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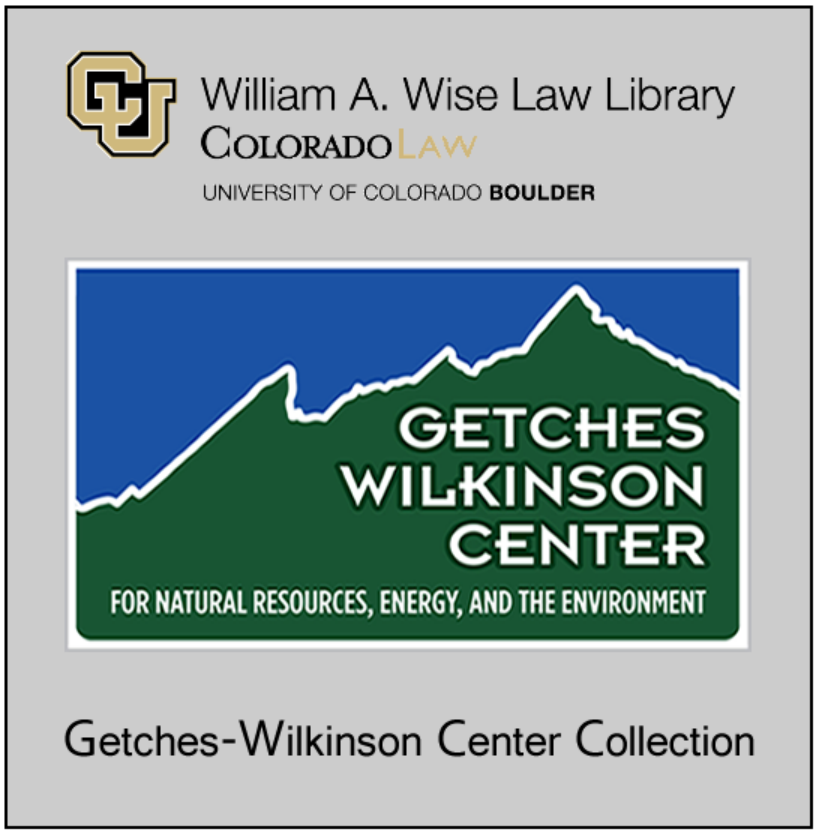


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# THE PUBLIC TRUST DOCTRINE

## Conflict With Traditional Western Water Law?

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## I. INTRODUCTION

A. For many years courts have used the public trust doctrine to provide some protection for the general public interest in the navigation, commerce and fishing associated with navigable water resources. Cases typically have concerned tidelands or submerged lands and have involved application of the public trust doctrine to limit property rights in land. Recently, however, several courts have concluded that in appropriate circumstances water rights also are subject to limitations in the name of the public trust doctrine. The leading case is Audubon, a California Supreme Court decision dealing with the impact of diversions by the City of Los Angeles on Mono Lake. These cases give rise to the question whether this application of the public trust doctrine is in conflict with traditional western water law.

B. Reference Sources

1. Sources on the public trust doctrine in general.

a. H. Althaus, Public Trust Rights (1978).

b. Sax, "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention," 68 Mich. L.Rev. 471 (1970)

c. Stevens, "The Public Trust: A Sovereign's Ancient Prerogative Becomes The People's Environmental Right," 14 U.C. Davis L. Rev. 195 (1980).

2. Sources on the relevance of the public trust doctrine to water rights law.

a. Dunning, "The Public Trust Doctrine and Western Water Law: Discord or Harmony?" 30 Rocky Mt. Min. L. Inst. 17-1 (1985).

b. Johnson, "Public Trust Protection for Stream Flows and Lake Levels," 14 U.C. Davis L. Rev. 233 (1980).

c. Dunning, "The Significance of California's Public Trust Easement for California's Water Rights Law," 14 U.C. Davis L. Rev. 357 (1980).

## II. BRIEF HISTORY OF THE ORIGINS OF THE PUBLIC TRUST DOCTRINE

A. Roman law Origins

1. "By the law of nature these things are

common to mankind -- the air, running water, the sea and consequently the shores of the sea." The Institutes of Justinian 2.1.1. (Moyle trans. 5th ed. 1912).

B. Recognition in English Law

1. "All rivers and ports are public, so that the right to fish therein is common to all persons. The use of the river banks, as the river itself, is also public by the jus gentium [and one] consequently is free to moor ships . . . just as [one] is free to navigate the river itself." 2 Bracton, On the Laws and Customs of England 39-40 (S. Thorne, trans. 1908).

C. Professor Sax suggests, however, that the "core of the trust idea" is found neither in Roman Law nor in the English experience. J. Sax, "Liberating the Public Trust Doctrine From Its Historical Shackles," 14 U.C. Davis L. Rev. 185, 186 (1980). Rather, it is the tradition of the commons in medieval Europe which is "the historical experience that most clearly reveals the proper sources for the legal public trust doctrine today." Id. at 189. For

these commons the medieval customary law "[put] developed expectations, rather than formalities such as title ownership, at the center of attention." Id. at 192.

## III. NINETEENTH CENTRUY RECEPTION OF THE PUBLIC TRUST DOCTRINE IN AMERICAN LAW

A. The first clear formulation of the modern American public trust doctrine came in 1821 from the Chief Justice of the New Jersey Supreme Court:

> "[B]y the law of nature, which is the only true foundation of all social rights . . . by the civil law, which formerly governed almost all the civilized world . . . by the common law of England . . . the navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purposes of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products (a few things excepted) are common to all the citizens, and . . . each has a right to use them according to his necessities, subject only to the laws which regulate that use; . . . the property indeed, strictly speaking, is vested in the sovereign, but it is vested in him and not for his own use, but for the use of the citizen, that is, for his direct and immediate enjoyment." Arnold v. Mundy, 6 N.J.L. 1, 76-77 (1821).

B. The Arnold v. Mundy formulation is termed "nonsense" as history by one commentator. Deveney, "Title, Jus Publicum, and the Public Trust: An Historical Analysis," 1

Sea Grant L.J. 13, 56 (1976). See also MacGrady, "The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water," 3 Fla. St. U. L. Rev. 511 (1975). It was, however, followed in 1842 by Chief Justice Taney of the United States Supreme Court. Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).

C. Nineteenth century courts which accepted the public trust doctrine divided on the significance of the doctrine for alienation of trust property.

1. Some suggested a direct and absolute grant is void, as "a grievance which never could be long borne by a free people." Arnold v. Mundy, 6 N.J.L. 1, 78 (1821).

2. Others allowed alienations with no restrictions whatsoever. Hoboken v. Pennsylvania Railroad Co., 124 U.S. 656, 691 (1888).

3. Still others took a middle course and decided through alienation the trust could be destroyed for particular parcels if such action advanced the general objectives of the trust.

Eldridge v. Cowell, 4 Cal. 80 (1854). This general approach was approved in the decision now generally regarded as the leading U. S. Supreme Court public trust doctrine case. Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892).

a. In Illinois Central the state legislature granted virtually the entire Chicago waterfront to the railroad company. Several years later, the legislature purported to repeal the grant. The U. S. Supreme Court upheld the repeal.

b. The Court assumed that the submerged lands under the Great Lakes are owned by the states as "property of a special character," id. at 454, "held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." Id. at 452.

c. Alienation for improvements such as wharves which further navigation or

other trust activity is permitted, as are grants for improvements which "do not substantially impair the public interest in the lands and waters remaining." Id.

d. But "the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake . . . is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public." Id. at 452-453.

## IV. TWENTIETH CENTURY CALIFORNIA DECISIONS PROVIDING THE FOUNDATION FOR AUDUBON

A. During this century, the California courts have generally followed the Illinois Central approach on alienation of public trust properties. The leading California case is People v. California Fish Co., 186 Cal. 576, 138 P.79 (1913), which held that a patent of tidelands passed "only the title to the soil subject to the public right of navigation." Id. at 588, 138 P. at 84.

B. Uses beyond the traditional navigation, commerce and fishing have repeatedly been declared to be protected by the public trust. There is no "outmoded classification favoring one mode of utilization [of trust resources] over another." Colberg, Inc. v. State ex rel Dep't of Public Works, 67 Cal.2d 408, 422, 432 P.2d 3, 12, 62 Cal.Rptr. 401, 410 (1967), cert. denied, 390 U.S. 949 (1968). Tidelands are preserved "so that they may serve as ecological units for scientific study, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." Marks v. Whitney, 6 Cal.3d 251, 259-60, 491 P.2d 374, 380, 98 Cal.Rptr. 790, 796 (1971).

C. The public trust doctrine has been applied to the shores of inland lakes, where the privately owned lands between the low-water and high-water marks have been held to be subject to a public trust easement. State of California v. Superior Court (Lyon), 29 Cal.3d 210, 172 Cal.Rptr. 696, 625 P.2d 239, cert. denied, 454 U.S. 865 (1981); State of California v. Superior Court

(Fogerty), 29 Cal.3d 240, 172 Cal.Rptr. 713, 625 P.2d 256, cert. denied, 454 U.S. 865 (1981).

D. The California Supreme Court also held as a matter of state law that the public trust doctrine applies to Mexican grants of tidelands. City of Los Angeles v. Venice Properties, 31 Cal.3d 288, 644 P.2d 792, 182 Cal.Rptr. 599 (1982), rev'd sub nom. Summa Corp. v. California ex rel. State Lands Comm'n, 104 S. Ct. 1751 (1984). This decision was reversed by the U. S. Supreme Court, however, on the theory that any state law public trust right had not been preserved in the patent confirmation proceedings which took place pursuant to federal law. Id. at 1753.

## V. THE SITUATION AT MONO LAKE

A. Mono Lake is an ancient and highly saline lake east of Yosemite National Park. It has no fish life. Brine shrimp are plentiful, however, and they serve as a source of food for large numbers of local and migratory birds.

1. Several fresh water streams supply nearly half of the lake's fresh water

inflow. The rest comes from small creeks, groundwater and precipitation on the lake's surface.

2. No streams leave the lake, and there apparently is no loss by seepage. Consequently water is lost from the lake only by evaporation.

B. In the 1930's the City of Los Angeles Department of Water and Power (DWP) made plans to extend its Owens Valley water supply system northward to the Mono Basin. In 1940 the city obtained permits from the state to allow it to divert water from most of the streams which feed Mono Lake. By the 1970's, when expanded facilities were in place, DWP exported annually an average of nearly 100,000 acre-feet of water from the Mono Basin. This constitutes nearly 20% of the city's annual water supply. The water flows to Los Angeles by gravity, and en route it generates about 2% of the city's electricity supply.

1. In 1940 when the state permitted the city's appropriations the state agency involved stated that:

"[I]t is indeed unfortunate that the city's proposed development will result in decreasing the aesthetic advantages

of Mono Basin but there is apparently nothing that this office can do to prevent it. [The use to which the city intends to put the water is defined by law as the highest use to which water may be applied.] This office therefore has no alternative but to dismiss all protests based upon the possible lowering of the water level in Mono Lake and the effect that the diversion of water may have upon the aesthetic and recreational value of the Basin."

National Audubon Society v. Superior Court of Alpine County, 33 Cal. 419, 428, 658 P.2d 709, 714, 189 Cal.Rptr. 346, 351, cert. denied, 104 S. Ct. 413 (1983) (hereinafter cited as Audubon).

2. In 1974 the state confirmed that Los Angeles had perfected its Mono Basin appropriative rights by issuing licenses for the diversions.

C. Diversions by the city from Mono Basin streams have caused a general decline in the level of Mono Lake. This decline has caused three environmental impacts of particular concern to those who challenge the diversions.

1. An island in the lake important for the nesting of birds has at times been turned into a peninsula. This has allowed access by predators.

2. The decline in the volume of water in

the lake has brought an increase in salinity from 48,000 parts per million in 1941 to 98,000 in 1981. This may threaten the algae upon which the brine shrimp feed, in turn threatening the birds which feed on the brine shrimp.

3. Exposed areas of alkaline lake bottom are contributing dust which makes particulate levels in the area's atmosphere among the worst in California, frequently exceeding federal emergency levels.

## VI. THE MONO LAKE LITIGATION

### A. Major Procedural Steps

1. In 1979 the National Audubon Society and others sued DWP in state court. Plaintiffs sought injunctive and declaratory relief regarding DWP's diversions from the Mono Basin. One cause of action was based on the public trust doctrine.
2. DWP cross-complained against more than a hundred others who claim water rights in the Mono Basin, including the United States.
3. The United States as cross-defendant removed the action to the U. S. District

Court for the Eastern District of California.

4. The federal court determined that unresolved questions of state law regarding the application of the public trust doctrine to water rights were involved. It consequently abstained and posed several questions to the state courts.

5. In the ensuing state court litigation the California Supreme Court held that appropriative water rights and the public trust doctrine are "parts of an integrated system of water law," so that Audubon could pursue its public trust cause of action against DWP. Id. at 452, 658 P.2d at 732, 189 Cal.Rptr. at 369. The court also held that courts and the State Water Resources Control Board have concurrent jurisdiction to determine water rights, although it noted the advantages to be gained from the use of administrative expertise. Id. at 451, 658 P.2d at 731, 189 Cal.Rptr. at 368.

6. The federal district court remanded to state court those portions of the case dealing with the public trust doctrine.

It retained a cause of action based upon federal common law nuisance. These decisions are currently in the process of being certified for an interlocutory appeal.

B. The Reasoning of the California Supreme Court

1. The public trust doctrine is an incident of state sovereignty.
2. The core of the doctrine is "the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters." Id. at 425, 658 P.2d at 712, 189 Cal.Rptr. at 349.
3. This supervisory authority prevents anyone from "claiming a vested right to divert water once it becomes clear that such diversions harm the interests protected by the public trust." Id. at 426, 658 P.2d at 712, 189 Cal.Rptr. at 349.
4. Where harm to public trust interests is demonstrated, the state has a duty "to protect the people's common heritage of streams, lakes, marshlands and

tidelands." Id. at 441, 658 P.2d at 724, 189 Cal.Rptr. at 361.

5. The public trust doctrine applies in situations, such as that in the Mono Basin, where harm to a navigable body of water (Mono Lake) arises from diversions of non-navigable streams tributary to the lake.

6. State constitutional provisions that limit all water rights to reasonable beneficial use do not preclude use of the public trust doctrine where water rights are involved.

7. But because the prosperity and habitability of much of California depend on large-scale water diversions, the state "must have the power to grant non-vested usufructuary rights to appropriate water even if diversions harm public trust uses." Id. at 426, 658 P.2d at 712, 189 Cal.Rptr. at 349. Authorization of such appropriations, however, carries the burden of properly comprehensive and environmentally sensitive decision-making. In the future, courts and agencies which approve water diversions in California "should consider the effect 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." Id. at 420, 658 P.2d at 712, 189 Cal.Rptr. at 349.

C. Presumably the court or agency which next rules in the Mono Lake litigation will attempt to give substantive content to Audubon's feasibility standard.

## VII. A POSSIBLE NEW APPLICATION FOR THE CALIFORNIA PUBLIC TRUST DOCTRINE: INLAND WETLANDS

A. Many tidelands public trust doctrine cases involve coastal wetlands affected by navigable waters.

B. Recently the Natural Resources Defense Council pleaded the public trust doctrine in litigation over Kesterson National Wildlife Refuge in the San Joaquin Valley.

1. The refuge includes Kesterson Reservoir, which was created in recent years to receive drainage water from the Westlands Water District.
2. Recent discoveries indicate that toxic levels of certain elements in the agricultural waste water, particularly

selenium, have caused deformities and mortalities in birds at Kesterson Reservoir.

a. As a result, the Department of the Interior announced it will close the reservoir in order to avoid liability under the Migratory Bird Treaty Act.

3. NRDC'S suit presents several significant legal questions with regard to the public trust doctrine, viz.:

a. Definition of navigability with regard to inland wetlands;

b. Applicability of the public trust doctrine to artificially created waters such as Kesterson Reservoir;

c. Applicability of the public trust doctrine where public uses of navigable waters are damaged by pollution, rather than by fill (as in the typical tidelands case) or diversion (as in the Mono Lake case); and

d. Applicability of state public trust law to federal facilities. In particular, is the public trust doctrine part of state law "respecting the control and

abatement of water pollution" with which federal facilities must generally comply pursuant to Section 313 of the Clean Water Act?

## VIII. DEVELOPMENTS IN WESTERN STATES OTHER THAN CALIFORNIA

A. One decision from North Dakota predates Audubon in subjecting water rights to limitation in the name of the public trust doctrine. United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n, 247 N.W. 2d 457 (N.D. 1976).

1. In United Plainsmen plaintiffs sought to enjoin the state agency from issuing permits to appropriate water for coal-related activity until comprehensive planning had been done, particularly with regard to water conservation and injury to the public. They invoked statutory planning provisions on water resources and related land resources.

2. The North Dakota Supreme Court held the statutory provisions to be only "a significant advisory policy statement." Id. at 460 (emphasis added). But it held on the basis of the public trust doctrine that water resources may be

allocated "only after an analysis of present supply and future need." Id. at 463. In effect, the court used the public trust doctrine to make the advisory statutory planning requirements binding.

3. Although United Plainsmen contains some broad statements on the expanding role of the public trust doctrine in environmental law, its holding deals only with administration of the prior appropriation system with regard to the granting of new rights and with a policy previously deemed desirable by the legislature. It does not suggest that diversions of water pursuant to perfected appropriative rights might have to be reduced in the name of the public trust doctrine, and it thus seems to be a less dramatic and important decision than Audubon.

B. A recent decision from the Idaho Supreme Court vigorously and explicitly embraced the Audubon decision in dicta.

1. Kootenai Environmental Alliance Inc. v. State Bd. of Land Comm'rs, 105 Idaho 622, 671 P.2d 1085 (1983) involved a

lease by the state of five acres of the surface of Lake Coeur d'Alene.

2. The court stated that the public trust doctrine applies in Idaho, and it evaluated the lease in terms of that doctrine. It concluded that the lease for yacht club purposes "does not violate the public trust in the resource at this time." 671 P.2d at 1094.

3. Kootenai contains a detailed discussion of Audubon and explicitly adopts "the California rule." Id. It notes that under this rule "the state is not precluded from determining in the future that this conveyance is no longer compatible with the public trust imposed . . ." Id.

4. Kootenai twice states that under the California rule it adopts "the public trust doctrine takes precedence even over vested water rights." Id.

C. In other western states there are decisions on public access to water for boating which suggest possible judicial attitudes to use of the public trust doctrine as a limitation on water rights.

1. The Colorado Supreme Court denied public

access to boat across a privately-owned ranch and upheld a conviction for criminal trespass in People v. Emmert, 198 Colo. 137, 597 P.2d 1025 (1979). It explicitly rejected the use of the public trust doctrine and/or a theory of navigational servitude by the judiciary to expand public access in such situations.

The Attorney General of Colorado has, however, expressed the opinion that legislation enacted in 1977 and not applicable to the events in Emmert limits criminal liability in Colorado to those boaters who touch the river banks or beds. Letter of Attorney General Woodard to Hamlet Barry III, Acting Director, Department of Natural Resources (August 31, 1983) (commenting on purpose and effect of C.R.S. 1973, 18-4-504.5 (1978 repl. vol.8)).

2. By way of contrast, the Montana Supreme Court recently joined the nationwide trend to allow broad public access to waters. It held that both under state constitutional provisions and under the public trust doctrine "any surface waters that are capable of recreational

use may be so used by the public without regard to stream bed ownership or navigability for non- recreational purposes." Montana Coalition for Stream Access, Inc. v. Curran, 682 P.2d 163, 171 (1984). See also Montana Coalition for Stream Access, Inc. v. Hildreth, 684 P.2d 1088 (1984).

## IX. CONCLUSION

The public trust doctrine has served beneficial purposes with regard to tidelands and lakeshores without seriously disrupting the regime of private rights in those natural resources, and it can do the same with regard to water. Although decisions like Audubon clearly do disrupt the expectations of holders of appropriative water rights such as the City of Los Angeles, they do so to respond to important environmental needs. In this sense they are similar to Winters Doctrine decisions through which the courts have responded to important social needs. Ultimately to be inclusive of and sensitive to the environmental aspects of water allocations is to produce a stronger and more durable western water law.