River Voices

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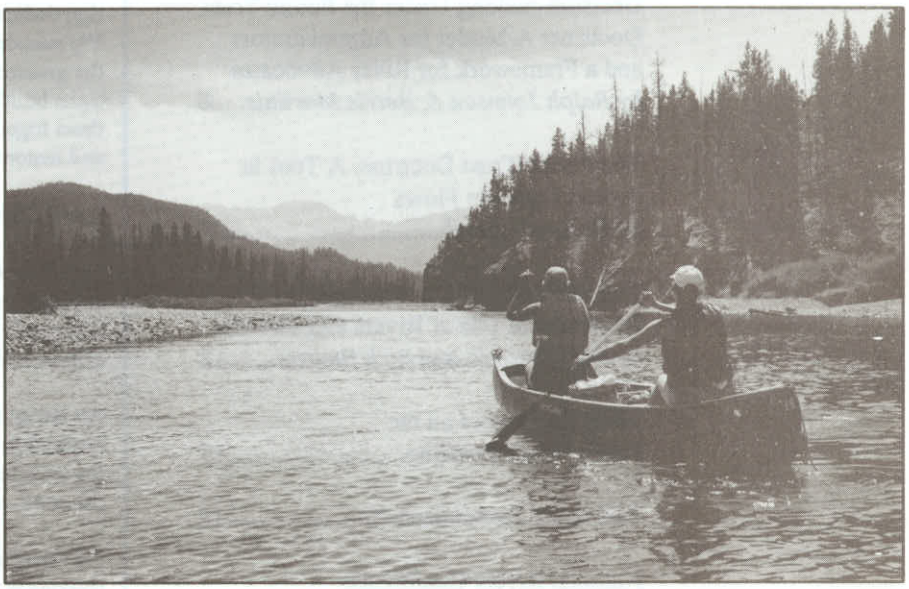
The Public Trust Doctrine
A Primer for Friends of America's Rivers

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



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

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

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Inside *River Voices*

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 experiences. 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 organization 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.

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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.

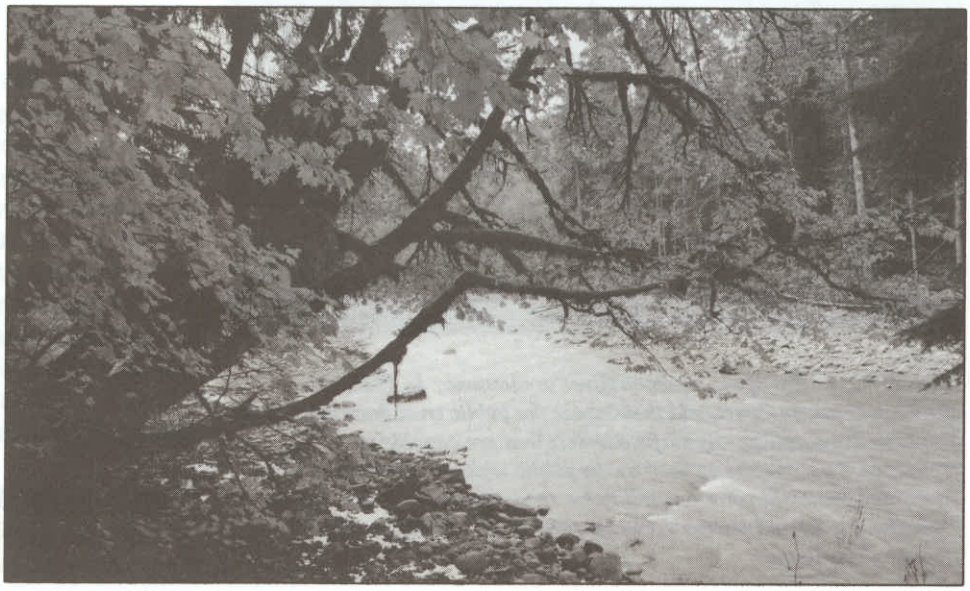
This is not a dry legal concept. It is common sense. Rivers, like the ocean beaches do not belong to private parties. They belong to the public. The state, in its wisdom may have granted to private parties various rights to take water and use streambeds, but these rights are *limited* -- limited by the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

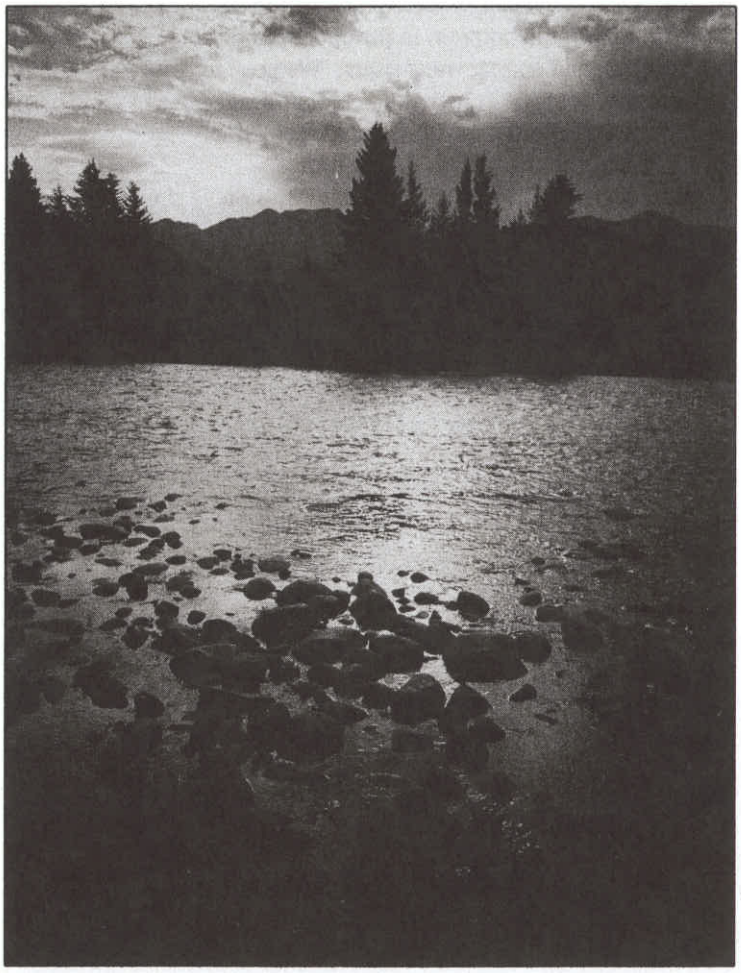


(below) Robe Gorge on the South Fork of the Stilliguamish River in Washington. River Network is working to protect this section of river by transferring it into public ownership. Photo by John Marshall.

(Primer *continued from p 1)*

study of Roman jurisprudence," but better understood as part of a master plan to consolidate the eastern, and retake the western, Roman empire, Justinian called together his most senior legal scholars to write a code of imperial enactments, the Digest, which appeared in 533. At the same time the "hornbook" for law students, the Institutes, was published. It is from this hornbook from which the Public Trust Doctrine has its roots.

Roman civil law, as written in the Digest and Institutes, was adopted in substance by English common law after the Magna Charta and brought to the English colonies in the late 1500s and early 1600s. From the English colonies to the 13 original States, to all 50 States of the United States today, the Public Trust Doctrine has continued to evolve over the centuries, keeping pace with the changing times. What lands and waters are subject to the Doctrine today?



(above) The shores of the Madison River in Montana. In 1988, the Montana Supreme Court held that "under the public trust doctrine and the Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for recreational purposes" Montana Coalition for Stream Access v. Curran, 682 P.2d 163 [Mont. 1988]. Photo by Tim Palmer

I. The Public's Trust Resources

The word "trust" in the name Public Trust Doctrine refers to a real trust in the legal sense of the word. As with any trust there are trust assets, generally in the form of navigable waters and the lands beneath these waters. To apply the Public Trust Doctrine, it must first be determined whether the land or water in question is indeed within the geographic scope of the doctrine.

Navigable Waters

Justinian's Institutes held "running waters" common to all mankind. Generally, tide waters were thought of as common waters, simply because with wind powered vessels tide waters were the only waterways available for commerce. The U.S. Supreme Court, however, has recognized that non-tidal waters can also be subject to the Public Trust Doctrine. As technology advanced, and powered vessels began to ply great distances above the ebb and flow of the tide, the term "navigable waters" likewise has been expanded to include these non-tidal river waters. Today, all waters that are "navigable" in accordance with State law (in contrast to federal law) are within the scope of the Public Trust Doctrine.

Navigability also used to be measured solely in terms of commercial use of the waters. But today, recreational use is considered a factor in nearly every State. Thus, non-tidal waters used solely for recreational purposes are today often classified as "navigable."

Is "my river" Navigable?

If the river is travelled by power craft, the answer is most likely. But as depths get shallower, the question is more problematic. Again, each State's law must be checked. Generally, however, more and more stretches of shallow river are falling with the definition of navigable. Vast lengths of whitewater rapids, never used for commerce in the past, have been opened up to rafting, which is not only recreational to the rafters, but also a commercial enterprise to those renting and guiding the rafting trips.

Lands and Shorelands

As navigability defines what non-tidal waters are within the scope of the Public Trust

Doctrine, so does it define what lands are within the trust. Generally (with a whole bunch of exceptions!) the bottom lands of rivers and other non-tidal yet navigable waters are subject to the public trust to a greater or lesser degree, whether publicly or privately owned.

But if you want complexity, this is it. An analysis of public and private ownership of navigable freshwater bottomlands in this country is quite complex, owing to the derivations and permutations of the English common law employed by the numerous States. Between those States that have fully adopted, or fully rejected, the English common law are many States which have modified the common law to fit the State's circumstances and history.

Is The Bottom of "my river" Publicly or Privately Owned?

In large rivers it is more common for the river bottom to be publicly owned, that is, privately owned waterfront property will generally extend to the high water mark, or simply just "to the water." In small creeks and streams, the reverse is generally true; private waterfront property generally extends to the middle (often referred to as the "thread") of the stream. Unless State law is clear on the question, one must resort to inspecting the land titles to waterfront property. But even this can be very confusing in that titles and deeds are notorious for anything but clear language describing the waterside boundary of the property. In any event, when in doubt the burden is upon the waterfront landowner to show that her property extends under the navigable waters.

If the Bottom of "my river" is Privately Owned, Am I Trespassing by Boating? Or Fishing?

No. Just the bottom is privately owned, not the river water passing over it. You can also throw an anchor over, pole a vessel, and make other use of the bottom normally associated with boating. In some cases, however, standing on the bottom could constitute trespassing. For example, standing in waders and fishing could, and has been, held to be trespassing, giving the private landowner the right to have you leave.

II. Protected Public Uses of Trust Assets

The Public Trust Doctrine not only provides protection for navigable waters and the lands beneath, but it also provides for the public's use and enjoyment of them. For what good is a trust if the beneficiaries can't enjoy the trust assets?

What Public Uses Are Protected by the Doctrine?

An exact listing of the public's trust rights protected by the doctrine is not only difficult, but counter-productive. It is difficult, for a fundamental characteristic of the doctrine is that it evolves as does society, constantly providing protection for the uses of the waters as society advances. This dynamic nature of the doctrine to "keep up" with society has been noted by numerous courts.

"The very purposes of the public trust [doctrine] have evolved in tandem with the changing public perception of the values and uses of waterways."

National Audubon Society v. Superior Court of Alpine County, 33 Cal.3d 419.

At the same time, a common trilogy of public uses has traditionally been protected by the doctrine: the public's rights to fish in, navigate over, and conduct commerce upon the public's trust waters and lands. But the doctrine has come a long ways in the recent decades. No longer are these three traditional uses the extent of the scope of protected uses. Bathing, hunting, skating, cutting ice, gathering seaweed, log floating, even pushing a baby carriage along the public's trust shorelands have been protected by the courts as within the scope of the doctrine! A New York court has even gone so far as to state that "whatever is needed for the complete and innocent enjoyment" of trust lands and waters is protected, and this was a 1907 decision.

III. The Modern Public Trust Doctrine

To see how the advancement of society and our knowledge has brought the Public Trust Doctrine into the modern age, one need only think about a favorite pastime, and one of the traditionally protected uses of the doctrine: fishing. Emperor Justinian recognized that fishing in public waters was a public right. But to be able to go fishing, there must be fish. And as any third grader today can tell you, in order to have fish there must clean water and a sustain-

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Using the Public Trust Doctrine Effectively

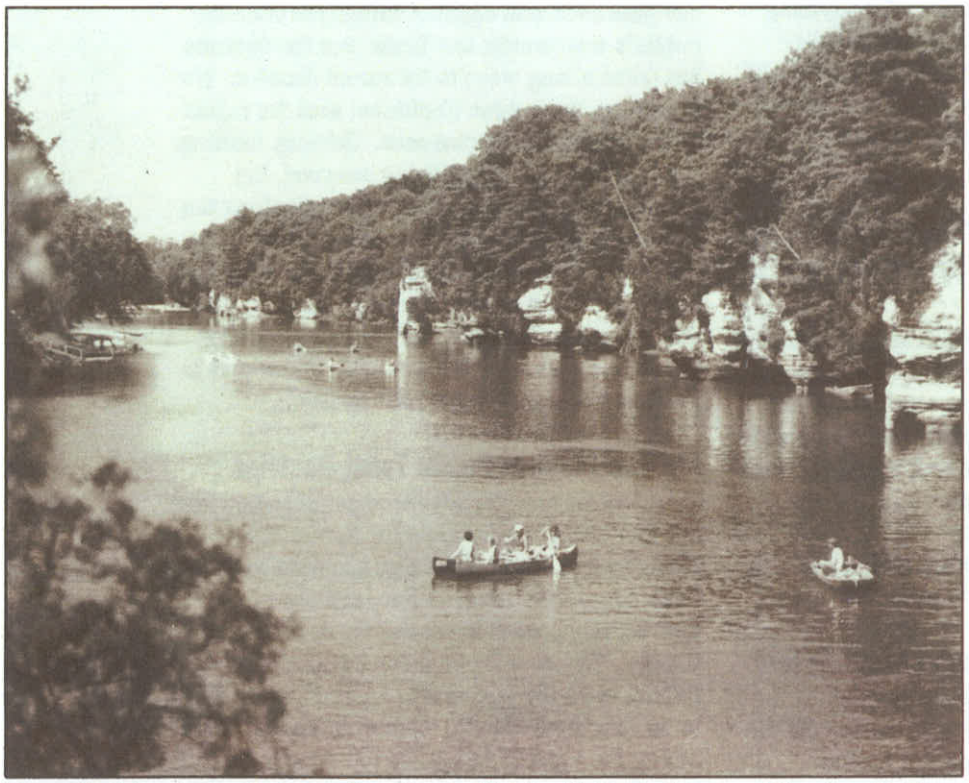
by Dan Tarlock

Politicians consume river and lake beds that same way that perpetual dieters consume a turtle pie - a sliver at a time. And, they both have a similar justification for their actions. Dieters believe that small slices contain fewer calories per ounce than do large slices, and politicians believe that the environmental impacts or small insults are always minor regardless of their cumulative impacts. Dieters must ultimately exercise self-control to reduce their consumption of calories, but politicians who nibble their way at rivers and lakes through small fills or the failure to take necessary preventative actions are subject to an external control: the public trust doctrine. This doctrine can be effectively used by river protection advocates before legislative committees, state and local agencies and in court to prevent river degradation from large and small activities such as fills, dubious public works projects and diversions.

The public trust is a judicial limitation on the use of the beds of navigable lakes and rivers for "non-trust" purposes. Navigability is a technical legal term, and the standard varies from state to state. Under the common law of the United States, states are the trustees of the beds and waters of navigable lakes, rivers, and their nonnavigable tributaries. This power can be retained by the state or delegated to local governments, as it has been in many states. The basic idea is that lake and river bottoms should only be used, in modern terms, for water-related purposes and that all citizens should have access to these resources. Originally, the trust protected the use of rivers and lakes for commercial navigation, Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892), but the trust now protects recreational use and the dedication of these water systems to the maintenance of ecological integrity. The leading national precedent is National Audubon Society v. Superior Court, 33 Cal 3d 419, 658 P.2d 709 (1983).

The public trust does not preclude all use of lakes and rivers non-environmental purposes, but it imposes two major limitations on public activities that threaten the integrity of trust resources. First, the trust contains substantive environmental standards which prohibit many harmful activities. Second, the trust effectively places the burden on public agencies to justify an environmentally harmful activity.

The trust is primarily a judicial doctrine, and the standards are formulated and enforced by state courts. A few states, most notably Michigan and Minnesota, have enacted legislation which adopts the public trust as a standard to review administrative actions. Such legislation expands the trust from navigable waters to dry land and



Recreationists enjoying the Lower Fox River in Illinois with its sandstone and limestone bluffs. Friends of the Fox River has used to Public Trust Doctrine to oppose a riverland development

provides a basis to challenge the adverse environmental impacts of a wide variety of state and local actions. These statutes also grant private citizens standing (access to court) to enforce the statute.

Sue Them

A lawsuit is the ultimate use of the public trust doctrine. If the state or local "trustee" authorizes a non-trust use, a court has the power to set aside legislation or administrative action. In many states, the power of the state to alter lake and river beds to promote the public interest is considerable so a lawsuit may be the only way of testing the limits of state power. In states where public trust duties are relatively clear, a law suit can remind politicians that they have to follow the law when they make a law. A dramatic example of this occurred in Illinois. A small private university convinced the legislature to transfer title of 18.5 acres of the bed of Lake Michigan to allow a campus expansion. Illinois - the home of the public trust doctrine - is relatively clear that Lake Michigan fills are discouraged, but the legislature ignored this law as they often do. A federal district court invalidated the legislation and the campus is looking landward not lakeward. Lake Michigan Federation v. United States Army Corps of Engineers, 742 F. Supp. 441 (N.D. Ill. 1990).

The public trust doctrine is also a useful back-up doctrine. Even if existing public trust law does clearly prohibit an activity, such as a transfer of water from rural to an urban area, the public trust doctrine can be used to reinforce other objections to an activity. In addition, when the exercise of regulatory authority for river protection is exercised, the trust may provide an additional justification for the authority.

Threaten Them

Last year I had a call from the executive director of the Friends of Fox River west of Chicago, Illinois. Illinois is currently gambling mad, and the current interest is on river boat casinos since that is all the law allows. A casino developer asked a city along the river to convey a portion of the river bed so he could lay a 2,00 foot cable to operate permanently moored "riverboat" along the shore. In return, there was a promise of land for a park. This is a typical low visibility decision on which trust values are likely to be ignored or given marginal weight. I was able to suggest that the organization frame their objections primarily in terms of the public trust doctrine.

River Advocates and State Legislature Cooperate to Codify the Public Trust Doctrine in New York

by Juli Neander

In New York many of our important public trust cases involved challenges by members of the public to enforce their public trust rights. Though these cases were often successful, they were not being incorporated into the State's managment of our public trust resources. To remedy this, the Hudson River Sloop Clearwater sought cooperation in the State legislature to develop legislation that clarified the obligations of state agencies to implement the Doctrine. Since Clearwater's main goals are to protect the Hudson River, its living resources, and the public's rights to access and enjoy them, we wanted a bill that reflected these goals.

In 1992 we finally succeeded in passing a bill that prohibits the sale or outright grant of most public trust lands requires that public access be provided when trust lands are leased. The same bill establishes an interagency review of private leases of public trust resources to insure that biological resources are protected. While there is much more to be done, this small victory is an excellent first step.

For more information contact Clearwater, 112 Market Street, Poughkeepsie, NY 12601, (914) 454-7673

Juli Neander was an Environmental Associate at Clearwater. She is now the Resource Specialist for the City of Arcata, CA.

Public trust objections can be a powerful club to force an agency to reconsider a project. A public trust objection puts them on the defensive; they must now develop and disclose information to show that the activity will not harm the river. More importantly, the threat of a law suit is real and serves to equalize the bargaining power between the public agency and a citizen organization.

Stiffen Their Backbone

Like most of us, politicians hate to say no. People will not vote for them, and increasingly will sue them. The public trust doctrine makes it easier for politicians to say no to environmentally harmful actions or to regulate them for two reasons. First, it gives them an

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Decision-making Under the Public Trust Doctrine:

A Model for Administrators and a Framework for River Advocates

by Ralph W. Johnson & Berrie Martinis

This article is an extremely shortened version of another article by Ralph Johnson, The Public Trust Doctrine and Coastal Zone Management in Washington State, 67 Wash. L. Rev. 521 (1992). It is written in a legal style for public administrators, but the concepts covered are important for river advocates to understand as well.

The public trust doctrine helps to prevent both private actors and the state from impairing public trust interests in waters and underlying lands. Under the public trust doctrine, the state has always retained an ownership interest in those resources. That ownership interest has often been compared to an easement or covenant that burdens private landowners' property. The state can prevent private land owners from doing anything that would impair the trust without owing compensation to the owner. For example, the state can prevent tideland fills, or prohibit construction that interferes with navigation.

The public trust doctrine is part of the common law of property. Common law binds all parties, not just those in cases that come before the court. Therefore, even though it is a judicial rather than a legislative doctrine, it is nonetheless binding on administrators and planners.

The public trust doctrine is in some respects a quasi-constitutional type of law. Usually, courts review legislative and executive action in accordance with the statutes and regulations that those branches have created, or on occasion, with principles found in the state constitution. If a statute conflicts with the constitution, it is struck down. Similarly, the public trust doctrine can overcome conflicting laws, and may be used to defeat legislation that interferes with public trust goals.

The goal of this discussion is to describe how a resource manager can extract relevant public trust doctrine data from any river related proposal, then insert that data into the existing decision-making process. All administrators are obliged to consider the doctrine, when implementing riverland policy. State and local administrators often fail to implement the public trust doctrine in decisionmaking because they are uncertain how it relates to their ongoing programs.

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The Model

To aid administrators in fulfilling their obligation to apply the public trust doctrine, this discussion provides a generic public trust model. This model is not intended to act as a substitute for regulatory review. It proposes a corollary review to determine the relevance of the public trust doctrine in existing regulatory programs. This model enables an administrator to determine how the doctrine applies on a case-by-case basis. It prescribes a process, but does not dictate the outcome. Consultation with local counsel, the state Attorney General, or the State natural resources agency may assist in the final determination.

The model is designed for local administrators presently active in riverland management and is discussed from this perspective. However, the model is also designed for use by state resource managers managing the state's proprietary interests in riverlands, tidelands, shorelands, wetlands, fisheries, etc. Issues that may arise in a proposal affecting public trust resources include general site/permit information, ownership, geographic scope, and use.

1. Ownership

The State has conveyed many tide and shorelands into private ownership, usually without mention of the public trust doctrine. If the applicability of the doctrine is in question, conveyances of shorelands, including riverlands, should first be analyzed to determine whether the transfer was authorized by legislation explicitly extinguishing the public trust interest, whether the conveyance promoted public trust purposes, and whether the conveyance resulted in no substantial impairment of the public use of remaining public trust lands or waters. This

analysis may be new to administrators and they are advised to identify the conveyances and then analyze their significance with local counsel.

2. Geographic scope

Next, the administrator must determine the geographic boundaries of the proposed area in order to identify whether public trust lands are involved. Because the geographic reach of the doctrine is not firmly settled, the administrator should seek legal assistance for final confirmation.

3. Proposed Uses

As a third step, the administrator must compare the proposed use with recognized public trust uses. This comparison may also extend to expanded uses that have evolved through other states' interpretations of the public trust doctrine. The administrator should also determine whether the public trust doctrine supplements the relevant regulatory scheme. Public trust uses fall into three general categories: traditional, expanded, and non-compatible. Navigation and fishing are traditional trust uses. Commerce, the third traditional use, is combined with ports due to the role ports play in facilitating waterborne commerce. Expanded uses include public access, recreational navigation, water-borne recreation, aesthetics, habitat protection, and aquaculture. Non-compatible uses include, but are not limited to, landfilling, non-water related commercial development, hydroelectric power development, and oil and mineral extraction. These uses, however, may be compatible with the doctrine if they promote commerce and provide an overriding public benefit. To clarify this analysis, determinations of use compatibility should focus on whether an incompatible use provides an overriding public benefit, and does not simply serve a single interest.

Primary Analysis

After the issues and the applicability of the doctrine are identified, primary evaluation starts with consultation between the administrator and local counsel. This initial process should focus on accurate interpretation of the doctrine, an essential step if the doctrine is invoked to condition or deny a permit. Local statutes, potential takings challenges, errors in the administrator's analysis, and data gaps should also be identified at this time. The administrator should prepare a list of alternatives and a recommendation to request or bypass state review. Depending on the facts, the public trust doctrine may not be a significant factor that warrants comment by a reviewing state agency. If the local agency elects to bypass state review, the process moves forward to the decision and action steps.

Local analysts should be cautious when bypassing full secondary analysis. It is the responsibility of local officials to consider the doctrine in riverland administration. Even when trust issues are minor, as they are likely to be in most cases, administrators should solicit advice from relevant state agencies, before deciding that the doctrine is inapplicable. In this manner, administrators and local officials may learn how the doctrine applies locally.

Secondary Analysis

Secondary analysis is designed to interject a statewide perspective into the local decision-making process. Secondary analysis has two functions. First, the primary analysis findings are presented to state agencies for legal and policy assessments. Second, it may expand or limit decision options. Secondary analysis also employs public involvement elements by adding a second review with local elected officials, and the option of a public hearing. Finally, secondary analysis provides a feedback loop to the local regulatory or planning program that may assist in future use of the public trust model.

Some Actions Referencing the Public Trust

Various administrative actions may be considered. The model neither expands nor creates new statutory authority or powers. The model may, however, strengthen existing policies, rules, or powers through its consideration of public trust principles. Some examples of existing administrative actions that may either explicitly, or implicitly, reference the public trust doctrine include:

-Denial, approval, rescission, or appeal of proposals or permits without explicit reference to the doctrine.

-Approval of proposals or permits with conditions explicitly referencing the public trust doctrine.

- Revisions to local policies, guidelines, or rules using the doctrine for guidance.

-Revision of zoning ordinances to protect public trust rights, uses or resources; an example being a public trust doctrine overlay map.

- Amendments to comprehensive plans or related descriptive materials.

-Passive application of the public trust doctrine as a supportive argument in appeals.

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The Public Trust Doctrine: A Tool to Protect Instream Flows

by Berton L. Lamb

In 1977, Bruce Bowler made the unique, non-traditional argument that water allocation law should be tempered by the concept of "equity" (Bowler, 1977). Bowler contended that there is a body of law under which the concept of equity (i.e., fairness and justice) is an appropriate consideration for American courts in deciding water disputes. His main assertion was that the public's interest in flowing water resources — especially protecting anadromous fish populations — outweighs the rights of some individuals to use water for personal economic gain (Bowler 1977:25).[1]

Under every scenario, application of the doctrine is complex and the results uncertain. Controversy will be evident, because the public trust flies in the face of existing rights.

Bowler's concept of using equity law as a protection strategy for instream flows has not been widely accepted. To the contrary, western water law has emphasized the rights of individuals to divert water from streams for "beneficial" uses. But in a few western states courts have used a related principle that is beginning to make a contribution to the law of water allocation. That principle is known as the public trust doctrine. The public trust doctrine is not about fairness and justice, but — like equity — the focus is on protecting the public interest in natural resources. The public trust doctrine is an ancient legal rule, originally applied only to navigation, commerce, and fishing. Today, the doctrine has been extended to protect the public interest in those three uses as well as fish and wildlife, environmental quality, and recreation (Johnson 1988). Moreover, some assert a public trust for scientific study, open space, and wildlife habitat (Dunning 1989). The public trust describes the duty of the government to protect public resources. Specifically, when a resource — like a stock of fish or flowing water — is held in common, the government cannot alienate that resource from the people without due consideration of the costs and benefits to the public.

Applications of the public trust

The public trust doctrine, as related to instream flow, is tied to the idea that the public has a common interest in the protection of navigable waters. When an action is taken to allow individuals to use a public resource, that action must include consideration of the public trust. For example, the California Supreme Court determined that the public had an interest in the levels of two natural lakes: Clear Lake and Lake Tahoe. The Court found that the government held those lake levels in trust for the people. The key to finding a public trust in lake levels was that the lakes were navigable waters of the state (State of California v. Superior Court, 172 Cal. Rptr. 713, 625 P. 2d 256 cert. denied, 454 U.S.865 [1981]; and State of California v. Superior Court, 172 Cal. Rptr. 696, 625 P.2d, cert. denied, 454 U.S. 865 [1981]).

The most famous public trust doctrine case related to maintaining the level of Mono Lake in California (National Audubon Society v. Superior Court of Alpine County, 33 Cal. 3d 419, 658 P. 2d 709, 189 Cal. Rptr. 346, cert. denied 464 U.S. 977 [1983]). Mono Lake is a very salty, navigable body of water that provides a variety of public benefits, including waterfowl nesting. In the Mono Lake case, the court found that "only in rare cases when the abandonment of that right is consistent with the purposes of the trust" could the government surrender protection of the public trust.

The decision on Mono Lake is connected to instream flow protection for two reasons. First, the maintenance of lake and flow levels are related concepts. If lake levels can be protected under the public trust doctrine then stream flows are also subject to the trust. Second, the physical link is that protection of the level of Mono Lake requires limitations on water withdrawals from the streams that feed Mono

Lake. Following the public trust theory approved in the Mono Lake decision, the California Court of Appeals ruled that existing rights to appropriate water from streams feeding Mono Lake had to be conditioned to ensure streamflow protection for fish (California Trout v. State Water Resources Control Board, 207 Cal. App. 3d 585, 255 Cal. Rptr. 184 [1989]). This ruling resulted in extensive studies on the streams that feed the lake to determine the quantity of flow needed for preservation of fisheries in the streams. The *National Audubon* and *California Trout* cases stand as strong statements that appropriative water rights, which impair the public trust, can be amended to protect public trust resources long after those rights were granted. The two California cases broke important ground in demonstrating the bridge between traditional views of the public trust doctrine and instream uses of water.[2]

California offers another example of courts applying the public trust doctrine to streamflow. In Environmental Defense Fund, Inc. et al. v. East Bay Municipal Utility District (Superior Court for Alameda County, No. 425955, Statement of Decision [1989]) the court found that the public trust doctrine applied to decisions allocating water in the American River. The judge also found that he had to "coordinate the public trust doctrine with the 'reasonable use doctrine' found in Article X, section 2 of the California Constitution" (Somach 1990). The judge found that wherever possible he was required to accommodate the two doctrines rather than decide between them. The judge mandated a plan where diversion of water could occur while instream values were protected.

The doctrine is an issue in streamflow protection controversies across the Nation. For example, the Nevada Supreme Court ruled in State v. Bankowski (88 Nev. 623, 503 P. 2d 1231 [1972]) that the state holds the lands below the ordinary high water mark of navigable rivers in trust for public use. But the Nevada court continues to place a high value on the protection of vested water rights. This leaves the role of the public trust doctrine in Nevada uncertain (Gould 1992). Another example is in Vermont where opponents to a snow-making project argued under the public trust that the state should not approve a water use permit that would reduce the level of winter streamflow (Okemo Mountain, Inc. Application No. 2S0351-12A-EB Findings of Fact, Conclusions of Law, and Order [Revised] 23 July 1992).

Application of the public trust doctrine has subjected existing water rights to review and change. Under the doctrine, citizens have the ability to bring challenges to state agency decisions. Successful citizen challenges point out the duty of states to consider trust values in natural resource decisions. It is through court cases that the doctrine offers opportunities to address the question of instream flow protection. However, answers provided by the courts are not always unambiguous.

As Gould (1989) observed, "the doctrine has its limitations." The principal limitation is that the doctrine does not provide absolute protection against harm to trust uses. The *East Bay Municipal Utility District* case illustrates that application of the doctrine is often a balancing of trust uses against social and economic benefits. "[T]here will undoubtedly be cases in which the social and economic benefits are found to outweigh the harm to trust uses" (Gould 1989). The second limitation is that the doctrine is judge-made law and the balancing decisons might be more appropriately performed by elected legislatures.

Future Scenarios

Three possible future scenarios have been suggested by Dunning (1989): Interpretation, consideration, and property rights. Under the interpretation scenario, the doctrine serves mainly to buttress "dominant contemporary public policies regarding water" (Dunning 1989). The concept of a public trust has been used by courts over the years to justify both development and environmental protection. It seems likely that the result of a balancing decision will be tempered by contemporary social context. The consideration scenario refers to the requirement that a government decision-maker consider all aspects of a decision. It is not clear how much the requirement to consider all issues will result in environmental protection but this scenario does encourage decision-makers to look ahead. The property right scenario envisages a time when the state will be seen to hold natural resources in trust for the public in such a way that the public in general is the actual owner of the trust uses and resources. Under this scenario, states would be limited in the allocation of resources to individuals in violation of the trust and, as in the Mono Lake case, could actually revoke or amend a vested property right. The property right scenario raises the most controversy because it can lead to findings that

(continued on p 18)

The Public Trust Doctrine and Recreational Use of Rivers and Streams

by Pope Barrow and Rich Bowers

"The potentialities of the public trust are enormous and need only be awakened...." Rogers in Environmental Law

In a recently released paper on river access, the American Whitewater Affiliation expressed a policy regarding recreational use of rivers and streams which reads as follows:

"The public should have the right to travel in canoes, kayaks, and other recreational water craft on the waters of all rivers and streams reasonably susceptible of passage, even where a private entity owns the shorelines and the stream bed...."

This policy generally comports with traditional patterns of rivers throughout the United States. It sets forth a noble ideal, and one which is consistent with notions of public trust.

Unfortunately, however, the legal rights of recreational canoeists, kayakers, and rafters to paddle or row down recreational waterways depend on an often chaotic and confusing body of judicial decisions. These decisions do not always conform to the ideal expressed in the AWA policy paper.

The courts of the 50 States, in fact, have applied an amazing variety of doctrines, principles and precedents to resolve conflicts between stream side landowners and recreational boaters. Consequently, the rights of public passage vary greatly from State to State.

The public trust doctrine states that certain natural resources, such as air, water, and other natural resources, are imbued with a public trust and that the government has a a trusteeship responsibility to protect and preserve these resources for public benefit. According to the doctrine, these resources cannot be transferred to private ownership without a valid public purpose.

This doctrine is built into the fabric of American environmental law. It has strongly influenced the decisions of both Federal and State courts in cases regarding rights of public passage on lakes, rivers, and streams. In fact, the modern public trust doctrine is generally considered to have its origin in a case involving the public rights to navigable waters in Lake Michigan. [1]

The doctrine applies to rivers flowing through public lands and to rivers flowing through private lands.

Rivers Flowing Through Public Lands

The beds of rivers (whether navigable or not) which flow through public lands are usually owned by either the Federal or State government. Those rivers are open to public use, subject only to regulation by the agency managing the adjacent lands.

The public trust doctrine has an as yet untapped potential to greatly improve public access the rivers and streams which flow through public lands. Many of these rivers (such as the Yellowstone and Niagara Gorge) are closed, in part or entirely, to recreational kayaking, rafting, and canoeing. Others, such as the Colorado in the Grand Canyon, or the North Umpqua in Oregon, are regulated in ways which may be unfair to one segment of the boating public (noncommercial selfguided boaters). In other cases, such as the Youghiogheny in Pennsylvania, discriminatory fees are imposed on private boaters entering the river.

There are public trust cases in other areas of enviromental law which hold that the administration of public trust natural resources must avoid a substantial impairment of public uses [2], achieve a fair balance among competing uses, [3] and not impose discriminatory fees on one segment of the public.[4] The application of these cases to the river access problems mentioned above is, as yet, largely unexplored.

Rivers Flowing Through Private Lands

Rights of public access to rivers which flow through private lands are governed by a complex mix of Federal and State law. The law of navigability has always been the key to

determining public and private rights on waterways flowing through private lands.

Federal law determines who owns the bed of rivers deemed navigable under the Federal rule of navigability. The right to use those waters is, therefore, a matter of Federal law. State law determines who owns the bed of rivers not navigable under Federal law, and more importantly, what public rights exist to use those rivers for boating, fishing, swimming and similar recreational purposes. The public trust doctrine influences the rights of public use in the case of both types of rivers.

Rivers Navigable Under Federal Law

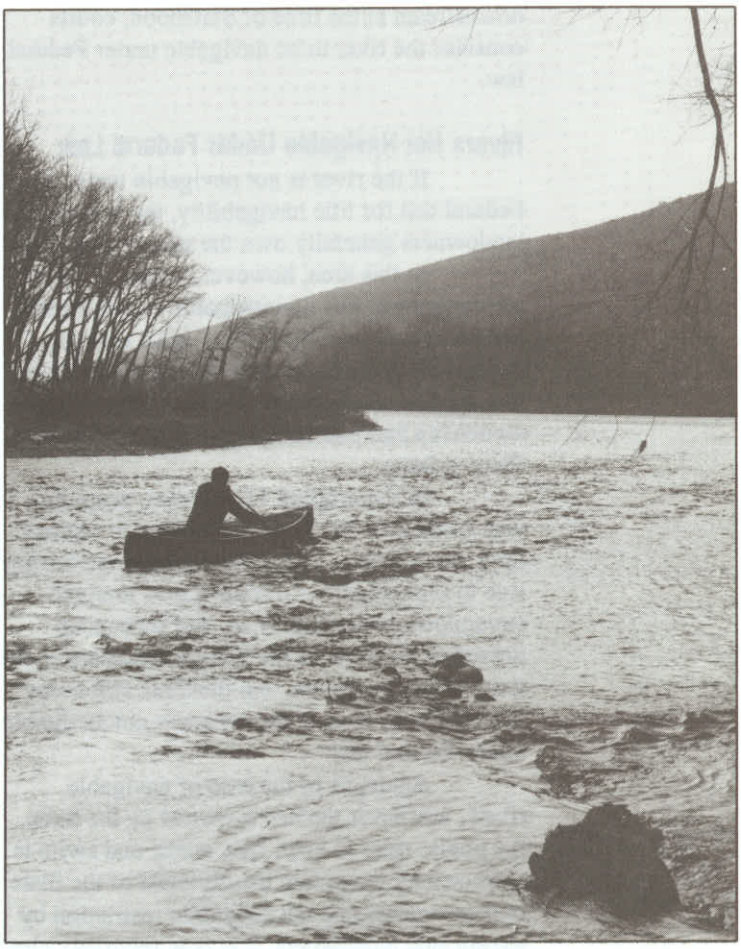
For rivers which are navigable under Federal law, the stream bed is owned by the State, not by the stream side landowner unless, prior to Statehood, ownership of the stream bed was transferred into private ownership by the United States (or the King of England in the case of lands part of the original 13 colonies).

State ownership of these submerged stream beds was first declared by the Supreme Court in 1842 in Martin v Waddell (41 U.S. 234, 16 Pet. 367 (1842)). Chief Justice Roger Taney declared that "dominion and property in navigable waters, and in the lands under them, [were] held by the king as a public trust". According to Justice Taney, this public trust was a property right which passed to the people of each State "when the Revolution took place".

Although Martin v. Waddell applied only to States which were part of the original 13 colonies (the 13 east coast States, plus Tennessee, Kentucky, West Virginia, and Vermont), the same principle was extended through the "equal footing doctrine" to all States subsequently admitted to the union. [5]

State ownership of the stream bed of navigable waters of all States was ratified by the Submerged Lands Act which declared the lands beneath the navigable waters of the United States to be owned by the States within which those waters are located. [6]

The public trust doctrine has strongly influenced specific decisions regarding whether a particular stream bed was retained in State ownership or transferred by deed to private ownership. Under the public trust doctrine, the right of the public to use a State-owned streambed is held in a public trust by the State for the benefit of all citizens. This right cannot be eliminated or transferred to private ownership, except to the extent consistent with the public purposes inherent in the trusteeship. Mindful of the public trust responsibility, Congress rarely granted private title to these waters prior to Statehood and courts have been reluctant to interpret ambiguous pre-Statehood deeds as transferring stream bed lands out of government ownership.[7]



(above) A canoeist on the West Branch of the Susquehanna River in Pennsylvania. The possibilities for conflict over river access continue to grow as rivers become more populated and river side lands more developed. Photo by Tim Palmer.

For navigable rivers where the stream bed is Stateowned, the public right of recreational navigation in the waters above that stream bed is secure, subject only to limits established by the Federal or State government.[8]

It is always difficult, of course, to determine whether a particular river or stream is navigable for purposes of the Federal navigability test used in stream bed title cases. Fortunately, the cases applying this test have found a wide variety of rivers and streams to be navigable. Under the Federal title navigability test, any river on which, in its natural and ordinary condition, small craft could transport people or goods in commerce at the time of Statehood is deemed navigable. Even if only logs were floated

(continued on next page)

downstream at the time of Statehood, courts consider the river to be navigable under Federal law.

Rivers Not Navigable Under Federal Law

If the river is not navigable under the Federal test for title navigability, the stream side landowners generally own the stream bed. [9]

In this area, however, generalizations are dangerous. For nonnavigable rivers, stream bed ownership and the public rights to boat, swim, fish or wade are determined under State law and the resolution of disputes concerning ownership and public rights varies widely from State to State.

In the original 13 colonies, property was granted by the King of England to various large landowners. The King's grant transferring title to this property, in some cases, retained stream bed ownership. If so, that ownership passed to the State as the King's successor at the time of the revolution, and the State still owns the river beds even if the stream is not navigable under Federal law.

Again, as in the case of navigable rivers, whenever the bed is owned by the State, the public right to boat, fish, wade, and swim is protected by the public trust interest of the State in those waters and not subject to restriction by stream side landowners. It is now relatively clear that the public trust doctrine covers public outdoor recreation, as well as such traditional uses of waterways as commercial navigation and fishing.[10]

A more interesting situation arises in the case of those non navigable rivers in which, under State law, the stream bed is owned by the stream side landowner.

This is a critical issue for whitewater boaters who seek out smaller, steeper creeks since many of these may not be found to be navigable under the Federal navigability test, and under the original land grant (in the case of east coast States) the government may not have retained stream bed title. Yet these are often streams which offer outstanding recreational opportunities, especially for experts who favor steep and challenging whitewater.

Examples

In a few States, such as Colorado, court decisions have prohibited customary recreational river use on rivers flowing through private lands where the stream bed is owned by the stream side landowner.[11] In one unfortunate situation, the State of Georgia, the legislature has given stream side landowners the exclusive right to use the waters of all non navigable streams.[12]

In most States, however, applying a variety of statutes and legal doctrines, courts have developed a body of case law which supports a public right of passage on many streams which flow through private lands. Some States have relied on State constitutional provisions to assert a public right of navigation on these streams.[13] Some have relied on State statutes.[14] Some have relied on the common law and an expansive State law concept of a public navigational easement. [15]

In some States, California and Wisconsin particular, the public trust doctrine is deeply entrenched in constitutional provisions and case law. In these States, and others [16], it could be much more widely used to sustain rights of public access to rivers and streams flowing through private lands and over privately owned stream beds.[17]

Under the public trust doctrine, private ownership of land does not extinguish the public trust in associated natural resources, the air and water flowing over and through that land and the wildlife which moves about in that water and land. The public trust applies to all natural resources, wherever located.[18]

In a number of California cases, the public trust in the waters of streams flowing through private lands has been held to be, in effect, an encumbrance on the property which authorizes a number of public uses.[19] Under California law, a public trust easement exists in these waters which is incapable of private ownership and which authorizes the public to make limited use of those waters, hunting, fishing, and boating, for example. [20]

Courts in Wisconsin have also found a direct relationship between the public trust doctrine and public rights of access to small inland streams. In Nekoosa-Edwards Paper Company v Railroad Commission (228 N.W. 144 (1930), the Wisconsin Supreme Court held that Four Mile Creek, a stream navigable by logs and small boats, was open to public recreational use as a public highway; this right of access is held in trust for the public by the State irrespective of the private ownership of the stream bed. Since the court found a public right of recreational use whether or not the State or the stream side landowner owned the river bottom, the court found it unnecessary to delve into the complex issues of stream bed title described above. [21]

Because the public trust doctrine limits the exercise of private property rights, it has

been suggested that the public trust doctrine provides a basis for State legislation codifying and clarifying public rights of access to recreational waterways. Codifying rights of public access to resouces already impressed with a public easement would insulate any such legislation from a constitutional challenge based on the "takings" clause of the Constitution.[22]

The public trust doctrine has the potential to improve public access opportunities both for rivers flowing through public lands and for rivers flowing through private lands. In the private lands context, greater use of the public trust doctrine can circumvent the need to apply complex and difficult legal concepts of navigability and could lead to greater clarity and consistency in the chaotic body of case law which now governs the availability of public rights of passage. It could also be used as the basis for legislation codifying rights of public passage on small streams.

A Word of Caution

In the meanwhile, caution is in order. Given the confusion and diversity in the State law which now controls rights of public passage, recreational boaters on small streams flowing through private lands would be wise to seek permission, where feasible, from stream side landowners and to avoid conflict and confrontation with those landowners as much as possible.

Since the loss of a single trespass case on a single river can have ripple effects which reduce access opportunities throughout an entire state for decades thereafter, boaters should avoid lawsuits unless they are fully prepared ahead of time with a wellfunded expert legal team and a strategy to win. This approach has worked well, for example, in Montana (Dearborn and Beaverhead Rivers) [23] and is currently being pursued by the Sierra Club Legal Defense Fund in New York (Moose River). On the other hand, with thinner legal and financial resources, and in a more hostile judicial environment boaters have lost critical lawsuits in other States (e.g. Armuche Creek in Georgia and Colorado River in Colorado).[24]

For help or advice in solving your river access problems, for information about acess rights in your State, or for free copies of the American Whitewater Affiliation river access paper, write Rich Bowers, AWA, 1609 Northcrest Drive, Silver Spring, MD 20904.

Pope Barrow is an attorney and coauthor of Rivers at Risk published by Island Press in 1989 to assist river conservationists cope with environmentally damaging hydopower projects.

Rich Bowers is the Conservation Program Director of the American Whitewater Affiliation.

END NOTES

1. Illinois Central R.R. v Illinois, 146 U.S. 387 (1892).
2. In re Trempealeau Drainage Dist. Merwin v Houghton, 131 N.W. 838, 842 (Wisc) (1911).
3. State v Public Serv. Comm'n, 81 N.W. 2d 71, 73 (Wisc.)(1957).
4. Neptune City v AvonbytheSea, 294 A.2d 47 (1972).
5. Pollard's lessee v hagan, 44 U.S. (3 How.) 212 (1845).
6. 43 U.S.C. 13011315
7. Laurent, Judicial Criteria of Navigability and Federal Cases, 1953 Wisc. L. Rev. 8.
8. Shively v Bowlby, 152 U.S.1 (1894).
9. Donnelly v United States, 228 U.S. 243, 262 (1913), modified at 228 U.S. 708 (1913).
10. Neptune City v AvonbytheSea, 294 A.2d 47,54 (1972).
11. People v Emmert, 597 P.2d 1025 (Colo. 1979). Doubt has been cast on the validity of this opinion by a subsequent opinion of the Colorado Attorney General and by uniformly critical scholarly opinion.
12. GA CODE ANN. 851304, 1305.
13. Day v Armstrong, 362 P.2d 137 (Wyo. 1961); State v Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).
14. Gratto v Palangi, 154 Me, 308, 147 A.2d 455 (1958). See also Leighty, Public Rights in Navigable State Waters Some Statutory Approaches, VI Land and Water L.R. 459 (1971).
15. Luscher v Reynolds, 625 P.2d 1158 (1936); People v Mack, 19 Cal.App. 3d 1040, 97 Cal. Rptr. 448 (1971).
16. See Strom and Strom, Stream Fishing Law in Michigan: Lets Redefine Navigability, Mich. Bar Jour. 390 (May 1990)
17. See Dietz v King, 465 P.2d 50 (1970) enforcing public access to a beach access route.
18. People v Truckee Lumber Co., 48 P.374 (1897)
19. Marks v Whitney, 491 P.2d 374 (1971).
20. Forestier v Johnson, 127 P. 156 (1912); See Frank, Forever Free: Navigability, Inland Waterways, and the Expanding Public Interest, 16 U.C. Davis L.R. 579 (1983).
21. See also Collins v Gerhardt, 237 Mich 38, 211 N.W. 115 (1926).
22. Just v Marinette Co., 201 N.W.2d 761 (Wisc)(1972).
23. This strategy has been taken on the Dearborn and Beaverhed Rivers in Montana with good results (Montana Coalition for Stream Access v Curran 210 Mont. 38 (1984) and Montana Coaltion for Stream Access v Hildreth, 211 Mont. 29 (1984) and is currently taken in New York in a case on the Moose River defended by the Sierra Club Legal Defense Fund.
24. For a description of the case in Georgia, see Judge Loggins Renders Decision, The Eddy Line, newsletter of the Georgia Canoeing Association, vol 26, no. 8, August 1991. The Colorado case is discussed in People v Emmert: A Step Backward, 52 Colo.L.R. 247 (1981).

(Primer *continued from p 5)*
ing ecosystem. What is truly amazing, though, is that State and Federal judges are beginning to catch up with these third graders and evoking the Public Trust Doctrine in order to preserve the habitat and water quality. Thus, another public protection under the doctrine, increasingly being recognized in more and more States, is the ecological integrity of the waters and bottomlands.

This evolution of the doctrine along with society's advancement has not only established a new public use, but also brought along the recognition of yet another "asset" of the public's trust. In addition to navigable waters and the lands beneath them, it is now commonly recognized that all aquatic life forming the food web for the top predators, the fish, forms part of the assets of the trust protected by the doctrine. Thus, by taking one of the most ancient protected uses of public waters, fishing, and staying up to date with a constantly advancing society, the Public Trust Doctrine now is being recognized as protecting the public's right to fish by both protecting the aquatic environment, and including the living resources of the waters to the list of assets held in trust.

An Emperor's Legacy

The Public Trust Doctrine is a wonderful legal legacy from a Roman Emperor through English kings to the American Public — the right to fully use and enjoy America's navigable waters. And though its actual application may be trickier than fly fishing that mountain brook, the doctrine nonetheless is in the bedrock of American law. There is nothing new about the Public Trust Doctrine except for its name. And as members of the public, we all are important stewards over what Emperor Justinian claimed by the law of nature to be common to all mankind: running waters and the life within them.

David C. Slade is currently the Director of the Coastal States Organization, representing the collective views of the Governors of the 30 coastal States of the United States in Congress, covering a range of coastal, Great Lakes and marine issues. Prior to this position, Mr. Slade was the General Counsel for the Coastal States Organization. During that time he represented the 13 original States in the landmark Supreme Court case Phillips Petroleum v. Mississippi, wherein the Court gave a ringing reaffirmation of the Public Trust Doctrine. Mr. Slade also headed up the national Public Trust Study which involved over 30 States researching the application of the Doctrine in their State.

(Effective Use *continued from p 7)*
excuse for saying no that is beyond their power to change and second, it is very difficult to set aside actions that protect the public trust. Individuals have no constitutionally protected property rights to violate the public trust of property without due process of law. Assertions of the public trust is especially important after the Supreme Court's 1992 takings decision, *Lucas v. South Carolina Coastal Council.* The trust is a long standing limitation on private property that meets the Court's narrow exceptions to the rule that regulations which destroy all conventional value of a property are a taking with due process of law.

The force of trust to justify regulation is illustrated in a recent challenge to a port's regulation of a harbor for environmental and safety reasons. The port of San Diego, which owns the tidelands in the harbor, recently prohibited long-term anchorage in many parts of San Diego Bay to prevent pollution and boating accidents. Pleasure boaters protested and argued that their public trust rights were violated. An appellate court recently held that the public right of navigation includes the right to anchor in navigable waters, but this incidental right is subject to the exercise of the public trust. Specifically, the court held that "[b]oaters do not have a constitutional right to long-term anchorage in public navigable waters." Graf v. San Diego Unified Port District, 7 Cal. App. 4th 1224, 9 Cal.Rptr. 530 (4 Dist. 1992).

Researching the Public Trust Doctrine

Public trust law is easy to locate and research. It is well discussed in water law casebooks and treatises; there is an extensive legal literature. The entries "Navigable Waters 39" and "Public Lands 149" in the West Publishing key number system, used by most lawyers for legal research, will yield a rich lode of case law. Daniel P. Selmi and Kenneth Manaster, *State Environmental Law* (Clark Boardman Callaghan 4.03) is a good introduction to the judicial and legislative trust law at the state and local level.

Dan Tarlock is a Professor of Law at Chicago Kent College of Law at the Illinois Institute of Technology. He has written and lectured extensively about water law and consulted with private law firms and government agencies on water and water-related issues. He is also a River Network DORIS specialist.

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River Seed Grants Available

Recreational Equipment, Inc. has once again directed a grant to the National Rivers Coalition to distribute as seed grants to citizen organizations for river policy work. River Network is a member of the coalition. By the end of the year - sixth in the program - the committee will have distributed $335,000. Grants generally range from $200 to $1000.

The coalition considers applications for grassroots work that:

*promotes the passage of federal legislation that would facilitate federal, state or local river protection;

*protects and enhances natural resources and recreation for rivers subject to hydropower licensing and relicensing;

*adds rivers for study or designation in the national Wild and Scenic Rivers System or improves the management of designated rivers;

*improves State river programs through efforts on legislation, regulations, and /or implementation of a statewide rivers assessment; and

*supports increased funding of the National Park Service's Conservation Assistance Program for Fiscal Year '94.

Applications and questions should go to Suzi Wilkins at American Rivers, 801 Pennsylvania Ave., SE #400, Washington, DC 20003, (202) 547-6900.

(Instream *continued from p 11*)

application of the doctrine requires the government to compensate water right holders if there is a taking.

It is exactly the notion that water rights are a special kind of property that makes application of the public trust doctrine so controversial (Bates et al. 1993). Sax (1990) argued that in spite of popular misconceptions to the contrary, the right to use water is subject to regulation just as is any other property right. Moreover, it is becoming increasingly evident that water rights are subject to a public trust. The doctrine is not an aberration; it is only one of several doctrines that can sharply limit private rights.

Under every scenario, application of the doctrine is complex and the results uncertain. Controversy will be evident, because the public trust flies in the face of existing rights. In the face of stark conflicts, decision-makers may well prefer a process of balancing when they apply the public trust doctrine.

Endnotes:

1. Bowler was only one of the people in the mid-1970's who suggested novel legal theories for protecting natural resources. Two more famous works are Stone (1972) and Reed (1976) who argued that natural objects like rivers have legal rights.
2. Actually there are a number of California court cases that deal with the public trust. Those interested in these cases should refer to Dunning (1980 and 1989).

(References cited in Lamb's article are listed on page 17 with other public trust references.)

Berton L. Lamb is a policy analyst at the National Ecology Research Center of the US Fish & Wildlife Service. He has written numerous publications about the protection of instream flows. He is also a River Network DORIS specialist.

(Model continued from p 9)

- Revision of environment designations and/or use regulations.
- Revision of aquatic lands lease conditions.
- Revision to permit conditions for conditional use permits and variance permits.
- Revision of non-conforming use policies or exemptions.

The public trust doctrine provides an increasingly valuable tool for protecting our waters. The doctrine is still expanding through judicial decisions, and the limits of the doctrine have not been reached. The public trust doctrine protects the public, and obligates the state to that protection. State agencies are no less obligated to protect the public trust than state legislatures. The decisionmaking model briefly illustrated here provides administrators with a means to fulfill their obligation to the public trust.

Professor Ralph W. Johnson has been teaching since 1955 and specializes in water law. He has served as Chief Consultant to the United States Senate Committee on Interior and Insular Affairs, on national water policy and as consultant to the National Water Commission, National Academy of Sciences Water Committee, and State and federal agencies, and has authored numerous law review articles on water law.

Berrie Martinis is a student of law at the University of Washington and is research assistant to Professor Johnson. She is currently serving as Managing Editor of the Washington Law Review.

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River Wealth a collection of fundraising ideas and techniques used successfully by grassroots river groups. Ideas are organized by membership, business support, events, and sales and services. $5.00

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C(3) or C(4) - a manual to lead river groups through the decision-making process of whether to apply as 501(c)(3) or 501(c)(4) tax-exempt status. $2.00

Case studies:

We document and distribute "success stories" of river conservation to help activists avoid reinventing the wheel. We recently published a booklet of five case studies, entitled ***People Protecting Rivers: A Collection of Lessons from Grassroots Activists.*** The features stories are the Charles in Massachusetts, Clark Fork in Montana and Idaho, Gauley in West Virginia, Sacramento in California, and Upper Mississippi in Minnesota. The case studies are organized by issues for easy reference. $2.00

Lotus Software:

In cooperation with the Lotus Development Corporation, River Network is offering a free copy of Lotus 123 software to any organization working on river protection. Lotus 123 is both a spreadsheet and a database software program compatible with personal computers. If your group is interested, please send River Network a letter that includes the following information:

1) a statement that your group is incorporated
2) a brief description of how your group plans to use the Lotus software, and
3) what size computer disks (3.5 or 5.25 inch).

Fundraising Training Videos:

If your group is considering a fundraising campaign, you may want to consider some training first. Kim Klein, a national fundraising trainer and author of *Fundraising for Social Change*, with help from the Partnership for Democracy, has produced six videos:

Planning for Fundraising
Special Events
The Role of the Board
Asking for Money & Prospect Identification
Major Gift Solicitation
Raising Money by Mail

River Network has purchased a set of these videos. If you'd like to borrow them, free of charge, give us a call.

DORIS
(Directory Of River Information Specialists)

DORIS is a free service to put you in touch with volunteer specialists with expertise on river-related issues. River Network has recruited over 500 river specialists within conservation organizations, professional societies, state and federal agencies, and our national network of river guardians. DORIS specialists have expertise in a wide variety of issues ranging from hydropower to streamside development to pollution. Information about the DORIS specialists, including how they'd like to help grassroots river activists and areas of expertise is compiled on a computer database housed at River Network.

To find out more information about DORIS and how it can help you and your group protect rivers, call us toll-free at (800) 42-DORIS. We'll link you up with some free advice.

We'd like your input to make DORIS even better. We are always interested in expanding the team of DORIS specialists. If you have experience or expertise in any aspect of river conservation that you feel would be helpful to other river activists, we welcome and encourage you to participate in DORIS. In addition, if you know of other river specialists you think might be interested in sharing their expertise through DORIS, please let us know who they are. We will contact them through the mail and request

National Rivers Conference

"The Future of America's Rivers:
A Celebration of the 25th Anniversary of the National Wild and Scenic River Act"

Sponsored by American Rivers, Inc.

Thursday - Sunday
November 4-7, 1993

Arlington, Virginia

***River Network** is co-sponsoring the conference and will host the following events for river guardians*

Thursday, November 4 afternoon:
Grassroots Training on Basic Fundraising
Pat Munoz, the Director of River Network's new River Wealth Program, will lead this workshop.

Thursday, November 4 evening:
"Reflections on Saving Rivers" by David Bolling. David is the former executive director of Friends of the River in California, and he's writing a book for River Network entitled, *How to Save a River*, to be published by Island Press in 1994.

Other Conference Topics include:
*The "science" of rivers - current scientific information about the state of America's rivers and what is needed to protect and restore them;
*State and local river conservation tools, with "how to" sessions for grassroots participants;
*The methodology of river protection and restoration - for both natural rivers and those in the built environment;
*The National Wild & Scenic Rivers System;
*Other national river conservation policy tools currently available or needed.

Registration:
Fee is $165 (includes two breakfasts, two lunches, breaks, handout materials, and the gala banquet)
To receive a conference brochure to register, contact Suzi Wilkins at American Rivers, (202) 547-6900.

River Network
PO Box 8787
Portland, OR 97207

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