

# Property and the Public Trust Doctrine

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“Property must be secured, or liberty cannot exist.”

—John Adams, *Discourses on Davila*, 1790

# Property and the Public Trust Doctrine

RANDY T. SIMMONS

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## INTRODUCTION

In 2006, Montana District Court Judge Ted Mizner ruled that the Mitchell Slough, a 13-mile-long waterway in Montana’s Bitterroot Valley, is not a natural stream and, therefore, Montana’s Stream Access Law<sup>1</sup> cannot be used to provide public access to the slough. The Montana statute, passed in 1985, asserts a right for public use of “all surface waters capable of recreational use” regardless of who owns the streambed or surrounding land. Montana’s governor, Brian Schweitzer, believes the Mitchell Slough decision “has to be appealed because it affects streams, creeks, and sloughs all over Montana. It’s a natural body of water and by my reading of the stream access law it should be open to the public to fish and recreate” (Robbins 2006). Governor Schweitzer emphasized his commitment to the Stream Access Law and said, “If you want to buy a big ranch and you want to have a river and you want privacy, don’t buy in Montana. The rivers belong to the people of Montana” (Robbins 2006). The case was appealed to the Montana Supreme Court and the first briefs were filed in December 2006.

Mitchell Slough, according to Mizner, is “no longer natural” because of years of extensive changes that included building irrigation structures, digging deep holes, and stabilizing banks to improve trout habitat. The owners of the land that the slough flows through argued that it is a private

irrigation ditch and, therefore, not subject to the Stream Access Law. The Bitterroot Protective Association and Montana Department of Fish, Wildlife, and Parks argued that the slough is a natural waterway and has been a source of public recreation for decades.

Montana's Ruby River has been at the center of a controversy similar to that involving Mitchell Slough. The Ruby, a prized trout fishery, flows through miles of private land protected by "No Trespassing" signs, barbed wire, and electric fences. The "landowners claim these fences are to keep livestock in; anglers, however, believe landowners erected the fences to keep the public out" (Stauffer 2006). In July 2005, "Stream Access Float Day" was organized by the Montana Coalition for Stream Access "to call attention to escalating tensions between riparian landowners and access advocates over access to waters held in trust by the state for its citizens" (Stauffer 2006). About 200 people in canoes, kayaks, and rafts floated through 12 miles of private property. Jackie Corr, one of the organizers, said: "Remember, wherever you live in Montana, the Ruby River is your river. If we don't say 'no, enough is enough' at the Ruby, we will soon be at the complete mercy of the ruthless predators who want to privatize everything in the state that serves and benefits the public good" (Ochenski 2005).

The root issue in the conflicts over the Mitchell Slough and Ruby River is the extent of the public's rights to all streams in the state. The legislative basis for claims of public rights is Montana's Stream Access Law, which is built on a principle known as the *public trust doctrine*—a doctrine loosely based on Roman and English law that supposedly establishes public rights to certain resources.

The public trust doctrine was historically applied to rivers and seashores to protect navigation, commercial, and fishing rights. Today, its advocates have far more grand plans for the doctrine. In a study of the history of the public trust doctrine, James Huffman (2006, 1–2) provides a few examples of what he notes are:

Ambitions for an expanded public trust doctrine... with the financial support of the federal government and under contract to the state of Connecticut, David Slade and several coauthors wrote an entire book

on how the public trust doctrine might be applied to the management of the “lands, waters, and living resources” of coastal states (Slade 1990). Gary Meyers has argued that the public trust doctrine can be the vehicle for a more holistic approach to the management of wildlife and wildlife habitat (Meyers 2003). Robert Fischman, noting that the public trust doctrine “has long held attraction for advocates of federal public land conservation,” suggests the legislative “mandate to make affirmative contributions toward the [National Wildlife Refuge] System mission provides a statutory basis for application of the public trust doctrine” (Fischman 2002). Samantha Bohrman argues that coalbed methane development “exacerbates an inequity between gas giants and farmers, ranchers, and common citizens, ...[leaves] counties struggling to fund and maintain programs and infrastructure they can no longer afford, ... [and] compromises the environment, ... [all of which] presents a classic violation of the public trust doctrine” (Bohrman 2006). Kristen Carpenter suggests that the public trust doctrine “may support the right of citizens (including American Indian citizens) to use public lands for religious and cultural purposes” (Carpenter 2005). Alison Rieser makes the case for ecological preservation as a public property right under the public trust doctrine (Rieser 1991). . . . The possibilities, it seems, are only limited by the imagination.

This Policy Series explores political and social implications of an expanding public trust doctrine. Specifically, I consider what the doctrine means, how it is applied, and what its effect is. The emphasis is on expected and actual outcomes in terms of practical politics. Of particular interest is how the doctrine can be expanded to justify interference with private property in a free society. The public trust doctrine is a blunt instrument in the hands of interest groups, voters, legislatures, and courts. Blunt instruments accomplish many things, but consequences may go beyond those intended by their proponents. I suggest that while the short-term effects of an expanding, flexible doctrine will be politically popular, the long-term effects on some public trust resources may be negative. Good intentions and good outcomes are often strangers in politics. The public trust doctrine appears to be one of those cases.

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## HISTORY OF THE PUBLIC TRUST DOCTRINE

Most articles on the public trust doctrine refer to the Justinian Code, the compilation of legal codes created under the rule of Roman ruler Justinian I. The standard history asserts that the Justinian Code was the basis for portions of the English and North American common law, including the public trust doctrine. According to the code, “these things are by natural law common to all: air, flowing water, the sea, and consequently the shores of the sea, if he abstains from injury to the villas, monuments and buildings there, because these are not governed by the law of nations as is the sea” (Cooper 1841). This view continues the story from Roman to English common law, claiming that English common law “perpetuated those principles with the gloss that these rights were owned by the sovereign in trust for the public” (Eagle 2001).

*Illinois Central Railroad Co. v. Illinois* is often asserted to be the first major application of the public trust doctrine in the United States. The Supreme Court declared that the sovereign’s public trust rights belong to the states, and that these rights are different than the rights they hold to other lands. According to the Court, “It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein . . .” (*Illinois Central Railroad Co. v. Illinois* 1892, 452). This is a fiduciary or trust obligation that requires states to manage assets for the benefit of the general public. Unlike publicly owned lands, which can be sold, a right held in trust can be sold only under rare and strictly defined circumstances.

The problem with the standard history is that it plays fast and loose with legal history. When Justinian said that seashores were common to all, he was explaining their state before being appropriated by an individual or the state. Otherwise the claim would be “inconsistent with the existence of villas and buildings that were not to be injured by public use of the seashore . . .” (Huffman 2006). Rather than the English common law including a public trust doctrine, it allowed submerged land to be privately owned and for that ownership to be established through “usage, custom, prescription, or convey-

ance from the Crown” (Huffman 2006, 18). Finally, the majority opinion in *Illinois Central* did not claim that public property burdened with the public trust could not be alienated. Thus, the pillars upon which the modern public trust doctrine has been erected are illusory, even mythical.

## ROMAN LAW

Joseph Sax, the best known and probably the most cited proponent of the public trust doctrine, tells the Roman story this way:

Long ago there developed in the law of the Roman Empire a legal theory known as the “doctrine of the public trust.” It was founded upon the very sensible idea that certain common properties, such as rivers, the seashore, and the air were held by the government in trusteeship for the free and unimpeded use of the general public (Sax 1970, 163–64).

In his review of Sax’s claims about the public trust doctrine’s basis in Roman law, Huffman notes that Sax also argues “[o]ur contemporary concerns about the ‘environment’ bear a very close conceptual relationship to this venerable legal doctrine.” But, Huffman observes, “In fact there is no evidence whatsoever that the Roman concept of *jus publicum* has even a distant relationship to contemporary concerns for the environment (Huffman 2006, 6), ... The confusion that contemporary concerns are related to Roman laws is likely because the meaning of words changes over time and we easily frame ancient issues with modern understandings.<sup>2</sup>

Further understanding about Roman law and the public trust doctrine comes through an article by Patrick Deveney (1976). In reference to the Justinian statement about natural law making some resources “common to all,” Deveney notes:

[T]here was...a sentiment, primarily Stoic and philosophical, that *unless* and *until* a private person or the state required exclusive control of the resource, the sea and shore should be open for the use of all. In light of the vast coastal area of the Roman *Mare Nostrum*, the generally low population density outside the cities, and the even lower percentage of the population with sufficient means to utilize coastal

lands, such an attitude was not impractical. However to concentrate on this aspect of Roman law to the exclusion of its complements—state grants of exclusive rights and individual acquisition of ownership by occupation—is to misunderstand the Roman law and to ignore the economic realities of the time. (Deveney 1976, 21–22)

The realities were that where people had the technology to divide resources into private property they did it. As Deveney suggests, land “had long been ‘divided up far and wide by boundaries, set by cautious surveyors’” (Deveney 1976, 27). “It was their character as ‘things common to all’ that made the sea and seashore capable of individual appropriation” (Deveney 1976, 30). As explained by Justinian:

If I drive piles into the sea . . . and if I build an island in the sea, it becomes mine at once, because what is the property of no one becomes that of the occupier. What a person builds on the seashore becomes his, because beaches are not public in the same way as those things which are in the patrimony of the people, but as those things which were at first produced by nature and which have not yet come into ownership of anyone; their condition is not unlike that of fish and wild beasts, which, as soon as they are taken, become without doubt the property of those into whose hands they have fallen.

Justinian’s understanding of “common to all” is consistent with John Locke’s state of nature in which individuals turn common property into private property. That understanding “turns on its head the modern reliance on Roman law as the foundation for the public trust doctrine” (Huffman 2006, 12). Deveney proposes an even more difficult problem for Roman law being the basis for the public trust doctrine: “there were no restraints whatever imposed by law on the power of the sovereign to convey public land, including the sea and seashore. All such restraints were in fact made impossible by the basic premise of Roman law: ‘That which pleases the Emperor has the force of law’” (Deveney 1976, 17). The Emperor did not hold land in trust for the people. In fact, Roman law was innocent of the idea of trusts, had no

idea at all of a “public” (in the sense we use the term) as the beneficiary of such a trust, allowed no legal remedies whatever against state allotment of land, exploited by private monopolies everything (including the sea and the seashore) that was worth exploiting, and had a general idea of public rights that is quite alien to our own (Deveney 1976, 21).

If there is a basis for the public trust doctrine in Roman law it is exactly opposite that proposed by modern commentators. There were no resources held in trust for “the people.” Resources not already held by the state or by private individuals were common property available for anyone to appropriate and claim as his own, except that navigation must not be impeded. As Deveney concludes, “The [Roman] rule that ‘the sea and seashore are by nature common to all’ reflected a philosophic commitment to the freedom of elemental things for all men, even though its legal effect was to make the sea and shore available for private appropriation” (Deveney 1976, 34).

## ENGLISH COMMON LAW

The story of the public trust doctrine’s basis in English common law contradicts the story told by many advocates of the doctrine. Those writers claim that Magna Carta limited the Crown from infringing on public rights. They further claim that English common law established the king as sovereign trustee of public rights in land and water and established an inalienable public right in state ownership of beaches and submerged lands.

Magna Carta was a landmark institution in that it defined rights and restrictions on the English king and barons. Some, including Blackstone, have claimed that Chapter 33 is the basis for creating exclusive fisheries in tidal waters (Blackstone as cited in McKechnie 1914, 344). Chapter 33 requires that, “All fish-weirs shall be removed from the Thames, the Medway, and throughout the whole of England, except on the sea coast.” Blackstone said this chapter “prohibited for the future the grants of exclusive fisheries” (Blackstone, as cited in McKechnie 1914, 344). But the more realistic purpose of Chapter 33 is to “protect freedom of navigation, not freedom of fishing” (McKechnie 1914, 344). In his *Commentary on the Great Charter of King John*, McKechnie explained:

this is obvious from the last words of the chapter: “kydells [weirs] are to be removed from Thames and Medway and throughout all England *‘except upon the seashore.’* It would have been a manifest absurdity to allow monopolies of taking fish in the open seas, while insisting on freedom to fish in rivers, the banks of which were private property. The sense is clear: no objection was taken to ‘kydells’ so long as they did not interfere with navigation” (McKechnie 1914, 344).

Another Magna Carta chapter relied upon by modern writers about the public trust is Chapter 47, which states:

All forests that have been made such in our time shall forthwith be disafforested; and a similar course shall be followed with regard to river banks that have been placed “in defence” by us in our time (McKechnie 1914, 435).

King John had extended the boundaries of forests claimed by the king and Chapter 47 required him to give them up to the previous owners (barons or freeholders). The king pursued similar but temporary activity with rivers, which were placed “in defence,” or designated for the king’s private use for a limited period covered by the king’s command and then returned to previous users. The king designated the rivers for hunting waterfowl with hawks and falcons. When the king wanted to go fowling along a river, he instructed the sheriff to prohibit anyone else from fowling before the king had his sport. The king “claimed a preferential right to this form of sport along the banks of certain rivers; and those ‘preserved’ rivers were said to be ‘in defence’” (McKechnie 1914, 301–303). “Thus, rather than designating public rights to rivers, Chapter 47 disallows the king’s prerogative to an exclusive right to hunt waterfowl with falcons” (McKechnie 1914, 435).

Huffman explains that these Magna Carta chapters are “thin reeds upon which to rest an expansive public trust doctrine” (Huffman 2006, 15). Moreover, he notes that at the time of Magna Carta there was no concept of a king holding title to lands “as trustee for the general public.” Instead, the king owned his lands, the barons owned theirs, and the freeholders owned theirs. There was

no state property. And the king's property differed from his barons' property "only to the extent that he held more of it" (Deveney 1976, 38).

Roman and English law regarding submerged lands and those below the high-tide mark were consistent. The land belonged to no one until someone appropriated it. That rule changed in England when John Selden proposed the *mare clausum* (the closed sea) was the property of the king (Selden 1663, as cited in Huffman 2006, 15). It became Crown property through the Norman Conquest. Thus, the land between the high- and low-tide lines, as well as any other property owned by anyone other than the king, became his property. He granted it to individuals so regularly that "[b]y the reign of King John almost all of the foreshore and the rivers of the kingdom were still held by the Crown as private property or had been granted in fee to individual holders" (Deveney 1976, 39).

One feature of English common law did become the basis for modern public trust theory—the rule for establishing ownership of submerged and tidal lands. "Under the prima facie theory, the power of the Crown to make grants of the foreshore and land under water was never in question. None of the parties involved was interested in expanding the interests of the general public in the coastal area" (Deveney 1976, 43). The prima facie rule established that title to the submerged and tidal lands were not necessarily connected to title to the uplands. But it did not prohibit the Crown from alienating those lands through grant or sale.

## AMERICAN PUBLIC TRUST LAW

For the American founding generation, the law on submerged and tidal lands was well settled. States inherited the role of the English king and thereby had title to everything not owned by someone else. Citing the case of *The Royal Fishery of the River Banne*, Chancellor Kent stated that "by the rules and authorities of the common law, every river where the sea does not ebb and flow, was an inland river not navigable, and belonged to the owners of the adjoining soil" (*Palmer v. Mulligan* 1805). "Pursuant to the prima facie rule, all other submerged lands were presumed to be owned by the state unless a private claimant could demonstrate otherwise" (Jennings 1826 as cited in Huffman 2006, 20). The

definition of navigable waters changed with time but through at least the early nineteenth century, ownership was clear.

Sax calls *Illinois Central Railroad v. Illinois* the “lodestar” (Sax 1970, 489) for modern public trust doctrine. But, just as in the story of public trust in Roman and English law, *Illinois Central* cannot carry the burden imposed on it by today’s public trust advocates.

The standard story is that Illinois Central Railroad used its friends in the Illinois legislature to grant the railroad monopoly rights to the Chicago lake-shore, including 1,000 acres of submerged lands. Pressure from an outraged public caused the legislature to reconsider its original action and to revoke the land grant. The railroad took the state to court. Justice Field, for the court, held that the public trust doctrine prohibited alienation of trust lands, so the original grant from the legislature was not a legal transfer.

The more realistic story is one of power politics lasting more than forty years among the Illinois legislature, the city of Chicago, the U.S. government, Illinois Central, and other private interests (Kearney and Merrill 2004, 925 as cited in Huffman 2006, 38–39). No one among these competing parties appeared to have environmental preservation as a goal, except for a few wealthy residents concerned with preserving their unobstructed views. Justice Field’s purpose was “to preserve access to the lake for commercial vessels at competitive prices, not to preserve Lake Park or the shoreline from further economic development” (Kearney and Merrill 2004, 925 as cited in Huffman 2006, 38).

A feature of *Illinois Central* missed, or at least not cited, by public trust doctrine advocates is that the case does not forbid lands burdened by the public trust from being alienated. In fact, Justice Field states that submerged and coastal public trust lands can be alienated “five times in the opinion” (Huffman 2006, 39). Field does make clear these lands are “held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties” (Kearney and Merrill 2004, 925–31). Huffman adds:

So the import of *Illinois Central* when it was decided was that the state had considerable discretion in meeting its trust responsibilities with respect to navigable waters and submerged lands. . . . It could alienate

land for any private purpose so long as it did not interfere with the public interests in navigation, commerce and fishing. However, the alienation of most of the then present and future harbor of the City of Chicago could not be done consistent with these trust responsibilities. The permitted alienations, wrote Justice Field, reflect “a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake (Huffman 2006, 40–41).

*Illinois Central* does not provide a historical legal basis for modern attempts to expand the public trust doctrine. It recognizes a public trust in navigation and commerce but also recognizes that some property covered by the public trust may be sold to private parties under certain conditions. The public trust doctrine of *Illinois Central* is not anti-development. It is a limited application of public trust principles to a case generated by power politics. And “had the Illinois legislature’s grant to Illinois Central Railroad been for particular parcels in the Chicago harbor for the purpose of facilitating the development of the railroad or of associated commercial activity it would have been upheld” (Huffman 2006, 48).

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## THE PUBLIC TRUST DOCTRINE TODAY

In 1970, Sax claimed, “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” (Sax 1970, 474). He also identified three restrictions the public trust doctrine places on government action: “first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses” (Sax 1970, 477).

Elsewhere, Sax notes that there is a need to liberate the public trust doctrine

from its “historical shackles” (Sax 1980). Although many courts and legislatures have been unwilling to expand the public trust doctrine, a few have applied it to non-navigable waters and “an expanded array of uses and to resources having little or nothing to do with navigable waters” (Huffman 2006, 3).<sup>3</sup>

For the public trust doctrine to lose some of its shackles, it must abandon its historical basis. Commerce, navigation, and fishing in navigable waters can no longer set bounds and define the public interest. Courts and legislatures must be able to define new public interests as they imagine them. Thus, we have advisors to the Great Lakes Governors’ Council asserting that the Governors’ trust responsibilities regarding the Great Lakes include, in addition to commerce, navigation and fishing, the people’s right to “aesthetic enjoyment and ecological value” (Policy Solutions Ltd. 2004). Similarly, the Coastal States Organization claims that “public trust lands, waters, and living resources in a State are held by the State in trust for the benefit of all of the people, and establishes the right of the public to fully enjoy public trust lands, waters, and living resources for a wide variety of recognized public resources” (Coastal States Organization 1997).

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## UNDERSTANDING PRIVATE PROPERTY

Sax’s expansive view of the public trust doctrine asserts that individuals should not have the right to exclude others from using any property designated as public trust property. Similarly, Governor Schweitzer tells people not to buy a ranch with a river and expect privacy because “the river belongs to the people of Montana.” If Sax, the governor, and other proponents of the public trust doctrine are correct about rivers, streams, shorelines, and beaches being open to the public, does that mean all lands which provides access to waters also are open? Why not just apply the public trust doctrine to all property? To answer this question requires a basic understanding of property and its role in society—any society.

Our hunter-gatherer ancestors owned everything and nothing. That is, the world was a commons where no one could exclude or control others’ access to resources they wanted. Once conflict developed over who got what,

property institutions developed. Today we can identify rules of property rights that have evolved to allocate scarce resources.

The *open-access commons* of early hunter-gatherer societies was the earliest form of property. Because there were no rules to exclude some people and privilege others, one way a person could own something was to beat everyone else to it. The effective rule was the law of capture—I keep what I capture and you keep what you capture. What I beat you to is mine, and what you beat me to is yours.

*Common property* is an alternative to the open-access commons. Rights to use a particular resource are vested in a limited set of owners with a set of rules recognized by users and non-users. Those rules can allow or restrict one's rights in common property to be used. Common property rights have proven to be effective at managing resources in small groups ranging from lobster-fishing communities in Maine to alpine villages in Switzerland (McKay and Acheson 1990). The conditions for them to work effectively are rather strict and narrow.

*Private property* emerged as an alternative to the open-access commons and common property. Individual, rather than group, ownership characterizes this form of property. The owner may exclude others and sell or give away all or part of his property that is recognized and protected by the formal legal system. A fundamental feature of effective property rights is the legally recognized right to exclude (Honoré 1987, 166). Without that right, property devolves back to the open-access commons from which it emerged. And when resources are limited, desires unlimited, and exclusion impossible, overuse and environmental destruction are inevitable (Hardin 1968).

## CONSEQUENCES OF THE PUBLIC TRUST DOCTRINE

The public trust doctrine returns resources to their open-access past. Everyone who wants access to the resources gets it. Overuse results. This raises the question of the desirability of applying the public trust doctrine to Montana lands and streams. I would contend that Montana's ranches and farms are too important to put in the public trust. They need far better protection than an open-access rule allows.

A key reason not to apply the public trust doctrine to private lands has to do with investment and expectations. Without the ability to exclude, owners cannot know if an investment will pay off because they will not be able to control the actions of non-owners. As the Supreme Court has explained, “The right to exclude others” is “one of the most essential sticks in the bundle of rights that are commonly characterized as property” (*Kaiser Aetna v. United States* 1979, 164). The degree of exclusivity determines a property owner’s expectations about whether his decisions about the uses of his property are likely to be effective. “The greater the probability those expectations will be upheld in one way or another (custom, social ostracism, or government punishment of violators), the stronger are his property rights” (Alchian and Allen 1977, 114). When exclusivity rules are clearly defined and enforced, they would require me to gain your permission to your property through sale or gift. To do otherwise would be to trespass on your property or to convert (steal) it.

Gaining permission illustrates a unique feature of private property—owners can transfer their rights to others. Unlike open access, private property owners may sell or lease hunting rights for mule deer to one set of users, fishing rights to others, and upland game rights to still others, while retaining the right to raise crops. We also see in Montana many examples of property owners kindly granting public access to designated trails that pass through their property.

The ability to transfer property holds people accountable for their choices about their property. If they treat their property poorly, its value decreases. If they treat it well, its value increases. Higher value means that others approve of the actions owners are taking and indicates that approval through market prices to purchase or use the property. Besides the personal pleasure a property owner may obtain by treating property well, owners have a financial incentive to care for and improve their property’s value. If, however, owners cannot control access to their property, they have little incentive to care about others’ preferences.

Because public trust rights cannot be sold—owners cannot transfer their rights to others—there are no owners to capture the benefits of good decisions or pay the costs of poor decisions. Members of the public may

use, but do not manage, control, or have reason to evaluate the costs they impose on others or on the resource.

This section began by asking if rivers, streams, and beaches should be open for public access. Why not do the same with land? The purpose in asking if the public trust doctrine should be applied to resources currently considered private is to demonstrate the costs that occur from such an action. If public access to ranches would cause overuse and reduce incentives to protect, invest, and care about others' preferences, might it not do the same to rivers, streams, watersheds, beaches, and shorelines and all the other resources exposed to public trust?

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## REDUCING AND ELIMINATING RIGHTS: BUT WHAT ABOUT THE FIFTH AMENDMENT?

Commerce on navigable waters is one area where the public trust doctrine is more effective than private property rights. The problem of medieval commerce along the Rhine River illustrates this. The Rhine was a major commercial waterway but commerce was stifled because the Rhine barons owned the sections of the river bordering their property. They charged tolls on traffic passing along their sections of the river and, because of their monopoly power on the river, set the fees so high that much commerce was greatly reduced. The public trust doctrine would have been a solution to the Barons' monopoly.

A public trust right in navigable waters and shorelines to promote commerce is widely accepted. The conflicts have been over extensions of that doctrine to private property. A specific issue is whether applying the public trust doctrine is subject to the Fifth Amendment's requirement that private property cannot be "taken for public use without just compensation." Some courts have ruled that the public trust doctrine has "immunity... from Fifth Amendment 'takings' claims" (Bader 1992). That is, when an application of the public trust doctrine reduces property rights and, therefore, property value, the owner is not eligible for compensation.

A recent demonstration comes from the South Carolina Supreme Court's

decision in *McQueen v. South Carolina Coastal Council* (2003). McQueen purchased two non-contiguous lots on man-made saltwater canals in North Myrtle Beach. The lots surrounding McQueen's lots had been developed and retaining walls installed to stop erosion from tidal flow. McQueen applied for a permit to backfill the eroded portions of his lots and build retaining walls. Without the backfill and retaining walls the property did not have sufficient high ground to be developed. He was denied permits to develop the lots because South Carolina's Office of Ocean and Coastal Resource Management designated his lots as "critical area wetlands."<sup>4</sup>

McQueen's argument was similar to that of David Lucas in his successful U.S. Supreme Court challenge that disputed a refusal by the South Carolina government to issue him building permits for lots zoned for construction without the permits. McQueen claimed his property was economically worthless. Under the Lucas ruling, a regulation that removes all economic value from a property violates the Fifth Amendment and the property owner must be compensated. McQueen's claim was denied because the court held the tidal wetlands on his lots were public trust property, even though all surrounding lots had been developed. Since the property was declared to be public trust property, there could be no taking.<sup>5</sup>

To define McQueen's lots as public trust and not eligible for compensation, the South Carolina high court explained that even though his property had been above the high tide mark when he purchased it, subsequent erosion had caused the lots to revert to tidelands. Because the lots became tidelands, "McQueen's ownership rights do not include the right to backfill or place bulkheads on public trust land and the State need not compensate him for the denial of permits to do what he cannot otherwise do." Although the public trust burden on his title was not asserted until long after McQueen's ownership rights were established, he was due no compensation. His appeal to the U.S. Supreme Court was denied.

*McQueen* provides an example of what one legal scholar calls "truncation through definitional takings" (Eagle 2001, 12-1). A definitional taking is enhancing "the power of government through curtailing the rights in [private] property" (Eagle 2001, 12-1). The Taking Clause of the Fifth Amendment was meant to prevent government from seizing private property without

compensation. A definitional taking, however, allows the government to control property simply by defining away most private uses.

Huffman provides an example of using the public trust doctrine to create a definitional taking. “By linking the flexibility of constitutional interpretation with the deep historical roots of the public trust doctrine, it is possible to manufacture new rights while claiming simply to uphold existing rights” (Huffman 1989, 547–48). That is, the 1972 revisions to the Montana constitution concerning surface waters have been tied to the public trust doctrine. This created new “rights,” or at least ones never recognized before in Montana, that were created at the expense of long-standing private property rights.

A trust right must be managed by the state for the benefit of the general public. There is little guidance for this obligation, however, as states have significant leeway in determining what benefits the public. States interpret the public trust doctrine in different ways. Should the public trust doctrine be applied to air and wildlife (Meyers 2003)? If so, it could potentially be applied to most private lands. Already, some estimate that one-third of property claimed by the states to be public trust property is in private rather than public hands (Smith and Sweeney 2006). Thus, any expansion of the public trust doctrine will narrow the remaining scope of private property and transfer more power to government. Given the continuing expansion of applications of the public trust doctrine to private lands, “The core issue becomes the extent to which private property rights are either compromised or eliminated altogether without any Fifth Amendment compensation” (Smith and Sweeney 2006, 333).

Sax’s proposal to take the shackles off the public trust doctrine is an argument that there are no firm property rights. If the public trust burden expands as our perceptions of the public interest expand, there is little to constrain judges or legislatures. Huffman provides a sobering conclusion that applies to legislators and interest groups as well as judges:

But if a public right to fish implies a public right to hunt and a navigable waterway implies a prairie pothole, or if the concept of a public right in navigation, commerce, and fishing implies a public

right in all things the public might be thought to value at any point in time, then there can be no rule of law because there is no bounded concept to constrain the judge. (Huffman 2006, 71)

Without bounded concepts, property cannot function and the idea of a constitutional taking disappears.

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## SOME ECONOMIC AND SOCIAL IMPLICATIONS OF THE PUBLIC TRUST DOCTRINE

A major area where the public trust doctrine's reach has been expanded is in the reallocation of water in the American West. This section examines the implications of the public trust doctrine for the security of water rights and the incentives to use water effectively.

First, some background. Although water is scarce in the West, relative to the East, there is a large amount available for a broad range of uses if it can be transferred from one use to another. In most Western states, for example, farmers use about 80 percent of the developed water, with the remainder used by municipalities, industry, recreation, or for environmental purposes. The only way to effectively meet growing urban, recreational, and environmental demands is to transfer some water from agricultural uses. Much of the water in agriculture irrigates crops, such as alfalfa, that have a relatively low value.

Effectively and efficiently transferring water between users and uses requires that there are clear property rights to the water and that appropriate institutions exist to make the transfer possible. The process can be tedious and time consuming. For example, I am mayor of a city of 6,000 people in northern Utah. As I write this, we have been trying for 18 months to transfer water rights, not the physical water, just the rights, from a farm 15 miles away to our city. The owner of a farm with rights to 500 acre feet of water (an acre foot is enough to supply a family of four for one year) sold the water rights to the city, through a developer, to provide water rights adequate to meet future growth. The market part of the transfer was easy.

The developer and the city agreed with the owner on a price for the water rights and purchased them. Then came the hard parts.

We had to obtain approval from the state water engineer to transfer the rights from the farm to a city well and also respond to appeals from an irrigation company and some private parties who asked the state engineer to reject the transfer. The engineer approved the transfer. We are now awaiting a court date where those protesting the transfer have appealed the state water engineer's decision. A well-developed market for rights to water would have allowed us to make the transfer quickly and without controversy. Like most states, Utah does not have such a market. Our water transfers are located somewhere between markets and government. Imagine the difficulties we would face if the rights we seek were burdened with the public trust doctrine.

If *Illinois Central* is the “lodestone” for the public trust doctrine, the California Supreme Court's 1983 Mono Lake case is its modern counterpart. The California court used the public trust doctrine as its basis for claiming the state's authority “to exercise a continuous supervision and control over” state waters (*National Audubon Society v. Superior Court* 1983). The ruling expanded state control over water rights that Los Angeles had purchased in the 1930s. After years of building infrastructure to connect the Mono Basin to the Los Angeles Aqueduct, the city began large scale diversions (over 100,000 acre feet per year) in the 1970s. Water levels in Mono Lake began to decline. By 1981, the water level was 46 feet lower than it had been in 1941. That decline caused the lake, which has no outlet, to lose half its volume and double its salinity. The National Audubon Society and others sued the Los Angeles Department of Water and Power, claiming that the water diversions violated the public trust doctrine.

The California Supreme Court agreed, holding that Los Angeles' water rights could be limited under the public trust doctrine and that the state should regulate future water diversions. The ruling dismayed property rights advocates and energized advocacy groups throughout the region. Sax explained:

Existing water users are distraught by decisions like the Mono Lake case, and understandably so. Enormously valuable, long-recognized

interests in water are at stake. Such cases portend major changes in the status of water rights. Traditional water users understand full well that a fundamental transition is taking place in the conception of how water ought to be used in the West ... Let me start by saying that as a matter of legal analysis, the holders of existing water rights are in deep trouble. (Sax 1989, 475–6, as cited in Libecap 2006)

The “deep trouble” for Los Angeles was that after ten more years of litigation over the details of their now depleted rights, and litigation costs of about \$12 million, Los Angeles lost the water. The courts stopped any water transfers from the Mono Basin until the lake reached a level determined by the state—a process that should take about 20 years (Libecap 2006, 17).

Although some considered the Mono Lake outcome a way to balance public and private demands for water (see *e.g.* Hart 1996), Gary Libecap identifies three problems with applying the public trust to water: The public doctrine defines water as a regulated commons, it weakens water rights, and the broad legal standing granted under the public trust doctrine may make settling disputes privately more difficult (Libecap 2006, 12–15).

Libecap explains that government-regulated commons have performed so poorly that there has been a movement away from them toward private rights. Regulated fisheries, air, and oil and gas fields have all performed much better when private rights are substituted for regulations. Substituting more private rights for public rights has created incentives for better stewardship and conservation. “Where ITQs [individual transferable quotas] have been adopted, fishery stocks generally have rebounded and the value of the fisheries increased. Tradable emission permits have lowered the costs of achieving air quality standards. Oil field unitization has brought important efficiency gains” (Libecap 2006, 12).

Applying the public trust doctrine to water moves resources from private control to public control, from private property to public property. As public values change, the regulators are expected to notice those changes and adjust rights accordingly. As Libecap notes, “It is not obvious why greater regulation of this ‘common’ resource (water) would perform more effectively than has been the case in fisheries, air pollution, or oil pools” (Libecap 2006, 12).

The second problem Libecap identifies is that water rights are weakened to the point where they are in play or even non-existent. They can be revoked without compensation. As the California court said: “the foregoing cases amply demonstrate the continuing power of the state as administrator of the public trust, a power which extends to the revocation of previously granted rights... once again we rejected the claim that establishment of the public trust constituted a taking of property for which compensation was required” (*National Audubon Society v. Superior Court* 1983, 440, 723).

One of the functions of property is to cause owners to act as if they value others’ preferences. That happens because the property is more highly valued—it is worth more. But if the ability to exclude is taken away by making the resource available to anyone who wants to use it, the incentive to improve the resource is diminished.

Libecap explains: “The doctrine, then, potentially adds uncertainty to water ownership, weakening existing property rights and their ability to promote investment, trade, and efficient use of water” (Libecap 2006, 13). He further concludes, “This expansive interpretation of the public trust is occurring as the value of fishing and hunting is increasing dramatically, and it could undermine private efforts to invest in habitat that would provide greater hunting and fishing opportunities” (Libecap 2006, 18).

The third problem with the public trust doctrine is “that legal disputes brought under it may be more difficult to privately settle because of the broad legal standing it authorizes” (Libecap 2006, 14). Broad standing creates several problems for the defendant in a public trust suit. First, there is not a limit on the number of plaintiffs and they do not have to agree with each other. Thus, settlement agreements with one group can be scuttled by other groups. The transaction costs of dealing with all groups can prohibit any negotiated settlement. Second, ideological parties to the conflict have little incentive to settle. Compromise is a betrayal of ideals. Finally, many “public interest” plaintiffs face few costs in making demands for an expanded use of the public trust doctrine so they are likely to make more and more extreme demands. How do judges and regulators sort out the conflicting demands?

A fourth problem to add to those Libecap suggests is that landowners may respond in ways that harm the resource. Because the public trust

doctrine reduces an owner's property rights, we should expect that owners will manage their property to discourage what they consider to be trespass by non-owners by reducing the quality of the experience. Instead of fencing cows from riparian areas, for example, they will be more likely to remove fences. Instead of restoring degraded streams, they will allow or even cause more degradation. And, to use one commentator's description of landowner practices under the Endangered Species Act, these actions will not be "the result of malice toward the environment" but will be "fairly rational decisions, motivated by a desire to avoid potentially significant economic constraints." They are "a predictable response to fairly perverse incentives that sometimes accompany regulatory programs..." (Hogberg 2006, 4).

Despite these problems, citizens may press legislatures or courts to grant us goods such as stream access to float or fish or swimmers' access to dry land above the tidewater mark that will be used by many and paid by others, including, in large measure, the landowners. That is, even though we do not own the affected land, we may choose politically to allow access to streams and beaches whether or not we fish or float there. Voting for more public access to private property may be appealing because we expect to benefit or we think others should be able to use such resources. But such reasoning does not take into account that all citizens must pay for new costs that are created, and existing property owners are forced to bear the cost of lost value in their property.<sup>6</sup>

This discussion suggests that expanding the application of the public trust doctrine may produce outcomes that casual observers of the stream access discussion would not prefer. Although "the public trust" sounds high minded, politics is the art of compromise, which requires responding to competing and conflicting interests. Public trust resources are managed through the process of competition and conflict that we know as politics. The result is that public trust resources are really political resources.

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## CONCLUSION

In an open-access commons, the only right is to get mine before you get it. There are no reciprocal responsibilities. In a property rights system, the social roles of private property are to clearly identify expectations about rights and responsibilities. Property rights are human rights to use things, to own them exclusively, and to give or trade them. These are fundamental to a well-functioning society. They “eliminate destructive competition for control of economic resources. Well-defined and well-protected property rights replace competition by violence with competition by peaceful means” (Alchian and Allen 1977, para. 8). Peaceful means include trading, selling, gifting—all ways of moving resources from lower-valued to higher-valued uses.

Owners around the world are expanding access to their private and communal property. That access ranges from large corporations controlling millions of acres to African villages controlling local lands. International Paper opened much of its 2.3 million acres of timberlands across Texas, Louisiana, and Arkansas to recreationists who pay for hunting rights, daily-use permits, and family camping permits (Anderson and Leal 1997, 4–8). Zambian and Zimbabwean villages solicit westerners to visit their communal lands for photo and hunting safaris (Child 2002) Owners who have the ability to exclude also have the opportunity to grant permission.

Sax and his followers want to move land, water, and other resources away from private rights and toward the commons. In his essay, “The Limits of Private Rights in Public Waters,” Sax wrote: “The new era is one of reallocation. The direction is changing from agriculture to urban uses and in-stream flows for water quality, recreation, and ecosystem protection... No private property claims are going to halt this transformation” (Sax 1989, 483). Sax apparently does not realize that private property claims hasten transformations and do so in relatively smooth, low-cost, and uncontentious ways. Instead, he prefers judicial, executive, legislative, and regulatory determinations on the use of private property.

An expanding application of the public trust doctrine relies on a mythological history of the doctrine. To succeed in loosening the public trust

doctrine's historic shackles, proponents must seek justifications outside of history, precedent, and tradition. If they succeed, they will "slow the transformation Sax refers to, make it more costly, and less complete" (Libecap 2006, 25). They will also reduce constraints on judges and legislatures by reducing property rights to the whims of changing public perceptions.

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## NOTES

1. Montana Code Annotated § 23-2-302 (2005).
2. Huffman suggests these problems "can lead us to misunderstand or misrepresent the motivations of historic lawmakers both because our own morality condemns what we take to be the intended results of historic laws or because, out of its historic context, the law's purpose appears consistent with that to which we aspire—as in the case of the public trust doctrine" (Huffman 2006, 8).
3. Huffman (2006, 3–4) cites the following examples: "[T]he Illinois case of *Paepcke v. Public Building Co.* (1970) has been cited often as an example of the application of the public trust doctrine to park lands unrelated to any navigable waters. While the court does speak of public parks as subject to a public trust, it upholds a challenged change of use on the basis of a clear legislative authorization of the change. As recently as 2003, the Illinois court reaffirmed that holding in *Friends of Parks v. Chicago Park District* (2003). In *Complaint of Steuart Transportation Co.* (1980, 4), a federal district court stated that "[u]nder the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people." )
4. South Carolina Code Annotated § 48-39-130(C) (Supp. 2002) provides that "no person shall fill, remove, dredge, drain or erect any structure on or in any way alter any critical area without first obtaining a permit from the department."
5. Note that the South Carolina Supreme Court expanded the public

trust doctrine to cover unsubmerged lands and thereby allowed the state to evade a constitutional obligation to compensate McQueen for taking all value from his land in a regulatory taking or a taking under eminent domain.

6. See Robbins (2006) for a discussion of “rich out-of-staters.” While the focus has been on “rich Californians,” who are perceived as taking unfair advantage of property in Montana when they buy it, in fact they do not own most working Montana lands that would be impacted by such decisions.

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