



# **Restoring the Trust:**

## **Water Resources and the Public Trust Doctrine, A Manual for Advocates**

**By Alexandra B. Klass and Ling-Yee Huang**

## About the Center for Progressive Reform

Founded in 2002, the Center for Progressive Reform (CPR) is a 501(c)(3) nonprofit research and educational organization comprising a network of scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes that sensible safeguards in these areas serve important shared values, including doing the best possible to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes that people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation, and improved public access to information. The Center for Progressive Reform is grateful to the Park Foundation for funding this *Manual*, as well as to the Bauman Foundation and the Deer Creek Foundation for their generous support of CPR's work.

A number of CPR Member Scholars made significant contributions to this publication, providing essential analysis and generating the ideas in this *Manual*. Contributors include **John D. Echeverria**, **Christine A. Klein**, and **Sandra B. Zellmer**. CPR Executive Director **Shana Jones** was a tremendous resource as well.

We would also like to thank the following people who provided valuable insight and assistance during the course of this project: **Michael Blumm**, Professor of Law, Lewis & Clark Law School; **Chris Bzdok**, Principal, Olson, Bzdok, & Howard, P.C.; **Michael Cain**, Attorney, Wisconsin Department of Natural Resources; **Denny Caneff**, Executive Director, River Alliance of Wisconsin; **Richard Frank**, Lecturer in Residence and Executive Director of the California Center for Environmental Law & Policy, Berkeley Law; **Jon Groveman**, Water Program Co-Director and Legal Counsel, Vermont Natural Resources Council; **Noah Hall**, Assistant Professor of Law, Wayne State University Law School; **Ryan Houston**, Executive Director, Upper Deschutes Watershed Council; **Jennifer Maier**, Law Fellow, Environmental Law Foundation; **Christian Marsh**, Attorney, Brisco Ivester & Bazel LLP; **Scott McCaulou**, Program Director, Deschutes River Conservancy; **David Mears**, Director of the Environmental and Natural Resources Law Clinis and Associate Professor of Law, Vermont Law School; **Isaac Moriwake**, Attorney, Earthjustice; **Jennifer Peters**, Policy Analyst, Clean Water Network; **Rodney Pingree**, Chief, Vermont Department of Environmental Conservation Water Resources Section; **Oday Salim**, L.L.M. Candidate, Lewis & Clark Law School; and **Roderick Walston**, Of Counsel, Best Best & Krieger LLP.

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### Acknowledgments

The Center for  
Progressive Reform is  
grateful to the Park  
Foundation for its  
generous support of  
this project.

Printed in the U.S.A.



## Purpose of the Manual

After decades of unwise water policies and practices, water resources in the United States are increasingly overdrawn and overwhelmed. The warning signs of the problem may be obscured for those who see running tap water from their kitchen sink or glance cursorily at a lake. But upon closer examination, the signs are clear – wells are depleted, and river flows are low – and the projected trends are not reassuring. Demands for water resources from urban and suburban development are competing with demands for aquatic ecosystem restoration and preservation. Climate change promises to exacerbate the problem by fundamentally altering the water cycle. Yet this confluence of factors provides the opportunity to take advantage of the revived environmental consciousness pulsing across the country.

Part of this consciousness involves restoring the view of public and state ownership of certain natural resources that benefit all. In legal terms, this concept is known as the *public trust doctrine*. This doctrine holds that certain natural resources belong to all and cannot be privately owned or controlled because of their inherent importance to each individual and society as a whole. A clear declaration of public ownership, the doctrine reaffirms the superiority of public rights over private rights for critical resources. It impresses upon states the affirmative duties of a trustee to manage these natural resources for the benefit of present and future generations and embodies key principles of environmental protection: stewardship, communal responsibility, and sustainability.

While water resources protected under the doctrine *may not be monopolized* by private entities, they nevertheless face great strains today from private use and misuse. Combating these abuses of shared water resources is a major task, particularly when private economic considerations are often given preference over public environmental values. But across the nation, grassroots, regional and national organizations are fighting to force state governments to protect the nation's water resources for future generations. The purpose of this *Manual* is to share the successes and lessons of these efforts, so that environmental organizations across the nation may consider replicating and expanding this work – to better accomplish their core mission of protecting the nation's waterways.

The Center for Progressive Reform's *RESTORING THE TRUST: WATER RESOURCES & THE PUBLIC TRUST DOCTRINE, A MANUAL FOR ADVOCATES* explores one particular application of the public trust doctrine – the protection of surface water and groundwater resources. The *Manual*

- Introduces public interest environmental groups and others to the public trust doctrine and familiarizes them with both the opportunities and limitations its application offers in protecting water resources;
- Identifies for environmental attorneys legal arguments where the doctrine is most relevant to existing state water law and water resource protection;



BLUE HOLE SUNBEAM  
PHOTO CREDIT: BRIAN WALKER,  
WWW.WILDWORLDPHOTOS.COM

Beneath Florida and parts of Alabama, Georgia, and South Carolina is the vast Floridan Aquifer, one of the world's most productive aquifers. It connects to surface waters by numerous springs and sinkholes throughout the region. In the Ichetucknee Springs State Park in north-central Florida, each day an average of 230 million gallons of crystal-clear groundwater gush to the surface from a series of springs, including the Blue Hole Spring (cover photo). The photo captures a beam of sunlight penetrating the underwater cave entrance at the Blue Hole Spring, illuminating the connection between surface water and groundwater.

- Analyzes successful applications of the public trust doctrine and public trust statutes through case studies of California, Hawai’i, and Vermont and in an accompanying 50-state index of constitutional and statutory provisions and notable cases related to the public trust doctrine, available on the CPR website, <http://www.progressivereform.org/pubtrustwater.cfm>; and
- Encourages reconsideration and reassessment of this ancient legal doctrine to confront the challenges facing modern freshwater management at the state level.

While the public trust doctrine is neither a panacea nor an adequate substitute for comprehensive water regulations, it is both a powerful legal tool and an effective paradigm for water resources management. The public trust doctrine embodies the ethical touchstone from which all water resource decisions should be made: namely, that water resources belong to the public. They are not commodities to be sold but natural assets to be protected, and we have a collective responsibility to preserve water resources for future generations.

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## The Power of the Public Trust Doctrine

Across cultures and continents, communities have always imbued certain natural resources with a sense of permanent public ownership. This unique status for these resources – such as the ocean, certain water bodies, shorelines, submerged lands, and the air – reflects their immense importance to individuals and society as a whole. These resources belong to the public, and no private entity can ever acquire the right to monopolize or deprive the public of the right to use and enjoy them.<sup>1</sup> In legal terms, this concept became known as the *public trust doctrine*, imported into the United States as common law<sup>2</sup> from ancient Roman, Spanish, and English law.

Similar to any legal trust, the public trust doctrine has three primary components: the trustee, the trust principal, and the beneficiaries of the trust. In the public trust framework, the *state* is the trustee, which manages specific *natural resources*<sup>3</sup> – the trust principal – for the benefit of the *current and future generations* – the beneficiaries.

To date, the greatest and most consistent successes of the public trust doctrine involve cases of *public access* rather than resource protection – emphasizing the *present beneficiaries* of the trust rather than fortifying the *principal* of the trust. A handful of cases, however, have succeeded in fortifying the trust principal by requiring improved natural resources management. These cases fall into two broad categories:

- **Environmental groups cite the doctrine as a limit on state action that relinquishes or compromises trust resources, or**
- **The state cites the doctrine to support state action that protects trust resources from private actions.**

*Illinois Central*, an early and seminal case from 1892, is the classic example of the doctrine as a *limit* on state action, arising from a populist movement that challenged the legislature's grant of lakefront property to a private railroad company.<sup>4</sup> In ruling that a state cannot wholly grant control of trust resources to a private entity, the U.S. Supreme Court laid the foundation of the doctrine as an upper limit on state power. More than century later in Arizona, Native American tribes successfully challenged the state legislature's bill to eliminate the public trust doctrine from being considered in water-rights adjudications.<sup>5</sup> The Arizona Supreme Court expressly stated that the doctrine is a state-level *constitutional* limitation on legislative power to give away trust resources and found that the legislature could not remove restraints on its powers.<sup>6</sup>

The other broad category of cases involves the public trust doctrine as *support* for state action to protect trust resources from private action. For example, the Louisiana Supreme Court upheld a state project, challenged by oyster fishermen, that flooded oyster beds to help recover the coastline and to enhance wildlife and fisheries.<sup>7</sup> According to the court,

Of all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems.

– Joseph L. Sax

the state's public trust duty to prevent the loss of coastal land validated the project, despite the loss of oyster beds and impact on local fishermen. Similarly, a Virginia appeals court cited the public trust doctrine in upholding a state agency's order for a riparian landowner to remove non-permitted structures on a pier that interfered with trust resources.<sup>8</sup>

Applying the public trust doctrine to natural resources protection results in a variety of improved management approaches, underlying the environmental benefit of the doctrine. Courts have required states and their agencies to simply *fulfill public trust duties*. In the seminal *Mono Lake* case, the California Supreme Court examined for the first time the impact of the public trust doctrine on state water law.<sup>9</sup> In this context, the court articulated the state duty as "an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible."

As a corollary, natural resources management has also benefitted from courts requiring states to *apply public trust principles in decisionmaking*. On the basis of the doctrine's notion of sustainability, the North Dakota Supreme Court found that the state water commission was required to determine the impact of water allocation on both the present water supply and future water needs in the state.<sup>10</sup>

Application of the public trust to natural resources has *democratized control over the use of trust resources* by requiring clear legislative intent regarding any private use of trust resources and by requiring justified and transparent agency decisionmaking.<sup>11</sup> In New York, where public parkland is a trust resource, the Court of Appeals held that approval by the state legislature is required before construction of a water treatment plant on parkland could proceed.<sup>12</sup> Here, the construction would have substantially intruded on and affected park uses by altering the topography and requiring partial closure of the park for an extended period of time. In *Waiahole*, the Hawai'i Supreme Court pushed this notion further by shifting the burden of proof: parties – private or state – that undertake activities impacting public trust resources must justify those activities in light of public trust purposes.<sup>13</sup>

Similarly, litigating the public trust doctrine has also resulted in *government accountability and citizen empowerment* by permitting citizen suits against the state for failure to uphold trust duties. For example, a recent California appeals court decision affirmed the right of citizens to sue the state for failing to uphold trust duties.<sup>14</sup> In this case, the state's public trust duty involved protecting wildlife – raptors and other birds – from death and injury by turbines on private wind farms. A beneficiary of any legal trust can sue the trustee for harm to the trust principal, and the California court affirmed that members of the public may do likewise by suing the appropriate state agency. Other states, such as Michigan, Minnesota, Connecticut, and South Dakota, have explicit statutes that permit citizen suits against the state and private parties for violation of public trust duties.<sup>15</sup>

The power of the public trust doctrine in protecting water resources lies in its flexibility and dynamism. From its historical roots in navigation, fishing, and commerce, the doctrine has evolved to encompass modern public uses that include recreation and aesthetic uses and



environmental preservation.<sup>16</sup> While citizen groups and state governments have long used the doctrine to promote *access*, cases across the country demonstrate the its applicability to resource *protection* and ultimately strengthening natural resources management. As these same groups begin focusing on the trust *principal* – the natural resources themselves – the public trust doctrine offers the legal tools and persuasive power to achieve lasting protection for water resources.

## Examining the Trust in Practice: A Landmark Case in California

A landmark case on the modern public trust doctrine is *Mono Lake*,<sup>17</sup> in which the California Supreme Court expanded the traditional public trust doctrine to *non-navigable* waters that feed into navigable waters.<sup>18</sup> For decades, Los Angeles secured much of its municipal water supply by diverting four of the five non-navigable tributaries of Mono Lake, a navigable water body. This diversion caused a precipitous decline in the lake level and severe damage to the ecosystem, an important feeding ground for migratory birds.

Considering both the public trust doctrine and state water laws, the California Supreme Court concluded that the state has a dual mandate: to balance the need for municipal water supplies with the ecological need for water to restore and maintain natural water-dependent ecosystems.<sup>19</sup> The decision in *Mono Lake* affirmed several key features of the modern public trust doctrine:

- **Dynamic and Accommodating.** The public trust doctrine is dynamic and accommodates current uses and values, such as the recreational, aesthetic, and ecological uses that the National Audubon Society sought to protect;
- **Applicable to Private Water Rights.** The public trust doctrine applies to private water rights, meaning individual water rights that affect public trust resources are rights of use that a state can revoke if the private right harms those resources;
- **Continuous, Supervisory Duty.** The state's duty as trustee of public trust resources is *continuous*, meaning that its obligations to protect trust resources never cease; and
- **Deep, Entrenched Legal Roots.** The public trust doctrine is a common law doctrine with historical roots equivalent to states' common law water doctrines.<sup>20</sup>

Courts in other states regularly cite *Mono Lake* when confronted with modern questions of the public trust doctrine.

The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.

—*Mono Lake*

**The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.**  
**-New Jersey Supreme Court**

## The Public Trust Doctrine and Water Resource Protection

The myriad demands on water and water resources requires commensurate responses to ensure these critical resources are responsibly and sustainably managed. The public trust doctrine is one such response. The challenge in using this particular tool, however, is that in its traditional form the doctrine only pertains to navigable water resources, ignoring other important surface water resources and – significantly – groundwater. While only some states have applied the doctrine beyond the traditional confines, many states could easily follow suit both judicially and legislatively based on an existing public trust framework.

The following sections of this *Manual* provide an overview of states' public trust doctrines, noting common elements of an effective doctrine. The *Manual* discusses the role of the doctrine in current state water laws and the case for applying the doctrine to groundwater. The *Manual* also examines Hawai'i and Vermont as recent examples of judicial and legislative application of the doctrine to groundwater.

### Protecting Water Resources with the Public Trust Doctrine: Why It Matters

The roots of the public trust doctrine are steeped in water and water-dependent activities. Applying the doctrine to all water resources is a logical step that would capture the value and importance of water as a public resource. Yet even after the California Supreme Court's decision in *Mono Lake*, surprisingly few states have applied the doctrine to water resource protection in general.

Several factors, however, are pushing the public trust doctrine to the forefront of water resource protection. First, there is a growing public awareness that water is not an infinite resource and that current rates of use are depleting supplies. Emerging physical evidence of dwindling water supplies – from dry pumps in the Ogallala Aquifer to the Georgia Legislature's attempt to annex a part of Tennessee to control the water source for Atlanta – is becoming harder and harder to ignore.<sup>21</sup> Meanwhile, cities such as San Francisco and Seattle have banned bottled water from city functions, recognizing that certain uses of water are wasteful and increasingly devalued by the public.<sup>22</sup>

Overshadowing all this are the negative impacts of climate change on water resources and future water supplies. Increased global surface temperatures will impact the timing and rate of snow melt, contribute to saltwater intrusion by sea-level rise, and alter precipitation patterns across the United States. A recent study of the Colorado River, which supplies water to approximately 27 million people, concluded that a 10-percent reduction in snow pack means that nearly 60 percent of water deliveries will not be fulfilled by 2050. To



exacerbate the situation, existing water allocation assumed 20th-century flow levels, among the highest in the past few centuries.<sup>23</sup>

These problems are compounded by the privatization of water resources, a growing and unwelcome trend in a world where water is increasingly contested. A public trust declaration for all waters would provide the legal underpinnings to oppose this development. Each year, private companies reap millions in private profits from exploiting public resources. For example, bottled water companies generally pay a nominal fee for permits to withdraw millions of gallons of water from surface water bodies and aquifers – and pay nothing for the water they withdraw.<sup>24</sup> States like Florida and Colorado are facing paradoxical situations in certain watersheds – running out of water while simultaneously considering water withdrawal permits from bottling companies.<sup>25</sup> Collectively, this disquieting brew provides a timely opportunity for the public trust doctrine to both complement and reinforce water resource protection laws.

**The Public Trust Doctrine Continuum**

Across the United States, states display varying levels of robustness in applying the public trust doctrine to water resources. Although the doctrine began and has developed as common law,<sup>26</sup> states have adopted supplementary legislative provisions and constitutional amendments. At its core, the public trust doctrine remains a state-based doctrine, unique to each state but with lessons transferrable to other states.

Scope of Public Trust Doctrine	Examples
No real application, or Limited to traditional common law public trust doctrine	Kentucky, Alabama Colorado, Delaware Georgia, Kansas, Ohio, Oklahoma
Expanded trust purpose, Expanded trust principal, Expanded to all surface water and groundwater, or A constitutional or statutory	Arkansas, Massachusetts, Michigan, Minnesota, New York, Utah, Iowa
Expanded trust purpose, Expanded navigable-in-fact definition, and Expanded to all surface water or groundwater	California, Wisconsin Montana, New Jersey
Expanded trust purpose, Expanded navigable-in-fact definition, Expanded to surface water or groundwater, and A constitutional or statutory public trust provision	Hawai'i, Vermont, Louisiana

The ideal operating framework for using the public trust doctrine to protect water resources is like a well-balanced tripod: a robust and updated common law, a constitutional declaration of public ownership of water, and statutory incorporation of the doctrine into water resources legislation. This framework integrates the public trust doctrine in all its forms and allows each form to be mutually reinforcing – a strength in one leg can compensate for any weaknesses in another leg.<sup>27</sup>

The accompanying 50-state index reveals that components of this public trust structure already exist in many states.<sup>28</sup> The constitutional and statutory provisions range from explicit adoption of the doctrine to implicit reference to public trust principles and concepts. While reinvigorating the public trust is not as simple as pointing to these provisions, their mere existence *does* establish a basis on which to apply the doctrine to water resources.<sup>29</sup>

Elements of a successful public trust doctrine include:

- **Clear Statement of Public or State Ownership and State Duties.** The state must have a clear statement of public or state ownership of water resources and a corresponding statement of the state’s affirmative and ongoing duties and obligations to protect and manage those resources for the benefit of present and future generations.
- **Superiority of Public Rights over Individual Use Rights.** A state must also have a clear statement that an individual water right is strictly a right of use, rather than ownership, that is subordinate to and conditioned on a superior public right.
- **Inclusion of Groundwater.** Any public trust doctrine provision must include surface water and groundwater to ensure complete protection of water resources and to accurately reflect the hydrologic cycle.
- **Translation of Dynamism.** If the common law is incorporated into a constitutional or statutory provision, both should retain the dynamic nature of the common law such that the doctrine remains accommodating as public uses and values evolve.
- **Criteria for and Prioritization of Public Uses.** A list of public trust uses or, less specifically, criteria for identifying a public use should accompany any public trust provision.<sup>30</sup>
- **Public Participation.** The provision should permit public participation in determining the use and management of a water resource.
- **Resources for Implementation.** Any statutory provision or agency rule should include the financial, personnel, and institutional resources for implementation, without which even the strongest legal foundation will falter.

The following sections offer ideas and strategies for using the public trust doctrine to protect water resources.

## Informing the Discussion: The Public Trust Doctrine and State Water Laws

States are primarily responsible for how water resources are used and allocated. Applying the public trust doctrine to state laws provides the legal authority to both enhance and enforce state management responsibilities. While it already applies to all water rights that impact public trust resources, it also has the potential to impact all water rights by informing terms key to water allocation. Whenever key water allocation terms are debated or discussed, advocates should strive to point out how the public trust doctrine informs their definitions in an effort to expand their meaning in a more resource-protective direction.

In the United States, state water law generally falls into two categories, depending on whether a state is east or west of the 100th meridian. Eastern states generally follow *riparian law*, which allocates a water right by ownership of land adjacent to a water body. A subset of eastern states has adopted *regulated riparianism*, which allocates water rights based on permits rather than land ownership. Western states generally follow a legal system called *prior appropriation*, which allocates water by permit according to the earliest date of use.

The public trust doctrine underlies the exercise of every water right that withdraws or affects a public trust resource, regardless of the differences in state water law around the country. In this way, so-called private water rights are not absolute but instead subject to public considerations. For example, even if a landowner in an eastern state holds a riparian water right in a watercourse that is subject to public trust protection, the public interest in the water resource is paramount.<sup>31</sup> In 1983, the Wisconsin Supreme Court found that water permits could be granted only if the use did not “materially obstruct navigation, or reduce flood flow capacity of a stream, or if it [was] not detrimental to the public interest.”<sup>32</sup> Similarly, the North Dakota Supreme Court found that the public trust doctrine limits water allocation by requiring consideration of the present and future impact on state water resources.<sup>33</sup>

In addition, the public trust doctrine has the potential to impact every water right by the explicit terms of each state’s respective water laws. Water rights in both eastern and western states are defined by terms that consider a broad range of impacts of the water use, many of which overlap with public trust values. Eastern riparian water rights are defined by *reasonable use*, which considers factors such as the harm to other riparians, broader public harm or benefit, and the environmental impact of the use. Reasonable use is a context-specific consideration that depends on the community of water users, a community that could broadly include present and future users in an expanded geographic region. This macroscopic consideration incorporates a public trust view of water resources in existing riparian laws.

Similarly, western prior appropriation water rights are defined by *beneficial use*, a term that has demonstrated great flexibility as water uses have evolved. Traditional beneficial uses were limited to domestic and economic uses but now include uses that reflect public trust values

**The public trust doctrine applies to every water right that impacts a trust resource and may define the very nature of a water right.**

of stewardship, conservation, and sustainability. These modern beneficial uses include water for fish and wildlife preservation, in-stream flow protection and recreational use, groundwater recharge, wetlands restoration, and flow augmentation.<sup>34</sup>

In eastern states that follow regulated riparianism and western states, an additional avenue exists to incorporate the public trust doctrine into the explicit terms of water permits. Both systems examine the *public interest* in water uses, which the Idaho Supreme Court described as “related to the larger doctrine of the public trust.”<sup>35</sup> Defining the public interest permit criteria, the court referred to the legislature’s declaration that, “the streams of [Idaho] and their environments be protected against loss of water supply to preserve the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality.”<sup>36</sup>

Regulated riparianism also includes the public interest as a specific permit criterion. This term is defined by one Florida water district as “the rights and claims on behalf of people in general.”<sup>37</sup> When reviewing a proposed water use, the state agency is required to consider whether the use is “beneficial or detrimental to the *overall collective* well-being of the people or to the water resources.”<sup>38</sup>

The public trust doctrine already affects many water rights and has the potential to impact many more through the key terms and permit criteria. As water and water rights become increasingly contested, injecting the public trust doctrine and public trust values into the discussion – as some state courts have – may influence the ultimate outcome for the benefit of the public and the natural environment.

### **Integrating Water Regimes: The Public Trust and Groundwater**

Groundwater, invisible as it flows beneath our feet, provides approximately half of all drinking water in the United States and nearly all drinking water for rural communities.<sup>39</sup> As water demand skyrockets, communities and industries are pumping groundwater at rates faster than it can be replenished. For instance, underlying the Great Plains is the Ogallala Aquifer, which has provided water for decades of farming. This once dependable and seemingly infinite source is disappearing in certain areas, reversing farming fortunes for many.<sup>40</sup> In the southeast, saltwater is entering the Floridan Aquifer due to low water levels, potentially contaminating the water supply for the many communities that depend on this source of groundwater.<sup>41</sup>

Despite these threats and a future of increasing demand, many states are only recently beginning to actively and comprehensively regulate groundwater, providing an opportune moment for water advocacy groups to push for public trust protection through legislation or common law development. Applying the public trust to groundwater is a natural progression of the modern public trust doctrine, consistent with the focus on water.

Groundwater is undeniably as important as other trust resources and deserves equal protection.

Moreover, applying the public trust doctrine to groundwater would integrate science and law. The haphazard regulation of groundwater developed at a time when, as one court declared, the existence and movement of groundwater was perceived as “secret, occult, and concealed” so as to render legal rules “practically impossible.”<sup>42</sup> Hydrological science has long rejected the “occult” properties of groundwater and has established definitive connections to surface water and the larger global water cycle. In many parts of the country, groundwater is the direct source of water for surface springs and other navigable waterbodies. In Michigan, a state appellate court recognized that groundwater withdrawals would decrease by 24 percent the base flow of a stream important for recreational use and aesthetics.<sup>43</sup> Yet many states still follow completely different legal regimes for the allocation and use of surface water and groundwater.

The public trust doctrine could apply to groundwater through existing groundwater regulation, by application of the reasoning in *Mono Lake*,<sup>44</sup> or by explicit legislative extension. Where existing groundwater regulation mirrors surface water laws – riparian, regulated riparian, or prior appropriation – the public trust can shape the laws as discussed earlier. Alternatively, the language in *Mono Lake* is instructive: groundwater is often a non-navigable tributary of a navigable waterway, as demonstrated by the cover photo. The same duties and obligations that apply to surface water management would also apply to groundwater management.

The public trust doctrine could also apply to groundwater by statute, either by implication or in explicit legislation.<sup>45</sup> For example, states like Idaho and Arizona declare public ownership of all waters of the state, which include surface and groundwater.<sup>46</sup> These declarations imply public ownership of groundwater, to which the public trust doctrine would apply. Other states such as Montana and Nebraska are beginning to give legal recognition to the connection between surface and groundwater. In 2006, the Montana Supreme Court invalidated applications for groundwater withdrawals because the state agency failed to account for the impact of such withdrawals on surface water flows.<sup>47</sup> This case demonstrates that Montana has taken the first step toward applying the doctrine to groundwater by recognizing the hydrological connection between surface water and groundwater.

To ensure stronger protection of groundwater, advocates should build on the *Mono Lake* and *Waiahole* precedents and existing state public trust principles to extend public trust protection to groundwater. Advocates should also launch campaigns to enact specific legislation to protect groundwater as a public trust resource and thus abolish the artificial distinction between surface water and groundwater resources.

**Because many states are beginning to comprehensively regulate groundwater, now is the time for water advocacy groups to push for public trust legislation.**

## Examining the Public Trust in Practice: A Landmark Victory in Hawai'i

In many ways, Hawai'i has pioneered a groundbreaking and unique path to using the modern public trust doctrine to protect water resources. The state's common law doctrine is buttressed by an explicit constitutional provision and a fairly comprehensive state water code. In addition to native Hawaiian customs, the state has a robust set of public trust provisions.

In 2000, the Hawai'i Supreme Court gave new force to the role of the public trust doctrine in water resources protection in the *Waiahole* case.<sup>48</sup> A grassroots coalition of Native Hawaiians, small farmers, and community members petitioned the state water commission to return water to its natural flow from a decommissioned irrigation system. Opposing this coalition was a group of agribusiness interests and developers that sought continued water diversions that exceeded the entire flow of the original irrigation system. In its ruling, the Hawai'i Supreme Court recognized a separate *water resources trust* that includes all waters of the state. The court also clarified the standards and obligations of this trust:

[T]he public trust doctrine applies to all water resources without exception or distinction.... Modern science and technology have discredited the surface-ground dichotomy.... [W]e see little sense in adhering to artificial distinctions neither recognized by the ancient system nor borne out in the present practical realities of this state.

-Hawai'i Supreme Court

- **Trust Uses.** The court recognized modern recreational uses; resource protection; maintaining waters in their natural state; and Native Hawaiian, traditional, and customary uses as public trust uses. The court concluded that “the public trust, by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances.”<sup>49</sup>
- **Inclusion of Groundwater.** In one stream, the existing water diversion from ground and surface sources diminished the flow by 90 percent.<sup>50</sup> In applying the doctrine to *all* state waters, the court saw “little sense in adhering to artificial distinctions [between surface water and groundwaters] neither recognized by the ancient system nor borne out in the present practical realities of this state.”<sup>51</sup>
- **State Duties and Obligations.** Under the public trust doctrine in Hawai'i, the state has a continuous duty to consider the public in allocating water resources. This duty means that the state can reevaluate prior allocations and must act to preserve the rights of present and future generations.<sup>52</sup>
- **Presumption in Favor of Protecting the Public Trust.** Where many courts have recognized superior public rights, the Hawai'i Supreme Court went even further by establishing a presumption in favor of public trust uses. Instead of the grassroots community establishing the need for in-stream water, the business interests were required to establish the need for out-of-stream uses in light of the public trust. This burden-shifting is a unique and cutting-edge aspect of the modern public trust doctrine.

While Hawai'i benefitted from a somewhat unique set of circumstances and laws, the court referenced the opinion of the California Supreme Court in *Mono Lake*. By building on another state's precedent, the Hawai'i Supreme Court pushed the public trust doctrine one step further to protect all water resources.



## Examining the Public Trust in Practice: A Grassroots Victory in Vermont

In Vermont, a persistent and focused grassroots campaign culminated in explicit legislation that brings groundwater under the protective scope of the public trust doctrine. While the doctrine applied to surface waters in Vermont, it did not apply expressly to groundwater despite the interconnection between surface and groundwater and the importance of groundwater for water supplies in the state. The nonprofit Vermont Natural Resources Council (VNRC) sought to close this illogical gap through legislation by embarking on an education and awareness campaign for state legislators and the public.

This four-year effort arose at a time when groundwater withdrawals were depleting wells and damaging trout streams and bottled water companies were proposing to tap Vermont aquifers for bottling operations.<sup>53</sup> The campaign generated a debate among citizens on fundamental questions of water ownership and management. Among legislators, the VNRC found opposition from those who feared increased litigation and governmental takings. Among citizens, opposition arose from private property owners. When meeting with citizens, the VNRC found that most expressed an intuitive but difficult to articulate sense that all water was public and not subject to private control.<sup>54</sup>

The final legislation states, “It is the policy of the state that the groundwater resources of the state are held in trust for the public.”<sup>55</sup> This policy clarifies uncertainties regarding ownership of water in Vermont: it is unquestionably a public resource, subject to public ownership. Under new legislation for groundwater withdrawals, which goes into effect on July 1, 2010, proposals for large withdrawals must meet criteria related to public trust principles: the withdrawal must be consistent with short- and long-term water planning and must not harm water resources that are hydrologically connected to the source.

To date, there are no cases interpreting the new statute. However, Vermont’s experience with the public trust doctrine demonstrates that even the most precipitation-rich states should be concerned with management of water resources – a concern that can be addressed in part by a declaration of the public trust.

It is the policy of the state that the groundwater resources of the state are held in trust for the public.

### Defending Trust Actions:

#### The Public Trust Doctrine as a Background Principle

The public trust doctrine can play a particularly significant role in supporting state actions to protect trust resources as a defense against a Fifth Amendment takings claim for compensation by a private property owner.<sup>56</sup> In the United States, two types of governmental takings affect individuals and, if found, require compensation: a physical taking and a regulatory taking. A physical taking occurs when the government physically displaces an individual from exclusive control of property. A regulatory taking occurs when government restrictions on property are tantamount to a physical invasion.<sup>57</sup>

In 1992 the Supreme Court created a defense to regulatory takings: if the regulation inheres in the property title itself, based on restrictions that “background principles” of state law

**The public trust doctrine is a “background principle” defense to state action that protects public trust resources but impacts private property.**

place on property rights, then there is no regulatory taking. In other words, the property was always and intrinsically limited by these background principles. The common law public trust doctrine qualifies as a background principle based on its deep roots that predate the creation of many states. Where regulations that arise from public trust duties impact private land, states may assert this defense to foreclose dilatory lawsuits.<sup>58</sup>

In the water context, this defense could arise where state action affects real property (land or subsurface land rights) or where state action affects a water right. For example, in Tennessee, a federal court held that denial of a mining permit that impaired state waters did not constitute a compensable taking because of the public trust doctrine as codified in Tennessee statutes.<sup>59</sup> In this case, Rith Energy applied for and obtained a permit for subsurface mining, but the federal Office of Surface Mining later ordered the company to cease all mining operations. The court reasoned that no compensation was due because the state was obligated by the public trust doctrine to protect state waters and could not grant a permit that would ultimately impair the waters.<sup>60</sup>

Where the state action impacts a water right, the public trust doctrine question will precede a determination of compensability. The overlying doctrine trumps claims of an exclusive, private, and compensable water right. Without a compensable private right, the public trust doctrine would negate a takings claim. In *Franco-American Charolaise*, an exceptional case where the Oklahoma Supreme Court found a compensable taking of uninitiated riparian rights, the dissent relied on the public trust doctrine to dispute the majority’s outcome.<sup>61</sup> At a minimum, the dissent asserted, any grant of water rights comes burdened with public interests in the water that are paramount to private interests. These grants are perpetually subject to paramount public interests, protected by proper legislation.<sup>62</sup>

Crucial state and federal regulations to protect water resources are often delayed when private individuals rely on regulatory takings arguments to contest the restrictions made to promote public interests. A potential defense to these regulatory takings is the public trust doctrine, a background principle that precludes compensation because private property is inherently and intrinsically burdened with certain public interests. As a governmental defense against private takings claims, the public trust doctrine may facilitate state action to protect trust resources. Advocates can help state legislators by educating them about their ability to protect water resources on the basis of public trust duties and quelling their fears of takings litigation.

## Filling the Gaps: The Overarching Role of the Public Trust Doctrine

Practitioners interviewed for this *Manual* have noted that water resources and public trust doctrine cases have not capitalized on the momentum from or potential of the California Supreme Court's *Mono Lake* decision. One explanation is that once a state enacts comprehensive water regulation courts are less likely to rely on the common law. However, for the many states without comprehensive water regulation or integrated surface water and groundwater regulation, the public trust doctrine can help ensure protection of water resources as an overarching state duty.

As common law alone, the public trust doctrine can fill the interstices where statutory law does not yet reach. If the common law doctrine and statutory provisions coexist, courts may look to one to interpret or give context to the other.<sup>63</sup> Moreover, as a firmly established legal principle, the doctrine cannot be eliminated or rendered inapplicable by state legislatures.<sup>64</sup>

The North Dakota Supreme Court, for example, has demonstrated this gap-filling role of the public trust doctrine. The statutory policy in North Dakota requires “well-balanced short- and long-term plans and programs for the conservation and development of [water] resources.”<sup>65</sup> Based on this provision, plaintiffs in *United Plainsmen* argued that the state water commission was obligated to undertake long-term planning for water resources.<sup>66</sup> The North Dakota Supreme Court agreed that the commission was required to determine the potential effect of water allocations on present and future water supplies and needs within the state. In reaching its conclusion, the court relied on the public trust doctrine rather than the statutory policy.<sup>67</sup> The court reasoned that the statutory policy was merely advisory, while the doctrine was mandatory.

Using the public trust doctrine as a gap-filler is an important legal tool, particularly as states undergo water law reform. While the lengthy and deliberative legislative process may ultimately produce comprehensive water regulations, the public trust doctrine does not depend on the legislative process and is a tool that can be used *now* in water protection efforts.

**The common law public trust doctrine is a legal tool that can be used *now* to protect water resources.**

**The public trust doctrine is as much a legal tool as an environmental paradigm, a timeless ethic for water resources management.**

## **Capturing the Imagination: The Narrative Force of the Public Trust Doctrine**

The very concept of the public trust doctrine captures the imagination with its ideas of guardianship, responsibility, and community.<sup>68</sup> Its well-established legal history invites use by judges and lawmakers, and its succinct encapsulation of environmental and other public values deserves greater notice by water advocacy groups. The public trust doctrine is as much a legal tool as an environmental paradigm, a principle that use of critical water resources must “ultimately proceed with due regard for certain enduring public rights.”<sup>69</sup>

A public trust doctrine narrative is persuasive because of its deep legal roots: It is a well-established doctrine that courts have used since the founding of the United States. Judicial opinions that involve the public trust doctrine nearly all begin by elaborating on its historical context. In water resource disputes, state courts are becoming receptive to the doctrine, affirming its importance and relevance. For example, in 2004, the South Dakota Supreme Court declared that “history and precedent have established the public trust doctrine as an inherent attribute of sovereign authority.”<sup>70</sup> In Idaho, the state supreme court has stated that “the public trust doctrine at all times forms the outer boundaries of permissible government action with respect to public trust resources,”<sup>71</sup> demonstrating both the broad gap-filling role of the doctrine and its power to color government action.

The doctrine is also persuasive because it captures timeless values that are being rediscovered by the public in this current environmental reawakening. As one practitioner in Michigan commented:

The beauty of the doctrine is that it makes old values new again; it is the wisdom of the ages applied to modern challenges. Its power in advocacy is that it is an old, entrenched doctrine.<sup>72</sup>

The idea that the state must manage water resources for the benefit of *present and future generations* captures the idea of *sustainability* and reflects our extended connection to those who succeed us. For judges who favor fair and equitable outcomes, the public trust champions the underrepresented or inchoate interests – such as the public at large or future generations – against specialized, minority interests. The ability to harness the rhetorical power of the doctrine may prove to be a tipping point in water resources litigation.

## Understanding the Boundaries: The Limitations of the Public Trust Doctrine

The public trust doctrine is one of many tools for water resource protection that has untapped potential to resolve conflicting uses of water in favor of protective management. Courts in California, Hawai'i, and Wisconsin, as well as legislatures in states like Vermont, demonstrate the power of the doctrine applied to water resources. While these legal precedents may help pave the way in other states, the legal application of the public trust doctrine to *all* water resources has yet to match the broader public perception. Despite historical roots in water, states are only beginning to push the legal protections forward.

Moreover the public trust doctrine is neither a panacea nor an adequate substitute for comprehensive water laws. As noted earlier, successful public trust doctrine cases focus more on the public use and ultimately public *access* to natural resources, particularly beaches and shorelines, rather than fortifying the trust principal – the natural resources themselves.

The effort to extend the public trust doctrine beyond its traditional resources is not without critics from both ends of the ideological spectrum.<sup>73</sup> The modern attempts to broadly paint public trust duties over a range of resources may dilute other sources of legal protection for traditional resources. More importantly, legal developments and increased environmental protections have in some ways supplanted the need for a judicially enforced public trust doctrine. Courts and state legislatures have articulated procedural standards for state water agencies to meet public trust duties, including requirements for public participation, transparency, and accountability in decisionmaking. State and federal governments have assumed significant roles in protecting natural resources, and many environmental laws now permit citizen suits for enforcement. Moreover, using the common law public trust doctrine alone to protect water resources may rely too heavily on judicial goodwill toward the environment rather than a mandatory procedure.<sup>74</sup>

Finally, implementing the public trust doctrine is challenging, even with strong constitutional and statutory backing and supportive case law. In states such as Wisconsin and California, the push for applying the public trust doctrine is very much in the state agency branch of government. As trustees, these agencies are not immune from political pressure, and those responsible for implementing the doctrine may lack the experience and training to fulfill trustee duties under the doctrine.<sup>75</sup> In addition to advocating for public trust doctrine legislation, environmental groups could play an equally important role in reaching out to state water agencies to ensure the existing public trust tools are used.

**The public trust doctrine does not and cannot substitute for comprehensive water law reform. It is one legal tool among many others.**

## Future Ambitions: Achieving the Ideal

In the years to come, water may supplant petroleum as the world's most coveted and contested liquid natural resource. This critical resource demands a solid framework of legal protections to ensure adequate supplies for present and future generations. This framework is incomplete without a robust public trust doctrine to guide courts and legislatures in better protecting water resources.

Many states, as surveyed in this *Manual*, have the requisite elements that can be the focus of a revived and modernized doctrine. Building on this framework, state legislatures should explicitly declare that the public trust doctrine applies to all water resources. Such a declaration would reinforce and clarify the duty for states to manage water quality, quantity, and viability for present and future generations and would unfailingly recognize the ecological and environmental value of water.

Water and environmental advocates can advance public trust arguments and strengthen its common law foundation in courts, capturing the persuasive power of this deeply rooted doctrine. The public trust doctrine serves to inform key terms of and fill gaps in existing state water laws. In court, it tells a compelling narrative of water needs for humans and the environment. While the doctrine has certain limitations and cannot replace comprehensive water laws, it may often provide the weight and substance to tip an argument in favor of water resource protection rather than depletion.

The public trust doctrine is an invaluable tool in a water advocate's kit – a timeless environmental ethic that applies to all water resources.



Recommendations for Action		
	Judicial Action	Legislative Action
State Water Laws	Advocates should inject the public trust doctrine and its values into state water law terms and permit criteria, expanding their application to include more protections for water.	Advocates should promote public ownership of water resources and public trust legislation that specifically covers <del>all</del> critical water resources
Background Principle	Advocates should rely on the public trust doctrine as a background principle to support state efforts to protect water resources.	Advocates should assuage state legislators' fear of takings litigation by educating them about their ability to protect water resources on the basis of public trust duties.
Groundwater	Advocates should build on the <i>Mono Lake</i> and <i>Waikoloa</i> precedents and existing state public trust principles to extend public trust protection to groundwater.	Advocates should launch campaigns to enact specific legislation to protect groundwater as a public trust resource and thus abolish the artificial distinction between surface water and groundwater resources.
Gap-Filler	Advocates should rely on the public trust doctrine to fill the gaps on state duty and obligation to protect water resources where state law is silent.	Advocates should urge state legislators to solidify the public trust duties and obligations by moving the doctrine from a judicially enforced common law doctrine to a legislatively mandated consideration.
Narrative	Advocates should focus on the long-established principle of public ownership of water resources and on the historical application of the doctrine in law.	Advocates should motivate local communities to act by emphasizing the deeply resonant values captured by the public trust doctrine.

## Resources

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Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. ENVTL. L. REV. 1 (2007).

Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, F.S.U. College of Law, Public Law Research Paper No. 369 (May 16, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1405822](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1405822).

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Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799 (2004).

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Melissa K. Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, 27 ECOLOGY L. Q. 135 (2000).

Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157 (2003).

Jack Tuholske, *Trusting the Public Trust: Application of the Public Trust Doctrine to Groundwater Resources*, 9 VT. J. ENVTL. L. 189 (2008).

Charles Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425 (1989).

## Sample Constitutional and Statutory Provisions

The tables below cite state constitutional and statutory provisions that illustrate the possible application of the public trust doctrine to surface water and groundwater resources. Please refer to the 50-state index for a comprehensive list, available at <http://www.progressivereform.org/pubtrustwater.cfm>.

### Public Trust Doctrine: Explicit Constitutional Provisions

Hawai'i	Article XI, section 1. All public natural resources are held in trust by the State for the benefit of the people. Article XI, Section 7. The State has an obligation to protect, control and regulate the use of Hawai'i's water resources for the benefit of its people.	In re Water Use Permit Applications <sup>76</sup>
Pennsylvania	Article I, section 27. The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.	Payne v. Kassab <sup>77</sup>

### Public Trust Doctrine: Implicit Constitutional Provisions

Alaska	Article 8, section 3. Wherever occurring in their natural state, fish, wildlife, and waters are <i>reserved to the people for common use</i> .	Owsichek v. State <sup>78</sup>
Montana	Article 9, section 3, paragraph 3. All surface, underground, flood, and atmospheric waters within the boundaries of the state are the <i>property of the state for the use of its people...</i>	Montana Coalition for Stream Access, Inc. v. Curran <sup>79</sup>
North Carolina	Article 14, section 5. It shall be the policy of this State to conserve and protect its lands and waters <i>for the benefit of all its citizenry...</i>	State ex rel. Rohrer v. Credle <sup>80</sup>
North Dakota	Article XI, section 3. All flowing streams and natural watercourses are <i>property of the state</i> for mining, irrigating, and manufacturing purposes.	United Plainsmen Association v. North Dakota State Water Conservation Commission <sup>81</sup>
Wisconsin	Article IX, section 1. [T]he river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the the carrying places between the same, shall be <i>common highways and forever free</i> , as well to the inhabitants of the state as to the citizens of the United States....	State v. Bleck <sup>82</sup>

### Public Trust Doctrine: Environmental Rights Statutes

Connecticut <sup>83</sup>	Conn. Gen. Stat. § 22a-16 (2009). [Any person] may maintain an action... for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction....	City of Waterbury v. Town of Washington <sup>84</sup>
Hawai'i	Hi. Const. art. XI§ 9 (2009) Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.	In re Water Use Permit Applications <sup>85</sup>
Michigan	Mich. Comp. Laws § 324.1701 (2009). The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.	Michigan Citizens for Water Conservation v. Nestle Waters North America Inc. <sup>86</sup>
Minnesota	Minn. Stat. § 116B.03 (2009) [Any person] may maintain a civil action... for declaratory or equitable relief in the name of the state of Minnesota against any person, for the protection of the air, water, land, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction....	People for Environmental Enlightenment & Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council <sup>87</sup> Minnesota Public Interest Research Group v. White Bear Rod and Gun Club <sup>88</sup>
South Dakota	S.D. Codified Laws § 34A-10-1 (2009). [Any person] may maintain an action... for the protection of the air, water, and other natural resources and the public trust therein from pollution, impairment, or destruction.	

**Public Trust Doctrine: Explicit Statutory Provisions**

<p>Connecticut<sup>89</sup></p>	<p>Conn. Gen. Stat. § 22a-15 (2008). It is hereby found and declared that there is a public trust in the air, water and other natural resources of the state of Connecticut and that each person is entitled to the protection, preservation and enhancement of the same. It is further found and declared that it is in the public interest to provide all persons with an adequate remedy to protect the air, water and other natural resources from unreasonable pollution, impairment or destruction.</p>	<p>Connecticut Coalition Against Millstone v. Rocque<sup>90</sup></p>
<p>Texas</p>	<p>Tex. Water Code Ann. § 11.021 (2009). The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.</p> <p>Tex. Water Code Ann. § 11.0235 (2009). The waters of the state are held in trust for the public, and the right to use state water may be appropriated only as expressly authorized by law.</p>	<p>Cummins v. Travis County Water Control and Improvement Dist. No. 17<sup>91</sup></p>
<p>Vermont</p>	<p>Vt. Stat. Ann. tit. 10, § 901 (2009). It is hereby declared to be the policy of the state that the water resources of the state shall be protected, regulated and, where necessary, controlled under authority of the state in the public interest and to promote the general welfare.</p> <p>Vt. Stat. Ann. tit. 10, § 1390(5) (2009) It is the policy of the state that the groundwater resources of the state are held in trust for the public.</p>	

**Public Trust Doctrine: Implicit Statutory Provisions**

<p>Arizona</p>	<p>Ariz. Rev. Stat. Ann. § 45-141(A) (2009). The waters of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belong to the public....</p>	<p>San Carlos Apache Tribe v. Superior Court ex rel. County<sup>92</sup></p>
<p>South Dakota</p>	<p>S.D. Codified Laws § 46-1-1 (2009). It is hereby declared that the people of the state have a paramount interest in the use of all the water of the state and that the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection.</p> <p>S.D. Codified Laws § 46-1-2 (2009). It is hereby declared that all water within the state is the property of the people of the state, but the right to the use of water may be acquired by appropriation as provided by law.</p>	<p>Parks v. Cooper<sup>93</sup></p>
<p>Washington</p>	<p>Wash. Rev. Code § 90.44.040 (2008). Subject to existing rights, all natural groundwaters of the state... [and] also all artificial groundwaters that have been abandoned or forfeited, are hereby declared to be public groundwaters and to belong to the public and to be subject to appropriation for beneficial use under the terms of this chapter and not otherwise.</p>	



## End Notes

- 1 Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 484 (1970).
- 2 Common law is the body of law that stems from judicial precedent rather than legislative action.
- 3 Historically, the natural resources comprising the trust principal were limited to navigable waters and the submerged lands beneath them. The legal definition of “navigable” comes from an early Supreme Court case: a waterway is navigable when it is or could be used in its natural state as a highway for commerce in the customary ways commerce is conducted. *The Daniel Ball*, 77 U.S. 557 (1870). At that time, commerce was dominated by river and other water-dependent transportation.
- 4 Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892) [hereinafter *Illinois Central*].
- 5 San Carlos Apache Tribe v. Super. Ct., 972 P.2d 179 (Ariz. 1999).
- 6 *Id.* at 199.
- 7 Avenal v. State, 886 So. 2d 1085 (La. 2004).
- 8 Evelyn v. Commonwealth Marine Resources Comm’n, 621 S.E.2d 130 (Va. App. 2005).
- 9 *See infra* notes 17-20 and accompanying text.
- 10 United Plainsmen v. N.D. State Water Conserv. Comm’n, 247 N.W. 2d 457 (1976).
- 11 Michael Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 595 (1989).
- 12 Friends of Van Cortlandt Park v. City of New York, 750 N.E.2d 1050 (N.Y. 2001).
- 13 In re Water Use Permit Applications, 9 P.3d 409 (Haw. 2000) [hereinafter *Waiabole*].
- 14 Ctr. for Biological Diversity, Inc. v. FPL Group, Inc., 83 Cal. Rptr. 3d 588 (Cal. Ct. App. 2008).
- 15 In some instances, courts have interpreted these citizen suit provisions narrowly, undermining citizens’ ability to enforce trust duties. *See* Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006).
- 16 Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (“There is a growing public recognition that one of the most important public uses of the tidelands – a use encompassed within the tidelands trust – is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.”) (emphasis added).
- 17 Nat’l Audubon Soc’y v. Super. Ct., 658 P.2d 709 (Cal. 1983) [hereinafter *Mono Lake*].
- 18 *See supra* note 3.
- 19 *Mono Lake*, 658 P.2d at 728.
- 20 Michael C. Blumm, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701, 709-14 (1995).
- 21 Shaila Dewan, *Georgia Claims a Sliver of the Tennessee River*, N.Y. TIMES (Feb. 22, 2008).
- 22 Sharon Pian Chan, *City of Seattle Won’t Buy Bottled Water*, SEATTLE TIMES (Mar. 13, 2008); Cecilia M. Vega, *Mayor to Cut Off Flow of City Money for Bottled Water*, S.F. CHRON. (June 22, 2007).
- 23 Tim P. Barnett and David W. Pierce, *Sustainable Water Deliveries from the Colorado River in a Changing Climate*, Proceedings of the National Academies of Science (April 20, 2009).
- 24 In early 2009, the Florida legislature considered a tax on bottled water withdrawal but the measure failed. Catherine Dolinski, *Opposition Sinks Bottled Water Tax*, TAMPA TRIB. (April 20, 2009).
- 25 Martin E. Comas, *Ecologist: Bottling Water Could Harm Wetlands*, ORLANDO SENTINEL (Apr. 16, 2009); DeeDee Correll, *Out West, A New Kind of Water War*, L.A. TIMES (Apr. 2, 2009).
- 26 *See supra* note 2.
- 27 Klass, *supra* note 15, at 701.
- 28 *See Index, available at* <http://www.progressivereform.org/pubtrustwater.cfm>.
- 29 *See infra* Sample Constitutional and Statutory Provisions.
- 30 Example of potential public trust criteria could be borrowed from states’ existing public interest criteria, including whether the use (1) promotes or enhances protection of state water resources; (2) promotes or enhances future water supplies; (3) promotes or enhances public health and safety; (4) includes water conservation measures; (5) is economically beneficial to the collective good in a macroscopic sense. *See* Christine A. Klein, Mary Jane Angelo, & Richard Hamann, *Modernizing Water Law: The Example of Florida*, 61 FLA. L. REV. 403.
- 31 State v. Bleck, 338 N.W.2d 492 (Wis. 1983).
- 32 *Id.*
- 33 *United Plainsmen, supra* note 10.
- 34 A. Dan Tarlock, LAW OF WATER RIGHTS AND RESOURCES § 5:57 (2006). *See also* Shokal v. Dunn, 707 P.2d 441, n.2 (“Trust interests include property values, navigation, fish, and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality.”).
- 35 Shokal, *supra* note 34, at n.2.
- 36 IDAHO CODE § 42-1501 (2009). In 1997, the Idaho Legislature passed a statute that effectively minimized the protective scope of the public trust doctrine. IDAHO CODE § 58-1203 (2009). Although this statute has not been challenged yet, legal scholars question its validity. *See* Michael C. Blumm, *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794*, 24 ECOLOGY L.Q. 461 (1997).
- 37 Marion County v. Greene, 5 So. 3d 775, 778 (Fla. Dist. Ct. App. 2009).
- 38 *Id.*; St. Johns River Water Management District, Applicant’s Handbook: Consumptive Uses of Water, Chapter 40C-2, F.A.C., section 9-3 (March 8, 2009) (emphasis added).
- 39 According to The Groundwater Foundation, groundwater accounts for 51 percent of the drinking water for the total population and 99 percent of the drinking water for the rural population. The Groundwater Foundation, “How much do we depend on groundwater?,” <http://www.groundwater.org/gi/depend.html> (last visited June 23, 2009).
- 40 Jane Braxton Little, *The Ogallala Aquifer: Saving a Vital U.S. Water Source*, SCI. AM. (March 30, 2009).
- 41 Rick M. Spechler, *The Relation Between Structure and Saltwater Intrusion in the Floridan Aquifer System, Northeastern Florida*, U.S. Geological Survey, [http://water.usgs.gov/ogw/karst/kigconference/rms\\_relationintrusion.htm](http://water.usgs.gov/ogw/karst/kigconference/rms_relationintrusion.htm) (last visited May 13, 2009).
- 42 Houston & T.C. Ry. Co. v. East, 81 S.W. 279 (Tex. 1904).
- 43 Mich. Citizens for Water Conserv. v. Nestlé Waters North America Inc., 709 N.W.2d 174 (Mich. Ct. App. 2005), *overruled on other grounds*, 737 N.W.2d 447 (Mich. 2007).
- 44 *See supra* notes 17-20 and accompanying text.
- 45 VT. STAT. ANN. tit. 10, § 1390(5) (2009). *See infra* notes 53 & 55 and accompanying text.
- 46 *See infra* Sample Constitutional and Statutory Provisions.
- 47 Mont. Trout Unlimited v. Mont. Dept. of Nat. Res. & Conserv., 133 P.3d 224 (Mont. 2006).
- 48 *Waiabole, supra* note 13, at 447.
- 49 *Id.*
- 50 D. Kapua’ala Sproat & Isaac Moriwake, *Ke Kalo Pa’a O Waiabole: Use of the Public Trust as a Tool for Environmental Advocacy*, in CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT 247-84 (Clifford Rechtshaffen & Denise Antolini eds. 2007).
- 51 *Waiabole, supra* note 13, at 447.
- 52 Sproat & Moriwake, *supra* note 50, at 263.

## End Notes

- <sup>53</sup> Johanna Miller, *Who Owns Vermont's Water? Exploring a Vital Part of Vermont's Commons*, <http://www.vtcommons.org/journal/2008/03/johanna-miller-who-owns-vermont%E2%80%99s-water-exploring-vital-part-vermonts-commons> (last visited April 29, 2009).
- <sup>54</sup> Telephone Interview with Jon Groveman, Water Program Director and General Counsel, Vermont Natural Resources Council, in Montpelier, Vt. (Feb. 26, 2009).
- <sup>55</sup> VT. STAT. ANN. tit. 10, § 1390(5) (West 2009).
- <sup>56</sup> The Fifth Amendment of the United States Constitution states, in part, “[N]or shall private property be taken for public use, without just compensation.”
- <sup>57</sup> A regulatory taking can occur under two circumstances. First, government regulation constitutes a regulatory taking when the regulation completely deprives the property owner of all reasonably beneficial use of her property. Second, a court may find that government regulation is a regulatory taking under the multi-factor balancing test that considers (1) the character of the government action; (2) the severity of the economic impact; and (3) the extent to which the regulation interferes with the property owner’s investment-backed expectations. *See* Lingle v. Chevron U.S.A., 544 U.S. 528, 537 (2005); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (holding that state regulation requiring landlords to allow television cable companies to place cable facilities in their apartment buildings constituted a taking even though the facilities occupied at most only one and one-half cubic feet of the landlord’s property). For regulatory takings, *see* Penn Central Transportation Co. v. New York, 438 U.S. 104 (1978); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).
- <sup>58</sup> The Court acknowledged that these background principles may change, stating that “changed circumstances or new knowledge may make what was previously permissible no longer so.” Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992)
- <sup>59</sup> Rith Energy, Inc. v. U.S., 44 Fed. Cl. 108 (1999).
- <sup>60</sup> The Florida Supreme Court recently upheld the state’s Beach and Shore Preservation Act, which fixed beachfront homeowners’ property line in the event that the state-sponsored beach renourishment increased the dry beach area. Property owners argued that by fixing the property line they were denied property rights in the event of land accretion, but the Florida Supreme Court upheld the Act under the state’s constitutional public trust duty to protect its beaches. The U.S. Supreme Court granted cert for the Fall 2009 term. *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008), cert. granted, 129 S. Ct. 2792 (2009).
- <sup>61</sup> Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd., 855 P.2d 568 (Okla. 1990) (Lavender, J., dissenting).
- <sup>62</sup> *Id.*
- <sup>63</sup> Michael D. Axline, *The Limits of Statutory Law and the Wisdom of Common Law*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10268 (2008). *See also* Klass, *supra* note 15.
- <sup>64</sup> *See Illinois Central*, *supra* note 4, and *San Carlos Apache*, *supra* note 5.
- <sup>65</sup> N.D. CENT. CODE § 61-01-26 (West 2009).
- <sup>66</sup> *United Plainsmen*, *supra* note 10.
- <sup>67</sup> *Id.* at 460 (emphasis added).
- <sup>68</sup> Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351 (1998).
- <sup>69</sup> *Waiahole*, *supra* note 13, at 502 n.108 (Haw. 2000).
- <sup>70</sup> *Parks v. Cooper*, 676 N.W.2d 823 (S.D. 2004).
- <sup>71</sup> *Kootenai Env’tl. Alliance v. Panhandle Yacht Club*, 671 P.2d 1085, 1095 (Id. 1983).
- <sup>72</sup> Telephone Interview with Chris Bzdok, Principal, Olson, Bzdok, & Howard P.C., in Traverse City, Mich. (Feb. 12, 2009).
- <sup>73</sup> *See* Richard Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986).
- <sup>74</sup> *Id.*
- <sup>75</sup> Melissa K. Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, 27 ECOLOGY L.Q. 135 (2000).
- <sup>76</sup> 9 P.3d 409 (Haw. 2000). *See supra* notes 48-52 and accompanying text.
- <sup>77</sup> 312 A.2d 86 (Pa. Commw. Ct. 1973) (holding that Section 27 “was intended to allow the normal development of property in the Commonwealth, while at the same time constitutionally affixing a public trust concept to the management of public natural resources of Pennsylvania”) (emphasis added).
- <sup>78</sup> 763 P.2d 488, 493 (Alaska. 1988) (noting the uniqueness of the “common use” provision and its anti-monopoly purpose, which was achieved by “constitutionalizing common law principles imposing upon the state a public trust duty with regard to the management of fish, wildlife and waters”).
- <sup>79</sup> 682 P.2d 163 (Mont. 1984) (holding that the public has a right of recreational use of navigable waters flowing through privately owned land and citing the constitutional provision declaring state ownership of waters is burdened by the public trust).
- <sup>80</sup> 369 S.E. 2d 825 (N.C. 1988) (determining that a series of fishery and wildlife legislation embodying the public trust culminated in constitutional adoption of the public trust in Article 14, section 5, in 1972).
- <sup>81</sup> 247 N.W. 2d 457, 461 (N.D. 1976) (citing constitutional provision as support for declaration that “the State holds the navigable waters, as well as the lands beneath them, in trust for the public”).
- <sup>82</sup> 338 N.W. 2d 492, 497 (Wis. 1983) (“The public trust doctrine is rooted in article 9, section 1, of the Wisconsin Constitution.”).
- <sup>83</sup> For a comparison of Connecticut and Minnesota’s environmental rights statutes, *see* Andrew J. Piela, Comment, *A Tale of Two Statutes: Twenty Year Judicial Interpretation of the Citizen Suit Provision in the Connecticut Environmental Protection Act and the Minnesota Environmental Rights Act*, 21 B.C. ENVTL. AFF. L. REV. 401 (1994). *See also* Klass, *supra* note 15.
- <sup>84</sup> 800 A.2d 1102, 1137 (Conn. 2002) (holding under the Connecticut Environmental Protection Act that, “when there is an environmental legislative and regulatory scheme in place that specifically governs the conduct that the plaintiff claims constitutes an unreasonable impairment under CEPA, whether the conduct is unreasonable under CEPA will depend on whether it complies with that scheme”).
- <sup>85</sup> 9 P.3d 409 (Haw. 2000). *See supra* notes 48-52 and accompanying text.
- <sup>86</sup> 737 N.W.2d 447 (Mich. 2007) (holding that plaintiffs lacked standing under traditional standing doctrine because legislatively granted standing in MEPA violated separation of powers).
- <sup>87</sup> 266 N.W.2d 858, 866 (Minn. 1978) (stating that “[t]he need for citizen vigilance exists whether or not specific environmental legislation applies, and MERA is clearly a proper mechanism to force an administrative agency, even the MEQC, to consider environmental values that it might have overlooked”).
- <sup>88</sup> 257 N.W.2d 762 (Minn. 1977) (litigants can demonstrate harm to environment by either proof that the conduct violates an existing standard, regulation, or ordinance or that the conduct materially, adversely affects or is likely to affect the environment).
- <sup>89</sup> Connecticut also provides a citizen-suit provision for unreasonable pollution of natural resources subject to public trust protection. CONN. GEN. STAT. ANN. § 22a-16 (West 2008).

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## End Notes

<sup>90</sup> 836 A.2d 414 (Conn. 2003) (holding that litigants lacked standing to bring a claim under section 22a-15 based on an expired permit and emergency permit issuance, which are conditions that “[do] not directly threaten the public trust in the air, water and other natural resources of the state under § 22a-16”).

<sup>91</sup> 175 S.W.3d 34, 49 (Tex. App. 2005) (in a case where landowners appealed denial of a permit to build a dock on submerged lands adjacent to their property, court cited section 11.021 of the Water Code as evidence of public trust doctrine in Texas and state’s obligation to regulate public trust resources, including submerged lands and navigable waters).

<sup>92</sup> 972 P.2d 179 (Ariz. 1999) (invalidating legislation that prohibited courts from considering public trust values in water-rights adjudications).

<sup>93</sup> 676 N.W.2d 823 (S.D. 2004) (holding that the Water Resources Act codifies, rather than supplants, the public trust doctrine based on history and precedent in South Dakota and other states and noting the core public trust principles embodied in the Act: the paramount public interest in the use of state waters; use of state waters for the greatest public benefit; and public ownership of state waters).

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**Alexandra B. Klass** is an Associate Professor at the University of Minnesota Law School and a CPR Member Scholar. She teaches and writes in the areas of environmental, natural resources, tort, and property law. Her scholarly articles on these topics have appeared in numerous law journals, including *Minnesota Law Review*, *Emory Law Journal*, *William & Mary Law Review*, *Iowa Law Review*, *Notre Dame Law Review*, *University of Colorado Law Review*, and *Ecology Law Quarterly*. Prior to teaching, Professor Klass was a partner at Dorsey & Whitney LLP in Minneapolis, where she specialized in environmental law and land use cases. She received her B.A. in political science and French from the University of Michigan and her J.D. *cum laude* from the University of Wisconsin Law School.



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