# THE PUBLIC TRUST DOCTRINE AND ITS APPLICATION TO CONSERVE INSTREAM FLOWS AND WATER LEVELS

## UPDATES TO THE 1996 NATIONAL INSTREAM FLOW PROGRAM ASSESSMENT PROJECT'S PUBLIC TRUST DOCTRINE WORKSHOP PROCEEDINGS

**SPECIAL REPORT TO THE INSTREAM FLOW COUNCIL**

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This is a special report to the Instream Flow Council (IFC). This builds on work done by the National Instream Flow Program Assessment (NIFPA) with respect to the public trust doctrine. Alaska Department of Fish and Game spearheaded the program in collaboration with the U.S. Fish and Wildlife Service (FWS) under a multi-state conservation grant.

The purpose of NIFPA was to improve the abilities of state fish and wildlife agencies, FWS regions, and Tribes to successfully secure adequate amounts of water for fish and wildlife in rivers, lakes, and reservoirs. This project led to the 1998 formation of the IFC, whose membership is open to all U.S. state and territorial fish and wildlife agencies and their Canadian provincial and territorial counterparts.

NIFPA convened a workshop on the public trust doctrine in March 1996. The workshop reflected the recent application (1994) of the doctrine by the State of California, to limit Los Angeles' diversions from the freshwater tributaries to Mono Lake. The workshop anticipated how state and provincial agencies may use the doctrine to supplement their regulatory authorities for protection of instream flows and water levels. NIFPA published workshop proceedings.

As we approached the twenty-sixth anniversary of that ground-breaking workshop, the IFC commissioned this special report, with support from the Tennessee Wildlife Resources Agency, to review subsequent experiences with the doctrine. In sum, how has the doctrine been applied to protect instream flows and water levels or stages? To address this question, we have compiled US and Canada court cases by state and province, since 1996, showing application of the public trust doctrine for instream flow and water level conservation, and other public uses. Appendix A is a folder of such cases. Appendix A.1 indexes these cases by venue (jurisdiction) and includes a historical section. Appendix B is a folder of recent law review articles and similar reports on this topic. Appendix B.1 indexes these articles and reports by author and includes a synopsis of each. We note that these documents, which include copyrighted materials, are for the internal use of IFC members and their respective agencies.

## BASICS OF PUBLIC TRUST DOCTRINE

We begin with a summary of the discussion in the 1996 workshop.[1] We address the central tendencies of the doctrine, focusing on states as no court in Canada has resolved whether the doctrine is common law in that nation and its provinces.

Under the public trust doctrine, a state is trustee for navigable waters and the submerged lands beneath such waters, up to the ordinary high-water mark. The state

manages these waters and lands in trust for its people and public uses. These interests and rights are incident of the state's sovereignty.

**Common Law**. The doctrine is common law. By definition, "common law" is made and interpreted by courts. It varies by state. It evolves over time through successive cases. And a single text does not exist, as the doctrine in a given state is a function of all the cases that interpreted it. Because such cases are subject to re-interpretation by any reader, there is no such thing as a definitive statement of the doctrine in a state. By contrast, legislatures enact statutes, and agencies adopt rules to implement the statutes that provide their authorities. The text of such regulatory laws in a state is fixed – as stated in codes – at any given time.

This common law is ancient. It arose in Roman law, as restated in the Institutes of Justinian (535 C.E.). Roman law distinguished private property from *res communis*, or common things, which were reserved for public uses. "By the law of nature these things are common to mankind – the air, running water, the sea and consequently the shores of the sea."[2] The doctrine became common law throughout the Roman empire, and then in the nations that emerged from that empire. As of the 1700s, courts in England applied the doctrine to its seashores and tidal waters, including all navigable rivers. The crown was required to acknowledge and protect public uses of these waters.

The doctrine became common law in the English colonies. It continued as common law when these colonies became the original states in 1789. Under the equal footing doctrine, which assures equality between original and subsequent states, the doctrine became common law in each subsequent state upon the date of its admission to the United States.

**Integration with Regulatory Laws.** The doctrine is an incident of a state's sovereignty. It exists as common law regardless of whether a legislature has enacted a statute that recognizes it. So how does it relate to the regulatory laws for allocation of water, including protection of instream flows and water levels? Each state has such laws. As a general matter, the doctrine supplements such laws and is not superseded by them. A state agency (or court) may apply the doctrine to supplement the express requirements of the applicable regulatory law. As the California Supreme Court stated in the Mono Lake Cases:

> "As we have seen, the public trust doctrine and the appropriative water rights system administered by the Water Board developed independently of each other. Each developed comprehensive rules and principles which, if applied to the full extent of their scope, would occupy the field of allocation of stream waters to the exclusion of any competing system of legal thought. Plaintiffs, for example, argue

> that the public trust is antecedent to and thus limits all appropriative water rights, an argument which implies that most appropriative water rights in California were acquired and are presently being used unlawfully. Defendant [Los Angeles Department of Water and Power or] DWP, on the other hand, argues that the public trust doctrine as to stream waters has been 'subsumed' into the appropriative water rights system and, absorbed by that body of law, quietly disappeared; according to DWP, the recipient of a board license enjoys a vested right in perpetuity to take water without concern for the consequences to the trust.
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> We are unable to accept either position. In our opinion, both the public trust doctrine and the water rights system embody important precepts which make the law more responsive to the diverse needs and interests involved in the planning and allocation of water resources. To embrace one system of thought and reject the other would lead to an unbalanced structure, one which would either decry as a breach of trust appropriations essential to the economic development of this state, or deny any duty to protect or even consider the values promoted by the public trust. Therefore, [we will seek] an accommodation which will make use of the pertinent principles of both the public trust doctrine and the appropriative water rights system…."[3]

In this example, the court applied the Water Code to affirm Los Angeles' water rights as lawful, despite foreseeable harm to Mono Lake and its freshwater tributaries. And the court applied the public trust doctrine to require the California Water Board to reopen the rights and limit the diversion to avoid "unnecessary harm" to these public trust resources.

**Property Interests.** The state owns the water in navigable rivers and the submerged lands up to the ordinary high-water mark. On the ocean shore, the state owns the lands from that mark seaward to the boundary of the state. These property interests exist even if not recorded in the written deed or official records maintained by the local county. The state may permit private uses such as water diversions, wharves, and docks, but it may not convey its property interests so as to defeat the public uses of the resource at that location. The U.S. Supreme Court reversed a statutory grant of the Chicago Harbor to a railway company for improvement, holding:

> "A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels

> mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government, the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So, with trusts connected with public property, or property of a special character, like lands under navigable waters; they cannot be placed entirely beyond the direction and control of the state."[4]

**Public Rights.** The doctrine protects public rights in fishing, water-dependent commerce, and navigation. In early years, the doctrine was primarily applied to permit public foraging for clams, crabs, and similar marine life in New England states, notwithstanding private efforts to fence-off the shoreline. To this day, the primary application is to protect public right of access and use for navigable waters. Recently, the fishing right has been expanded in some states to protect fish habitat and population.

**State's Duties**. The state, as trustee, has a duty to protect the public uses of navigable waters and submerged lands for the benefit of the public, including future generations. The state has a related duty to periodically re-examine its past decisions to avoid unnecessary harm to these public uses.

**Application to Instream Flows and Water Levels**. As of the 1996 workshop, many cases had protected public access to navigable rivers, but only one case had applied the public trust doctrine to water rights. In 1983, the California Supreme Court held that Los Angeles' water rights for municipal water supply (as granted in 1940) must be limited to protect Mono Lake and its freshwater tributaries. The court directed the state agency that issues appropriative water rights to reopen and amend these specific rights, which permitted diversions from creeks tributary to Mono Lake. The court held that the doctrine applied to such non-navigable waters to the extent necessary to protect the public uses of Mono Lake itself. The state agency amended the rights in 1994, reducing the otherwise lawful quantity of diversion by roughly 75%. That remedy was designed to maintain a target lake level; avoid unnecessary harm to migratory waterfowl, trout fisheries in the freshwater tributaries, navigation on the lake, and air quality; and permit continued diversion for municipal water supply.[5]

## RECENT DEVELOPMENTS

The 1996 workshop addressed the prospect that the public trust doctrine would be applied broadly to establish limitations on water rights as necessary to protect public

trust. As shown in Appendices A - B, that has not occurred. Most cases nationally since 1996 have applied the doctrine in its traditional manner to protect public access. Only a few cases that have followed the Mono Lake Cases to apply the doctrine to water rights.

Since 1996, California courts have confirmed that water rights (when issued, amended, and as used) must avoid unnecessary harm to the public trust. One such case applied the doctrine to regulate well pumping, on the principle that groundwater is like a non-navigable tributary to a navigable river. These cases arose from stakeholder complaints against specific rights. However, during this period, the state's regulatory agency has not established a process to review and potentially reopen the tens of thousands of water rights issued before the Mono Lake Cases. And the Nevada Supreme Court went further, expressly declining to apply the doctrine to reopen water rights that had been fully adjudicated under state law. In Canada, several cases have addressed whether the public trust doctrine is common law, without resolving the foundational issue or applying the doctrine to water rights.

Litigation applying the public trust doctrine to water rights will probably have limited effect in protecting instream flows and water levels on a system level. There are several reasons for that. Each state has regulatory laws that expressly control uses of water resources. Federal laws including the Endangered Species Act also apply. It is difficult to use litigation based on common law (general as it is) to double-check the complex and often elaborate rules and practices of state and federal agencies applying these statutes. And even successful litigation tends to have limited effect, affirming or vacating an agency's action with respect to particular waters. Finally, litigation like the Mono Lake Cases tends to be very expensive for the plaintiff stakeholders. This is the situation in Canada, too.

In 1970 Professor Joseph Sax famously framed the doctrine as a lever for judicial intervention in checking a state's actions with respect to trust resources.[6] That framing directly contributed to the Mono Lake Cases and other cases over the next several decades. The 1996 workshop largely focused on that strategy. However, several speakers then suggested that the better approach would be integrating the doctrine into the actual rules and practices that state agencies apply in regulating water rights.[7] This update confirms the wisdom of that approach, internalizing the doctrine versus relying on litigation by third parties.[8] We explored this approach in the IFC's 2022 biennial meeting.

## RECOMMENDATIONS

Based on this update, we recommend that IFC members consider the following steps to better integrate this doctrine into the routine administration of the laws governing water resources.

**Internal status review**. Share this update within your agency, including your legal office. Ask your colleagues whether they are familiar with the doctrine, and specifically whether they have reviewed how the doctrine provides authority to protect instream flows and water levels in your jurisdiction. If not, encourage the legal office to review Appendix A.1, including cases from similarly situated jurisdictions.

**External stakeholder engagement**. You may provide interested stakeholders the public link to the 1996 workshop proceedings. You may provide your own summary of information in this update, being mindful of the copyright limitations discussed above.

**Potential new applications**. The doctrine establishes public rights in navigable waters and submerged lands. Ask your legal office whether the doctrine could enhance the authorities expressly granted by organic statutes for your agency, with respect to instream flows and water levels. If yes, explore options that complement what the statutes require.

**Future priority for Instream Flow Council**. We recommend that the IFC compile and periodically update rules, policies, and practices of member agencies in applying the public trust doctrine. These will illustrate how the doctrine is being integrated into the ordinary administration of water rights, not just through litigation, to protect instream flows and water levels. Such a library will be helpful to members in developing potential new applications of the doctrine.

We recommend that the IFC update this report on case law and law review articles, every five years. The IFC should consider including U.S. and Canadian territories within the scope of such future updates.

## CONCLUSION

The public trust doctrine is common law in all states. It has potential to be recognized as such in Canada. In litigation, it has proven to be a North Star to require periodic review and revision of water rights as necessary to protect fishing, navigation, and related commerce. It prohibits unnecessary or avoidable effects on such uses. However, its practical effect turns on whether it is integrated into regulatory programs. We recommend that as a key priority for the IFC.

## ENDNOTES

[1] This summary draws largely on the introduction by Professor Joseph M. Sax, *1996 Workshop Proceedings*, pp. 5-17.

[2] Institutes of Justinian 2.1.1, quoted in *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 434 (1983).

[3] *National Audubon Society*, 33 Cal.3d at 445.

[4] *Illinois Central Railway Company v. State of Illinois*, 146 U.S. 387, 454 (1892).

[5] State of California Water Resources Control Board, Water Rights Decision 1631 (1994), pp. 194-211 (*available at* https://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1631.pdf).

[6] Joseph L. Sax, "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention," 68 *Michigan Law Review* 471 (1970).

[7] Harold M. Thomas, *1996 Workshop Proceedings*, p. 118.

[8] Dave Owen, "The Mono Lake Case, Public Trust Doctrine, and the Administrative State," 45 *University of California, Davis Law Review* 1099 (2012).