In Defense of Private Rights in Water

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IN DEFENSE OF PRIVATE RIGHTS IN WATER: A RESPONSE

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WATER AS A PUBLIC RESOURCE: EMERGING RIGHTS AND OBLIGATIONS

A Short Course Sponsored by the
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THE PUBLIC TRUST DOCTRINE -
BAD LAW, BAD ECONOMICS, BAD PUBLIC POLICY

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I. Introduction

A. Brief history of the public trust in navigable waters.

B. Description of the extreme extension in National Audubon (Mono Lake) case.

C. Analytical differences between traditional public trust law and National Audubon.
   1. Public trust to protect preferred use of navigable water for commercial transportation was a well-established allocation of resources known to investors before investments were made.
   2. National Audubon was reallocation of resources after investment has been made.

D. The new public trust law is bad.
   1. Bad law.
   2. Bad economics.

II. Audubon's Public Trust Doctrine is Bad Law

A. Foundation case for revocability, Illinois Central, was bad law when handed down.

B. National Audubon is bad law.
   1. Covers too much water.
   2. Covers too many interests.

III. Audubon's Public Trust Doctrine is Bad Economics

A. The minimal requirements for maintaining a market system for efficient allocation of resources.
1. Property rights quantified.
3. Freely transferable.

If these conditions are met, resources will be subject to a price system that signals the value of the resource in alternative uses.

B. The public trust does not meet any of these criteria. It is the opposite of a market exchange system; it is allocation of resources by administrative fiat.

IV. Audubon's public Trust Doctrine is Bad Public Policy

A. Improper for government to take property from one person and give to another without compensation.

B. Improper to delegate to an administrative agency the power to reallocate resources with no discernible standards to guide it.

V. The Proper Solution to Obtaining Water for Public Trust Purposes.

A. Inadequacy of some proposed statutes.

B. A statute providing for just compensation.