

PUBLIC TRUST IMPACTS ON WATER PLANNING

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Under the public trust doctrine, the state holds its navigable waters and underlying beds in trust for certain public uses, principally navigation, commerce, and fisheries. Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892); National Audubon Society v. Superior Court, 33 Cal.3d 419 (1983); City of Berkeley v. Superior Court, 26 Cal.3d 515 (1980). Recent court decisions have expanded the doctrine to include virtually any public use associated with navigable waters, such as recreation and aesthetics. Since the state holds public uses in trust for the public, the state cannot wholly alienate such uses, and private users cannot obtain vested rights in navigable waters that are paramount to public uses. Hence, if the state purports to grant a fee interest in navigable waters, it can revoke the fee grant.

The public trust doctrine originated in Roman law. The Institutes of the Emperor Justinian provided that water, like air, is incapable of private ownership; the resource belongs to everyone and therefore can be owned by no one. Under the English common law, the King was held to have sovereign power in navigable waters, and his sovereign power was paramount to private proprietary interests. After the American Revolution, the King's sovereign control of navigable waters was transferred to the states. Shively v. Bowlby, 152 U.S. 1 (1894); Pollard v. Hagan, 44 U.S. 212 (1845). When the Union was formed, the states surrendered to the federal government the power to regulate commerce, but otherwise retained their sovereign interests in navigable waters. The states' sovereign interests provide the foundation of the public trust doctrine, which recognizes that the states have sovereign rights and responsibilities in navigable waters.

The public trust doctrine first gained national recognition in the United States Supreme Court's decision in Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892). There the Illinois legislature had granted a fee interest in the Chicago waterfront

to a railroad company. The legislature later revoked the fee grant, and the railroad company sued. The Supreme Court upheld the action of the Illinois legislature, declaring that Illinois held sovereign interests in lands underlying navigable waters and that such interests were held in trust for certain public uses. According to the Court, the legislature could not alienate its trust responsibility over the lands, and if the legislature purported to alienate its responsibility, it could revoke the fee grant.

The public trust doctrine has traditionally been applied in land title disputes, in which the question was whether the state has paramount rights as against private landowners in tidelands or other lands under navigable waters. State water rights laws have grown up without specific reference to public trust principles, although state constitutional and statutory provisions often provide that the state has a "property" interest in water or that water use is a "public use" subject to state regulation and control. State water rights laws generally consist of the riparian doctrine, which provides that private landowners have property rights in waters contiguous to their lands, and the prior appropriation doctrine, which provides that water can be diverted to beneficial use. Prior to the California Supreme Court's decision in National Audubon Society v. Superior Court, 33 Cal.3d 419 (1983), no court had ever considered whether the public trust doctrine affects riparian or appropriative water rights.

In National Audubon Society, the California Supreme Court considered whether the public trust doctrine applies to the city of Los Angeles' rights to divert water from Mono Lake basin to its service area. In the 1940s, the city had obtained appropriative water rights permits authorizing diversions from Mono Lake basin. The diversions provide the city with approximately 17% of its water supply, but also cause environmental harm to Mono Lake by causing increased salinity harmful to the brine shrimp

population. The National Audubon Society brought an action to restrain the city's diversions, arguing that the diversions were invalid *per se* because they impaired public trust values in Mono Lake. The city argued that the public trust doctrine did not apply in the water rights context, and that the city has "vested" water rights that cannot be modified by subsequent state action.

The California Supreme Court held that the public trust doctrine applies in the water rights context, and that the city's water rights were not "vested" but were subject to continuing state regulation and control. The court, however, rejected National Audubon Society's argument that the city's diversions were invalid *per se* because they impaired trust values. Instead, the court held that the public trust doctrine, as applied in the water rights context, required that the state "balance" economic needs against environmental values in granting water rights, and that the state retains continuing jurisdiction to determine whether this balance is consistent with modern public needs. Indeed, the court stated that the state may authorize water diversions that impair public trust values, if, in the state's judgement, the economic need for the diversions "outweighs" the environmental interest at stake.

It is not clear whether the United States Constitution restricts state regulation of water rights under the public trust doctrine or other theories. The Takings Clause of the Constitution prohibits states from "taking" water rights for public use without payment of compensation. U.S. Const., Amendments V, XIV; see Chicago, B. & O. R. R. v. Chicago, 166 U.S. 226 (1897). On the one hand, a water right is a form of "property" within the meaning of the Takings Clause. On the other hand, state law defines property rights under the Constitution; therefore, the state may have a right to define a water right as subject to the state's continuing regulation and control. The U.S. Supreme Court has never answered these questions.

There is an unavoidable tension between the state's duty to plan water development and the state's duty to protect its resources for the public. The former assumes that the state can predict future water availability, and the latter assumes that the state can reallocate resources and thus limit future availability. Because of this tension, water regulators cannot insulate their decisions from public trust scrutiny. They can take certain steps, however, to minimize the impacts of such scrutiny.

First, regulators should thoroughly consider public trust uses in making decisions affecting such uses. Second, regulators should thoroughly evaluate

needs that are in competition with public trust uses. Third, regulators should consider alternative methods to achieve economic goals. Fourth, regulators should consider whether economic goals can be achieved by conservation of resources.

If regulators follow these steps, courts may be more likely to defer to the regulators' decisions. The proper balance between economic goals and environmental values is a traditional function of the legislative and executive branches of government, not the judicial branch. Therefore, courts will generally look to legislators and agencies to make these decisions. The courts are more likely to make such decisions only when legislators and agencies fail to act. Regulators should actively consider public trust needs and fulfill their responsibility to protect the public interest in resources.