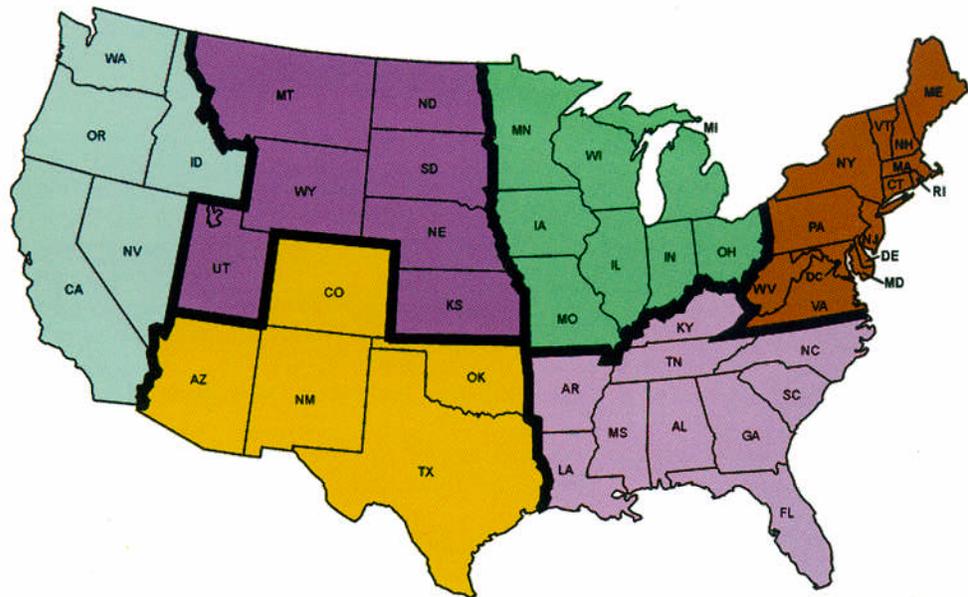
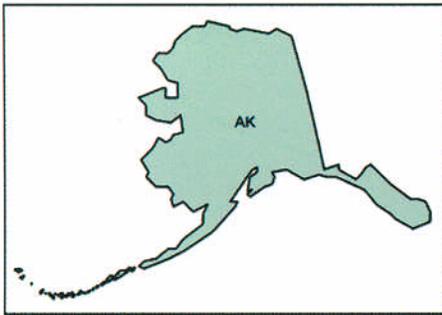


# The Public Trust Doctrine and its Application to Protecting Instream Flows: Proceedings of a Workshop



National Instream Flow  
Program Assessment



-NIFPA-



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**THE PUBLIC TRUST DOCTRINE  
AND ITS APPLICATION TO  
PROTECTING INSTREAM FLOWS**

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**March 5-6, 1996  
Denver, Colorado**

*Proceedings of a Workshop Sponsored by the*  
**National Instream Flow Program Assessment**  
**Anchorage, Alaska**

*Edited By*  
**Gary E. Smith and Alexander R. Hoar**

**March 1999**

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Cover art work prepared by Keith D. Bayha, U.S. Fish and Wildlife Service, Anchorage, Alaska.

## IN MEMORY OF ELDON H. VESTAL

---

These proceedings are dedicated to the memory of Mr. Eldon H. Vestal. Mr. Vestal's efforts, and enduring belief in the power of science, were instrumental in righting an environmental injustice in the Mono Lake Basin of California's eastern Sierra Nevada. His scientific work and testimony formed the foundation for the precedent-setting Mono Lake instream flow decisions in both the Superior and Appellate Courts. His detailed scientific observations led to the restoration of the four major Mono Lake Basin streams after nearly 50 years of man-made drought.

Mr. Vestal was the State of California Department of Fish and Game biologist assigned to Mono Lake when the Los Angeles Department of Water and Power began significant diversions of water from the four streams. On his own authority, Mr. Vestal ordered the Los Angeles Department of Water and Power to limit or cease diversions. His order was soon overruled and his reputation trampled by politicians in Sacramento. As the streams ceased to run and the landscape desiccated, Mr. Vestal's meticulous records and daily diaries became the only contemporaneous record of the declining ecosystem. One-half century later, his clear memory of the events and historic conditions were the key scientific evidence upon which the Mono Lake cases were decided. Mr. Vestal kept the Public Trust alive, and enabled the streams to burst forth with life so many years after their apparent demise. We are indebted.

National Instream Flow Program Assessment Steering Committee



Mr. Eldon H. Vestal  
(Photo by Gerda S. Mathan)



Mono Lake, California  
(Photo by Gary E. Smith)

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PUBLIC TRUST DOCTRINE AND ITS APPLICATION TO  
PROTECTING INSTREAM FLOWS WORKSHOP SUB-COMMITTEE**

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**THE PUBLIC TRUST DOCTRINE AND ITS APPLICATION TO  
PROTECTING INSTREAM FLOWS WORKSHOP  
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# THE PUBLIC TRUST DOCTRINE AND ITS APPLICATION TO PROTECTING INSTREAM FLOWS WORKSHOP

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## INVITED SPEAKERS<sup>1</sup>

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**Joseph L. Sax**, Office of the Secretary, U.S. Department of the Interior, Washington, D.C.  
**Justice Coleman A. Blease**, Third Appellate District, Sacramento, California  
**Robert (Bob) T. Anderson**, U.S. Department of the Interior, Seattle, Washington  
**David S. Baron**, Arizona Center for Law in the Public Interest, Tucson, Arizona  
**Thomas (Tom) J. Dawson**, Wisconsin Department of Justice, Madison, Wisconsin  
**J. Allen Jernigan**, North Carolina Department of Justice, Raleigh, North Carolina  
**Laird J. Lucas**, Land and Water Fund of the Rockies, Boise, Idaho  
**J. Wallace (Walley) Malley, Jr.**, Office of the Attorney General, Montpelier, Vermont  
**Richard Roos-Collins**, Natural Heritage Institute, San Francisco, California  
**Mary J. Scoonover**, California Attorney General's Office, Sacramento, California  
**Mark Sinclair**, Conservation Law Foundation, Montpelier, Vermont  
**Harold (Hal) M. Thomas**, California Department of Fish and Game, Sacramento, California

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1. The invited speakers' biographies are presented in Appendix B.



## ACKNOWLEDGMENTS

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The National Instream Flow Program Assessment's (NIFPA) Public Trust Doctrine and its Application to Protecting Instream Flows Workshop and Workshop Proceedings are the results of the efforts of many. Foremost in the success of the workshop are the invited speakers and participants. The invited speakers took time away from their busy schedules to enthusiastically participate in all phases of the workshop and informal discussions, and to assist with preparation of the proceedings. We are grateful to their efforts. Christopher Estes and Keith Bayha, Co-chairmen of the NIFPA Steering Committee, the NIFPA Steering Committee, and the NIFPA participants also were instrumental to the inception and success of the workshop. Christopher Estes, Keith Bayha, Steering Committee member E. Dawn Whitehead, and Harold M. Thomas (California Department of Fish and Game) assisted with manuscript preparation. Paula Botch, Pam Dansereau, Christine Guimond, and Tammy Hogan (U.S. Fish and Wildlife Service), Celia Rozen (Alaska Department of Fish and Game), and Janet Smith provided valuable review and critique of the proceedings. We are grateful to all for their efforts, contributions, and encouragement.



## FORWARD

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The overall goal of the NIFPA project is to help each state fish and wildlife agency and Service region improve its ability to protect and manage fish and wildlife habitats and resources by building more effective instream flow programs. The primary objectives of this project are to:

- Reestablish and expand an informal communication network of state fish and wildlife agency and regional Service instream flow programs and coordinators.
- Identify, develop, and apply criteria for evaluating instream flow programs of all 50 state fish and wildlife agencies and the seven Service regions.
- Peer review each state's and Service region's instream flow program.
- Compile and distribute materials and strategies useful for strengthening state and federal instream flow programs.

NIFPA reports and products are intended for use by fish, wildlife, and other natural resource professionals. Distribution is to NIFPA participants, state fish and wildlife agencies, Service, U.S. Geological Survey, Biological Resources Division, publication distribution centers, libraries, individuals, and, on request, to other agencies, organizations, and individuals. This report is one of a series of NIFPA reports and products. Due to its content, size, and value to its audience, it is published as a stand-alone document. A list of all NIFPA reports and products is printed on the inside of the front cover.

This report is the result of a NIFPA sponsored workshop on the Public Trust Doctrine and its application to instream flow issues. The workshop proceedings were prepared from transcripts developed from audio and video recordings of the workshop. The proceedings follow the workshop transcripts closely, but are not verbatim. The transcripts were edited during proceedings preparation to improve clarity.

The contents of this publication do not necessarily reflect the views and policies of the Federal Government, U.S. Department of the Interior, the Service, the states, or of the workshop speakers' or participants' respective agency, organization, or employers, unless so designated by other authorized documents.



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# The Public Trust Doctrine and its Application to Protecting Instream Flows

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## Workshop Introduction

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*Alexander R. Hoar*

U.S. Fish and Wildlife Service, Hadley, Massachusetts.

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Welcome to the National Instream Flow Program Assessment's (NIFPA) workshop. We are going to spend the next day and a half talking about the Public Trust Doctrine and its application to protecting instream flows. As you will find out from our speakers, this is not a new topic, nor is it something radical. It is an ancient Doctrine that goes back to Roman times.

My name is Alex Hoar. I work for the U.S. Fish and Wildlife Service in the northeastern United States, and I will be your moderator for this workshop. Gary Smith, of the California Department of Fish and Game, Douglas Sheppard, who works for the New York Department of Environmental Conservation, and I were asked by the NIFPA Steering Committee to develop this workshop. We were charged with helping to answer questions that you have related to the Public Trust Doctrine, its applicability to fish and wildlife resources, and the protection of instream flows. Accordingly, the objective of this workshop is to provide you with an introduction to the Public Trust Doctrine and its application to the protection of instream flows. We wanted experts from across the country to participate, and they are. We discussed the Doctrine and workshop with many people, and invited 12 to participate. There are many, many others who are well qualified to be here, but who are not, simply because of workshop limitations on space, time, scope, and funding. We believe the 12 selected will provide a very productive workshop.

We wanted geographic representation, so somebody in Connecticut could listen to somebody from that area of the country. So somebody from California likewise could listen to somebody who was not very far away. The same for somebody from Georgia, Oklahoma, Wisconsin, and so on. But, on the other hand, we also wanted to have discussions on how use of the Doctrine in other areas of the Nation could be applicable to your state. We think that when we introduce who is here, you will find that we achieved this goal. You will have a neighbor, somebody you can relate to, someone who understands your problems, and maybe even someone who has your accent. We think you will also find that application of the Doctrine in other areas of the country may also apply to your state.

We originally set out to have experts from state attorney general offices, academia, private practice, and public interest groups participate in the workshop. Each of those categories has different perspectives to offer. Unfortunately, representatives from academia, or at least currently with academia, and private practice are not here. That is unfortunate because we will not have the benefit of their input. We also tried to find somebody in the judiciary who could come and talk with

us, and we are very honored to have a judge with us. So we will have perspectives on the Public Trust Doctrine ranging from the field biologist at the start of a project to litigation. You will hear perspectives from people in the state attorney general offices who represent state fish and wildlife agencies. You will also hear from public interest groups, who look at the state with a different eye, and who may have different views.

There are many aspects of the Doctrine that we are not going to talk about during the workshop. That is not because we are not interested in those aspects; it is because we are going to focus on application of the Public trust Doctrine to the protection on instream flows. With some variations between states, the Doctrine extends the Trust to navigable waters, shorelines, tidal lands, beaches, and perhaps uplands, but our emphasis is on instream flows.

So, what exactly are we going to do during the workshop? I would like to run through a simplified version of the agenda. I also want to point out that there are biographical sketches of the guest speakers included in the back of the agenda. The first thing we are going to do is have a general introduction to the Public Trust Doctrine by a leading expert. This presentation is going to be a broad overview of the general aspects of the Public Trust Doctrine. This will take about an hour and a half. We are then going to hear from the judge who signed the landmark Mono Lake, California, decision that, in essence, forms the foundation for what will be talking about today and tomorrow. Following that, we are going to examine the Public Trust Doctrine and riparian and prior appropriation water rights from state and public interest group perspectives. Then we will talk about the fringes of the Public Trust Doctrine through a review of case studies. This is the area where application of the Doctrine is evolving. These case studies will not necessarily focus on the specific facts of each case, but only enough on the facts to carry the kernels of information and interest to you so that you will be able to take home what is important about each case.

Tomorrow, we will talk about new applications of the Public Trust Doctrine. We will talk a little about where it has been, and where it might be going. We want you to know where the edges are. We want you to be comfortable with the Doctrine, so when you talk about it with others you will be on solid ground.

Lastly, we are going to talk about the Doctrine and other legal tools for instream flow protection. The Doctrine does not have to stand by itself. Many other laws and regulations have been key to successful application of the Doctrine. For example, the federal Clean Water Act and its water quality standards provides a legal framework for successfully implementing the Doctrine. When you review a project and its impacts, the laws and regulations under which you work, which you may not even think about anymore, may be key to implementing the Trust responsibility.

As we proceed with the workshop, and into different perspectives and questions, we expect that you may develop a different perspective on why there is an official fish and wildlife agency in your state, on its mission, and on what it should be doing. There is more to a state fish and wildlife agency's responsibilities than simply selling licenses and generating financial support. We think that, at the end of this workshop, you will have a little bit different perspective on your agencies' mission.

This workshop was designed to be a participant involvement workshop. We encourage you to feel free to walk up to the microphones and ask questions. We ask that you not speak from your desk because all of this is being video- and audiotaped so we can prepare permanent records for those who were unable to be here. The videotape will be sent to you so you can share it with your colleagues, and the audiotape will be used to prepare a written proceedings. We think the videotape is a marvelous idea. It is an outreach effort. One of the issues addressed in the survey is how to reach out to people regarding instream flow issues.

Before we hear from our speakers, I must point out that many of our speakers, particularly those who come from state agencies or state attorney general offices, are voicing their own views, and that those views are not necessarily those of their employers or their clients. I want to make this point very clear. We want to have free and open dialogue, we want you to be able to ask questions and get forthright responses.



# Introduction to the Public Trust Doctrine

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*Joseph L. Sax<sup>2</sup>*

Office of the Secretary, U.S. Department of the Interior, Washington, D.C.

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I am going to introduce to you, in an hour or so, one of the most unusual, most powerful, and potentially--in terms of your interest--most useful doctrines in all the legal system. Because people usually spend not only a semester, but a lifetime, trying to understand the Public Trust Doctrine, one has to do a little condensing conceptually to fit a discussion of the Doctrine into 90 minutes. I am going to try to do that by reducing the entire Public Trust concept into four words or concepts. I think you will see that this will be helpful. If you remember these four things, you will have the rudiments of the Public Trust concept clearly in mind, and you can take it from there.

The first point is that the Public Trust is common law. The second point is that the Public Trust is state law. The third point is that the Public Trust is property law. The fourth point is that the Public Trust is a public right.

Let me begin by first saying a few brief words about each of these four things and then I will expand on them. The common law point means that there is no book you can go to and find the text of the Public Trust Doctrine. Unlike many laws, perhaps most of the laws you deal with in your work that are codified in statutes, no one has ever sat down and officially enacted the Public Trust. Rather, it is common law (although there are some statutes that deal with specific trust issues). What this means is the Public Trust is overwhelmingly judge-made law. It is identified by judges in court decisions, it is interpreted by judges in court decisions, and it evolves over time through court decisions.

From the perspective of your work with instream flow issues this may seem unusual, but it is only unusual in the perspective of our own time--that is, in the 20th century. Today, most of our law is statutory law--codified law, and constitutional law in a written constitution. For most of the development of the Anglo-American legal system, the law was common law--it was judge-made law. That makes things more difficult, more open-ended, and more interesting. The first point you need to keep in mind, therefore, is that the Public Trust is a part of the common law tradition.

The second point is also very important. We are increasingly dealing with federal laws, particularly in the natural resources and environmental area--the Clean Air, Clean Water, and Endangered Species acts, and so on. But the Public Trust is not a federal law and is not a single law that applies to the whole country. It is state law. What that means is that the Public Trust will be interpreted by judges in each state in its own way. So, the Public Trust, as it is understood in California or in New Jersey, is not necessarily the way it is understood in Illinois or Alaska. That

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2. Mr. Sax's biography is presented in Appendix B.

does not mean there are no common elements. One of the striking things about common law is that it is common--not common in the sense of being crude, but common in the sense that it is meant to embody the fundamental rights of all citizens.

The third and fourth points go together. Most laws, particularly laws that protect natural resources, are rules and regulations made by legislatures in the exercise of the police power. The Public Trust is unusual in that it creates not just a legal regulatory right under the police power, but a property right. The Public Trust is public property. Those of us who enforce the Public Trust have the same benefits that private property owners usually have. That is to say, we can base what we are claiming on a right of property with all the dignity and importance that property rights have. You know there has been a great interest in recent years in the so-called property rights movement and in enacting laws at state and federal levels that would require compensation to owners of various kinds of property rights (water, land) when they are subject to regulations. Where the Public Trust is implemented, we do not run up against this so-called takings problem at all because the state cannot arguably be taking away any private person's property by regulation. It is asserting its own property right, a property right that belongs to the public. If you are asserting a property right, you cannot be taking a property right. That is one of the great strengths of the Public Trust.

The fourth and last point is the Public Trust is a public right. Trust property is owned by the public, and held in Trust for the benefit of the public--you, me, and everybody else. To assert this Public Trust, you do not have to have any special status; for example, that of a landowner claiming a particular right of access across somebody's property, or anything like that. All you have to do is claim you are a member of the public. If, as a member of the public, what you are claiming is one of these Public Trust rights, then it is your right whether it is being violated by a private individual or by the state. Claim is sometimes made that the state is not doing its duty that it owes to the public. The Trust is an obligation owed by the state to each of us as members of the public. This is a powerful right because it is a property right.

Now, let me go back, back, back in history. You heard Alex Hoar say the Public Trust has its roots in the Roman law. He is correct. The Public Trust Doctrine is old law. That is okay, because the older the law is, the deeper its roots in our collective values.

The Romans had a very elaborate property system. The Romans were great catalogers. They believed that there were different kinds of property, and that these different kinds of property had different functions in the world. Certain property, like a temple, belonged to the gods. Certain property belonged to the state. And certain property, or ordinary property, belonged to individuals. Each of these kinds of property had a special kind of status and had to be treated in a certain way. For example, the property might not be capable of being bought and sold. You could not alienate or sell a temple that belonged to the gods. In the late medieval law, religious relics and the remains of saints were at one time much desired. They were special property, and you could not take them anywhere. We have some sort of vague concept of this in our society. If I mentioned the crown jewels to you, you might think that is not ordinary property. The king or queen holds the crown jewels, but they cannot sell them.

In addition to the Roman categories I mentioned --property that belongs to the gods, the state, or individuals--there were a couple of other kinds of property in Roman law. The most important of these was common property. The Latin for this is *res communis*--common things. These common things had two special qualities as property. One was that they could not be privately owned, but were common to everybody. The second thing was they were for common use. Everybody had a right to use them. These common things could not be bought and sold in the ordinary way since they were for everybody's use. Certain things were to be used in certain ways because that was their destiny.

What were those things? The sea and the seashore, and navigable rivers and harbors were the most important things in Roman law that were common property. They were held for the use of everybody and were not to be made private property. For example, the sea was to be for common navigation. The idea of navigability on the ocean has carried over without any change in our law. Today, we have the same conception of the ocean and right of free navigation and the nonproprietary nature of the ocean that the Romans had.

Our modern Public Trust Doctrine, insofar as it deals with the seashore, rivers, and lakes, has imported the Roman idea that there are things that are special in their nature--a special kind of property. That is the first building block of the modern idea of the Public Trust. The second building block comes, as most of our law does, out of the English common law. England had its own twist on the Roman law. It had the idea, which it derived from the Roman law, that certain properties, of navigable rivers primarily, but also of the seashore, were held by the king for the benefit of the king's subjects. These properties were owned by the king, but they were not owned by the king for his private use. Although the king did own property, which comprised his wealth, the properties held for his subjects were not his private holdings.

Today, the Queen of England owns land that produces rent that she and her children live on. The queen also owns horses. Those are her private property. The queen is a wealthy woman. The queen also owns other things that are not her private property. Her crown would be an obvious example. Navigable waters and the seashore also fall within this category. However, navigable waters are held by the queen for the benefit of her subjects in a special way. The reason this concept is important is that it is the origin of this notion of Trust, the Trust that we today call the Public Trust. You own it as trustee for somebody else, so you have a special responsibility.

We all know this concept in general. If you were a very wealthy person, very old, and about to die, and you wanted to leave your wealth for the benefit of your minor child, you would go to some person--perhaps a bank or an individual--and make that person the trustee for the benefit of the trust. The bank or individual owns the trust and has title to it and has the right to manage it. The trust has to be managed in a productive way, not for the bank's or individual's benefit, but for the sole benefit of the child. The trustee has title, but not the beneficial interest. That was exactly the idea in English law--that the king's subjects (the public, citizens) are the beneficiaries of the Trust, and the king is just the owner of the Trust. The king has a property interest. That is the idea that we picked up from English law.

Now, move from England across the Atlantic Ocean to the American Colonies. It is the 18th century. Since we initially came from England, English law applied in the colonies, so all the ideas of property ownership and Trust carried over to the colonies. Then there is independence and, all of a sudden, we do not have a king. What do we do with all this wealth that the king owned as the trustee for former subjects who now are American citizens? To solve this dilemma, we developed the idea that the states would take over the role that the king had played because, just as the king was the sovereign, the states in America are sovereign. The law of England became the law of America. We imported the Trust idea, but switched the role of the king to the state, and the state became the owner and Trustee for the public.

The question then became what exactly is it that the state owns in this Trust capacity? The original answer to that was it is whatever it was in England. In England, it was understood to be those lands over which tidal waters had flowed. In England, as a practical matter, tidal waters were navigable waters. What happened in the United States is that we picked up the notion that the navigable waters of the United States and the lands beneath them are the subject of the Trust. That is a very important concept, because it led to the following situation. At the moment of independence for the 13 colonies, and for every subsequent state at the moment of statehood, ownership of all the land beneath tidal and navigable waters, up to the ordinary high water mark, became the property of the state and subject to the Trust. On the ocean shoreline, all land and water from the high water mark seaward to the boundary of the state are subject to the Trust. That is the historical meaning of the Trust.

The next question is, what is navigable water? That question has a very specific answer. It is those waters that are navigable within the meaning of a case referred to as the Daniel Ball (10 Wall. 557) decision. Basically, Daniel Ball says those waters in their natural condition that are used, or are capable of being used, for commerce on the water are, in fact, navigable. This is what is known as the federal navigable test, and basically, is the Public Trust as it was carried over to the United States from England. Traditionally, only those waters that met the federal navigable test and the land underneath them were within the Public Trust in the sense that the states own the river bottom. However, the definition has been broadened through the courts. The U.S. Supreme Court recently ruled that all waters that meet the federal navigability test, and all tidal waters, whether navigable or not, are within the Public Trust (Phillips Petroleum Co. v. Mississippi, 484 v.5.469). Furthermore, because of the Trust, the state, in fact, owns the bottomlands of these waters.

Because the Public Trust Doctrine is a common law Doctrine, a "judge-made" Doctrine, it does not have any textual basis. Like all common law doctrines, it is fashioned by the courts and, consequently, tends to evolve over time. Although there have been some expansions in the interpretation of this traditional Public Trust, ownership cannot change, for the ownership is fixed. For example, California came into the Union in 1850 and Montana in 1889. On the day each state entered the Union, the Public Trust ownership was fixed.

In addition to the Trust applying to navigable waters, for interpretive purposes, some courts have said if there is a non-navigable tributary of a navigable river, and uses are being made on that non-navigable tributary so that it adversely affects the uses of the Public Trust of the navigable river or lake, then we can control that activity to protect the Public Trust. This is the underlying

foundation of one of the leading Public Trust cases everyone must know about--the Mono Lake case in California (33 Cal. 3d 419). Non-navigable tributaries to the traditionally navigable Mono Lake were diverted. This adversely affected the lake's Trust resources. The court ruled that since that state's Trust properties were adversely affected, the state had the authority to regulate uses on the non-navigable tributaries. That is exactly the way the common law works.

We have another example of expansion of the Trust in a case in New Jersey. This was a beach access case, and is called Borough of Neptune v. Borough of Avon by the Sea (6 N.J. 296). There, the court said, in order to protect public access to the protected Public Trust values (the ocean and submerged lands), we have to give some protection to the dry sand beach or else the people will not be able to use the Trust lands that they are entitled to. This extended Public Trust protection to the dry, beach sand areas, at least on municipal beaches. As a result, some people have critically said that the Public Trust is expanding and "crawling up the beach."

You can imagine other areas that Public Trust might "crawl" into, but has not. Let us say that timber harvesting on uplands above the high water mark of a navigable river was causing siltation problems in the river and that the siltation was affecting fish in the river. Could you regulate timber harvesting under the Public Trust Doctrine? Such an extension would be plausible, as a logical extension of the Mono Lake and Avon by the Sea cases. Up to this point, however, no court has so ruled.

In some states, the courts have determined that the Public Trust applies even to non-navigable streams as long as they are navigable for recreational purposes. They found that if you can canoe downstream, it is navigable for Trust purposes. They are free to do that, but it is important to understand that, in those circumstances, the state does not own the bottomlands of the waterway. The Trust applies to the stream itself and the resources within it. This is not a traditional interpretation of Public Trust which is based on the historic tradition and ownership. It is an example of the state exercising its police power and extending the Trust under the aegis of the regulatory police power.

Lack of state ownership of the streambed may lead to problems. For example, in some states, trespass problems occurred with people getting out of a boat and walking on the bottom of the stream. If the waterway is not a federally navigable river, ordinarily those bottomlands are in private ownership and trespass laws apply. In federally non-navigable rivers, private ownership of the land beneath the water usually extends to the middle of the river. Hence, although you may have the right to use the waterway, you may be a trespasser if you get out of your boat. No such problems occur under the traditional interpretation of the Public Trust because the state owns the bottomlands of all federally navigable and tidal waterways.

Some of you may say, I live in a state--say, Massachusetts--and I know that lands beneath navigable waters that are navigable for title are not owned by the state. They are in private ownership. That raises an important point that is often misunderstood by people. Here is the situation, and it applies in about every state. At the moment of statehood, navigable and tidal bottomlands went into state ownership. No doubt about that. However, some states, in one way or another, proceeded to give or sell those lands to adjacent landowners or other private individuals to

dispose of the land down to the low water mark. The state did that in Massachusetts in the 17th century. Many states have done that in one way or another. The general rule that the courts have articulated (not every state is the same) is the states may pass title to the land, but they cannot dispose of the Trust. It can give title but it cannot give the Public Trust away. The grantee takes title burdened by the Public Trust right in the land (for example, see People v. Cal. Fish Company, 166 Cal. 576).

What are protected public uses? Traditionally, in England, the Public Trust was extended to navigation and fisheries. When the Public Trust came to the United States, it was expanded to commerce, navigation, and fisheries. That is the traditional Public Trust in the United States. When they talked about commerce, they meant building wharves, harbors, and so on, to promote commerce. It was a legitimate use of submerged lands to fill them in for building a wharf. For example, the whole waterfront in San Francisco is built on Public Trust land. That was challenged in the courts in the 19th century, and the courts said that such activities were appropriate because it was for the promotion of commerce. In New England, Massachusetts, Maine, and New Hampshire have added fowling and fishing, as well as the traditional uses for commerce and navigation, as appropriate uses of Public Trust lands. Hence, those uses are protected by the Public Trust.

To some extent, Public Trust lands may be disposed of to private owners, but only consistent with the Trust. In the Boone against Kingsbury case, the court in California said it is okay to allow people to drill for oil under the ocean as long as the public right of navigation is protected. The court essentially said that an oil drilling project, as it stands, does not adversely affect the public right of navigation. However, there is a continuing duty of supervision of the Public Trust. The court also said that, if at any time, it turns out that the oil wells adversely affect Public Trust uses, the oil wells may be removed (206 Cal. 148). For example, if a state gives away some bottomland and somebody wants to build on it, and it is determined that the building would not affect public navigation and the public right of fishery, the courts might approve. However, if this is a biologically productive area, although it may not be useful for navigation, states may not be able to give the land away, since some courts say the Trust now protects natural values and not just navigation and commerce (Marks v. Whitney, 6 Cal.3d 251).

How about the protection of instream flows in rivers that have traditionally been used for diversions for municipal, irrigation, and hydroelectric uses? How does the Public Trust apply to such uses of water? The answer is that this is still in a state of fairly early development. One problem, in particular, is in the arid west where the prior appropriation Doctrine applies. Until very recently, there was no connection between the Public Trust Doctrine and western water law. People were diverting water out of streams, even to the point of totally dewatering these streams, and that was considered a legitimate use of the water. Traditionally, the notion was that you were not using water beneficially unless you were diverting it out of the stream. This process went along in the west for many years (130 years) with no relationship to the Public Trust Doctrine. It also continues to be the philosophy in some states today that do not recognize instream appropriations as beneficial uses of water.

Assume you had a navigable stream and there were diversions from that stream that had been operating for some time. Also assume that these diversions were having an adverse affect on the

public's fishery. Could you go back and say that those diversions were a violation of the Public Trust? Theoretically speaking, yes, you have what lawyers call a plausible case, if you are within the physical boundaries of the Trust. A fishery is a traditional use of the Public Trust. The Public Trust is a property interest so that whatever rights the appropriators were previously assigned from the state to appropriate water may be like the grants of submerged land that some of the states gave to people. The grantee may have received the right to use that water for irrigation, but only to the extent that those uses did not violate the Public Trust. If it subsequently turns out that appropriative uses of the water, in fact, do violate Public Trust uses, then there may be a violation of the Public Trust despite pre-existing appropriations.

This is a version of what happened in the Mono Lake case in California, mentioned above. The City of Los Angeles appropriated water from four streams in the Mono Lake Basin as early as 1940. The Public Trust values were pre-existing, state-recognized property rights and the appropriation, in effect, eliminated these values. The Public Trust, like all other public rights, is not subject to loss through prescription and it is a continuing right of supervision. The California court recognized that in the Mono Lake case. This confirms that you can reconsider water appropriations if a problem arises, and Trust values and uses are adversely affected. This seems a plausible theory as long as you have the right of fishery or navigation.

Obviously, there are the troublesome problems of politics, economics, fairness, all the activities and benefits people have deriving from the use of the water with no previous objections that tend to cloud reconsideration of existing water rights. It would no

surprise me that when these issues are raised in courts in various states, the courts may interpret the Public Trust in a rather narrow and ungenerous way because they are trying to accommodate these longstanding water uses. A legislature may also seek to define away such Trust rights, as occurred recently in Idaho (see v. 24, Ecology Law Quarterly, p 461).

Let us turn our attention briefly to the federal government and Public Trust. I have explained that the Public Trust Doctrine is common law, that it is state law, that it is a state property interest, and that the state is the Trustee. Under the traditional Doctrine, there is no federal Public Trust. The conventional view is that all Public Trust responsibility passed to each state at the moment of statehood. Further, there have been some lower federal court decisions that have said the only Trustee obligations the federal government has are obligations created in federal statutes. There is no common law Public Trust duty on the federal government (Sierra Club v. Andrus, 487 F. Supp. 443). I suspect the courts are not going to recognize any common law type of federal Public Trust. There are some minor qualifications and exceptions to all of this, but, for the most part, you have to look to a federal statute. A federal statute can create a trust or trust-like responsibility. If you have a designated wild and scenic river, you get some of the benefits you would have by having a common law. If you are under the National Parks Organic Act, you might get a statutorily created trust obligation to protect the area (Sierra Club v. Dept. of the Interior, 398 Supp. 284). Of course, Congress is free to create additional regulatory authority protection.

There is a particular federal doctrine that essentially duplicates some Public Trust obligations. That is so-called federal navigation servitude. In federally navigable and tidal waters, there is a

navigation servitude. This means the federal government has the authority, despite any state-created rights, to destroy or abrogate those rights through the federal primacy power in order to protect its navigation servitude. The courts interpret this servitude very broadly (U.S. v. Willow River Power Co., 324 U.S. 499). This has been viewed, not as a duty on the part of the federal government, but as a right.

What is the relationship between the Public Trust Doctrine and other protective laws? Some other laws do some of the same things the Public Trust Doctrine would do. The ownership of wildlife by the state gives some of the benefits that the Public Trust does because it is a proprietary kind of interest. Federal statutes (like the Wild and Scenic Rivers Act), and federal reserved rights in waters are all legal constructs that do some of the same things the Public Trust does. They stand side-by-side, and sometimes are overlapping with the Doctrine. You might be able to say, "I have a Public Trust claim and I have a claim under the Wild and Scenic Rivers Act and there also is a federal reserved water right for a refuge downstream."

There are some unique things about the Public Trust that, if the courts are willing to implement the Doctrine in a strong way, may have some benefits that these other laws do not. Further, it cannot be repealed, as can ordinary laws. Legislatures can get eliminate the laws, or weaken them, and they sometimes do. We are living in a time when there are some pretty strong pressures to weaken some of these other protections. The Public Trust, on the other hand, is not easily legislated away.

Here, we come to the knottiest problem of all. Could a legislature say it hates the Public Trust Doctrine and the criticism it is receiving from farmers, power companies, cattlemen, developers, etc., who are critical of the Trust because they have to leave water in the rivers for fish? Will the legislature enact a statute eliminating or abrogating the Public Trust? Can a state legislature do that? What is there to prevent a state from getting rid of the Trust? The Public Trust was not created by statute. It came with the common law. In ordinary legal thinking, the only thing that stops a state legislature from doing something they want to do is a constitutional prohibition on it. Although there is some Public Trust constitutional protection in some states, for the most part, the Public Trust is not mentioned in state constitutions. Only a few states have really had to address this issue head-on (see Scott v. Chicago Park District, 66 Ill. 2d 65; Arizona Center v. Hassell, 837 P. 2d 158). For the most part, what the courts tend to say is the legislatures have lots of authority, but they suggest the legislatures cannot eliminate the Public Trust. They put up a warning flag or caution to the legislature. The courts essentially indicate to the legislatures that they are going to read the laws the legislatures pass in a very narrow way, and they will interpret legislative actions as the intent was not to abrogate the Trust (see Sax, "The Public Trust Doctrine" 68 Mich. Law Review 472; Corp. v. Commonwealth, 378 Mass. 629).

# Introduction to the Public Trust Doctrine

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## *Questions and Answers*

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**QUESTION 1:** Are there any records of conflicts during Roman times of people taking water for one purpose as opposed to another? As time has gone on, it seems like the Trust Doctrine has changed from tidal situations in England to navigable conditions in this country, from going fishing to adding fowling. Are people trying to expand Public Trust now to say that something like electricity is more important than fisheries?

### **RESPONSE TO QUESTION 1:**

*Joseph L. Sax:* We generally know a fair amount about Roman law, but we know much less about how the law was actually applied. There were some conflicts with people who wanted to build houses at the beach, for example, but, other than that, we know little about the principles of Roman law.

As to the question whether there are people who are trying to expand the Public Trust, yes, there are people who are trying to do so, and there are people who are saying things such as electricity is more important than a fishery. The Public Trust concept is a two-edged sword. The idea of the Public Trust, the idea that there are certain things that ought to be safeguarded for the public as a whole is a very appealing idea. So, in a sense, the underlying notion of the Public Trust has a broad appeal to it. On the other hand, the great strength of the Public Trust, in the legal context, is the tradition of which it is a part--the fact that it creates property rights on behalf of the public. The fact that it limits private property rights, and so forth, gives it a great strength. Once you move away from this basic framework, however, you lose some of that strength.

**QUESTION 2:** What about the creation of navigable waters, for example, from damming? In Rhode Island, they are starting to look at the Clean Water Act and using that possibly in lieu of Public Trust to address related issues. Is one better than the other?

### **RESPONSE TO QUESTION 2:**

*Joseph L. Sax:* There are a variety of rights and remedies, of which the federal Clean Water Act would be an example. They very well may do the same things or better than the Public Trust. However, there is no need to choose one over the other; they are not exclusive. For example, you may have a right under the Clean Water Act, and you may also have a right under the Public Trust. Statutory rights generally tend to be advantageous because often they are specific. One of the things about the Public Trust, because it is common law doctrine, is that it lacks specificity. If you have a statute that specifically says something is prohibited, this is usually an easier and more effective course to follow.

Regarding artificial expansion of navigable waterways--when I referred to the Daniel Ball case, I said that to meet the test of federal navigability for submerged lands title, the water body has to be in its natural condition. The waters have to be navigable, in fact. That is, used or susceptible of being used, in their ordinary condition (i.e., natural state) as highways for commerce over which travel and trade are, or may be conducted in the customary mode on water. I know of only one exception to this, and this could be considered a common law expansion. If you have a natural lake that has a certain high water mark, and the lake has been permanently dammed so that the high water rises, the newly submerged lands are above the previous high water mark, some courts (e.g., Wilbour v. Gallagher, 462 P. 2d 232, Wash., 1969) have said that the Public Trust now extends to the newly submerged lands.

Thus, there is application of the Public Trust with artificial enlargement of certain natural water bodies. But, for the most part, simply damming a stream or creating a reservoir would not be treated as being within the Trust.

**QUESTION 3:** You seem to rest your view of the Public Trust Doctrine on commerce, navigation and land title, as opposed to fisheries and, perhaps, wildlife values. It seems that each state has some type of statutory protection for wildlife and, certainly, very strong protection for fisheries. Does a fertile ground or defensive position for the development of the Public Trust lie with the development of the Trust around wildlife and fisheries?

**RESPONSE TO QUESTION 3:**

*Joseph L. Sax:* I meant to say the traditional Trust in England was for navigation and fisheries. In the United States, navigation, fisheries, and commerce are the three traditional Trust uses. Certainly, a fishery is one of the most traditional and fundamental bases for the Public Trust.

The fact that there is ownership of wildlife is another property type claim that gives the state strong Trust authority. The ownership of wildlife gives the state authority, but does not mandate. The way the Public Trust has been understood is that it is perceived as a mandate. If you think about the Trust cases that arise in two general settings--one where there are private individuals who are violating the Trust, and others in which the state is not sufficiently implementing the Public Trust--this Doctrine does give you the potential of authority to mandate the state to do what it should be doing. Ownership of wildlife has never been utilized in that way. Public Trust is a stronger Doctrine.

When I say mandate, I mean obligations which the state cannot get out of even if it wants to. What you are describing are mandates that the state has imposed on itself by passing legislation. If you get to the point where you do not have that, and you do not have a willingness on the part of the state to protect the Public Trust, the opportunity arises for members of the public to come into court and oblige the state to do what it is supposed to do. How far the courts will go with that is a question of judicial judgment.

**QUESTION 4:** National security apparently overrides anything else. The Navy built a base in Mobile Bay, Alabama, and restricted people who had been using that area for many years from using

the fishery. Does the military have this authority? Further, can we, the states, require the federal government to mitigate the lost use of the fishery? So far, they have flatly refused to do so.

#### **RESPONSE TO QUESTION 4:**

*Joseph L. Sax:* You have described a significant problem that is not just a national security problem. As you know, the federal Constitution has a Supremacy Clause that makes federal law superior to inconsistent state law. If, in the exercise of the national defense, the federal government (i.e., Congress) has decided that it wants to displace state Public Trust, they have the power to do that. I was trying to describe a judicial attitude, saying that one might expect the courts to recognize the importance of the Public Trust, to read the Congressional mandate very carefully to see if they were explicit about that. For example, did Congress specifically say that it wanted the Navy to do these things, even if it displaces the public right of fishery, navigation, and so forth? Some courts say Congress may need to be more explicit about it. Basically, however, if you have federal preemption, that supersedes a state Public Trust common law.

**QUESTION 5:** I am under the understanding that fresh water flowing down the river is owned by the people of the state. The Central Elmore Water Authority in Alabama withdraws water from an Alabama power company reservoir for uses other than power production. As a result, the power company loses revenue. The power company wanted to charge the Water Authority a fee for lost power production of the water the Authority uses. The Authority refused and the power company sued. The case went to federal court because Central Elmore would have to pay the power company for use of water the power company did not own. If the power company can charge the public for drinking water the public already owns, could the state in turn charge the power company for use of the water the public owns?

#### **RESPONSE TO QUESTION 5:**

*Joseph L. Sax:* In terms of the public owning the water, that is the general rule everywhere. Yes, the public owns the water. This ownership is consistent with the Public Trust. However, the general rule is, even though the water is owned or held by the public, it is possible for people to acquire private rights for use of the water. Every state recognizes that concept in one form or another. Essentially, you can acquire some private rights to water, but they have to be consistent with the interest of the public.

**QUESTION 6:** Is there a common thread between the Public Trust Doctrine and Native American treaties? Were the treaties that were signed for the Native Americans covered by the Public Trust Doctrine? Treaties said items or property rights transferred from the Native Americans to the signatories (i.e., the federal government). Most commonly, there was reference to the natural resources. Is it affirming the Public Trust that those were conveyed from one property owner to another? There were certain obligations to provide the opportunities to continue their activities into the future.

## **RESPONSE TO QUESTION 6:**

*Joseph L. Sax:* I think that the answer is that just as federal law generally can displace state law, the treaties made with Native American people, to the extent that they would be inconsistent with the Public Trust, would probably trump Public Trust. If Native Americans asserting a treaty right were wanting to do something (e.g., have a fishery unconstrained by any regulation), and that was their treaty right--I think if you had that conflict between a state's Public Trust use, the Native American treaty right would supersede the Public Trust uses.

**QUESTION 7:** In Virginia, as well as some of the other original colonies, we have a good number of king's grants that precede state formation. Some of those grants give the privileges to the private landowner over privileges of the public to use water, fish, and wildlife Trust uses. Can the king's grants carry ownership or exclusive use of water, fish, wildlife and the like to private individuals?

## **RESPONSE TO QUESTION 7:**

*Joseph L. Sax:* That was litigated in the 19th century. The U.S. Supreme Court held that those grants did not abrogate the Public Trust. The Trust lands were held in anticipation of the future states. Let us say you have submerged lands and somebody says, "I have a grant from the king, and he granted all of the use of the water, fish, and wildlife. Therefore, I have an exclusive right to gather oysters in that area." Subsequently, someone else comes in and says, "I am a member of the public, and this is part of the Public Trust and I want to go oystering here." The member of the public prevails because the Public Trust prohibited the granting away of that public interest whether it was prior to independence or prior to statehood.

**QUESTION 8:** Is it okay to effectively sell the Public Trust through a fee system, or would that be abrogating the Trusteeship?

## **RESPONSE TO QUESTION 8:**

*Joseph L. Sax:* Selling the Public Trust is a no-no. However, if you are charging mitigation fees or imposing obligations so the fish can get around a dam, for example, and if you are imposing costs on people for those purposes, that is all consistent with the Public Trust. Those are the kinds of things to do to implement the Public Trust.

**QUESTION 9:** Traditional Public Trust lands extended from high water mark to high water mark. Does this high water mark include flood flows?

## **RESPONSE TO QUESTION 9:**

*Joseph L. Sax:* No, it does not. This is a very complicated problem. How you measure precisely determines the location of the high water mark. The line of ordinary high water is a hypothetical line, but it does not include winter flood flows.

**QUESTION 10:** If the traditional Public Trust lands (i.e., within the high water mark to high water mark boundaries) are reclaimed for agricultural or other purposes, does the Public Trust continue on those lands?

**RESPONSE TO QUESTION 10:**

*Joseph L. Sax:* If the land is no longer useful for Public Trust purposes, I think you might expect most courts to say it is done and there is nothing much we can do about it. But, in California, filled tidelands are still within the Trust, and must be employed for public purpose (also see the Vermont Central Railway, 571 A. 2d 1128).

**QUESTION 11:** Please comment further on the interaction between the state held Public Trust and preemption by federal law. I am interested in how Federal Energy Regulatory Commission licensing and decisions on Public Trust interests interact with the state's Trust rights.

**RESPONSE TO QUESTION 11:**

*Joseph Sax:* Assuming that the federal law is clear--that it means to invest authority to displace state Public Trust law--if you have a case where it is clear that Congress does mean to preempt, it is hard to argue that the state Trust can remain intact. That would be the first-line answer. There was a famous case in the 1940s, where the State of Iowa wanted to protect fish; a hydroelectric power company did not want to spend the money to protect the fish; and the Federal Power Commission preempted state law. That proposition has been recently reaffirmed by the Supreme Court. Although it was not in the context of the Public Trust law, but in the context of the state natural resource protection law, that is the standard position (see California v. FERC, 110 S. CT. 2024).

**QUESTION 12:** Many of us here represent state agencies and are concerned about restoration of instream flows. I have heard, because it is the states that have granted the water rights, and in many cases the states created the problems that need to be resolved, it is very difficult for the initiative to get the Public Trust Doctrine working to come from the states. What are your views on this point?

**RESPONSE TO QUESTION 12:**

*Joseph L. Sax:* One of the potential benefits of the Public Trust is that the initiative can come from private citizens. You are talking about something that is on the edge of development, but you could imagine private people instituting a Public Trust case and arguing that the Trust is continuous and that it includes a duty of restoration. In order to protect the fishery, you have to restore upstream habitat that has been lost or you are going to lose the fishery. That is a plausible Public Trust argument. However, we have not gotten there yet. The strategic problem in these areas is that if you push the envelope too hard or too fast, you are going to risk generating legislation restricting the Public Trust, as in the Idaho situation I mentioned in my talk.



# What Water Does The Public Trust Doctrine Carry?

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California Third Appellate District Court, Sacramento, California

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Thank you for inviting me to participate in this workshop. This is a distinguished group and I am honored to be here. I do, however, speak with some reservations. As I explained to Alex Hoar, when he called to invite me, "I really do not know much about the subject." For some reason not immediately apparent to me, I was then asked to give these remarks.

Now, ignorance is not my favorite topic, but it may serve to set the stage for what I have to say. It is necessarily said from the vantage point of a state appellate judge, but I am certain it has a broader application. It is, perhaps, not widely understood, but lack of knowledge is the natural state of appellate judges. We are practicing generalists, from which it reasonably might be concluded that we do not know anything in particular. There is truth in that. But, before you reply--worst fears confirmed--let me explain.

Outside of the criminal law, appellate judges rarely see the same issue twice. Our stock in trade is appellate procedure and scope of review. The issues we resolve are framed by the pleadings and cabined by the facts developed at trial. What we know about the case comes from the four corners of the record. What we bring to the court from our experience does not prepare us for the rigors of adjudication. We may harbor assumptions that obscure our vision. For these reasons, it is the duty of counsel to inform the court on what it needs to know, to invoke what Karl Llewellyn calls the court's "situation sense." (Llewellyn, *The Common Law Tradition: Deciding Appeals*.) Judges can find the precedent and the relevant statutes, but it is the lawyers who must bring the world to the judges. That burden is all the heavier when the world is technical.

There are some important lessons in this. My former law partner, Lawrence Karlton, now a federal District Court Judge, taught me many years ago that an argument to the court should be pitched at about the third grade level. We called our briefs "Dick and Jane" briefs. This is, of course, hyperbole; it is meant as a call to clarity, to the exposition of precisely that which the court needs to know, whether fact or law, to resolve the issues tendered. There are natural impediments to doing this. There is a temptation, sometimes irresistible, for lawyers to put their best foot forward, ignoring the disabilities of the trailing foot. But the reviewing court, if not the opposing party, is likely to discover the flaws thus concealed, and the awkward fact or the rule is torn from its roots in a case.

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3. Justice Blease's biography is presented in Appendix B.

This has an important application to common law adjudication. It is fact bound. A rule of decision (*i.e.*, the law as we understand it) is not an abstraction. It assumes a life in the law only when applied to facts. To put this conversely, a rule that has no conceivable application is meaningless. And, a rule that has unlimited applications is also useless. For this reason, courts look to holdings which impose contextual constraints on the extension of the rule. I realize that there are cases which depart from this model, but the generalizations they produce must be applied, and that is where the problem arises.

This brings me to the Public Trust Doctrine, and to the source of my unease. As I said, I know little about the topic in general, and I hesitate to say anything not constrained by a developed case. The Public Trust Doctrine is awash with high level generalities. It is a common law doctrine of an uncommon sort. In its doctrinal origins in navigable waters, commerce, and fisheries, it is clothed in attributes of sovereignty, which confer an unusual common law power on courts. To put the Doctrine into a useful context requires that we ask, "What water does the Doctrine carry?" Of concern here, what is sought to be accomplished by its application to instream flows?

What little I know is based upon the California cases regarding Mono Lake and its tributary streams. I apologize for this provincialism, but there is a lesson in this for the Public Trust law.

Let me illustrate my concerns with California Trout v. State Water Resources Board (1989) 207 Cal. App.3d 585 (Cal Trout), a case I authored in 1989. I had not recalled precisely the role of the Public Trust Doctrine in its resolution until I reread the case in preparation for this workshop. In the 1980's, the plaintiffs sought to compel the California State Water Resources Control Board (State Board) to rescind licenses issued in 1974 to the City of Los Angeles, Department of Water and Power (LADWP). The licenses confirmed LADWP's rights in the appropriation of the full flows of four streams tributary to Mono Lake in the eastern high Sierra. These four streams provide most of Mono Lake's inflow. It was claimed that the State Board failed, as required by California Fish and Game Code Section 5946 (which specifically applies to dams in the Mono Lake area) to condition the licenses by the requirement that sufficient water be released from the dams, by which the water was diverted, "to keep in good condition any fish that may be planted or exist below [them]." The 1974 licenses were predicated upon permits issued before the 1953 enactment of Section 5946. That section was preceded in 1933 by Section 525 (now Section 5937), which applies the requirement to all dams in California, but without reference to permits or licenses. A regulation of the State Board now requires sections 5937 and 5946 application to permits and licenses.

We held in Cal Trout that Section 5946 sets the measure of the State Board's duty, and directed the relief requested by plaintiffs. I might say, parenthetically, that we were not called upon to determine whether Section 5946 affected Mono Lake on the view that it is below the dam, and that the brine shrimp (*Artemia monica*) that inhabit Mono Lake are classified as fish pursuant to the definition of fish within the California Fish and Game Code (Section 45). I add that in 1992 Cal Trout was cited as authority for the application of Section 5937 to the federally operated Friant Dam on the San Joaquin River in California (Natural Resources Defense Council Patterson 791 F.Supp. 1425 (E.D.Cal., 1992)).

Naturally, numerous defenses were interposed to the plaintiffs' claims in *Cal Trout*. Among them was that the lawsuit came too late, and that the delay violated a statute of limitations. We answered, in part, that Section 5946 protects a species of Public Trust interest in non-navigable streams which sustain a fishery, and that, by analogy to the rule against adversely possessing public lands, no private right can arise from the running of time. We said that the, "Public Trust interest as to a fishery in a non-navigable stream is in the nature of a state 'property' interest" (Id. at p. 630). We founded this answer in the California Constitution (Article I, Section 25), which vests the public with title to fish within state waters, and on case law that waters which are a common passageway for fish, although flowing over private lands, are public waters for such purposes (*People v. Truckee Lumber Co.*, 116 Cal. 397, 400-401, 1906).

Now, we did not say what other legal consequences might flow from such a Public Trust interest; we expressly declined to rest our rejection of LADWP's claim to vested rights on the Public Trust Doctrine, notwithstanding that, as to navigable waters, *National Audubon* says that parties, "acquiring rights in Trust...can assert no vested right to use those rights in a manner harmful to the Trust" (*National Audubon Society v. Superior Court*, 33 Cal.3d 419, 437; cf. fn 24 at p. 445, 1983).

To respond to the vested rights claim, we looked to the facts of the case, finding that, although Los Angeles obtained permits for the water before the enactment of Section 5946, it had not perfected an appropriation by use of the water for domestic purposes by the date of Section 5946's enactment, because it could not. The aqueduct necessary for diversion and use of the water had not been completed. It was necessary, in this regard, to construe Section 5946, as permitted by its grammar, to require application of the fishery condition to licenses issued after 1953, which were predicated upon permits issued before that date.

Some years ago, Chief Justice Traynor of the California Supreme Court, wrote an eloquent article entitled "Statutes Revolving in Common Law Orbits." It said that courts develop common law, i.e., judge made law, by analogy to a policy underlying a statutory enactment. The title can as easily be applied in reverse, to statutes construed in the light of Common Law Doctrine. This process is at work in the water law of California.

In *National Audubon*, the California Supreme Court applied the Public Trust interests in navigable waters and their common law extension to ecological interests to the tributary streams of Mono Lake on the view that the obstruction of their flows affected these interests in the Mono Lake Basin. A statutory defense was interposed that California Water Code Section 106 establishes the use of water for domestic purposes as a priority over competing interests. It was upon this section that the predecessor to the State Board (i.e., the Water Commission) based its refusal in 1940 to consider the aesthetic advantages of the Mono Basin in granting Los Angeles permits for the appropriation of water from the lake's tributary streams.

The Supreme Court rejected this view in *National Audubon*. It did not, however, pose a conflict between the Public Trust Doctrine and the statute. It said that the policy of Section 106, which it limited to competing appropriators, had been trumped by later enactments when read in the light of the Public Trust Doctrine, specifically California Water Code Section 1243, which declares, "the preservation and enhancement of fish and wildlife resources as a beneficial use of water," and Water

Code Section 1257, which directs the Water Resources Control Board to consider the relative benefits from this beneficial use of water (33 Cal.3d at fn. 30, pp 447-448).

The court in National Audubon went through a careful analysis of California's water rights law as found in the state constitution and statutes. It sought, "an accommodation ... of the pertinent principles both in the Public Trust Doctrine and the water rights system ...." (33 Cal.3d at fn. 30, p 445). The court said that Water Code sections 1243 and 1257, "codify in part the duty of. the Water [State] Board to consider Public Trust uses of stream water" (33 Cal.3d at p. 446, fn. 27).

Significantly, the court declared that, "[t]hese enactments do not render the judicially fashioned Public Trust Doctrine superfluous [because it] remains important both to confirm the state's sovereign supervision and to require consideration of Public Trust uses in cases filed directly in the courts without prior proceedings before the [State] [B]oard" (Ibid). This led to the rejection of the claim that the court was precluded from acting by the failure of the plaintiffs to exhaust their administrative remedies. That would have required their resort to the State Board, which would have insulated from review the State Board's factual determinations, which are central to the balancing of interests. Instead, it invoked the Doctrine of Primary Jurisdiction under which the court may, but need not, employ the State Board as a master to take evidence in a given case. The consequence is that the court retains control over both the policy and related evidentiary considerations.

What I get from these considerations is that, not with standing the substantial legal edifice of the Public Trust Doctrine, the measure of its potential impact on instream flows lies in its application in a concrete factual setting within a developed system of water law. Absent a statutory directive which accords a priority to a Public Trust value, the Public Trust Doctrine directs only that Public Trust values be considered, and that they be balanced against competing public values.

In this balancing, National Audubon says that the use of the water, including Public Trust uses, must conform to California's constitutional standard of reasonable use (Article X, Section 2, p 443). National Audubon importantly warns that the State of California depends upon the appropriation of vast quantities of water for uses unrelated to instream Trust values, and that since, "the economy and population centers of [the] state have developed in reliance upon appropriated water, it would be disingenuous to hold that such appropriations are, and have always been, improper to the extent that they harm Public Trust uses, and can be justified only upon theories of reliance and estoppel" (Ibid).

The ecology of Mono Lake and its tributary streams, after decades of conflict and numerous court decisions, are the beneficiaries of the Public Trust Doctrine and its statutory application in Fish and Game Code Section 5946. These decisions grew out of increasing public concern and the realization that the loss of water from the tributary streams not only had destroyed the streams and threatened the extinction of wildlife dependent upon the lake, but would reduce the size of the lake itself by half. These facts are woven into the Mono Lake decisions and are exemplary of the considerations that will influence courts in the extension and application of the Public Trust Doctrine in other instream contexts.

# The Public Trust Doctrine and Riparian and Appropriative Water Rights, State and Public Interest Perspectives

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## *Panel Participants<sup>4</sup>*

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**Thomas J. Dawson - Panel Moderator:** Good morning. I am looking forward to this morning's panel discussion. I was drafted to moderate the panel, but I hope there will not be much need for moderation. Here is what we are going to do. Each of us have been allocated certain responsibilities in terms of delivering information to you. We are going to start reinforcing some of the excellent points that were made by Professor Joseph L. Sax. First of all, I want to compliment Professor Sax on what I consider to be an excellent job of laying a foundation for this Public Trust discussion. During our discussion, we are going to repeat a few points that need to be repeated because they are very important. Then we are going to try to expand on the foundation that Professor Sax laid.

We are going to start with a brief presentation by J. Wallace Malley, Jr. He will discuss the common law basis of private and public water rights, and expand on Professor Sax's thoughts. Then you will be subjected to me. I will discuss two topics, the Public Trust Doctrine's limits on private water rights, and the basics of common law water rights. Mary Scoonover will present a brief talk on common law appropriative water rights.

After Mary, we are going to start to move into a more mixed discussion. Richard Roos-Collins will discuss water rights in hybrid riparian and appropriative states. Richard is originally from

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4. The panel participants' biographies are presented in Appendix B.

Tennessee, currently resides in California, but also works in New York, so he is a good person for this task. After Richard, we are going to stir state perspectives and public interest group perspectives into the mix. I might remind you that those two perspectives are not necessarily mutually exclusive. I am in the middle of those two perspectives. I am a Public Intervener in the Department of Justice in Wisconsin. However, I often sue other state agencies in the pursuit of public rights and interest in Public Trust and other areas. So, I will be invoking the right to talk about either or both of those subjects.

With that, and without any further adieu, I am going to hand it over to Wally Malley.

# Common Law Basis of Private and Public Water Rights

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When Alex was doing introductions this morning, and he was talking about selecting 12 people from around the country, for some reason, I could not help but wonder. Are we supposed to be the "12 apostles" of the Public Trust? If any of you had similar thoughts, and if that analogy has any application whatsoever, I would like to say that probably there is going to be more than one Judas in this group. Among the five of us up here now, I think before this panel is done, you may start noticing some disagreement on the dogma of this "religion".

I am going to consolidate my initial remarks a little bit because Professor Sax already gave you a good definition of "common law." Professor Sax also alluded to the fact that, if you were looking for laws in the United States, you would probably look first to the statutes passed by the state legislatures. You probably have had opportunities to review state statutes that may affect what you do. Some of you probably have even had to prepare regulations for your respective agencies.

Statutes and regulations are similar in that regard. You can open up a book of statutes or a book of regulations and read them. They are right there in front of you. What you read is what you get. However, as Professor Sax indicated, it is not quite so simple when you get to the common law, because common law is judge-made law.

I had heard about common law during political science courses and so forth in college. During my first year in law school, I heard more about common law. The first time that the term really began to have some down-to-earth meaning for me was when I was working in the Washington, D.C. Superior Court lock-up during my first year of law school. We would interview people arrested the previous night to determine if they could be released prior to trial on their personal recognizance. We used to interview dozens of arrestees early in the morning. I had this long list of questions and people would get "points" for certain things. For example, they got a "point" if they lived in the community, if they had ties in the community, if they had a family, and so forth. I would ask questions like, "Where do you live? Are you married? Who is your wife? When I would ask who is your wife, I would often receive a response like, "Well, my common law wife is such and such." I actually did not know what a common law wife was, but I found out.

In the District of Columbia, the "common law" was if a man and woman co-habitated for 6 months, they were considered married for purposes of alimony, child support, and things of that sort. To me, that brought common law down to a very real level, for these people were trying to give me the pitch "Yeah, I live here. I've got a family here. This is my common law wife. Call her up and she will tell you." This gets them two "points" and gives them a better chance of getting out of jail

in a few hours. My point in mentioning this is to say that common law, even though it is not written down in those green-, red-, or brown-covered law books, in your various states, it is very real.

Why is it real? Well, when the highest court of your state issues a ruling, the state's lower courts are supposed to follow that decision. They are supposed to use it as guidance. There is a principle, universally recognized, that when a decision is reached, a court of equal or lesser authority, is supposed to look to the higher court's decisions for guidance in future cases on similar issues. The Latin term for this is *stare decisis*. So, that is the kind of thing that makes this common law something very real--these court-made rules are actually applied in other cases.

Now, having said that, I should also repeat the theme that has already been mentioned - namely that the common law can be changed by the legislatures. It can be written into the statutes. For example, in the District of Columbia, or any state that has common law marriages, the marriage provisions could be written right into their statutes. It also can be changed. The legislature could change the time requirement for common law marriage from 6 months to 12 months, or they could do away with it entirely. That is one of the tricky parts of the common law, and maybe this is one of those little things that might begin to make me seem like the "Judas" up here. Yes, we can believe in the Public Trust, but watch out for it. It can be changed by legislatures, it can be changed by judges, and as Professor Sax pointed out, it does evolve over time.

I would like to close leaving you with a thought. Virtually every state in the Union is represented here, and each of you is probably wondering how does this apply to me? Yes, common law and the Public Trust do apply to you. However, these are state-made laws. There are essentially 50 different common law rules of Public Trust, and so forth.

So, what can you take away from this meeting? Well, I think by listening to what is going on, not only in your state, but in other states, and by realizing what the common law is, you can start seeing some potential. There obviously are variations among the various states. When the judges start deciding cases, they do not look to the decisions of just their own states, they look to the decisions of other states.

There was a big Public Trust case in Vermont in 1989. We and the judges were looking at decisions from all over the country. The Mono Lake case in California was one of them. There were dozens of others from New Jersey, Maine, California, Illinois, and virtually everywhere in between. So, what happens in another state could, conceivably, pop up in your state and begin to make some law.

In 1988, you could have asked the lawyers in Vermont what is the Public Trust Doctrine? You would probably have gotten a very blank look from 95 percent of them. Public Trust really had not been in anybody's vocabulary. The Public Trust Doctrine had not been used for about 40 years. But, in about the last 8 years, we have had several cases. We have taken some of our old cases off the dusty shelves, and we have looked to other states to see what is going on in those states. I throw this out to you as you are listening to this panel to keep in mind that what happens in one state can affect another state. I also must warn you that what happens in your state may be quite different from what is happening next door.

# The Public Trust Doctrine and Limits on Private Water Rights

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*Thomas J. Dawson*

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I was initially tempted to give you a presentation on riparian water rights first, and the Public Trust Doctrine and its limits on private rights second. But, I was reminded by my co-panelists that there is a very important point to make here. It is one that was made by Professor Sax, and it deserves repeating. Public rights, that is Public Trust rights, are superior to private rights. This is a very important point. Supposedly, in law, when there is an irreconcilable conflict between a public right and a private right, the public right is supposed to win out. So, we want to emphasize the importance and significance of the Public Trust Doctrine in that regard, as we start to talk about private rights a little bit later.

The Public Trust Doctrine, as Professor Sax pointed out, creates public rights in navigable waters. The Public Trust is just that--it is a property right and it is a Trust right. The analogy that Professor Sax used about the Trust under the Public Trust Doctrine being similar or the same as the Trust that you would set up at a bank is quite accurate. In Wisconsin, and in many other states, the state Supreme Court justices have drawn upon property law and Trust law in order to describe, recognize, and evolve the law of the Public Trust Doctrine. What that means is the state owns the property as a Trustee, and the public has the right to bring an action against the Trustee if necessary. In other words, the state has a duty to protect and promote that Trust for the benefit of the public, which means the public is the beneficiary of the Trust. If the Trustee improperly administers the Trust, tries to sell it or destroy it, the beneficiary has a legal right to bring action against the Trustee.

That is a point we have not talked much about thus far. I want to point out here that, as beneficiaries of the Trust, members of the public have a legal right to protect the Trust just as the Trustee has legal rights and responsibilities to protect the Trust. The Trust is an empowerment of the state to protect Trust property, but it is also a limitation on the state. The state is empowered to protect the Trust; the state is limited by the Trust from destroying or impairing the Trust. Who are the ones to enforce this duty against the state? The beneficiaries. Just as the beneficiaries of a bank Trust have a right to take action against the Trustee for improperly fulfilling Trust duties, so do members of the public under the Public Trust Doctrine.

In Wisconsin, we have a famous case called Muench v. Public Service Commission, 261 Wis. 492, 53 N.W.2d 514 (1952), in which the Wisconsin Supreme Court noted that the beneficiary has standing, and has the right to bring an action against the Trustee, if necessary, in order to protect Trust property. The Justice on the Wisconsin Supreme Court, who drew the analogy to bank trusts, had been a property lawyer. The court established a very important principle, and I would like to reinforce it here. In terms of enforcement, or in protecting the Public Trust, the fact is, as a matter

of reality, the Public Trust is not automatically followed or incorporated into private rights, such as riparian rights or rights of appropriation. As Professor Sax pointed out, there are cases where the public interest has been ignored, and where the public rights have been harmed. What that shows is that there is not only a duty on behalf of the state, but for citizens to be vigilant about protecting public rights.

The Public Trust Doctrine is not self-enforcing. It is not automatically enforced. It may take someone to file a lawsuit or to remind a legislature or legislators of Trust responsibilities and duties. It is not something that is automatically administered and carried out.

So, again, remember that not only does the state have the right and the standing to file lawsuits, take actions and enact laws to protect Trust property, ordinary citizens also have the right to protect the Trust in ways such as filing lawsuits if they have the resources to do it.

While the Public Trust Doctrine does not prohibit the consumptive use of water, it does impose a fiduciary duty on states to protect Trust waters, including, as has been pointed out, against significant harm to fisheries. The Trust requires the state to act as a Trustee to preserve Trust property, values, and rights against harm or diminution for other public and private purposes. As beneficiaries of the Trust, members of the public have the same rights against the Trustee and others that would harm the Trust, including private riparian property owners, which I am about to discuss, as do beneficiaries of a Trust against a bank or any other Trustee.

I am now going to move into common law and riparian rights. What is a riparian? A riparian is a person who owns title to land directly abutting a natural body of water. Waters that are subject to the Riparian Doctrine include navigable and non-navigable surface waters in streams or lake beds. It does not apply, however, to ground water. Again, as Professor Sax pointed out, there is this distinction between *jus privatum* and *jus publicum*. We are talking now with regard to riparian rights, that is with respect to private rights in these waterways. The ownership of the property, mainly the riparian status of that property owner, under common law confers on that riparian certain private rights to the use of the water for domestic, recreational, and agricultural uses.

There are generally two versions or sub-doctrines of the Riparian Doctrine. I am going to mention these sub-doctrines briefly. One is the Natural Flow Doctrine, and some states have adopted this Doctrine. It is, however, a Doctrine that has been in disfavor in deference to the more favorable Doctrine, the Reasonable Use Doctrine. The Natural Flow Doctrine held that riparian land owners had equal rights to use water as long as they did not significantly affect the natural flow of the water with respect to quantity or quality. However, because of the difficulty in administering natural flow, and the fact that just about any use could have some impact on natural flow, this Doctrine came into disfavor. And so, predominantly in eastern states, the Reasonable Use Doctrine is the more favored Doctrine. Under the Reasonable Use Doctrine, riparians have equal rights to reasonable use of water without detriment to other riparians, or to the public. And I emphasize "or to the public," because the Public Trust Doctrine holds that those Public Trust rights are superior to private rights.

What is reasonable use? Reasonable use is a factual determination that is made on a case-by-case basis depending on the circumstances at hand. Again, we go to case law to see how the courts have administered the Reasonable Use Doctrine. The concept is similar to the concept of reasonable use in the common law tort action of nuisance.

Whether under the Natural Flow Doctrine or the Reasonable Use Doctrine, there are three more precepts to keep in mind. First, under common law, the riparian use of water may be made only by riparians. Again, this is a private right that only riparians have. If you are not a riparian under the Riparian Doctrine, you do not have these private rights to the use of water. Secondly, private riparian water use must be made for domestic purposes associated with the riparian land. In other words, the riparian cannot sell or ship the water to non-riparian land. The water has to be used by the riparian on riparian land. Third, the water may not be diverted to other non-riparian owners, or sold to non-riparian owners under common law.

The private property rights of riparian ownership and riparian rights of water use can be abrogated and regulated by the state subject to constitutional constraints, such as the Takings Clause in the U.S. Constitution. As Wally Malley and Professor Sax note, these common law riparian rights can be abrogated, changed, reconstituted, or abolished by legislatures--and they have sometimes done so.

With regard to streambed or riverbed ownership, Professor Sax made a very good point. In most states, the ownership of the bed of navigable waters is generally held by the state. That includes lakes and rivers. No private individual owns the bed of a lake. It is owned by the state. In most states, the bed of a stream is owned by the state. In some states, like Wisconsin, however, there is a recognition of private ownership of the bed of a stream by the riparian owner to the thread (the middle) of the stream. However, that ownership is subject to the public easement or the public right to the use of the water. That is why it is not a trespass for an angler to walk on the bed of a stream, even in Wisconsin, where the bed is actually owned by the adjacent landowner.

What are the rights of riparian landowners? Well, they are sunbathing, swimming, putting up piers and wharves, gaining access, fishing, those that relate to inflow and maintenance of inflow, rights to water cattle, to divert water for irrigation and other diversion on the riparian land. Keep in mind that public landowners, like the federal, state, or municipal governments, can also be riparians by the mere fact that they own land that abuts waterway and, therefore, enjoy private riparian rights if they so own the property.

With regard to enforcement, again, what happens if another riparian or another person injures the riparian rights of a riparian landowner? Well, that landowner, in order to enforce his or her rights, is probably going to have to go into court unless there is some other state mechanism for enforcing his or her riparian rights.



# Common Law and Appropriation Rights

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## A Primer

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*Mary J. Scoonover*

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A commentator once wrote, "When a person has taken, used, become accustomed to, and made a livelihood from water, it becomes 'his water,' and that if one who takes it from him, has 'stolen his water.' I used to think that Prior Appropriation was an American invention, but now I am convinced that it was the verbal identification of a very widespread human trait (Trelease 1977). The Doctrine of Prior Appropriation, like the Doctrine of Riparian Rights that Tom Dawson just spoke to you about, varies from state to state. Today, I will focus on some of the common elements to help you understand the Doctrine and its application and coordination with the Public Trust Doctrine.

Oliver Wendell Holmes once wrote that the law is "The felt necessities of the times." This is obviously true of the Doctrine of Appropriations. The Appropriations Doctrine grew out of the practical need of the settlers in the arid west. Water was scarce, yet essential. In many cases, the only way to mine or farm effectively was to divert water, oftentimes out of the water course and even the watershed, to a farm or mine where the water was needed. No federal or state laws or regulations controlled such diversions during the early settlement days. However, an effective water allocation system did evolve. The system had five basic elements.

The first element is the basic principle of priority. Out of a need to bring some order to a potentially chaotic system, the miners and farmers developed a customary rule that "first in time was first in right." That is, the first person to divert the water from the water course, and put it to use gained a legal right to use that water in perpetuity. So, the first doctrine is the principle of priority--first in time, first in right. The important thing about this right is that it existed independently of ownership of the soil.

Thomas Dawson just explained that riparian rights depended on the placement of the land in relation to the water course. Appropriative rights do not. An appropriative water rights user may divert water not only from a water course, but also from a watershed. As long as the water was put to beneficial use, the appropriator was free to divert the water to the location of beneficial use. Once the right was acquired, the point of diversion and the place of use could be changed without loss of priority, so long as the legal rights of others were not affected.

The second important element to note is that of beneficial use. Beneficial use in this context is similar to what Tom Dawson described, so I will not spend a lot of time on this principle other than to point out that simply claiming a right to water was not enough. An appropriator had to take the water and put it to beneficial use in order for his right to be perfected.

The third element is the idea of subsequent, or junior appropriators. These are often referred to as "later appropriators." The idea is that the right of the first appropriator is fixed as of the date of their appropriation. Each subsequent appropriator was entitled to have the water flow in the same manner as when he or she located on that stream, and could insist that the prior appropriators be confined to what was actually appropriated or necessary for the purposes of their appropriation. In other words, a later appropriator could insist that prior appropriators limit their uses to those beneficial uses to which the water had been placed originally, and that the prior appropriator not monopolize or waste the water.

The fourth element is that of shortages. Unlike riparian rights, where shortages are dealt with in a correlative fashion and shared among users, under the Appropriations Doctrine that was not the case. Shortages fell on junior appropriators. So, in times of water shortages, junior appropriators could lose their entire right of appropriation before a senior appropriator was required to even reduce his or her appropriations. Thus, there was no proportionate sharing in times of shortage.

Today, there are a number of rules that ease this seemingly extreme Doctrine. There are related concepts of beneficial use, reasonable use, waste, and efficiency that could limit its effect. Although junior appropriators have assumed the risks of drought, climatic changes, miscalculation in the line of supplies, and so on, they have also adopted a number of ways to deal with these uncertainties. One of the primary mechanisms in dealing with uncertainty in water supplies is engaging in activities in which the loss of water in a single year is not catastrophic, for example, planting annual crops as opposed to permanent or tree crops. Another such mechanism is the construction of storage facilities. In some cases, this second mechanism has left junior appropriators with more secure water supplies than the senior, direct flow diverters. In other words, junior appropriators, knowing that in times of water shortage they are going to lose their right to divert from the stream, have set up water supply facilities. In times of plenty, they store water and carry over supplies into next year. Senior appropriators, depending upon the stream, oftentimes do not, or in the past did not invest in such water supply storage facilities. So, in times of shortage if there was not enough water, senior appropriators had to make cuts in their operations, but junior appropriators simply turned to their storage supplies of water. It was not always perfect, but it was one of the ways of coping.

The fifth element is that appropriative rights are transferable. Appropriative rights may be sold or conveyed in whole or in part, separate and apart from any title to land. A right to appropriate water is not dependent upon property and the right can be sold or conveyed by, in, and of itself.

Finally, appropriative rights can be lost if they are not diligently perfected and used. This is known as the "use it or lose it" provision. It is reflected in the statutes of many appropriative rights states today.

The relationship of appropriative water rights to riparian rights is something that Richard Roos-Collins is going to discuss with you. I just want to mention briefly that most states that use appropriative rights systems have modified by statute this general common law practice. The modifications include requirements that before water can be appropriated from a stream there has to be a notice posted of someone's intention to do so. Oftentimes, responsible state agencies, whether a water board or state engineer, must review the application, make sure that there are

appropriate amounts of water remaining in the stream to be appropriated, and make findings that the point of diversion and the place of use are consistent with other public interests. We will discuss some of these points later when we get into the public perspectives.



# Riparian and Appropriative Water Rights Systems - Hybrid States

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*Richard Roos-Collins*

Natural Heritage Institute, San Francisco, California

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I will address two questions today. The first is, "What are water rights in hybrid states?" The second is, "How does the Public Trust Doctrine work in hybrid states?" As to the first, I am reminded of the saying that "democracy is like sausage, you cannot be too squeamish about how it is made or what is in it." That is a fair summary of the water rights system in the hybrid states.

Most states west of the Mississippi River use hybrid water rights systems. By and large, those states, when they were territories, imported the common law of riparian rights. The owners of properties adjacent to rivers and streams had rights to the use of the waters found within or immediately adjacent to their land. Over time, as Mary Scoonover suggested, the economy of the west became dependent upon diversion of water to properties that were not adjacent to the rivers or streams from which the water was diverted. Mines are a good example. Some of the canal systems developed by the gold-seeking 49ers in California stretch for more than 10 miles. Some of these canals run from basin to basin. In addition, much of the irrigable farmland in the west was not necessarily adjacent to rivers and streams, and water was brought to these lands. So, over time, the arid states west of the Mississippi developed the common law of appropriative rights allowing diversion to properties not adjacent to water courses.

By the end of the 1800s and the beginning of the 1900s, these states began to codify their hybrid systems. As long as their systems were common law, the owners of riparian properties and the holders of appropriative rights never quite knew where they stood until a judge ruled. So, legislatures were under pressure from all sides to codify these hybrid systems so parties would understand their respective rights. Now, I will say here that a little knowledge is a very dangerous thing, and I have a little knowledge of most western states, so I am something of a danger to you. In turn, what you learn here should be taken with a grain of salt. But, most western states now have codified riparian and appropriative rights.

Riparian rights generally are not governed by permits or licenses. You cannot find pieces of paper which state "this owner of this riparian property has this much right." On the other hand, most uses of riparian rights are reported to state agencies.

Appropriative rights are now generally governed by statute, and are granted by state agencies in the form of permits and licenses, and diversion rights are quantified.

In hybrid states, what are riparian rights? They generally remain the right to equal use to natural flows. They are not fixed, except in rare circumstances where an entire basin has had its flows

adjudicated. They may be recorded, but are not fixed to some certain amount. Riparian rights tend to be superior to appropriative rights in that they are not dependent upon time for their validity. In other words, if I were to buy riparian property in 1996, then I am not subordinate to all the appropriative rights granted in earlier years. Finally, riparian rights in hybrid states are now subject to the reasonable and beneficial use requirement. I will come back to this point in a few moments, for this is the single most important point that I want you to take home with regard to riparian rights in hybrid states. Riparian water rights are subject to reasonable and beneficial use requirements.

Appropriative rights still function more or less as Mary Scoonover described with regard to the common law system. They, too, are subject to the reasonable and beneficial use requirement.

In most hybrid states, if you ask the state agency responsible for administration of riparian and appropriative rights who has what right to what water, the only honest answer is, "We do not know." That is because in most states and river basins, riparian and appropriative rights have not been adjudicated against each other in a comprehensive or systematic fashion. Consequently, there is no certainty as to relative priority among the riparian and appropriative rights. Even so, all of these rights are subject to the reasonable and beneficial use requirement. This is where I will deal with the second question, which is how does the Public Trust Doctrine work in hybrid states? I view this as an element of reasonable and beneficial use, but I know I am way out on a limb here.

The Mono Lake cases were decided 12 years ago. To my knowledge, the Mono Lake cases were the first to apply the Public Trust Doctrine to limit an appropriative right for the protection of Trust uses. We are more than 2,000 years into the history of the Public Trust Doctrine, and that case was decided *only 12 years ago*.

I am not aware of any case which applies the Public Trust Doctrine in a similar direct fashion to riparian rights. So, I do not know how the Public Trust Doctrine and riparian rights are going to relate in hybrid states. I believe that the California Supreme Court did provide guidance in the Mono Lake cases regarding the Doctrine and riparian rights. The Court said that the Public Trust Doctrine must be administered in an integrated fashion with the water rights system. Thus, even though the Court expressly said that it was not applying a reasonable or beneficial use requirement to limit Los Angeles' water diversions, I believe that is what it did. I also believe that is how a court would treat a riparian right, if there were evidence--persuasive evidence--that the use of the right was causing unnecessary harm to Public Trust uses.

This is why I hope that those of you who live and work east of the Mississippi River have not been asleep during this presentation. I believe that your states, in a generation or two, will be something like the hybrid states west of the Mississippi, and that your water rights will turn, fundamentally, on the reasonable and beneficial use requirement. If so, the Public Trust Doctrine will be administered to determine whether a particular use is reasonable and beneficial. Is a water right causing unnecessary harm to Trust uses? If so, whether in hybrid states or east of the Mississippi, I think the answer will be, then change it if necessary to prevent or mitigate that harm.

# The Public Trust Doctrine and Riparian and Appropriative Water Rights, State and Public Interest Perspectives

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## Panel Discussion

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**Thomas J. Dawson - Panel Moderator:** Thank you, Richard Roos-Collins. One comment on that, because I am from one of those hybrid states. Keep in mind that when we are talking about hybrid states, we are talking about either hybrid evolution of the common law by the courts, where the courts are mixing, hopefully, the benefits of both doctrines--or hybrid in the nature of legislation and regulation. It can happen as a matter of the evolution of common law, or it can happen as a matter of the evolution of legislation.

At this point, we are going to move on to the state and public interest perspectives on the Public Trust Doctrine and water rights. We have put two mini-panels together. Mary Scoonover, Wally Malley, and I will present the states' perspectives. Richard Roos-Collins and Mark Sinclair will present the public interest perspectives.

I will start by first talking about how public rights meet private rights. I think the point has been well made that these public rights are supposedly superior to private rights, but there are a couple of other thoughts I want to leave with you. Number one, private rights do not necessarily have to conflict with public rights. In fact, in an ideal world they should not conflict with each other. They are supposed to be compatible. They are two common law concepts that are supposed to be able to work together. Riparian owners and appropriative users are supposed to be able to use water without treading upon public rights. Again, that is in an ideal world, but there does not necessarily have to be conflict. I might point out that it is often private owners of water rights that are the sentinels of a problem--of an environmental problem or a diversion problem, and so on. If I am a riparian owner, I have a vested property right interest in the quality and the quantity of that water, and one would think that I have an interest in making sure that there is adequate flow and that there is adequate water quality. Unfortunately, we all know that is not always true. There are riparian and other appropriators of water who have injured public rights, but I do want to point out that these two ideas do not necessarily conflict with each other.

Secondly, when there is conflict, there are different ways to resolve that conflict. Conflict resolution can occur in the courts, about which we lawyers often tend to talk. However, this course of resolution is very inefficient. We will talk a little bit more about that during our perspectives portion. These conflicts may also be resolved, hopefully, in a much more intelligent and thoughtful way through the regulatory process or the legislative process. Again, in a perfect world, we would resolve these conflicts in a sensible way, but we also know that legislatures screw up and regulators screw up. As a result, we sometimes wind up in the courts to have the courts finally resolve those conflicts, regardless of our best efforts to avoid the courts. That is what I have to say about these public and private rights meeting each other.

At this point, I will open up the panel to discuss our perspectives on these issues, and, hopefully, after each one of us has had a chance to offer some perspectives, then open it up to general questions and answers.

*J. Wallace Malley, Jr.:* I am going to take advantage of the fact that there is another guy from Vermont here and see if I can bait him a little bit.

I think you are probably sitting there saying to yourself, "God, what is this all about? What is this common law? It changes from state to state, and you know I am worried about whether we can do something to protect the flow, and the streams, and the habitat, and so on, or can we not?" It is hard to give a definitive answer to that, and I think that is one of the frustrating things about this panel.

Let me tell you a story which I think indicates the dilemma. In Vermont--undoubtedly, the same thing has happened in many states, and, if not, it could easily happen--they had a big Public Trust case in 1989 that was on a filled submerged land issue. There was a lot of flowery language in the case about the Public Trust Doctrine and that the land could not be given away, and it creates a public right to appropriate public uses. It was not limited to navigation, commerce, and fishing--it was public uses. It was potentially wide open to include recreation, maybe aesthetics, habitat protection, and any number of things. Shortly thereafter, a big marina was proposed for Lake Champlain. Briefly, the proposal was for hundreds of slips encompassing something like 8 to 12 acres in Lake Champlain. I cannot remember the exact numbers, but perhaps Mark Sinclair does. The state had to issue encroachment permits for this proposed project. There is a process the state goes through in reviewing these types of projects. I will not go into the details of the review, but ultimately the state issued a permit for the project. So, we in the Attorney General's office stuck our noses into the situation and said, "Hey, we have this Public Trust Doctrine, now we are really going to try to make it work." We jumped in on the case and said, "Hey, nobody did a Public Trust analysis on this permit and they have got to do it." And, lo and behold, the court agreed with that and overturned the grant of this permit because it had basically created a private enclave over a substantial portion of Lake Champlain where persons might otherwise be fishing and navigating, but would be prevented from doing so if the project were built. There was not any place for the public in this big marina facility.

So, it seemed like the Public Trust Doctrine was charging right along. Some time after that, the agency came to us and said, "We have to figure out what this means. We have permits to issue. What do we do? You cannot just tell us be reasonable." So there was this long period where there was a document created which tried to define what kind of public access, public purposes, and so forth had to be involved before a permit could be issued. That went along fine until this one private camp owner on a small lake in Vermont decided that he wanted to dredge some silt that had accumulated in front of his camp, so he could get his boat up to his shore and house. He and his family had lived in this camp for a number of years and did not have, or did not want to hire a lawyer, so he represented himself. The state denied him a permit to dredge the lake front. All of the issues were laid out in written documents. The dredging would have been near a stream that entered the lake. There could have been some potential impact on fish spawning. There were some legitimate environmental and Public Trust concerns. The state's denial was appealed to the court,

and the judge said “I do not see anything in this statute about this Public Trust Doctrine, so I do not think that this little protocol that you are using is worth anything.” We had to make a decision at that point. Are we going to appeal this to the Supreme Court--this David and Goliath thing--or are we going to find another solution? Basically, we told the state agency that the best alternative would be to be less aggressive in its application of the Public Trust Doctrine and the agency is sitting there saying you are the guys that got us into this thing in the first place.

I have heard Mark Sinclair say that every decision by every agency ought to be made with the backdrop of the Public Trust Doctrine in mind. So I want to know what he thinks about the situation I just described.

**Mark Sinclair:** I think the Vermont Attorney General, as a Trustee under the Public Trust Doctrine, should have brought that case to the superior court and supreme court, if necessary, to clarify the exact meaning and implications of the Doctrine in Vermont. Wally Malley makes a good point. The Public Trust Doctrine has many sources in law. It is part of the common law. It also has statutory expression in Vermont. Finally, it is also a constitutionally-based Doctrine in Vermont. The Doctrine also is a constantly evolving Doctrine, changing to meet today’s public needs and values. As such, it is important for state employees to know when to push the limits of the Doctrine in a particular case, or when it is best to be less aggressive, because the case does not involve a large public interest or the facts are poor.

There are some basic Trust principles, however, that every state official must consider in carrying out all regulatory actions. The Doctrine is a tool that state employees can use to protect public uses and Trust resources, such as fish. More than a tool, it is an obligation that state officials consider how their decisions affect Public Trust interests. For example, there is an obligation to determine whether a permitting action may harm Public Trust uses, whether the action furthers public purposes, and is consistent with the recognized Trust uses of fishing and boating.

The Doctrine is not an arcane legal Doctrine that sits on a shelf to be ignored. State employees must consider the Doctrine’s principles when issuing water use permits, when arguing with your supervisor about the need for a fish ladder at a dam, and when making recommendations to other agencies about water use decisions.

In the Vermont case mentioned by Wally Malley, that is exactly what the environmental agency was doing. It was trying to determine how a lake dredging activity--albeit a minor activity--would affect public uses. Applying the Public Trust Doctrine is a hard task. However, the bottom line is that every state agency must consider Public Trust issues, and do the best it can to make these hard decisions about water use by giving priority to protection of the public interest in waters.

What can guide these decisions? There are several sources of guidance in understanding the state law on the Public Trust Doctrine. First, you need to consider the state’s constitution. In Vermont, the constitution guarantees the public’s right to fish in all navigable waters. That right of fishing translates into the right to a healthy fishery and protective stream flows.

Second, there are statutory expressions of the Doctrine. In Vermont, there is a statute that mentions the Trust Doctrine and requires state agencies to protect fish and increase their supply. So, you need to be familiar with all sources of Trust law to be effective in carrying out your Trustee duties. You should seek the support of your state attorney general office in interpreting the Doctrine.

There are several specific ways that the Doctrine affects your jobs as state employees dealing with fishery and water use issues. First, the Doctrine provides you with a tool to require environmental protection for water and fisheries. Under the Doctrine, you must ensure your actions do not allow harm to protected public uses, such as fishery resources. You have a duty to mitigate any harm to Trust resources to the extent feasible through your regulatory decisions. In some states, you have a duty to perform comprehensive water planning before making water use decisions to ensure private uses of waters do not harm public resources, like fisheries, or future public needs.

Second, the Doctrine places an obligation on state agencies to provide full disclosure on how they reach water use decisions affecting Public Trust resources. You must explain your decisions and allow the public to have a voice in those regulatory decisions.

Third, the Doctrine requires state agencies to ensure that Public Trust resources and public waters are used efficiently and not wasted.

Fourth, under the Doctrine, state agencies must say no to bad projects that will harm Trust resources. It is difficult for state regulators to say no. There is tremendous political pressure on state officials to permit development projects. However, the Public Trust Doctrine gives you a rationale for saying no when warranted. For example, if there is a bad transportation project that involves the moving of a stream for road-building, you may remind your sister transportation agency of their Trust responsibilities to protect that stream. If necessary, get your attorney general's office involved in these debates to uphold the law. Oftentimes, raising the Doctrine's principles will cause officials and developers to slow down and reconsider the merits of a project that is detrimental to public waters and fisheries.

Finally, the Doctrine provides states with authorization to impose fees for use of public waters. After all, the public holds a property interest in public waters, and the public should be receiving fair rental value for use of public waters. You may wish to raise this fee issue with your agencies and state legislators. One warning about fees, however, a user fee cannot be used to justify an improper private use of Trust resources. There always must be a public purpose before the state can authorize private use of Trust resources, regardless of the collection of a fee. Also, any fees collected must not go into the general fund, but must be put back into the Trust resource to be consistent with the Doctrine.

The general theme here is that state agencies that are responsible for water use decisions must think about and apply the Doctrine's principles every time you take an official action. You must ask the hard questions about how the public resources are affected and ensure that no unnecessary harm occurs to Trust resources.

***Mary J Scoonover:*** The Public Trust Doctrine, as it has been interpreted recently, imposes an active duty of the states to consider the Public Trust Doctrine in water allocation decisions. In California, it has been described as a duty to exercise continuing supervision over the taking and allocation of water and to reconsider allocation decisions in light of current knowledge and current needs. I suggest the best way this active duty can be interpreted and can be protected is through statutory and/or constitutional provisions.

When the California legislature enacted a statute modifying a previous grant of tide lands to the city of Emeryville, in the interest of greater protection of the San Francisco Bay, the court saw to it that the intent was carried out. When the legislature required sufficient releases over, around, and through a dam in order to keep fish in good condition downstream, the courts again saw to it that this intent was carried out. And even where a modern water pollution statute provides for statutory penalties, a polluter may be held equally liable under common law principles for the destruction of fish.

This is not to say that the decision should be left only to governmental guardians of our environment or to state legislatures. I digress for just a minute to tell a story about a recent hearing in which a California Assembly sub-committee was considering a potential project that could affect a specific run of chinook salmon (*Onchorhynchus tshawytscha*) in the Sacramento/American River system in California. The legislator most concerned with protecting these fish insisted throughout the hearing on referring to them as "anadromous" as opposed to anadromous species. These are some of our best friends.

I would like to leave you with a couple of thoughts. The effective application of the Public Trust Doctrine depends upon environmental groups, public interest groups, and local, state, and federal government to raise concerns and seek protections. It is clear that in California members of the public, as well as concerned organizations and individuals with a direct stake in controversies, can sue to enforce the Public Trust Doctrine. Professor Sax indicated that the Public Trust Doctrine is most effective when used in tandem with other tools. This has clearly been the case in California. Finally, in my practice, I have seen the Public Trust Doctrine used most effectively in settlement negotiations without ever being litigated. When the Public Trust Doctrine is taken into account--either early in the planning process or in settlement negotiations once a dispute arises--the results are often positive.

**Thomas J. Dawson:** Mary's comment reminds me of a northern Wisconsin Senator who declared that he was going to introduce a bill to ban "nuclear suppositories" in Wisconsin.

**Richard Roos-Collins:** I would not want one!

I have five points to make. The first is the Public Trust Doctrine, from where I sit, is not a religion. Wally Malley was teasing about the 12 apostles. Please, whatever you do, do not treat the Doctrine as religion. No competent state or private attorney does that. It is not even "do gooder" ideal; it is law. It is law of the same solemnity as the law that your legislature passes. It is law that creates property interest held by the state for the benefit of people alive and people unborn. So, I cannot underscore enough the importance of treating the Doctrine not as an ideal, and certainly not as religion, but as law that gives you authority in every decision you make as state officials, to protect Trust uses of navigation, water-based commerce, and fishing.

That authority is of extraordinary power. Imagine for a moment, if you held funds in a bank for the benefit of your children, you would manage them one way. What if the funds were held in a bank for the benefit of your children, and your grandchildren, and your great grandchildren, and generations that you cannot even contemplate? What would you do then? Certainly, you would

manage the funds differently. The Public Trust Doctrine requires that latter sort of management, and authorizes you to do that in every decision that you make that affects Trust lands and waters.

Second point, the Trust creates a duty--a duty that is enforceable against you if you do not use the authority properly. If I were in your shoes, I would be thinking about the story of the Emperor with no clothes. Here we are, discussing this extraordinary authority, and yet most of you live with the reality, day in and day out, that your native fisheries are gone or going. If it is so powerful, why are we where we are? Well, the Public Trust Doctrine was not applied to water appropriations until very recently. Another reason is that we tend to be very regulatory in our orientation--you and the public interest community alike. If a particular facility complies with the dissolved oxygen standard or a Fish and Game Code provision, we tend to conclude that is good enough. Well, no, it is not. If the fisheries are gone or going in your state, I would say that the Public Trust Doctrine is not being adequately enforced, and you as state agencies are vulnerable to litigation--or to take Mary Scoonover's strategic suggestion, threat of litigation, to enforce that Doctrine better in addition to all of the other regulatory laws which you so routinely enforce.

Third point: all of you deal with the dead hand of history. I say that even though I am a historian in my heart. You deal with allocation decisions that were made by people before you, and those decisions have present consequences. Often existing permits or licenses appear untouchable and, consequently, they function as shields to protect those previous allocation decisions. They do not serve as shields against the Public Trust Doctrine. The Public Trust Doctrine is a universal re-opener--at least where it was not integrated into the original allocation decisions. So, for example, in the only state in the union that has "androgenous" fish, most--in fact nearly all--of the appropriative water rights were granted without consideration of the Public Trust Doctrine. Consequently, all of these appropriative rights are vulnerable to litigation or threat of litigation to reopen them for compliance with that Doctrine. The Public Trust Doctrine is a way for you to lift the dead hand of history off your rivers and bring them into a better balance of uses.

Fourth point: look at standing to sue. The public interest community is restricted in its standing to enforce some statutory or regulatory laws. Some laws expressly provide that only the state can enforce them. The Public Trust Doctrine, on the other hand, tends to be different. It tends to be enforceable by any interested party, whether or not that party is the state.

My final point is that the Public Trust Doctrine is a very sharp knife, and it can cut the hand of the person who holds it. The Public Trust Doctrine is now being developed in its application to riparian and appropriative water rights. One reason that there are so few cases applying the Public Trust Doctrine is that the public interest community, like the states, is afraid of setting bad precedent. The Doctrine can hurt. It can be applied in a way that is unexpected and can hurt the very objectives you have in bringing the case. So, I would encourage all of you to pay even more attention to our discussion of strategy. The black letter law that you have heard about so far is just the basis. The strategy is where the Public Trust Doctrine comes to life and succeeds or fails.

**Thomas J Dawson:** Thank you, Richard; very well put. I want to make one very quick comment. You have a bunch of lawyers up here; we have been talking law and courts and that kind of thing, but one point that I want to make is that the Public Trust Doctrine can also be a very powerful,

political tool. It can be a tool by which you remind your supervisors of what your duties are and what their duties are. It is a political tool by which you can remind legislatures of their obligations. I have found that the Public Trust Doctrine can be and has been used as a strong, political tool in legislative hearings and in other forums like that to head off bad law and bad legislation. So, keep in mind that the sole place to enforce the Public Trust Doctrine is not simply the courts. You can use the Public Trust Doctrine yourselves--in your work. I was impressed 17 years ago when a fisheries manager reminded me, a public interest advocate, that the Public Trust Doctrine required him to take action to protect a cold water fishery against the building of the dam. Keep that in mind as well; this can be used as a political tool.

*J. Wallace Malley, Jr.:* I am still looking for something, some practical kernel of advice to pass along here. I think I would recommend something that ties into what Richard Roos-Collins said earlier. Richard was projecting into the future about whether, at some point, we all would be subject to the reasonable and beneficial use kind of analysis. I suggest that when each of you returns to your respective offices that you do two things. One is check with legal counsel or the Attorney General's office and try to get some reaction from them on the scope or the strength of the Public Trust Doctrine in your jurisdiction. Undoubtedly, you are going to find that fishery protection is going to be there. I would be very surprised if any of you found that it is not there. In addition, you might find some other protected interests that have application to fisheries, such as recreational uses. I think that those two easily overlap. Likely, there are other points that are interrelated as well.

The second point is to go back and look at the statutes under which your division or your agency operates. Review your regulations to see if you can find references to public interest, public protection, or interests of the public. Look for little phrases and words that would allow you to incorporate Public Trust Doctrine protections into your regular decision making process. This may enliven the work that you are doing in a way that helps to fulfill the duty, that we are all recognizing here, to observe the protections of the Doctrine.



# The Public Trust Doctrine and Riparian and Appropriative Water Rights, State and Public Interest Perspectives

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## *Questions and Answers*

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**QUESTION 1:** What is the baseline under the Public Trust Doctrine? The context in which I ask the question and would like to have the response is within a coastal river. Assume a dam was constructed in the river's tidal area during the 1800s; migrations of seven anadromous species are blocked by the dam; and the dam's hydroelectric power production project is now subject to re-issuance of state and federal permits. In considering whether or not the states can use the Public Trust Doctrine to deny a permit, say a 401 permit or others, are the Trust "baseline" conditions pre-project conditions, or present post-project conditions?

### **RESPONSES TO QUESTION 1:**

**Richard Roos-Collins:** Let us leave aside federal preemption for a moment. If this dam were not under the jurisdiction of the Federal Energy Regulatory Commission, I believe that the environmental baseline would be the date of construction; in other words, pre-project conditions. That was the date when harm to resources occurred without adequate consideration by the state. Involvement of the Federal Energy Regulatory Commission (FERC) complicates your question, and I hope in the course of this workshop we can discuss, in some focused fashion, whether and how the Public Trust Doctrine applies to a dam under the Commission's jurisdiction. Otherwise, I do not think there is much debate.

**Thomas J. Dawson:** I tend to think that it is a little more complicated in that I agree with Richard Roos-Collins that you want to look at the natural flow and conditions either at the time of statehood, or at the time the dam was built. What if, on the other hand, that dam has enhanced statewide public rights in the fishery, and natural flow conditions may take us back to a point where the fishery was not nearly what it is today?

These are very fact intensive issues that are not simply answered. You have to look at all the circumstances surrounding the water, the fishery, the quality of that fishery, and the potentially conflicting public rights that you may have in that stream, all of which are protected by the Trust. We have not talked about potential conflict of public rights in navigable waters, but that is an issue that the courts are going to try to balance. So, it is going to be a very fact-circumstance-intensive question.

**Mark Sinclair:** I would like to add a point about federal preemption. If a federally regulated dam is involved, there is a big question as to whether the Public Trust Doctrine has any effect in light of the comprehensive authority given FERC to regulate these dams under the Federal Power Act. However, there are other tools that state biologists can use to protect state resources in these

situations. One tool is section 401 of the federal Clean Water Act, which requires a federally approved project to comply with state water quality standards and other requirements of state law. The “other requirements” language could be interpreted to include the Public Trust law in your state. This could pit the Clean Water Act against the Federal Power Act--a battle whose outcome we cannot predict. However, the 401 water quality certification is certainly a tool for states to use to influence federal dam licensing decisions.

A second tool for influencing federal dam relicensing decisions is a state’s comprehensive plans for rivers. Within a comprehensive plan, a state should articulate its Public Trust values and uses, including definition of the background water quality conditions to be protected. FERC must then respect the plan in making dam licensing decisions. Together, these tools can help influence federal decisions by explicitly stating what public uses and resources are important to the state.

**Richard Roos-Collins:** Have you heard the saying, “If you put six fishery biologists in a room you get eight opinions?” Well, it is true with attorneys, too. I disagree with Tom Dawson. I agree that the court would consider all changes caused by that dam, including the positive changes, for the purpose of determining whether the dam caused adverse impacts or unnecessary harm to Trust uses. But, it seems to me that somewhere in that fact-specific analysis the court must consider whether anadromous fisheries used the river above the dam before the dam was built. If we could ignore that fact, then the Trust Doctrine loses most of its meaning upstream of the dam. So, I am simply advocating that you consider pre-project as well as current conditions in applying the Public Trust Doctrine.

**Thomas J Dawson:** I believe that Richard and I would agree that you fishery biologists, fishery managers, and others are the experts, and that you may very well be the ones to help establish what those baselines are going to be because that is a science question. That is an evidentiary question that the lawyers cannot handle. It is going to take experts to contribute to answering that question.

**QUESTION 2:** There are bills in Congress, at the federal level, to sell Corps of Engineers’ projects in the southeast United States. My particular interest is on the Cumberland River. My question is, can Congress sell these projects? Apparently, there is no limitation on who may purchase these projects. Power companies like Duke Power or Carolina Power and Light, as well as private investors, may purchase these projects. Can the U.S. Congress sell these projects free of Public Trust Doctrine implications?

#### **RESPONSES TO QUESTION 2:**

**Thomas J. Dawson:** Professor Sax touched upon this. I think he agreed that this question is a difficult and complicated one because you have the supremacy clause of the Federal Constitution as well as Ninth and Tenth Amendment questions if the states intend to fight those kinds of actions, including their desire to protect public rights. It is up to the individual state and/or individual or group that are willing to even articulate the arguments as to why it cannot be done. But, I will tell you that this is probably going to be an uphill battle, a very serious uphill battle.

**J. Wallace Malley Jr.:** Are these facilities owned by the federal government? I think you asked a question that has not yet been answered. I think it is at least possible that a federal court in the right

place and the right case could recognize a Public Trust obligation in the course of proposed sales of federal lands. We are talking about creating new law here, but there are theories under which that argument could be made, and I think in quite a plausible fashion. But, it has not been done yet. You have asked a question that also comes up in a lot of context of proposed closures of federal military bases. Some of these bases have been built on and into water bodies, and now are being sold free of any kind of Public Trust issues. I believe that the possibility for successfully including at least some Public Trust obligation in the sales exists, but I would not want to hazard a guess on how it would come out.



# Case Histories of Public Trust Doctrine Applications to Instream Flow Protection

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## Introduction

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*Alexander R. Hoar*

U.S. Fish and Wildlife Service, Hadley, Massachusetts

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During this session, we will discuss what Professor Sax described as the “fringes of the Public Trust Doctrine.” As he said, you must talk about the fringes, because that is where things are moving. So, we have asked our speakers to discuss case histories that are on the edge of the application of the Public Trust Doctrine to protect of instream flows.

Someone from Pace University in New York described this edge as a ring of fire. If you think about where the fringe cases are--places like Wisconsin, Idaho, and California--and you think about the analogy, it is like a volcanic ring of fire. This does not mean the Public Trust Doctrine does not exist in those places where conditions are quiescent. The Doctrine is there and waiting. For example, the east coast was quiet for a long time, but there was some recent action in Vermont. That was a surprise. People in Massachusetts have indicated they did not expect a Doctrine case because the Public Trust Doctrine had been codified, and the state was carrying out its Trust responsibilities, but the Doctrine is there waiting. So, if you live in a quiescent area, do not think the Public Trust Doctrine does not exist in your state. It means it may not be being applied. The message we should start hearing is that the Doctrine should be part of our everyday thinking, and that the edges of its application should be explored.



# Applications of the Public Trust Doctrine in Wisconsin

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*Thomas J. Dawson*<sup>5</sup>

Wisconsin Department of Justice, Madison, Wisconsin

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Ironically, I have been asked to talk about applications of the Public Trust Doctrine in a state in which there are not many cases and I have been asked to explain why that may be so. Do not get me wrong--Wisconsin has a very rich tradition of Public Trust Doctrine cases.

Wisconsin is a state of over 14,000 lakes, 2,000 trout streams, thousands of miles of streams and rivers, and millions of acres of wetlands. As a result of all that water, there have been many cases that have gone to the Supreme Court of Wisconsin involving the Public Trust. However, not many cases have involved stream diversion or instream flow issues. Part of the reason that there have been few instream flow cases is that, unlike many states, the Public Trust Doctrine is incorporated into Wisconsin law. The Doctrine is incorporated into Article 9, Section 1, of the Wisconsin Constitution.

The Doctrine came to the Wisconsin Constitution through the Northwest Ordinance of States in 1787. Wisconsin was part of the Louisiana Purchase and the Ordinance of 1787, which was a contract between the federal government and the State of Virginia in which the Public Trust Doctrine was passed through to that territory and eventually to the State of Wisconsin. From that tradition, the Public Trust Doctrine has been incorporated into Wisconsin's constitution and into its statutes, including statutes involving water diversion. Responsibilities pertaining to the Doctrine and water diversions were carried out and administered by the Conservation Department of the 1950s and the Department of Natural Resources after 1967.

One thing that impresses me about the Water Regulation Bureau in the Wisconsin Department of Natural Resources, including fisheries people who are in that bureau, is that they know the Public Trust Doctrine. They have been taught the Public Trust Doctrine. I recently reviewed a legal memorandum prepared by the Bureau of Legal Services within the Department of Natural Resources on the Doctrine--diversion and instream flow issues, public access issues, and other protection measures that are required under the Doctrine. Clearly, the people in the regulatory arm of the Department of Natural Resources have a basic, fundamental understanding of the Public Trust Doctrine. They are able to use it in the field with regard to other people in state government. They are able to talk about it intelligently to legislators. They are able to talk about it intelligently and, hopefully, skillfully with citizens and property owners who might be affected by the regulatory programs that essentially are based on the Public Trust Doctrine.

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5. Mr. Dawson's biography is presented in Appendix B.

The Wisconsin Supreme Court recognized the Public Trust Doctrine soon after statehood in 1848. It began to actively enforce the Doctrine as early as the late 1800s and early 1900s. The judicial history and court enforcement of the Doctrine is found in the nationally recognized 1952 Muench v. Public Service Commission case, 261 Wis. 492, 53 N.W.2d 514 (1952). In that case, the court held unconstitutional a state law that gave counties exclusive control over the building of dams and state waterways. In that same case, the court also recognized the right of ordinary citizens to enforce the Public Trust Doctrine. It was a citizen, Virgil Muench of the Isaac Walton League, who brought that case. It was not the State. The court upheld the right of that citizen to enforce the Doctrine, which in that case saw the result of the court declaring unconstitutional a state law passed by the legislature. Significantly, the court recognized the broad expanse of the Doctrine to include noncommercial public rights in navigable waters, including the public right to enjoy natural scenic beauty. The court also articulated the requirement that the State had an active duty to protect and advance the Trust. The court cited countless past cases regarding the Doctrine in the Muench case.

In 1972, the Wisconsin Supreme Court rendered the landmark decision in Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972). That decision upheld Wisconsin's zoning laws protecting non-navigable marshes and wetlands that were adjacent to navigable waters. This decision was partially based on the Public Trust Doctrine as well as the state's police power.

The Wisconsin Legislature also has a long tradition of recognizing and incorporating Public Trust Doctrine principles into Wisconsin's statutes. For example, there is a statute currently on the books regulating legislative lake-bed grant reviews where the legislature recognizes "Public Trust purpose" as meaning a purpose in furtherance of the Public Trust in navigable waters established under Article 9, Section 1, of the Wisconsin Constitution.

There are numerous Wisconsin statutory chapters that are devoted to regulating activities in navigable waters for the purpose of protecting public rights and interests. Numerous chapters deal with activities in navigable waters. There are a few that deal with water diversion. The primary one is in Chapter 30 of the Wisconsin statutes (Section 30.18), and was originally enacted in 1935. It regulates the diversion of water from any stream. It holds that there are two purposes to be served by law--to protect the interests of downstream users, namely riparian users, and to protect public interests in waterways. It allows permits to be issued to riparian users for: 1) the diversion of what the statute calls "surplus water" (water that is not being beneficially used) for the purpose of enhancing flows in other water bodies, or 2) the diversion of "non-surplus water" for agriculture, with the consent of riparian users that would be injured by the diversion. That statute expressly states in regard to all diversions, "but no water shall be so diverted to the injury of public rights in the stream."

In 1959, the Wisconsin Supreme Court interpreted this statute in the context of the Public Trust Doctrine saying, "...the Reasonable Use Doctrine of riparian rights is qualified in this State by the Trust Doctrine of Public Interest." The statute requires public notice of an application to divert water. It requires or authorizes the Department of Natural Resources to: determine what is surplus water; permit and designate the amount of water to be diverted; and revoke permits found to be detrimental to the public interest; revoke permits for diversion from trout streams where "desirable for conservation purposes."

There are other Wisconsin statutes dealing with diversion, depending on the amount of water diverted. There is a statute dealing with diversions of 100,000 gallons a day (which is about 0.15 cubic feet per second [cfs]), and another that imposes a special permit requirement for diversions of over 2-million gallons a day (which is about 3.0 cfs). Within the context of those regulations, in 1992, the Department of Natural Resources published a water regulation handbook, an internal administrative document. One chapter pertains to surface water diversion, and provides the Department of Natural Resources will make public rights stage determinations with regard to non-navigable and navigable streams. Fishery values are examined and analyzed, and determinations made with regard to the amount of flows necessary to maintain fisheries, as well as other criteria for determining minimum flows, such as for navigability.

There are strengths and weaknesses in Wisconsin's program, but I believe the Public Trust Doctrine has been so incorporated into our law that it is not, perhaps as in other states, an anomaly. It is not something new, it is not something that is unknown. It is a living Doctrine in our state. I believe it can become a living Doctrine in all other states.

The strengths of Wisconsin's program are that protection of public rights are not left to litigation and state courts. It is part of our regulatory program, and this heads off litigation in the courts. Permits allow the state to prevent harm, rather than merely to react to it by filing nuisance lawsuits. It provides for an active, rather than passive or reactive, state role in the administration of the Public Trust. There are some weaknesses and need for improvements in our program. For example, governors have ordered waivers of public notice and hearing rights during droughts, precisely when public rights are most in jeopardy. The statutes are not fully protective of all public rights. Some riparian uses, diversions, and most well water withdrawals are not subject to regulation. I was involved as a Public Intervenor in a case in which a ground water diversion was causing the head waters of a trout stream to literally dry up. Our existing statutes were not adequate to invoke Department of Natural Resources permit jurisdiction because the threshold consideration of public rights--2-million gallons per day--was greater than the project's diversion. All that was left was the Common Law right for the State to bring a nuisance action, which it did not do in this case.

Furthermore, Wisconsin's statutes do not fully recognize the hydrologic link between ground water withdrawal impacts and surface water flow impacts. We have talked about the extension of the Doctrine to non-navigable tributaries. We have talked about the extension of the Doctrine to non-navigable wetlands and marshes. You as fishery people and biologists know ground water is part of the hydrological cycle that feeds our surface water fishery. Protection of ground water resources and ground water recharge is just as necessary to protect our Public Trust waters as is the protection of wetlands and non-navigable tributaries. This protection will come when, as a matter of Public Trust litigation, the courts recognize it--if legislatures do not recognize it first.

In summary, the reason why we in Wisconsin do not have a lot of case law on water diversion is that the Public Trust Doctrine really is part and parcel of our law and our administration of the law in regard to our water.



# Mono Lake, California, Water Rights and Instream Flow Issues

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*Richard Roos-Collins*<sup>6</sup>

Natural Heritage Institute, San Francisco, California

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Mary Scoonover and I are going to discuss California's Mono Lake water rights and instream flow cases. I will discuss the cases from a public interest group's perspective, and Mary will discuss the cases from the perspective of the state as a Trustee.

Let me begin by orienting you to Mono Lake, its basin, and its history. Mono Lake Basin lies on the eastern side of the Sierra Nevada Mountain range at the very western edge of the Great Basin. It is due east of Yosemite National Park. The lake is at an elevation of about 6,380 feet. The lake has no outlet. It is highly saline and alkaline.

Prior to the immigration of Europeans, there were no fish in the lake or its tributary streams. Due to its salinity and alkalinity, the lake itself supports only populations of brine shrimp (*Artemia monica*) and alkali fly (*Ephydra hians*). Beginning around 1850, shepherds, who used the pastures in the Sierra adjacent to the lake, and others planted trout in the basin's streams. More than a century later, these fish, as well as the indigenous shrimp and fly, became the focus of these cases.

Two of the lake's major tributaries (Rush Creek and Lee Vining Creek) and two of its minor tributaries (Parker Creek and Walker Creek), as well as the lake itself, are subject to these cases. There was some in-basin irrigation along the four creeks during the early 1900s. Beginning around 1920, the City of Los Angeles began to purchase adjacent lands and riparian and appropriative water rights to the creeks. Today, there are no water rights available to any water downstream of Los Angeles' points of diversion. Los Angeles holds them all.

In 1940, the agency responsible for allocating water in California issued permits to Los Angeles authorizing diversion of most of the waters from the four tributaries to the lake. Beginning in 1947, Los Angeles did just that. In the 1970s, Los Angeles obtained another license and completed the facilities necessary to divert all of the streamflow virtually all of the time from the four creeks.

The impacts of the diversions were varied and significant. The creeks dried up; the riparian vegetation died off; periodic major floods destroyed stream channel form; all stream fish and aquatic insects died; the lake level began to recede; increasing alkalinity and salinity threatened the lake's brine shrimp and alkali fly; significant waterfowl and shore bird habitat was destroyed; and the lake's California gull (*Larus californicus*) rookery became threatened. Mono County, which had one of

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6. Mr. Roos-Collins' biography is presented in Appendix B.

the most significant angling economies in the state, lost this economy within the basin. Mono Lake receded from a surface elevation of about 6,410 feet above sea level to about 6,372 feet at its low point.

In 1979, the first of the Mono Lake cases was brought by the National Audubon Society. That is the case that resulted in the 1983 decision by the California Supreme Court that I distributed. That decision held that the Public Trust Doctrine applies to limit diversions from these tributaries, although the Supreme Court did not say how. Subsequently, California Trout, the Mono Lake Committee, and other organizations brought other cases under California Fish and Game Code sections 5937 and 5946. These cases resulted in 1989 and 1990 decisions that also fall within the basket of Mono Lake cases. These cases held that the statutory requirements of the California Fish and Game Code required Los Angeles to release from its diversion facilities those waters necessary for the protection of fish downstream and to maintain those fish in good condition. The El Dorado County Superior Court provided subsequent interim relief while the State Water Resources Control Board undertook a massive effort to amend Los Angeles' water rights licenses. The State Board completed that process and reallocated Mono Basin streamflows in 1994. The State Board reserved to the creeks and the lake a long-term average in excess of 75 percent of the flows which Los Angeles had previously diverted. The State Board also ordered that lost stream and waterfowl habitats and conditions be restored or impacts mitigated.

Let me give you a very brief summary of the holdings of the Mono Lake cases. Then I want to spend the balance of my time on strategies and use of the Public Trust Doctrine.

**Holdings:** The Public Trust Doctrine limits the availability of waters for appropriation. It may be applied to non-navigable tributaries where diversions from those tributaries impact downstream navigable waters, in this instance, Mono Lake. It limits the availability of waters for diversion from non-navigable and navigable waterways so as to protect Trust uses--navigation, commerce, and fisheries. It does not protect them against change, it does not protect them against any harm. It does protect them against unnecessary harm, and it requires the state to exercise a duty of continuing supervision to prevent unnecessary harm to those Trust uses. In the event that unnecessary harm occurs, it can require restoration. In the Mono Lake cases, the courts and, consequently, the State Board, required not only the return of the waters to the lake, but also the restoration of the channels of the tributaries.

As to the baseline, as Alex Hoar was discussing, the baseline conditions used in these cases were pre-diversion. In other words, what were the creeks and the lake like before Los Angeles began diversions? The Public Trust Doctrine was not applied here to require a return to 1940. Rather, it was used to require restoration of generally equivalent and dynamic natural conditions. At one point, Los Angeles accused the plaintiffs of wanting to drive 1940 Fords. Not so, but the Doctrine does require a remedy for any unnecessary harm caused to the Trust resources which existed when the diversion began. The Mono Lake cases also resulted in license amendments which require Los Angeles to monitor and minimize continuing impacts of its diversions.

**First Strategy:** Good facts make good law. The Mono Lake cases would not have turned out this way, or at least we could not have predicted that they would have turned out this way, if this

precedent had been sought with regard to a humdrum stream. Instead, we are talking about the second oldest lake in America, in geologic terms, and a place that is quite extraordinary. I am not saying that the plaintiffs who brought the Mono Lake cases had the vision to know they had the facts that would result in the precedents that we now have. As you think about applying the Public Trust Doctrine, be selective in the circumstances available to you, and pick those circumstances that have the best facts, which will help develop better common law.

Second Strategy: Specificity of environmental objective. The Public Trust Doctrine is a "mushy" balancing rule. It requires the state or court to consider Trust uses against other public and private uses. It does not say how the balancing is to be done. If the State Board in 1994 or, for that matter, the Court of Appeal in 1989 and 1990, had been trying to apply the Public Trust Doctrine in the abstract without any specific objective, I doubt if we would have attained the precedents that we now have. Instead, the plaintiffs pursued several specific objectives, including a specific lake level and specific streamflow regimes for the fisheries in the creeks and, consequently, were successful.

Third and Most Important Strategy: Good people make good law. The Mono Lake cases were originally brought by private conservation organizations. But we would not be here today without the courage and leadership of state officials, including three who are in this audience: Hal Thomas, staff attorney for the California Department of Fish and Game; Gary Smith, biologist for the California Department of Fish and Game; and Mary Scoonover, who represents the California State Lands Commissions (which regulates Trust lands), and the California Department of Parks and Recreation. Considering that two of the cases were against the State Board, and the State Board was vigorously resisting these cases, it took considerable courage and individual leadership on their part and on their clients' part as well, to do what they did to make these cases come to life. The Department of Fish and Game became, in effect, a party plaintiff. The State Land Commission was essential to the development and articulation of the remedy in these cases.

There is one other person not present today, but who is the godfather of the Mono Lake cases-- Eldon Vestal. Mr. Vestal is a retired Department of Fish and Game biologist. Mr. Vestal was assigned to these four tributaries in 1947, when Los Angeles began significant diversions. Mr. Vestal issued an administrative order on his own authority to Los Angeles to tell them to stop their diversions, or at least limit them. He was quickly overruled by the Sacramento office of the California Department of Fish and Game and the political process. In time, he moved on to another part of the state, undertook a new assignment, and left behind Mono Lake and the tributaries. Mr. Vestal became a key witness in these cases. It turns out that he had maintained daily diaries of what he observed in the Mono Basin as Los Angeles undertook diversions. These diaries were on old yellow carbon paper. They were critical to our success in proving the extent of harm caused by Los Angeles' diversions. Mr. Vestal, in turn, put it best in the course of the cases. He described how he was convinced the tributaries were lost forever, and the Public Trust Doctrine allowed us to "take another bite out the apple, and bring them back."

It is people like Mr. Vestal and the three state officials that I mentioned, and people like you, that bring the Public Trust Doctrine to life. It was not done by the private conservation organizations on their own, although they often have the initiative and means to bring the cases to the forefront.

Fourth Strategy: Good evidence about pre-project conditions. I cannot underscore this enough. If we had talked about harm in the abstract, we would not have achieved such precedents. Again, we had Mr. Vestal's diaries; we had high-resolution aerial photographs taken in the 1920s, '30s, and '40s, and we had other reliable documentary evidence which demonstrated to the courts' and the State Water Resources Control Board's satisfaction what the habitats and resources were like before Los Angeles began diversions. If I can relate this back to my first strategy (i.e., good facts make good law), you need to involve your attorneys in sorting through your facts and evaluating the reliability of your evidence. You need good evidence of pre-diversion conditions if you want to restore them under the Public Trust Doctrine.

My last recommendation is to enforce the Public Trust Doctrine in an integrated fashion with other laws. The State Board's order in 1994 does not cite the Public Trust Doctrine as its sole basis. In fact, there is no provision in that order that is expressly based on the Doctrine. Instead, the State Board said of the Doctrine, Section 5937 of the Fish and Game Code, the Clean Water Act (insofar as water quality standards were being violated), the Clean Air Act (insofar as the diversions caused air quality problems): all have been violated. All of those laws figured into the order. The laws helped provide the specific measurable objectives which made the Public Trust Doctrine seem less abstract and more workable in the eyes of the courts and the State Board.

Let me now discuss some problems with the Public Trust Doctrine as illustrated by the Mono Lake cases. We are not here as advocates for the Public Trust Doctrine; we are here as advocates for the Doctrine as a strategy you may use to protect your fisheries. So, you need to be aware of problems as well as the advantages. The most obvious problem is cost. My firm has been associated with these cases for only 5 years on behalf of California Trout, one of the plaintiffs. However, in those 5 years we accumulated approximately 60 linear feet of files, and we got involved only in the remedy phase of the cases. Los Angeles spent an amount which is unknown to us outside of the city, but it is estimated to be in excess of over \$20-million. All told, the private plaintiffs spent millions, all eventually recovered from Los Angeles through attorneys' fees. It took Herculean efforts on the part of the private plaintiffs' fund-raisers to pay the expenses of the attorneys, even with discounted fees. State agencies incurred high costs as well.

I am not saying every Public Trust case will generate 60 feet of files. Obviously, this case was important to California and to Los Angeles as a precedent, but it was an expensive and time-consuming way to determine how to allocate the waters of Mono Lake. However, in this case, litigation was the only avenue available to the plaintiffs, since attempts at a negotiated settlement were unsuccessful. If you have a Public Trust case in your state and it might be a precedent that affects many other similarly situated parties, you had better be prepared for expensive litigation. As Mary Scoonover suggested earlier, you better look for opportunities for settlement if you are not prepared to litigate.

Another significant problem in the Mono Lake cases as precedent is that they grow out of unique circumstances. As I said earlier, Los Angeles controlled all the water rights from its point of diversion on the streams downstream to the lake. There were no other water rights contributing to the degradation of these tributaries or significantly to the lake. As a result, it was relatively easy to demonstrate the causal connection between Los Angeles' diversions and the harm suffered by the

Trust resources. In a circumstance where many water rights are contributing to degradation, proving the causal connection will be more difficult.

The Mono Lake cases did not involve the problem of federal preemption, such as at dams regulated by the Federal Energy Regulatory Commission. What we had in the Mono Lake cases was a dispute based entirely on state law against one party causing irreparable harm to a unique resource. In this respect, you should proceed with caution when applying these cases, particularly if you have the complicating factors of other water rights in the basin, possible federal preemption, and so on.

In closing, I want to emphasize a point I made previously, which is, the power of the Public Trust Doctrine to do good. Before the first case was filed in 1979, the attorney for the Mono Lake Committee met with the Los Angeles Department of Water and Power Commissioners and said, "We are going to sue you under the Public Trust Doctrine unless you reduce your diversions." The commissioner laughed and said, "Go ahead." At the time, I think most people involved in water law could not have foreseen what occurred in these cases. These cases were brought against the largest city in the state; they were brought against rights that had been used for half a century; and yet, these cases resulted in a substantial reduction in diversions by that city and will result in the restoration of the creeks and lake itself. While the Public Trust Doctrine would not have done this by itself, it was the spark that brought the statutory and regulatory laws to life and gave the parties the courage to do what they did--bring back resources that had been written off.



# A State Attorney's Perspective on the Mono Lake, California, Cases

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*Mary J. Scoonover*<sup>7</sup>

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The Mono Lake Basin has existed for nearly 10-million years. It has held a lake for approximately 3-million of those years. Therefore, in geologic terms, this litigation has been a drop in the bucket. That is good news. We sometimes get lost in the present and overwhelmed with the tasks that are facing us and, consequently, often do not take the long term vision.

I am going to discuss three different parts of the Mono Lake cases and application of the Public Trust Doctrine strategies, as well. I will discuss these from a state Trustee perspective. Richard Roos-Collins and I have slightly different interpretations of the Mono Lake judicial opinions; our opinions are representative of our clients' interests and responsibilities.

During the Mono Lake litigation, I represented the California State Lands Commission and the California Department of Parks and Recreation. The State Lands Commission is the owner of the bed of Mono Lake. Parks and Recreation administers the Mono Lake Tufa State Reserve.

You have already heard quite a bit about the set of cases that culminated in the California Supreme Court's decision in the National Audubon Society case. In that decision, the court articulated three fairly clear guidelines regarding the Public Trust Doctrine and appropriative water rights: no party may claim a vested right to divert water "once it becomes clear that such diversions harm the interests protected by the Public Trust"; before state agencies approve water diversions, "they should consider the effects of such diversions upon interests protected by the Public Trust, and attempt, so far as feasible to avoid or minimize any harm to those interests;" and, as a matter of practical necessity, the state may have to approve appropriations despite foreseeable harm to Public Trust uses. In doing so, however, the state must bear in mind its duty as a Trustee to consider the effects of the taking on the Public Trust, and to preserve, so far as is consistent with the public interest, the uses protected by the Trust."

The California Trout stream cases that Richard referred to and that Justice Blease spoke about had a different twist. The California Fish and Game Code provisions requiring full compliance with releases of streamflows downstream of dams were a legislative interpretation of the Public Trust Doctrine. The legislature clearly articulated that the legislative preference was for fish preservation. Thus, there is no balancing of competing uses to be done by the water allocation administration agency. The legislature had determined that, in any situation where a dam exists, sufficient water

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7. Ms. Scoonover's biography is presented in Appendix B.

must be released over, around, or through the dam to protect the fishery downstream in good condition. The legislative preference was for Public Trust use. That preference was clearly defined by the decisions of the Third District Court of Appeal.

After the National Audubon and California Trout decisions, the State Water Resources Control Board (State Board) undertook administrative hearings. It took the rulings from the National Audubon case on lake levels and the California Trout rulings on the instream flow issues, and entered an evidentiary hearing in order to try to determine what that meant in terms of modifying the City of Los Angeles' water rights. Hal Thomas, Gary Smith, Richard Roos-Collins, a number of others, and I spent more than 43 days before the State Board arguing lake level and streamflow issues. That is the bad news. The good news is the State Board did the right thing and ordered that the lake elevation be allowed to rise to a level that will protect Public Trust resources. It also set minimum stream flow regimes for the four tributary streams affected by Los Angeles' diversions.

In addition, the State Board also required that Los Angeles develop restoration plans to restore stream and waterfowl habitats. We are currently in the process of negotiating development of these plans. The stream habitat restoration plan includes activities such as replanting riparian vegetation; opening closed or abandoned stream channels; implementing appropriate channel flushing and maintenance streamflows in order for the streams to function in a natural, dynamic manner; and addressing other restoration concerns for the creeks.

The waterfowl habitat restoration plan includes waterfowl habitat development along the lake's margin, along the tributaries, and potentially rewatering another major tributary to Mono Lake (Mill Creek), for waterfowl habitat purposes. Mill Creek is not diverted significantly by the City of Los Angeles. (Los Angeles does divert some Mill Creek water for in-basin irrigation.) Most Mill Creek water is diverted by the Southern California Edison Company for hydroelectric power generation. Edison's project is a Federal Energy Regulatory Commission (FERC) permitted project. Mill Creek was diverted for hydroelectric power production quite a while before Los Angeles entered the basin. The involvement of FERC and the age of the project are why Mill Creek's water rights were not subject to the same State Board hearing. Mill Creek provides a significant opportunity for stream and waterfowl habitat restoration in the basin. We are hoping that, through the waterfowl habitat restoration efforts, we will be able to realize its potential benefits. That battle, however, remains to be fought. We are currently in a cooperative problem-solving mode, but we also are keeping in mind the long history of litigation.

I believe that the success of these Mono Lake cases rest on a multi-faceted strategy. The Public Trust Doctrine was not the only tool used to protect the lake. State and federal statutes were used. Some of these statutes are:

- California Fish and Game Code Provisions.
- State and federal Clean Air acts: When the lake receded, the exposed lake bed was the source of some of the worst PM10 violations in the continental United States.
- Federal Clean Water Act: Mono Lake was designated an outstanding resource water.
- California Wilderness Act of 1994: The U.S. Forest Service designated Mono Lake a National Scenic Area.

- Endangered Species Act: The lake's brine shrimp was under consideration for listing.
- Federal Funding for Reclamation Projects: In 1981, the state reserve was created and there were a number of state legislative efforts to help fund replacement water.

There were a number of environmental groups that worked very hard not to transfer environmental problems at Mono Lake to another locale. The Mono Lake Committee and others spearheaded efforts to get state and federal funding to help fund replacement water sources. There were, however, some problems with that. An editorial writer for the Sacramento Bee newspaper described this effort as paying a burglar to stop repeatedly burglarizing your home. There was a sense that Los Angeles was behind in the legal battle and that they needed to step forward and accept responsibility for their actions. This was a long-standing use of water that was done under existing water rights permits, but the reality of the situation was such that finding replacement water, or funding to help replacement sources; including reclaimed water, water conservation opportunities, and others, was a politically sound thing to do. It worked in this circumstance.

The environmental groups also made effective use of their public outreach (e.g., providing tours of Mono Lake, publishing newsletters, and so on). The Mono Lake Committee and others encouraged and funded/directed scientific research to establish the body of facts and law necessary to protect this resource. They also obtained special designations for the lake. For example, it is a designated Western Hemisphere Shorebird Reserve Network lake, which is part of an international network. They provided lots of scenic pictures of the lake, and they raised the issues to the people recreating in the area who carried the message home with them.

The environmental groups included local people and organizations in a battle to save Mono Lake, convincing them that it was in their best financial interest to protect this wonderful recreation opportunity. The Mono Lake Committee distributed a newsletter and held bike-a-thons and numerous other-fund raisers, all focused towards involving the public in the effort to save the lake.

Another alternative the environmental groups attempted was a dispute resolution process. Ultimately, this process did not result in resolution of the issues. The discussions did help the participants reach consensus on state and federal funding, and the cost-sharing for replacement water supplies, and it helped improve contacts, build trust, and gather information. A lot of information sharing occurred at that time. That, too, was a wise approach.

Eventually, the State Board unanimously approved the plan to save Mono Lake for four compelling reasons. The first was on the basis of the weight of the scientific evidence. Scientific evidence that was developed--even before Eldon Vestal, although he was a significant part of it--showed unquestionably that the impacts to Mono Lake were significant and continuing and could be potentially disastrous if the water diversions were allowed to continue.

Second, there was a persuasive body of law that was built through the cases that we have talked about. Third, there was overwhelming public support for protecting Mono Lake. Fourth, because of the cost-sharing efforts, the solution became politically palatable. It was easy for the State Board to vote to raise the lake water surface elevation and diminish diversions because all of these components were in place.

The Los Angeles Department of Water and Power has come a long way. In the beginning of this controversy, they were referring to the California gulls that inhabit the basin as winged rats, and the water that flowed into Mono Lake as water wasting into a saline sink. At one point during the dispute resolution process, someone suggested that one manner of refilling the lake would be to take all of the toilets they were retrofitting for ultra low flush toilets in the City of Los Angeles and dump them in the lake, therefore, displacing enough water to raise the lake's water surface elevation. The Los Angeles Department of Water and Power no longer makes such references in public, primarily because there was strong public backlash to such tactics. The Mono Lake Committee did a good organizing job in Los Angeles' back yard.

I do not want to leave you with the impression that the lake is going to be returned to its natural state. The level to which the State Board ordered the lake be allowed to rise is an average surface elevation of 6,392 feet. This is significantly less than its pre-diversion elevation. It clearly was a compromise. It may take 20 to 30 years, depending upon precipitation and run-off, to reach this elevation. Currently, the lake is at 6,378.8 feet and rising. The four creeks are running and restoration efforts are underway. With implementation of the stream restoration and waterfowl habitat restoration plans, we may actually see more restoration occurring on the ground.

The Mono Lake decision is not a perfect decision. It is not a return to natural conditions. However, it is a reasoned decision.

# Recent Experiences With the Public Trust Doctrine in Idaho

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Idaho has some similarities with the situation we have heard about in the Mono Lake cases, but it also has a lot of differences. I am going to describe two recent cases in Idaho involving the Public Trust. These cases represent a lot of the themes we have been hearing today--limitations of the Public Trust Doctrine and some of the opportunities it offers.

The first case involved the Snake River Basin adjudication. This is an adjudication of water rights that started 10 years ago and is going on in Idaho today. It is a general stream adjudication intended to adjudicate 90 percent of the water rights in Idaho.

The Snake River flows through southern Idaho, along Idaho's borders with Oregon and Washington, and then flows into Washington, joining the Columbia River. Some of its tributaries are rivers such as the Salmon River, the Clearwater River, the Payette River, and the Boise River. Most of Idaho ends up draining into the Snake River and this adjudication will determine the surface and ground water rights for the entire basin.

State agencies are involved. Federal agencies are involved. Indian tribes are involved. And, of course, water rights holders are involved. Conservation groups were not involved. Conservation groups were concerned that the process was expected to take 10 to 50 years, would result in a complete cataloging of water rights in Idaho, and would never consider the public interest or conservation perspectives. Taxpayers were funding the review, but the parties to the adjudication were the state, federal, and tribal governments; and water users. Members of the public could not be involved in the adjudication of water rights, even though it was often described as simple cataloging of who has what and what it "all" is (i.e., I have got 3 cfs out of Billingslay Creek that I use on fields in this location and my priority date is 1899). In fact, water rights adjudications involve a lot more than that.

We have heard about doctrines of Reasonable Use and Beneficial Use. The duty of water is one of the aspects of the water right. You cannot waste water; you have to use it reasonably and beneficially. The duty of water pertains to what is reasonable, beneficial use. If you flood irrigate a potato field in eastern Idaho today, as they did in the early part of this century, using so much water (in some cases up to 16 acre feet per acre) that the underground water zone rises, it would be considered wasteful in view of today's demands, high efficiency sprinklers, and other forms of irrigation.

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8. Mr. Lucas' biography is presented in Appendix B.

Should the Idaho Department of Resources be recommending water rights that are based on that kind of wasteful use or should they be undertaking some kind of review to look at the duty of water? If you can scale back the amount of water people are taking out of the stream for off-stream uses, you would improve your chances of leaving more water in the stream.

Under the Prior Appropriation Doctrine, if someone has a senior right and that right is reduced, that means more water would be available for a junior appropriator. Somewhere along the line you may free up more water for the stream, and there may be a way to hold that water in place for fishery, riparian, and other purposes.

The theory was that conservation groups needed to have a voice in the adjudication in order to see that environmental needs received adequate consideration. How are they going to do it? Conservation groups do not have water rights, and the adjudication is a game that is being played only by water rights holders. So, the Public Trust Doctrine became the principal theory for arguing that the public and conservation groups should play a role in this process. Can conservation groups have a voice in this water rights adjudication using the Public Trust Doctrine as the major theory?

The adjudication in Idaho, rather than taking on the entire state, has carved out a couple of test basins. People who see dark conspiracies think that Idaho Department of Water Resources chose these basins because they raise certain issues and not others. In fact, they were not ideal basins to raise conservation interests.

The key factual descriptions that we have heard about Mono Lake involved unique ecological resources being killed by one water user. Those kinds of scenarios were not presented in the test basins we had to deal with. We could not point to a declining lake level that is drying up or perhaps killing the breeding ground for important bird species. We did find some important resources in the three test basins, and raised theoretical Public Trust objections to those. But, more importantly, we raised the overall argument that the adjudication was going to be deciding water rights for the entire State of Idaho. When it is done, those water rights are going to be like concrete. It is going to be very tough to upset them.

If the Department of Water Resources is not making judgment calls about what are acceptable irrigation and transfer ditch conveyance losses, when will such things be considered? The duty of water--how do you administer water rights? What is the practice for rotation? Can you take water out of season when there are high spring flood flows? A lot of those issues are involved here. There are a lot of judgment calls, and, in exercising that judgment, should not the water agency be thinking about the public interest? It expressly said it was not. All it would do was look at historical practices, implement rights the way they saw them, and go forward on that basis. There was no proposed consideration of the public interest in the adjudication. We believed that there should be.

To get involved, we had to intervene. The legal theory was that we would become parties by intervening; we had this public interest we wanted to advance. We went to the Idaho Supreme Court and, in arguing that the Public Trust played a role in Idaho water law, we were working from some historical precepts.

I want to give you a sense of how we argued that the Public Trust was part of Idaho water law so that you may be able to understand how that would apply in your states. We have already heard some of it from Wisconsin, and from other states represented here. First of all, we argued that the Idaho Constitution reflected the Public Trust Doctrine. Our constitution states that all water uses shall be deemed public uses. There was one guy in the Idaho Constitutional Convention in 1889 who said they took this public use provision from the California Constitution, and, in California, "They felt it necessary to declare water appropriate for public use a Public Trust, and that the legislature should have the right to prescribe suitable laws concerning it." There are those words "Public Trust." And, there are old cases in Idaho that talk about water and it being so precious in an arid environment. It is so precious that it is held like a Public Trust.

We also had the legislature in the 1920s appropriating certain important recreational assets--waters, certain lakes, and springs in Idaho--to be held in Trust by the state for the people. This is not a minimum instream flow law. They are actually protecting lake levels in lakes like Lake Pend Oreille and Lake Couer d'Alene and certain springs in the area. Again, this action affects the concept of water being held in Trust for the people.

In 1978, some conservationists threatened to put an initiative on the Idaho ballot to adopt a minimum instream flow statute. That scared the Idaho legislature enough that the legislature passed its own minimum instream flow law. There are many flaws in that law (see Idaho Code Section 42-1501, *et seq.*). It allows only the State Water Board to appropriate water that is otherwise unappropriated. So, you have to find some streams that haven't been completely appropriated, and then convince them that the water should be appropriated for instream purposes. In southern Idaho, that is pretty tough. Furthermore, the minimum instream flow law allows appropriation of only the minimum amount necessary to protect fish and wildlife. It is also held that this appropriation is subject to later beneficial use appropriations. In other words, someone could come in and say we need this water for hydroelectric power production or farming, and the water board could potentially eliminate the instream appropriation in favor of the off-stream uses. There are other limitations with the instream flow law. The Idaho Water Resource Board has not been too friendly. Cindy Robertson, with the Idaho Department of Fish and Game, has worked hard over the last decade to put the instream flow statute into effect. I think she has done a great job, but the law has had limited impact on Idaho. Yet, in my arguments, I was able to say here is this instream flow law that protects these public interests in water.

We had some court decisions in the 1980s that also helped us out. In particular, we had a case that came after the Mono Lake case called Kootenai Environmental Alliance v. Panhandle Yacht (105 Idaho 622, 671 P. 2d 1085, 1983) that was helpful. It was not a water rights case. It was a submerged lands case involving Lake Couer d'Alene. Someone wanted to develop a marina, and the people who live around Lake Couer d'Alene loved that area for fishing, swimming, boating, and so on, and said that a private marina would adversely affect their activities and use of the lake. Lo and behold, the Idaho Supreme Court recognized that, in fact, the Public Trust Doctrine does apply in such circumstances. The court issued a lengthy opinion that discussed Massachusetts, Wisconsin, and California experiences with the Public Trust Doctrine, and ended up saying we follow the California rule. Even vested water rights are held subject to the Public Trust Doctrine. The Doctrine imposes a continuing duty of supervision on the state to make sure there are no impairments of

Public Trust resources. The courts are the final determiners of whether the state is adhering to its Public Trust obligations, and great language like that is powerful and helpful to us even though it was not a water rights case.

This submerged lands case was followed by another case a couple of years later that did deal with a water rights application (Shokal v. Dunn, 109 Idaho 330, 707 P. 2d 441, 1985). When the Idaho legislature adopted the minimum instream flow statute in 1978, it also adopted a public interest criteria within our water code (see Idaho Code Section 42-203A(5)). Any new application for water rights now has to look to see whether you will injure other water rights. Is there sufficient water? Does it conserve water resources? Is it in the public interest? That public interest was interpreted by the Idaho Supreme Court in the Shokal case to basically incorporate the Public Trust Doctrine. And, in that case, the court said that the values protected by the Public Trust Doctrine are navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. We have seen a real expansion from the historical bases of navigation, commerce, and fishing to protecting all these ecological concerns, public use concerns, and so on.

The public interest criteria applies to people who change water rights, too. If you are going to change the way you use your water in Idaho now, you are supposed to apply for a permit and go through the public notice and hearing process. The public interest review process applies. It has become effective in specific circumstances to protect fish and wildlife in the state. Indeed, we have had several cases where minimum instream flows have been imposed upon the water rights holder to protect sensitive or endangered species. The Thousand Springs area in Idaho was protected by minimum flows; the requirements were imposed under the local interest criteria (see Hardy v. Higginson, 123 Idaho 485, 849 P.2d 946, 1993).

But that is all forward-looking. What about the water rights that have been developed over the last 100 years from the Mormons and others who came in and settled the dry lands along the Snake River and other rivers, and turned what was the desert into productive agricultural lands? In the course of doing so, they routinely dewatered streams and rivers throughout the state. What about the impact of that? How do we get a measure of the impact? That is where the Public Trust Doctrine comes in and really what we wanted to do with the Snake River Basin adjudication. We were strongly opposed by all the irrigation interests in the state, as well as by the State of Idaho, which took the position that the Prior Appropriation Doctrine itself, with the reasonable beneficial use concept, actually protected the public interest. Their position was, "there is nothing more to do," water rights are vested property rights; you cannot take them without paying compensation. The conservation groups want to take water off our fields so they can kayak on them. I heard such comments over and over again. There was a lot of stonewalling and belittling of the concerns we were advancing.

The Idaho Supreme Court took 2 years to rule on this issue. After a lot of jockeying with the issue, they issued an opinion that was very bad for the Public Trust Doctrine. We then persuaded the court to reconsider that opinion, and they came back with another opinion that was very short, but said as follows:

"The adjudication of water rights in this massive adjudication does not include the Public Trust. It is not one of the things the legislature told the courts to consider. However, all water rights are held subject to the Public Trust Doctrine." (See Idaho Conservation League v. State of Idaho 127 Idaho 688, 911 P. 2d 748, 1995).

In other words, the result was we could not go in as an adjudication party to raise the Public Trust to challenge existing water uses, but we could go in to any other court in the state to do so. We could file a similar kind of complaint as used in the Mono Lake cases--where they filed a complaint in court and said give us a declaration of our rights--these water uses are violating public interest and there is a need to do something about it. So, the door is open right now in Idaho law to bring a Mono Lake case. I fully agree with what Richard Roos-Collins has said about being selective. Look for the compelling facts; do not use the Doctrine on any old stream or spring. Find a really key area where there really is no other way to go and you need to apply the Doctrine.

Professor Sax said that the Public Trust Doctrine has not yet been used to climb up out of the streambed to affect timber management. In fact, there was a recent case in the Idaho Supreme Court involving the Doctrine and timber harvest on state endowment lands (see Selirk-Priest Basin Association v. State, 127 Idaho 239, 99 P. 2d 949, 1985). The forest industry in Idaho had cut off all avenues to appeal state timber sales. An environmental group developed a theory that navigable streams run through the state lands. Those are Public Trust assets because the submerged beds were given to the state upon entering into the union and heavy siltation from clear cutting could kill fish and destroy habitat in those streams, thus affecting the public. The Idaho Supreme Court said that this is a plausible theory. However, the Supreme Court did not stop the timber sale because the lower court had ruled against the plaintiffs; it just sent the case back for further proceedings.

The possibility that the Public Trust Doctrine could be used to tackle timber harvests in Idaho at the same time that the Idaho Supreme Court, in my case, said all vested water rights are held subject to Public Trust has created a union between timber and irrigation interests in the state. These are two of the most powerful political lobbies and political interests in Idaho. They drafted legislation that was introduced on the sly that would have significantly reduced the scope of the Public Trust Doctrine. It would have undercut the Supreme Court decisions, and limited the Public Trust Doctrine to the alienation or encumbrance of title to submerged beds. Clever lawyers will argue that they have not changed the Doctrine at all, but it is intended to gut the Doctrine and our small accomplishments. This demonstrates that the potential for legislative backlash is very real. If you do not have strong public support or Public Trust arguments, you face a real threat of losing in the legislature that which you may have gained in the courts.

I loved hearing about the Wisconsin experience where the Public Trust Doctrine is clearly written into the constitution. But, more importantly, they have been living it for 50 years. In Idaho, the Doctrine is a new concept, and that scares people. They do not know what to make of it. They think we are going to shut off irrigation in southern Idaho. None of us want to do that. We are worried about those critical areas where you do have a critical fishery resource and you need the Public Trust to protect it. Unfortunately, I was not able to fashion my arguments in that very case-specific type context that we heard about in the Mono Lake cases.

Now, let me present an example of how the Public Trust Doctrine should work--the Auger Falls Dam example. The middle Snake River, which flows through southern Idaho, has about 15 dams on it. It is typically called Idaho's working river, but everyone in Idaho realizes that river has nearly been worked to death. The river is a series of slack water pools, with a few free-flowing stretches left. There are terrible water quality problems. One of the remaining free-flowing reaches is near Twin Falls, Idaho. This is a major agriculture area, but people there care about their river. They care about the free-flowing aspect. People in the City of Twin Falls often take evening walks and look over the beautiful Auger Falls. People fish, hunt, and enjoy the river. They do not want to see the river further impaired.

Under the federal Clean Water Act, the river is listed as water quality limited and total maximum daily loads imposed that could affect the industries in that area. The general public, agriculture, and industry are working together on a voluntary plan to clean up the river to avoid federal regulation. These groups do not want another dam on the river, and this includes the existing hydroelectric power industry.

A developer from Salt Lake City, Utah, proposed to develop a hydroelectric plant at the Auger Falls site near Twin Falls under the Public Utilities Regulatory Power Act of 1979, which is a federal law allowing small, private hydroelectric projects to be constructed and electrical utilities have to buy their output. The developer has been working on the project for 15 years. There has been substantial public opposition to the project, but there have been few opportunities for the public to express its opposition. Federal agencies have issued permits for the project. The U.S. Army Corps of Engineers issued a permit in 1996 without holding a public hearing. The Federal Energy Regulatory Commission (FERC) issued a license in 1990 based on hearings that were held in 1988--long before a lot of the problems were known. The Idaho Department of Fish and Game, the U.S. Fish and Wildlife Service, and the U.S. Environmental Protection Agency opposed it. Virtually anybody considering the resource opposed it, but the project slowly ground forward through the bureaucracies and the licenses were coming through. The project proposed to begin construction during spring of 1996.

We found that the project needed an easement to put the dam on the bottom of the Snake River, and that those submerged lands were owned by the state and were held subject to the Public Trust Doctrine. Consequently, the State Land Board had to approve that easement. In fact, the FERC license indicates that the project has to get such an easement for the project. I wrote a letter to the state in November 1995, indicating that an easement was required for the project, and that before granting an easement, the state should hold a public hearing. Idaho's State Land Board is comprised of Idaho's five highest elected officials, four Republicans and one Democrat--a very conservative body. Regardless, the state agreed to hold a public hearing in Twin Falls. A broad range of the population attended the hearing--young, Republican, Democrat--all political stripes were there. Unanimously they said do not put the dam in. The elected officials of the State Lands Board heard this message and voted to deny this easement for the dam, completely astounding the developer. Such easements had been routinely granted in the past. As far as I can tell, this is the first time a federally-licensed dam has been stopped on state Public Trust issues. This was a real escape valve for public sentiment to find a legal way to stop a project that the public really did not want. Fortunately, the elected officials listened.

As a result of the board's decision, I anticipate that we are going to have interesting federal preemption issues. I will be arguing that the FERC license does not preempt the state's authority and decision. It is not a water issue which is where preemption cases have been decided before; it is a land issue. I believe FERC clearly recognized the state's authority from the beginning when it included the provision of the license that the developer had to get an easement. This is an important case and, ultimately, it may go to the U.S. Supreme Court.

The importance of this issue to Idaho is that it showed the vitality and importance of the Public Trust Doctrine at the same time that the irrigation and timber interests were trying to gut the Doctrine.



# Application of the Public Trust Doctrine Where Navigability Has Not Been Determined

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I am going to discuss several points this afternoon. First, what do you do if you get into the situation Professor Sax described this morning, where your state decides to give it all away to avoid angering the powers that be? Secondly, what do you do when the navigability of a river that you are seeking to protect is disputed? How does the Public Trust Doctrine apply? Thirdly--and this is related to the second point--how do you prove a river was navigable at statehood, particularly if your state was admitted to the Union 100 years ago or so?

A little bit of background on Arizona and Public Trust. Arizona was admitted to the Union in 1912. As Professor Joseph L. Sax said this morning, at the instant of admission to the union, the state became the owner and Public Trustee of all the rivers and lakes that were then navigable. Unfortunately, however, the State of Arizona was not very zealous about protecting and exercising its Public Trust obligations and responsibilities, or asserting its Public Trust interests in rivers and lakes after statehood. Except on the Colorado River, the state pretty much slept on its obligations and responsibilities.

This situation began to change in the 1980s on the Verde River. The Verde is a perennial river in central Arizona, which is something of a rarity in Arizona these days due to diversions and consumptive uses. The Verde River Valley holds one of the state's best riparian habitats. It is prime cottonwood/willow habitat. The valley supports some of the largest bird populations and bird densities in the country. Many major species, such as bald eagles and peregrine falcons, are found in the valley. What happened on the Verde? A sand and gravel company moved into the river channel. The company is systematically excavating the river channel and the beautiful riparian habitat.

Well, the then-Governor of Arizona, Bruce Babbitt, who is a geologist and a lawyer, had done his homework in law school and had heard about the Public Trust Doctrine. Consequently, he informed the gravel company that it was trespassing on state-owned Public Trust lands, and that they must cease operations and withdraw from the channel and riparian areas. This sent shockwaves through the sand and gravel industry, which mines virtually every riverbed of any size in the state. It also sent shockwaves through Arizona's title insurance industry. Since the State of Arizona had been sleeping on its Trust rights and responsibilities for many years, apparently, the title insurance industry had not done its homework and had insured titles to many riverbed lands which could now,

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9. Mr. Baron's biography is presented in Appendix B.

in fact, be Public Trust lands of the State of Arizona. So, the two industries joined forces, went to the state legislature and yelled, "You have to do something about this." The legislature obliged and passed a statute relinquishing the state's claims to all the river beds and lake beds in the state, except for the Colorado River. Bruce Babbitt was still governor and he vetoed the bill. However, Governor Babbitt left office the next year. The legislature again passed the bill and the new governor, Evan Meacham, signed the legislation.

So, this is the situation. The Arizona legislature had relinquished the state's rights--any rights to title or claim the state might have based on navigability to all the rivers and lakes in the state. In most cases, this was done without charging any fee or compensation at all. On a few rivers, the state would collect \$25 per acre for issuing a quit claim deed for these lands. In some cases, these lands were worth as much as \$61,000 per acre. In response to this legislation and the subsequent give-away, the Arizona Center for Law in the Public Interest started a suit on behalf of conservationists, river runners, and wildlife organizations, arguing that this legislation was a blatant breach of the Public Trust, and that it also violated the state constitution, which prohibits the gift of public assets to private parties. A number of state constitutions across the country have similar provisions. I know California has a similar provision, as do a few of the new England states. The case was defended primarily by the sand and gravel and title insurance companies. The Arizona Attorney General's Office could not defend this statute because they had told the legislature when it tried to pass this law that this was not right, and the legislature could not do it. So, when the legislature went ahead anyway, the Attorney General's Office excused itself. Consequently, the State had to hire outside counsel to defend itself. The defense's argument was basically this. The navigability of these rivers has never been determined. Many of the rivers are dry for a good part of the year. The state does not have any Trust interests here. These are not navigable rivers, or at least they have not been proven to be navigable at statehood; therefore, the state is not relinquishing anything. We felt compelled to present evidence that this was not the case.

Many Arizona rivers and lakes were not only navigable at statehood, but are navigable today. We presented various kinds of evidence, and this is the sort of thing that you will probably get into as well if you have to address this issue. First of all, the most obvious evidence would be historical accounts of actual boating on rivers. As Professor Sax said, the test of navigability for the federal navigability for title test is that the waterway had to be susceptible for use for the transportation of people or goods and commerce at the time of statehood. So, although you do not have to show that there was actual boating at statehood, you have to show that the river was susceptible for that use at statehood. If there was actual boating on a particular waterway, that is pretty good evidence, particularly if it were on a regular basis. We introduced historic evidence of actual boating on several rivers from some of the early westward expeditions. Ferry boats were often used to cross a number of our rivers on a regular basis. We introduced some colorful stories of fur trappers who went out, fought the bears and trapped beaver, while all along canoeing in the Gila River, and so on. We also presented historic observations of river depths, widths, and flow levels. Stream gauges were not regularly maintained on most of these rivers until well after statehood. There were, however, early military expeditions where there were reports of the depths and widths of rivers, and some of these explorers actually speculated that this or that river could be navigated and could be used to drive logs on down from the mountains, which, by the way, is a form of navigation under the federal test. If the river could be used for log drives, it can be found navigable. And that is true even if it

can be used for log drives only during a few months of the year. The Ninth Circuit Court held this in an Oregon case (State of Oregon v. Riverfront Protective Association, 672 P. 2d 792, 9<sup>th</sup> Cir., 1982).

We also offered evidence of expert testimony by people who boat these waterways on how much water they need to boat on a specific river; i.e., what depths, what streamflow levels, and so on, and we correlated those with the kinds of depths and flow levels that the historical accounts showed. In addition, we offered evidence of present-day boating. For example, we presented evidence of canoeists near the headwaters of the Verde River. The Verde is not a large river like the Columbia River in the Pacific northwest; it is a small river typical of most Arizona rivers. One of our expert witnesses has run many of the rivers in the state. As a matter of fact, he has also written books about it. He, and other river runners, testified that they could run this stretch of the Verde in modern canoes at streamflows as low as 25 cubic feet per second, and in river depths as little as 2 inches. They indicated that for old fashioned row boats or canoes they would need 6 to 12 inches of water. Actually, the middle reach of the Verde River is used for commercial river rafting trips today. That was another argument that we made. Clearly, the river is a navigable waterway since these were commercial trips and, thus, the river is a "highway of commerce".

The other side, of course, argued that was not the appropriate kind of commerce. They were talking about freighters, warships, the Queen Mary, and so on. Clearly, you cannot get those kinds of boats down these rivers. That issue was not resolved in this case and, in fact, it has not yet been resolved by the courts. There are a few cases dealing with navigability that have held that touring is a form of commerce. There was a case in Alaska a few years ago where almost all of the evidence consisted of present-day boating for commercial river-rafting, but the rafts used were similar in size and water displacement to the kind of rafts used at statehood. Unfortunately, however, the courts have basically danced around this issue. So, the question remains, do modern-day uses, with modern-day equipment, and commercial sightseeing trips qualify under the test of navigability? We did, however, make that argument very strongly, particularly in our state where tourism is a big business (State of Alaska v. Ahtna, Incorporated 981 P. 2d 1401, 9<sup>th</sup> Cir., 1989).

You can have navigability determined on a downstream stretch of a river even though an upper reach is not navigable. For example, Oak Creek, a tributary to the Verde River, is not navigable in its upper reaches, but is in its lower reaches. Furthermore, occasional barriers or impediments to navigation do not make an entire river reach non-navigable. On many of our rivers, vegetation occasionally extends from bank to bank across the channel (river runners call these strainers), blocking the waterway. These occasional impediments do not defeat a showing of navigability. The courts have consistently said that occasional impediments do not defeat navigability as long as you can still use the waterway as a whole for transportation. If you have to portage every once in a while, if you hit a few sand bars here and there, it does not defeat navigability.

The defendants pointed to the Salt River, which flows through downtown Phoenix and, yes, it is dry most of the year. Actually, it is dry most of the year because it is dammed 30 miles upstream of Phoenix. The defendants stated that there is no interest left in the river since it is dried up and, besides, there is gravel mining there, and we are dumping garbage in the channel--believe it or not. For many years, the City of Phoenix and other municipalities have been dumping garbage on the banks of the Salt River.

Our response was two-fold. First, the issue is not navigability today, but navigability at statehood. The river was navigable at statehood. Consequently, the river is part of the Trust whether or not it is dried up today. In fact, there is substantial evidence of navigability of the river at Phoenix during early statehood. Second, the Salt River can be restored. Downstream of Phoenix, the river receives treated water from the City of Phoenix. Essentially, this is dammed Salt River water that had been supplied to the city and is now being given back to the river. In the downstream areas, after receiving the treated water, the river channel supports some of the finest riparian habitats in the state. The Audubon Society conducts its annual bird counts in this area. Numerous bird species, including the Yuma clapper rail, an endangered species, live there. So, restoration of Trust values, and the mere fact that it is dry today, does not mean that a riverbed has no Trust value.

After reviewing all the evidence, the court held that we had presented sufficient evidence to show that the state had substantial claims to these riverbed lands based on navigability under the Public Trust Doctrine. The court did not decide on navigability, it simply said that there is enough evidence to say the state has a colorable claim and that is enough to trigger the state's Trust responsibilities. The state does not have to go to court, prove that a river was navigable at statehood, and get a judicial determination. It is enough if there is evidence from which a court might conclude that the river is part of the Trust. The court went on to say that the Public Trust Doctrine and the Gift Clause of the Arizona Constitution prohibits this kind of wholesale relinquishment of Trusts of assets. Before making a wholesale disposition of such lands, the state must conduct a case by case investigation to quantify the Trust values at stake and determine the strength of the state's claim based on navigability. If the state determines to relinquish its title--its *jus privatum*--to the bed, it must make sure that it insures protection of the Public Trust uses that remain in the channel (Arizona Center for Law v. Hassell, 837 P. 2d 158, Arizona App., 1991).

So, here are a few overview conclusions from all of this. First, the state cannot give away its Public Trust rights, responsibilities, and obligations--particularly not in the wholesale fashion attempted by Arizona. I would venture to suspect that the same concepts apply even if the state were trying to do so in a less aggressive manner. Suppose, for example, someone was trying to give away a whole river system, or the whole river, based on the non-navigability of one stretch. That would not be permissible. Second, the fact that the state has slept on its rights for many years does not matter. The fact that the state had said nothing about the Verde River for all those years did not preclude the state and Governor Babbitt from reasserting the Trust. Third, rivers and lakes are part of the Trust and can be protected even if they are not navigable today, if there is evidence they were susceptible for use in navigation at statehood. Present day use by recreational boaters, canoeing, kayaking, and so on, although not necessarily conclusive of navigability, is probative of navigability at statehood. My final point is there is hope for those of us from states with small water supplies, with rivers with low streamflows--and the Public Trust Doctrine still lives in the west.

# The Public Trust Doctrine and Protecting Instream Flows: A Vermont Case Study

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Several Public Trust principles are illustrated in a 1996 lawsuit filed by Conservation Law Foundation (CLF), challenging Vermont State rules governing water withdrawals for artificial snow making. The CLF lawsuit provides several practical lessons for protecting instream flows under the Public Trust Doctrine.

Water use historically has not been a major environmental conflict in New England. We have had relatively few of the water battles that have long plagued arid western states. In recent years, however, Vermont, like other New England states, has struggled to meet increased demands for water by towns, hydroelectric dams, and ski areas.

One out of stream use--artificial snowmaking--is currently the focus of a major streamflow conflict in Vermont. The resolution of these snow wars will largely determine whether, and to what level, other much larger water users--like dams and municipal water users--will be required to protect instream flows.

Skiing is New England's chief recreational industry and ski areas have tremendous political power in Vermont. Vermont ski areas argue that snowmaking is the life blood of the industry and that loss of unlimited water sources would destroy their competitive edge, crippling them financially. With fierce competition in the industry for a shrinking market share and unpredictable weather, snowmaking is viewed by the skiing industry as essential. As a chairman of the Killington Ski Resort, which is Vermont's largest ski resort, recently said to the Wall Street Journal, "Without snowmaking, we couldn't have put in gondolas and high-speed lifts. And once you have developed the amenities, you can't live without snow making." Today, in many areas in the east, natural snow is now irrelevant. Real snow is harder to find than wooden skis.

To make artificial snow, many resorts end up drawing New England streams to drought levels, threatening fish habitat, and crippling water supplies for other needs. And many of the diversions are located in the wrong place--in small headwater streams where water is scarce.

For many years, the State of Vermont has issued streamflow alteration permits for snowmaking activities without any protection for instream needs. These old permits were issued without expiration dates. In recent years, however, the state environmental agencies have identified

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10. Mr. Sinclair's biography is presented in Appendix B.

streamflow alteration as a major water quality problem, and required ski areas that expand snowmaking to improve streamflows through investment in water conservation and storage ponds. However, the ski industry objects to making streamflow improvements, stating that they cannot afford costly storage ponds, that there are no studies showing that snowmaking has hurt fish, that ski areas have vested rights under prior permits to continue to draw streams down to drought level, and that they use much less water than other users. As a result, the environmental community and ski resorts have spent many years in highly-charged administrative proceedings challenging agency permits as either being too weak or too strong in protecting streamflows.

In response to these conflicts, in 1995, Vermont's Governor and Legislature decided to pass legislation requiring the environmental agency to adopt snowmaking rules that would give ski areas a break. As a result of a backroom agreement between the ski industry and certain key legislators, new rules were drafted that would allow ski areas to keep all the water historically used, and to reduce streamflow protection standards for new withdrawals.

In February 1996, CLF filed a lawsuit in a Vermont state court, challenging the new water withdrawal rule for ski area snowmaking activities. CLF's lawsuit charged the new snowmaking rule violates the state's affirmative obligation under the Public Trust Doctrine and State Constitution to protect fisheries and conserve water. As a subdivision of the state, the Vermont environmental agency must respect the Public Trust duties and limitations placed upon it as Trustee of Vermont's public waters--whether a statute says so or not. All state agencies must ensure their regulatory and rule-making actions do not violate the Public Trust Doctrine and the public's overriding property rights in Trust resources.

Vermont has added its own constitutional protection to the Public Trust Doctrine for one traditional Trust use--the common right of fishing. Vermont courts have stated that, under the state Constitution and Public Trust Doctrine, the state has an affirmative duty to preserve and increase the supply of fish as common property of the public. In Vermont, fishing is a public right and fish are owned by the state. To go fishing, there must be fish. To have fish, there must be clean water, adequate streamflows, and healthy habitat. Unfortunately, the snowmaking rule exempts many ski areas from improving streamflows to meet the state minimum streamflow standards that state biologists have determined provide a reasonable level of protection for fish.

The Vermont snowmaking rule violates the state's Trustee obligations to protect public waters and fish in several ways. First, the rule grants to ski areas a permanent right to use those public waters historically used regardless of impacts to fish. There is no obligation to improve instream streamflows if it would reduce historic water extraction volumes. Second, the rule does not require any improvements in substandard streamflows caused by existing snowmaking operations, despite the widely-recognized impacts to fisheries from excessive water withdrawals and low winter streamflows. Third, the rule sets less protective streamflow levels in Vermont's higher elevation streams although these upland streams provide primary fish spawning habitat. Finally, the rule places a costly and unprecedented burden on the state to prove environmental harm from excessive water withdrawals before the state can impose the state streamflow standard.

These provisions represent an unfortunate retreat from the progress achieved by many responsible Vermont ski areas to improve river flows through use of efficiency technology and storage ponds. For example, over the last few years, several ski resorts such as Okemo and Sugarbush have improved streamflows through prudent investments in water-saving measures like storage ponds. The new state rule, on the other hand, basically negates this progress. The new rule removes any requirement for streamflow improvement, and allows a few rogue resorts to continue to draw stream levels to below environmentally sound levels, even when reasonable water conservation measures could reduce water demand. For example, under the new rule, Killington Ski Resort could continue to dry up a public stream located on state land without regard to harm to fish habitat, and the Stowe Ski Resort could continue to draw down a small upland stream to drought levels forever.

CLF's pending lawsuit challenges the new rule on several Public Trust grounds. Vermont's snow wars and CLF's case illustrates some of the broad principles associated with the Public Trust Doctrine:

- **The State Cannot Convey Public Waters to Private Parties Permanently for Exclusively Private Purposes.**

A basic premise of the Public Trust Doctrine is that state agencies lack authority to convey permanent rights in public waters to private users. That is, the state cannot give to private persons a prescriptive right to control the streamflow of public waters, no matter how long the waters have been used for private purposes. Additionally, because the Public Trust Doctrine is a creation of common law, it cannot be altered by an agency regulation.

In violation of this principle, the Vermont snowmaking rule grants to ski areas permanent rights to specific amounts of public waters based on past water use. The rule is an illegal attempt by the state agency to transfer to ski resorts specific volumes of public waters forever. Under the rule, any water volumes used by ski areas in the 1994-95 season are now permanently transferred to the Vermont ski industry, regardless of impacts to fisheries and regardless of the availability of conservation measures to reduce water use and improve streamflows.

For example, under the new rule, Killington ski area is granted a permanent right to withdraw 450-million gallons of water each year--the amount of water it used in 1994-95--and to completely dry up a stream that flows through state land. Although the state has long complained that Killington is harming this stream's fisheries, the new rule now prevents the state from ever requiring Killington to restore stream flows. This is an unlawful giveaway of our public waters.

- **State Agencies Have A Fiduciary Duty to Protect Fish.**

Like all state environmental agencies, the Vermont environmental agency has an affirmative Trustee duty under the Public Trust Doctrine to protect fish. In Vermont, the state Constitution and Public Trust Doctrine combine to guarantee the public the right to a healthy fishery. The environmental agency has a duty to continuously manage and improve fisheries as common property, and cannot allow stream diversions to harm fish. This duty is different from

the state's discretionary police power regulation; Public Trust management of fisheries requires the state to protect fish.

The Vermont agency has identified that snowmaking operations are causing substandard streamflow conditions for fisheries in many streams. In response, the agency has endorsed the so-called February median streamflow (FMF) as the minimum streamflow standard necessary to protect fish habitat in winter (the FMF standard is derived from the U.S. Fish and Wildlife Service's Northeast Region's Aquatic Base Flow Policy). The new snowmaking rule, however, does not require ski resorts to meet this FMF streamflow standard. This is an explicit violation of the State's Constitutional and Trustee duty to safeguard and improve the health of fisheries.

- **Under the Public Trust Doctrine, Water Users Must Demonstrate That Their Use of Trust Resources Causes No Harm and Complies with State Environmental Standards.**

Courts have emphasized that a private party proposing to use Trust resources always has the burden of proof to show that its private use of public waters will not harm the resource, or violate state environmental laws. The Public Trust Doctrine does not authorize shifting the burden of demonstrating compliance with environmental laws from the water user to the state Trustee.

The Vermont rule violates this Public Trust principle. On small upland streams, the FMF streamflow standard does not apply unless the state proves it is needed to prevent documented damage to fish. In other words, the rule allows private water users to take small streams below levels the Trustee considers necessary for fishery health unless the state can develop costly and time-consuming information showing actual physical damage to fish. Of course, by this time, harm has occurred.

By burdening the right of the state Trustee to take those actions it believes are necessary to protect fish, the Vermont rule unlawfully interferes with the state agency's ability to carry out its fiduciary management obligations to protect Trust resources. Using private Trust law as an analogy, the Vermont rule is the equivalent of requiring a private Trustee to allow a non-beneficiary to use Trust assets until the Trustee can prove that such use would harm the beneficiaries.

Because Vermont's snowmaking rule violates the Public Trust Doctrine, CLF is challenging the rule in court.<sup>11</sup> This leads to an important question: How should a state agency

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11. Since this presentation, CLF settled its snowmaking rule lawsuit with the state of Vermont. Under the settlement, the state has issued interpretative guidance on how it will apply the snowmaking rule to ensure compliance with the Public Trust Doctrine. For example, the state agrees that no ski area has vested rights to any water allocation; that ski areas have the burden of demonstrating their water withdrawals meet state water quality standards, including maintenance of good fish habitat; and that all ski areas must restore streamflows to FMF levels over the next few years.

incorporate Public Trust principles in regulatory programs designed to protect instream flows? Here are a few thoughts:

- **Recommendations on Using the Doctrine to Protect Streamflow:**

State agencies must consider the Public Trust Doctrine when making water use permitting decisions. Navigable rivers do not belong to private parties--they belong to the public. The state may grant permits to private parties to take water, but, these rights are limited by the public's prior property rights. Therefore, the state must not authorize use of Trust waters without first considering the harm to Trust resources, like aquatic life.

To carry out its Trustee duties, a state should consider implementing some form of comprehensive administrative water-use permitting program. These programs are a means of subjecting new water withdrawals to state review and control. Permitting programs should include the power to prohibit withdrawals altogether or to impose mitigating conditions on permits to protect the public interest.

Permitting systems should ensure that water use decisions are not based on the economic interests of riparian land owners. Instead, the agency should take the public interest into account when issuing permits.

Permit systems should provide for public input and citizen appeal rights, so standing is no longer an obstacle to public involvement. After all, the public should have a voice in determining how its waters are used.

Water permitting systems also should explicitly require compliance with scientifically-based preservation streamflows designed to give reasonable protection to fish and instream values, require use of water conservation, and restrict water uses during water shortages. Protection of instream flows should be explicitly identified as a beneficial water use meriting protection.

Finally, water permits should be issued subject to a limited term so agency can re-evaluate the public interest over time, and the agency should have authority to reopen permits at any time to protect instream values.



# Native American Rights and Instream Flows: The Katie John Case

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First, thank you all for inviting me to this workshop. When I received my invitation, I wondered why does a unique Alaska case and statute have anything to do with the Public Trust Doctrine and the instream flow concerns of the rest of the 50 states? The Katie John case is a native fishing rights case. As I spent last weekend reviewing the materials that have been filed in the Supreme Court over the last month or so, I saw that 19 states had signed the *amicus curiae* briefs opposing my former client's interests and the United States' interests, urging the U.S. Supreme Court to reverse the Ninth Circuit decision in this case. Thus, I do think that the western states see a great deal of significance in the Katie John case and its construction of the Instream Flow Doctrine in conjunction with the Reserved Rights Doctrine.

Before I get into Katie John, I want to mention several points. Alaska law and the Alaska constitution provide that the fish, wildlife, and water resources of the state are to be available to the public for use and consumption, subject to a general reservation for fish and wildlife. That is a provision of the constitution that has not been litigated. But I would argue strenuously--and Christopher Estes, of the Alaska Department of Fish and Game, has pointed this out and argues it strenuously as well, that it likely embodies the Public Trust Doctrine. The debates of Alaska's Constitutional Convention seem to bear out that analysis. In the late 1950s, the constitutional framers were certainly looking toward preserving important rights in the public to water and to other natural resources in the state.

Second, the Alaska instream flow law is one of the best in the country. It provides federal agencies, private individuals, and other entities the ability to make claims for instream flows to protect fish populations and fish habitats. A significant weakness in the law, however, is the fact that every 10 years those waters rights are subject to review based on an evaluation of the "public interest." The agency that conducts the review is not only required and permitted to evaluate the effect of instream flows on fish and wildlife habitat, but likewise on economic concerns. I think it would be quite easy for a hostile state administration to, if not eliminate, at least significantly reduce instream flows that were granted under that law in order to facilitate economic development based on the circumstances at the time of review.

The third major effort at protecting instream flows was made in 1992, while I was still living in Alaska. This involved an attempt by certain state legislators to create a general reservation by

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12. Mr. Anderson's biography is presented in Appendix B.

statute of water in all lakes, rivers, and streams in the state for the purposes of protecting anadromous fish populations. The statute would have directed the agency to apply the "Tenant method" to reserve waters of the state for anadromous fish. The burden of proof that no environmental harm would be caused by reducing streamflows below reserved levels would have been placed on appropriators. Use of the Tenant or other methods for this purpose would be acceptable. I worked quite a bit on this legislation with Christopher Estes and others. We were repeatedly met with arguments like, "There is plenty of water in Alaska. This is not California or Oregon where you have endangered species. You do not need to reserve waters for these fish populations." In other words, it was a typical political response; that is to say, "Let's not worry about building any fences around our pastures until the cows are long gone." That sort of short-sighted philosophy is alive and well, and it prevented the proposed legislation from becoming law, even though the proposal had gained a great deal of momentum early on.

Let me move on to the Katie John case. I brought the case in 1985, when I had just moved to Alaska. The case embodies the law of unintended consequences. Katie John is an elderly lady who lived at a place called Batzulnetas located in interior Alaska. It had been renowned as the upper Ahtna Indian capital. The Ahtna have a colorful history--a lot of documentation of battles with the Russians in the 1790s and again in the 1850s, when the Russians were rebuffed in their initial incursions into Alaska. It is the site of the first friendly contact with the United States in 1885, and anthropological reports developed by the United States and Alaska demonstrate that this was a traditional capital, if you would, of the Indians who resided in that area. Since then, it has been used as a fishing camp by Katie John and her relatives throughout the 20th century.

In 1960, upon obtaining statehood, the State of Alaska surveyed the upper Copper River area quickly and, upon not seeing anyone actually fishing, shut down the fishery entirely. That was the status until the early 1980s. We were able to present the courts with a very compelling case of people who had a tradition of fishing there, but were denied that right by the state.

In 1980, Congress adopted a statute: Title VIII of Alaskan National Interest Lands Conservation Act. This Act divided much of the land in Alaska among various federal agencies, but also provided protection and priority for customary and traditional uses of fish and game by residents. The legislative history and the text of the statute itself made it clear: the purpose was to protect traditional native fishing and hunting activities. We approached the state agencies and asked them to provide a fishery at Batzulnetas. It was an insignificant fishery in terms of quantity. We were asking for a couple thousand red salmon (*Onchorhynchus nerka*) out of a run that numbers four or five hundred thousand fish. In terms of harvestable surplus, most of the harvest occurs in the ocean fishery. There was no documentation of an escapement problem in the particular tributaries where we wanted to fish. The state agency said no, and so, we filed a lawsuit. Federal statute (16 U.S.C. sections 3111 *et seq.*) provided that the state could manage subsistence activities on all federal public lands in Alaska. Approximately 220-million acres of Alaska are owned by the federal government as parks, refuges, preserves, monuments, Bureau of Land Management holdings, and national forests. The state was empowered to manage the lands so long as it provided a priority for subsistence uses in waters it controlled and on lands it controlled. In 1990, the state lost that control. We were still in court. We had managed to get the fishery opened on a half-time basis through a variety of legal maneuvers and negotiations. However, when President George Bush took office, his

administration refused to assert any jurisdiction over fishing in navigable waters, arguing that the United States had no interest in navigable waters in Alaska.

We then filed a second lawsuit, this time against the United States and the State of Alaska, arguing that the United States had the obligation to provide subsistence fishing opportunities in all navigable waters. Fundamental to our position was navigational servitude. As Professor Sax pointed out, the rights of the United States to protect navigation in all navigable bodies is akin to a property right. We argued that, under the English law, the United States in effect owned the water column and that the United States did not have to pay compensation to private users for purposes of navigation because it simply was not a Fifth Amendment taking, since the private individual had no property that could be taken due to the paramount servitude. The district court agreed with that argument and applied the federal priority to all waters in the state, including waters out to the three mile limit in the marginal sea. However, the Ninth Circuit Court of Appeals did not agree with the district court and instead limited application of the priority to federally reserved waters. Moreover, by now the United States had changed its view and joined us in arguing that the subsistence priority applied to all federally reserved waters. The state vigorously argued that the Submerged Land Act that was passed in 1953 not only conveyed to the State of Alaska ownership of the bed and banks of all these streams, but also of the water column. The appellate court did not discuss that issue, but in ruling in our favor implicitly rejected that argument.

The state's argument is a serious one. I think that if the U.S. Supreme Court were to reverse the Ninth Circuit Court's decision on the grounds set out by the dissent on the Submerged Lands Act argument, the notion of any federal reserved rights--for post-1953 reservations, at least--would be knocked out completely. That would preclude the Forest Service, for example, from making instream flow claims based on the Multiple Use Sustained Yield Act of 1960, which the Forest Service is attempting to do in adjudications in Idaho, Colorado, and other states. It would also preclude--and importantly for Alaska's purposes--the assertion of any instream flow rights within parks and refuges in Alaska, since most of those were created in 1980 when the National Interest Lands Conservation Act was passed.

At the same time that this was all going on, we had the Alaska Supreme Court reach out, in a case that really did not involve these issues, and create a conflict with the Ninth Court of Appeals. The Alaska Supreme Court specifically disagreed with the Katie John Court's reasoning, thereby making it easy for the state to argue that there is a conflict between the State Supreme Court and the Court of Appeals, increasing the likelihood that the U.S. Supreme Court will review the case this next term. The United States briefs are due, and we will probably find out relatively soon if the case will be reviewed or not. If it does go up, it will be probably one of the more significant cases in a long time on the construction of the Submerged Lands Act, in conjunction with the Equal Footing Doctrine, and the Reserved Rights Doctrine. Despite all this activity in the courts, the Ninth Circuit ordered the Secretary of Agriculture and the Secretary of the Interior to identify which waters in Alaska are subject to the Reserved Water Rights Doctrine in parks, monuments, refuges, and on other federal lands. This effort is underway right now.

One of the more interesting questions is the argument made with respect to the scope of the right. For example, there is a refuge on the headwaters of the Yukon River, and the express purposes

of that refuge are to protect fish and wildlife habitat, fish populations, and water quality and quantity. Clearly, you can imply a reserved water right within the refuge to fulfill those purposes. There also is a refuge at the mouth of the river, the Yukon Flats National Wildlife Refuge with identical purposes set out in the act. Well, what about the water in between those two refuges? Is not the water between the two refuges equally important and necessary to fulfill the purposes of the refuge at either end? It seems like a reasonable argument to me. I know that a number of professors from Colorado--David Getches and Charles Wilkinson, for example--wrote that argument had merit. That argument and others are under consideration at the departments now.

So, we have those sorts of arguments on the one hand and, on the other side, we have the state arguing that all lands and waters were conveyed to the state and that the federal government has no interest in those waters post-1955, at least. The state got into this mess by denying the puny little Katie John fishery. All along, the state had the power to regain control over all of these federal reservations, parks, and refuges, and the hunting and fishing thereon by amending its statute or amending its constitution to cure the defects that caused the federal government to take over in the first place. The state steadfastly refused to do that and set up this collision that may or may not go to the U.S. Supreme Court. I believe there are strong arguments that this is simply an Alaska problem; it is something that can be fixed by the state if they want to and, therefore, it is not worthy of the Supreme Court's review. At the same time, it is sort of a "sexy" water rights case in terms of all these complicated doctrines; i.e., the navigational servitude, the Submerged Lands Act, the Equal Footing Doctrine, and the scope of the Reserved Doctrine in the first place.

We could end up with a rule here that would provide significant instream flow protection in Alaska for all of these waters within parks and refuges. Even if the United States does not assert flows between the two refuges, certainly, the United States has extra-territorial power to prevent activities off federal enclaves that would interfere with activities on the enclaves. That is sort of a subsidiary question, but it is also one that is being addressed by the Department pursuing it to a rule-making petition right now. I think no one would dispute that power. And these sorts of mechanisms provide opportunities for you all; for states that are concerned, and constituents within states that are concerned with protecting instream flow and the values associated with them--an opportunity to work with native groups, environmental groups, and state sport fishing groups to really build a powerful coalition that has a lot of numbers, that has a lot of might and right on its side to ensure protection for values associated with instream flows.

The Snake River Basin adjudication provides another great example. The Nez Pierce Tribe, which I used to represent before I joined the Department of the Interior, originally had a reservation of 7-million acres pursuant to its first treaty. Since then, its reservation has shrunk to about 70 thousand acres. Nevertheless, the tribe maintained a right to hunt and fish at usual and accustomed places off of the much smaller reservation. Those usual and accustomed places are sprinkled up and down the Columbia River system: the Columbia itself; the Snake River; the Clearwater River; and the Salmon River in Idaho. The United States filed water rights claims, not just to provide fishing opportunities within the reservation, but for instream flows to protect fish habitat and populations upstream and downstream of the reservation in order to provide fish habitat and populations so that the right to fish at these usual and accustomed places can be protected. It is an argument that Laird Lucas has supported on behalf of his environmental group clients. The river rafters see this as a tool

for the constituents to employ to maintain stream flows suitable for rafting. Sport fishing groups likewise see that as a very valuable tool. And, again, I see these additional tools that you will be talking more about as providing ways that a wide variety of interests can get together and make a very strong claim for instream flows legally and politically. One thing that really caught my ear was when Mary Scoonover said that a lot of these legal doctrines are strong. They are very interesting. On the other hand, if you take the cases all the way to the courts of appeal or to the Supreme Court, you are really rolling the dice for an all or nothing situation. But, if you have these many and varied tools that you can use for negotiations, this gives you more control over the results. It seems to me that those avenues ought to be pursued rather than litigating these issues to death, which is often what lawyers like to do. The agencies need to remind the lawyers that we are here to solve problems, and that the goal is to maintain instream flows and the values associated with those flows.

One final area of the law that I find extremely fascinating is the environmental servitude issues. The water quality component of Indian fishing rights to harvest up to 50 percent of certain fish runs was recognized in an opinion, but that opinion has since been vacated by the Ninth Circuit Court. It is United States v. Washington - phase II. As you know, in U.S. v. Washington, the U.S. Supreme Court, affirming Judge Boldt's decision, upheld the right of the Indians to 50 percent of the harvest of anadromous fish in Washington State pursuant to the Steven's treaties. The second phase of that case involved the right of the tribes to protect habitat of those fish, not just water quantity, but water quality components. So often we talk about adjudications of water rights and we say, "Well, that is only quantity, it is not quality." The Ninth Circuit and the district court recognized that the water quality component was just as important as the quantity. This makes perfect sense. The opinion was vacated on procedural grounds and sent back to the lower court. Since then, things have been worked out in terms of those fisheries but, again, this is another powerful tool available to protect instream flows in the West and it seems to me you are protecting instream flows to protect Indian fishing rights.

Another tool that has been discussed briefly is building coalitions. There are a lot of side benefits that are provided to other groups that benefit from the water being in the rivers as well. Building alliances with these groups often strengthen your arguments to maintain instream flows.

I have a couple of more minutes and, during the balance of my time, I would like to discuss one area with which my office is very involved, i.e., Federal Energy Regulatory Commission (FERC) relicensing proceedings. We are devoting substantial resources to FERC's relicensing of federal power production projects. There are hundreds of them coming up for relicensing throughout the United States during the next 10 or 15 years. The Secretary of the Interior has the authority to impose conditions on these licenses to protect instream flow values for fish habitat, for fish populations associated with and necessary for protection of Indian reservations, as well as other federal reservations. That authority is mandatory on FERC, and FERC has to accept the Secretary's conditions. This is a mechanism for protecting instream flow values and is yet another tool that can be utilized.

I wish I could be here tomorrow to listen to the rest of the discussion. Unfortunately, I cannot. However, I believe you now have some sense from the native law perspective, of other cases and laws, and tools that are out there for your use in protecting instream flows in your own jurisdictions aside from the Public Trust Doctrine.



# Case Histories of Public Trust Doctrine Applications to instream Flow Protection

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## *Question and Answer*

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**QUESTION 1:** Several speakers have suggested that we should work with our respective attorney generals and approach the idea of using Public Trust principles in resource management decisions. Many of us seem to have the problem that we do not have direct access to legal staff, or that we may be in a state where the attorney general is selected by, or serves at the pleasure of the Governor. Consequently, it may not be in the attorney general's best political interest to support learning about this type of principle, or to promote sharing the knowledge about it. Please share with us your opinions of how we should approach this issue, and what avenues we may have available to us to overcome these obstacles.

### **RESPONSES to QUESTION 1:**

**Mary J. Scoonover:** I know this is a problem for many people. They feel as if they are a solitary voice in the wilderness, and that is not a positive connotation in terms of trying to be an advocate for instream flow protection. There are other issues to keep in mind. One, the Public Trust Doctrine is a Doctrine that is available to public interest groups and the public at large, as well as to state agencies. Consequently, a Public Trust Doctrine interest or action is not something that has to be generated by the state attorney general's office, or by the state fish and wildlife agency, or other specific state agencies. It is a public interest commonly held right. Therefore, the public can pursue that right. Please understand, I do not mean to insinuate that the public's application of the Public Trust Doctrine is an easy thing to do. It is a massive undertaking. It is, however, a powerful tool.

The other point I would strongly make is that, even if you have a great Public Trust case, and have an attorney who is sympathetic and might be interested in talking to you, without strong advocacy from those of you who really know what's going on, those who know the resources and know the threats to the resources, nothing is going to happen. There are many other interesting and compelling lawsuits competing for that attorney's attention and for a spare moment for that attorney to pursue. Thus, unless there is someone like you technical, scientific people who understand the system, strongly advocating on the side of the resources (to the point of becoming a pest), and developing a strong factual record, it is very likely that your issue, your stream system, will be overlooked. So, there has to be some tenacity on your part.

Another alternative is advocacy through professional societies and professional organizations. I have noticed a trend lately in filing Friends of the Court briefs. In recent U.S. Supreme Court case, a group of scientists filed an *amicus* brief. Agency scientists consulted with lawyers outside of their respective agencies, and filed the brief. These scientists were acting on their own time, and not as officials of their agencies. Other scientists and academics have also put together *amicus* briefs. One case filed in Sweethome, Oregon, talks about the practical effect if the court were to adopt an

interpretation of the Endangered Species Act that separated land from the critical habitat and taking. These scientists were incredibly articulate, they brought the real world into the court. They made the issues very practical, and made it clear to the court what resources were being fought over, and what an appropriate approach would be. I am seeing more and more of these actions; people who are frustrated because they cannot get the resources or support from agencies, but who can appear on their own and have their voice heard. Different court rules affect who can and cannot, and under what circumstances you may become involved, but this is another alternative. Clearly, this places a tremendous burden on all of you, and I do not mean to diminish that burden. I believe that, with the knowledge that you have, becoming involved is an obligation.

**J. Allen Jernigan:** A lot of times you are not part of the agency that will be permitting the diversion, so it is important when you see a Public Trust implication from a project, you get that in your comments, and it becomes a part of the administrative record. The agency has to justify overruling that particular aspect of the project or justifying issuing the permit in spite of the Public Trust implications. You see that it is put in the record, then that agency is going to have to deal with it.

**Thomas J. Dawson:** There are many lawyers who are trout anglers or are members of conservation organizations that are natural constituencies and allies. These attorneys also have obligations under their state and American Bar Association memberships to put in *pro bono* work for the public benefit; time with disregard to issues. There probably are attorneys' conservation organizations that have a natural interest in protecting fisheries and natural resources. These attorneys could be sought out, and asked, for example, to search for information, and to prepare a memorandum that summarizes Public Trust law in the respect to state.

**Richard Roos-Collins:** I have several recommendations for you. The first is that you frame the issue as narrowly as possible in order to obtain your management's approval. In other words, you do not say, "I want to bring California law to Alaska." Nor do you say "I want to apply the Public Trust Doctrine to limit all the water rights in the state." Rather, you should say, "the Public Trust Doctrine is law here, and we need to consider navigation, commerce, and fisheries in the course of our permitting authorities." How do we go about doing that? Frame it in a way your management buys into it.

Second, in the event that your agency and another state agency have a difference of opinion, it may well be that the Attorney General gets conflicted out. He cannot represent both agencies. As a result, you may be free to proceed with the advocacy. That happened in the Mono Lake cases in California. Two state agencies, the State Water Resources Control Board and the California Department of Fish and Game, involved in the cases held conflicting views and interests. Consequently, the State Water Resources Control Board was represented by the Attorney General, and the California Department of Fish and Game was represented by Harold Thomas, their staff attorney.

The third recommendation is to keep lines of communication open with the conservation community. You do not want to be accused of bias. But, if you see a good case going begging, tell other people about it. You will be surprised how often you will discover unlikely allies. In the Mono Lake cases, the Mono Lake Committee was not represented by an experienced water attorney,

but by an antitrust attorney who happened to like fishing. California Trout, an organization of trout anglers, was originally represented by an attorney who specialized in Hollywood law. But, he discovered Fish and Game Code Section 5937 when he was trying to find something that might help return water to the streams and lake. Basically, keep us, the attorneys, interested organizations, and so on in the loop. Feed us suggestions in the event you cannot get your management on board.

**Harold M. Thomas:** Fish and wildlife agencies have had historical conflicts of interest with their attorney generals and need to be realistic about their alternatives. California Fish and Game cannot commence major litigation and expect its policy needs to be articulated by environmental groups represented by say, a part-time, *pro bono*, fly fishing attorney. For example, if your wildlife agency is taking on timber and irrigation interests in the same legal action and you are employed by a small western state, you have a significant job ahead of you. Litigating against major economic interests requires more assistance than that provided by a part-time lawyer who makes his living in insurance defense work. I believe that the institutional barriers to successful Public Trust litigation are almost insurmountable if you do not have legal services from within your own agency or governmental entity.

In the Mono cases, we fought for a number of years to be represented by our own in-house lawyer. We were successful in this effort over the objections of the California Attorney General, who was representing the State's water rights agency. In our case, the issue of representation was considered by both the executive branch and the legislature before finally being resolved before the El Dorado County Superior Court. My view, supported by the historical record, is that fish and wildlife agencies will not have adequate legal representation until agencies have advocates appointed from outside of the traditional attorney generals' organizations. The best vehicle for appointing such an advocate is to seek court-appointed special counsel from the trial court considering the Public Trust claim.



# New Applications of the Public Trust Doctrine

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## *Panel Participants*<sup>13</sup>

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***J. Wallace Malley, Jr. - Panel Moderator:*** Today, we are going to try to do things differently. I believe you got hit pretty hard yesterday with a lot of information and, taking that into consideration, we got together last night and started thinking about paring down our presentations a bit to allow more time for audience interactions. That is exactly what we intend to do with this panel, and probably with the second panel. We are going to shorten our presentations a bit and allow at least 30 minutes of our 75 minutes for interaction and questions. We would really like to hear from you, and I am sure that each of you would probably like to hear a little bit from each other about your reactions to what you heard yesterday and this morning.

We had intended to have a section on this panel regarding the Public Trust Doctrine and jurisdictions where there is no state constitutional provision, but we have decided to delete that. David Baron was good enough to yield his time. One of the reasons we are modifying this panel is that we actually covered much of our panel's topics yesterday in the discussions of common law and how the Doctrine applies in each of the states. The long and short of it is that you do not need to have a provision in your state constitution in order to have a Public Trust Doctrine and, in fact, each of the states does have a Public Trust Doctrine notwithstanding what is in the constitution. That was described in various ways by several of yesterday's speakers. So, we intend to move ahead and deal with some of the other topics. The panelists are basically going to try to hold their initial presentations to about 10 minutes or so.

We will start with Allen Jernigan. Allen is going to discuss some of the theories used in North Carolina to protect fish populations. Specifically, he will discuss a matter involving Lake Gaston. Virginia Beach wants to withdraw 60-million gallons of water per day from the Roanoke River

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13. The panel participants' biographies are presented in Appendix B.

upstream of the lake. Allen may make some quick references to some coastal fisheries issues as well.

Mary Scoonover will then talk about restoring dry channels...dry stream beds and river beds. There was some discussion of those kinds of things yesterday, but Mary can give you a little bit more on that. And then she is going to discuss ways in which the Doctrine may be applied in some instances to ground water. From our perspective in the northeastern corner of the United States, I cannot quite imagine how that happens. But, Mary's perspective is indicative of how this Public Trust Doctrine can evolve differently in different jurisdictions. What happens in one place can actually become a blueprint for something that will happen elsewhere.

After Mary, we are going to hear from Richard Roos-Collins. Richard is going to be discussing something that is similar to Mary's topic, but Richard is going to talk about some theories that could be used to restore degraded channels, the meander of the channel, and other types of restorations to rivers and streams that have been changed or degraded over time, and the way the Public Trust Doctrine can be used for that.

Finally, I will come back. It seems like I get to be sort of the "throw the cold water on everything" guy. I am going to come back and repeat some of the cautions that have been made by several of the speakers. Amidst all the euphoria about creative ways that the Public Trust Doctrine can be used, you must be careful about backlash. So, having given that introduction, I will pitch it over to Allen.

# Theories to Protect Fish Populations

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*J. Allen Jernigan*

North Carolina Department of Justice, Raleigh, North Carolina

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I am going to begin with a disclaimer. I am going to be discussing active litigation. Nothing that I say represents the actual opinion of the Attorney General of North Carolina or the State of North Carolina. All my words and thoughts are my own.

The Public Trust Doctrine is alive and well in the southeastern United States, but it is usually applied in contexts other than instream flows. North Carolina has been applying the Public Trust Doctrine since 1715. Courts have regularly used it to invalidate conveyances of rights such as shell fishing, title to the beds of rivers, or exclusive fishing rights in navigable waters. In fact, the courts as recently as 1995 did that in one of our cases. I know that Florida has an active Public Trust Doctrine and I believe other southeastern states do as well. Instream flows are becoming an important issue in the Southeast.

Let me talk a little bit about potential applications of the Public Trust Doctrine to protect instream flows in the Lake Gaston case in North Carolina. First, I want to give you a little bit of background on the geography in the area and history, because these are important to understand the case, then I will discuss the case. The Roanoke River is one of the major rivers in North Carolina. The river flows through Virginia, along the Virginia-North Carolina border, through North Carolina to the Albemarle Sound, and on to the Atlantic Ocean. There are a series of dams and impoundments along the border between the two states. Hydroelectric power production and flood control are the main purposes of the projects. The projects are licensed by the Federal Energy Regulatory Commission (FERC) and operated by the U.S. Army Corps of Engineers.

The Albemarle Sound is a large freshwater estuary. Historically, the sound and the river supported substantial commercial fisheries. There was a lucrative commercial fishery in the 1800s and early 1900s for Atlantic striped bass (*Morone saxatilis*), river herring (*Alosa chrysochloris*), and several other species. The riparian landowners actually used steam-powered beach seines over a mile long, to catch incredible numbers of fish during the spawning runs. They measured the catch by how deep the piles of fish were as you walked through them. They were so successful in catching fish that they had decimated the species by the early 1900s. Early on, however, these fisheries were of substantial economic importance to North Carolina. In fact, the fishery was so important that the state authorized exclusive grants to riparian landowners for fishing purposes.

One case that I recently litigated, RJR Technical Co. v. Pratt, 339 N.C. 588, 453 S.E.2d 147 (1995), involved the claims of a subsidiary of R.J. Reynolds Tobacco Company, the RJR Technical Company, to exclusive fishing grants along the sound. Two of these grants claimed exclusive fishing rights to 1,100 acres of the Albemarle Sound. The North Carolina State Supreme Court invalidated these grants. The court said that there were no exclusive fishing rights conveyed because

the grants did not specifically say that such “exclusive rights” were conveyed. The grants said that they were conveyed for “fishing purposes.” So, that is an example of the application of the Public Trust Doctrine for fishery purposes in North Carolina.

Now, getting on to the Lake Gaston case, which involves the same basin. The city of Virginia Beach has a drinking water problem. It is located on the coast and is a resort community. The city seeks to divert 60-million gallons a day from Lake Gaston, which is one of the impoundments on the Roanoke River. The State of North Carolina has been opposing this particular diversion for nearly 15 years. There are several cases still pending in Federal court. One of the reasons that the State opposes the transfer is the potential impact on the striped bass population. The striped bass population is currently being managed under an Atlantic States Marine Fisheries Commission plan. That is a multi-state compact on the Atlantic coast that deals with inter-jurisdictional fisheries. Some of you are certainly familiar with the Commission and plan. The plan mandates stock recovery in 1997. We have commercial and recreational fishery quotas in place; we have an 18-inch minimum size limit; and we have other measures in place to reduce fish mortality. We are also taking measures to try to increase juvenile recruitment. One of the problems that we have is that when water levels in the river are too low, the fish are unable to migrate far enough upstream to spawn successfully. Consequently, there is little stock recruitment. We are looking at using the Public Trust Doctrine as a vehicle to protect the fish species in this particular case. Professor Sax mentioned this case yesterday, and I was encouraged by his words. He thought this was a valid application of the Trust and we do too. Hopefully, the courts will agree, and you will be hearing more about this case.

# Application of the Public Trust Doctrine to Non-Navigable Waters, and Efforts to Restore Dry River and Stream Beds

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*Mary J. Scoonover*

California Attorney General's Office, Sacramento, California

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Most of what I am going to talk about today are issues that we have already discussed, so this is not an entirely new application of the Public Trust Doctrine. What I am going to do is distill some of what we learned yesterday into some specific examples and demonstrate how broadly based the Trust really can be, even when looked at in its traditional form.

Professor Sax and others have discussed that, in some states, California and Montana for instance, a Public Trust recreational easement or Public Trust easement is recognized. This easement is separate and apart from ownership of the beds of navigable water. The easement is based on whether or not a water (e.g., seashore, estuary, lake, river, or stream) is navigable. In many states, all navigable waters are open to use by the public. I encourage you to go home, check your statutes, see if you have such a provision, and then see what protections this provision might provide to instream flow uses. Under many statutes, the navigable waters have to be kept open to allow such recreational activities as hunting, fishing, boating, or whatever you can imagine. It is pretty clear cut that navigable waters must be maintained open for such uses.

This Doctrine is a fairly powerful tool because it does not depend upon ownership of the beds and banks of the river. It is also a little more flexible than the traditional Public Trust Doctrine. However, it also does not carry quite the same weight in discussions as does the Public Trust Doctrine. So, the easement Trust is more broadly based--perhaps not quite as strong as the Public Trust Doctrine--but it can provide a useful tool. I encourage you to research it in your state.

In many states, the Public Trust Doctrine has been codified, or portions of the Trust Doctrine have been put into codes and statutes. Furthermore, uses separate and apart from traditional uses have been recognized by many states.

We talked a little bit about the United Plainsmen Case, where the court found the Public Trust Doctrine required the state to enter into discussion on long-term water planning issues (United Plainsmen v. North Dakota Water Conservation Com., 247 N.W. 2d 457, ND, 1976). The Doctrine also affects beaches in some states, even dry sand beaches. Professor Sax referred to the Doctrine as "crawling out of the waterways and up the beaches," and it actually has been recognized as applying to land beyond the waterways. So, that would be my other practical point to mention--the Public Trust Doctrine beyond navigable waterways.

Under traditional concepts of the Public Trust Doctrine, I think we all have this image that if there is a navigable river that is about to be diverted, dammed, or threatened by some action that would interfere with the navigation, commerce, or fishing uses of the river, you have a pretty darn good Public Trust claim. There are other instances where the Public Trust Doctrine, even in its traditional form, can apply. For example, yesterday we talked about artificially enlarged waters. In the State of California, artificially enlarged waters in some instances are also subject to the Public Trust Doctrine. So, look to see if artificially enlarged waters are included in the Trust Doctrine in your state.

Application of the Public Trust Doctrine to non-navigable tributaries of navigable waters is another tool available to you. Yesterday, we described how this was fundamental to our victories in the Mono Lake cases. In addition to Mono Lake, there are other instances where activities on non-navigable tributaries that affect a navigable body of water have been limited due to the Public Trust Doctrine.

Hal Thomas is going to talk to you about some of the public nuisance theories. I will briefly mention that, in California, it was activities on Sierra Nevada Mountain tributaries during the hydraulic mining days that affected downstream navigable waters, as well as downstream water users, that led to a lawsuit that actually ended hydraulic mining in the Sierra Nevada. That case was under more of a nuisance theory claim than necessarily a Public Trust Doctrine theory, but, again, it demonstrates that you should look for complementary theories of law. The public nuisance theory and Public Trust Doctrine oftentimes go hand-in-hand when you are dealing in a situation with a non-navigable tributary.

That concept also applies for issues like timber harvest practices. Laird Lucas spoke to you about an Idaho case. I know of other trial court cases in the western United States that have held that if improper timber harvest practices affect a tributary and have a negative impact on navigable waterways downstream, such activities on the tributaries are covered by the Public Trust Doctrine.

David Baron talked with you about dry or usually dry stream channels. The issue is not whether there is water in the channel today. The issue is whether the channels were navigable at the time of statehood. If they were, the Public Trust Doctrine applies, regardless of the stream's current condition.

We talked a little bit about the application of the Doctrine to wetlands. Just v. Marinette County (56 2d 7, 1972) found that wetlands are significant because of their clear and obvious effects on navigable waters, whether it is water quality, water habitat for food production for fish and wildlife, or habitats for fish, wildlife, bird, marine life, or simply for open space areas for scientific study. Wetlands meet a lot of the prerequisites of some of the older and existing case laws for the application of the Doctrine. So, look at wetlands and activities in wetlands that affect navigable bodies of water under the traditional Public Trust Doctrine as another tool. Professor Sax alluded to the fact that the Public Trust Doctrine, in and of itself, has expanded some to non-tidal wetlands. Whether or not non-tidal wetlands have a direct impact to navigable bodies of water is an issue that is definitely on the cutting edge. There have been a number of commentaries written that take the position that wetlands are such significant resources that the Public Trust Doctrine clearly applies.

I am not certain that it is quite so clear, but this is definitely an interesting issue, and it is not too far out on the fringe.

Wally Malley mentioned groundwater. This is one of those instances where I am unaware of an appellate court opinion that says, "You bet! The Public Trust Doctrine applies to ground water."

It may, however, be affecting water policy in California nonetheless. Streamflow in the Mojave River in southern California is, in some areas or times, subterranean (i.e., underflow), and in other areas or at other times, on the surface. Demand for offstream uses for the river's water exceeds the river's supply. There have been a number of attempts to adjudicate Mojave River water rights in the past. All of these efforts have ended up in multiple lawsuits that have gone on for years and years, and the issues have not been resolved. Finally, an attempt was made over the last couple of years to pull all of the water users together, even the *de minimus* users whose impact, when taken cumulatively, were fairly significant. A judicial adjudication was begun, and the California Department of Fish and Game became involved in the case. The Department argued that a significant amount of water needed to be dedicated to the river for fish and wildlife purposes.

This is a remarkable case for several reasons. First, a majority of the parties settled the adjudication through negotiations. It was an equitable appropriation resolution. In other words, the senior water rights holders did not necessarily get all of the water. The resolution was based on prior use and there was broad agreement. The other interesting point is that, even though the river is over-used and demand for offstream uses of water is high, water was allocated for fish and wildlife purposes. This was due to the intervention by the Department of Fish and Game into the proceedings as a Public Trustee agency. The water users' attorneys were concerned about the fallout and precedent of litigating whether or not the Public Trust Doctrine applied to underflow or ground water. Their advice to clients was, "Do not go there. We do not want to risk losing this issue." So, the parties settled. I believe it has become clear to water users in California that it may be wiser to allocate water for fish and wildlife purposes, and avoid potentially significantly greater losses through litigation.

In general terms, when a river is clearly fed by ground water, or when there is a clear connection between ground water, underflow, and surface flow--I believe the analogy is very close to non-navigable tributaries--or if "ground water" pumping clearly affects surface flow such that it interferes with navigation, commerce, fishing, or other Public Trust uses, you may have a Public Trust claim. However, when the ground water is distinct, or there is more debate or dispute over the connection between the surface flow and the ground water flow, again, you are on the cutting edge. There appears to be no agreement among appellate courts as to the appropriate approach to this issue. However, I do encourage you to examine the option of using the Doctrine. Many states have their own regulations on ground water, and these regulations could be effective and could be, when used in concert with the Public Trust Doctrine, an effective and useful tool.

Finally, one point that is often overlooked in Public Trust litigation is the point of diversion. Sometimes it is merely the point of diversion that is causing the major problem to instream uses. In California, Environmental Defense Fund v. East Bay Municipal Utility District (East Bay MUD), after two trips to the California Supreme Court and one to the U.S. Supreme Court, was remanded

back to the trial court where the plaintiffs alleged that the diversions were going to harm riparian habitat, fisheries, and recreational uses. The court held that, even though the legislature had approved this diversion project that would cause harm to Public Trust uses, the legislature did not mean to abrogate the Public Trust. There was no clear or explicit abrogation of the Trust. Therefore, the Public Trust Doctrine and Public Trust uses had to be protected. The trial court said that since there were available feasible sites that did not interfere with Public Trust uses, that was where the diversion must take place. The court referred to this as a physical solution. The diversion was for purposes of safe drinking water, and that is obviously a beneficial use. Conditions were attached to the permit to protect Public Trust resources, and the diversion was limited in terms of season, amount, and location of the point of diversion. A physical solution is an appropriate way at times to deal with two beneficial and competing uses, such as Public Trust uses and consumptive uses.

I believe David Baron mentioned the idea that people should not suffer from the inaction of those whose duty it is, or was, to protect their interests. Just because your state government has not yet moved to protect Public Trust uses does not mean that you are somehow time-barred from doing so. In supporting the brief that David mentioned, I thought my boss (Jan S. Stevens, Deputy Attorney General, California Attorney General's Office, Sacramento, California) made pretty good use of a quote. It came from Shakespeare, Act 2, Measure for Measure, "The law hath not been dead, though it hath slept." Remember that. It is important because, in many states, I know we are just starting to pursue Trust actions.

I will leave you with one other example. I believe the most pressing environmental problem in California today is the San Francisco Bay Delta and Estuary. Almost all of the possible environmental issues you can imagine are in the bay, delta, and estuary. It is a broad combination of water quality, water supply, environmental land use, toxins, and endangered species. It is phenomenal. There are state, federal, and local governments involved, as well as a variety of other parties, and public and private interest groups. Currently, a process is underway to develop a long-term solution to the bay-delta problems. It is not clear yet how the Public Trust Doctrine is going to play out in this effort, but it is clear that Trust uses are among those uses to be protected. The resource areas to be protected are: water supply reliability, water quality, levee and channel stability, and ecosystem restoration.

I encourage you to follow the bay-delta issues because I expect the Public Trust Doctrine to play a major role, and I hope it plays out in a positive way. In the discussions thus far, there has been no disagreement that the Trust Doctrine applies, and that Trust uses have to be protected. In the bay-delta, there are tidal and non-tidal areas; there are wetlands; there are navigable and non-navigable waterways; and there are a host of resources at issue. This is also an area that has been changed tremendously from what it was naturally. It does not even resemble what it looked like a hundred or so years ago. So, the issue is not, at this point, one of going back to some point in time, but looking at the Trust resources and determining how best to protect them today. It is clear that this will enter into the discussions. Hopefully, you will never see a Supreme Court case on the bay-delta on Public Trust. I really am serious when I say I hope that we can do some of our best work in protecting Trust resources at negotiation, discussion, and planning levels, and not have to wait and run the risks of litigating to the bitter end.

# Application of the Public Trust Doctrine to Restore Degraded Channel Meanders, Loss of Spawning Gravels, and Other Land Forms Related to Sustenance of a Fishery

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*Richard Roos-Collins*

Natural Heritage Institute, San Francisco, California

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The Public Trust Doctrine has a very long arm. We talked yesterday about its application to limit appropriation or other diversion of waters. Hal Thomas will talk shortly about the Public Trust Doctrine as it may apply to protect fish and wildlife. What I would like to discuss with you is the Public Trust Doctrine as it applies to protecting Trust lands.

Remember what Professor Sax told us, the state “owns the submerged lands of navigable rivers.” In each state, the extent of ownership varies. In some, ownership extends to the high water mark, while in others ownership extends to the low water mark. In others, these lands--or at least the private right to use these lands--have been conveyed to private individuals. But, regardless of the upland extent of ownership, in all states submerged lands are public property. That means the state has the right and obligation to manage the use of submerged lands, just as you have the right to manage any lands that you personally own. That right has been slept on--to use Shakespeare’s words--by many states. Most uses of submerged or Trust lands have not been permitted according to the mandatory procedures of the state or the Public Trust Doctrine. Most uses are unpermitted and, arguably, unlawful. But again, the Public Trust Doctrine still applies, and the state still owns those Trust lands.

I do not need to tell you that fish depend on channel form as well as upon water. What I would like to do is get you thinking about the possibility of using the Public Trust Doctrine to restore channel form up to and including riparian vegetation, particularly where channel form is a limiting factor for your fishery. Let me begin with the concept of achieving channel restoration under the Public Trust Doctrine incident to continued appropriation of water. Assume that you are dealing with an appropriator or diverter under a riparian water right, and that use of water has resulted in degradation of channel form. Further, assume that you have an opportunity to change the regulation of that diversion. You can require, under the Public Trust Doctrine, restoration of the degraded channel form as a condition for continued diversion. That is what the Mono Lake cases did. Let me explain how this worked.

You will recall that Los Angeles had licensed rights up through 1983 to divert all of the waters from four tributaries to Mono Lake, and that it used those rights in some years to divert all streamflows from four the tributaries. When the streamflows were diverted, existing riparian vegetation, which was almost like a jungle--notwithstanding the high desert location--died. Periodically, floods would overwhelm Los Angeles’ storage facilities, roar down these otherwise dry channels, and rip the hell out of them. So, over the course of time, rather than deep, sinuous,

forested channels, these streams became throughways for floodwaters. Then the Mono Lake cases resulted in requirements that Los Angeles reduce its diversions of water. The California Department of Fish and Game and the other plaintiffs realized that water would not be enough to bring back the fisheries that existed before Los Angeles began diversions. In one of Justice Blease's decisions, specifically in a footnote that carries tremendous weight, he wrote that Los Angeles really had a choice: it could forfeit diversion, or it could continue diversion but subject to the condition of restoring channel form. In order to restore the Trust uses which existed before Los Angeles began diversions, we could: stop diversions, and over time the waters would once again carve the tributaries; or we could allow the diversions to continue, and require an active restoration program. The State Water Resources Control Board (State Board) chose the latter remedy. It allowed Los Angeles to divert a fraction of the streamflows of these tributaries and, as a condition for that continued diversion, it required Los Angeles to restore the channel form so as to remove the limiting factor for the trout fisheries.

The plan for such restoration was submitted to the State Board. The parties will comment on the plan. It has not yet been implemented, but we all have great hope that it will do what the law requires, which is to restore the channel forms of these tributaries. In combination with the required flows, we expect to get the prediversion fisheries back. So, restoration can be accomplished incidental to re-regulation of the diversion.

The other context in which restoration of channel form can be accomplished is really re-regulation of land use. Let us leave water aside for a moment. Picture a navigable river in your state where the channel form has been degraded by, say, a wharf, a levee, sedimentation, or by any number of causes. Now it is not suitable for native or other desirable fishes. The Public Trust Doctrine can reach so far as to regulate the uses which caused that degradation of channel form. Mary Scoonover mentioned the Gold Run Ditch mining case from the 1870s. That was the first case, in California at least, to hold that upstream sedimentation which has a downstream impact on channel form could be prohibited. In turn, there are literally hundreds of cases throughout the country where courts have held that unpermitted occupancy of Trust lands can be remedied: building a wharf without permission, building a home without permission, a levee--you name it.

What I am suggesting is that you think of the Public Trust Doctrine in more than just the negative sense (i.e., stop doing something that is unpermitted). Think of it in a positive sense also, "You did something that is unpermitted; now, undo it and give us back the channel form we need to benefit the fisheries."

Here are several strategic recommendations. First, define your objective: restore what? Are you trying to restore the channel form that existed at some point in time? Are you trying to restore the channel form that would be suitable today for a particular fishery? Define your objective. In the course of getting us organized for this conference, Alex Hoar said, "If you do not know where you are going, any road will get you there." That is exactly right about restoration of channel form. If you do not know where you are going, any road will get you there. It may be a better channel form or it may not be. Define your objective before you set out on restoration.

Second, then do a limiting factor analysis, which is to say, a systematic analysis of those environmental conditions which may affect or injure the fishery. One of the things we did wrong in the Mono Lake cases was to wait until late in the process to conduct a limiting factor analysis. We knew early on that absence of flows was one of the factors limiting the fishery. However, it was not until late in the cases that we even started a systematic analysis of the channel form, channel meander, riparian vegetation, spawning gravels, and so forth. Which one of those was most important? Which one(s) should be fixed?

Third recommendation: pick the responsible party or parties. The Public Trust Doctrine does not authorize you to require an upstream landowner to fix degraded channel form if he did not cause the degradation. You have to show the causal connection. The more direct the connection, the better. In the Gold Run Ditch case, the defendant was the primary hydraulic mining company on this particular tributary. On most navigable rivers today, it will be more difficult to determine who is causally responsible for the degradation. In fact, the degradation may be the direct consequence of activities that occurred over a century ago. So, you cannot simply go out and restore channel form by just saying the Public Trust Doctrine applies. You have to identify the responsible party or parties that caused the degradation you want fixed.

Fourth recommendation: integrate an enforcement of related and complementary laws. We previously discussed that at length. I again want to underscore that the Public Trust Doctrine works best in conjunction with other laws. You want peace on the river. If you are going out to restore it and you sue or threaten to sue responsible parties, offer them an all-in-one deal. "If you do this and you comply with all of these laws, including the Public Trust Doctrine, then we will not come after you again as long as you do what this agreement requires."

Fifth recommendation: select possible restoration measures. There are many different ways to restore degraded channel form. This depends, of course, upon the individual circumstance. There will be many different ways to restore degraded channel form. The Public Trust Doctrine includes feasibility; it does not require the impossible. Your efforts to apply the Public Trust Doctrine to restore degraded channel flow will work best if you also are concerned about the feasibility of restoration and make a point of analyzing alternatives and picking the one which is most feasible--not necessarily the cheapest, but most feasible. In the Mono Lake cases, for example, one of the tributary creeks, Rush Creek, has incised upwards of 40 feet near the lake. It would be virtually impossible to restore the creek's channel form to what and, in particular, where it used to be. The state and the other plaintiffs decided not to seek a requirement that Los Angeles restore the degraded channel to its original form because that could have killed the goose that laid the golden egg. That would have been unreasonable. Instead, we agreed to seek alternatives that would provide the same functional benefits for the fisheries. Include consideration of feasibility in your restoration plan for a channel.

Sixth recommendation: decide on governance. It is unlikely that restoration of the channel form of a navigable river will be a two-party arrangement, for example, the state and the responsible party. It is likely that it will include many other interested parties, such as counties, conservation organizations, other land owners, and so forth. It is important to establish a system of governance: who does what, who has what say, and so on, before you begin restoration on the ground. Otherwise, you run the risk of parties who think they should be at the table complaining they were excluded.

You run the risk of uncertainty regarding how decisions are made. Your restoration plan can get bogged down before implementation simply because you have not agreed on governance. So, integrate governance into your restoration plan.

Let me end on a high note. I have been in this business for 9 years. Most of you have been in it for longer than that. Most of the fish and wildlife biologists I know, in state and federal agencies alike, are dedicated to their work, yet are deeply frustrated by political realities, budgetary constraints, and legal constraints.

On some days, I feel like I have my shoulder to the grindstone and am making little progress. I am sure you feel that way, too. The Public Trust Doctrine includes great joy. If you use it to restore waters or channel form of a navigable river, you will have the joy of seeing a natural resource return that may not have been there since your grandparents' time. That is the joy that we have in the Mono Lake cases, and it is one reason we cannot stop talking about it. It is the joy that other attorneys and fish and wildlife biologists have felt when they have used the Public Trust Doctrine to restore other resources. It is hard, day in and day out, to be saying no or yes to new development, holding the line, trying to prevent further degradation. Think of the Public Trust Doctrine as a way to do something affirmative, to bring back resources we have lost. I hope you will find more joy in doing the good work that you do.

# A Cautionary Note on Legislative and Judicial Back-Lash

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*J. Wallace Malley, Jr.*

Vermont Attorney General's Office, Montpelier, Vermont

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I am going to introduce a dose of reality on the Public Trust Doctrine. I do not mean to throw cold water onto the issue, but it is important that you realize that the Doctrine is not going to solve all of your problems. I am going to mention a few things from my own background that I believe are worth bearing in mind.

In the euphoria and joy in the aftermath of a big Public Trust case in Vermont in 1989, the Doctrine suddenly had come from being something that nobody knew anything about to being a central point of discussion. Quite frankly, the Doctrine created a lot of fear--a lot of unnecessary fear--but, nevertheless, a lot of fear. That is the sort of reality you will have to deal with if you are going to use the Public Trust Doctrine.

I remember vividly going up to a public hearing in Grand Isle, Vermont, which is an island up in northern Lake Champlain. I suspect that many of you probably have had similar situations in your own states. We were having a public hearing to explain legislation pending in our state legislature. The legislation would have helped to define what the Public Trust Doctrine would mean in the permitting process, and to remove any ambiguities regarding boundary lines between public ownership and private ownership in Vermont. A few other people and I were invited to attend the meeting by a state senator and a state representative. They just wanted us to talk to their constituents. It sounded innocent enough to me. So, I go into a school gymnasium in a rural area on a Wednesday night, and there are 300 people there--understand that, in Vermont, 300 people in one place is a whole lot of people!

The entrance to the gymnasium was on one end, and we were seated at the other end, a long way from the exit. I was in the uncomfortable position of having to leave early because I had to catch a train to New York City later that evening. So, at the beginning of the meeting I explained to the audience not to take it personally if I walked out in the middle of the public hearing as I had to catch a train. I wanted them to know that I was not leaving because I was not having a good time, and so forth.

The discussion was about the Public Trust Doctrine and how it protects the public's right to use the waterways. Visions of people in boats or swimming...coming right up to the shoreline where people own property on the island...began to form in the islanders' minds. That scared people. We were simply trying to explain that the Doctrine was for the benefit of everybody, but people began to get scared. Well, I did not get very far into my presentation when I started hearing crowd noises like, "Woo, woo--hey, Wally, I think your train is coming...time to leave!"

Believe me, the ability to have a rational discussion about the Public Trust Doctrine had pretty much been lost at that point. In fact, I did have to leave and I had to walk down the aisle, right through the middle of all those angry islanders. This experience left me with something to think about. When people get scared, all kinds of things can happen. Remember, there is good reason to handle the Public Trust Doctrine carefully.

I have a quote from the State Chamber of Commerce, issued around the same time, that also demonstrates the potential scare factor. The Public Trust Doctrine was called the "...scariest idea I have seen in Vermont in 20 years for the impact it could have on the economy and on our lifestyle...It could affect ownership of land itself." You are going to have to deal with this sort of thing. That is not to say that it cannot be dealt with, but you will face such problems. On the other hand, you will have allies who understand the Doctrine and why it is important to maintain the public's resources and to maintain the public's ability to use those resources.

I also want to briefly relate to you a joy-and-sorrow story from Maine. Then we will open the panel to questions. I was talking with Paul Stern, who is with Maine's Attorney General's Office, after he had argued a case dealing with public easement to the intertidal zone along the Maine coastline. There had been a 1986 state statute which sought to define the circumstances under which the public could use the beach and shoreline for various uses. Historically, in Maine, navigation, fowling, and fishing purposes had been recognized from colonial times as appropriate uses of the shoreline, and persons were holding shoreline parcels in a chain of title that went back to colonial times. A comprehensive 1986 statute recognized the right of the public not only to put their boats up on the shore within the intertidal region, but also the public's right to fish from that region of the shoreline, and to use it for other recreational purposes, such as sun bathing, sitting on the beach, and so forth. That scared a lot of people in Maine, notwithstanding the fact that it had passed the Maine legislature. Consequently, that law was challenged and went up to the Maine Supreme Court. In a 1989 decision that was split four to three, the Maine Supreme Court held that the provisions in the statute related to recreational uses of the intertidal zone were invalid and unconstitutional. Basically, the court's ruling froze the protections of the Public Trust Doctrine as they had existed in a 1641 colonial ordinance. Paul Stern had all of the joy from the legislative win in 1986, but he was beside himself with what had happened almost overnight with the Public Trust Doctrine in Maine due to the court's decision.

There was at least one member of that court who was a coastal landowner. You have to keep in mind that there are people out there who will be afraid of what it is you are trying to do with the Public Trust Doctrine. Consequently, you have to make your case not only in the court, but you have to make it with the public as well.

# New Applications of the Public Trust Doctrine

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## *Questions and Answers*

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**QUESTION 1:** In Pennsylvania, we have inter-basin commissions that make permitting decisions in two of our major river basins. The commissions are comprised of the four states involved and the federal government. Pennsylvania has one vote. Would the Public Trust Doctrine apply in those situations? How might that complicate use of the Doctrine? If the public were to bring a lawsuit, would the Doctrine apply? We are an independent agency and we have been known to appeal permitting actions of the commission. Would the Doctrine apply in that case?

### **RESPONSES TO QUESTION 1:**

***Justice Coleman Blease:*** Since we had heavy litigation involving compacts when I was representing the League to Save Lake Tahoe, I can tell you that a compact is an odd animal. It is a three-cornered animal between two or more states and the federal government, so you have interweaving between federal and state law. There are state law issues and there are federal law issues which all get mixed up. So, conceptually, what you have to figure out is how you take the state law Public Trust aspect of this and interweave it into your compact determination. I am not saying this is simple; it took a couple of years to try and get it clear in my head about what was going on with this. That, however, is the approach you have to take to start thinking this through.

***J. Wallace Malley, Jr.:*** Another reaction I would have to that is that the first step is to try to influence the position that your own state representative is going to be taking. This is a classic opportunity or example of the overarching nature of the Public Trust Doctrine. If the state is indeed the Trustee for everyone, then presumably the positions that are brought to the decision-making process on that compact by the respective states are supposed to represent that Trustee relationship. I believe the difficult part of what you have raised is the federal side of the issue. Thus far, other than a couple of cases, there really is not a federal common law of Public Trust where the federal government would say we are bound by the Public Trust. So, there are some difficulties from the federal perspective.

***Mary J. Scoonover:*** California has a number of interstate water issues in addition to Lake Tahoe. There are interstate issues associated with the Colorado River and a variety of other systems. These interstate water disputes are really odd animals. It sounds like your state has reached a point where there is some peace, or at least some procedures to work out difficulties. As Judge Blease said, a compact is the appropriate document to set the tone for how those procedures will operate. But, again, the Public Trust Doctrine is a state Doctrine, and the first place to start is to research what the Doctrine looks like in your state and in the other states that participate. Make sure that when your state representative is making a decision, he or she has all of the information on how that decision will affect the natural resources and how that stacks up against prior Public Trust information. It is

a heavy burden but, in these instances, the stakes are often very high and I am afraid the burden falls to you all to let the decision maker know exactly what their decision means for the resource.

**QUESTION 2:** In Rhode Island, we have a major program for anadromous fish restoration, and one of our big problems is with dams. We have been dammed to death. My first question is about the responsible party for any sort of restoration. Who is the responsible party when the dam was probably built at or right after the turn of the century, and it is owned by someone else today? My second question is more about restoration. How can we use the Public Trust Doctrine, for example, to look at anadromous fish restoration, in terms of fishway construction or other types of passage?

## **RESPONSES TO QUESTION 2:**

**Richard Roos-Collins:** The responsible party is the current owner. If the party who built the dam still has some ownership or operational interest, it could be responsible too. Based on the way you frame the question, I understand that the dam is now owned and operated by a successor. Go after the successor. Is your question specific to a hydroelectric power dam or is it general to any dam which blocks fish passage?

**Questioner:** It is more general. In other words, can we use this to look at, say degradation of habitat or degradation of a fish run that was historically present and fished, and now use this Doctrine to sort of encourage through negotiation that the construction of fishways is around dams?

**Richard Roos-Collins:** Leaving aside for the moment whatever statutory law your state may have regarding fish passage, yes. The dam is on a navigable river. The dam, therefore, occupies Trust lands owned by the state and uses Trust waters. The state can condition occupancy. The state can change the condition of occupancy even if the dam were originally permitted without fish passage. Although I am not aware of any case where the Public Trust Doctrine has been applied as the primary authority for fish passage, it is squarely within the state's authority to so condition use of Trust lands and waters.

If I could continue with regard to the question you did not ask, namely, fish passage at a dam regulated by the Federal Energy Regulatory Commission, I do think that the U.S. Fish and Wildlife Service should consider the Doctrine in making its Section 18 of the Federal Power Act fishway prescriptions. In other words, the Fish and Wildlife Service should avoid inconsistency with the Public Trust Doctrine in making those prescriptions.

**Alexander R. Hoar:** I want to echo the business about Section 18 of the Federal Power Act. What I want to offer is something about the 1906 or 1908 Federal Dam Act. That is the genesis for Section 18 of the Federal Power Act, and it says that for every dam regulated by the U.S. Army Corps of Engineers, a non-hydroelectric dam regulated by the Corps (that does not mean owned by the Corps, like on the Ohio River, but any dam that would have required a Section 404 permit of the Clean Water Act), the Department of the Interior is given the authority to prescribe directly to the current dam owner. I believe it is not through the Corps, but directly to the dam owner to put in fish passage facilities. Fish passage can be used only to provide access to upstream habitat, but not necessarily to prescribe habitat management. I need to tell you that there has been no test of that. We have just

recently become aware of this. We discovered it in looking around and, if you have a test case, we would like to know about it.

**Harold M. Thomas:** The other remedy I would suggest is to look to the Rhode Island fish passage laws. I reviewed nuisance laws in various states to determine if fish passage was included within the Nuisance Doctrines. A number of states have excellent fish passage laws, and the dams which block the health and welfare of Public Trust protected fisheries may be subject to abatement actions under nuisance as well as common law Public Trust theories.

**Mary J. Scoonover:** It is often difficult to identify the responsible party. The water right holder might not necessarily be the responsible party. It may be another water user who has dammed the river, or done something else. Maybe someone who is simply contracting with the water right holder is the responsible party. In the American river case that I told you about--the Environmental Defense Fund v. East Bay MUD--our State Water Board determined that the Public Trust Doctrine was an effective tool against a water contractor as opposed to, or as distinguished from, the water right holder. That broadens the application a little bit. This too, however, is relatively untested, uncharted waters, and I would caution you on it, but it does broaden the potentially responsible party field quite a bit.

**Richard Roos-Collins:** May I underscore one strategic point here? You have now heard, on at least three occasions, about laws that were discovered in the course of looking up something else. The 1906 Act is the latest of these examples. I recommend that you go home and read your fish and game code, implementing rules, and any related laws, from start to finish. Do not do it all at one sitting, but do it in a systematic way. Section 5937 of the California Fish and Game Code, which was the basis for the Mono Lake cases, was rediscovered by this Hollywood attorney, then representing California Trout, who was desperate to find a way to put water back into these tributaries. He went to the experts and asked what could be done and they said they did not know. So, he read the Fish and Game Code from start to finish. He came to Section 5937 and realized that this law dates back to 1870 and was put into the Civil Code in 1930. Although there was no case law at the time, it says every dam operator shall release enough water to maintain fish in good condition. It must mean what it says, and he made it mean what it says. So, try it. You may find some unexpected authority in your statutes.

**QUESTION 3:** Connecticut laws and regulations dealing with water diversions were developed in the late 1970s and early 1980s. These were based on principles of the Public Trust Doctrine, at least as they applied to newer, revised allocations of water. They, however, included clauses that institutionalized or grandfathered previous allocations of water that many times had severe consequences for fisheries resources. I suspect that is also much the case for other states. What avenues might exist to reverse the negative consequences of those allocations using the Public Trust Doctrine? And what are some of the political and judicial pitfalls that might exist?

### **RESPONSES TO QUESTION 3:**

**J. Allen Jernigan:** Your statute grandfather's certain existing conditions, is that what it does?

**Questioner:** It establishes a permitting process by which any new application for allocation of water requires a permit. Anyone who is diverting water at that point could simply register the quantity of, or capacity of water for diversion at that point. Now, in many instances, there were a number of water supply reservoirs which perhaps were using 2-million gallons per day, but they had the capacity in their water treatment facility or in their pumping capacity to perhaps pump as much as 10-million gallons per day. They could register that quantity and, in perpetuity, they had access to, or authorization to use that much water. It may have been far beyond what they were actually using at the time, but it was the capacity they had the time they registered.

**J. Allen Jernigan:** Okay, your constitution, or maybe the law of Connecticut, may have something that prohibits granting public rights in perpetuity. We have something similar of like that in North Carolina. This is a difficult question. Grandfather clauses are out there in a lot of programs and they have been upheld, but the Public Trust Doctrine, although it is dormant, may provide you an opening in those kinds of cases. Once the state has issued a permit for something, someone is going to have to challenge that. As I said, it is a tough situation.

**J. Wallace Malley, Jr.:** Another aspect of it is that it may depend somewhat on a case-by-case situation. How, shall I say, Draconian is the grand-fathering? If the effect of that grand-fathering statute would have a far reaching effect on a given drainage basin or given river system, to the point of really decimating the resource, there are plenty of Public Trust cases from many jurisdictions concluding that the legislature is powerless to grant away, at least in any substantial way, the Public Trust interest. If the cumulative effects on a river are major, an argument certainly could be made that the legislative action was invalid under the Public Trust Doctrine.

**Harold M. Thomas:** In considering water rights and the impact on fisheries, it is not always the quantity of water that makes the largest impact on fisheries. Sometimes it is the schedule and timing of water releases that are most significant to a fishery. If the exercise of a water right creates a condition of pollution, there is a remedy against the water user under the laws of many states. For example, too much water, nutrient laden water, or too little water are all potential disabilities to a stream in good condition. We should evaluate how water rights are exercised to determine compliance with applicable fisheries law.

**Mary J. Scoonover:** That is one important point that might not have come through clearly yesterday. Water is a different type of property than, say, real property. Water is recognized as a right to use or a usufructuary right. States grant the right to use water, not the right in perpetuity to own or control it. It is a different kind of right. In California, it is interpreted to mean the state has ongoing management responsibilities to assure that the water allocations are meeting current needs through the beneficial use provisions in our constitution. That allows our State Water Board, or the courts, a re-examination of existing water uses. That is exactly what happened in the Mono Lake cases; a permitted water use was re-examined and was modified. So, a water use is not necessarily given for all time. Water rights are somewhat different than other property rights, and the Public Trust Doctrine is an active and ongoing Doctrine that does not cease simply because a state agency, rightly or wrongly at the time, grants the right to use water.

**Richard Roos-Collins:** This is the central issue in applying the Public Trust Doctrine to rights created under statutes. It does not turn on the specifics of your statute. The central issue is, can you apply the Public Trust Doctrine to a use which is lawfully permitted under statute? In the Mono Lake cases, the answer is yes. That lawful use is not grandfathered against the Public Trust Doctrine. The Public Trust Doctrine can spring back to life at any time. In several states where the Mono Lake cases have been subsequently applied as precedent, courts have reached the same conclusion. And, in at least one case, a court held that the lawful use pursuant to statute was grandfathered against the Public Trust Doctrine. So, while the Public Trust Doctrine generally operates independently of statute, and can be applied at any time to a lawful use, that is not a given. This will be a central issue in any state where you attempt to apply the Public Trust Doctrine to re-regulate a use that the user believes is vested under statute.

**QUESTION 4:** Certain states decided after statehood that their submerged lands would be sold to private interests. So, the thread of the stream passed into private ownership. Richard Roos-Collins stated that all states owned the submerged lands. Are there any references, documentation, or cases about how that contradiction may be settled, decided, or considered?

#### **RESPONSES TO QUESTION 4:**

**Richard Roos-Collins:** State ownership applies to all submerged lands except where it does not. Seriously, I will quit being an attorney for a moment and answer the question directly. I think Professor Sax anticipated that question when he said that some states had transferred into private ownership title to submerged lands and, therefore, the deeds for those submerged lands run to private parties. He said, and I agree, that even in those states, the state retains ownership, *jus publicum*, which amounts to the right to assure that the submerged lands are used in a manner consistent with Trust uses: navigation, commerce, and fisheries. So, if the lawful owner of title to submerged lands built a dam that interfered with fisheries, the state could assert the Public Trust Doctrine to require the removal of the dam, or at least mitigation for it, because of that continued public right.

**J. Wallace Malley, Jr.:** The long and short of it is that, even though the title may have passed away, the public right in that land may still be there. This has been asserted in other jurisdictions in those kinds of situations. Massachusetts is one of the jurisdictions to which Professor Sax referred. I suspect that the theory is viable in your state as well.

**QUESTION 5:** I have somewhat of a comment rather than a question that follows up on what Richard Roos-Collins was talking about. One of the things done in Montana to try to restore streams is to try to put water back into those streams through a water leasing program. The way we do that is we attempt to lease an early priority date water right from a diversionary use, and transfer that right, temporarily, instream for a period of time. In doing that, we have been paying the water right holder to lease that water right. Late last night, several of us were sitting around talking about this, and the question came up, "Why should the state pay for its own water?" My comment or question is between the theory of the Public Trust and the practicality of trying to restore streams. Our leasing program took a long time to implement, and it is not completely accepted by everyone in the state, but it is getting better. We have been able to implement several leases by paying for water the state owns. The other option would be to try to do it through the Public Trust, and probably open up a real

can of worms and maybe put the thing back a hundred years. Does anybody want to comment on this?

#### **RESPONSES TO QUESTION 5:**

**Mary J. Scoonover:** I believe the political reality, as well as the physical situation, varies from state to state. Even though you might have God and the Public Trust Doctrine on your side, if you have worked out a practical solution to the problem, I would encourage you to stick with it. Do not make a drastic change, potentially setting back a program that is actually making some progress on the ground. Litigation is not an easy answer. Litigation is not a quick fix. Even when you win in court that does not necessarily translate into a victory for resources or change on the ground. Each of you has to think about the current political climate in your state and if there is a way to work out problems. I encourage you to seek such creative solutions.

**Richard Roos-Collins:** This underscores the importance of strategy. It is not the law by itself, it is strategy that brings the law to life. You should have an informed strategy in place to protect the fishery in any given river. If the Public Trust Doctrine is available now, both legally and politically, so be it. If it is not, start smaller. Build a political constituency, which is exactly what you are doing. I suspect that the fishing guides and the hotels and the gas stations and the restaurants and all the other commercial interests that benefit from your leased water will become a political constituency, which allows you to move on and do even grander things in the future.

**QUESTION 6:** I want to throw a term out for our lawyers' benefit, and see if they can react to it. I am concerned about the stream situation that David Baron discussed, the relationship between surface water and ground water, and the application of extending Public Trust Doctrine from fisheries to fish food organisms. There is a part of the river called the hyporehich zone, which is the zone below the streambed, but may be refugia habitat for insects during dry, desperate periods. When the water returns to the streams, the insects from the hyporehich zone come back up into the sediments, repopulating the stream bed, and again contributing to the food chain for fish. My question is, has there been any specific applications of the Public Trust Doctrine to protect the hyporehich zone during dry stream conditions?

#### **RESPONSES TO QUESTION 6:**

**Mary J. Scoonover:** I do not know of any.

**David S. Baron:** Nor do I.

**Mary J. Scoonover:** This is the idea that I was trying to get to earlier. The closer the physical connection, the closer the evidence that changes in the environment, or changes in the tributaries, changes in the ground water or the sub-surface flow are affecting a navigable body of water, either interfering with navigation, commerce, fishing, or the other Public Trust uses, the stronger your case for trying to protect or trying to manage or govern those uses. So, it comes down somewhat to how closely related are the issues, how good is the documentary evidence, and is it clear what is causing the problem? Is there an identifiable source, the causal link that Richard Roos-Collins spoke of?

Is there something that you can pick out, identify, and identify a solution as well? That is something that we have not talked about a whole lot. Not only do you have to be able to identify the problem, it certainly helps your case if you have a vision of the resolution you want, what the solution ought to be. For example, what kind of fish passage facilities do you want? What kind of reduction in the diversion? Where would the point of diversion be more effective? In this way, you can prove your solution is a feasible alternative. This is an important part of the equation on which we have not spent a lot of time.

**Richard Roos-Collins:** When the National Instream Flow Program Assessment reconvenes in 10 years, a case will be discussed that addresses that question. So far, the Public Trust Doctrine has been applied at a relatively crude level.

**Harold M. Thomas:** I believe the Mojave River adjudication in California did apply the Public Trust Doctrine to an underground streambed to preserve the streambed's biota. The Department of Fish and Game was concerned about maintaining the biota in reaches of the stream bed that were intermittent or underground. The Department calculated the amount of water that it would take to preserve the stream habitat and then required the purchase and discharge of sufficient water to keep the natural vegetative community alive and healthy. The solution was arrived at through negotiations and has not been imposed on an adverse party by a court.

**Richard Roos-Collins:** Bear in mind that the use is fishery. If a fishery needs a particular water quality, or a particular plankton population, and if a use of Trust waters or lands interferes with that habitat need, that should be actionable under the Public Trust Doctrine.

**Harold M. Thomas:** We were actually preserving the Mojave tui chub (*Gila mohavensis*), which was living in the day-lighting sections of the river, those sections where subsurface flows rise to the surface and provide chub habitat. But, we were also concerned about the aquatic insects, because they fall within the definition of fish in our code.

**J. Allen Jernigan:** Does the state own the bed of the river in the situation that you are talking about?

**Questioner:** Yes.

**J. Allen Jernigan:** I would think the Public Trust Doctrine would apply then.



# The Public Trust Doctrine and Other Legal Tools for Instream Flow Protection

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## *Panel Participants*<sup>14</sup>

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**David S. Baron**

Arizona Center for Law in the Public  
Interest  
Tucson, Arizona

**Harold M. Thomas**

California Department of Fish and Game  
Sacramento, California

**J. Wallace Malley, Jr.**

Deputy Attorney General  
Vermont Attorney General's Office  
Montpelier, Vermont

***Harold M. Thomas - Panel Moderator:*** We have 1 hour and 15 minutes to provide some clean-up. We are going to break up the legal education initially, and focus on some of the institutional realities that one needs to get a case forward in a fish and wildlife agency bureaucracy. I will spend about 15 minutes discussing the institutional realities. David Baron will discuss legal education, and specifically address the federal Clean Water Act, and issues that you deal with on a daily basis, as a means of providing tools to you to link the Public Trust Doctrine with a statute. Wally Malley will be talking about some of the linkages with riparian rights and cause of action. I will then come back and spend a few minutes discussing the law of nuisance.

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14. The panel participants' biographies are presented in Appendix B.



# The Public Trust Doctrine and Institutional Realities

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*Harold M. Thomas*

California Department of Fish and Game, Sacramento, California

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I am going to begin our discussion of institutional realities by focusing briefly on three points. In order to bring Public Trust cases from an idea at a seminar and cause the restoration of a stream, you need the support of your executive branch agency head or commissioner, you need a lawyer with institutional staying power, and you need a defendant.

Executive support is a significant issue because fish and wildlife agencies historically do not have strong advocates in the executive branch of government. Fish and game agency staff cope with multiple executives, including fish and game commissions, gubernatorial appointees, department heads, division chiefs, and so on. One of the first things I do when I sit down with our biological staff to consider legal action, is to look at who is the current executive and inquire as to what are their legal objectives. If the case we wish to promote meets the executive's criteria, and we have executive support for that effort, then we can go forward. If not, I work with our staff to determine how can we change the effort, or perhaps recast the case to secure executive support, because when we do go forward, we want to have the resources and support for a significant action. We do not want to get three-quarters of the way into the case and find out that the chief counsel has been replaced and the biologist is now conducting fish studies in Needles--which is on the Colorado River--a long way away from where a reasonable Pacific salmon biologist might want to be.

A fish and game agency litigation group must understand the nature of the interests that they will be opposing. Irrigated agricultural entities tend to be powerful interests in states where water is short, however, these entities come in many shapes and forms. The Westlands Water District, which irrigates square miles of cotton in California's Central Valley, is an entirely different entity from the Walker River Irrigation District, which happens to use California water to grow onions just over the border in Nevada. When you pick your battles, you have to ask yourself if you will have institutional support for this case. When we picked our battles against the irrigation interests, we used fish and game statutes, and nuisance and pollution laws. In each case, we asked ourselves where can we bring this case and win? We picked the Nevada farm interests because they do not have representatives in the California legislature. Their water is "our water," that is California water, and that sense of ownership was very important to the case. We developed an enormous case law litigating against Nevada farmers, and we developed good fish and game laws in District 4.5, which is the east side of the Sierra Nevada. Our laboratory was the eastern Sierra Nevada, and we kept executive support for the duration of the experiment.

Nonprofit and public interest groups are now taking our law from the east side of the Sierra and applying it to the west side of the Sierra. The Department of Fish and Game is not involved in these

fighters, but the irrigation districts are dealing with nonprofit groups using the same laws that we successfully used against the Walker River Irrigation District.

Effective litigation requires expert contracts for technical witnesses; and, for this, you need a budget. You cannot go into a water adjudication against a power company that has 10 consultants on staff without your own adequate staffing and expertise. You need in-house executive support to develop budgets for outside experts. For example, you may need expert fluvial geomorphologists and riparian vegetation specialists as well as expert fishery biologists. You need to develop a team so that your Ph.D. appears to the reviewing court to be more reliable than their Ph.D. This concern with risk management may sound like overkill, but that is what it takes to win a case.

You need to have retained your own lawyer. It is fine to have nonprofit groups in the community with their core environmental philosophies, but living in a bureaucracy, there are duties of loyalty to the executive branch and duties of loyalty to your fish and game commission. The California Department of Fish and Game does not function as agents of environmental groups. The minute a philosophical line is crossed, an organization suffers the effects of dual loyalties and the adverse results of unsuccessful litigation shows the strain of divided loyalties.

There are several potential areas of law to explore if you have your own attorney. If you look at your fish and game and nuisance laws, those laws are enforced by district attorneys. This is not a well-known fact. In California, most of the fish and game laws are prosecuted by district attorneys, and have been since 1870. In many states, county district attorneys could play an active role in fish and game nuisance cases. You may find a district attorney in a county that has an active fish and wildlife interest that can bring these cases on a routine basis. You may also convince your fish and game commission that the active support of district attorneys is a proper activity for the commission. If you can work with a district attorney, you have secured the services of a lawyer with a more local set of objectives from those of the state's executive branch. If a local district attorney has objectives that are common to your objectives, you begin to see the beginnings of a viable case. One of the functions of a district attorney is to protect common community rights and enforce common duties in a manner acceptable to the local community. The Public Trust is an example of common rights that may be enforced locally.

Each state has its own attorney general. Politics are different in every state, but there are common themes and institutional realities. One of the common realities is that attorneys general have dual loyalties. They generally have multiple clients and those clients frequently have inconsistent policy objectives. Typically, an attorney general does not have enough time to service all of their client constituents.

A second reality is that deputy attorney generals (DAG) have limitations on their choice of cases. In states with small offices, a DAG will be assigned to a case even though he/she is not truly interested in fish life or aquatic communities. A DAG may get an assignment because no one else would take the case, and you may be stuck with a lawyer who does not have an affinity to your case. To be fair, DAGs, are not typically promoted on the basis of winning fish and game cases. When was the last time you read about a lawyer who made his legal reputation in wildlife law becoming a lead or elected attorney general? The political dominance of extractive industries--at least in the west--is something we all live with.

The remedies to this problem of divided loyalties would be to educate and assist your individual attorney general. You need to become their paralegal staff, their assistants, and their junior lawyers. You need to find the appropriate law, educate, and cultivate them. We do this with district attorneys and deputy attorney generals. We take them on trips to view the fishery problem. We take them fishing. Make those lawyers your own, and you will at least overcome the "love of the case" problem. Unfortunately, absent greater economic power, you will not likely overcome the promotion problem inherent in representing fish and wildlife.

Every fishery advocate needs good supporting statutory laws. The Public Trust does not spring out full-blown on the horizon and get decided in a vacuum. The impression I have developed is that the Public Trust functions without supporting statutory law, and in my view, that is not the case. The common law is important, but you need to rest your defense of aquatic ecosystems on statutes because, if you lose a case, all you lose is a legislative enactment. Litigation over the meaning of statutes does not risk your state's Public Trust Doctrine on a single fact pattern being considered by a single superior court judge. If you take a fish passage statute and you make a Public Trust argument around the violation of a fish passage statute, the worse that can happen is you lose the fish passage statute. It is good down-side risk management to base your case on a statute. If the court is willing to run with the Public Trust Doctrine and theory, the court can publish marvelous appellate language supporting and enhancing the fisheries statute. That statute can become very powerful. Public Trust holdings and *dicta* can grow from the roots of legislative enactment but cannot easily be extinguished by an adverse court. In my view, the Public Trust Doctrine will continue to live through the interplay of statutory and judge-made law.

Fish-friendly statutes come in many forms. Some states have explicit fish protection statutes, and some states have enacted streambed alteration statutes. Every state appears to have pollution control statutes applicable to fishery preservation. The pollution statutes may be found in the water rights laws, or they may be located in the nuisance laws, but every state has some form of pollution control statutes. I echo some of the recommendations made earlier. Specifically, that it is important to read your fish and game statutes as well as your civil codes. It is important to get a handle on the types of statutes out there that may be useful to you, specifically, I recommend that you read the nuisance statutes. The general indexes are a good place to start.

Every well-planned lawsuit needs a defendant who is a responsible party with sufficient assets to engage in the remedy you seek. On the other hand, one must be careful when developing a litigation strategy so that you do not take on an organization as powerful as the New York Public Power Company in your first action. Look for that smaller organization with assets and interests equivalent to our Walker River Irrigation District. You want to find a defendant that is not going to make its successful defense through the political process. Hopefully, your defendant will be so sufficiently stubborn that a favorable, lower court decision will be appealed and become favorable published law. If you have a defendant that is sufficiently well financed to take the good fish-friendly factual case to the Supreme Court, your odds of creating good decisional law increase. There are lawyers in our state who are very reputable and do a fine job, and we are always grateful that they are representing water interests with sufficient resources to litigate before the appellate courts.

In conclusion, I have given you a lot of advice today and I hope my thoughts prove helpful as you decide how to proceed in your fisheries advocacy work. My comments are largely institutional in nature, because it is the institutions of government that will ultimately preserve and protect the native and other important fisheries of our various states. Good luck in your efforts.

# The Federal Clean Water Act and the Public Trust Doctrine

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*David S. Baron*

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I am going to discuss something fairly concrete that you can do with the Public Trust Doctrine right away--to the extent that you have involvement in your state's process of certifying projects under Section 401 of the federal Clean Water Act. The Clean Water Act is the law that requires a National Pollution Discharge Elimination System (NPDES) permit for point source discharges to waters of the United States, which includes just about every river and lake that there is. The Act also requires each state to adopt water quality standards to protect those rivers and lakes. The standards are supposed to specify designated uses (fishing, swimming, wildlife habitat, agricultural irrigation, etc.). Also, they are to include numeric and narrative criteria that specify limits on the levels of pollution that will be allowed in those waters.

The Clean Water Act contains a specific requirement in Section 401. Any applicant for a federal license or permit, that may result in a discharge to a water of the United States, must obtain certification from the state in which discharge is going to occur to certify that the discharge will not violate the state's water quality standards adopted pursuant to the Clean Water Act. The state can deny the certification if the discharge will cause violation of standards. The state can also grant the certification on the condition that the federal license or permit will contain limitations, monitoring requirements, and similar provisions to assure compliance with state water quality standards, and any other appropriate requirements of state law.

Until a couple of years ago, most people thought this statute simply allowed the state to certify a power project or NPDES permit. Let me clarify what activities this certification requirement covers. What are the federal licenses or permits that might result in a discharge to waters in the United States and would fall within the jurisdiction of Section 401? We are talking about activities requiring a NPDES permit: sewage plant and industrial discharge. We are talking about U.S. Army Corps of Engineers permits, Section 404 permits for discharge of fill materials to waters of the United States. We are talking about federal licensing of hydroelectric power facilities.

Until recently, most people thought that the only way a state could condition or deny a certification under Section 401 was if there was going to be a violation of numeric pollution limits in the receiving water. In other words, for example, they were going to discharge too much arsenic and that would cause a violation of the stream standard for arsenic. Or they were going to discharge so much in the way of suspended solids that it would violate the state's numeric standard for suspended solids in that stream.

In 1994, the U.S. Supreme Court concluded Section 401 certification goes a lot further than that. The U.S. Supreme Court concluded in the Jefferson County, Washington case that states can also deny a certification if the activity to be permitted would interfere with one of the designated uses of the receiving water by, among other things, reducing its streamflow too much. In the Jefferson County case, the State of Washington had conditioned its certification of a federally licensed hydroelectric power project by a minimum streamflow requirement that had to be maintained by that project. The Supreme Court said that was okay; part of the Clean Water Act's goal is to not simply maintain the chemical integrity, but also to maintain a system's physical and biological integrity. The Court concluded that you need enough water in terms of quantity to maintain these factors and, therefore, the state was within its rights in denying a certification, or conditioning certification, pursuant to the Clean Water Act based on minimum streamflow requirements.

Although this was not a Public Trust Doctrine case, the state was simply relying on the designated use of the river in question for fish habitat, and on its belief that the project, without minimum streamflow requirements, would interfere with that use. There is not any reason the state could not deny a certification if the project would interfere with Public Trust values, such as preservation of fisheries, wildlife, navigation, recreational values, and so on. As I said, the state can deny or condition the certification if the discharge threatens any other appropriate requirement of state law. Certainly, the Public Trust is highly relevant to the preservation of the very values the Clean Water Act is designed to protect.

I do not know if the game and fish agencies in all states are in the loop for these certifications. I think probably not. In many states, these certification requests go to the state environmental agency and that is often not the same as the game and fish agency. Furthermore, that agency may not be consulting with the game and fish agency on the certification. If this is the case in your state, I suggest you try to get into the loop. Tell the environmental agency that if it is getting Section 401 certification requests for hydroelectric power projects, pollution permits, or 404 permits, your agency wants to review the application before certification is granted. If you see an application that would dry up a river or that would reduce streamflows to levels that would impair fisheries, or that would cause pollution levels that would impair fisheries, request that certification be denied on that basis under the Public Trust Doctrine. I believe that, in many states, you can also ask for deniable certification based on the state's water quality standards themselves, as in the Jefferson County case. If the river in question is designated as a fishery, for example, a cold water fishery (in some cases the states have adopted detailed designations in their water quality standards, and these standards are usually adopted by the state environmental agency), and the federally permitted activity would interfere with that use, you can cite that and say that this is going to interfere with the protected use. Therefore, certification should be denied, or conditioned on the proposed activity being limited in such a way to protect the resource. It is a powerful tool because the project cannot proceed without state certification. That is something you can use as leverage. Sometimes you might be able to negotiate instream flows with the project proponents in order for them to get their necessary certification.

There are many other things you can do under the federal Clean Water Act to protect fisheries, both in terms of quantity and quality protection. I encourage you to review the Act and explore ways it may be useful to you in maintaining instream flows. I wrote an article on that subject in 1995, and I have a few copies to distribute.

# The Public Trust Doctrine, Riparian Water Rights, and Other Causes of Action

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*J. Wallace Malley, Jr.*

Vermont Attorney General's Office, Montpelier, Vermont

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I am going to begin with a disclaimer. Although I am going to discuss riparian water rights law, I would not pretend to be an expert on riparian law. When Alex Hoar introduced this panel, he said we should be on the final approach with our landing gear locked down. I was thinking "I am not sure my landing gear is locked down, but I am beginning to loose altitude."

What we are trying to suggest to you in this panel, is that there are other legal theories out there that may or may not have been tested. These "tools" may have some application for you. Tuck these points away in the back of your mind. There may be opportunities for you to use them in the future. Basically, this represents some thinking out loud on my part.

I am going to attempt to tie a few of the points together that we have been discussing. One notion is that the Public Trust Doctrine perhaps works best when used with something else. I certainly would underscore that theme. There is a lot of uncertainty about the Doctrine.

During the next 10 minutes or so, I want to talk to you about two theories that are fraught with uncertainty. On one hand, the Public Trust Doctrine and, on the other hand, you have private water rights--in particular, riparian water rights claims. I want to focus on using other water law rights to advance Public Trust objectives. I should start by echoing something that Richard Roos-Collins said. He was describing the private water law rights in the hybrid states where there is some kind of combination between riparian law and prior appropriation water rights. I was busily trying to take down as much of this information as possible to set my landing gear for today and, after he had described everything, I heard him ask, "So who has what right to water?" Then his response to his own question was, "Well, we do not know." I think that was Richard's way of pointing out that there are uncertainties.

It is difficult to predict the outcome of litigation on a private riparian water rights claim. You will be dealing with principles such as: "Riparian water users have equal rights to reasonable use of the water." It is hard to get gallons per day out of that, or at least to predict where you are going to end up if you bring one of these cases. I was looking at some old cases in Vermont dating back to old water-driven mills, old dams, and things of that sort. I have seen expressions such as "It is the appropriate use of the stream in a proper manner" used in court decisions. Again, I am looking for a "landing gear" for you, and this is not giving me much to go on. Then you look at the Public Trust Doctrine and you have the notion that the state is the Trustee to protect the resources for public uses of navigation, commerce, and fishing. In some jurisdictions, it goes well beyond those uses, and includes such things as recreation and other uses. Obviously, that does not mean that nobody else can use the river but the state. So, you are always in a situation of striking a balance.

Back to the fact patterns. Let us look at scenario one. The scenario is that the state owns a fish hatchery along the river and has been operating it for some time, maybe 30 years. Upstream agricultural enterprise comes in after the state has established its hatchery and begins to draw off a substantial amount of water (assume streamflows are reduced by 50 percent) and results in a dramatic drop in production at the fish hatchery. I have thrown out the hypothetical of 50 percent in order to give you an egregious case with which to start. It is pretty obvious in that kind of situation that the state has all kinds of claims it can make. If the state is a riparian water rights state, it can make the claim that the upstream project and water use is an unreasonable use; it deprives the hatchery of an equal access to the water to the point of basically destroying the fundamental function of the hatchery. In a prior appropriation state, the state and its hatchery were there first, and the "Johnny-Come-Lately" (a junior appropriator) came in and upset things. I believe that there is a very strong claim that can be made here. In this instance, there is no need to start invoking Public Trust claims. Prior appropriation claims are sufficiently strong.

I threw out the first scenario to demonstrate that you should keep in mind that if you are looking for a way to address fishery problems, you may have a situation where you have a state facility on the river that is using the river in some way. This gives the state a claim that any riparian property owner would have.

Scenarios two and three get a little more complicated. Scenario two actually is a version of scenario one. This scenario is somewhat like the Missisquoi River situation in northern Vermont. The Missisquoi River flows through a national wildlife refuge and into Lake Champlain. Let us suppose, however, that rather than a federal refuge, it is a state refuge. The refuge has substantial fish and wildlife habitats and populations. The state has owned the refuge's land for many decades. Further assume that at some point upstream an irrigation withdrawal results in a negative effect on the state-owned lands downstream, and that there is a 20 percent loss of fish spawning area within the refuge. It seems to me that this is another one of those situations where, putting the Public Trust Doctrine aside, the state has a strong claim. The state is a property owner like anybody else. In a riparian state, the courts would be asked to strike a balance, a reasonable use balance between the state activity within the wildlife refuge and the irrigation user upstream. This can get into complications, however. What is the cause and effect of the upstream withdrawal? That gets very uncertain. Are there other withdrawals that are affecting the situation, and how do you actually carve out what this one particular upstream user is doing or causing?

Under scenario two, there is a potential riparian claim within riparian states, and within hybrid states, there would also be a riparian claim and perhaps a prior appropriation claim. This is an area where, if you bring in the Public Trust Doctrine, you are likely to enhance the effectiveness of the water rights claims and of Trust claims over either of the two claims standing alone. The riparian claim is very uncertain and the Public Trust claim can be the same way. If you put the two together, you are giving the court a couple of hooks upon which to hang a good decision. Sometimes, these theories can be mutually supportive, when the state comes in as a property owner and asserts its riparian rights. The state's use is a legitimate use. In addition, the state has the obligation on behalf of the public to protect this resource for navigation, commerce, and fishing. You put those two together and you have a case there. I would not begin to discount what your likelihood of success would be. I am suggesting that if you have a concern about river X, and the state owns some land

(for example a park, forest, wildlife refuge, etc.), there may be some claims there that you can hook together with Public Trust in order to maintain instream flows.

The third fact pattern addresses the situation where the state does not own a wildlife refuge, park, state forest, fish hatchery, or other lands along the river. Assume the waterway is a navigable waterway. Thus, the state, except for Nebraska and a few other states, owns the river bed up to the high water mark. In my view, a riparian right protects any landowner who owns land abutting or joining a river, the land over which and through which a natural waterway flows. The fact that the state does not own the farmland or the forest land, for example, above the high water line, but does own the riverbed, would appear to me to give the state a riparian water right claim just like any other landowner. It seems to me that, even in circumstances where the state does not own lands adjoining the waterway, the state has a valid riparian claim. What closer connection to the river can a landowner have than owning the river bottom? So, add this point to the fact that the state stocks the river with fish, and actively tries to use it for fishing and recreational uses. I suggest this as a possibility that may exist as you are looking for ways to raise issues that protect fish and stream flows. You may be able to bring it into a Public Trust claim, and work it together with a private riparian claim. The two together may do a lot better than either of them alone.



# Instream Flows and the Law Of Nuisance

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*Harold M. Thomas*

California Department of Fish and Game, Sacramento, California

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I am going to conclude this panel with a discussion of nuisance laws, and I begin by urging each of you to go back to your individual states and check the statutes in this area.

The Public Trust Doctrine is all about protecting public rights or, said another way, common property rights. Today's modern property rights debate is a discussion about what is common and what is private. Every state has a little different political culture, and a different view about what is private and what is common. I have done some research in this area of the law, and recently discovered an interesting section in the Louisiana Code. I was led to the Louisiana Code by reading the Field Code, which is a c. 1870 codification of state law that is the source of California's statutory nuisance law. In my research, I read a note in the Field Code that indicated portions of the Field Code was derived from the more ancient Louisiana Code. In turn, the Louisiana Code was said to be derived from the French Code Napoleon. I then read the Louisiana Code in search of the roots of the Public Trust Doctrine.

In particular, I was led to Article 449 of the Louisiana Code, which characterizes certain property rights. The Article states that, "...common things may not be owned by anyone. They are such as the air and the high seas, that may be freely used by everyone comfortably with the use by which nature intended them." That is modern Louisiana law, and yet, in the context of the property rights debates, this ancient code restates ideas associated with a community based philosophy. The idea of a common property cannot be owned by anyone is a communal concept that stands in opposition to exclusively private property.

The following article of the Louisiana Code discussed the nature of public property. "Public things are owned by the state or its political subdivisions. Public things that belong to the state are running waters, the waters and bottoms of natural navigable water bodies, the territory sea, and the seashore." There is a lot of water in Louisiana, and this article states that all of it is owned by the state. So, if the residents of Louisiana are debating private property claims to use water, have they not misread the property law of their state? If the code indicates that all of the waters are owned by the state, where is the source of the private rights claims?

How is wildlife ownership treated by the common law? In English common law, the king owned the wildlife. In Louisiana, the state owns "wild birds, quadrupeds, fish, aquatic life, water bottoms, oysters and shellfish." Ownership and title to all wild birds, and other wildlife, and bordering streams, bayou, lakes, bays, sounds, and inlets are within the territory and jurisdiction of the state. There is no claim of private rights in the words of the Louisiana wildlife statutes.

The communal philosophy that supports Louisiana water law was, in part, the basis for

California fishery law. California was a state that adopted the Field Code as the form and substance for its basic law. There are six states that adopted the Field Code, South Dakota, North Dakota, Washington, Idaho, California, and Colorado--although Colorado really did not follow the water resource sections. All of these states' laws imported the same legal principals of common ownership of water and wildlife into their statutory law.

The law of nuisance is one of those common law expressions of public rights. No better definition of a public nuisance has been suggested than an act or omission "which obstructs or causes inconvenience or damage to the public in an exercise of rights common to her majesty's subjects." Any invasion of common rights is proscribed by nuisance law. These ideas found form in the 1872 California nuisance law which proscribed, "Anything which is injurious to health, indecent, offensive, obstruction to the free use of property, interferes with the comfortable enjoyment of life or property, or unlawfully obstructs free passage or use, in the customary navigable lake, river, bay, stream, canal, or basin." I wish to emphasize that any interference with the enumerated public property interests is a statutory nuisance and thus penalized by criminal sanctions as well as damages and abatement. This is not an unusual statute. A number of states have similar statutes, including the Field Code states of South Dakota and North Dakota.

How can nuisance laws help increase instream water resources? Violations of nuisance laws traditionally have been treated as criminal violations, and local district attorneys are the proper actors to enforce nuisance laws. Fishery agencies do not require an attorney general to prosecute a nuisance violation. Fisheries advocates can convince a district attorney to file cases under the nuisance law, and thus address both water supply and fish passage issues. In fact, in California for 60 years, the district attorneys have been enforcing fish preservation law under nuisance theories. Moreover, there is a California appellate decision from as far back as in 1890 that clarified the link between fish and nuisance law in California. At the end of the 19<sup>th</sup> century, water diversion pumps on the Sacramento River had been killing salmon in large quantities, and a Superior Court enjoined operation of the pumps to prevent a continuing statutory nuisance. The pumps were shut down, and the Court of Appeals supported the abatement in their published decision.

Ohio also has a nuisance law that says, "No person shall unlawfully obstruct or impede the passage of a navigable river, harbor, or canal." This is particularly noteworthy since Ohio is not known as a state whose laws support preservation of fish and wildlife.

Another conservative state which has aquatic nuisance laws is Colorado. Colorado has a very narrow definition of nuisance, and it is only the unlawful pollution or contamination of surface or subsurface waters of any water that constitutes a nuisance. Since the law refers to "any water," perhaps we could expand the Colorado law, even as narrowly as it is written, to form a basis for expanded protection for fish and wildlife.

We have very good nuisance laws in a number of states, and to capitalize on these laws we must pick the right legal case to develop strong appellate law. We must also pick the right factual situation to develop good protective law, and to achieve fisheries objectives. Nuisance law is a gold mine of potential causes of action, and it gives you a choice of forums. You can bring nuisance cases through multiple plaintiffs, and venue considerations may give you a choice of locations. You can

team up with environmental groups that are interested in bringing fisheries cases and you can team up with your attorney general to prosecute the case. As a factual matter, given the text of these very broad laws, there are many actionable nuisances in each state.

I do have a caution, however. We have a heavy burden when plaintiffs are choosing which cases to bring and how to make the law work. Every state has a community of fisherman who wish to bring Public Trust Doctrine claims on every dam, river, and stream in their state. Many streams have been abused or dewatered, and in a perfect world, these wrongs should be corrected. I frequently advise our constituents to avoid legal action on cases that seem to demand a remedy. I explain that I understand they know the river, and have been wronged by illegal or unwise diversion, but the difficult fact of life is if one brings a case on a well loved river and loses, the consequences are unacceptable for a generation or more. It is incumbent upon us as fishery lawyers to carefully choose our cases, to develop the facts and evidence in those cases, and to bring those cases in a way that reallocates water and protects the riverine resources.



# The Public Trust Doctrine and Other Legal Tools for Instream Flow Protection

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## *Questions and Answers*

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**QUESTION 1:** For J. Wallace Malley, Jr. - You described several interesting scenarios that present a number of evidentiary questions and illustrate some procedural problems. For instance, your second hypothetical talks about a 20 percent reduction in spawning grounds. In your situation, have you actually demonstrated that there is a problem, that the problem is due to the loss of spawning area, and that the loss of spawning area is due to the stream flow reduction?

### **RESPONSE TO QUESTION 1:**

*J. Wallace Malley, Jr.:* For my scenario, I assumed that the loss was from the lowering of the water levels during the spawning season, and that the loss could be measured. The reason I included spawning ground losses in the scenario was to give a sense that there is something tangible that you can prove. It is not a complete destruction of the area, but certainly is significant enough that a state, as a landowner, could begin to make reasonable use of this resource just like anyone else, and we are suffering a tangible harm here.

**QUESTION 2:** For J. Wallace Malley, Jr. - We have already established that the Public Trust Doctrine lies within the state's rights. In Alaska, the U.S. Fish and Wildlife Service has 16 refuges, and owns 20 percent of Alaska--that is a lot of acres. Within those 16 refuges, there are navigable rivers to which the state, once we establish the head of navigability, will have control of the bed. The state already has it, but we do not know the extent of the ownership. The threat we perceive is that the state politicians are pro-development, and it may well be the state itself that is the entity that would cause a threat to the fish and wildlife resources that are within the state-owned water column and stream bed. Can the federal government initiate Public Trust Doctrine backed litigation if necessary against the state for the state's failure to protect its Public Trust responsibilities?

### **RESPONSES TO QUESTION 2:**

*J. Wallace Malley, Jr.:* That is a good question. The ability of persons to bring Public Trust claims is pretty broad. Certainly individual citizens have been able to claim, in some states, the right to bring a suit. However, I cannot think of a circumstance where the United States has brought such a suit, but I see no reason why it could not. The federal government is an entity. The question is whether it has an interest which is directly and sufficiently impacted by the activity so as to have "standing" to bring a suit.

*David S. Baron:* I believe this issue is up in the air. The best argument that the United States would have is that it is a property owner and, as such, has an interest and is a beneficiary of the Trust as

well as everyone else in the state. Ironically, usually the United States is trying to defeat state Trust claims. A lot of litigation over navigability involves a state claiming a river was navigable at statehood and, therefore, belongs to the state, and the United States claiming, no, it belongs to the United States. You pose an interesting situation.

**QUESTION 3:** For J. Wallace Malley, Jr. - In your second scenario, you assumed the refuge was state-owned. Would the same hold true if the refuge were federally-owned or county-owned?

**RESPONSE TO QUESTION 3:**

*J. Wallace Malley, Jr.:* Certainly the federal government could bring a riparian rights claim under this scenario. Its ability to assert its Public Trust claim has never, to my knowledge, been recognized by a court. My personal view is that the federal government probably could not assert a Public Trust claim.

**QUESTION 4:** J. Wallace Malley, Jr. - In the event the state owned the submerged lands, the lands beneath the navigable waters, and the federal government owned the uplands adjacent or riparian to the aquatic system, could the state and federal government have riparian claims or Public Trust claims?

**RESPONSES TO QUESTION 4:**

*J. Wallace Malley, Jr.:* In that scenario, I can foresee each of them having riparian type claims. Certainly the state would have a Public Trust claim. Whether the federal government could join in on the Public Trust claim seems doubtful to me.

*Harold M. Thomas:* I agree with Wally.

**QUESTION 5:** I have heard a number of references about the states owning to the high water mark. The Big Horn River case in Montana went all the way to the U.S. Supreme Court--it took about 6 years. The Supreme Court handed down the finding that state ownership extended to the average high water mark. Is there other case law or another Supreme Court decision where state ownership actually goes to the high water mark? And would that be the highest water mark ever?

**RESPONSE TO QUESTION 5:**

*Mary J. Scoonover:* It is a state-by-state determination but, generally, it is the average or ordinary high water mark and does not include flood flows or some unique experience that has happened. Even if a unique flood flow occurs on a regular basis, courts have not been willing to extend it to the highest water mark, but "ordinary" or "customary" is the phrase that is used most often.

**QUESTION 6:** Is there a fair degree of variation between the terms "ordinary" and "customary?"

## RESPONSES TO QUESTION 6:

**Mary J. Scoonover:** It comes down to a factual determination. Often it is the state's scientists and historians against the water user's or adjacent landowner's scientists or historians to determine what is exactly the ordinary or common high water mark. It is not clearly defined, like a lot of other things in the Public Trust and water rights law, and it is open to determination and factual situations. So, we have some good appellate court decisions in California and some that are not so good.

**J. Wallace Malley, Jr.:** That is a good question, because use of the term "mark" suggests something that you can visibly see. Generally speaking, when we talk about ordinary or common high water marks, we are talking about a hypothetical "mark" rather than some visible, physical mark or line on the shore.

**J. Allen Jernigan:** In coastal states, the high water mark is usually going to be the mean high water line in cases where you are talking about the tidal waters. However, there are also some low water mark states on the East Coast; for example, Maine, Massachusetts, Virginia, and Pennsylvania. These marks are typically calculated from something like 19 years of tidal data.

**COMMENT:** For J. Wallace Malley, Jr. - I realize your third scenario is hypothetical but, if you were in Wyoming, you would not touch it with a 10-foot pole. First off, if you say who has been stocking that stream for 40 years, there is a good chance you have introduced whirling disease, or something else, that would have knocked out the trout population. The fact that you reduced the streamflow only 25 percent and you still have reduced your trout population only 15 percent is great news in Wyoming.

## RESPONSES TO COMMENT:

**J. Wallace Malley, Jr.:** That is one of the reasons I mentioned this scenario. This is the kind of case that, by itself, would be hard to make just on a riparian claim. That is why maybe combining it with a Public Trust claim might make a difference. Your point is well taken. Those numbers are not the type of thing that is going to make a judge jump out and say this is outrageous.

**COMMENT:** For Harold M. Thomas - As far as looking for legal assistance, in addition to looking to attorney generals and your environmental groups, I suggest you look to tribal governments. This is an opportunity for effective alliances. I realize that there may be some historical antagonism between tribal and state governments, but there is always time to heal. Tribal governments and their constituencies have unique cultural ties to the resources, and very often they have begun to develop legal capabilities. They often have in-house attorneys. I encourage you to explore alliances with tribal governments as a good way to accomplish your objectives.

## RESPONSE TO COMMENT:

**Harold M. Thomas:** That is a good suggestion. However, I do have one caution, and this applies to all potential allies. It may appear on the surface to be a natural alliance but one has to look very

carefully at what those rights are and make sure they are exactly coterminous. Goals of other parties and your agency's goals may not be compatible, so one has to be careful when seeking allies.

**QUESTION 7:** Assume you pick the right case and you are successful. If you have another situation that is similar, do you have to go through the whole thing again, or is there some precedent that carries over so that you do not have to do as much work the next time?

**RESPONSES to QUESTION 7:**

**Harold M. Thomas:** That is a good question, and it is more of a sort of human nature question. As a legal matter, in theory, you could repeat the problem endlessly and the solution endlessly but, as a practical matter--and I think the Mojave River issue illustrates what happens--we did not have to litigate the Public Trust Doctrine in the Mojave case; we just threatened to litigate it. We had litigated the Doctrine in the Mono Lake cases, and the same lawyers were involved in both cases, the Attorney General's Office and ourselves. So, if you play your cards well, I believe you can build on the deterrent effect of successful litigation through a good settlement policy. That being said, there are always willful people who are more willful than the government, and (much like the example we heard about in Vermont, where someone was going to dredge the lake in front of his place) I would let specific cases go even though my fish biologist says we have to do this. We will never convert the unreconstructed, dedicated exploiter of resources, so you have to accept that fact, but I think the general trend can be successful and has been in our cases.

**David S. Baron:** There is a more legalistic answer to that question. Assume you win a Public Trust claim in the lowest court, a trial court. You duke it out, you win, and that is the way it ends. Under the law, that case has no binding effect on anybody other than the parties to that case, the facts of that case, and the water body at issue. You cannot go to the next case and tell the consumptive user there that the judge in Humboldt County decided that the Public Trust prohibits this particular kind of activity, and he cannot do that in Kern County either. You can point to that case, however, and say the case was won over there and there is a good chance of winning this one, too. But the judge in the second case does not have to follow the decision in the first case. On the other hand, if the decision in the first case gets appealed and it is won again and the court writes a written decision that is published, then the legal principles that are decided in that case will bind everybody in subsequent cases. That does not mean you will not have to go through the facts in the second case, but your burden is lowered because you will have already won, hopefully, on a lot of the legal arguments. It will be less of a battle, but you are still going to have to go through the facts in each case.

**QUESTION 8:** The federal Clean Water Act and state Section 401 certification has created quite a dilemma in Nebraska. The State Water Quality Act relegates water quality issues to one agency and water quantity issues to a separate agency. The state water quality agency says it does not have the jurisdiction to condition water quality certification, or 401 certification, with minimum streamflows, even though there is sufficient justification for those streamflows. What are your opinions on this dilemma, and how might this conflict be resolved?

## RESPONSE TO QUESTION 8:

*David S. Baron:* It appears that the issue of who has the certification power within the state is a matter of state law and, in this case, the authority is assigned to the water quality agency. Moreover, the legislature has said that denial of certification based on quantity issues can only be made by the "water quantity" agency. Given these conditions, I believe the Federal Energy Regulatory Commission would have a hard time recognizing a denial of certification based on water quantity if the recommendation came from the "water quality" agency. However, if it is unclear which agency has the certification authority, if it is not set out in clear language, then I believe the question is more of an up-in-the-air question.

Section 401 certification is a matter of state law. In fact, if a state agency denies certification to a project and the project sponsor disagrees, the issue is litigated in state court. It is not a federal court question. However, I suspect that the federal Environmental Protection Agency could weigh in and say they do not believe it is a standards issue; but it could only be persuasive on that point--it could not be binding.



# The Public Trust Doctrine and its Application to Protecting Instream Flows

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## General Questions, Answers, and Discussion

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*Workshop Participants*

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**QUESTION 1:** For Mary J. Scoonover - What are the payoffs of the Mono Lake cases, particularly in California?

**RESPONSE TO QUESTION 1:**

*Mary J. Scoonover:* The California Supreme Court in the National Audubon decision revitalized the ancient Public Trust Doctrine to require the state to protect its common heritage of streams, rivers, tidelands, and navigable waterways. The payoff is that the state now has an active, and ongoing duty to take the Public Trust into account in all of its water allocation decisions, and to consider those allocation decisions in light of current knowledge and current needs. The benefit has been that Mono Lake and most of the Public Trust resources of the Mono Lake Basin will be protected in perpetuity.

**QUESTION 2:** For Mary J. Scoonover - Do you consider this decision precedent setting?

**RESPONSE TO QUESTION 2:**

*Mary J. Scoonover:* Clearly, the Mono Lake decision and the National Audubon decisions are precedent setting decisions, not only in California but also in the western United States.

**QUESTION 3:** For Richard Roos-Collins - Can you tell us a little bit about the application that the precedent the Mono Lake cases may have in other states to agency and non-agency plaintiffs?

**RESPONSE TO QUESTION 3:**

*Richard Roos-Collins:* The Mono Lake cases were decided under the Public Trust Doctrine. That Doctrine is law in all 50 states. In California, prior to the Mono Lake cases, the law had not been enforced to limit the diversion of waters for offstream consumptive uses. The Mono Lake cases held that diversions for that purpose must be undertaken in a way that protects fisheries and ecological values. Those cases, therefore, are a precedent for the enforcement of the Public Trust Doctrine in all 50 states. The Doctrine recognizes the states' ownership of the lands and waters of navigable waterways.

**QUESTION 4:** For Harold M. Thomas - Please tell us how the Public Trust Doctrine was applied in the Mojave Lake, California, adjudication to avoid litigation, and how it was used in negotiations.

#### **RESPONSE TO QUESTION 4:**

**Harold M. Thomas:** The lessons of the Mono Lake cases, that is the holdings about water rights, had a fairly immediate application in the Mojave River water rights adjudication. The Mojave River adjudication was a large adjudication that included a lot of water users--development interests, agriculture interests, municipal supply, and so on. As a result of the Mono cases, the state agencies were able to go to the table in the settlement discussions, and allege and argue that the water rights cases, the Public Trust cases, meant that fish and wildlife had to be taken care of in the context of the water rights adjudication. The other side of the table accepted this argument, and consequently, we did not have to litigate the Mojave case. Settlement was achieved on the basis of the threat of our potential success. The Mono Lake precedent established the credibility of that threat.

**QUESTION 5:** For Gary E. Smith - As program leader of the California Department of Fish and Game's Mono Lake activities and litigation, and as lead biologist providing technical expertise in the Mono Lake water rights litigation and hearings, could you tell us about some of the problems field biologists may face, and what we should be most concerned with if we were to pursue similar litigation?

#### **RESPONSE TO QUESTION 5:**

**Gary E. Smith:** One of the biggest problems that we initially faced was obtaining adequate funding and getting management's support in a politically tenuous climate for the operations and investigations that we needed to conduct in order to be well prepared, technically, for the hearings. Once we obtained funding and support, the next priority was to form a team of experts from a number of technical disciplines to develop and evaluate information on the aquatic systems, to evaluate streamflow regimes needed to restore and maintain each stream's habitats and dynamic processes, and to develop streamflow regimes necessary to keep fish in good condition. Once we had the funding, support, and the team set up, the rest fell into place.

One of the first things to do, when pursuing a water rights or Public Trust issue, is to define your objectives, and then focus on those objectives. Do not let yourself get off track. Be very clear on what you are trying to accomplish. The administration's support is essential to any chances of success. If you cannot convince management to support your cause, you are probably doomed to failure. Surround yourself with a team of good people. Include legal counsel, as well as technical experts, on the team early on. Clearly, the teamwork of experts from numerous disciplines and legal staff was fundamental to our success in the Mono cases. When conducting investigations and preparing your cases, keep in mind what you are going to do with your information. Use techniques and methodologies that are state of the art, are accepted, and are defensible. When you go into a hearing or litigation, present data that have been developed in a manner that is trackable and defensible. It is critical that the information that you use stands up to legal and technical cross-examination and criticism. It may be creative, but it has to be trackable and defensible. You cannot be successful by saying, "Gee, I think...this is right." You may well be right, but your conclusion is not defensible. You have to present and rely on information that a judge or a hearing officer can look at later and see how you got to the end product.

**QUESTION 6:** For Harold M. Thomas - What are some other significant points stemming from the Mojave River negotiations?

**RESPONSE TO QUESTION 6:**

**Harold M. Thomas:** The Mojave River adjudication was significant because the Public Trust Doctrine, or more specifically, the threat of the use of the Doctrine, not only protected the Mohave tui chub (*Gila bicolor mohavensis*), which exists in intermittent pools in the riverbed, and other fish and wildlife in an intermittent river, it was used to protect other habitats and resources as well. The Doctrine's reach extended to the river's riparian vegetation, its underflow, and the habitats and resources between the surface and underflow zone. So, the Public Trust Doctrine is evolving to cover not only active water habitats and resources, it is being extended to intermittent river habitats and resources.

**QUESTION 7:** For Gary E. Smith - How does a biologist know when he has enough data or enough information when preparing for a hearing or litigation?

**RESPONSE TO QUESTION 7:**

**Gary E. Smith:** A somewhat tongue in cheek response is "a biologist never has enough information." We always want more data. Enough data is not a black and white situation. This question goes to the heart of my comment of a moment ago--develop clear objectives and develop defensible information. If you have defined your objectives and remained focused, set up multi-discipline studies and analyses and followed through, the likelihood of having collected enough data will be increased. Review your study design for shortcomings before beginning the investigations. Ask other experts to review it. Ask your legal counsel to review it. Remember, your counsel will be taking the lead during litigation or hearings, and your counsel's early involvement and understanding of the technical aspects is invaluable. Do the same with the data developed. If you have set up and conducted your studies properly, the data collected should be sufficient. However, always be prepared for someone to point out an unexpected shortcoming.

**QUESTION 8:** For Gary Smith - How do you pick the right case to litigate? What are the things that one should think about? Is this the river? Is this the case? Is this the court? Is this the judge? How do you decide?

**RESPONSE TO QUESTION 8:**

**Gary E. Smith:** That is a difficult question for a biologist. I fall into the category of wanting every case to be tested or to be contested. I am fortunate to receive good legal advice, and I have learned to rely on legal counsel to pick the appropriate cases. They know the legal arena a lot better than I. I am the biologist. They come to me for the biological information. I, in turn, go to them with my biological information and help them pick the case.

**QUESTION 9:** For Richard Roos-Collins - If a biologist asks "Can we litigate this case?", what advice do you give them about picking the right case?

## **RESPONSE TO QUESTION 9:**

**Richard Roos-Collins:** The decision to proceed in a case rests largely on intangible and intuitive logic developed from looking at the facts, talking to your peers, and being sensitive to the local political, institutional environment that you operate in. In other words, does this case seem egregious? Does this case seem wrong? Does what the defendant is engaged in seem inappropriate? That intuitive logic of right and wrong ultimately drives any of this litigation, and it drives the success because, if we cannot convince the public and the judges and the institutions that what is going on is intuitively wrong, we are not going to prevail.

**QUESTION 10:** For Alexander R. Hoar - Briefly describe your impression of the workshop.

## **RESPONSE TO QUESTION 10:**

**Alexander R. Hoar:** We brought representatives from fish and wildlife agencies from 50 states together for a workshop on the Public Trust Doctrine and its application to instream flow protection. The purpose was to provide an introduction to the Doctrine, which has been asleep in many states. The workshop was a wake-up call. There are a few cases around that everyone has heard about, and those were discussed. However, the main purpose was to bring in a panel of experts--all lawyers representing the states, attorney general offices, public interest groups, and from academia--to present a history of the Public Trust Doctrine and to explain how it is being applied from different perspectives. These included states' perspectives and public interest groups' perspectives. We also had a judge with us who gave us his own perspective on Public Trust Doctrine cases. We had an afternoon of case studies, where we talked about some of the fringes of the Doctrine, and as one person said, where it was "creeping." The first day was spent in education. The second day we talked about how the Doctrine can be applied, and how it should be applied with all the other laws and regulations with which we work, such as the federal Clean Water Act, state laws, fish and game laws, fish passage and access laws, and so on, so that the tools in their tool box all work in concert to protect the public resources. Where we hope to go from here is to help the states in any way we can to further implement the Public Trust Doctrine.

APPENDICES  
TO THE PROCEEDINGS OF  
THE PUBLIC TRUST DOCTRINE  
AND ITS APPLICATION TO PROTECTING  
INSTREAM FLOWS WORKSHOP



## APPENDIX A

# THE PUBLIC TRUST DOCTRINE AND ITS APPLICATION TO PROTECTING INSTREAM FLOWS

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### *Select Public Trust Doctrine Litigation and Literature*

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#### Relevant Case Law:

Arizona Center for Law v. Hassell, 837 P. 2d 158 (Arizona App. 1991)

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

Baker v. Mack, 107 Cal. App. 3d 1040 (1971)

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Borough of Neptune City v. Borough of Avon by the Sea, 294 A.2d 47 (New Jersey 1972)

Boston Waterfront Development Corp. v. Commonwealth, 378 Mass. 629 (1979)

California v. Federal Energy Regulatory Commission, 495 U.S. 490 (1990)

California v. Superior Court (Lyon), 29 Cal. 3d 210 (1981)

California v. Superior Court (Fogerty), 29 Cal. 3d 240 (1981)

California Trout, Inc. v. State Water Resources Control Board, 207 Cal. App. 3d 585 (1989)

California Trout, Inc. v. Superior Court, 218 Cal. App. 3d 187 (1990)

Daniel Ball, 77 U.S. 557 (1871)

Environmental Defense Fund v. East Bay Municipal Utility District, 439 U.S. 811 (1978)

Geer v. Connecticut, 161 U.S. 519 (1896)

Hardy v. Higginson, 849 P.2d 946 (Idaho 1993)

Hazen v. Perkins, 92 Vt. 414 (1918)

Hughes v. Oklahoma, 441 U.S. 322 (1979)

Idaho Conservation League v. State of Idaho, 911 P. 2d 748 (Idaho 1995)

Illinois Central Railroad Company v. Illinois, 146 U.S. 387 (1892)

Just v. Marinette County, 201 N.W.2d 761 (Wisconsin 1972)

Katie John v. United States, 1994 U.S. Dist. Lexis 12785 (D. Alaska 1994), *rev'd*, Alaska v. Babbitt, 54 F.3d 549 (9<sup>th</sup> Cir. 1995), *cert. denied*, Alaska State Legislature v. Alaska, 516 U.S. 815 (1995)

Kootenai Environmental Alliance v. Panhandle Yacht, 671 P. 2d 1085 (Idaho 1983)

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Massachusetts v. Alger, 61 Mass. 53 (1851)

Montana Coalition for Stream Access v. Curran, 682 P.2d 162 (Montana 1984)

Muench v. Public Service Commission, 53 N.W.2d 514 (Wisconsin 1952)

National Audubon Society v. Superior Court, 33 Cal. 3d 419 (1983)

Natural Resources Defense Council v. Patterson, 791 F. Supp. 1425 (E.D. California 1992)

Oregon Div. of Lands v. Riverfront Protective Association, 672 F. 2d 792 (9<sup>th</sup> Cir. 1982)

Payne v. Kassab, 312 A.2d 86 (Pennsylvania 1973)

People v. California Fish Company, 166 Cal. 576 (1913)

People v. Gold Run Ditch and Mining Company, 66 Cal. 138 (1884)

People v. Truckee Lumber Company, 116 Cal. 397 (1897)

Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988)

Pollard's Lessee v. Hagan, 44 U.S. 212 (1845)

The Propeller Genessee Chief v. Fitzhugh, 53 U.S. 443 (1851)

RJR Technical Co. v. Pratt, 453 S.E.2d 147 (North Carolina 1995)

Roanoke River Basin Associ

State of North Carolina v. Hudson, 665 F. Supp. 428, *cert. denied*, 502 U.S. 1092 (1992) Roanoke River Basin Ass'n v. Hudson, 502 U.S. 1092, 112 S.Ct. 1164, 117 L.Ed.2d 411, 60 USLW 3436, 60 USLW 3572, 60 USLW 3578, 34 ERC 1616 (U.S.N.C., Feb 24, 1992) (NO. 91-848)

State of Vermont v. Malmquist, 114 Vt. 96 (1945)

State of Vermont and City of Burlington v. Vermont Central Railway, 571 A. 2d 1128 (1989)

Superior Public Rights v. State Department of Natural Resources, 263 N.W. 2d 290 (Michigan 1978)

United Plainsmen v. North Dakota State Water Conservation Commission, 247 N.W. 2d 457 (North Dakota 1976)

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United States v. Willow River Power Co., 324 U.S. 499 (1945)

Utah v. United States, 403 U.S. 9 (1971)

Wilbour v. Gallagher, 462 P. 2d 232 (Washington 1969)

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## APPENDIX B

# THE PUBLIC TRUST DOCTRINE AND ITS APPLICATION TO PROTECTING INSTREAM FLOWS WORKSHOP

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## INVITED SPEAKERS' BIOGRAPHIES

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### **JOSEPH L. SAX**

Office of the Secretary  
U.S. Department of the Interior  
Washington, D.C.

Professor Joseph L. Sax is Counselor to the Secretary of the Interior and Deputy Assistant Secretary for Policy, for the U.S. Department of Interior. He came to the Department of the Interior from the University of California (Berkeley, California) where he was the James H. House and Hiram H. Hurd Professor of Environmental Regulation. Professor Sax has written extensively on western public land and water issues, national parks, the Public Trust Doctrine, and the "takings" clause of the Constitution. He is author or co-author of a number of books, including *Legal Control of Water Resources*, and *Mountains Without Handrails: Reflections on the National Parks*, and more than 100 articles on natural resources and property rights in scholarly and general interest journals. Among his most recent articles is a study of the U.S. Supreme Court opinion in Lucas v. South Carolina Coastal Council, "Property Rights and the Economy of Nature," which appeared in the *Stanford Law Review*.

Professor Sax is a graduate of Harvard College and the University of Chicago Law School. He worked at the U.S. Department of Justice and in private practice in Washington, D.C., and has served on the faculty at the University of Colorado, the University of Michigan, and at Berkeley. He has been a visiting professor at many universities, including the University of Paris, Stanford University, and the University of Utah. He holds an honorary doctor of laws degree from the Illinois Institute of Technology, and is a member of the American Academy of Arts and Sciences. He is the recipient of many awards, including the Elizabeth Haub Medal of the Free University of Brussels (Belgium), the University of Chicago Alumni Achievement Award, the American Motors Conservation Award, and awards from the U.S. Environmental Protection Agency, the National Wildlife Federation, the Environmental Law Institute, the Audubon Society, and the Sierra Club.

**JUSTICE COLEMAN A. BLEASE**

Third Appellate District  
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Justice Coleman Blease, a resident of Sacramento, California, has served for over 16 years as an Associate Justice of the Court of Appeal, Third Appellate District, California. He is the author of over 200 published opinions, a number of which concern environmental law, and has taught courses in statutory construction and appellate practice and procedure to lawyers and judges. Justice Blease received undergraduate (1952) and law degrees (1955) from the University of California at Berkeley. He also taught undergraduate courses in constitutional law and the logic of argument at the University of California at Berkeley, California. Before appointment to the bench, he had a varied practice in public law. He argued some 40 cases before the appellate courts of California and the Ninth Circuit Court of Appeal. His clients included the League to Save Lake Tahoe. He also represented the American Civil Liberties Union before the California Legislature for 14 years.

**ROBERT T. ANDERSON**

Counselor to the Secretary  
U.S. Department of the Interior  
909 First Avenue, Fifth Floor  
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Mr. Robert T. Anderson is the Associate Solicitor for Indian Affairs in the U.S. Department of the Interior, where he supervises a staff of 23 attorneys who advise the Department on Native American legal issues. Prior to his appointment by Secretary Babbitt in April 1994, he spent 12 years with the Native American Rights Fund (NARF) advocating on behalf of Native tribes on a wide variety of issues. Mr. Anderson was one of two attorneys responsible for opening NARF's Alaska office in 1984 and has represented Alaska natives in major federal and state court litigation involving tribal sovereignty and native hunting and fishing rights, including the Katie John litigation. He also has extensive experience in litigation involving Native American water rights, including representation of the Nez Perce Tribe for 7 years in Idaho's Snake River Basin Adjudication. The Nez Perce Tribe and the United States have filed substantial claims to instream flows necessary to support tribal fishing rights in the Snake River Basin.

Mr. Anderson is a member of the Bois Forte Band of the Minnesota Chippewa Tribe and is licensed to practice law in Minnesota, Colorado, and Alaska, as well as numerous federal appellate courts. He graduated from the University of Minnesota Law School in 1983.

**DAVID S. BARON**

Assistant Director  
Arizona Center for Law in the Public Interest  
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Mr. David S. Baron graduated phi beta kappa from Johns Hopkins University and cum laude from Cornell Law School, where he was Article Editor of the Cornell Law Review. He clerked for Judge Anthony Celebrezze of the U.S. Court of Appeals for the Sixth Circuit and subsequently conducted environmental enforcement actions as an Assistant Attorney General for the State of Arizona. Since 1981, Mr. Baron has conducted environmental litigation and advocacy for the Arizona Center for Law in the Public Interest on issues including water pollution, hazardous wastes, air quality, and protection of public lands. He has been awarded for his environmental work by the Arizona Public Health Association, the Arizona Lung Association, and the American Trial Lawyers Association. Mr. Baron has also studied environmental issues in Europe as a fellow of the German Marshall Fund of the United States. He has taught as an adjunct professor at the University of Arizona College of Law, Arizona State University College of Law, and Tulane Law School.

**THOMAS J. DAWSON**

Wisconsin Department of Justice  
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Mr. Thomas J. Dawson is an Assistant Attorney General in the Wisconsin Department of Justice. He received his undergraduate degree in political science with honors from Rutgers University (New Jersey) in 1971, and graduated *magna cum laude* from Howard University School of Law (Washington, D.C.) in 1975.

Mr. Dawson served in the Wisconsin Department of Justice as one of two Public Intervenors for the State from 1976 to 1995. As environmental watchdogs, the Public Intervenors were charged under state law with the duty of advocating the protection of public rights in the waters and other natural resources of the state. These rights included rights protected under the Public Trust Doctrine of navigable waters. The Public Intervenors litigated cases and participated in public policy formation in many environmental areas, including Public Trust issues, at legislative and agency levels. The state legislature abolished the Public Intervenor Office in July 1995.

Mr. Dawson is still active in environmental matters. He is an instructor of environmental law at the University of Wisconsin Law School and University of Wisconsin Environmental Toxicology Center, and is often a guest lecturer on environmental topics. Mr. Dawson provides *pro bono* advice to citizens and environmental groups, and consults with other state attorneys on environmental issues. Mr. Dawson has taught courses sponsored by the University of Wisconsin Extension, and has delivered numerous talks and papers at national conferences on many environmental subjects, including Public Trust rights, groundwater, and wetlands.

**J. ALLEN JERNIGAN**

Special Deputy Attorney General  
North Carolina Department of Justice  
P.O. Box 629  
Raleigh, North Carolina 27602-0629

Mr. J. Allen Jernigan graduated from the University of North Carolina at Chapel Hill, and received a Bachelor of Arts, with Honors, in 1980, and Juris Doctor in 1983. He was admitted to practice law in North Carolina in 1983. Mr Jernigan is a Special Deputy Attorney General, and is responsible for supervising the Air and Natural Resources Section of the Environmental Division of the North Carolina Attorney General's Office. He has been employed by the Environmental Division or its predecessor since 1983.

The Air and Natural Resources Section advises and represents the North Carolina Department of Environment and Natural Resources on air quality and natural resources issues, including litigation in state and federal courts. Subject areas include: submerged lands, coastal development, marine fisheries, Public Trust Doctrine, outer continental shelf and ocean policy, military activities, and air pollution control. Duties include serving as lead counsel on submerged lands, air quality, and natural resources issues. Mr. Jernigan is a member of the U.S. Supreme Court Bar; Tulane Environmental Law Journal Advisory Board; and Carolinas Air Pollution Control Association.

**LAIRD J. LUCAS**

Director, Land and Water Fund of the Rockies  
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Boise, Idaho 83701

Mr. Laird J. Lucas is a senior staff attorney with the Land and Water Fund of the Rockies, and is director of the Boise office. Mr. Lucas is a 1986 graduate of Yale Law School and has an Master of degree in international economics from Yale Graduate School. He received his undergraduate degree from Lewis & Clark College in 1978. After law school, Laird served as law clerk to U.S. District Judge William Wayne in Texas. After several years in private practice with the firm Keker & Brockett in San Francisco, he joined the Land and Water Fund of the Rockies in 1993. His representation of conservation groups in Idaho has focused on water rights and policy, public lands management, endangered species, and has included several recent Public Trust cases.

**J. WALLACE MALLEY, JR.**

Deputy Attorney General  
State of Vermont  
Office of the Attorney General  
109 State Street  
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A native of Washington, D.C., Mr. J. Wallace Malley, Jr. has lived in Vermont for the past 20 years. Mr. Malley is the Deputy Attorney General of Vermont. A graduate of Duke University (B.A. Economics, 1969) and Georgetown Law School (Juris Doctor 1972), Mr. Malley has participated in a wide variety of matters, both criminal and civil, for the Vermont Attorney General's Office. His Public Trust credentials stem from his years as an environmental attorney with the office where, among other things, he brought a successful civil suit against the Central Vermont Railway and other purported "owners" of filled land along the shore of Lake Champlain in Burlington, Vermont, claiming that the Doctrine imposed an ongoing obligation, which could never be dissolved, to use the filled lands for public purposes. Mr. Malley has also been involved in several other Public Trust cases or controversies involving dredging, marina developments, and water withdrawals. He co-authored a 1991 Vermont Law Review article entitled, "The Public Trust Doctrine and Federal Condemnation: A Call for Recognition of a Federal Common Law."

**RICHARD ROOS-COLLINS**

Natural Heritage Institute  
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Mr. Richard Roos-Collins is a senior attorney with the Natural Heritage Institute, a public interest law firm with offices in San Francisco and Washington, D.C. Mr. Roos-Collins specializes in water resources, forestry, and energy laws, and represents government agencies and conservation organizations in his practice. He previously worked as a Deputy Attorney General for the State of California, prosecuting violations of environmental laws, and as an Attorney-Advisor for the U.S. Environmental Protection Agency's Office of General Counsel.

Mr. Roos-Collins' experience with the Public Trust Doctrine began with the Mono Lake cases, which concern the City of Los Angeles' diversions from tributaries to the eastern Sierra lake. In those cases, he is the trial attorney for one of the plaintiffs, California Trout.

**MARY J. SCOONOVER**

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Ms. Mary Scoonover received a Bachelor of Arts degree in political science and environmental studies from the University of California at Davis in 1984. She obtained her Juris Doctorate degree in 1987, also from the University of California at Davis. After a position as a staff attorney with the California Department of Water Resources (1987-1990), Ms. Scoonover joined the California

Department of Justice in 1990. Ms. Scoonover is currently a Deputy Attorney General in the Land Law Section of the Public Rights Division in Sacramento. In that capacity, she represents the State Lands Commission, the Coastal Commission, the California Resources Agency, the CALFED Bay Delta Program, the Bay Delta Advisory Council, the Department of Fish and Game, and other state agencies and conservancies. Ms. Scoonover's responsibilities involve litigation on behalf of these agencies in state and federal courts, primarily in areas of natural resource law.

Ms. Scoonover's litigation experience includes participation on behalf of the State of California in Public Trust and water right issues including the Mono Lake and Owens Valley disputes, as well as the Sacramento-San Joaquin Bay Delta Estuary, and the Yuba, Mokelumne and Merced rivers. She also represents the State in inverse condemnation and land use cases concerning the Lake Tahoe Basin and the California coast.

**MARK SINCLAIR**

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Mr. Mark Sinclair is an attorney with the Vermont office of the Conservation Law Foundation, a non-profit environmental law organization. The Foundation is dedicated to the use of law to improve resource management, environmental quality, and public health throughout New England. Mr. Sinclair is responsible for litigation and advocacy on issues involving transportation planning, water and air quality, hydroelectric power relicensing, and land use in the states of Vermont and New Hampshire.

Mr. Sinclair has practiced environmental and land use law for 10 years, previously serving as general counsel to the Vermont Department of Environmental Conservation. Prior to becoming an attorney, he was a park ranger in several western national parks, including Grand Canyon and Yellowstone. He holds a Bachelor of Arts degree in English from Williams College and a law degree from Cornell Law School.

**HAROLD M. THOMAS**

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Office of Oil Spill Prevention and Response  
California Department of Fish and Game  
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Mr. Harold M. Thomas graduated from St. Lawrence University, Canton, New York, with a Bachelor of Arts in 1974, and from the University of Pacific, McGeorge School of Law, with a Juris Doctorate in 1987. He was admitted to practice in the State of California in 1987. Mr. Thomas was House Counsel, California Department of Fish and Game from 1987 to 1993. He was awarded the American Fisheries Society, Western Division, Conservation Achievement Award in 1993. He is currently Lead Counsel, Enforcement and Civil Penalties Program, for the Department of Fish and Game's Office of Oil Spill Prevention and Response from 1993 to the present.

Mr. Thomas was the first civil service attorney appointed by the California Department of Fish and Game. Prior to 1987, the Department had been represented in trial litigation by the California Attorney General's office. Mr. Thomas was responsible for the Department's legal efforts in such leading environmental cases as the Mono Lakes Coordinated Water Rights Proceedings, the Sacramento River fish screening and endangered salmon cases, as well as a host of smaller but important fish and game enforcement actions in the State of California.

In 1993, responding to the changing political tide, Mr. Thomas was posted to lead the civil enforcement efforts of the Department of Fish and Game's pollution control division where he continues to enforce California's tough, strict liability water pollution laws. Mr. Thomas is known as a leader and innovative advocate for California's fish and wildlife.



## APPENDIX C

# THE PUBLIC TRUST DOCTRINE AND ITS APPLICATION TO PROTECTING INSTREAM FLOWS WORKSHOP

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## WORKSHOP PARTICIPANTS

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- Ronald Ahle**, South Carolina Wildlife and Marine Resources Department, Columbia,  
South Carolina
- Thomas Annear**, Wyoming Department of Game and Fish, Cheyenne, Wyoming
- David Arnoldi**, Louisiana Department of Wildlife and Fisheries, Baton Rouge, Louisiana
- Keith Bayha**, U.S. Fish and Wildlife Service, Anchorage, Alaska
- Harold Beecher**, Washington Department of Fish and Wildlife, Olympia, Washington
- Kerry Bledsoe**, West Virginia Division of Natural Resources, Fairmont, West Virginia
- William Bradwisch**, Utah Department of Natural Resources, Salt Lake City, Utah
- Nina Burkardt**, Instream Flow and Water Resources Policy Analyst, Ft. Collins, Colorado
- Ian Chisholm**, Minnesota Department of Natural Resources, St. Paul, Minnesota
- Charles Coomer**, Georgia Department of Natural Resources, Atlanta, Georgia
- Wayne Davis**, Kentucky Department of Fish and Wildlife Resources, Lexington, Kentucky
- Robert Davis**, Maryland Department of Natural Resources, Cumberland, Maryland
- Andrew Didun**, New Jersey Department of Environmental Protection and Energy, Trenton,  
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- Steve Dyke**, North Dakota Department of Game and Fish, Bismarck, North Dakota
- Fred Eiserman**, Instream Flow Consultant, Casper, Wyoming
- Christopher Estes**, Alaska Department of Fish and Game, Anchorage, Alaska
- Steve Filipek**, Arkansas Game and Fish Commission, Little Rock, Arkansas
- Stephanie Goudreau**, North Carolina Wildlife Resources Commission, Marion,  
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- Kent Hanauer**, Indiana Department of Natural Resources, Indianapolis, Indiana
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**Delbert Lobb**, Missouri Department of Conservation, Columbia, Missouri

**John Marshall**, Ohio Department of Natural Resources, Columbus, Ohio

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