado River from its headwaters all the way to the Ocean.[103] He had tried to join up with Major Powell's expedition, but Powell and his men did not take him seriously and rebuffed his attempt to join them.[104] Adams commenced his own expedition to prove the navigability of the Colorado River through the Western States.[105]

After launching their boats, Adams and his crew had scarcely floated a few miles past the confluence of the Blue River and Ten Mile Creek when they unexpectedly ran into Boulder Creek rapids and lost much equipment.[106] Further downstream, two of their boats were destroyed; with two boats remaining and a crew depleted by deserters, Adams continued on to Gore Canyon.[107] Adams at least had the common sense not to try to float through Gore Canyon, but he still lost his remaining boats trying to get through the canyon. He also lost all but two of his men to desertion. The remaining adventurers built rafts and continued, but after losing successive rafts and more equipment and provisions, they finally admitted defeat somewhere above the confluence of the Eagle and Colorado Rivers.[108] Had Adams continued, he soon would have run into the deadly cascading rapids in Glenwood Canyon above today's Shoshone Power Plant. Still ahead were the dark waves of Westwater Canyon and the enormous haystacks and hydraulics of Cataract and Grand Canyons.

Captain Adams' disastrous adventure was the result of his false assumption that Colorado's largest river was navigable. In fact, no river in Colorado has

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99. Our apologies to Professor Huffman (*see* note 11, *supra*).
100. DOUG WHEAT, THE FLOATER'S GUIDE TO COLORADO 41 (1995).
101. *See* WALLACE STEGNER, BEYOND THE HUNDREDTH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST 50-51 (1954); WHEAT, *supra* note 100, at 41.
102. WHEAT, *supra* note 100, at 41-42.
103. STEGNER, *supra* note 101, at 51.
104. WHEAT, *supra* note 100, at 42.
105. *Id.*
106. *Id.* at 42-43.
107. *Id.* at 43, 47.
108. *Id.* at 42-44.

ever been recognized as navigable in fact, or navigable under state law.[109] This fact has particular importance under *Illinois Central* and *PPL Montana*, which defined a navigable body of water as one sustaining *commerce between different states or nations.*[110]

Captain Adams' hard lessons also highlight the simple truth that gave rise to the appropriation doctrine: rivers and man's needs for water are different west of the 100th Meridian, rendering navigability a fantasy. East of that line, which crosses western Kansas, water is more plentiful, feeding streams that really have been used for navigation.[111] Without more urgent needs or scarce supplies, eastern states' powers and laws were developed based on riparian rights and navigability. Their premise was that "reasonable use" of water–the basic riparian right–would never seriously affect the flow of the large navigable rivers.

But west of the 100th Meridian, such navigability generally ends. With it ends the basis for imposing a public trust doctrine as a historic and extra-constitutional restraint on states' power to allow private rights in their resources. The rivers of the West are not like those of the Midwest or East. In their natural state, they flood in late spring and taper off to trickles by mid-summer. Some western rivers may now provide excellent sport for whitewater enthusiasts, but their nature was never that of navigable rivers; nor was navigation a common public value inextricably intertwined in the fabric of settlement between the High Plains and the Sierras. The reasons common law judges protected title to lands submerged under tidal or navigable waters are largely absent west of the 100th Meridian. Water is scarce. It must be diverted from its course to be used, and must be stored to be used optimally. Weighed against these necessities, Captain Adams' dream of Colorado navigation is foolish and frivolous. The traditional public trust doctrine has no practical application here.

B. COLORADO'S CONSTITUTION, PRIOR APPROPRIATION, AND ITS REJECTION OF A PUBLIC TRUST DOCTRINE

Colorado water law is grounded in the constitutionally guaranteed right of prior appropriation.[112] Unlike several other states, Colorado's constitutional declaration regarding public ownership of unappropriated waters is expressly and exclusively for use by appropriation:

> The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the

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109. *See* People v. Emmert, 597 P.2d 1025, 1027 (Colo. 1979) (en banc); In re German Ditch & Reservoir Co., 139 P. 2, 9 (Colo. 1913).

110. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 436 (1892); *PPL Montana*, 132 S. Ct. at 1228; contrast the Clean Water Act's "Alice in Wonderland" definition of "navigable waters" as "*the waters* of the United States . . . ." 33 U.S.C. § 1362(7) (emphasis added).

111. Professor Wilkinson, in emphasizing the importance of navigable waters, recounts the critical role such navigability played in the history of the country. But the waters mentioned are those west of the 100th Meridian. Wilkinson, *supra* note 8, at 436-37.

112. COLO. CONST. art. XVI, § 5.

> same is *dedicated to the use of the people* of the state, *subject to appropriation* as hereinafter provided.[113]

The Colorado Supreme Court has held that this provision "simply and firmly establishes the right of appropriation in this state."[114] This declaration is paired with the express constitutional right to appropriate water: "The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."[115]

Colorado courts have long emphasized the property nature of appropriative water rights, holding that appropriation creates a "most valuable property right" in the exclusive use of water.[116]

> A priority to the use of water for irrigation or domestic purposes is a property right and as such is fully protected by the constitutional guaranties relating to property in general.[117]

Advocates of public ownership have argued unsuccessfully that implied and inherent constitutional limitations such as the public trust doctrine limit this express constitutional guarantee of appropriative rights. The Colorado Supreme Court in *People v. Emmert* followed the state constitution by refusing to apply the public trust doctrine to Colorado's waters.[118]

Emmert involved rafters who were charged with trespassing on private property for floating down a section of the upper Colorado River, not far from Gore Canyon, which was the site of Captain Adams' debacle.[119] In their defense, the rafters claimed a public easement on the river based on the public trust doctrine. The Colorado Supreme Court rejected this defense: "[W]e do not feel constrained to follow the trend away from the coupling of bed title with the right of public recreational use of surface waters as urged by defendants."[120] The court elaborated:

> We recognize the various rationales employed by courts to allow public recreational use of water overlying privately owned beds, *i.e.,* (i) practical considerations employed in water rich states such as Florida, Minnesota and Washington; (ii) a *public easement* in recreation as an incident of navigation; (iii) the creation of a *public trust* based on usability, thereby establishing only a limited private usufructurary right; and (iv) state constitutional basis for state ownership. We consider the common law rule [of private ownership] of

113. *Id.* (emphasis added).
114. People v. Emmert, 597 P.2d 1025, 1028 (Colo. 1979) (en banc).
115. COLO. CONST. art. XVI, § 6.
116. Navajo Devel. Co. v. Sanderson, 655 P.2d 1374, 1378 (Colo. 1982) (en banc); Nichols v. McIntosh, 34 P. 278, 280 (Colo. 1893).
117. Farmers Irrig. Co. v. Game & Fish Comm'n, 369 P.2d 557, 559-60 (Colo. 1962) (en banc).
118. *Emmert*, 597 P.2d at 1029.
119. *Id.* at 1025.
120. *Id.* at 1027.

> more force and effect, especially given its longstanding recognition in this state.[121]

This decision also was based on the stipulated fact that the upper Colorado River was non-navigable.[122]

Colorado's constitutional declaration of "public property" in unappropriated water is simply for "use of the people," not for navigation but by appropriation. The only state protection required is protection *for appropriation*, not protection *from* use or for preservation.[123] "Colorado's rejection of the public trust doctrine as a water allocation mechanism is justified on the basis that the doctrine does not provide standards by which the judiciary can determine the allocation of quantities of water between competing demands."[124]

In subsequent decisions, the Colorado Supreme Court has shown no inclination to reverse course and consider adopting a public trust doctrine. For example, the *Union Park* case[125] involved claims for large volumes of transmountain diversions and storage on the headwaters of the Gunnison River, met by a panoply of objections ranging from water availability to environmental concerns, some under the rubric of a public trust doctrine. After an unsuccessful effort to argue the public trust doctrine as grounds for objection in the water court (Water Division 4), some of the objectors cross-appealed, arguing that the water court erred in not considering the environmental impacts of the Union Park Project and that the term beneficial use "inherently encompasses a broad public policy of protecting the natural and man-made environment."[126] The Colorado Supreme Court rejected these arguments, holding that in adjudicating water rights, such environmental interests may be recognized only to the extent of instream flow water rights held by the Colorado Water Conservation Board ("CWCB").[127] "Conceptually, a public interest theory is in conflict with the doctrine of prior appropriation because a water court cannot, in the absence of statutory authority, deny a legitimate appropriation based on public policy."[128] Accordingly, the Court rejected "the cross-appellants' invitation to create a complex system of common law to balance competing public interests."[129]

A few months later, the Colorado Supreme Court addressed the CWCB's responsibilities as the statutory holder of decreed instream flow water rights on

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121. *Id.* (emphasis added).
122. *Id.* at 1026.
123. "If anything, [such] constitutional language imposes a trust on water *for appropriation*." Gould, *supra* note 10, at 25-53 (emphasis in original).
124. Hobbs & Raley, *supra* note 3, at 881.
125. Bd. of Cnty. Comm'rs v. United States, 891 P.2d 952, 957-58, 971 (Colo. 1995) (en banc).
126. *Id.* at 971.
127. *Id.* at 971-73; *see also* COLO. REV. STAT. § 37-92-102(3) (CWCB's authority to appropriate minimum instream flows).
128. *Bd. of Cnty. Comm'rs*, 891 P.2d at 973.
129. *Id.*

Snowmass Creek.[130] In a split decision, the majority recognized the CWCB has a "unique statutory fiduciary duty" and may not unilaterally reduce the previously decreed amount of instream flow without the water court's approval.[131] The majority's initial slip opinion repeatedly characterized the CWCB's unique duties as a "public trust."[132] In response to a motion for rehearing, the Court revised these characterizations, deleting all reference to a "public trust," instead relying on the CWCB's "unique statutory fiduciary duty."[133] Meanwhile, Justice Mullarkey's dissenting opinion pointed out the inconsistency of the majority's rationale with Colorado's historical water rights principles, noting, "This court has never recognized the public trust with respect to water."[134]

Ironically, in light of Colorado's steadfast rejection of a public trust doctrine, some commentators continue to cite an unpublished 1969 federal case from Colorado as authority for applying the public trust doctrine to private land.[135] *Defenders of Florissant v. Park Land Co.*[136] involved ancient fossil beds lying partly beneath a property owned by a developer who was poised to begin excavation for and construction of a residential subdivision.[137] In fact, Congress was in the midst of designating the property a national monument during the trials and appeals, but had not yet passed a law to do so.[138] The plaintiffs successfully obtained a temporary restraining order from the Tenth Circuit, which remanded the case to the US District Court for the District of Colorado for a hearing on the merits.[139] The district court dismissed the case without reaching the merits, and the plaintiffs filed a successful emergency appeal with the Tenth Circuit after the developer declared that he was ready to begin excavation on the property with bulldozers.[140] The Tenth Circuit's equitable order

130. Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd., 901 P.2d 1251, 1253 (Colo. 1995) (en banc).

131. *Id.* at 1259-61.

132. Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd., No. 93SC740, slip op. at 19-24 (Colo. June 19, 1995); *see also* Gregory J. Hobbs, Jr., *Has the Colorado Supreme Court Annulled the Instream Flow Program?*, 16 U. DENV. WATER L. REP. 1 (1995).

133. *Aspen Wilderness*, 901 P.2d at 1259-60.

134. *Id.* at 1263 (Mullarkey, J., dissenting).

135. *See, e.g.*, John Hedges, *Currents in California Water Law: The Push to Integrate Groundwater and Surface Water Management Through the Courts*, 14 U. DENV. WATER L. REV. 375, 392-93 (2011); Darren K. Cottriel, *The Right to Hunt in the Twenty-First Century: Can the Public Trust Doctrine Save an American Tradition?*, 27 PAC. L.J. 1235, 1264 (1996); Joan E. Van Tol, *The Public Trust Doctrine: A New Approach to Environmental Preservation*, 81 W. VA. L. REV. 455, 462 (1979); Victor John Yannacone, Jr., *Agricultural Lands, Fertile Soils, Popular Sovereignty, the Trust Doctrine, Environmental Impact Assessment and the Natural Law*, 51 N.D. L. REV. 615, 633 (1975); Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 473-76, 556 (1970); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 159 (1971).

136. VICTOR YANNACONE, JR., BERNARD S. COHEN & STEVEN G. DAVIDSON, ENVIRONMENTAL RIGHTS AND REMEDIES 39-45 (1972) (discussing at length the unpublished case of Defenders of Florissant v. Park Land Co., No. 403-69 (10th Cir. July 29, 1969)).

137. *Id.* at 40.

138. *Id.*

139. *Id.* at 42.

140. *Id.* at 42-43.

granting the emergency appeal and the resulting indefinite restraining order were not accompanied by an opinion and made no reference to a public trust doctrine.[141] The court's extraordinary order briefly mentioned the adequacy of the pleadings and affidavit for a temporary restraining order to prevent irreparable harm—the only issue pleaded by the plaintiffs—and did not discuss the legal merits of the underlying case.[142] Before any further judicial action could take place, Congress designated the property a national monument.[143] As the California Court of Appeal has recognized, *Florissant* is "an unreported case in which the court did not pass on the issue of obtaining the fossil under a public trust."[144] The *Florissant* case remains a popular story considering that the decision is not only unpublished, but is unavailable without visiting the National Archives building in Lakewood, Colorado. Clearly, the Tenth Circuit did not intend for this temporary equitable decision to be cited as precedent for public trust law, where the public trust doctrine was not mentioned, the merits of the case were never addressed, and the controversy was mooted by an act of Congress.[145] So, it appears that this case is not precedent at any level, but simply another instance of the "mythological history" created by proponents of the public trust doctrine.[146]

C. COLORADO AND THE "RIGHT TO FLOAT": STREAM ACCESS DISPUTES SINCE *EMMERT*

As mentioned above in the context of *Emmert*, proponents of expansive rights to public access of Colorado's streams, often referred to as the "right to float," have often relied on the public trust doctrine to support the argument that a right to float and access to streambeds throughout the state exists.[147] The debate has continued, even after the Colorado Supreme Court expressly rejected the argument in *Emmert*.[148] Moreover, some attempts to impose a public trust on Colorado water rights through the initiative process have combined access and public trust issues.[149] Those who support such an application of the public trust in Colorado make much of other states' public trust doctrines, which often include a right to float. However, Colorado's Constitution, as well

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141. *Id.*
142. *Id.* at 43-44.
143. Pub. L. No. 91-60, 83 Stat. 101-102 (1969).
144. San Diego Archaeological Soc'y v. Compadres, 81 Cal. App. 3d 923, 923 n. 2 (Cal. Ct. App. 1978).
145. Pub. L. No. 91-60, 83 Stat. 101-102 (establishing Florissant Fossil Beds National Monument).
146. *See* Huffman, *History of the Public Trust*, *supra* note 13, at 101.
147. People v. Emmert, 597 P.2d 1025, 1027-28 (Colo. 1979) (en banc).
148. Perhaps most notably, in the pages of this publication, Colorado water attorneys Lori Potter and John R. Hill provided their best arguments for and against the right to float in 2001 and 2002. *See* John R. Hill, Jr., *The "Right" to Float Through Private Property in Colorado: Dispelling the Myth*, 4 U. DENV. WATER L. REV. 331 (2001); *see also* Lori Potter, Steven Marlin & Kathy Kanda, *Legal Underpinnings of the Right to Float Through Private Property in Colorado: A Reply to John Hill*, 5 U. DENV. WATER L. REV. 457 (2002).
149. As discussed *infra* Section VI.

as more basic property rights principles, weighs heavily against the creation of such rights in Colorado.[150]

1. Colorado's Constitution: The Right to Appropriate

In *Emmert*, the Colorado Supreme Court explicitly held that no right to float exists in Colorado.[151] In accordance with its previous decision in *Hartman v. Tresise*,[152] the court concluded article XVI, section 5 of the Colorado Constitution "simply and firmly establishes the right of appropriation in this state."[153]

Despite the court's ruling, commentators who argue in favor of the right to float often cite Wyoming's Constitution as evidence that the Colorado Supreme Court interpreted this provision of the Colorado Constitution too narrowly with regard to public access and the public trust.[154] The corresponding provision of Wyoming's Constitution provides "the water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state."[155] In *Emmert*, the Court specifically addressed the difference between the Colorado and Wyoming Constitutions, noting, "[s]ignificantly, unlike Colorado's counterpart constitutional provision, the Wyoming provision does not mention appropriation. As such, it has been regarded as a stronger statement of the public's right to recreational use of all surface waters."[156] Ironically, the Court cited the godfather of the modern public trust doctrine, Joseph Sax, for this proposition, concluding Colorado's Constitution does not provide the basis for a public right of access.[157] Arizona and Montana's constitutions use language similar to Wyoming's in providing public rights to those states' waters. However, the uniquely Coloradan concept of the public right of appropriation distinguishes these other states' recognition of a right to float.

2. Navigability in Fact: Colorado's Non-Navigable Waters

Proponents of the right to float in Colorado also argue for the application of the public trust doctrine to the state's streambeds.[158] The argument goes that those navigable waters that are subject to the equal-footing doctrine and thus owned by the state are held in the public trust, and as such, the public should be able to access them.[159] This argument is similarly restrained, however, by the Colorado Supreme Court's recognition that the drafters of the Colorado Constitution were familiar with the geography of the state, and "knew that the natu-

150. COLO. CONST. art. 16, § 5.
151. *Emmert*, 597 P.2d at 1030.
152. 84 P. 685 (Colo. 1905).
153. *Emmert*, 597 P.2d at 1028.
154. *See Richard Gast, People v. Emmert: A Step Backward for Recreational Water Use in Colorado*, 52 U. COLO. L. REV. 247 (1981); *see also* Potter, Marlin & Kanda, *supra* note 148.
155. WYO. CONST. art. 8, § 1.
156. *Emmert*, 597 P.2d at 1028.
157. *Id.* (citing JOSEPH L. SAX, WATER LAW: CASES AND COMMENTARIES 354 (1965)).
158. Potter, Marlin & Kanda, *supra* note 148, at 480-81.
159. *Id.* at 479.

ral streams of this state are, in fact, non-navigable within its territorial limits, and practically all of them have their sources within its own boundaries, and that no stream of any importance whose source is without those boundaries, flows into or through this state."[160]

In her 2002 article arguing for a right to float in Colorado, Lori Potter found this pronouncement and others that followed from the Colorado courts problematic because the courts had not surveyed the state's rivers.[161] Potter argued that until the courts had decided, on a drainage-by-drainage basis, what streams were and were not navigable, the possibility remained that a public trust may yet apply to some of Colorado's waters.[162] She advocated that Arizona's approach to navigability determinations, as set forth in *Defenders of Wildlife v. Hull*,[163] should be followed by Colorado[164]—a somewhat persuasive position in 2002, prior to *PPL Montana*.

Notably, in *Defenders of Wildlife* and other cases examining the public trust doctrine, Arizona courts have consistently relied on *Illinois Central* as "the seminal case on the scope of the public trust doctrine and the primary authority today."[165] The Arizona Court of Appeals stated that it was bound by the Supreme Court's decision in *Illinois Central* with regard to its public trust obligations.[166] In light of the US Supreme Court's recent ruling in *PPL Montana*, which clarified that the public trust doctrine is a matter of state law and that *Illinois Central* was decided based on Illinois law, it remains to be seen whether and to what extent Arizona law regarding the public trust will shift. Certainly, any argument that Colorado is obligated to follow Arizona's lead as to the public trust, assessing navigability for title to the state's water on a stream-by-stream basis, has lost any persuasive authority following *PPL Montana*.

3. A Statutory Right to Float and the Problem of Takings

While *Emmert* was under consideration, the Colorado Legislature revised the criminal code to define "premises" as "real property, buildings, and other improvements thereon, and the stream banks and beds of any non-navigable fresh water streams flowing through such real property."[167] The legislative history of this revision to the criminal code indicates that legislators were concerned

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160. Stockman v. Leddy, 129 P. 220, 222 (Colo. 1912) (en banc), *overruled on other grounds by* United States v. City & County of Denver, 656 P.2d 1 (Colo. 1982) (en banc).

161. Potter, Marlin & Kanda, *supra* note 148, at 480-81.

162. *Id.* at 484-85.

163. 18 P.3d 722, 728, 738-39 (Ariz. Ct. App. 2001) (holding that an Arizona statute meant to release the state's property interest in certain Arizona stream beds was unconstitutional. Plaintiffs argued the statute violated the Arizona Constitution's gift clause, as well as the public trust doctrine. The court held that without a "particularized assessment" of the navigability of each stream in question under the statute, the statute was indeed invalid.).

164. Potter, Marlin & Kanda, *supra* note 148 at 481-85.

165. Ariz. Ctr. for Law in Pub. Interest v. Hassell, 837 P.2d 158, 168 (Ariz. Ct. App. 1991) (alteration in original) (quoting Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, 671 P.2d 1085, 1088 (Idaho 1983)).

166. *Id.* at 168.

167. COLO. REV. STAT. ANN. § 18-4-504.5 (2012).

with prohibiting rafters' access to private land as they floated the state's streams, but did not intend to impose criminal liability for the recreational use of the waters themselves.[168]

Proponents of the right to float seize upon the legislature's revision to the criminal code as proof of the right to float in Colorado.[169] Even if the legislature's intent was not clearly documented, John Hill's conclusion that "[d]efining a crime and creating a public easement are fundamentally different things" still stands.[170] In light of the Colorado Supreme Court's explicit rejection of a right to float, it would seem unlikely that the criminal code could reallocate property rights merely by redefining "premises" for certain crimes.

Ultimately, despite the myriad ways the Colorado courts or the Colorado Legislature *could* construe a right to float in Colorado, neither has chosen to create such a right. Moreover, the issue of potential takings claims by riparian landowners, discussed in greater detail below, remains a constant check on the development of an expansive public access right in Colorado.

IV. CALIFORNIA BROADENS ITS PUBLIC TRUST REVOCATION POWERS.

A. BEYOND NAVIGATION

After the *Illinois Central* decision, the public trust doctrine continued as a relatively narrow and uncontroversial legal doctrine.[171] Limited to questions of navigability and title to submerged lands, it had no reason to assume a more prominent role in the legal arena. While the doctrine was not ignored or dismissed, it did not expand in scope until recent decades.[172]

In 1970, Professor Joseph Sax published his landmark law review article, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention."[173] Professor Sax's article detailed the history of the public trust doctrine and urged courts to apply the doctrine expansively, taking it far beyond its traditional foundation of navigability.[174] The article had its desired effect and

168. Hill, *supra* note 148, at 334-35.

169. Potter, Marlin, & Kanda, *supra* note 148, at 475-77.

170. Hill, *supra* note 148, at 338.

171. The history and impact of the public trust doctrine could be compared to that of the federal reserved rights doctrine. *See* Harrison C. Dunning, *The Public Trust Doctrine and Western Water Law: Discord or Harmony?*, 30 ROCKY MTN. MIN. L. INST. 17-01, 17-43 to 17-45. Reserved water rights were long considered to be an obscure peculiarity in Indian law under Winters v. United States, 207 U.S. 564 (1908). The reserved water rights doctrine, however, exploded in scope with the case of Arizona v. California, 373 U.S. 546 (1963), expanding the reserved water rights doctrine to all manner of federal land reservations and withdrawals. Disputes over federal reserved water rights have kept water lawyers busy ever since.

172. *See* Huffman, *History of the Public Trust*, supra note 13, at 62-63, 67.

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

174. *Id.* at 475-76, 556-57.

sparked a renewed interest in the doctrine, not in its traditional form, but expanded to encompass a much larger scope in natural resources law.[175]

Since that time, the public trust doctrine has expanded most rapidly and drawn the most attention in California. Three landmark cases have resulted in radically expanded application of the doctrine. The first case was *Marks v. Whitney*,[176] which upheld a claimed public trust easement over certain tidelands for which California had long ago issued a patent. The court held that any patent of tidelands was subject to an implied public trust easement.[177]

More significantly, the California Supreme Court set the public trust doctrine adrift from its anchor of navigation purposes, holding that the public trust easement was not limited in scope to the traditional uses of "navigation, commerce and fisheries."[178] Rather, the Court treated the public trust as an amorphous public right changing to accommodate whatever use or, more accurately, non-use, a reviewing court thought appropriate for the public:

> The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.[179]

California's expansion of the public trust doctrine imposed an easement that was not for navigation needs, but for protection of the tidelands from those needs—not for use, but for prevention of use, leaving the natural environment intact.[180]

The second case was *City of Berkeley v. Superior Court of Alameda*,[181] which tried to untangle the Gordian Knot of applying the doctrine many years after the fact to the San Francisco Bay. In an effort to develop the Bay, the State long ago had conveyed title to numerous parcels of the Bay that were in

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175. Professor Michael Blumm later commented that Sax's public trust doctrine "represents every law professor's dream: a law review article that not only revived a dormant area of the law but continues to be relied upon by courts some two decades later. Nearly twenty years ago, Professor Sax initiated modern interest in the public trust doctrine with publication of his seminal article." Michael Blumm, *Public Property & the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L., 573, 574 (1980).

176. Marks v. Whitney, 491 P.2d 374, 379 (Cal. 1971) (en banc).

177. *Id.* at 380.

178. *Id.*

179. *Id.*

180. The leap taken by the court in *Marks v. Whitney* was crucial to Marks, the holder of the patent to the tidelands. Under the court's decision, he could not fill and develop the property because of the public easement. If navigation were the concern, Marks' plans to build a marina would have furthered the trust purpose. *Id.* at 381.

181. 606 P.2d 362 (Cal. 1980).

fact submerged by the high tide reach of navigable waters.[182] Many areas had been filled in, and the shore and high tide line had been pushed far outward in many instances.[183] California's Land Board and the City of Berkeley, which had long previously conveyed tidelands by patent to private owners, then asserted a public trust against the private owners.[184]

The California Supreme Court had settled the question long before; it ruled in 1915 that under an 1870 act of the California legislature, these lands were conveyed in fee simple, free of the public trust.[185] Notwithstanding that the San Francisco Bay had been extensively developed based on the law (affirmed by the California Supreme Court's 1915 decision) that the lands were conveyed free of the public trust,[186] the California Supreme Court in 1980 overruled its previous cases and held that a public trust did exist over those tidelands of the San Francisco Bay.[187] The difficulty was how to apply the public trust doctrine after the fact, now that much of the patented land had been filled in and developed as a harbor. With no apparent legal premise, the Court legislated its own solution: those parcels not filled in remained burdened by the public trust.[188] The public trust continued only where the property "is still physically adaptable for trust uses."[189]

The retroactive effect of *City of Berkeley* raises more difficult questions. The Court did not directly address whether its decision created a constitutional "takings" problem—whether the government, here aided by the court's reversal of prior law, was depriving private owners of property without just compensation in violation of the Fifth Amendment to the US Constitution. Nevertheless, the Court left little doubt as to its view of such a takings claim: because regulation already made it very difficult to fill the tidelands, "the economic loss to the grantees of such lots is speculative at best and is clearly outweighed by the interests of the public."[190] Moreover, judicial recognition of a public trust, even many years after people relied on contrary decisions, implies the land really never was conveyed free of the trust. Upholding the public trust, at least where it has always existed, even if unrecognized, "takes" only what the government has always had.

Perhaps the case's greatest significance, however, is the Court's justification for its Solomonic application of the public trust doctrine in *City of Berkeley*. Its justification was that belated recognition of the public trust doctrine should not undo an irretrievable commitment of resources, one that was inex-

182. *Id.* at 367.
183. *Id.* at 366.
184. *See id.*
185. Knudson v. Kearney, 152 P. 541 (Cal. 1915) (en banc), *overruled by* City of Berkeley v. Superior Court, 606 P.2d 362 (Cal. 1980); *see also* Alameda Conservation Ass'n v. City of Alameda, 70 Cal. Rptr. 264 (Cal. Ct. App. 1968) (reaching a similar holding), *overruled by* City of Berkeley v. Superior Court, 606 P.2d 362 (Cal. 1980).
186. *Berkeley*, 606 P.2d at 374-75 (Clark, J., dissenting).
187. *Id.* at 368-73.
188. *Id.* at 373-74.
189. *Id.* at 373.
190. *Id.* at 374.

tricably intertwined with the development of the resource itself.[191] If the tideland was filled, it was filled, and not even the mighty public trust doctrine, which can reverse even the inherent legislative power of the state, could undo the past physical change. Even this last restraint, though, would soon be attacked.

B. CALIFORNIA'S PUBLIC TRUST AND APPROPRIATION RIGHTS: THE SAGA OF MONO LAKE AND LOS ANGELES

The public trust doctrine's newfound potential to undo past commitments of water use rights comes from California's well-known Mono Lake case, *National Audubon Society v. Superior Court*,[192] involving the saga of Owens Valley and Los Angeles. In its 1983 Mono Lake decision, the California Supreme Court first applied the public trust doctrine to appropriative water rights, expanding the potential stakes of such a doctrine for Colorado. The Court held that Los Angeles' 1940 permit for water rights to streams feeding Mono Lake, which had been used since 1941, must be reconsidered in light of the effects Los Angeles' diversions had on the ecosystem of Mono Lake.[193]

Mono Lake is a large saline body of water in Eastern California, situated at the foot of the Sierra Nevadas.[194] Many believe it is an area of unique natural beauty and features.[195] The lake's saline waters support a population of brine shrimp, which in turn serve as food for millions of local and migratory birds.[196] The lake is also a stopping point in the pathway of migratory birds and an important breeding ground for California gulls.[197]

Just south of the lake is the Owens Valley, from which Los Angeles has diverted much of the water flowing off the east slope of the Sierra Nevadas into the city's aqueduct.[198] Los Angeles supplemented its supply of water by extending its aqueduct and diversions to the Mono Lake basin.[199] Los Angeles first acquired by condemnation the riparian rights of landowners adjoining Mono Lake, and then obtained state permits (the California equivalent of water decrees) to divert from four tributary streams.[200] From 1940 to 1970, the city diverted on average 57,000 acre-feet per year from these streams above Mono Lake.[201] The city completed a second aqueduct, and between 1970 and 1980 its annual diversions from these streams averaged 99,850 acre-feet.[202]

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191. *See id.* at 373.
192. *Mono Lake*, 658 P.2d 709 (Cal. 1983) (en banc).
193. *Id.* at 728-29.
194. *Id.* at 711.
195. *See id.* at 716.
196. *Id.* at 711.
197. *Id.*
198. *Id.*
199. *Id.* at 713.
200. *Id.* at 713, n.4
201. *Id.* at 714.
202. *Id.*

Environmental groups sued to stop the diversions, based on observed and anticipated environmental effects.[203] The lake surface had dropped considerably, and experts predicted that if the diversions continued unabated, the lake would shrink to roughly half its original size.[204] The diversions and reduced lake size threatened to increase the salinity of the water, reduce the supply of the lake algae and brine shrimp and thus food for the birds, reduce the birds' water supply, and expose their nesting grounds to predators.[205] Reduction of lake size was also alleged to impair the lake's value as a unique scenic, recreational, and scientific resource.[206]

Although the streams from which Los Angeles diverted were not themselves navigable, the California Supreme Court imposed the public trust doctrine because the streams fed Mono Lake, which the court held was navigable for brine shrimp fishing.[207] The Court reasoned that if the doctrine prevents filling navigable waters when it destroys navigation, then extracting water that is needed to maintain navigable waters downstream also triggers the doctrine because it "destroys navigation and other public interests."[208] Thus, in California, the public trust leaped beyond its traditional restraint on alienation of title to submerged lands to cover rights not only in navigable waters, but also in waters tributary to navigable waters. Moreover, the public trust now protected water not only when needed for navigation, but also for the new environmental, recreational, and ecological values of the trust: "[I]t prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust."[209]

The Court recognized that appropriative water rights and the public trust doctrine were on a "collision course"[210] and that either doctrine fully applied would exclude the other.[211] In the end, the Court favored the implied public trust doctrine and required that state agencies and courts take it into account when awarding or reconsidering appropriative water rights.[212] The Court thus held that the state may award appropriative rights even if they could foreseeably harm public trust uses, but the state has an affirmative duty to consider the public trust and may award rights that would harm trust uses only in cases of "practical necessity."[213] The state may always revoke, curtail, or otherwise modify an existing water right to protect a public trust interest, whether or not it had

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203. *Id.* at 715-16.
204. *Id.* at 715.
205. *Id.* at 715-16.
206. *Id.* at 716.
207. *Id.* at 719.
208. *Id.* at 720 (quoting Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C. DAVIS L. REV. 233, 257-58 (1980)).
209. *Id.* at 727; *see also id.* at 719.
210. 658 P.2d at 712.
211. *Id.* at 712, 727.
212. *Id.* at 727, 728; Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257, 269 (1990).
213. 658 P.2d at 728.

thoroughly considered effects on this interest when originally allocating the right.[214]

Mono Lake was hardly ever used for traditional "navigation."[215] However, located at the opposite end of the Owens Valley is Owens Lake, once a similarly briny lake that was truly navigable.[216] Owens Lake supported steamboat navigation during a silver mining boom from 1872 to 1882.[217] By 1924, however, Los Angeles' diversion of water from Owens Valley left Owens Lake completely dry.[218] With no real concern for navigation, Los Angeles was never ordered to curtail its diversion of water to replenish the lake.[219] Instead, during exceptionally wet years, Los Angeles discharged water it did not need or could not take *back* to the Owens River, which began to fill up the dry lakebed.[220] This flooded the facilities of mineral developers who were leasing the lakebed from the state, and they sued.[221] Los Angeles ultimately was *enjoined* from restoring water to a lake that once had supported navigation.[222] The contrasting fates of Owens Lake and Mono Lake confirm the pragmatic limit of the public trust doctrine the California Supreme Court recognized in *City of Berkeley*: even the public trust should not reverse state-permitted development that has permanently altered the resource.[223]

This result confounds the traditional public trust doctrine, which shackled the state's ability to harm the trust purpose of navigation. Under the Mono Lake case, by contrast, California can do what no state could do under the public trust doctrine: revoke rights granted, in good faith, in non-navigable streams to protect non-navigation uses; except that trust purposes must yield in cases of "practical necessity." To apply the public trust doctrine to water bodies, rights and uses never contemplated under the traditional doctrine, extending even to the prevention of any use, is an unprincipled stretching of a doctrine designed to promote use. The newly desired end of environmental protection cannot justify taking such judicial license with an already super-constitutional doctrine.

Such a decision is somewhat understandable in the context of California water law, where appropriative water rights had been a latecomer and remain subordinate to public navigation and early riparian and other rights.[224] For

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214. *Id.*

215. Actual navigation on Mono Lake was limited to occasional harvesting of brine shrimp. *Id.* at 719.

216. *See* Natural Soda Prods. Co. v. City of Los Angeles, 240 P.2d 993, 993 (Cal. Dist. Ct. App. 1952); People v. City of Los Angeles, 200 P.2d 122, 123, 125 (Cal. Dist. Ct. App. 1948), *opinion vacated by* People v. City of Los Angeles, 34 Cal.2d 695 (1950) (en banc).

217. LOUIS W. CLARK & VIRGINIA D. CLARK, HIGH MOUNTAINS & DEEP VALLEYS: THE GOLD BONANZA DAYS 107-08 (1978).

218. *Natural Soda Prods.*, 240 P.2d at 994.

219. *See People v. City of Los Angeles*, 200 P.2d at 125.

220. *See* Natural Soda Prods. Co., v. City of Los Angeles, 143 P.2d 12, 15 (Cal. 1943) (en banc).

221. *People v. City of Los Angeles*, 200 P.2d at 123-24.

222. *Id.* at 122, 127.

223. *See* 606 P.2d at 532, 534-35.

224. *See* Gould, *supra* note 10, at pp.25-43 to -45; Hobbs & Raley, *supra* note 3, at 880-81 n.209 (contrasting California's water law system with Colorado's).

many years before the Mono Lake decision, California interpreted its constitution's "reasonable use" requirement to allow reconsideration and modification of water rights due to changed conditions.[225] This requirement, "which makes California a 'hybrid' riparian/prior appropriation state, has never been the law in Colorado's 'pure' prior appropriation system."[226] The Mono Lake decision subjects virtually all California water rights to review for environmental protection, without addressing constitutional takings protection against the curtailment or abrogation of water rights.

C. CALIFORNIA WATER RIGHTS AFTER MONO LAKE

Mono Lake may be a unique resource, but this case was not unique; instead, it set off a statewide barrage of litigation. Environmental advocates laid siege to water rights from virtually every major water body in the state. After the Mono Lake decision, California leapfrogged Colorado for an uncontested lead in water litigation. Not just Los Angeles, but a wide assortment of municipal, state and agricultural water providers had their historic water rights threatened and in some cases curtailed, to satisfy environmental demands raised under the doctrine in water rights proceedings.[227]

Building on the Mono Lake case, California courts have extended the public trust beyond navigable waterways, concluding that "public trust interests pertain to non-navigable streams which sustain a fishery."[228] Under this doctrine, "[t]he state's right to protect fish is not limited to navigable or otherwise public waters but extends to any waters where fish are habitated [sic] or accustomed to resort and through which they have the freedom of passage to and from the public fishing grounds of the state."[229] While the Mono Lake court held that the public trust doctrine may restrict new water rights or even modify existing rights in non-navigable waters connecting to navigable waters,[230] California courts still recognize that to extend this doctrine to non-navigable waters, those non-navigable waters must affect a navigable waterway.[231] Moreover, California citizens may sue to enforce the public trust in water for the protection of ecological resources.[232]

Similar to most other Western states, California's Court of Appeal has held California's public trust doctrine does not extend to groundwater, at least

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225. Dunning, *supra* note 171, at 17-42.

226. Kemper v. Hamilton (*In re* Title, Ballot Title, and Submission Clause for 2011-2012 #3), 274 P.3d 562, 573 (Colo. 2012) (en banc) (Hobbs, J., dissenting).

227. *See* Sax, *supra* note 212, at 271; Arthur L. Littleworth, *The Public Trust vs. The Public Interest*, 19 PAC. L.J. 1201, 1207-1223 (1988) (discussing how the public trust doctrine's application has evolved under California water law).

228. Cal. Trout, Inc. v. State Water Res. Control Bd., 255 Cal. Rptr. 184, 211 (Cal. Ct. App. 1989).

229. Golden Feather Cmty. Ass'n v. Thermalito Irrigation Dist., 257 Cal. Rptr. 836, 840 (Cal. Ct. App. 1989).

230. *Mono Lake*, 658 P.2d 709, 722 (Cal. 1983) (en banc).

231. *Golden Feather*, 257 Cal. Rptr. at 841-42.

232. Ctr. for Biological Diversity v. FPL Grp., Inc., 83 Cal. Rptr. 3d 588, 600 (Cal. Ct. App. 2008).

absent some impact on the public use of navigable waters.[233] However, recent litigants have argued the public trust doctrine as a basis to restrict tributary groundwater diversions in order to protect affected public trust resources in surface waters of the Scott River in northern California.[234] This assertion appears to be premised in part on a unique (for California) statute recognizing groundwater is connected to the Scott River.[235]

In the aftermath of the California Supreme Court's Mono Lake decision, litigation continued over Los Angeles's licenses to divert water from tributaries above Mono Lake. The California Court of Appeal rejected the City's defense of its water rights based on a statute of limitations, holding an "encroachment on the public trust interest" may not ripen into a right shielded by such a statute.[236] The court ordered California's State Water Resources Control Board ("SWRCB") to set appropriate limits on Los Angeles's diversions.[237] The SWRCB held a lengthy evidentiary hearing, and then issued its decision mandating minimum stream flows and a restored lake surface level to protect public trust resources, including air quality, water quality, recreation and views.[238] In so doing, "the Board recognized the public trust as an ecological baseline that places fundamental limits on diversion of water for consumptive uses."[239] To implement this decision, Los Angeles was forced to relinquish an estimated 70,900 acre-feet per year of its historical exports from the Mono Lake basin, replacing this water with far more expensive sources of supply.[240] Along the way, the state legislature decided to compensate Los Angeles for its loss, authorizing thirty-six million dollars for alternative water supplies to replace one-third of the City's historic diversions.[241]

Much of the legal development of California's public trust limits on water rights has occurred through both litigation and regulatory proceedings involv-

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233. Santa Teresa Citizen Action Grp. v. San Jose, 7 Cal. Rptr. 3d 868, 884 (Cal. Ct. App. 2003).

234. John Hedges, *Currents in California Water Law: The Push to Integrate Groundwater and Surface Water Management through the Courts*, 14 U. DENV. WATER L. REV. 375, 396-97 (2011) (evaluating Petition for Writ of Mandamus, *Envtl. L. Found. v. State Water Resource Control Bd.*, filed in Sacramento County Superior Court, June 23, 2010 (No. 34-2010-8000583), *available at* https://services.saccourt.com/PublicDMS/Search.aspx (search using case number)).

235. *Id.* at 396 (construing CAL. WATER CODE §2500.5(b) (West 2012)).

236. Cal. Trout, Inc. v. State Water Res. Control Bd., 255 Cal. Rptr. 184, 212 (Cal. Ct. App. 1989).

237. *Id.* at 212-13; *see also* Ronald B. Robie, *Effective Implementation of the Public Trust Doctrine in California Water Resources Decision-Making: A View from the Bench*, 45 U.C. DAVIS L. REV. 1155, 1160-61 (2012).

238. CAL. STATE WATER RES. CONTROL BD., MONO LAKE BASIN WATER RIGHT DECISION, NO. 1631, 19-20, 77, 194-95 (Sept. 28, 1994) [hereinafter *SWRCB Mono Lake Decision*], *available at* http://www.waterboards.ca.gov/publications_forms/publications/general/docs/monolake_wr_dec1631_a.pdf; *see also* Brian Gray, *Ensuring the Public Trust*, 45 U.C. DAVIS L. REV. 973, 995-96 (2012).

239. Gray, *supra* note 238, at 997.

240. *SWRCB Mono Lake Decision*, *supra* note 238, at 163, 170; Gray, *supra* note 238, at 996.

241. *Mono Lake - Not On the Level*, AQUEDUCT 2000 (Metro. Water Dist. of S. Cal.), Mar.-Apr. 1994, at 5.

ing the San Francisco Bay Delta, a large estuary system located at the mouth of the Sacramento and San Joaquin Rivers, downstream from several structures diverting an average of 5.9 million acre-feet for agriculture and municipal uses.[242] Not long after the 1983 Mono Lake decision, Justice Racanelli of the California Court of Appeal upheld SWRCB limits on federal and state project diversions to implement Bay Delta water quality standards. Specifically, the court held that the SWRCB "unquestionably possessed legal authority under the public trust doctrine to exercise supervision over appropriators in order to protect fish and wildlife."[243]

In a 2006 decision reviewing the SWRCB's later action to modify the same conditions, the California Court of Appeal rejected an argument that conflicts between the public trust and competing water uses must be resolved in favor of the public trust.[244] Consistent with the Mono Lake holding, the state must protect the public trust resources whenever "feasible."[245] "What is 'feasible,' however, is a matter for the Board [SWRCB] to determine."[246] Similarly, in another 2006 decision involving diversions affecting the Bay Delta, the California Court of Appeal held that "every effort must be made to preserve water right priorities to the extent those priorities do not lead to violation of the public trust doctrine. . . . [T]he subversion of water right priority is justified only if enforcing that priority will in fact lead to the unreasonable use of water or result in harm to values protected by the public trust."[247]

Contemplating these recent decisions, some commentators recently have questioned whether California's public trust doctrine is restricting water use and protecting ecosystems to the degree contemplated by the Mono Lake decision.[248] Professor Dave Owen finds that since that case, no other case "has set aside an agency decision on public trust grounds, or has ordered the reexamination of an existing (or applied-for) water right."[249] Rather, California courts show a prevailing trend of deference to the SWRCB on public trust issues.[250] The SWRCB, in turn, generally considers the public trust doctrine not in isolation, but as one factor intertwined with several other environmental laws and mandates, given the SWRCB's regulatory role in determining and conditioning California water rights.[251] The SWRCB has used the public trust doctrine to reexamine existing rights only on "very rare occasions," instead focusing its attention on new water rights or water users' requests for changes

242. *In re* Bay-Delta Programmatic Envtl. Impact Report Coordinated Proceedings, 184 P.3d 709, 715 (Cal. 2008); Gray, *supra* note 238, at 999.

243. United States v. State Water Res. Control Bd., 227 Cal. Rptr. 161, 201-02 (Cal. Ct. App. 1986).

244. State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d 189, 272 (Cal. Ct. App. 2006).

245. *Id.* at 272 (quoting *Mono Lake*, 658 P.2d at 446).

246. *Id.*

247. El Dorado Irrigation Dist. v. State Water Res. Control Bd., 48 Cal. Rptr. 3d 468, 490-91 (Cal. Ct. App. 2006).

248. Gray, *supra* note 238, at 974-75, 1004-06; Dave Owen, *The Mono Lake Case, the Public Trust Doctrine, and the Administrative State*, 45 U.C. DAVIS L. REV. 1099, 1099 (2012).

249. Owen, *supra* note 284, at 1122-23.

250. *Id.* at 1129.

251. *Id.* at 1135-36.

of water rights.[252] Professor Owen concludes that while the SWRCB's integration of public trust and other considerations has been significant, after *Mono Lake* the public trust doctrine "was only marginally relevant" in California's past thirty years of water litigation.[253]

V. WESTERN STATE TRENDS, BEYOND CALIFORNIA AND MONO LAKE

As California's experience shows, the public trust doctrine is malleable - it can expand as needed to accomplish any number of environmental goals in those states that recognize the doctrine. Indeed, the modern trend in several Western states has been to recognize a public trust that goes beyond the historical scope of the doctrine, i.e., commerce and navigation.[254] This trend is due in large part to the California Supreme Court's *Marks* and Mono Lake decisions.[255] Although the public trust doctrine is being used to pursue a wide range of environmental goals, the greatest expansion of the doctrine over the last thirty years remains the doctrine's application to water rights.[256] This section addresses developments in several Western states and examines the basis for the doctrine in each state, in part to determine what effect the Supreme Court's decision in *PPL Montana* may have on public trust doctrine jurisprudence moving forward.

A. HAWAII

Although perhaps less discussed than developments in California, Hawaii has seen the most expansive use of the public trust doctrine in relation to water rights.[257] In 2000, the Hawaii Supreme Court explicitly acknowledged its adherence to *National Audubon Society* when expanding the state's public trust to cover not only navigable waters, but groundwater as well.[258] Hawaii's public trust doctrine, also referred to as the "water resources trust," finds its roots in Hawaii's Constitution, which is exceptionally protective of natural resources.[259] Hawaii's Constitution provides:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner

252. *Id.* at 1134-35.
253. *Id.* at 1152.
254. *See* Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 675 (2012).
255. *Id.* at 667-68, 675.
256. *Id.* at 675. Interestingly, the North Dakota Supreme Court, not California, should receive credit for being the first state to apply the public trust doctrine to consumptive water rights.
257. Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781, 838 (2010).
258. *In re* Water Use Permit Applications, 9 P.3d 409, 452-54 (Haw. 2000) (citing *Mono Lake*, 658 P.2d 709, 728 n. 27 (Cal. 1983) (en banc)).
259. Craig, *supra* note 257, at 840.

> consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.[260]

Further defining its public trust as one of the most environmentally protective, the Hawaii Supreme Court held in 2006 that Clean Water Act discharge permits are subject to the state public trust and the issuing department, the Hawaii Department of Health, must consider the trust when issuing permits.[261] Hawaii undoubtedly treats private rights to water with suspicion, and the public interest in water takes precedence over private interests. The Hawaii Supreme Court reasoned in 2000 "the public trust has never been understood to safeguard rights of exclusive use for private commercial gain."[262] Further, current and past diversion decisions, as in California, are subject to retroactive application of the trust and courts may make modifications in order to benefit the public interest in the water.[263]

B. MONTANA

Similarly, Montana courts have found the basis of a robust public trust in that state's constitution, which provides that "all waters are owned by the State for the use of its people."[264] Montana's public trust doctrine has a strong connection with public access to Montana's streams and rivers. The courts have established a "recreational use" test to determine which waters are subject to recreational access.[265] It is important to note that while the public has the ability to access any water, navigable or non-navigable for fishing, the public cannot cross private property to access the stream.[266] Also, there is no public ownership of the beds or banks of non-navigable streams, just the water itself, but incidental use of privately owned bed or banks of waterways is allowed.[267] While access to water is an important component of the Montana public trust doctrine by statute, established water rights still trump any other use of water, including environmental protection and public uses.[268]

The Supreme Court's narrower construction of navigability in the *PPL Montana* decision clearly dealt a blow to Montana's assumptions of title to streambeds, and its linked assertion of a public trust in those streams. It remains to be seen how this decision will influence the Montana Supreme Court's application of the public trust doctrine in other contexts.

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260. HAW. CONST. art. XI, § 1.
261. *Kelly v. 1250 Oceanside Partners*, 140 P.3d 985, 1009 (Haw. 2006).
262. *In re* Water Use Permit Applications, 9 P.3d at 450.
263. *Id.* at 452.
264. Galt v. Montana, 731 P.2d 912, 915 (Mont. 1987).
265. Mont. Coal. For Stream Access v. Hildreth, 684 P.2d 1088, 1091 (Mont. 1984), *overruled on other grounds by* Gray v. City of Billings, 689 P.2d 268, 272 (Mont. 1984).
266. *Id.*
267. *Galt*, 731 P.2d at 915.
268. Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 78 (2010) [hereinafter Craig, *Comparative Guide*] (citing Mont. Code Ann. §§ 75-5-705, 75-7-104, 85-1-111 (2009)).

In other states such as Idaho and Arizona, public policy favors private water rights and therefore those states' legislative bodies have attempted, with varying degrees of success, to curb any judicial trend toward a more robust public trust doctrine.[269]

C. IDAHO

A series of Idaho Supreme Court decisions during the 1980s and early 1990s followed California's lead in *National Audubon Society* and adopted the rule that "[t]he public trust doctrine takes precedent even over vested water rights."[270] The Idaho Legislature was apparently of a different mind on this point, however, and passed legislation in 1996 to limit the public trust doctrine to be "solely a limitation on the power of the state to alienate or encumber the title to the beds of navigable waters," and not to apply to appropriation.[271]

The Idaho Legislature's move to curb the public trust spurred debate in the academic community as to whether the public trust doctrine is a common law concept amendable by the legislature, or a constitutional principle beyond the legislature's reach. The murky underpinnings of the public trust doctrine fueled the debate (as discussed above); without knowing the basis for the doctrine, it was challenging to analyze the legislature's power to limit the doctrine.[272] Relying on *Illinois Central*, several commentators came to the conclusion that the doctrine was at the very least "quasi-constitutional" and so inherently tied to state sovereignty that the states were without authority to limit or diminish its application.[273]

Of course, *PPL Montana* lays to rest much of the debate about the states' ability to define or limit the public trust doctrine. Because the Supreme Court has now clarified that the doctrine is a creature of state law, the Idaho Legislature's preference for the protection and exercise of private water rights over any later asserted public interest in those waters is far less contentious than it was in 1996.

D. ARIZONA

A similar legislative tug of war has occurred in Arizona, where the Arizona courts have had the last word in defining the public trust doctrine as "a constitutional limitation on legislative power to give away resources held by the state in trust for its people."[274] Consequently, in the words of the Arizona Supreme

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269. *See id.* at 76, 80, 92.

270. Idaho Conservation League v. Idaho, 911 P.2d 748, 750 (Idaho 1995); Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, 671 P.2d 1085, 1094 (Idaho 1983).

271. IDAHO CODE ANN. §§ 58-1203(1), (2)(b)-(c) (1996).

272. *See* James M. Kearney, *Recent Statute: Closing the Floodgates? Idaho's Statutory Limitation on the Public Trust Doctrine*, 34 IDAHO L. REV. 91, 113 (1997).

273. *Id.*; Michael C. Blumm & Scott W. Reed, *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794*, 24 ECOLOGY L.Q. 461, 483 (1997).

274. San Carlos Apache Tribe v. Superior Court ex rel. Cnty. of Maricopa, 972 P.2d 179, 199 (Ariz. 1999) (en banc) (citing Ariz. Ctr. for Law in the Pub. Interest v. Hassell, 837 P.2d 158, 166-68 (Ariz. Ct. App. 1991)).

Court, "[t]he Legislature cannot by legislation destroy the constitutional limits on its authority."[275] Accordingly, an Arizona statute limits the public trust doctrine to the extent it can: it is applicable only to navigable waters as defined under the equal-footing doctrine and is limited to the three traditional uses of commerce, navigation, and fishing.[276]

As noted above, the Arizona Supreme Court has been unwilling to accept that Arizona's rivers are largely non-navigable without a case-by-case analysis of the state's streams.[277] Thus, the Arizona legislature created the Arizona Navigable Stream Adjudication Commission ("NSAC") and charged it with the duty of determining the navigability of the streams throughout the state.[278] The Arizona Legislature passed legislation that provides compensation to landowners who lose title due to the navigability determinations of the NSAC.[279] Additionally, Arizona's land department may release from the public trust waters deemed subject to it upon request and hearing.[280] The US Supreme Court's clarification of the public trust doctrine's state law underpinning in *PPL Montana* may prompt a reevaluation of Arizona's evolving statutory framework regarding navigability determinations and application of the public trust doctrine to the extent the Arizona courts have in the past relied heavily on *Illinois Central*, which was viewed as binding federal constitutional precedent.[281] Like Montana, Arizona may need to reconsider the reach of its public trust and title assertions.

VI. THE PUBLIC TRUST BALLOT INITIATIVES IN COLORADO

Since 1994, Richard Hamilton of Park County (a microbiologist and former lobbyist for environmental groups) has been the driving force behind a series of statewide ballot initiatives seeking to amend Colorado's constitution to impose a public trust doctrine on Colorado waters.[282] While none of these proposals to date have appeared on the ballot for voters' consideration, most have been through the state's ballot title setting process, and the Colorado Supreme Court has reviewed some of the resulting titles.[283]

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275. *Id.*

276. ARIZ. REV. STAT. ANN. §§ 37-1101(5), (9) (West).

277. Defenders of Wildlife v. Hull, 18 P.3d 722, 729 (Ariz. Ct. App. 2001).

278. ARIZ. REV. STAT. ANN. § 37-1128(A) (2012).

279. *Id.* § 37-1132(A)(1)-(3).

280. *Id.* § 37-1151(A).

281. *See, e.g., Defenders of Wildlife*, 18 P.3d at 727-28; Ariz. Ctr. for Law in the Pub. Interest v. Hassell, 837 P.2d 158, 166-68 (Ariz. Ct. App.1991); *see also* Craig, *Comparative Guide*, *supra* note 268, at 104 ("Arizona courts view the public trust doctrine as a *federal* constitutional issue. . . .") (emphasis added).

282. Patrick Malone, *Water Initiatives Aim to Erase Existing Rights*, PUEBLO CHIEFTAIN (Jan. 5, 2012), http://www.chieftain.com/news/local/water-initiatives-aim-to-erase-existing-rights/article_2907f744-376a-11e1-9798-0019bb2963f4.html.

283. Colorado law provides for the Colorado Supreme Court's expedited review of certain determinations by the state's ballot title setting board ("Title Board") on statewide initiatives. COLO. REV. STAT. § 1-40-107(2) (2012).

A. PREVIOUS PROPOSED AMENDMENTS

The first such initiatives, proposed in 1994 and 1995, had many features. First and foremost, they would require Colorado to "adopt and defend a *strong public trust doctrine* regarding the public's rights and ownerships in and of the waters in Colorado."[284] While the "strong public trust doctrine" was not defined in these measures, Mr. Hamilton was not shy in explaining what he understood it to mean. He suggested it would go at least as far as California's doctrine, relying especially on the *Marks*, *City of Berkeley*, and the Mono Lake cases discussed above.[285] In 1994, the Colorado Supreme Court declined to adopt the proponents' interpretation of the meaning of this phrase, holding that "any intent of the proponents not adequately expressed in the language of the measure will not govern [courts'] construction. . . . The phrase 'strong public trust doctrine,' therefore, does not necessarily carry the specialized meaning propounded by the proponents."[286] Thus, if such an initiative is adopted, it will remain for the courts to sort out its meaning.

The second clause of these early initiatives would require the State to "protect and defend the public's interests in waters *from unwarranted or otherwise narrow definitions of its waters as private property.*"[287] Mr. Hamilton says this is to "insist that our public waters never be defined as private property."[288] If thus interpreted, this provision would fly in the face of the longstanding Colorado principle that appropriation creates a "most valuable property right" in the exclusive use of water,[289] requiring the State to defend *against* the very rights it has always approved and defended. This provision also requires the state to act against private owners, contrary to the traditional public trust doctrine, which restrained the state's powers.

The final section of these initiatives provided for public ownership, through the Colorado Water Conservation Board ("CWCB"), of waters dedicated to instream or in-lake uses. Any "ownership in the rights of use of waters" could be decreed to such public use, and the CWCB would be required to accept, protect and defend such dedications as an element of the public

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284. MacRavey v. Hamilton (*In re* Title, Ballot Title, Submission Clause, and Summary Adopted April 5, 1995) (*Public Rights II*), 898 P.2d 1076, 1077 n.1 (Colo. 1995) (en banc) (quoting 1995 proposed initiative "Public Rights in Waters II," by Richard Hamilton and Jeanne Englert); MacRavey v. Swingle (*In re* Title, Ballot Title, Submission Clause, and Summary Adopted April 6, 1994) (*In re Water Rights Initiative*), 877 P.2d 321, 324-25 (Colo. 1994) (en banc) (quoting 1994 proposed initiative "Give the Vote on Water," by Richard Hamilton and Jerry Swingle) (emphasis added).

285. *See* Answering Brief for Respondent at 6-10, In re Water Rights Initiative, 877 P.2d 321 (Colo. 1994) (No. 94SA149), 1994 WL 16058752, [hereinafter *Hamilton Brief*].

286. *In re Water Rights Initiative*, 877 P.2d at 327.

287. *Public Rights II*, 898 P.2d at 1077 n.1; *In re Water Rights Initiative*, 877 P.2d at 324 (emphasis added).

288. *See* Reply Brief for Petitioner at 9, *MacRavey v. Swingle*, 877 P.2d 321 (Colo. 1994) (en banc) (No. 94SA149), 1994 WL 16058755 (citing *Hamilton Brief*, *supra* note 285, Exhibit H at 2).

289. Navajo Dev. Co. v. Sanderson, 655 P.2d 1374, 1377-78 (Colo. 1982) (en banc); *see also* Farmers Irrigation Co. v. Game & Fish Comm'n, 369 P.2d 557, 559-60 (Colo. 1962) (en banc); Nichols v. McIntosh, 34 P. 278, 280 (Colo. 1893).

trust.[290] This section would greatly alter the CWCB's "instream flow" ("ISF") program, which protects instream uses and natural lake levels, within the confines of the appropriation system.[291] The CWCB may appropriate new water rights for instream flow, and may acquire existing senior rights to convert their historic use to instream flow.[292] Such use by the CWCB is deemed "beneficial use," to the extent it is required "to preserve the natural environment to a reasonable degree."[293] Because the CWCB is also charged with promoting use of the water to which Colorado is entitled by interstate compacts and apportionments, it is ideally suited to determine how much instream flow is required and reasonable, in light of the other uses precluded thereby.[294]

In November 1994, voters amended the Colorado Constitution by referendum to require that no initiative contain more than one subject.[295] The 1994 and 1995 initiatives also contained provisions that would substantially alter the law governing water conservancy districts, imposing new requirements for elections on those districts' board members and boundary changes.[296] Based on the new constitutional requirement, the Colorado Supreme Court held in 1995 that these election requirements constituted a separate subject from the public trust and water rights provisions, so that no title could be set for the ballot.[297] "The public trust water rights paragraphs of the Initiative impose obligations on the state of Colorado to recognize and protect public ownership of water," matters over which the "water conservancy . . . districts have little or no power" and "[t]he common characteristic that the paragraphs all involve 'water' is too general and too broad to constitute a single subject. . . ."[298]

In 1996, Mr. Hamilton and Phillip Hufford proposed a similar constitutional amendment, including the mandate for a public trust doctrine (omitting the adjective "strong") and a provision controlling public dedication of water rights for in-stream use, but eliminating the district election requirements from Hamilton's earlier proposals.[299] The Colorado Supreme Court upheld the title for this initiative, holding that the "public trust" and water rights provisions were sufficiently related to constitute a single subject, but declined to interpret the meaning or effect of those provisions.[300] Hamilton and Englert submitted a

290. *Public Rights II*, 898 P.2d at 1077 n.1; *In re Water Rights Initiative*, 877 P.2d at 324-25.

291. *See* Colo. River Water Conserv. Dist. v. Colo. Water Conserv. Bd., 594 P.2d 570, 577 (Colo. 1979) (en banc); Steven Sims, *Colorado's Instream Flow Program: Integrating Instream Flow Protection Into a Prior Appropriation System*, *in* INSTREAM FLOW PROTECTION IN THE WEST 12-1, 12-1 to -2 (Lawrence J. MacDonnell & Teresa A. Rice eds., U. Colo. Nat. Resources Law Center rev. ed. 1993).

292. COLO. REV. STAT. §37-92-102(3) (2012).

293. *Id.* § 37-92-102(4).

294. *See* Sims, *supra* note 291, at 12-10 to -11.

295. COLO. CONST. art. V, § 1(5.5).

296. *Public Rights II*, 898 P.2d 1076, 1077 n.1 (Colo. 1995) (en banc); In re Water Rights Initiative, 877 P.2d 321, 324 (Colo. 1994) (en banc).

297. *Public Rights II*, 898 P.2d at 1078-80.

298. *Id.* at 1080.

299. MacRavey v. Hufford (*In re* Title, Ballot Title, Submission Clause, and Summary Adopted March 20, 1996), 917 P.2d 1277, 1278 n.2 (Colo. 1996) (en banc) (quoting 1996 proposed initiative "1996-6," by T. Philip Hufford and Richard Hamilton).

300. *Id.* at 1280-81.

similar measure in 2002 for title setting, but no petition was filed for review by the Supreme Court.[301]

In 2007, Mr. Hamilton and Phillip Doe proposed a constitutional amendment with a different emphasis: the creation of a new state "Department of Environmental Conservation."[302] The measure would give this department "[t]rust responsibilities" to favor "public ownerships and public values" over competing economic interests.[303] In an opinion by Justice Hobbs, a majority of the Colorado Supreme Court held that this "mandatory public trust standard for agency decision-making," to be imposed on existing state bodies that would be merged into the new department, was "a variation on" the subject of the "public trust doctrine" previously proposed in the initiatives discussed above.[304] This public trust standard was "coiled in the folds of the measure," presenting "the danger of voter surprise and fraud" that the single-subject requirement for initiatives seeks to avoid.[305] Thus, the combination of this standard into the measure violated the requirement, so the measure was not a proper initiative.[306]

B. INITIATIVES 3 AND 45 (2012)

In 2012, a pair of proposed initiatives again focused the attention of Colorado's water community and news media on the public trust doctrine. Mr. Hamilton and Mr. Doe concurrently proposed Initiatives 3 and 45, both to amend water provisions of the Colorado Constitution.[307] Titles were set for both measures, and the Colorado Supreme Court upheld them in split decisions.[308] The proponents then circulated petitions for both measures, but did not obtain the requisite number of signatures to qualify for the statewide ballot.[309]

Initiative 3 proposed to amend section 5 of Article XVI, the constitution's section declaring unappropriated water to be "property of the public," adding provisions to adopt and define a "Colorado public trust doctrine" that would protect public ownership rights and interests in the water of natural streams, while giving "the public's estate in water in Colorado . . . legal authority superior to rules and terms of contracts or property law."[310] In contrast, the initiative

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301. Richard G. Hamilton & Jeanne W. Englert, Public Ownership and Use of Water, Colo. Initiative 2001-2002 No. 135 (proposed May 1, 2002).

302. Kemper v. Hamilton (*In re* Title, Ballot Title, and Submission Clause, For 2007-08, #17), 172 P.3d 871 app. B at 880 (Colo. 2007) (en banc).

303. *Id.* app. B § 7 at 883.

304. *Id.* at 874-75.

305. *Id.* at 875-76.

306. *Id.* at 876.

307. Kemper v. Hamilton (*In re* Title For 2011-2012 #3) (*In re Title for #3*), 274 P.3d 562 app. at 568 (Colo. 2012) (en banc); Kemper v. Hamilton (*In re* Title For 2011-2012 #45) (*In re Title for #45*), 274 P.3d 576 app. at 582 (Colo. 2012) (en banc).

308. *In re Title for #3*, 274 P.3d at 562; *In re Title for #45*, 274 P.3d at 576.

309. *See* COLO. CONST. art. V, §1(2) (specifying the formula to determine the required number of signatures for initiative petitions); Protect Colorado Water, http://protectcoloradowater.org (last visited Oct. 22, 2012).

238. *In re Title for #3*, 274 P.3d 562 app. § 5(2)-(3) at 568.

defined appropriation water rights as "servient to the public's dominant water estate" and subject to the public trust doctrine, to be "managed by the state government, acting as steward of the public's water, so as to protect the natural environment and to protect the public's enjoyment and use of water."[311] The initiative mandated the executive, legislative, and judicial branches of state government to enforce these provisions, acting "as stewards to protect the public's interests in its water estate," and authorized citizens to sue to enforce these mandates.[312]

Unlike Mr. Hamilton's earlier public trust proposals, Initiative 3 expressly addressed stream access, providing for "access by the public along, and on, the wetted natural perimeter of a stream bank of a water course of any natural stream in Colorado," as a "navigation servitude for commerce and public use as recognized in the Colorado public trust doctrine."[313] These provisions sought to overturn the primary holding of *People v. Emmert*,[314] echoing themes from legislation and initiatives introduced in 2010, when river outfitters pressed their case for a "right to float" without liability for trespass.[315]

However, a majority of the Colorado Supreme Court upheld the title set for Initiative 3, rejecting arguments that the measure encompassed separate subjects by both subordinating water rights and transferring rights in land under streams.[316] The court held that the initiative's various provisions all related to "the public's rights in the waters of natural streams" via the proposed adoption of a "Colorado public trust doctrine" as a "new legal regime" to address water rights, property rights, and stream access.[317] The majority opinion distinguished the court's previous decisions that Mr. Hamilton's 1995 and 2007 measures violated the single-subject requirement, stating that unlike those measures, the provisions in Initiative 3 "all relate to the 'Colorado public trust doctrine' and that doctrine's impact on the 'public's rights in waters of natural streams.'"[318]

Justice Hobbs dissented from the single-subject holding, noting that a voter could casually read Initiative 3 "as a reaffirmation of Colorado's longstanding water law doctrine, which provides that the water resource is always owned by the public, subject to . . . use rights created in priority through appropriations of unappropriated water by public and private entities. However, within

311. *Id.* app. § 5(4)(a), (c) at 568-69.
312. *Id.* app. § 5(6) at 569.
313. *Id.* app. § 5(5)(a) at 569.
314. People v. Emmert, 597 P.2d 1025, 1027 (Colo. 1979) (en banc) (citing More v. Johnson, 568 P.2d 437 (1977) (en banc); Hartman v. Tresise, 84 P. 685 (1906); Hanlon v. Hobson, 51 P. 433 (1897)) ("[T]he land underlying non-navigable streams is the subject of private ownership and is vested in the proprietors of the adjoining lands.").
315. *See* H.B. 10-1188, 67th Gen. Assemb., 2nd Reg. Sess. (Colo. 2010); Use of Colorado Water Streams, Colo. Initiative 2009-2010 No. 87 (proposed Apr. 9, 2010); Use of Colorado Water Streams, Colo. Initiative 2009-2010 No. 88 (proposed Apr. 9, 2010); Use of Colorado Water Streams, Colo. Initiative 2009-2010 No. 89 (proposed Apr. 9, 2010); Use of Colorado Water Streams, Colo. Initiative 2009-2010 No. 90 (proposed Apr. 9, 2010).
316. *In re Title for #3*, 274 P.3d at 566-68.
317. *Id.* at 567.
318. *Id.*

the folds of this complex initiative are coiled three separate and discrete subjects. . . ."[319] He explained that the measure would (i) "subordinate all existing water rights in Colorado created over the past 150 years to a newly created dominant water estate"; (ii) "vest in the public possessory rights to the beds and banks of the stream now owned by local public entities and private landowners in Colorado"; and (iii) "vest a recreational easement in the public across all private property in Colorado through which even a trickle of water runs," abrogating private property owners' right to prohibit trespass across their land. "These three subject matters separately and together propose to drop what amounts to a nuclear bomb on Colorado water rights and land rights."[320]

In his dissent, Justice Hobbs then explained the doctrinal framework of public trust law and other matters addressed by the initiative, including the "two different subjects" of non-navigable stream title and public trust theory addressed in the *Emmert* case, and the *PPL Montana* decision's distinction between federal law determining navigability for title and state law determining "the existence and scope of the public trust doctrine."[321] He traced the English common-law origins of the public trust doctrine and the separate lineage of some states' creation of public rights "to use waters for fishing and navigation regardless of title and regardless of whether the waters were ever navigable for title," which New Mexico and California courts had derived from Native American and Mexican law.[322] In contrast from the roots of both doctrines, Colorado has completely broken from the common law of water, making all surface water and groundwater "a public resource dedicated to the establishment and exercise of water use rights created in accordance with applicable law. The 'Colorado Doctrine' arose from the 'imperative necessity' of water scarcity in the western region, and ... created a property-rights-based allocation and administration system that promotes multiple use of a finite resource for beneficial purposes."[323]

In concluding his analysis, Justice Hobbs observed that Initiative 3 "appears to seek to overturn all aspects of *Emmert*, and goes farther by creating a 'public trust' not only in all water rights in the state, as with California's *Mono Lake* case, but also in all natural stream beds regardless of navigability, which would be a novelty among jurisdictions in the United States."[324] Despite the majority's reluctance to analyze the measure's substance in applying the single-subject requirement, Justice Hobbs's insightful explanation of the separate evolution of the common-law public trust and the "Colorado doctrine" confirms that the roots of the public trust and public ownership doctrines are quite

319. *Id.* at 571 (Hobbs, J., dissenting).
320. *Id.* at 571-72.
321. *Id* at 572.
322. *Id.* at 572-73 (citing *Mono Lake*, 658 P.2d 709, 727 (Cal. 1983) (en banc); State ex rel. State Game Comm'n v. Red River Valley Co., 182 P.2d 421, 432 (N.M. 1945)).
323. *Id.* at 573-74 (citing Bd. of Cnty. Comm'rs v. Park Cnty. Sportsmen's Ranch, LLP, 45 P.3d 693, 706 (Colo. 2002) (en banc)).
324. *Id.* at 574.

foreign to Colorado law, and that the terms of Initiative 3 would depart even further from Colorado's longstanding legal framework to address water issues.

Mr. Hamilton and Mr. Doe concurrently proposed Initiative 45, to amend section 6 of Article XVI of the Colorado Constitution (the section protecting the right to divert unappropriated water to beneficial use by appropriation). The initiative would amend the current text of section 6, deleting words that limit the diversion right to "unappropriated" waters of "natural stream[s]," thus extending that right to "any water within the state of Colorado."[325] It would then add several provisions, most of them limiting the appropriation right in terms similar to Initiative 3, but without using that measure's central phrase, "public trust doctrine." Echoing the "public trust" statements of the companion measure, Initiative 45 provides for diversions to be limited or curtailed "to protect natural elements of the public's dominant water estate."[326] Going beyond Initiative 3, it requires that water diversion rights "shall require the water use appropriator to return water unimpaired to the public, after use, so as to protect the natural environment and the public's use and enjoyment of waters."[327]

In a split decision, the Title Board determined that Initiative 45 contained a single subject. A majority of the Colorado Supreme Court affirmed this decision, with Justice Hobbs again dissenting.[328] The majority found that the subject "public control of waters" accurately described the initiative's scope, as the initiative's primary features would extend public control to all Colorado water through a publicly controlled, "dominant water estate."[329] Water use rights would be subordinated to this dominant estate through several provisions, including the requirement "to return used water unimpaired to the public."[330]

In his dissent, Justice Hobbs noted three subjects "concealed within the folds of this complex initiative."[331] First, like Initiative 3, it would "subordinate all existing water rights in Colorado created over the past 150 years to a newly created dominant water estate" by creating "a super water right" for environmental protection and public use.[332] Second, by deleting the restriction on appropriation to "unappropriated waters of any natural stream," it would "allow non-tributary groundwater to be appropriated by anyone without the consent of the overlying landowner."[333] Finally, Initiative 45 would "impose riparian water law upon the State of Colorado and upon already appropriated water rights, by requiring that the appropriator must return the water to the steam unimpaired."[334]

Elaborating this last point, Justice Hobbs explained that the requirement to return water unimpaired was central to common law rights of riparian own-

325. *In re Title for #45,* 274 P.3d 576 app. at 582-83 (Colo. 2012) (en banc) (quoting text of Proposed Initiative 2011-12 #45, §1).
326. *Id.*
327. *Id.* at 583.
328. *See id.* at 576.
329. *Id.* at 581.
330. *Id.*at 580-81.
331. *Id.,* 274 P.3d at 586 (Hobbs, J., dissenting).
332. *Id.*
333. *Id.*
334. *Id.*

ers to water in streams, the very legal framework Colorado rejected in adopting a prior appropriation doctrine.[335] Such a return requirement, he pointed out, would defeat the rights to develop and consume water that Colorado has diligently reserved in its interstate water compacts and equitable apportionment decrees.[336]

C. IMPACTS OF THE PROPOSALS

How would the public trust doctrine as proposed in these initiatives transform Colorado law? With each of these proposals, Mr. Hamilton has suggested his version of the doctrine would go at least as far as California's doctrine, relying especially on the *Marks v. Whitney* and Mono Lake cases discussed above.[337] Under the common law cases, the doctrine is limited to protection of tidal and navigable waterways, which California may extend to restricting diversions from their non-navigable tributaries.[338] Initiative 3, however, would extend to *all* waters in the state, perhaps due to Colorado's recognition that it has no navigable streams. If such an initiative extends its protection to all the waters in Colorado, it would be the most radical extension of the public trust doctrine yet, severing the doctrine completely from its historic anchor of navigability. This would revolutionize water rights in Colorado, more than anything in over 150 years.

At the very least, such an initiative would dramatically increase litigation over Colorado water rights. The proponents intend it to apply not only in determinations of new water rights, but also to force reconsideration of rights previously decreed, as in the Mono Lake case.[339] Because a public trust doctrine has never been defined in Colorado, and has taken various different common law meanings elsewhere, "its meaning and content can only be determined through years of lawsuits."[340] In essence, Initiative 3 (like its predecessors) would grant enormous power over water rights to the judiciary, with hardly any standards constraining that power. Such raw judicial power undercuts not only property rights, but also the basic principles of democratic government.[341] Moreover, the prospect of such broad based, standardless litigation destroys the fundamental certainty provided by property rights in general and prior appropriation water rights in particular.[342]

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335. *Id.* at 585 (citing United States v. Gerlach Live Stock Co., 339 U.S. 725, 744-45 (1950)).

336. *Id.* at 586 (citing Kansas v. Colorado, 206 U.S. 46, 118 (1907)).

337. *See, e.g.*, Opening Brief of Respondent Richard G. Hamilton at 15-18, *In re* Title, Ballot Title, Submission Clause for the Proposed Initiative 2011-2012 No. 3, 274 P.3d 562 (Colo. 2012) (en banc), *available at* http://www.courts.state.co.us/Courts/Supreme_Court/2011Initiatives.cfm; Answering Brief of Respondent Richard G. Hamilton at 6-10, *In re* Title, Ballot Title, Submission Clause, and Summary Adopted April 6, 1994, 877 P.2d 321 (Colo. 1994) (en banc) (No. 16058752), 1994 WL 16058752.

338. Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (en banc).

339. *See, e.g.*, Opening Brief of Respondent Richard G. Hamilton, *supra* note 337; Answering Brief of Respondent Richard G. Hamilton, *supra* note 337, at 9-10.

340. Gould, *supra* note 10, at 18.

341. *See* Huffman, *Fish Out of Water*, *supra* note 11, at 554, 566.

342. *See* Gould, *supra* note 10, at 18.

Owners and users of all water diverted and stored in Colorado would be at risk. All diversion and storage projects are planned, financed, and completed based on assumptions the priority system applies, and that a certain volume of water can be diverted or stored whenever available in priority. A public trust, however, would render all these rights subject to potential curtailment or revocation—not just by water shortage, senior rights or non-use, but by the state's or a judge's subjective determination that one use has become more valuable than another. This intolerable level of uncertainty could make it virtually impossible to plan or finance a significant water project, and might jeopardize the financing of many projects that have been built but not yet paid off.

Like other modern advocates of the public trust doctrine, Mr. Hamilton has sought to use the doctrine proposed in his initiatives to enable state-required transfers of private rights to public use, without the owners' consent and without compensation. Mr. Hamilton said to Legislative Council staff in 1994: "Do the proponents intend that the courts, in upholding a 'public trust doctrine,' will have the authority to *transfer existing privately held rights to the public*? And the answer is that *yes, we do.*"[343]

To the next question, "*Without the consent* of the individuals who may have the right to use that water at the moment?," Mr. Hamilton answered, "*Yeah.*"[344] Mr. Hamilton went on to describe California's *City of Berkeley* decision, saying these forced transfers of private rights to the public would be without compensation.[345] However, not even an amendment to Colorado's Constitution can take, without compensation, property rights protected by the US Constitution. A newly adopted state constitutional provision "cannot be the basis for asserting that a public right has existed since statehood."[346] Colorado water rights have always been recognized as property rights, have never been limited by a public trust, and cannot be so limited retroactively, absent just compensation. Thus, the transfers contemplated by Mr. Hamilton would subject the State to enormous liability for takings.

Moreover, the cost of these measures would be enormous. In 1994, the CWCB estimated it would need to spend an additional $750,000 to $16,600,000 for litigation and administrative requirements imposed by the first public trust initiative.[347] In 1996, the Office of State Planning and Budgeting estimated "the total annual fiscal impact to state government would be $12,295,000" from the 1996 version of Hamilton's proposed amendment.[348] In addition, local governments (cities, towns, and districts) own many or most of the water rights impacted by these initiatives, and would also face huge litiga-

343. *In Re The Proposed Constitutional Amendment: "Vote on Water" Before Colo. Gen. Assemb., Legis. Council and the Office of Legis. Legal Services*, 1994 Leg., 50th Sess. at 42 (Co. 1994) (emphasis added).

344. *Id.*

345. *Id.* at 46; *see also* Title v. Swingle, 877 P.2d 321, 328 (Colo. 1994) (en banc).

346. *See* Huffman, *Fish Out of Water*, *supra* note 11, at 547.

347. Letter from Daries C. Lile, Director, Colorado Water Conservation Board, to Ronald W. Cattany, Deputy Director, Colorado Department of Natural Resources (Mar. 15, 1994) (on file with U. DENV. WATER L. REV.).

348. Letter from George H. Delaney, Director, Office of State Planning and Budgeting, to Victoria Buckley, Secretary of State (Feb. 29, 1996) (on file with U. DENV. WATER L. REV.).

tion expenses.[349] In 1996, the Department of Local Affairs estimated the very uncertain net fiscal impacts of the initiative to local governments in Colorado could range from *$2.28 to $3.36 billion*, not including "litigation and other ancillary expenses that could result from the measure."[350] While the state did not release fiscal impact estimates for Initiative 3,[351] surely the cost in 2012 dollars would be much greater. In these days of the TABOR Amendment and other constraints and mandates on state and local government spending, surely there are better uses for scarce public funds.

VII. THE "MODERN" PUBLIC TRUST DOCTRINE AND ITS EFFECTS

A. AN ENVIRONMENTAL PROTECTION DOCTRINE

California's public trust doctrine is hardly concerned with navigation or commerce. Navigability may still serve as a pre-textual hook on which to hang the justification for a public trust, but today, environmentalists invoke the public trust doctrine to preserve, protect, or restore natural environments, and ecosystems. This is a far cry from the traditional public trust doctrine, which "focuses on preservation not reallocation of rights."[352]

These environmental goals are increasingly desirable to the public, but they are public policy goals best resolved by legislation after public debate, considering the most appropriate solution for each resource, with due regard for property rights. Extension of the public trust doctrine, by contrast, is judicial sleight of hand; its rationale (far afield from its roots) is that environmental concerns deserve the same nature and level of protection as public access to water bodies historically used for navigation. Navigational and environmental uses, however, are not cut of the same cloth. To put the clothes of navigation, developed over hundreds of years, suddenly onto the body of environmentalism and preservationism, the cause du jour, bypasses property rights and the democratic process.[353]

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349. *See Swingle*, 877 P.2d at 326.

350. Letter from Larry Kallenberger, Executive Director, Department of Local Affairs, to Victoria Buckley, Secretary of State (Mar. 1, 1996) (on file with author).

351. Colorado law was amended in 2000, removing the requirement for the Title Board to prepare a summary including a statement of fiscal impacts. S.B. 00-172, 62nd Gen. Assemb., Reg. Sess. (Colo. 2000). Instead, fiscal impact estimates are prepared for the "Blue Book" at a later stage of the initiative process. COLO. REV. STAT. § 1-40-124.5 (2012). The proponents of Initiatives 3 and 45 announced they would not submit signatures on July 20, 2012, just before Legislative Council staff was to release draft fiscal impact estimates as part of the Blue Book drafting process. *See* Cathy Proctor, *Water Ballot Initiatives are Withdrawn*, DENVER BUSINESS JOURNAL (July 23, 2012, 11:56 AM), http://www.bizjournals.com/denver/news/2012/07/23/water-ballot-initiatives-are-withdrawn.html.

352. Barton H. Thompson, Jr., *The Public Trust Doctrine: A Conservative Reconstruction & Defense*, 15 SOUTHEASTERN ENVTL. L.J. 47, 67 (2006).

353. Huffman, *Fish Out of Water*, *supra* note 11, at 567 ("How easy it is to turn a limitation on government power into a justification for expansion. And how utterly unprincipled.").

B. TAKINGS IMPLICATIONS OF AN EXPANDED PUBLIC TRUST DOCTRINE

Federal law does not prevent state governments from condemning water rights to solve environmental problems.[354] However, under the Fifth and Fourteenth Amendments of the US Constitution (and typically similar state constitutional provisions[355]), just compensation must be paid for taking a property right. If California had been forced to compensate Los Angeles for taking the city's water, the state would have been forced to price and prioritize environmental values. The public is much more willing to sacrifice others' property rights when taxpayers do not have to pay.

"[I]t is clear that the avoidance of takings problems is a major attraction to those advancing the public trust doctrine. Some advocates of the doctrine are quite frank about this."[356] The Supreme Court's ruling in *Lucas v. South Carolina Coastal Commission*, briefly gave private property advocates hope that the courts would more readily recognize regulatory takings claims.[357] The result of *Lucas*, however, was the recognition of "background principles" of state common law that could defeat a takings claim.[358] Since *Lucas*, commentators have introduced the notion that the public trust doctrine should be recognized as a "background principle" to defend against potential claims for takings of water rights in states that recognize the doctrine.[359]

1. Lucas and the Public Trust Doctrine as a "Background Principle"

The private property owner who brought suit in *Lucas* purchased two parcels of land on one of South Carolina's Barrier Islands, intending to develop homes like those already built on the island.[360] The following year, before Lucas could build, the South Carolina legislature passed the Beachfront Man-

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354. A Colorado statute prohibits condemnation for the CWCB minimum streamflow program. COLO. REV. STAT. § 37-92-102(3)(d) (2012). This restrictive Colorado statute draws into question whether Colorado may condemn water rights for public trust type preservation purposes.

355. *Compare* U.S. CONST. amend. V.; U.S. CONST. amend. XIV, § 1 *with* COLO. CONST. art. II, § 15. The provision in Article II, Section 15 of the Colorado Constitution, in fact, is broader:

> Private property shall not be taken or *damaged*, for public or private use, without just compensation. . . . and until the same shall be paid to the owner, . . . the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public. (emphasis added).

356. Gould, *supra* note 10, at 25-19.

357. *See generally* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

358. *Id.* at 1031.

359. *E.g.*, Michael C. Blumm & Lucas Ritchie, Lucas*'s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 Harv. Envtl. L. Rev. 321, 343-44 (2005).

360. *Id.* at 1006-07.

agement Act, which barred the type of construction Lucas had planned.[361] The South Carolina trial court held that the Act resulted in a per se taking as Lucas's property was now worthless and awarded 1.2 million dollars in compensation.[362] The South Carolina Supreme Court reversed under the novel theory that it was under an obligation to accept the legislature's proposed reasoning for the Act, and therefore, the Act had transformed Lucas's building and development plans into a "public nuisance."[363] Citing the well-established principle that when regulation "is designed 'to prevent serious public harm,' . . . no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value," the Court reversed and found in favor of the State.[364]

The US Supreme Court rejected the South Carolina Supreme Court's reasoning because determining whether regulations are meant to prevent serious harm or advance the public interest is difficult when the only difference between the two concepts is the perspective of the interpreting party.[365] Instead, the Court returned to the underpinnings of takings law, noting that two discrete categories of regulatory action are compensable without case-specific inquiry into the "public interest advanced in support of the restraint."[366] Those two categories are (i) an actual physical invasion, no matter how minute;[367] and (ii) a regulation that "denies all economically beneficial or productive use of land."[368]

From there, the Court charted new territory in its regulatory takings jurisprudence. Beginning with the underlying principle that the Fifth Amendment is violated "when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land,'"[369] the Court delved into the difficulties of inquiring into government's motivations for regulation. In balancing state interests against private ownership, the Court recognized the following:

> [A]ffirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private

361. *Id.* at 1007.
362. *Id.* at 1007, 1009.
363. *Id.* at 1009-10.
364. *Id.* at 1010 (citing Lucas v. S. C. Coastal Council, 404 S.E.2d 895, 899 (S.C. 1991), *rev'd*, Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992)).
365. *Id.* at 1020-22.
366. *Id.* at 1015.
367. *Id.* (citing, *e.g.*, Loretto v. Telemprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979) (imposition of a navigational servitude upon private marina)).
368. *Id.* (citing Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Nollan v. CA Coastal Comm'n, 483 U.S. 825, 834 (1987); Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 495 (1987); Hodel v. Virginia Surface Mining & Reclamation Assn., 452 U.S. 264, 295-296 (1981)).
369. *Id.* at 1016 (emphasis omitted) (quoting *Agins*, 447 U.S. at 260).

property is being pressed into some form of public service under the guise of mitigating serious public harm.[370]

The Court then held that if the State seeks to claim the activity is in some part a public nuisance to resist compensation, it must be able to identify background principles of law to show the property owner never actually held the right to conduct the activity in question.[371] The Court reasoned the State could show the property owner had truly lost nothing only by demonstrating that the proscribed activity was already forbidden.[372] The Court then reversed and remanded for proceedings consistent with its opinion.[373]

2. Colorado's Public Trust Initiatives and the Issue of Takings

Understandably, property rights advocates saw cause for celebration after *Lucas*. The case presented total economic loss as a new categorical takings rule and was a victory for a property rights owner, only the second of its kind in the history of regulatory takings jurisprudence.[374] The victory was short-lived, however, as the Court subsequently backed away from a categorical approach to regulatory takings in *Palazzolo v. Rhode Island*[375] and *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*,[376] returning instead to Justice Brennan's multi-factor balancing analysis, first established in Penn Central.[377] Ironically, the aftermath of *Lucas* has still provided proponents of the public trust doctrine ample hope that courts will rely on the doctrine as a background principle (at least of California water and property law) under *Lucas* to reject takings claims arising from regulatory restrictions on water use.[378]

However, the public trust doctrine's effect, as a background principle of property law, depends entirely on its historical extent in state law, as *PPL Montana* makes clear. In Colorado, the public trust doctrine has never before existed. Here, adopting a public trust doctrine would "take" water rights and other property and would require compensation to those whose rights are taken or damaged.[379] The US Supreme Court stated, "[T]he government's

370. *Id.* at 1018 (citing Annicelli v. S. Kingstown, 463 A.2d 133, 140-41 (R.I. 1983) (prohibition on construction adjacent to beach justified on twin grounds of safety and "conservation of open space"); Morris Cnty. Land Improvement Co. v. Parsippany-Troy Hills Twp., 193 A.2d 232, 240 (N.J. 1963) (prohibition on filling marshlands imposed in order to preserve region as water detention basin and create wildlife refuge)).

371. *Id.* at 1031-32.

372. *Id.* at 1032.

373. *Id.* at 1032.

374. Michael C. Blumm, *Palazzolo and the Decline of Justice Scalia's Categorical Takings Doctrine*, 30 B.C. ENVTL. AFF. L. REV. 137, 140 (2002).

375. Palazzolo v. Rhode Island, 533 U.S. 606, 616-18, 631 (2001).

376. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321, 323-24, 330 (2002).

377. Blumm, *supra* note 374, at 139.

378. *See* John D. Echeverria, *The Public Trust Doctrine As A Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931, 932 (2012).

379. *See Summa Corp. v. California ex rel.* State Lands Comm'n, 466 U.S. 198 (1984) (rejecting California's belated assertion of a public trust easement on certain private lands).

power to redefine the range of interests included in the ownership of property [is] necessarily constrained by constitutional limits."[380] An owner's property right, for Fifth Amendment purposes, is defined by state law at the time ownership is acquired; "newly legislated or decreed" limitations which destroy the economically beneficial use of a property right are compensable takings.[381] This is true whether the limitations are imposed by legislation, administrative action, constitutional amendment, or judicial decision.[382]

Colorado has rejected the public trust doctrine as inconsistent with rights of appropriation under the state constitution. Unlike California law, which has long recognized both riparian rights (as superior to appropriative rights) and public trust constraints, past and present Colorado law provides no basis for subjecting water rights to public trust purposes. Colorado water rights are vested property rights, fully protected by constitutional guarantees against takings without compensation.[383] To impose a public trust on existing water rights at this late date, even by constitutional amendment, would require compensation. Thus, future proposals along the lines of Initiatives 3 and 45, to impose a public trust doctrine or "dominant water estate" on the state's waters, will likely trigger the takings issue by redefining property rights clearly recognized under Colorado law.

VIII. CONCLUSION

Colorado's appropriation doctrine has met the state's water needs for well over one hundred years. As new needs and values have arisen, including the so-called "public trust values," they have been effectively addressed within that system by a series of adaptations. As Justice Gregory Hobbs of the Colorado Supreme Court has explained, "Colorado water law adapts and evolves to meet society's changing values. Since the 1970s, there has been a persistent effort to integrate environmental water values into the water rights legal framework."[384] There are "no aspects of the public interest that cannot be protected within" Colorado's prior appropriation framework.[385] The CWCB's instream flow program provides for stream flows and lake levels to preserve the natural environment, including fisheries.[386] When new appropriations are insufficient to protect such flows, the CWCB may acquire or lease more senior water rights for this purpose.[387] Federal agencies' water needs can be assigned priori-

380. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) (explaining Pa. Coal Co. v. Mahon, 260 U.S. 393, 414-15 (1992)).

381. *Id.* at 1029.

382. *See* Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990).

383. Farmers Irrigation Co.v. Game and Fish Comm'n, 369 P.2d 557, 559-60 (Colo. 1962) (en banc).

384. GREGORY J. HOBBS, JR., *A Decade of Colorado Supreme Court Water Decisions 1996-2006, in* THE PUBLIC'S WATER RESOURCE; ARTICLES ON WATER LAW, HISTORY, AND CULTURE 111, 126 (2d ed. 2010).

385. Hobbs & Raley, *supra* note 3, at 874.

386. *See id.* at 882; COLO. REV. STAT. § 37-92-103 (2012).

387. Hobbs & Raley, *supra* note 3, at 882; *see Temporary Loans and Leases of Water Rights for Instream Flows*, COLO. WATER CONSERVATION BD., http://cwcb.state.co.us/environment/instream-flow-

ties for reserved or appropriated water rights, consistent with federal law, by adjudication and administration in Colorado's priority system under the McCarran Amendment.[388] Local governments may protect reasonable flows for recreational boating use through structures improving stream channels as "recreational in-channel diversions," consistent with other beneficial uses of water.[389] Reservoir operations are often used to maintain flows for fisheries and recreational boating.[390] Such storage operations play a vital role in protecting endangered fish species' habitat as part of the recovery program for the Upper Colorado River.[391] Moreover, Colorado has ample tools for protecting water quality in concert with water rights administration under the prior appropriation doctrine.[392] To avoid damage to the environment when water is transferred from agricultural use, water courts now impose reasonable requirements for revegetation and noxious weed management on historically irrigated land.[393]

No one can say with certainty to what extent a "Colorado public trust doctrine" would transform Colorado water law. However, it would undoubtedly require massive and endless litigation, both to determine the meaning of the initiative, and to comply with its express requirements. The initiative's hostility to private property is unwarranted, and would carry great costs. To the extent reallocation of water to new uses is desired, Colorado's existing laws and market forces can achieve the goal while assuring no one's rights are taken or damaged without compensation. Unlike property rights and market forces, the public trust "trump card" takes away the incentive for private owners to conserve or wisely manage their property, putting the entire burden on the state and the courts.

Colorado's water problems have typically been addressed through discussions among concerned parties. In many ways, those discussions are more fruitful now than ever before, as negotiating parties find new and creative ways to reach win-win-win solutions to old and new problems. The deadly weapon

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program/Pages/TemporaryLoansWaterRightsInstreamFlows.aspx (last visited Oct. 19, 2012) (such leases, in cooperation with the Colorado Water Trust, have protected stream flows under drought conditions in 2012); *see also* Michael Schrantz, *Colorado Water Trust release serves purpose of protecting Yampa River*, STEAMBOAT TODAY (Sept. 10, 2012), http://www.steamboattoday.com/news/2012/sep/10/colorado-water-trust-release-serves-purpose-protec/.

388. 43 U.S.C. § 666 (2012); *see* HOBBS, *Priority: The Most Misunderstood Stick in the Bundle*, *in* THE PUBLIC'S WATER RESOURCE; ARTICLES ON WATER LAW, HISTORY, AND CULTURE 303, 308-11 (2d ed. 2010).

389. *See* COLO. REV. STAT. §§ 37-92-102(5), 103(10.3) (2012); Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist., 109 P.3d 585 (Colo. 2005) (en banc).

390. *See* Michael F. Browning, *Private Means to Enhance Public Streams*, 33 COLO. LAW. 69, 72 (2004); Upper Gunnison River Water Conservancy Dist. v. Arapahoe, 838 P.2d 840, 849 (Colo. 1992) (en banc).

391. *See Final Programmatic Biological Opinion for the Bureau of Reclamation's Operations and Depletions, Other Depletions, and Funding and Implementation of Recovery Program Actions in the Upper Colorado River above the Confluence with the Gunnison River*, U.S. FISH & WILDLIFE SERV., 8-11 (Dec. 1999), http://www.coloradoriverrecovery.org/documents-publications/section-7-consultation/15mile/FinalPBO.pdf.

392. *See* Hobbs & Raley, *supra* note 3, at 882-99.

393. COLO. REV. STAT. § 37-92-305(4.5)(a) (2012).

of a "strong public trust doctrine" would immediately shift these discussions into the courtroom, replacing collaborative problem solving with destructive legal warfare.