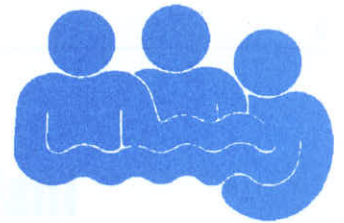


River Voices



A quarterly publication of River Network

Summer 1993

The Public Trust Doctrine A Primer for Friends of America's Rivers

by David C. Slade, Esq.

Do you want to swim in the river? Or fish? Canoe down its flows and rapids, or just float along on your innertube, meandering away a lazy summer day? What if someone is polluting the waters, and you want to try to stop them? Or maybe you just want to take in the scenic wonder that the river has to offer. For any of these activities, the Public Trust Doctrine may apply.

"A river is more than an amenity, it is a treasure."

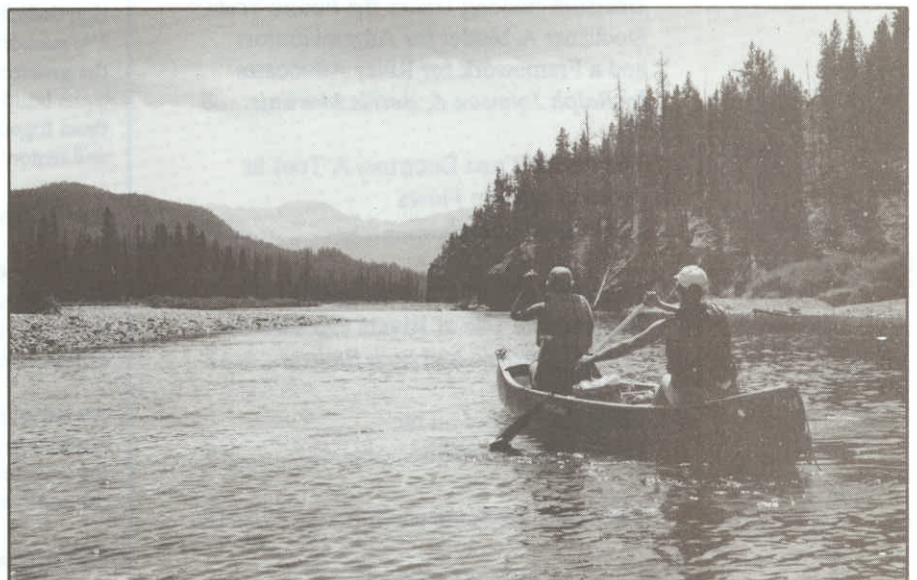
Oliver Wendell Holmes

As for any of America's treasurers, there is a body of law protecting the Nation's rivers. An important part of this jurisprudence is the Public Trust Doctrine. And although the doctrine is a complex body of law — as complex as any river system — it is adaptable, not only to the many physical variations of a stream, brook or river, but also to the uses of these waterways that today's citizens would like to make of them.

One could speak for hours trying to answer the question "What is a river?" Similarly, volumes can, and have been, written about the Public Trust Doctrine, in all of its intricacies, convolutions and complexity. But taking the doctrine part by part, it can be understood in its primary terms fairly easily. Where to start? How about around 533 A.D.

The Institutes of Justinian

Any reader of the Public Trust Doctrine will quickly come upon the keystone quote of the



doctrine, a mere paragraph in a law students "hornbook," the Institutes, done for Emperor Justinian in the year 533:

"By the law of nature these things are common to all mankind — the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations."

Fifty years after the fall of the western Roman empire, Justinian, a former peasant boy from what used to be Yugoslavia, was crowned emperor — the first literate and formally educated emperor in the history of the Roman Empire. Partly to "animate the youth of his dominions who had devoted themselves to the

(above) Canoeists enjoying the Snake River in Wyoming. Photo by Tim Palmer.

(continued on p 4)

Inside *River Voices*

The Public Trust Doctrine: A Primer for
Friends of America's Rivers
by *David Slade*.....1

Using the Public Trust Doctrine
Effectively
by *Dan Tarlock*.....6

Decision-making Under the Public Trust
Doctrine: A Model for Administrators
and a Framework for River Advocates
by *Ralph Johnson & Berrie Martinis*.....8

The Public Trust Doctrine: A Tool to
Protect Instream Flows
by *Berton L. Lamb*.....10

The Public Trust Doctrine and
Recreational Use of Rivers and Streams
by *Pope Barrow and Rich Bowers*.....12

More References on the
Public Trust Doctrine.....17

REI Grant Announcement.....18

National Rivers Conference
Announcement.....20

River Network would like to thank the
guest writers - David Slade, Dan
Tarlock, Ralph Johnson, Berton Lamb,
Pope Barrow, Rich Bowers, Juli Neander
for sharing their expertise and experi-
ences. Thanks also to Patrick Reese of
Friends of the Fox River for suggesting
we address the Public Trust Doctrine.



PO Box 8787
Portland, OR 97207
(503) 241-3506
or (800) 423-6747
EcoNet: rivernet

River Network is a national non-profit organiza-
tion dedicated to helping people protect rivers.
We support river conservationists in America at
the grassroots, state and regional levels; help
them build effective organizations; and link
them together in a national movement to protect
and restore America's rivers and watersheds.

River Network has three programs:

the **River Clearinghouse** provides local river
activists with information and referrals on
technical river resource and non-profit
organizational issues;

the **River Leadership Program** develops new
leadership and strengthens existing programs in
the river and watershed protection movement at
the state, regional and grassroots levels;

the **Riverlands Conservancy** brings critical
riverlands into public ownership, thereby
empowering the public to oversee management
and protection.

Staff

Phillip Wallin, Executive Director

Lindy Walsh, Administrator

Rita Haberman,
Director, River Clearinghouse

Sue Doroff,
NW Director, Riverlands Conservancy

Peter Lavigne,
Director, River Leadership Program

Jean Hamilla,
Administrative Assistant

Letter from the Director

It's Time to Put the Public Trust Doctrine to Work

Last summer we helped fund the Montana River Watch, a network of volunteers watching for illegal water diversions. River Watch blew its whistle when the Jefferson River went dry. This famous Montana trout stream was hit by drought, but hit even harder by irrigators, who built an earth-and-gravel dam to divert 95% of the meager flow into their ditches.

The volunteers were dismayed to learn that the dam was legal. The prior appropriation system in Missouri gives water users the right to dry up a river, even one as fabled as the Jefferson. In 1992 it happened all over the state.

Most people who care about rivers would say, "How can this be? Doesn't the river itself have a right to flow? Doesn't the public have the right to a flowing Jefferson?"

The answer, in the American West, seems to be: the river itself has no rights. The public, however, may.

This concept of the rights of the public lies at the heart of the public trust doctrine. This doctrine, adopted by the courts of various states, says that the public has the right to use the flow of the river for fishing, boating and other purposes. Most importantly, it says that this right *predates and supersedes* the rights of private users.

This is not a dry legal concept. It is common sense. Rivers, like the ocean beaches do not belong to private parties. They belong to the public. The state, in its wisdom may have granted to private parties various rights to take water and use streambeds, but these rights are *limited* - limited by the prior rights of the public.

Personally, I believe that the public trust doctrine is the key to conserving rivers in the West. I do not believe that our rivers can be protected from dewatering by operating within the system of

prior appropriation. Leasing water rights, filing for new instream flow rights, purchasing senior water rights -- these techniques have their uses, but they are not effective on the scale that is needed.

We need a widespread application of the public trust doctrine -- the concept that the public has rights to flowing streams for fishing and floating and other uses, and that the public's right existed before the first private water right was granted. We need to secure recognition of that right in public opinion, in the courts, in the legislatures, and among water users. We need to expand that doctrine to include the public's right to water clean enough for fishing and recreation.

This issue of *River Voices* brings together some of the nation's top authorities on the public trust doctrine to talk about practicalities -- how to use the public trust doctrine to conserve *your* (i.e., the public's) river.

Phillip Wallin
Executive Director

(below) Robe Gorge on the South Fork of the Stilligamish River in Washington. River Network is working to protect this section of river by transferring it into public ownership. Photo by John Marshall.

