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Public Property and the Democratization of Western Water Law: a Modern View of the Public Trust Doctrine

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Public Property and the Democratization of Western Water Law: a Modern View of the Public Trust Doctrine

Abstract

Professor Blumm traces the evolution of the modern public trust doctrine in the West. He claims the doctrine is best understood by focusing on the remedies courts prescribe for trust violations. Although he sees four distinct categories of remedies in the case law, he asserts that they all possess the unifying theme of promoting public access to trust resources or to decision makers with authority to allocate those resources. Thus, the trust doctrine is a democratizing force—preventing monopolizing of trust resources and promoting decision making that is accountable to the public. Professor Blumm predicts that state courts will continue to expand the public trust, relying especially on constitutional provisions declaring water to be publicly owned. Finally, replying to Professor Huffman’s criticisms of the public trust doctrine, he argues that the doctrine is a coherent body of law that supplies a necessary complement to prior appropriation principles, is not inconsistent with fifth amendment ‘takings’ jurisprudence, and has sufficient grounding in various state constitutions and statutes to continue to infuse public concerns into Western water law in the years ahead.

I. INTRODUCTION

The public trust doctrine, an area of natural resources law that approaches mythic proportions among many of its students, represents every law professor's dream: a law review article that not only revived a dormant area of the law but continues to be relied upon by courts some two decades later. Nearly twenty years ago, Professor Sax initiated modern interest in the public trust doctrine with publication of his seminal article.¹ *Environmental Law* is especially fortunate to have his latest thoughts on the public trust as part of this symposium issue.²

Influenced by Professor Sax's scholarship, judges have found this deeply conservative doctrine in state constitutions, state statutes (even in water codes), and in the common law.³ Lawyers increasingly use it in their briefs, the impetus for the rapid spread of the doctrine throughout the West, especially the Pacific Northwest. In the last five years alone, the doctrine has become an important part of natural resources law in Alaska, Idaho, Montana, and Washington.⁴ During the same period, significant new decisions also have been handed down in California and North Dakota.⁵ While perhaps not a prairie fire sweeping the west,

¹Sax, *The Public Trust Doctrine In Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) [hereinafter Sax, *Judicial Intervention*]. Professor Sax's article has been cited in at least 33 judicial opinions and 26 law review articles. See also Sax, *Liberating the Public Trust Doctrine from its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 188 (1980) (a 'central idea of the public trust is preventing the destabilizing disappointment of expectations held in common, but without formal recognition such as title').

²Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473 (1989).

³See, e.g., *National Audubon Soc'y v. Superior Court (Mono Lake)*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 341, cert. denied, 64 U.S. 977 (1983); *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985); *United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n*, 427 N.W.2d 457 (N.D. 1974). Although modern courts assume the public trust doctrine is grounded in state law, see also *infra* note 14, Professor Wilkinson's contribution to this symposium advances a convincing case that its wellspring lies in federal law. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425 (1989).

⁴See *Owsichek v. Alaska Guide Licensing & Control Bd.*, 763 P.2d 488 (Alaska 1988); *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115 (Alaska 1988); *Idaho Forest Indus. v. Hayden Lake Watershed Improvement Dist.*, 112 Idaho 512, 733 P.2d 733 (1987); *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985); *Kootenai Envtl. Alliance v. Panhandle Yacht Club*, 105 Idaho 622, 671 P.2d 1085 (1983); *Galt v. Montana Dep't of Fish, Wildlife & Parks*, 731 P.2d 912 (Mont. 1987); *Montana Coalition for Stream Access v. Curran*, 682 P.2d 163 (Mont. 1984); *Montana Coalition for Stream Access v. Hildreth*, 684 P.2d 1088 (Mont. 1984); *Orion Corp. v. Washington*, 109 Wash. 2d 621, 747 P.2d 1062 (1987), cert. denied, 108 S. Ct. 1996 (1988); *Caminiti v. Boyle*, 107 Wash. 2d 662, 732 P.2d 989 (1987), cert. denied, 108 S. Ct. 703 (1988); see also Bodi, *The Public Trust Doctrine in the State of Washington: Does it Make any Difference to the Public?*, 19 ENVTL. L. 645 (1989); Reed, *The Public Trust Doctrine in Idaho*, 19 ENVTL. L. 655 (1989); Schmidt, *The Public Trust Doctrine in Montana: Conflict at the Headwaters*, 19 ENVTL. L. 675 (1989).

⁵See *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82, 227 Cal. Rptr. 161 (1986); *In re Stone Creek Channel Improvements*, 424 N.W.2d 894 (N.D. 1988); see also Stevens, *The Public Trust and Instream Uses*, 19 ENVTL. L. 605 (1989) (review of recent developments in California public trust law).

this nevertheless constitutes revolutionary judicial change.

Surely one of the reasons for the popularity of the public trust is that it sometimes seems as if it's all things to all people. A few years ago, Scott Reed asked if the public trust was amphibious (that is, could it be extended from the shoreline upland?).⁶ I suggest, however, that the doctrine is more aptly described as androgynous than amphibious.⁷ That is, the chief characteristic of the doctrine is not so much the resources to which it attaches,⁸ but the diversity of remedies it provides to resolve resource conflicts.

The public trust doctrine may actually be the legal equivalent of President Bush's fabled 'thousand points of light.' For some, including the California Supreme Court, it is a vehicle to protect the public's common heritage in water resources.⁹ For others, the public trust is a mechanism for judicial checks on legislatures, equipping courts with the authority to correct legislative allocations that favor special, narrow interests.¹⁰

To the extent that the doctrine is a common-law principle, the latter view is suspect; the common law must be subject to legislative correction.¹¹ However, the trust may constrain the legislature where it is

⁶Reed, *The Public Trust Doctrine: Is It Amphibious?*, 1 J. ENVTL. L. & LITIGATION 107 (1986).

⁷I make this claim realizing that, as editor of the *Anadromous Fish Law Memo*, I'm bound to be misunderstood. See *Anadromous Fish Law Memo* (Nat. Resources L. Inst.) (June 1979-Jan. 89). Webster's defines androgynous as 'both male and female in one.' WEBSTER'S NEW WORLD DICTIONARY 52 (2d College ed. 1980). On the other hand, anadromous (from the Greek word 'anadromos,' running upward) means 'ascending the rivers to spawn.' *Id.* at 49. Cf. Huffman, *Chicken Law In An Eggshell: Part III-A Dissenting Note*, 16 ENVTL. L. 761, 762 (1986) ('The chicken is neither androgynous nor anadromous.').

⁸See, e.g., *National Audubon Soc'y v. Superior Court (Mono Lake)*, 33 Cal. 3d 419, 437-38, 658 P.2d 709, 720-21, 189 Cal. Rptr. 346, 357-58, cert. denied, 464 U.S. 977 (1983) (trust applies to nonnavigable tributaries affecting navigable waters); *Gould v. Greylock Reservation Comm'n*, 350 Mass. 410, 419, 215 N.E.2d 114, 121 (1966) (applies to state parklands); *Montana Coalition for Stream Access v. Curran*, 682 P.2d 163 (Mont. 1984) (applies to waters susceptible for recreational use); *Van Ness v. Borough of Deal*, 78 N.J. 174, 181, 393 A.2d 571, 574 (1978) (applies to dry sand area of breach). See generally 1 W. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER § 2.20, at 158-60 (1986).

⁹See *Mono Lake*, 33 Cal. 3d at 441, 658 P.2d at 724, 189 Cal. Rptr. at 361.

¹⁰See, e.g., Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 ENVTL. L. 517 (1989); Note, *The Public Trust Doctrine as a Source of State Reserved Water Rights*, 63 DEN. U.L. REV. 585, 596 (1986); Comment, *The Public Trust in Maine's Submerged Lands: Public Rights, State obligation, and the Role of the Courts*, 37 ME. L. REV. 105, 141 (1985) [hereinafter Comment, *Maine's Submerged Lands*].

On the other hand, a number of commentators are troubled by their perception of the antidemocratic implications of the doctrine. See, e.g., Deveney, *Title, Pus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13, 13-14 (1976); Huffman, *Trusting the Public Interest to Judges: A Comment on the Public Trust Writings of Professor Sax, Wilkinson, Dunning, and Johnson*, 63 DEN. U.L. REV. 565, 574-76 (1986); Walston, *The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy*, 22 SANTA CLARA L. REV. 63, 81 (1982); Comment, *The Public Trust Totem in Public Land Law: Ineffective--And Undesirable--Judicial Intervention*, 10 ECOLOGY L.Q. 455, 457 (1982).

¹¹Sutherland suggests that every statute either remedies defects existing in the common law or clarifies and unifies common-law principles. 3 N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 61.04 (4th ed. 1986 rev.). See also Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1907) (arguing that legislation represents

implied in a state's constitution, and there are some intriguing constitutional possibilities, especially in western states, regarding water.¹² As yet there has been little recognition of these possibilities, however.¹³

Nevertheless, the doctrine's flexibility is also the source of its strength: in a given state, it may be of constitutional, statutory, or common law significance. Moreover, both the resources to which it attaches and the purpose it serves are also matters of state interpretation.¹⁴ In short, the public trust doctrine

a truer form of democracy than does the common law).

¹²The following state constitutional provisions expressly declare that water (and sometimes other resources) belongs to the public: ALASKA CONST. art. VIII, § 3 (reserving fish, wildlife, and waters that occur in their natural state 'to the people for common use'). See also ALASKA CONST. art. VIII, § 4 (declaring a sustained yield principle for fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the state), § 12 (calling for a prior appropriation system of water rights limited to state's purposes and to the general reservation of fish and wildlife), § 14 (guaranteeing free access to waters), § 15 (prohibiting exclusive rights or special privileges for fisheries). Other express state constitutional provisions include: COLO. CONST. art. XVI, § 5 (declaring waters of all natural streams to be public property, dedicated to public use, subject to appropriation); MONT. CONST. art. IX, § 3, cl. 3 (declaring 'surface, underground, flood, and atmospheric' waters to be the property of the state subject to appropriation for beneficial use). See also MONT. CONST. art. II, § 3 (including the right to a 'lean and healthful environment' as an inalienable individual right). Further express provisions are: N.M. CONST. art. XVI, § 2 (declaring unappropriated water as belonging to the public); N.D. CONST. art. XI, § 3 (water shall remain state property for mining, irrigating, and manufacturing purposes); WYO. CONST. art. VIII, § 1 (declaring water to be the property of the state).

Other states use constitutional language that implies state ownership of waters. See CAL. CONST. art. X, § 2 (reasonable and beneficial use is in the public interest), § 4 (prohibiting obstructions of public access to navigable waters), § 5 (declaring appropriation to be a public use subject to regulation); see generally *Ivanhoe Irrigation Dist. v. All Parties & Persons*, 47 Cal. 2d 597, 306 P.2d 824 (1957) (while the state does not own water in the sense that it may exclude beneficial use rights, the state has an equitable title that resides in the water users of the state), *rev'd on other grounds*, 357 U.S. 275 (1958). For other state constitutional language implying state ownership of waters, see IDAHO CONST. art. XV, § 1 (declaring use of waters to be a public use); NEB. CONST. art. XV, § 4 (declaring the domestic and irrigation use of water to be a 'natural want'), § 5 (dedicating the use of water to the people for beneficial use), § 6 (allowing for the denial of the right to divert unappropriated waters 'when such denial is in the public interest'); TEX. CONST. art. 16, § 59(a) (phrasing natural resource conservation and development policy in possessory language implying state ownership of 'its' waters); see generally *Lower Colo. River Auth. v. Texas Dep't of Water Resources*, 638 S.W.2d 557, 562 (Tex. Ct. App. 1982) ('state water is a public trust and the State is under a constitutional duty to conserve the water as a precious resource'), *rev'd on other grounds*, 689 S.W.2d 873 (Tex. 1984). See also Oregon Admission Act of Feb. 14, 1859, § 2 (declaring 'rivers and waters, and all navigable waters' of the state to be 'common highways and forever free').

¹³But see *Owsichek v. Alaska Guide Licensing & Control Bd.*, 763 P.2d 488, 494 (Alaska 1988) (construing the state constitution's 'common use' clause, which declares that fish, wildlife, and waters in their natural state are reserved to the people for common use, to codify the public trust doctrine); *United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n*, 247 N.W.2d 457, 463 (N.D. 1976) (state constitutional and statutory provisions declaring streams to be public embody the public trust doctrine).

¹⁴See also *Appleby v. New York*, 271 U.S. 364, 395 (1926) (interpreting the result in *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892), see *infra* note 25, to be a reflection of state law); *Idaho Forest Indus. v. Hayden Lake Watershed Improvement Dist.*, 112 Idaho 512, 517, 733 P.2d 733, 738 (1987) ('All questions concerning public trust lands in this state are questions of state law'). But cf. *Wilkinson*, *supra* note 3, at 460-64 (asserting that the foundation of the public trust lies in either the statehood or commerce clauses of the United States Constitution; this thesis holds that, while a state may expand the resources burdened by the public trust or the purposes it serves, it cannot abdicate its federally imposed trust responsibilities over fishery resources and navigation in traditionally navigable waters).

represents a working example of federalism. If the western states' approaches to the public trust doctrine do not fire a thousand points of light, they do represent functional laboratories in which the details of the doctrine are being fine-tuned to meet the felt necessities of local situations.

This Article contends that the public trust doctrine is best understood not so much by the resources to which it applies or the scope of uses it favors, but rather by the remedies it prescribes. It seems to me that public trust remedies contain the secret to unraveling the mysteries of the doctrine's purpose and potential. Recent cases illustrate at least four different types of public trust remedies: (1) a public easement guaranteeing access to trust resources;¹⁵ (2) a restrictive servitude insulating public regulation of private activities against constitutional takings claims;¹⁶ (3) a rule of statutory and constitutional construction disfavoring terminations of the trust;¹⁷ and (4) a requirement of reasoned administrative decision making.¹⁸ Although these remedies vary widely depending upon the jurisdiction and the context of the dispute, they all possess a unifying theme of promoting public access--access both to the resources impressed with the public trust as well as to decision makers with power to allocate those resources among competing users.

Thus, the public trust is actually more androgynous than amphibious; it is chameleon-like, its character depending on the context of the dispute at hand. It can, for example, induce the Montana Supreme Court to sanction portage rights necessary for the public to maintain access to float on the state's streams,¹⁹ lead the Washington Supreme Court to find no constitutional taking for restrictions on tideland fills,²⁰ encourage the Oregon Supreme Court to require an administrative finding of 'public need' for fill

On the resources encumbered by the trust doctrine, see *National Audubon Soc'y v. Superior Court (Mono Lake)*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, cert. denied, 464 U.S. 977 (1983) (trust applies to nonnavigable tributaries affecting navigable waters); *Gould v. Greylock Reservation Comm'n*, 350 Mass. 410, 215 N.E.2d 114 (1966) (applies to state parklands); *Montana Coalition for Stream Access v. Curran*, 682 P.2d 163 (Mont. 1984) (applies to waters susceptible for recreational use); *Van Ness v. Borough of Deal*, 78 N.J. 174, 393 A.2d 571 (1978) (applies to dry sand area of beach). On the doctrine's purposes, see *Marks v. Whitney*, 6 Cal. 3d 251, 259-60, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971) (trust purposes include ecological and recreational uses as well as purposes such as navigation, commerce, and fishing); *National Audubon Soc'y v. Superior Court (Mono Lake)*, 33 Cal. 3d 419, 434-35, 658 P.2d 709, 719, 189 Cal. Rptr. 346, 356, cert. denied, 464 U.S. 977 (1983) (same); *Kootenai Env'tl. Alliance v. Panhandle Yacht Club*, 105 Idaho 622, 692-30, 671 P.2d 1085, 1092-93 (1983) (trust uses include fish and wildlife habitat, recreation, aesthetic beauty, and water quality); 1 W. RODGERS, JR., *supra* note 8, § 2.20, at 160-62. For an argument that states should expand the trust doctrine to include wildlife, see *Meyers, Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723 (1989).

¹⁵See *infra* § II.

¹⁶See *infra* § III.

¹⁷See *infra* § IV.

¹⁸See *infra* § V.

¹⁹*Montana Coalition for Stream Access v. Curran*, 682 P.2d 163, 172 (Mont. 1984).

²⁰*Orion Corp. v. Washington*, 109 Wash. 2d 621, 747 P.2d 1062, cert. denied, 108 S. Ct. 1996 (1988).

projects under the state's fill and removal law,²¹ prompt the Alaska Supreme Court to find public trust in its state constitutional guarantee of public use of waters and fish and wildlife,²² and enable the North Dakota Supreme Court to require detailed administrative records discussing the environmental effects of proposed changes to public trust resources, as well as mitigative and protective measures to reduce or eliminate those effects.²³

This Article looks at the public trust doctrine from a remedies perspective, surveying recent case law and concentrating especially on water cases from the western states. Section II describes situations in which the remedy is provision of public access to trust resources. Section III analyzes examples of the trust serving to insulate state regulation against constitutional takings claims, on the ground that trust resources are burdened with a prior restrictive servitude circumscribing development of trust property. Section IV outlines instances of courts using the trust as a rule of statutory and constitutional interpretation that demands explicit language to terminate the trust. Section V assesses cases in which courts have interpreted the trust to require 'hard look' administrative decision making. Section VI argues that in all of these manifestations the public trust doctrine's overarching thrust is one of public access, either to the trust resources themselves or to decision makers with authority to allocate trust property. This public access theme makes the doctrine a democratizing force by (1) preventing monopolization of trust resources and (2) promoting natural resource decision making that involves and is accountable to the public. The Article concludes that the flexibility of the public trust's remedies will encourage its continued evolution in the years to come and predicts that courts are especially likely to conclude that the doctrine is codified in western state constitutional provisions declaring all waters to be publicly owned.

II. THE PUBLIC TRUST AS A PUBLIC EASEMENT

The most familiar manifestation of the public trust doctrine is as a property right entitling the public to maintain access to water resources. From the nineteenth century foundation cases of *Arnold v. Mundy*²⁴ and *Illinois Central Railroad v. Illinois*,²⁵ the doctrine has operated as a public easement, ensuring public use of tidelands and shorelands necessary to conduct waterborne commerce. As recently as 1984, the

²¹*Morse v. Oregon Div. of State Lands*, 285 Or. 197, 206-09, 590 P.2d 709, 712-16 (1979); see *Huston & Ard, The Public Trust Doctrine in Oregon*, 19 ENVTL. L. 623 (1989).

²²*CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1120 (Alaska 1988).

²³*United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n*, 247 N.W.2d 457, 463 (N.D. 1976).

²⁴6 N.J.L. 1, 71 (1821) (common property right to 'the air, the running water, the sea, the fish, and wild beasts').

²⁵146 U.S. 387, 452-53 (1892) (public rights of navigation and fishing held in trust; cannot alienate submerged land if it would substantially impair public rights). For an illuminating reconsideration of *Illinois Central*, see *Wilkinson*, *supra* note 3, at 450-53.

Supreme Court recognized this public right-of-way remedy as a central component of the doctrine.²⁶

Contemporary western court decisions reflect the persistence of the access remedy. Perhaps the best examples are the Montana Coalition for Stream Access cases, where the Montana Supreme Court not only extended the scope of the doctrine to all waters capable of recreational use, but also ruled that it included a public easement to portage around stream barriers.²⁷ Similarly, the Alaska Supreme Court held that a state tidelands patentee could not maintain a trespass action against a commercial fisherman because the public held an easement over the tidelands that survived the conveyance between the state and the patentee,²⁸ a result paralleling long-settled practice in California.²⁹ Both the Washington and Idaho Supreme Courts recently clarified that the public trust doctrine preserves public access rights to tidelands and shorelands in those states.³⁰

In protecting the public's access to trust resources, the doctrine operates as a public property right, a right favoring retention of public rights to, and sometimes ownership of, natural resources. This aspect of modern public trust case law runs counter to the dogma propounded by Judge Posner and his fellow travelers in the Chicago School of Law and Economics, who claim that the efficient allocation of natural resources calls for privatization,³¹ presumably in order to avoid Garrett Hardin's 'tragedy of the

²⁶*Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, 200, 204-05, 209 (1984) (repeated references to public trust 'easement').

²⁷*Montana Coalition for Stream Access v. Curran*, 682 P.2d 163, 170-72 (Mont. 1984); *Montana Coalition for Stream Access v. Hildreth*, 684 P.2d 1088, 1092 (Mont. 1984) (title to underlying streambed immaterial to determining whether public easement exists).

²⁸*CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1121 (Alaska 1988) (tidelands patentees cannot exclude members of the public exercising public trust fishing rights).

²⁹*Marks v. Whitney*, 6 Cal. 3d 251, 260, 491 P.2d 374, 381, 98 Cal. Rptr. 790, 797 (1971) (jus publicum not extinguished by a tidelands patent); *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 534, 606 P.2d 362, 373-74, 162 Cal. Rptr. 327, 373-74, cert. denied, 449 U.S. 840 (1980) (tidelands grants did not extinguish trust so long as tidelands 'still physically adaptable for trust uses').

³⁰*Caminiti v. Boyle*, 107 Wash. 2d 662, 669, 732 P.2d 989, 994 (1987), cert. denied, 108 S. Ct. 703 (1988) (state cannot convey away jus publicum interest in tidelands); *Idaho Forest Indus. v. Hayden Lake Watershed Improvement Dist.*, 112 Idaho 512, 516, 733 P.2d 733, 737 (1987) (public trust 'preserves inviolate the public use of those lands').

³¹See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* 30 (3d ed. 1986) (wealthenhancing value of property rights); Yandle, *Resource Economics: A Property Rights Perspective*, 5 J. ENERGY L. & POL'Y 1 (1983) (all things capable of ownership should have a private owner); Nelson, *Private Rights to Governmental Actions: How Modern Property Rights Evolve*, 1986 U. ILL. L. REV. 361 (arguing for the creation of a private property regime to replace governmental allocation of common resources); Anderson & Leal, *Going With the Flow: Marketing Instream Flows and Groundwater*, 13 COLUM. J. ENVTL. L. 317 (1988); Huffman, *Instream Water Use: Public and Private Alternatives in WATER RIGHTS: STATE RESOURCE ALLOCATION, BUREAUCRACY, AND THE ENVIRONMENT* 249 (T. Anderson ed. 1983) (advocating private allocation of water rights); Huffman, *The Allocative Impact of Mineral Severance: Implications of the Regulation of Surface Mining*, 22 NAT. RESOURCES J. 201 (1982) (defending private allocation of mineral rights).

commons.³² As Carol Rose has shown, however, the inherently public nature of waterways and submerged lands persisted from Roman law to English common law to modern American cases precisely because privatization of these resources would not produce efficiency.³³ Public access rights prevented monopolization and private capture of public wealth, which would have undermined efficiency because waterways and submerged lands achieved their highest and best use through public use.³⁴

The public access remedy is, of course, hardly unique to the public trust doctrine; there are parallel public property concepts on both the federal and state levels. For example, the federal reserved water rights doctrine implicitly reserves water necessary to fulfill the primary purpose of federal land reservations.³⁵ Reserved water rights, however, spring from particular real estate transactions,³⁶ whereas public trust rights date at least from statehood,³⁷ if not from time immemorial.³⁸ As a result, they more closely resemble Indian treaty fishing rights, which also date from time immemorial,³⁹ and which include

³²Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

³³Rose, *The Comedy of the Commons: Custom, Commerce and Inherently Public Property*, 53 *U. CHI. L. REV.* 711, 723, 749-61, 774-77 (1986) (public rights in roadways and waterways fostered commerce by producing returns of scale and eliminating dangers of privatization such as holdouts and monopolies). See also *Shively v. Bowlby*, 152 U.S. 1, 57 (1894):

Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and the control of them are vested in the sovereign for the benefit of the whole people.

³⁴Rose, *supra* note 33, at 766-71, 774, 781.

³⁵See *United States v. New Mexico*, 438 U.S. 696 (1978); see generally C. MEYERS, A TARLOCK, J. COREBRIDGE & D. GETCHES, *WATER RESOURCE MANAGEMENT* 771-840 (3d ed. 1988) [hereinafter C. MEYERS].

³⁶That is, treaties, acts of Congress, or executive orders setting aside areas of the public domain for particular uses. See, e.g., *Winters v. United States*, 207 U.S. 564 (1908) (when the United States sets aside land for an Indian reservation, it impliedly reserves sufficient water to fulfill the purposes of the reservation).

³⁷See, e.g., *Caminiti v. Boyle*, 107 Wash. 2d 662, 670, 732 P.2d 989, 994 (1987), cert. denied, 108 S. Ct. 703 (1988) (public trust doctrine 'has always existed in the State of Washington').

³⁸If the trust doctrine is a common law doctrine, prior to statehood the trust would have burdened either the federal government's or the English Crown's title. See *Montana Coalition for Stream Access v. Curran*, 682 P.2d 163, 170 (Mont. 1984) (federal government held submerged lands in trust prior to statehood). See generally *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). On the English and Roman history of the doctrine, see Sax, *Judicial Intervention*, *supra* note 1, at 475-76; Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 *YALE L.J.* 762, 763-68 (1970).

³⁹See *United States v. Adair*, 723 F.2d 1394, 1412-15 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984) (distinguishing express treaty reserved fishing rights from implied reserved water rights). See also Blumm, *Why Study Pacific Salmon Law?* 22 *IDAHO L. REV.* 629, 634-35 (1986) (discussing *Adair*).

an implied easement that survives subsequent federal land patents.⁴⁰

Perhaps more analogous than the federal doctrines are the state concepts of implied dedication⁴¹ and customary rights,⁴² both of which have ensured public access to water resources. But implied dedication, a quasi-contract concept, requires land owner acquiescence to public use for a prescribed period,⁴³ while custom requires reasonably continuous public use over a broad geographic area essentially from time immemorial.⁴⁴ Public trust access, on the other hand, does not require a rigid pattern of public use,⁴⁵ and the doctrine has proved to be flexible enough to proscribe taxation and regulatory schemes that, while not prohibiting public access to trust resources, make it difficult.⁴⁶

Thus, while having access right parallels on both the federal and state levels, other public property doctrines apply to a more limited range of resources, are dependent upon real estate transfers, or have as a prerequisite a persistent pattern of public use. The public trust can provide access to a greater variety of resources, requires less in the way of empirical proof of use, and supplies greater flexibility in terms of remedies than the other access doctrines.

III. THE PUBLIC TRUST AS A DEFENSE TO TAKINGS CLAIMS

The property right nature of the public trust is also evident in the second major manifestation of the

⁴⁰United States v. Winans, 198 U.S. 371 (1905) (treaty impresses an implied easement on subsequent real property titles, giving the Indians a perpetual right of access to their traditional fishing grounds).

⁴¹Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970) (widespread public use sufficient evidence of dedication to the public).

⁴²State ex rel. Thorton v. Hay, 254 Or. 584, 462 P.2d 671 (1969) (free public use of recreational purposes of Oregon beaches sufficient to establish a customary right); County of Hawaii v. Sotomura, 55 Haw. 176, 517 P.2d 57 (1973).

⁴³Gion, 2 Cal. 3d at 38-39, 465 P.2d at 55-56, 84 Cal. Rptr. at 167-68 (issue is whether the public use has persisted for more than five years without permission of the owner; no presumption of permissive use).

⁴⁴Thorton, 254 Or. at 595-97, 462 P.2d at 676-77 (unbroken public use of Oregon dry sand area from the initiation of institutionalized land tenure).

⁴⁵In Montana, for example, the applicability of the doctrine depends on whether the waterway is 'susceptible' to use by the public for recreational purposes. Montana Coalition for Stream Access v. Curran, 682 P.2d 163, 170-71 (Mont. 1984). In California, the test is whether a waterway affects a navigable waterway burdened by the trust. National Audubon Soc'y v. Superior Court (Mono Lake), 33 Cal. 3d 419, 435-37, 658 P.2d 709, 720-21, 189 Cal. Rptr. 346, 356-57, cert. denied, 464 U.S. 977 (1983).

⁴⁶See Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 309, 294 A.2d 47, 55 (1972) (striking down an ordinance requiring higher fees of nonresidents for use of a public beach because public trust doctrine requires access to all on equal terms); Van Ness v. Borough of Deal, 78 N.J. 174, 179-80, 393 A.2d 571, 574 (1978) (municipality cannot dedicate use of beach to residents only); Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 326, 471 A.2d 355, 363 (1984) (nonprofit corporation cannot restrict access of beach to its members).

doctrine: an insulation against takings claims. The basis for this defense is similar to the access right--the state need not compensate for limiting or restricting private development of trust resource because, as the California Supreme Court noted, there are no vested rights in trust property.⁴⁷ Although the Illinois Central Court's restraint on alienation of public property⁴⁸ seems not to have survived, except perhaps in Illinois,⁴⁹ modern courts restrict the actions of private successors to trust property while upholding the right to transfer the property subject to the use restrictions.⁵⁰ Thus, while alienable, trust property is encumbered with an implied servitude restricting uses consistent with trust purposes.⁵¹

Consequently, fee simple titles remain subject to trust and are, in the words of the Idaho Supreme Court, 'subject . . . to action by the state necessary to fulfill its trust responsibilities. The public trust doctrine takes precedence even over vested water rights.'⁵² This regulatory servitude not only authorizes the state to restrict uses of trust property but imposes an affirmative 'duty of the state to protect the common heritage of streams, lakes, marshlands, and tidelands' for public purposes.⁵³ As a result, private owners with property burdened by the trust cannot successfully challenge state restrictions on constitutional takings grounds. For example, the public's right to use waters over privately owned submerged lands is not a

⁴⁷Mono Lake, 33 Cal. 3d at 438-40, 658 P.2d at 722-23, 189 Cal. Rptr. at 358-60; see also Kootenai Env'tl. Alliance v. Panhandle Yacht Club, 105 Idaho 622, 631, 671 P.2d 1085, 1085 (1983).

⁴⁸See Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 450-51 (1892). It has never been entirely clear whether the Illinois Central Court ruled that the conveyance was void ab initio or simply voidable by act of a subsequent legislature. See Huffman, Phillips Petroleum Co. v. Mississippi: A Hidden Victory for Private Property?, 19 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,051, 10,052 (1988).

⁴⁹See People ex rel. Scott v. Chicago Park Dist., 66 Ill. 2d 65, 79-81, 360 N.E.2d 773, 780-81 (1976) (invalidating a legislative grant of some 190 acres of Lake Michigan submerged lands to U.S. Steel because the court determined that 'the primary purpose was to benefit a private interest; the asserted public purpose--additional employment and economic improvement--was 'too indirect, intangible, and remote' to satisfy the public purpose demanded by the public trust doctrine).

⁵⁰See, e.g., Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); Kootenai Env'tl. Alliance, 105 Idaho at 630, 633, 671 P.2d at 1093, 1096; CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115 (Alaska 1988); Caminiti v. Boyle, 107 Wash. 2d 662, 732 P.2d 989 (1987), cert. denied, 108 S. Ct. 703 (1988).

⁵¹See Orion Corp. v. Washington, 109 Wash. 2d 621, 640, 747 P.2d 1062, 1072-73 (1987), cert. denied, 108 S. Ct. 1996 (1988) ('The public trust doctrine resembles 'a covenant running with the land' (quoting Reed, supra note 6, at 118)). For an overview of the law of servitudes, see Symposium, 55 S. CAL. L. REV. 1177 (1982).

⁵²Kootenai Env'tl. Alliance, 105 Idaho at 631, 671 P.2d at 1094; see also Shokal v. Dunn, 109 Idaho 330, 336 n.2, 707 P.2d 441, 447 n.2 (1985) (water rights are subject to the public trust doctrine).

⁵³National Audubon Soc'y v. Superior Court (Mono Lake), 33 Cal. 3d 419, 441, 658 P.2d 709, 724, 189 Cal. Rptr. 346, 361, cert. denied, 464 U.S. 977 (1983).

taking,⁵⁴ nor are restrictions on tideland fills.⁵⁵ Moreover, the trust equips the state with authority to enforce water quality standards to protect fish and wildlife despite impairment of vested water appropriation rights.⁵⁶ The public trust doctrine does not, however, sanction overnight camping or construction of hunting or portaging facilities on private lands without compensation.⁵⁷

Insulation of public restrictions on private actions from constitutional compensation is troublesome to a number of commentators.⁵⁸ Further, recent Supreme Court decisions have created a judicial climate undeniably more receptive to takings challenges than to regulatory restrictions.⁵⁹ Nevertheless, none of the Court's recent pronouncements concerned trust property, and there is substantial precedent from the analogous federal navigation servitude doctrine to deny takings claims,⁶⁰ although the record is not entirely unmixed.⁶¹ At bottom, the viability of the trust doctrine as a successful defense to takings allegations will

⁵⁴Montana Coalition for Stream Access v. Curran, 682 P.2d 163, 171 (Mont. 1984); Montana Coalition for Stream Access v. Hildreth, 684 P.2d 1088, 1093 (Mont. 1984).

⁵⁵Orion, 109 Wash. 2d at 641-42, 747 P.2d at 1073.

⁵⁶United States v. State Water Resources Control Bd., 182 Cal. App. 3d 82, 148-52, 227 Cal. Rptr. 161, 200-02 (1986).

⁵⁷Galt v. Montana Dep't of Fish, Wildlife & Parks, 731 P.2d 912, 915 (Mont. 1987) (doctrine extends to all waters and to use of bed and banks of streams so long as it is of minimal impact; portage right around stream barriers is not a taking, but a requirement to supply and maintain portaging facilities is beyond the limits of the trust).

⁵⁸See, e.g., Huffman, Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines At Work, 3 J. LAND USE & ENVTL. L. 171 (1987); Ausness, Waters Rights, the Public Trust Doctrine, and the Protection of Instream Uses, 1986 U. ILL. L. REV. 407, 436. See also G. Gould, 'The Public Trust Doctrine and Takings' (outline prepared for 'The Public Trust and the Waters of the American West: Yesterday, Today and Tomorrow,' conference outlines available from CLE Director, Northwestern School of Law of Lewis and Clark College) (arguing that courts do take property in the constitutional sense).

⁵⁹See Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (public easement as a condition to development approval is a taking); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (remedy for a temporary taking is money damages). See generally Michelman, Takings, 1987, 88 COLUM. L. REV. 1600 (1988); Epstein, Takings: Descent and Resurrection, 1987 SUP. CT. REV. 1; Large, The Supreme Court and the Takings Clause: The Search for a Better Rule, 18 ENVTL. L. 3 (1987); Williams, Legal Discourse, Social Vision, and the Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Lutheran Church and Nollan, 59 U. COLO. L. REV. 427 (1988).

⁶⁰According to one leading casebook, the navigation servitude reflects 'a rather remarkable preference for navigation. A servitude imposed on all lands along navigable waterways gives the federal government the ability to impose burdens on those lands without the necessity for compensation.' C. MEYERS, *supra* note 35, at 503. See also *id.* at 859-67 (reprinting United States v. Rands, 389 U.S. 121 (1967)); J. SAX & R. ABRAMS, LEGAL CONTROL OF WATER RESOURCES, 96-97 (1986) (servitude's scope includes public, commercial, and recreational usufructuary rights as well as physical alterations to watercourse to promote navigation); F. TRELEASE & G. GOULD, WATER LAW 652 (4th ed. 1986) (servitude originated as 'a right of way for the public to use a stream for travel despite private ownership of the bed or bank of the river').

⁶¹Kaiser Aetna v. United States, 444 U.S. 164, 177-79 (1979) (imposition of a navigation easement to allow public access to artificially created navigable water not insulated from takings; pond was considered private property under

depend upon notice, the amount of property encumbered, and the availability of alternative means of making the property economically viable.⁶² In the case of Western water rights, the public trust seems especially likely to be a complete answer to constitutional challenges, given (1) long-established Supreme Court authority recognizing the inapplicability of rigid private property concepts to water,⁶³ and (2) the nearly universal declaration in western states of the public nature of the water resource.⁶⁴

IV. THE PUBLIC TRUST AS A RULE OF CONSTRUCTION

The third manifestation of the public trust doctrine is as a rule of statutory and constitutional interpretation. In this context, the doctrine's presumption favoring public ownership and control is evident. While all common-law rules benefit from the maxim that legislation in derogation of the common law is to be strictly construed,⁶⁵ courts construing statutes terminating public trust restrictions take a particularly narrow view.⁶⁶ As Professor Rodgers suggests, 'The notion is that diminishment of the public commons is a choice with consequences so grave (for both present and future generations) that it should not be allowed to happen carelessly, accidentally, or by legerdemain.'⁶⁷

Hawaiian law).

⁶²See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 9-7, at 607-08 (2d ed. 1988) (noting that a legitimate government defense to a takings claim is: 'You can't complain of any injury at all, since you never had what you claim we took away. From the very beginning, your property was subject to the condition that, if and when we thought it wise to do so, we could restrict it . . .') (emphasis in original).

⁶³In *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), Justice Holmes wrote that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. The public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. *Id.* at 356. See also *New Jersey v. New York*, 283 U.S. 336, 342 (1931) (Holmes, J.) ('A river is more than an amenity, it is treasure. It offers a necessity of life that must be rationed among those who have power over it.');

United States v. Appalachian Elec. Power Co., 311 U.S. 377, 427 (1940) ('[T]here is no private property in the flow of the stream.')

⁶⁴See, e.g., sources cited *supra* note 12.

⁶⁵See *Turlington v. McLeod*, 374 S.E.2d 394, 397 (N.C. 1988); *McNeal v. Allen*, 95 Wash. 2d 265, 621 P.2d 1285, 1288 (1980); *Beeler v. Hickman*, 50 Wash. App. 746, 750 P.2d 1282, 1285 (1988); *Reliance Ins. Co. v. Chevron U.S.A., Inc.*, 713 P.2d 766, 770 (Wyo. 1986); see generally 3 N. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 61.01 (4th ed. 1986 rev.).

⁶⁶See, e.g., *Gould v. Greylock Reservation Comm'n*, 350 Mass. 410, 419, 215 N.E.2d 114, 121 (1966) (state parkland not to be used for purposes inconsistent with the trust 'without plain and explicit legislation').

⁶⁷1 W. RODGERS, JR., *supra* note 8, § 2.20, at 164.

This rule of strict construction⁶⁸ has prevented conveyances free of trust obligations absent 'clear and plain' legislation.⁶⁹ Thus, statutory ambiguities arguably terminating the trust do not extinguish it where preservation is reasonably possible.⁷⁰ The rule of construction also encourages close judicial scrutiny of legislative declarations of the public purposes served by the statute.⁷¹ Courts adopting the latter view see a greater judicial role in reviewing legislative motives under the public trust than the Supreme Court has sanctioned under the fifth amendment's public use clause.⁷² This interpretation, which has some support in modern public trust cases,⁷³ has encouraged some public trust advocates to suggest that the doctrine equips courts with the authority to reverse legislative action inconsistent with trust purposes.⁷⁴

More in the mainstream are those cases that interpret constitutional and statutory provisions to codify public trust principles. For example, the Alaska Supreme Court refused to assume that the legislature intended to authorize conveyances of tidelands inconsistent with the state's constitutional provision reserving fish, wildlife, and waters in their natural state to the people.⁷⁵ The North Dakota Supreme Court construed statutory and constitutional declarations of the public nature of the streams in that state to require prior state planning of present and future effects of proposed major water diversions.⁷⁶ The

⁶⁸This rule resembles the approach federal courts have employed to resolve attempted terminations of Indian trust resources. See *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979) ('Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . .'); *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968) (need an 'explicit statement' to abrogate tribal hunting and fishing rights; intention to abrogate would not be 'lightly imputed'); see generally F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 222- 24, 467-70 (1982 ed.).

⁶⁹See, e.g., *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1119- 20 (Alaska 1988) (conveyances in furtherance of specific trust purposes or without substantial impairment of trust uses can be made free of trust but only if legislative intent is 'clearly expressed or necessarily implied'); *Caminiti v. Boyle*, 107 Wash. 2d 662, 670-71, 732 P.2d 989, 994-95 (1987), cert. denied, 108 S. Ct. 703 (1988). Both the CWC Fisheries and Caminiti courts ruled that tidelands conveyed to a private owner remained subject to public obligations.

⁷⁰See *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 528, 606 P.2d 362, 369, 162 Cal. Rptr. 327, 334, cert. denied, 449 U.S. 840 (1980) (statutes purporting, to abandon the trust are strictly construed); *Morse v. Oregon Div. of State Lands*, 285 Or. 197, 206, 590 P.2d 709, 714 (1979) (doubts resolved in favor of preservation). In *Berkeley*, however, the court ruled that a tidelands grantee, in reasonable reliance on the grant, could free the property of the trust by rendering it physically unsuitable for trust purposes. 26 Cal. 3d at 534-35, 606 P.2d at 373, 162 Cal. Rptr. at 338.

⁷¹See *People ex rel. Scott v. Chicago Park Dist.*, 66 Ill. 2d 65, 80, 360 N.E.2d 773, 781 (1976) (statutory conveyance of 190 acres of Lake Michigan shorelands to U.S. Steel supported by 'a self-serving recitation of a public purpose' and with only incidental and remote public benefits violated the public trust doctrine).

⁷²Cf. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (fifth amendment's public use clause coterminous with the scope of the sovereign's police powers; both are essentially committed to legislative discretion).

⁷³*Scott*, 66 Ill. 2d at 80-81, 360 N.E.2d at 781.

⁷⁴See, e.g., *Dunning*, supra note 10; *Note*, supra note 10; *Comment*, *Maine's Submerged Lands*, supra note 10.

⁷⁵*CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1120-21 (Alaska 1988).

⁷⁶*United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n*, 247 N.W.2d 457, 463 (N.D. 1976).

Oregon Supreme Court employed the public trust doctrine to require a finding of public need prior to issuance of fill permits under the state's fill and removal law.⁷⁷

All of these interpretations assume that the legislative norm is to preserve trust assets, that relinquishment of the trust is the exception rather than the rule, and that legislative clarity is necessary to free resources from trust encumbrances. While some see in these interpretive devices the potential for substantive judicial control of legislative decision making,⁷⁸ Professor Rodgers more accurately describes this rule of 'explicit repealer' as a reincarnation of the nondelegation doctrine, demanding 'close scrutiny of resource flows away from the public commons.'⁷⁹

V. THE PUBLIC TRUST AS THE 'HARD LOOK' DOCTRINE

The final manifestation of the public trust is also the most recent: a judicial insistence upon 'hard look' administrative decision making. Under the 'hard look' doctrine,⁸⁰ courts require agencies to (1) offer detailed explanations of their decisions, (2) justify departures from past practices, (3) allow effective participation in the regulatory process of a broad range of affected interests, and (4) consider alternatives to proposed actions.⁸¹ 'Hard look' review has initiated pluralistic agency procedures and required contemporaneous written records explaining why the agency decision is reasonable in light of pertinent

⁷⁷Morse v. Oregon Div. of State Lands, 285 Or. 197, 207, 590 P.2d 709, 714 (1979).

⁷⁸See Dunning, *supra* note 10; Note, *supra* note 10; Comment, Maine's Submerged Lands, *supra* note 10.

⁷⁹1 W. RODGERS, JR., *supra* note 8, § 2.20, at 164.

⁸⁰The 'hard look' doctrine is an innovation of administrative law that developed over the past two decades. 'Hard look' review may be traced to Judge Leventhal's opinion in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971) (a reviewing court must intervene if it 'becomes aware . . . that the agency has not really taken a 'hard look' at the salient problems and has not genuinely engaged in reasoned decision-making.'). See also Judge Bazelon's opinion in *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584, 597-98 (D.C. Cir. 1971) (proclaiming 'a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts,' and suggesting that henceforth it would no longer be appropriate to routinely affirm agency action 'with a nod in the direction of the 'substantial evidence' test, and a bow to the mysteries of administrative expertise' because a more positive role is warranted when agency action 'touches on fundamental personal interests in life, health, and liberty. . . . To protect these interests from administrative arbitrariness, it is necessary . . . to insist on strict judicial scrutiny of administrative action.'). See generally S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 341-73 (2d ed. 1985); Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974); Rodgers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 699 (1979); Marcel, *The Role of the Courts in a Legislative and Administrative Legal System--The Use of Hard Look Review in Federal Environmental Litigation*, 62 OR. L. REV. 403 (1983); Pierce & Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175 (1981); Wald, *Making 'Informed' Decisions on the District of Columbia Circuit*, 50 GEO. WASH. L. REV. 135 (1982).

⁸¹See Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 S. CT. REV. 177, 181-82.

facts, policies, and public comment.⁸² The result has been a judicial emphasis on process fairness and 'reasoned decision-making'⁸³ from administrators, rather than particular substantive results.⁸⁴

The evolution of trust remedies toward 'hard look' process has been noted by the leading treatise writer, Professor Rodgers, who suggests that this trend was inevitable given the breadth of the trust's purposes (including, for example, protection of fishery habitats and promotion of navigation).⁸⁵ There seems to be little question that recognition of the doctrine's vague substantive content has led directly to the recent emphasis on process in fashioning remedies for trust violations.⁸⁶

The best known public trust case of the last dozen years, the Mono Lake case,⁸⁷ is perhaps the leading example of a 'hard look' result. Because it determined that the inalienability rules for tidelands were inapplicable to water, the California Supreme Court fashioned a procedural remedy. The court directed the State Water Resources Control Board to reconsider the effect of water diversions to Los Angeles on Mono Lake, and to protect public trust uses 'whenever feasible.'⁸⁸ This mandate to consider adverse effects and to protect public uses where feasible is similar to what the California Environmental Quality Act (CEQA)⁸⁹ would have required of the Water Board had the statute applied to the diversion in question. CEQA stipulates that 'public agencies should not approve projects as proposed if there are feasible

⁸²See generally Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

⁸³The phrase is Judge Leventhal's; see *Greater Boston Television*, 444 F.2d at 851.

⁸⁴See Sunstein, *supra* note 81, at 183 (substantive component of the 'hard look' doctrine--judicial willingness to overturn agency actions in light of the evidentiary record--rarely exercised).

⁸⁵1 W. RODGERS, JR., *supra* note 8, § 2.20, at 164.

⁸⁶See, e.g., *Kootenai Envtl. Alliance v. Panhandle Yacht Club*, 105 Idaho 622, 628-31, 671 P.2d 1085, 1091-94 (1983) (court took a 'close look' at a trust conveyance for marina construction by (1) examining effects on trust purposes, both individually and cumulatively, (2) requiring an open and visible process informing the public and affording an opportunity for public response, and (3) requiring that the property remain subject to the trust); *In re Stone Creek Channel Improvements*, 424 N.W.2d 894, 902-03 (N.D. 1988) (approval of permits to drain wetlands satisfied public trust because administrative record (1) analyzed evidence, (2) discussed potential impacts, (3) included mitigating conditions, (4) protected some wetlands, and (5) subjected the drainage project to future regulations if necessary to protect public interest).

⁸⁷*National Audubon Soc'y v. Superior Court (Mono Lake)*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, cert. denied, 464 U.S. 977 (1983). Professor Dunning has been the most prolific commentator on the Mono Lake case; see Dunning, *The Mono Lake Decision: Protecting A Common Heritage Resource from Death by Diversion*, 13 *Envtl. L. Rep. (Envt. L. Inst.)* 10,144 (1983); *The Public Trust Doctrine and Western Water Law: Discord or Harmony?*, 30 *ROCKY MTN. MIN. L. INST.* 1 (1984); *Instream Flows, the Public Trust, and the Future of the West* presented at *Instream Flow Protection in the Western U. S.: A Practical Symposium*, Natural Resources Law Center, University of Colorado (Mar. 31-Apr. 1, 1988) (conference proceedings available from Natural Resources Law Center, University of Colorado). For his most recent contribution, see Dunning, *supra* note 10.

⁸⁸33 Cal. 3d at 446, 658 P.2d at 728, 189 Cal. Rptr. at 364.

⁸⁹CAL. PUB. RES. CODE § § 21,000-21,165 (West 1986).

alternatives or feasible mitigating measures which would substantially lessen the significant environmental effects of such projects.⁹⁰ Since judicial review of the administrative procedures imposed by federal and state environmental policy acts has been an essential element in the evolution of 'hard look' review,⁹¹ perhaps it is not surprising that the Mono Lake court looked to its state statute in fashioning a public trust remedy.

Other courts have imposed similar procedural requirements in the name of the public trust. For instance, the Oregon Supreme Court demanded a demonstration of public need for projects damaging to trust resources.⁹² The Idaho Supreme Court prescribed an examination of individual and cumulative adverse effects on trust resources and an 'open and visible' administrative process informing the public and affording an opportunity for comment.⁹³ Not long ago, the North Dakota Supreme Court ruled that the trust was satisfied by an administrative record analyzing the evidence, discussing potential adverse effects, and including both mitigating measures and protection for some trust resources.⁹⁴ A number of courts have emphasized the importance of continued state oversight of projects affecting trust resources.⁹⁵

Some public trust advocates will object to process remedies as a dilution of the force of the trust. Nevertheless, as the public trust expands its geographic scope and its range of protected resources, the inappropriateness of the alienation restraint applicable to tidelands becomes evident.⁹⁶ Even Professor Sax cautioned against a doctrine equipping courts with authority to engage in substantive environmental decision making.⁹⁷ 'Hard look' review not only avoids judicial overreaching, it also supplies administrators with

⁹⁰Id. § 21,002 (codifying *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 263 n.8, 502 P.2d 1049, 1059-60 n.8, 104 Cal. Rptr. 761, 771-72 n.8 (1972)).

⁹¹See, e.g., S. BREYER & R. STEWART, *supra* note 80.

⁹²*Morse v. Oregon Div. of State Lands*, 285 Or. 197, 207-09, 590 P.2d 709, 714-15 (1979).

⁹³*Kootenai Env'tl. Alliance v. Panhandle Yacht Club*, 105 Idaho 622, 671 P.2d 1085 (1983). See also *supra* note 86.

⁹⁴*In re Stone Creek Channel Improvements*, 424 N.W.2d 894 (N.D. 1988). See *supra* note 86.

⁹⁵E.g., *National Audubon Soc'y v. Superior Court (Mono Lake)*, 33 Cal. 3d 419, 437, 445, 658 P.2d 709, 721, 727, 189 Cal. Rptr. 346, 358, 364, cert. denied, 464 U.S. 977 (1983) (state's duty to exercise 'continued supervision' of trust property); *Kootenai Env'tl. Alliance*, 105 Idaho at 631, 671 P.2d at 1094 (state not precluded from determining that a past conveyance is no longer compatible with the trust); *Caminiti v. Boyle*, 107 Wash. 2d 662, 672, 732 P.2d 989, 995 (1987), cert. denied, 108 S. Ct. 703 (1988) (state must retain adequate control over trust resources); *Stone Creek Channel Improvements*, 424 N.W.2d at 903 (wetlands drainage project subject to future modifications to fulfill trust responsibilities).

⁹⁶The best example of the movement beyond the remedy of an absolute restraint on alienation of trust resources is the California Supreme Court's Mono Lake case, which noted that 'as a matter of current and historical necessity' the state water board could grant water rights even though the diversion would harm trust uses at the source stream because '[t]he population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values.' 33 Cal. 3d at 446, 658 P.2d at 727, 189 Cal. Rptr. at 364.

⁹⁷Sax, *Judicial Intervention*, *supra* note 1, at 557-60 (emphasizing procedural remedies, such as remands to the legislature for policy clarification for trust violations, noting that 'there is no reason that the judiciary should be the

standards that they can employ to protect trust resources outside of the judicial process. Despite a recent allegation that this protection is unnecessary given federal administrative law developments,⁹⁸ there is little or no evidence to suggest that the typical state court review of administrative action under a state administrative procedure act resembles the federal analogue.⁹⁹ In fact, cases deferring to the mysteries of state agency expertise are legion.¹⁰⁰

ultimate guardian of the public weal').

⁹⁸Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 679-88 (1986). Professor Lazarus argues that administrative law developments (such as the 'hard look' doctrine) have 'undercut any meaningful role' for the public trust doctrine. The entirety of his argument is based on federal developments. However, while the core of the public trust may be federal law, see Wilkinson, *supra* note 3, the reach of the modern doctrine is clearly a function of state law, as Justice White reminded recently in *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791, 795, 798 (1988) (relying on Mississippi law to hold that the geographic scope of the doctrine extends to tidally influenced waters that are not navigable-in-fact).

Similarly, Professor Lazarus' allegation that the trust is antiquated because of the enactment of numerous environmental laws over the past two decades is also grounded on federal examples. Lazarus, *supra* at 688-91. He is, moreover, hopelessly naive when he characterizes the federal role as primarily 'to prevent needless environmental degradation and to maintain a healthy environment.' *Id.* at 689. See, e.g., J. LASH, K. GILLMAN & D. SHERIDAN, *A SEASON OF SPOILS* (1984). For a sampling of water quality problems ignored by both the federal and state governments, see Johnson, *Water Pollution and the Public Trust Doctrine*, 19 ENVTL. L. 485 (1989) (including saltwater intrusion; nonpoint source pollution, especially from pesticides; and dam-induced water quality degradation).

⁹⁹Professor Lazarus, *supra* note 98, makes two other erroneous criticisms of the public trust doctrine. First, he vastly overstates the decline of traditional property rights and the Supreme Court's 'acceptance of the legitimacy of pervasive governmental regulation undermin[ing] expectations in private property rights.' *Id.* at 674. To the contrary, the Court frequently finds private property rights to be impediments to governmental initiatives; see, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 177-79 (1979) (governmental attempt to condition regulatory approval on provision of public access is a taking); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841-42 (1987) (public easement as a condition to development approval is a taking); *Hodel v. Irving*, 481 U.S. 704, 718 (1987) (government attempt to terminate fractional shares of Indian allotments is a taking); *Leo Sheep Co. v. United States*, 440 U.S. 668, 678-82 (1979) (government has no implied easement to access its lands for recreational purposes and therefore must pay 'just compensation' for access rights across adjacent private lands); *United States v. New Mexico*, 438 U.S. 696, 705, 718 (1978) (no reserved water rights for fish and wildlife in national forests, as private water rights holders would lose 'gallon for gallon' as the government gained); *Nevada v. United States*, 463 U.S. 110, 142 (1983) (*res judicata* bars government's attempt to claim reserved water rights for tribal fishery; government is obligated not only as a trustee of the tribe but also to holders of water rights dependent on a federal reclamation project).

Professor Lazarus' second erroneous criticism is his charge that 'the trust doctrine finds its strength and tenacity in its resistance of candor and its refusal to compromise its principles.' Lazarus, *supra* note 98, at 709-10. Not only does he quickly contradict himself by also faulting the trust doctrine for being capable of promoting both developmental and preservationist objectives, *id.* at 710 n.451, but he overlooks the widespread recognition that one of the doctrine's chief strengths lies in its flexible remedies. See, e.g., *supra* text accompanying notes 14-23; *infra* text accompanying notes 101-03. Although Professor Lazarus might respond by alleging that this flexibility is a reflection of the doctrine's lack of content, see *id.* at 710 ('[T]he public trust doctrine provides no ready framework for the assignment of lawmaking authority,' 'offers nothing much' in place of legislative and administrative lawmaking, and 'impede[s] the fashioning of a unified system of law.'), this Article shows that the flexible natures of all public trust remedies serve the overarching themes of physical access and democratic decision making. See *infra* § VI.

¹⁰⁰See, e.g., *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82, 130, 227 Cal. Rptr. 161, 188 (1986); *Office of Consumer Advocate v. Iowa State Commerce Comm'n*, 432 N.W.2d 148, 151 (Iowa 1988); *Molasses Pond Lake Ass'n v. Soil & Water Conservation Comm'n*, 534 A.2d 679, 681 (Me. 1987); *In re Hibbing Taconite Co.*, 431

VI. THE PUBLIC TRUST AS A DEMOCRATIZING FORCE IN NATURAL RESOURCE LAW

The foregoing analysis of public trust remedies illustrates that the chief characteristic of this public property doctrine is its flexibility; it combines private property concepts (such as easements and restrictive servitudes)¹⁰¹ with constitutional and statutory rules of interpretation (such as requiring clear legislative revocations of the trust)¹⁰² and administrative law principles (such as the 'hard look' doctrine).¹⁰³ Despite the flexible nature of public trust remedies, the doctrine possesses a clearly overarching theme: public access--both to resources customarily used by the public and to decision makers with the power to allocate those resources.

The easement remedy supplies public access; the restrictive servitude remedy maintains public use in the face of private attempts to extinguish the trust; and the interpretative presumption remedy maintains public use in the case of ambiguous governmental attempts to terminate the trust. Each of these results fosters public access to trust resources. The rules demanding clear legislative revocations of the trust and close judicial scrutiny of administrative alienation of trust resources ensure the public a meaningful opportunity to participate in the allocation of trust resources and to hold accountable responsible officials. By enabling increased public access to decision-making processes, the public trust doctrine serves as a democratizing influence, fostering pluralistic administrative processes and demanding legislative clarity. The easement and servitude remedies also are democratizing forces, for they both guard against monopolization and encourage governmental protection of trust resources.

The 'hard look' remedy is especially consonant with the notion that the public trust is democratizing natural resource decision making. As both the resources and geographic scope of the public trust doctrine

N.W.2d 885, 889 (Minn. App. 1988); *Hitchcock & Red Willow Irrigation Dist. v. Lower Platte Natural Resources Dist.*, 226 Neb. 146, 153, 410 N.W.2d 101, 106 (1987); *Nevada Power Co. v. Public Serv. Comm'n of Nev.*, 102 Nev. 1, 4, 711 P.2d 867, 869 (1986); *Public Serv. Co. of N.M. v. New Mexico Pub. Serv. Comm'n*, 106 N.M. 622, 625, 747 P.2d 917, 920 (1987); *Barnes County v. Garrison Diversion Conservancy Dist.*, 312 N.W.2d 20, 25 (N.D. 1981); *City of La Crosse v. Wisconsin Dep't of Natural Resources*, 120 Wis. 2d 168, 179, 353 N.W.2d 68, 73 (1984); *Cody Gas Co. v. Public Serv. Comm'n of Wyo.*, 748 P.2d 1144, 1147-48 (Wyo. 1988).

See generally NEV. REV. STAT. § 533.450(9) (1987) ('decision of the state engineer shall be prima facie correct, and the burden of proof shall be on the party attacking the same'); Brodie & Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review*, 1977 ARIZ. ST. L.J. 537 (identifying differences between judicial review of state administrative action from federal administration action); F. COOPER, *STATE ADMINISTRATIVE LAW* 670-71 (1965) (scope of review for adjudication); *id.* at 781 (scope of review for rulemaking).

¹⁰¹See supra § II, III.

¹⁰²See supra § IV.

¹⁰³See supra § V.

expand,¹⁰⁴ disputes over use of trust resources will persist. It may be impossible to arrive at a substantive definition of how to resolve conflicts between trust uses, but the 'hard look' doctrine offers a procedural remedy. By insisting that administrators involve the public in their decision making and justify in contemporaneous written records their decisions in terms of their trust responsibilities, the courts help to democratize the administrative process. The public trust doctrine, in short, encourages state courts to enter into a partnership with administrators similar to that which Judge Leventhal called for on the federal level two decades ago.¹⁰⁵ The chief product of this relationship between these two undemocratic institutions is, as I have suggested elsewhere,¹⁰⁶ to enhance prospects for democratic decision making. Thus, far from enabling the courts to impose their own version of the public interest, the public trust doctrine ought to be seen as a vehicle for enhancing effective public involvement in the allocation of trust resources.

VII. CONCLUSION

In the 1980s the public trust doctrine has spread rapidly throughout the West. This is partly because the trust's versatile remedies are attractive to litigants, jurists, and legislatures.¹⁰⁷ In part, the

¹⁰⁴See *National Audubon Soc'y v. Superior Court (Mono Lake)*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, cert. denied, 464 U.S. 977 (1983); *Gould v. Greylock Reservation Comm'n*, 350 Mass. 410, 215 N.E.2d 114 (1966); *Montana Coalition for Stream Access v. Curran*, 682 P.2d 163 (Mont. 1984); *Van Ness v. Borough of Deal*, 78 N.J. 174, 393 A.2d 571 (1978); *Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); *National Audubon Soc'y v. Superior Court (Mono Lake)*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, cert. denied, 464 U.S. 977 (1983); *Kootenai Envtl. Alliance v. Panhandle Yacht Club*, 105 Idaho 622, 671 P.2d 1085 (1983); 1 W. RODGERS, JR., *supra* note 8, § 2.20, at 160-62. For an argument that states should expand the trust doctrine to include wildlife, see Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723 (1989).

¹⁰⁵See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971) ('partnership in furtherance of the public interest,' where the 'court is in a real sense part of the administrative process, and not a hostile stranger').

¹⁰⁶Blumm, *Environmental Decision Making, Judicial Review, and the Democratization of the Leviathan State: Some Comments on the Huffman/Funk Colloquy*, 4 THE ADVOCATE 10 (Spring 1985) (Northwestern School of Law of Lewis & Clark College alumni magazine).

By insisting on reasoned decision making under the hard look doctrine, the courts encourage fair, consistent, and informed agency decisions. Pluralistic procedures that encourage widespread public participation can help democratize the administrative process. Decisions justified by written articulation of relevant facts and policies may encourage congressional reaction, further democratizing the process. In short, the goal of the fabled partnership between agencies and the courts, two undemocratic institutions, should be to promote democratic decision making. I don't mean to suggest that judicial review can or should attempt to transform bureaucrats into legislators. But I do contend that the goal of active judicial review of agency action should be to make agency decision making more accessible and accountable to both the public and the Congress.
Id. at 14 (footnotes omitted).

¹⁰⁷For recent examples of legislative codifications of the public trust doctrine, see the following provisions of the Oregon Water Code, all enacted in 1987: (1) OR. REV. STAT. § 537.332(2) (1987) (defining an 'in-stream water right' as a right 'held in trust by the Water Resources Department for the benefit of the people of the State of Oregon to maintain water in-stream for public use'); (2) OR. REV. STAT. § 537.334(2) (1987) (declaring that in-stream water rights 'shall not diminish the public's rights in the ownership and control of the waters of this state or the public trust therein');

doctrine's growth is explainable because, contrary to Professor Huffman's assertion,¹⁰⁸ it is serving as a

(3) OR. REV. STAT. § 537.455(5)(f) (1987) (definition of 'public use' includes uses 'protected by the public trust'). See also IDAHO CODE § 36-1601 (1977) (codifying the rules laid down in *Kootenai Env'tl. Alliance* and summarized in *Shokal v. Dunn*, 109 Idaho 330, 336-37 n.2, 707 P.2d 441, 447-48 n.2 (1985) (navigable watercourses and all watercourses running through public lands, shall be open to public use)).

¹⁰⁸See Huffman, *A Fish Out of Water: The Public Trust in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989) [hereinafter Huffman, Fish]. Professor Huffman's frequent criticisms of the public trust doctrine, see also his articles cited supra notes 10, 48, 58, have earned him the reputation of being the Darth Vader of the public trust.

In his latest contribution, Professor Huffman alleges that the modern public trust doctrine threatens basic values of constitutional democracy and individual liberty because it frustrates reasonable expectations by producing unexpected outcomes concerning trust resources.' Huffman, Fish, at 532. He therefore contends that recent decisions expanding the geographic scope of the doctrine or prescribing new remedies for trust violations violate the federal constitution's takings clause. *Id.* at 547-51.

First, it is evident that Huffman's argument is a normative one--he cannot rely on any of the recent case law cited in this Article (or his own) to support his arguments, other than to suggest that all previous cases are misguided. Second, he can point to no instance in which a state court decision has been held to violate the 'takings' proscription. Third, he fails to show how any of the modern public trust cases actually worked a taking. His assumption seems to be that the Constitution protects against any arguable change in landowner expectations. That assumption is also a normative (and quite radical) one, overlooking constitutionally pertinent issues such as the existence of reasonable notice of likely restriction, the availability of economically viable remaining uses, and the magnitude of the diminution of value of the whole property in question. It is far from clear, for example, that statutory provisions requiring (1) reconsideration of Los Angeles' diversions from Mono Lake or (2) forbidding fencing of nonnavigable streams in Montana would have produced takings had the public trust doctrine not been invoked. Even statutory portage rights arguably would not be a taking, given their temporary nature and the lack of demonstrable economic loss to the landowner.

Professor Huffman's apparent problems with the public trust doctrine stem from its persistent evolution to meet the felt necessities of the time. See *id.* at 527-28. He seems to forget that this characteristic is the quintessence of common-law rules. See, e.g., O. HOLMES, *THE COMMON LAW* (M.D. Howe ed. 1963). For example, had not nuisance law evolved from an absolute prohibition against all substantial interferences to a protection against only unreasonable and substantial interferences, private landowners could have effectively blocked much of the advance of the Industrial Revolution. See, e.g., M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* at 74-78 (1977). Similarly, the antidevelopmental aspects of the doctrine of riparian water rights would have inhibited irrigation in the arid West, had the courts not imposed a new common law of prior appropriation. See, e.g., Anderson & Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163 (1975). Huffman's plea for a static view of property rights has been rejected by countless judicial decisions, both vintage and contemporary. See, e.g., *Tulk v. Moxhay*, 41 Eng. Rep. 1143 (1848) (enforcing as an equitable servitude a promise that would have been unenforceable against a subsequent purchase as a real covenant at law); *Willard v. First Church of Christ*, 7 Cal. 3d 473, 498 P.2d 987, 102 Cal. Rptr. 739 (1972) (enforcing an easement created in a third party, despite California and English precedent to the contrary); *Brown v. Voss*, 105 Wash. 2d 366, 715 P.2d 514 (1986) (refusing to enjoin use of an easement to benefit non-dominant land, despite acknowledging such use to be 'misuse' of the easement). Furthermore, his conclusion that property rights change only where consistent with popular expectations, Huffman, Fish, at 529-30, is undocumented and unwarranted. No plebiscites were conducted prior to the fundamental alterations in the doctrine of nuisance, water rights, easements, or equitable servitudes mentioned above. In addition, the prospect of frustrated landowner expectations was no bar to the constraints placed on the right to restrict property transfers in *Shelley v. Kraemer*, 334 U.S. 1 (1948) (refusing to enforce racially restrictive covenants) or the right to exclude in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding federal nondiscrimination rules).

Professor Huffman's agenda seems clear. Unlike Professor Lazarus, see supra notes 98-99, he is not arguing against the public trust doctrine because he seeks resolution of water-related legal controversies by more representative branches of government than the courts. Instead, his project is to advocate private resolution of such disputes, Huffman, Fish, at 558, despite over a quarter century of demonstrable evidence that private arrangements are incapable

democratizing influence, just as Professor Sax predicted two decades ago.¹⁰⁹

The public trust will continue to grow in the years ahead. The field of western water law appears especially ripe for the injection of public trust principles, given the numerous declarations in western state constitutions of the public nature of water and the state's role as a trustee.¹¹⁰ It appears likely that many western courts will seize upon these provisions to declare water a public trust resource. Water rights are already clearly subject to the public trust doctrine in California, Idaho, North Dakota, and Oregon, the first three jurisdictions by judicial decisions,¹¹¹ the latter by legislative declaration.¹¹² Recognition of the constitutional nature of the public trust in Western water law would not only remove some troublesome questions about the permissible geographic scope of the doctrine,¹¹³ it would speed recognition of

of producing either efficient or fair results allocating resources whose benefits and burdens are necessarily shared by the community, as well as individual landowners. See, e.g., J. KRIER & E. URSIN, *POLLUTION AND POLICY: A CASE ESSAY ON THE CALIFORNIA AND FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION, 1940-1975* (1977). Huffman contends that it is a 'tragic irony' that the public trust doctrine, 'a doctrine intended to protect liberty is becoming a doctrine that justifies the denial of liberty.' Huffman, *Fish*, at 554. I do not understand why the only liberty Huffman concerns himself with is the landowner's liberty. Why isn't the liberty of those who wish to raft without barbed wire fences as relevant as the liberty of the fencers? Quite probably, the aggregate liberty of the former outweighs the latter. Similarly, why does Huffman not concern himself with reasonable expectations of the nondiversionary users of Mono Lake, who might reasonably expect it to remain a lake, rather than the water rights holder? Isn't it too late in the day to determine what is reasonable by focusing exclusively on what an appropriator of a resource believed were his rights when he appropriated the resource?

In the final analysis, Professor Huffman's static view of property rights and his absolutist approach to the takings issue assumes a world in which the public interest is simply the aggregate of those fortunate enough to own land. This eighteenth century view of the world not only would fail to produce just or efficient results in the late twentieth century, it would also stifle recognition of the essential public nature of natural resources allocation, substituting an artificial, atomistic view of the world for one in which individual landowner preferences are tempered by community values and collective choices concerning resources in which all have a legitimate stake.

¹⁰⁹Sax, *Judicial Intervention*, *supra* note 1, at 558-61.

¹¹⁰See sources cited *supra* note 12.

¹¹¹*National Audubon Soc'y v. Superior Court (Mino Lake)*, 33 Cal. 3d 419, 437, 658 P.2d 709, 721, 189 Cal. Rptr. 346, 357, cert. denied, 464 U.S. 977 (1983) (by common law); *Shokal v. Dunn*, 109 Idaho 330, 336-37 n.2, 707 P.2d 441, 447-48 n.2 (1985) (by common law); *United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n*, 247 N.W.2d 457, 461-63 (N.D. 1976) (by constitutional and statutory interpretation).

¹¹²See provisions cited *supra* note 107.

¹¹³Somewhat surprisingly, Professor Huffman agrees with Professor Wilkinson on the federal source of the public trust doctrine. Huffman alleges, however, that the federal nature of the doctrine limits its geographic scope to resources the state once owned. Thus, he contends that the public trust must be limited to submerged lands the state acquired from the federal government under the equal footing doctrine, or the government faces the prospect of paying compensation to private owners under the fifth amendment. He finds support for this view in the Supreme Court's recent *Phillips Petroleum* decision. See Huffman, *supra* note 48.

Professor Wilkinson also sees the linkage between the equal footing and public trust doctrines, but he argues that the equal footing doctrine means that a state cannot, consistent with federal law, abdicate its trust responsibility over resources the federal government implicitly conveyed to it; however, a state may choose to extend trust protection to other resources as a matter of state law. See Wilkinson, *supra* note 3, at 439-48. In other words, for Professor Huffman the federal equal footing doctrine delineates the maximum reach of the public trust doctrine, while for Professor

Professor Johnson's suggestion that the public trust is the vehicle to finally link water quality and quantity concerns.¹¹⁴ Whether by constitutional declaration, legislative enactment, or continued common law evolution, the inevitable marriage of the public trust doctrine to western water law will produce more pluralistic and better reasoned water rights decision making, a result that will redound to the benefit not only of the public, but to current water rights holders as well.

A REPLY TO PROFESSOR HUFFMAN'S POSTSCRIPT

In hyperbole reminiscent of an eighteenth century pamphleteer, Professor Huffman indicts the modern public trust doctrine by embracing a 'dictatorship of unconstrained majoritarianism' and suggests that my interpretation of the case law advocates reliance 'exclusively on central planning to allocate scarce natural resources. . . .'¹¹⁵ I cannot resist the opportunity to correct the distortions his postscript advances.

First, I never suggested that there is no role for private rights in resource allocation. As every soul west of the hundredth meridian knows, Western water law has always been, and continues to be, overwhelmingly dominated by a private rights system--one that persistently fails to account for external costs imposed upon downstream users. I do not deny that government subsidies have exacerbated the diverters' ability to impose these costs, but Huffman's contention that 'massive and extensive public intervention' is the root cause of the prior appropriation doctrine's shortcomings ignore its fundamental failure to account for the needs of numerous legitimate water users (such as Indian tribes, foreign governments, recreation, and wildlife habitat) and its single-minded policy favoring consumptive use over water conservation and water quality.¹¹⁶ The public trust offers only an effective avenue to temper western water law's narrow focus with a broader perspective more sensitive to the realities of sound water resource management; it is by no means a complete substitute for prior appropriation. As the California Supreme Court noted in *Mono Lake*, the task is to produce 'an accommodation which will make use of the pertinent principles of both the public trust doctrine and the appropriative water rights system . . .'¹¹⁷

Wilkinson equal footing marks a minimum for trust coverage.

Judicial recognition of the state constitutional nature of the public trust in western waters would help resolve the geographic scope issue in favor of Professor Wilkinson's thesis, for it would firmly ground the modern trust doctrine in state law, which is not necessarily coextensive with the reach of the federal equal footing doctrine. This would not undermine Professor Wilkinson's thesis of the federal origin of the trust, see *supra* notes 3 & 14, but it would resolve Professor Huffman's fifth amendment concerns, since private property can be acquired only consistent with a state's constitution. See *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 167, 169, 179 (1979) (Hawaiian law led plaintiffs to believe their pond to be private property).

¹¹⁴See Johnson, *supra* note 98.

¹¹⁵Huffman, Fish, *supra* note 108, at 571.

¹¹⁶See, e.g., Wilkinson, Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine, 24 LAND & WATER L. REV. 1, 14-17 (1989).

¹¹⁷33 Cal. 3d 419, 445, 658 P.2d 709, 727, 189 Cal. Rptr. 346, 364, cert. denied, 464 U.S. 977 (1983).

The need to marry public trust with prior appropriation principles is perhaps best illustrated from a water quality perspective. An upstream discharger of pollutants degrading downstream water quality is clearly subject to regulation, irrespective of his temporal priority. Even Professor Huffman would acknowledge that this nuisance-like activity cannot ignore its external costs by virtue of its seniority. But the prior appropriation doctrine insulates a senior upstream appropriator producing the same water quality degradation--on the ground that the diversion is a protected property right, while the discharge is not. I suggest that no principle of property law compels this artificial dichotomy, and that no legal legerdemain resting on such a tenuous premise will persist for long.

Second, Professor Huffman alleges that because of its 'doctrinal confusion,' the public trust doctrine is in need of normative direction or, according to his argument, confinement.¹¹⁸ My survey of recent case law, however, reveals that the modern public trust is in fact a coherent body of law guaranteeing public access to trust resources and public accountability of decision making affecting those resources.¹¹⁹ While I am not surprised that Huffman fails to see this cohesion, I am chagrined by his contention that I view the takings clause 'as an obstacle to democratic resource allocation. . . .'¹²⁰ On the contrary, I believe my Article shows that fifty amendment protection and democratic allocation of trust resources are entirely compatible pursuits.¹²¹ Huffman's lament that economic liberties do not enjoy the same protection from democratic decision making as individual liberties is an attempt to turn the clock back, if not to the eighteenth century, at least to before *Carolene Products*.¹²²

Third, Huffman's vision of property rights suffers from an unwavering adherence to 'popular expectations,' apparently defined at the time of resource appropriation by the appropriator. He views this as a 'principled view' of property rights,¹²³ but offers no principled distinction between the Colorado

¹¹⁸Huffman, Fish, supra note 108, at 568.

¹¹⁹See supra § VI.

¹²⁰Huffman, Fish, supra note 108, at 568.

¹²¹See supra § § III, VI.

¹²²*United States v. Carolene Products Co.*, 304 U.S. 144 (1938). In footnote 4, perhaps the most famous footnote in constitutional history, Justice Stone suggested that, although the Supreme Court had recently abandoned strict scrutiny of economic legislation, relatively strict judicial scrutiny was appropriate for legislation interfering with political processes or affecting the rights of 'discrete and insular minorities.' *Id.* at 152, 153 n.4. The underpinning of this dichotomy between economic and individual process liberties is that the former have effective representation in the democratic process, while the latter do not. Consequently, heightened judicial scrutiny of legislation is warranted when it threatens groups that cannot protect themselves in the legislature, but judicial deference is warranted to legislative decisions affecting those who can protect their interests in the legislative process. See, e.g., Powell, *Carolene Products Revisited*, 82 COLUM. L. REV. 1087 (1982); see generally J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

¹²³Huffman, Fish, supra note 108, at 570.

Supreme Court's declaration that Coffin never had any riparian rights¹²⁴ (which he approves) and the California Supreme Court's holding that Los Angeles' appropriation rights were always subject to limits imposed by the public trust¹²⁵ (which he decries). Coffin surely had no more notice of the applicable rule than Los Angeles, and the magnitude of his loss was much more severe than the City's. The reality is that, contrary to Huffman's argument,¹²⁶ property rights evolve, and not all private expectancies are affirmed.¹²⁷ It is no more reasonable for an appropriator to expect the same amount of withdrawals in perpetuity than it is for a polluter to expect to be able to discharge the same loadings in perpetuity, or the fisher to forever expect the same allowable harvests.

Finally, Huffman acknowledges that private property interests, even the essential right to exclude, must give way to constitutional imperatives, such as the federal government's commerce clause.¹²⁸ Absent such 'positive law,' he claims that changes in private rights must be compensated.¹²⁹ Apart from the irony of governmental payment to water appropriators who, of course, paid nothing for taking the resource from the public commissions, I wonder if there is a principled distinction between the commerce power which sanctioned restrictions on the right to exclude in *Heart of Atlanta Motel, Inc.*¹³⁰ and the state's tenth amendment police power which justified the limitations on the Mono Lake diversion.¹³¹ Moreover, Huffman's allegation that 'no . . . positive law, therefore, no basis for expectation, is offered to explain

¹²⁴*Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 447 (1882) (riparian rights never existed in Colorado, despite the territorial legislature's enactment of § 32 of the Session Laws of 1864 stating, 'Nor shall the water of any stream be diverted from its original channel to the detriment of any minor, millmen or others along the line of said stream, who may have a priority of right, and there shall be at all times sufficient water in said stream for the use of miners and agriculturists along said stream.').

¹²⁵*National Audubon Soc'y v. Superior Court (Mono Lake)*, 33 Cal. 3d 419, 445, 447, 658 P.2d 709, 727, 729, 189 Cal. Rptr. 346, 364, 365, cert. denied, 464 U.S. 977 (1983) (no private party may acquire 'a vested right to appropriate water in a manner harmful to the interests protected by the public trust' and no vested rights bar reconsideration of the allocation of the waters of the Mono Basin).

¹²⁶See, Huffman, Fish, *supra* note 108, at 560-65.

¹²⁷See *Tulk v. Moxhay*, 41 Eng. Rep. 1143 (1848); *Willard v. First Church of Christ*, 7 Cal. 3d 473, 498 P.2d 987, 102 Cal. Rptr. 739 (1972); *Brown v. Voss*, 105 Wash. 2d 366, 715 P.2d 514 (1986).

¹²⁸See Huffman, Fish, *supra* note 108, at 556-60.

¹²⁹*Id.* at 571-72.

¹³⁰*Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding federal authority to enforce nondiscrimination rules against a private property owner asserting the right to exclude on racial grounds).

¹³¹See *National Audubon Soc'y v. Superior Court (Mono Lake)*, 33 Cal. 3d 419, 447, 658 P.2d 709, 728, 189 Cal. Rptr. 346, 365, cert. denied, 464 U.S. 977 (1983) ('In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs'); U.S. CONST. amend. X (powers not granted to the federal government are reserved to the states).

the frustration of property rights under the modern public trust doctrine . . .¹³² overlooks numerous state constitutional provisions that arguably give the doctrine constitutional dimensions.¹³³ My view is that courts will increasingly recognize state constitutional declarations reserving water to the people of the state as acknowledgments that property rights in water are not and were not the same as those in land, that water always maintained both its public and private characteristics, and that no private water right may be exercised contrary to the public's interest in sound water resource management. If that sounds like Judge Posner to Professor Huffman,¹³⁴ I'll accept the incongruity.

¹³²Huffman, Fish, *supra* note 108, at 571.

¹³³See *supra* note 12.

¹³⁴Huffman, Fish, *supra* note 108, at 572.