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Drinking from a Deep Well: The Public Trust Doctrine and Western Water Law

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CAROL NECOLE BROWN

I. INTRODUCTION.....	2
II. GREATER OPPORTUNITIES FOR PUBLIC ACCESS AND MORE EFFICIENT USE OF WESTERN WATER RESOURCES	8
A. ADDRESSING WATER SHORTAGES USING THE PUBLIC TRUST DOCTRINE	8
1. General Proposal.....	8
2. An Analysis of the Effect of a More Robust Public Trust Doctrine on Existing Water Disputes	22
(a) Tulare Lake Basin Water Storage Dist. v. United States	22
(b) Klamath Irrigation District v. United States	26
B. A LESSER ALTERNATIVE: STRICTER ADHERENCE TO THE PRIOR APPROPRIATION DOCTRINE	30
III. IMPLICATIONS OF A MORE ROBUST PUBLIC TRUST DOCTRINE.....	38
A. PUBLIC OWNERSHIP ALLOWS FOR GREATER DECENTRALIZATION WITHOUT INFRINGING ON PROPERLY VESTED PRIVATE PROPERTY RIGHTS.....	38
B. ANALOGIES: CONSERVATION EASEMENTS, WATER TRUSTS, AND THE PUBLIC TRUST DOCTRINE...	42
IV. CONCLUSION.....	49

Drinking From a Deep Well: The Public Trust Doctrine and Western Water Law

CAROL NECOLE BROWN*

I. INTRODUCTION

American water law reflects the diverse geography and population patterns of this expansive country.¹ In the eastern states where water is rather abundant, the doctrine of riparian rights dominates water law.² The arid western states, in contrast, rejected the doctrine of riparian rights in favor of the doctrine of prior appropriation due to a natural scarcity of water and increasing population growth.³ The western states provide fertile ground to consider the burdens of a rapidly growing region on already scarce water resources.⁴

My thesis is that the public trust doctrine is being underutilized by the states and that the optimal approach to the western states' water scarcity dilemma is one that applies the public trust doctrine more aggressively while simultaneously diminishing the applicability of the prior

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¹ William L. Andreen, *The Evolving Contours of Water Law in the United States: Bridging the Gap Between Water Rights, Land Use and the Protection of the Aquatic Environment*, 23 ENVTL. AND PLANNING L.J. 4 (2006); Jane Maslow Cohen, *Symposium of Waterbanks, Piggybanks, and Bankruptcy: Changing Directions in Water Law: Foreword*, 83 TEX. L. REV. 1809, 1813 (2005).

² Andreen, *supra* note 1, at 4. Although the doctrine of riparian rights is prevalent in the eastern states, nearly half of them "have supplemented the riparian rights system with permit schemes governing large water withdrawals" because of increasing demand and competition in the east for water. *Id.* at 5.

³ *See, e.g.*, Andreen, *supra* note 1, at 4 (discussing the origins of American water law and the distinctions between the doctrines of riparian rights and prior appropriation); *In re Bay-Delta Programmatic Env'tl. Impact Report Coordinated Proceedings*, 34 Cal. Rptr. 3d 696 (Cal. Ct. App. 2005) (generally chronicling California's historic and recurring water shortages and concerns as well as the water problems plaguing Mexico and other western states such as Colorado, Arizona, and Nevada); Reed D. Benson, *So Much Conflict, Yet So Much in Common: Considering the Similarities Between Western Water Law and the Endangered Species Act*, 44 NAT. RESOURCES J. 29, 32-33 (2004).

⁴ *E.g.*, *Arizona v. California*, 460 U.S. 605, 620 (1983); *California Trout, Inc. v. State Water Res. Control Bd.*, 207 Cal. App. 3d 585, 625 (1989); Benson, *So Much Conflict, supra* note 3, at 32-33 (stating that the West is "easily the driest region of the United States").

appropriation doctrine with its inherently private property approach to water resource entitlement.⁵ There are two ways to conceptualize a more robust public trust doctrine. The first is to expand the waters that are subject to the public trust doctrine, essentially an expansion of location. The second way is to increase the doctrine's reach to include additional purposes and uses within the protection of the doctrine. I recommend extending the public trust doctrine to encompass all bodies of water serving the public welfare, even minimally.⁶ I also support expanding public trust purposes even though much of this Article's focus concerns making the case for expanding the geographical scope of the doctrine.

During the early years of their economic development, the seventeen western states adopted the prior appropriation doctrine to govern their water allocation systems.⁷ Originating in the common law and later codified by the various state legislatures, the prior appropriation doctrine declared a “first in time, is first in right” policy of dividing the waters among competing users.⁸ A misconception concerning the doctrine of prior appropriation is that it was comprehensive, equitable, and most importantly for the purposes of this Article, that the doctrine's system of water allocation was historically preferred over other methods of settling

⁵ *Infra* Part II.B. and accompanying text.

⁶ *See, e.g.*, *National Audubon Soc’y v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983) (expanding the state public trust doctrine of California to the actual waters and non-navigable tributaries and not just the water bed); *Lamprey v. Metcalf*, 53 N.W. 1139 (Minn. 1893) (advocating a broad construction of the public trust doctrine); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892) (also expanding the public trust doctrine beyond previous applications); Carol Necole Brown, *A Time to Preserve: A Call for Formal Private-Party Rights in Perpetual Conservation Easements*, 40 GA. L. REV. 85 (Fall 2005) (discussing the importance and applicability of public trust principles to public resource conservation).

⁷ Ralph W. Johnson, *Water Pollution and the Public Trust Doctrine*, 19 ENVTL. L. 485 (1989); *e.g.*, *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 153 (1935); *Irwin v. Phillips*, 5 Cal. 140, 147 (1855) (one of the earliest cases establishing the prior appropriation doctrine); *State ex rel. State Game Comm'n v. Red River Valley Co.*, 182 P.2d 421, 430 (N.M. 1945); *infra* Part II.B. (discussing the history of the doctrine of prior appropriation).

⁸ *Supra* note 3.

competing water claims.⁹ However, the prior appropriation doctrine was not intended to affect the scope or coverage of the public trust doctrine; rather, it was and still is a doctrine that caters to special interests such as development, mining, and agriculture.¹⁰ The prior appropriation doctrine is “a special interest legal doctrine”¹¹ that essentially imbues water resources with private property qualities similar to those traditionally associated with real property interests.¹² Claims of vested rights to continued distribution levels and of entitlements to just compensation when government modifies water rights to the detriment of prior appropriators evidence the private property perception of water that characterizes the prior appropriation doctrine.¹³

“[W]here a water crisis is not yet . . . so severe as to make a transparent call on the popular will (as remains true in most of the United States), the critical nature of the stakes may translate only into incremental political moves”¹⁴ or, in the worst of cases, to a total absence of policy reformation.¹⁵ The intense need for water and its increasing scarcity in the West prompt

⁹ Johnson, *supra* note 7, at 489.

¹⁰ *E.g.*, *California Oregon Power Co.*, 295 U.S. at 153 (discussing manufacturing as a third source of western states’ need for established water laws); Johnson, *supra* note 7, at 489-90; *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 279-83 (1958) (describing the Central Valley Project, an estimated billion dollar joint venture between the federal government and California for the purpose of bringing to California’s “parched acres a water supply sufficiently permanent to transform them . . . for the benefit of mankind”); *Peterson v. United States Dep’t of Interior*, 899 F.2d 799, 802-03 (9th Cir. 1990) (discussing more than a century of federal government initiatives aimed at the orderly development and opening of the West to settlement and agriculture using water as the primary instrument); *California Oregon Power Co.*, 295 U.S. at 156-57 (discussing the reclamation of valuable yet arid lands by western pioneers and their transformation of such lands into valuable farmland and plentiful orchards).

¹¹ Johnson, *supra* note 7, at 489-90.

¹² Brown, *A Time to Preserve*, *supra* note 6, at Part V (discussing the bundle of property rights metaphor that dominates the American understanding of the nature of entitlements generally accompanying the status of ownership of private property).

¹³ *See, e.g., infra* notes 176-194 and accompanying text (discussing *National Audubon Soc’y v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983) (the Mono Lake case)); *infra* Part II.B. (discussing the impropriety of applying a private property rubric to certain water resources because of their inherently public nature).

¹⁴ Cohen, *supra* note 1, at 1819.

¹⁵ *Id.* at 1819-20.

me to consider what role a more robust public trust doctrine might play in modifying existing water law concepts to better manage and conserve this essential resource.¹⁶

A liberal application of the public trust doctrine decentralizes the use interest in western waters thereby creating greater opportunities for: (1) public access and efficient use; (2) environmental protection; and (3) the safe-guarding of recreational interests.¹⁷ Decentralization of real property and of access to real property is strong indicia of a well-functioning democratic society.¹⁸ Similarly, protecting public rights to inherently public resources such as water is an important component of the process of striking the proper balance in “safeguarding public rights along with private ones. . . .”¹⁹ Public rights are just as essential to a healthy and functioning democratic society as are private rights and strengthening the public trust doctrine insures that

¹⁶ Melissa K. Scanlan, *We Must Protect Great Lakes Waters*, WISC. STATE J., at A8 (Aug. 13, 2005).

Water scarcity is becoming a reality – the “oil” of the 21st century. A handful of multinational corporations is capitalizing on this scarcity by amassing control of water resources in what is now a \$1 trillion industry.

Wisconsin had its own brush with privatization on a large scale in 2000 when Nestle/Perrier attempted to bottle Wisconsin’s spring waters. In an incredible display of community concern that combined local organizing, town hall meetings, media outreach, state legislation and litigation, Wisconsin’s residents sent Perrier packing. But his episode exposed the lack of legal protections for water.

Id.

¹⁷ *E.g.*, “[T]he right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use.” *National Audubon*, 658 P.2d at 724 (citation omitted); *Capital Water Co. v. Public Utilities Comm’n*, 262 P. 863, 870 (Idaho 1926) (stating that beneficial use, but not title, is all that may be acquired by parties to the state’s waters); *Rencken v. Young*, 711 P.2d 954, 960 n.9 (Or. 1985) (stating that “the proprietary right [in water] is usufructuary in character”) (citation omitted).

¹⁸ Brown, *A Time to Preserve*, *supra* note 6, at Part V (discussing decentralization of real property by recognizing that the public has a beneficial interest in conservation easements sufficient to confer private-party standing to enforce and defend against challenges to perpetual conservation easements); Carol Necole Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims After Property Transfers*, 36 CONN. L. REV. 7, 46 (2003) (discussing decentralization of real property as essential to distributive justice in the context of the survival of regulatory takings claims when the regulation pre-dates the owner’s acquisition of title).

¹⁹ Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265, 298 (1996).

public resources are not turned over to private owners, essentially consolidating usufructuary interests in important waters in the hands of a few and to the exclusion of the public.²⁰

This Article’s proposal for a more liberally applied public trust doctrine is consistent with my earlier proposals for private-party standing to enforce perpetual conservation easements and decentralization of real property rights so as to facilitate the survival of regulatory takings claims in the context of post-regulatory acquisitions of property.²¹ My prior articles focused on decentralization of real property²² and I contend that the same basic concepts apply to water rights.²³

Changing times and conditions necessitate a thoughtful dialogue about the appropriate scope of the public trust doctrine. Strong precedent exists for continued reconsideration and broadening of the public trust doctrine’s reach.²⁴ In the past, “the prior appropriation doctrine and the public trust doctrine operated entirely independent of each other. They are now being brought into contact, and conflict.”²⁵ It is time for a change in paradigm.

²⁰ *Id.* at 298; Brown, *A Time to Preserve*, *supra* note 6, at Part V (discussing the decentralization of property as important for democratic systems); Brown, *Taking the Takings Claim*, *supra* note 18, at 34 (making the case for recognition of the takings claim itself as a cognizable property interest deserving of protection and resulting in an expanded notion of private property).

²¹ Brown, *A Time to Preserve*, *supra* note 6, at 85; Brown, *Taking the Takings Claim*, *supra* note 18, at 7.

²² Brown, *A Time to Preserve*, *supra* note 6, at Part V; Brown, *Taking the Takings Claim*, *supra* note 18, at 7.

²³ *Infra* Part III.A.

²⁴ *Phillips Petroleum Co. et al. v. Mississippi et al.*, 484 U.S. 469, 484 (1988) (expanding the reach of the public trust doctrine). For a discussion of expansion of the reach of the public trust doctrine by modern courts, see Brown, *A Time to Preserve*, *supra* note 6, at Part VI.C.; David L. Callies & Benjamin A. Kudo, Address Before the Midyear Meeting of the AALS, *The Idea of Property: Custom and Public Trust* (June 17, 2004) (on file with the author and with the _____ Law Review) (for selected state cases discussing recent expansions and refusals to expand the public trust doctrine); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Sources and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 453-69 (1989).

²⁵ Johnson, *supra* note 7, at 504; *Arizona v. California*, 373 U.S. 546, 552 (1963); Scanlan, *supra* note 16, at A8.

Water scarcity is becoming a reality – the “oil” of the 21st century. A handful of multinational corporations is capitalizing on this scarcity by amassing control of water resources in what is now a \$1 trillion industry.

In Part II of this Article, I explore two possible approaches to the water scarcity problem. Suggestions for how best to ensure reasonable public access to water are as limitless as are the number of potential appropriators, landowners, and interested environmentalists. This Article considers only two of the many options. The first approach is to decentralize water use entitlements through strengthening and expanding the public trust doctrine. I illustrate the potential benefits of a more robust public trust doctrine using two compelling cases that each attempt to strike the balance between private-party expectations and public rights to water. The second approach is to adhere even more strictly to the prior appropriation doctrine. I discuss why this approach is a lesser alternative to rethinking the public trust doctrine.

Next, in Part III, I discuss possible implications arising from the approaches discussed in Part II. One implication concerns the decentralizing effect of an expanded public trust doctrine, specifically, its impact on regulatory takings claims²⁶ and the related problem of vested rights. The other implication considers whether the real property conservation easement framework should be applied to create similar conservation easements in water resources.

Wisconsin had its own brush with privatization on a large scale in 2000 when Nestle/Perrier attempted to bottle Wisconsin's spring waters. In an incredible display of community concern that combined local organizing, town hall meetings, media outreach, state legislation and litigation, Wisconsin's residents sent Perrier packing. But his episode exposed the lack of legal protections for water.

Id. An important moment of change in this historic separation occurred in the 1980s in California with the Mono Lake decision, *National Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983).

²⁶ Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

"Taking" is, of course, constitutional law's expression for any sort of publicly inflicted private injury for which the Constitution requires payment of compensation. Whether a particular injurious result of governmental activity is to be classed as a "taking" is a question which usually arises where the nature of the activity and its causation of private loss are not themselves disputed; and so a court assigned to differentiate among impacts which are and are not "takings" is essentially engaged in deciding when government may execute public programs while leaving associated costs disproportionately concentrated upon one or a few persons.

Id.

Part IV concludes by reiterating the importance of undertaking sometimes difficult transitions when faced with an ever dynamic and changing environment.

II. GREATER OPPORTUNITIES FOR PUBLIC ACCESS AND MORE EFFICIENT USE OF WESTERN WATER RESOURCES

A. Addressing Water Shortages Using the Public Trust Doctrine

1. General Proposal

The public trust doctrine is “perhaps the single most complicated development in natural resources law.”²⁷ The theory underlying the traditional federal public trust doctrine is that the navigable waters²⁸ of the United States are held in perpetual trust by the states²⁹ for the continual use of the public.³⁰ The public trust doctrine exists on two levels; there is the federal public trust

²⁷ Wilkinson, *supra* note 24, at 426.

²⁸ See *infra* Part II.A.1. and accompanying text (discussing the definition of navigable waters); see also Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979).

[C]ongressional authority over the waters of this Nation does not depend on a stream’s “navigability.” . . . [A] wide spectrum of economic activities “affect” interstate commerce and thus are susceptible of congressional regulation under the Commerce Clause irrespective of whether navigation, or, indeed, water, is involved.

Id.

²⁹ See, e.g., *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935) (discussing non-navigable waters and establishing that state law governed the acquisition of water rights); *Nevada v. United States*, 463 U.S. 110, 123-24 (1983) (citing *California Oregon Power Co.*, 295 U.S. at 142, for the same proposition above); *Martin v. Lessee of Waddell* 41 U.S. 367, 410 (1842) (discussing navigable waters as subject to the sovereign authority of the states as of the American Revolution); *State ex rel. State Game Comm'n v. Red River Valley Co.*, 182 P.2d 421, 460, 463 (N.M. 1945) (discussing non-navigable waters). “[T]he public has a prima facie right to fish in all navigable streams, just as it has in other public waters. . . .” *Id.* at 463-64; *Galt v. Montana*, 731 P.2d 912, 914-15 (Mont. 1987) (discussing the State of Montana as trustee under the public trust doctrine of, among other things, the waters in navigable streams and lakes); *Golden Feather Community Ass'n v. Thermalito Irrigation Dist.*, 257 Cal. Rptr. 836, 841 (Cal. Ct. App. 1989) (discussing navigable waters and stating that the State of California holds lands subject to navigable waters “in its sovereign capacity in trust for the public purposes of navigation and fishery, and a public easement and servitude exists for these purposes”); Anthony Arnold, *Is Wet Growth Smarter than Smart Growth?: The Fragmentation and Integration of Land Use and Water*, 35 ELR 10152 (2005). “Water use is largely a matter of long-standing state common-law doctrines of property rights. . . .” *Id.* at 10164.

³⁰ Wilkinson, *supra* note 24, at 426-27. “By the traditional doctrine, I mean the trust principles that the United States Supreme Court has applied to those watercourses that are navigable for the purposes of title – those watercourses whose shorelines, beds, and banks pass by implication to states at the time of statehood.” *Id.* (citations omitted). For a discussion of the history and principles underlying the public trust doctrine, see Joseph L. Sax, *The*

doctrine and the varying public trust doctrines of the fifty states.³¹ Federal law has historically deferred to state law expressions of the nature, extent, and content of public and private rights to waters within the boundaries of the individual states.³²

The United States Supreme Court first articulated the federal public trust doctrine in *Illinois Central Railroad Co. v. Illinois*.³³ The Court's description of the state's public trust power and authority clearly established that both derived from federal law.³⁴ As an example, the Court stated that no state has the authority to contract for the conveyance of property in violation of the public trust and any state legislation purporting to allow such a contract would be inoperable.³⁵ The federal public trust doctrine typically follows state title and is useful for the rather limited purposes of protecting the use of and access to navigable waters.³⁶ Navigability is a critical term because under the traditional federal public trust doctrine, only navigable waters were subject to the doctrine and therein safeguarded against private appropriation for the public benefit.³⁷ Navigable waters are characterized by a public right of use which finds expression in the public trust doctrine.

Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 MICH. L. REV. 471 (1969); Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980).

³¹ Wilkinson, *supra* note 24, at 425 (citation omitted); Robin Kundis Craig, *Beyond SWANCC: The New Federalism and Clean Water Act Jurisdiction*, 33 ENVTL. L. 113 n.45 (2003) (discussing the federal public trust doctrine).

³² Cohen, *supra* note 1, at 1846.

³³ 146 U.S. 387 (1892); Wilkinson, *supra* note 24, at 453-54.

³⁴ See, e.g., *Illinois Cent. R.R.*, 146 U.S. at 387 (stating that states are prohibited from acting in disregard of their public trust duties); *New York v. DeLyser*, 759 F. Supp. 982, 990 (W.D.N.Y. 1991). "The *Illinois Central* case . . . involved a fundamental issue of federal law concerning the nature of a state's sovereignty, and the powers assumed by a state upon its admission to the Union. . . ." *Id.*; Wilkinson, *supra* note 24, at 453-55. "*Illinois Central*, however, seems plainly to have been premised on federal law. . . . In describing the trust, the Court made it clear that the trust derives from federal law and is binding on all states. . . ." *Id.*

³⁵ *Illinois Cent. R.R.*, 146 U.S. at 460.

³⁶ Craig, *Beyond SWANCC*, *supra* note 31, at 113 n.45; Wilkinson, *supra* note 24, at 464-65.

³⁷ A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 8:4 (2004).

States have considerable discretion in how they interpret the public trust doctrine; federal law serves as a baseline for the states and they are “prohibited from abrogating the public trust entirely.”³⁸ In response to changed conditions, many state courts and legislatures³⁹ have gradually expanded the doctrine.⁴⁰ Although the public trust doctrine originated with the judiciary and for a long while developed in a somewhat haphazard fashion due to the uncertainties of litigation,⁴¹ over time, the states began expressing the public trust doctrine in their state constitutions and statutes.⁴² Initially the doctrine included only the “tidelands under

³⁸ Wilkinson, *supra* note 24, at 464.

³⁹ Sax, *Public Trust Doctrine*, *supra* note 30, at 509-46 (discussing the propriety of leaving control of the public trust doctrine with the judiciary rather than the legislature); Carol M. Rose, *Takings, Public Trust, Unhappy Truths, and Helpless Giants: A Review of Professor Joseph Sax’s Defense of the Environment Through Academic Scholarship: Joseph Sax and the Idea of the Public Trust*, 25 *ECOLOGY L.Q.* 351 (1998); State *ex rel.* Brown v. Newport Concrete Co., 336 N.E.2d 453, 457 (Ohio Ct. App. 1975). The public trust doctrine “is a philosophy which has grown rapidly among . . . natural resource legal advocates, and has been accepted with greater breadth by . . . courts. . . .” *Id.*

⁴⁰ Brown, *A Time to Preserve*, *supra* note 6, at Part VI.C.; Callies & Kudo, *supra* note 24 (on file with the author and with the _____ Law Review) (for selected state cases discussing recent expansions and refusals to expand the public trust doctrine); Michael Booth, *Public’s Access to Private Beach is Upheld, Subject to Reasonable Fees*, N.J. L.J., Aug. 1, 2005.

The justices extended the "public trust doctrine" - under which "submerged lands and waters below mean highwater mark are owned by the state government in trust for public uses such as transportation and fishing" - to upland beach areas that are a necessary adjunct to bathers' enjoyment of the ocean.

....

The ruling expands on a 1984 case, *Matthews v. Bay Head Improvement Association*, 95 N.J. 306, that said the public must be afforded "reasonable access to the foreshore" but that did not address what could be done with the vast tracts of dry sand that are privately owned.

Id.; Wilkinson, *supra* note 24, at 464-45.

⁴¹ Terry W. Frazier, *The Green Alternative to Classical Liberal Property Theory*, 20 *VT. L. REV.* 299, 354-57 (1995).

⁴² See, e.g., CAL. PUB. RESOURCES CODE § 6307 (2005) (stating that California’s State Lands Commission was entrusted by the California Constitution to protect the state’s interested in designated waters and lands as public trust lands); C.R.S. 37-92-102 (2005 (discussing basic tenets of Colorado water law); HAW. REV. STAT. § 174C-1 (2004) (stating that it is not the legislative intent to abolish the common law public trust doctrine); CAL. CONST. art. X, § 4 (2005) (codifying California public trust doctrine); MCLA § 324.32501 et seq. (2005) (stating that the Great Lakes Submerged Lands Act (GLSLA) “reiterates the state’s authority as trustee of the inalienable jus publicum, which extends over both publicly and privately owned lands”); PA. CONST. art. I, § 27 (2005); WIS. CONST. art. IX, § 1 (2005); MONT. CONST. art. IX, § 3 (2005); HAW. CONST. art. XI, §§ 1, 7 (2005); WASH. CONST. art. XVII, § 1 (2005).

navigable waters”⁴³ and for the benefit of navigation and fishing.⁴⁴ Some states have broadened the public trust doctrine to include certain non-navigable tributaries,⁴⁵ non-navigable streams that support established public trust interests,⁴⁶ state groundwaters,⁴⁷ and various recreational and ecological needs,⁴⁸ drinking water,⁴⁹ and even “into the area of appropriation of water.”⁵⁰ These sustained extensions demonstrate the dynamic nature of the public trust doctrine.

Joseph Sax eloquently expressed the essential benefits attending the public trust doctrine and, relatedly, its expansion, when he stated the following:

When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism on any government conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.⁵¹

⁴³ *Ill. Cent. R.R.*, 146 U.S. at 458; *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). The Court developed three distinct tests for navigability: “‘navigability in fact,’ ‘navigable capacity,’ and ‘ebb and flow’ of the tide.” *Id.* at 182. For an interesting history of these tests and of the question of navigability in general to the public trust doctrine, see *Kaiser*, 444 U.S. at 182-87. *Webb v. California Fish Co., et al.*, 138 P. 79 (Cal. 1913). “It is a well established proposition that the lands lying between the lines of ordinary high and low tide, as well as that within a bay or harbor and permanently covered by its waters, belong to the state in its sovereign character and are held in trust for the public purposes of navigation and fishery.” *Id.* at 82.

⁴⁴ *Golden Feather Community Ass'n v. Thermalito Irrigation Dist.*, 257 Cal. Rptr. 836, 841 (Cal. Ct. App. 1989).

⁴⁵ *National Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709, 721 (Cal. 1983).

⁴⁶ *Golden Feather*, 257 Cal. Rptr. at 843.

⁴⁷ *Rith Energy, Inc. v. United States*, 44 Fed. Cl. 108 (1999).

⁴⁸ *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984) (stating that the public trust doctrine was broad enough to protect, for the public, purposes such as swimming, bathing and shore activities); *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978 (9th Cir. 2002) (precluding shoreline residential development because of its detrimental impact on recreational needs of the public); *R.W. Docks & Slips v. Wisconsin*, 628 N.W.2d 781 (Wis. 2001) (including recreation and scenic beauty preservation within the scope of the public trust doctrine); *National Audubon*, 658 P.2d at 719. “The principal values plaintiffs seek to protect . . . are recreational and ecological – the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds. . . . [I]t is clear that protection of these values is among the purposes of the public trust.” *Id.*

⁴⁹ *Wilkinson*, *supra* note 24, at 465.

⁵⁰ *Id.*

⁵¹ *Sax, Public Trust Doctrine*, *supra* note 30, at 490 (discussing the holding in *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892)).

The heightened protection of water resources that attends broader application of the public trust doctrine could help slow the over-appropriation of vital waters, reacquire instream flows⁵² of such waters, and increase water conservation efforts.⁵³

My suggestion of an expanded and more robust public trust doctrine is neither novel nor new. Several state courts have held or suggested “that water rights obtained under the prior appropriation doctrine might be curtailed if such appropriations substantially impair [certain] watercourses. . . .”⁵⁴ Harry Bader noted more than a decade ago that the development of a broader and more aggressive public trust doctrine is one component of an environmental law policy substantive enough to possibly serve as what he termed “an affirmative instrument for ecological protection.”⁵⁵ He rightly observed that a public trust doctrine with the limited function of merely guaranteeing public access to America’s fish, wildlife, and water resources is a vacuous doctrine indeed.⁵⁶ What good do citizens reap from access to important waters if, through diversions, such as in the case of Mono Lake,⁵⁷ discussed in greater detail below, the water resource is threatened with degradation and atrophy, and dependent animal and plant species are imperiled?⁵⁸ The public trust doctrine must not only secure the public’s access but

⁵² "Instream flow protection refers to 'the legal, physical, contractual, and/or administrative methods that have been used to ensure that enough water remains in streams to sustain instream [flows].'" Mary Ann King, *Getting Our Feet Wet: An Introduction to Water Trusts*, 28 HARV. ENVTL. L. REV. 495, 502 (2004).

⁵³ WILLIAM GOLDFARB, *WATER LAW* 133 (2d ed. 1988).

⁵⁴ See Wilkinson, *supra* note 24, at 465 (discussing states that have extended the public trust doctrine to water rights obtained through beneficial use under the prior appropriation doctrine); see *National Audubon Soc’y v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983) (the Mono Lake case, *infra* notes 176-194 and accompanying text).

⁵⁵ Harry R. Bader, *Antaeus and the Public Trust Doctrine: A New Approach to Substantive Environmental Protection in the Common Law*, 19 B.C. ENVTL. AFF. L. REV. 749, 750 (1992).

⁵⁶ *Id.* at 750.

⁵⁷ *Infra* notes 176-194 and accompanying text.

⁵⁸ *National Audubon*, 658 P.2d 709 at 711.

also “must be applied as an affirmative instrument for ecological protection.”⁵⁹ Recent changes in ecology and enhanced environmental protection tools to protect real property, such as perpetual conservation easements,⁶⁰ support the ideas expressed by Bader then and by this author now.⁶¹

Broadening the public trust doctrine creates the appropriate amount of diffusion or decentralization of power while simultaneously using the institution of government to maintain economic and social stability. As the public trust doctrine grows to protect more extensive water sources for public use, the decentralization of power “promotes justice by recognizing the dignity and equality of each individual. It promotes the utilitarian goal of maximizing human satisfaction by creating the conditions necessary for economic efficiency and social welfare. These justice and utilitarian goals often go together.”⁶² Government, the administrator of the public trust, insures that property and the power accompanying it are not too diffuse because excessive diffusion risks giving rise to anarchy.⁶³

As a result of these diversion [from four of the five streams feeding Mono Lake], the level of the lake has dropped; the surface area has diminished by one-third; one of the two principal islands in the lake has become a peninsula, exposing the gull rookery there to coyotes and other predators and causing the gulls to abandon the former island. The ultimate effect of continued diversions is a matter of intense dispute, but there seems little doubt that both the scenic beauty and the ecological values of Mono Lake are imperiled.

Id.; Bader, *supra* note 55, at 750; Frazier, *supra* note 41, at 356.

⁵⁹ Bader, *supra* note 55, at 750.

⁶⁰ Brown, *A Time to Preserve*, *supra* note 6, at Part III (discussing the value of citizen-suits, also known as private-party standing to enforce perpetual conservation easements as created by the Uniform Conservation Easement Act); e.g., Bader, *supra* note 55, at 749 (generally discussing changed ecological conditions in the context of Alaska’s wilderness); Frazier, *supra* note 41, at 356.

⁶¹ Bader, *supra* note 55, at 749.

⁶² Brown, *A Time to Preserve*, *supra* note 6, at 126 n.188 (citing JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 144 (2000)); Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 344-45 (1996).

⁶³ Brown, *A Time to Preserve*, *supra* note 6, at Part V (discussing the importance of decentralization in the context of private property); Rose, *Keystone*, *supra* note 62, at 344-45.

One consequence of expanding the public trust doctrine is the potentially unsettling effect it could have on the rights and expectations of those claiming vested rights in water resources that are presently treated as exempt from the public trust doctrine.⁶⁴ Expansion of the public trust doctrine does not abrogate the property protections established by the various states to the extent of additional value added to non-vested usufructuary rights.⁶⁵ “Despite the public trust doctrine’s potential power, courts generally have tried to accommodate it within our dominant private property rights regime.”⁶⁶ For instance, the private-property protections afforded citizens

⁶⁴ *E.g.*, *City of Los Angeles v. Aitken*, 52 P.2d 585 (Cal. Ct. App. 1935). The court considered if a municipality’s exercise of the power of eminent domain to condemn private property owners’ littoral rights to a navigable lake constituted a compensable event under the state constitution. *Id.* at 586; *e.g.*, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (stating that public use should also be understood to include public purpose for purposes of justifying use of the state takings power).

⁶⁵ *E.g.*, *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 455 (1892) (stating the Illinois Central Railroad would be entitled to compensation from the State of Illinois to the extent of its investment in submerged lands waters that were alienated to the railroad by the State of Illinois in violation of its public trust responsibilities); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (stating that even though Kaupa Pond fell “within the definition of ‘navigable waters’ as this Court has used that term in delimiting the boundaries of Congress’ regulatory authority under the Commerce Clause, . . . this Court has never held that the navigational servitude creates a blanket exception to the Takings Clause. . . .” *Id.*; *National Audubon Soc’y v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983). The court rejected a claim that establishment of the public trust constituted a compensable taking of property but held that the state could not appropriate improvements on the affected lands in this particular case without paying compensation. *Id.* at 440 n.22.

⁶⁶ Michael C. Blumm et al., *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794*, 24 *ECOLOGY L.Q.* 461, 465 (1997); Rose, *A Dozen Propositions*, *supra* note 19, at 286-87.

For example, takings and due process considerations typically have required that pre-existing uses be “grandfathered” into new legislation aimed at protecting public rights. . . . [I]n state property jurisprudence, there is much attention to what are called the “vested rights” of private property owners to continue land development projects, even when the projects are inconsistent with recent legislative change. The much-used phrase in federal takings jurisprudence, “investment-backed expectations,” aims to identify and, if necessary, to indemnify the property owners who may suffer particularly pointed losses, even from legislation that is otherwise a reasonable effort to protect public rights.

These judicial techniques are compromises, or rather, they are all the same compromise. The compromise aims at protecting settled expectations, avoiding the demoralizing of private owners who can establish their settled expectations, and preventing the deadweight loss of pre-existing capital investments taken in good faith. Those are the aims with respect to regulated individuals.

But the other aims of the compromise are public: to stave off private evasions that might destroy resources important to the public; to permit legislatures, over time, *to adjust the protections necessary for the preservation*

under the Fifth Amendment’s Takings Clause⁶⁷ are not abrogated by the renewal of the public trust doctrine.⁶⁸ In *Illinois Central Railroad Co. v. Illinois*,⁶⁹ the Supreme Court held that the State of Illinois was neither free to alienate its navigable waters nor abdicate its public trust responsibilities over such waters in a manner that was inconsistent with its public trust duties.⁷⁰ Importantly, the Court acknowledged that if Illinois Central Railroad could demonstrate that it made valuable improvements during the period between the state’s grant of the land to the railroad and its subsequent repeal of the grant, the state would not be able to appropriate the land without compensating the railroad for the value of its investment.⁷¹

of public rights and resources; and to obviate the need to compensate owners beyond a point at which those owners should reasonably be expected to adjust their own expectations about what they can and cannot do on their properties.

Id. at 286 (citations omitted) (emphasis added).

⁶⁷ GOLDFARB, *supra* note 53, at 133. Some argue that not only is the public trust doctrine necessary for the maintenance of important waters but that if anyone is entitled to compensation under the Fifth Amendment’s Takings Clause, it is “the general public – deprived for so long of its recreational and environmental rights. . . .”

⁶⁸ See, e.g., *infra* notes 77-108 and accompanying text (discussing the public trust doctrine and takings claims).

⁶⁹ 146 U.S. 387 (1892).

⁷⁰ *Illinois Cent. R.R.*, 146 U.S. at 452-53, 455. The Court stated:

The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. . . .

This follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested.

Id. at 453; see also Brown, *A Time to Preserve*, *supra* note 6, at Part VI.C.2. (discussing *Illinois Cent. R.R.*). For a more recent example of the protections afforded private-property rights within a more aggressive public trust regime, see *Kaiser v. Aetna*, 408 F. Supp. 42 (D. Haw. 1976), *aff’d in part, rev’d in part*, 584 F.2d 378 (9th Cir.), *rev’d*, 444 U.S. 164 (1979).

⁷¹ *Illinois Cent. R.R.*, 146 U.S. at 455. “Undoubtedly there may be expenses incurred in improvements made under such a grant which the State ought to pay; but, be that as it may, the power to resume the trust whenever the State judges best is, we think, incontrovertible.” *Id.* A modern example of a type of compensable improvements include improving water quality for the purpose of repopulating bodies of water with aquatic wildlife and other types of endangered species.

Thus, citizens would retain their rights to pursue takings challenges in the face of state action redefining the scope of the public trust doctrine.⁷² The traditional doctrines that protect citizens in their *properly* vested rights in private property would be undisturbed by a more expansive construction of the public trust doctrine.⁷³ Extension of the public trust doctrine though does not entitle water rights holders to compensation, per se.⁷⁴ Federal and state governments that articulate an historical understanding of the public trust doctrine as broad and expansive will prove to be difficult venues for citizens bringing these types of private takings claims.⁷⁵ This assertion would be particularly powerful in jurisdictions that find that when dealing with “weak and tenuous property right[s] – and, at the least, all of the water’s usufruct[ua]ry rights are intended to count as such – what is prima facie reasonable is the expectation that your use-right could get diminished or supplanted at any time for any reason that a governmental entity agency takes to be a paramount claim.”⁷⁶

⁷² See, e.g., Brown, *Taking the Takings Claim*, *supra* note 18, at 7 (discussing takings challenges in the context of the notice rule); *supra* note 30.

⁷³ Of course, when property is deemed commons property and no vested rights have attached, citizens should not be able to succeed on Takings challenges. “Water is a common resource; this is why nearly all of the western states declare it to be a public resource.” Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 973 (1998).

⁷⁴ For an in-depth discussion of the intersection between takings jurisprudence and an expanded public trust doctrine, see John D. Leshy, *A Conversation About Takings and Water Rights*, 83 TEX. L. REV. 1985 (2005); see also *Kelo v. Town of New London*, 125 S. Ct. 2665 (2005). The Court held that its finding that the Fifth Amendment’s public use provision was broad enough to encompass economic development takings did not give rise to an entitlement to just compensation in the case before it. The Court acknowledged that, initially, the public use requirement had been applied broadly but then found that over time, courts “embraced a broader and more natural interpretation” of the term which was warranted by the changing nature of the public’s needs, evolving over time and in different ways in different parts of the nation. *Id.* at 2662, 2664.

⁷⁵ See, e.g., *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (affirming a broad interpretation of the “public use” restriction of the Fifth Amendment’s Takings Clause as consistent with “public purpose”).

⁷⁶ Cohen, *supra* note 1, at 1858.

The proposition under advancement is that government should not bear the cost of direct compensation whenever, acting to protect a water resource or to satisfy any other related mandate, it strips the holder of a water right of the water itself. The dent that this might cause to the value of otherwise marketable water rights is taken to be an unobjectionable result of the collision between market forces and the public’s preemptive will.

The recent United States Supreme Court case, *Kelo v. Town of New London*,⁷⁷ exemplifies a similar type of judicial understanding in the regulatory takings context.⁷⁸ The *Kelo* Court granted certiorari to determine whether the “public use” clause of the Fifth Amendment to the United States Constitution permitted the exercise of eminent domain for the primary purpose of promoting economic development.⁷⁹

In 2000, the city of New London, Connecticut approved a plan of development that “was ‘projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city. . . .’”⁸⁰ New London approved the purchase of property from willing sellers and the exercise of the power of eminent domain to acquire the property of unwilling sellers, in exchange for the payment of just compensation.⁸¹ The petitioners sued New London, one of their claims being that New London’s exercise of its eminent domain powers to condemn and acquire their properties violated the public use requirement of the Fifth Amendment.⁸² For the petitioners, the egregiousness of the proposed condemnation was worsened because, pursuant to the development plan, their private properties would be transferred to another private owner and for primarily private benefit with only the potential for

Id. at 1837. For an in-depth discussion of the intersection between takings jurisprudence and an expanded public trust doctrine, see Leshy, *supra* note 74, at 1985.

⁷⁷ 125 S. Ct. 2655 (2005).

⁷⁸ *Id.* For an in-depth discussion of the *Kelo* decision, representing thoughtful and diverse viewpoints, see *Probate and Property*, vol. 19, No. 2 (ABA Section on Real Property, Probate and Trust Law, Mar./Apr. 2005) (containing numerous articles commenting on the Fifth Amendment’s public use requirement and the *Kelo* decision).

⁷⁹ *Id.*

⁸⁰ *Id.* at 2658 (quoting the Supreme Court of Connecticut in *Kelo v. City of New London*, 843 A.2d 500, 507 (Conn. 2004), *cert. granted*, 125 S. Ct. 2655 (2005). Respondent New London Development Corporation, a private nonprofit entity, was reactivated to implement the development project, having been established years earlier to help the city of New London with economic development planning. *Id.* at 2658-59.

⁸¹ *Kelo*, 125 S. Ct. at 2658.

⁸² There were nine petitioners owning a total of fifteen properties located in the targeted development area. *Kelo*, 125 S. Ct. at 2660.

incidental public benefits flowing to the public.⁸³ The petitioners urged the Court to find that “economic development [did] not qualify as a public use.”⁸⁴

The Superior Court of Connecticut granted a permanent restraining order against New London prohibiting the taking of properties located within the park and marina support areas of the development plan.⁸⁵ However, the court denied relief to petitioners as to those properties located within the area designated for office space.⁸⁶ Both sides appealed the Superior Court’s decision to the Supreme Court of Connecticut. The Supreme Court reversed the Superior Court’s ruling in favor of the petitioners (granting a restraining order as to the park and marina support areas) and affirmed the Superior Court’s ruling in favor of New London.⁸⁷

In disposing of the case, the United States Supreme Court framed the question before it as whether the development plan served a public purpose recognizable under the Fifth Amendment.⁸⁸ The Court traced its application of the public use exception back to the 19th century and discussed the naturally changing and evolving nature of how state and federal courts have interpreted the public use test. The Court applied seminal cases from the past and characterized the dynamic nature of the public use requirement as follows:

[W]hile many state courts in the mid-19th century endorsed “use by the public” as the proper definition of public use, that narrow

⁸³ *Kelo*, 125 S. Ct. at 2671, 2675 (O’Connor, J., dissenting, joined by Rehnquist, C.J., Scalia and Thomas, JJ.). The New London Development Corporation was approved by New London to carry out the development plan. The corporation is a private, non-profit corporation. At one point during the litigation, the New London Development Corporation was engaging in negotiations with a private developer, Corcoran Jennison for a 99-year ground lease for one dollar per year in rent. *Id.* at 2660 n.4. Petitioners also contended that the primary purpose of New London’s proposal was to benefit the Pfizer company that was seeking to relocate in the area. The Connecticut Superior and Supreme Courts agreed that New London’s “development plan was intended to revitalize the local economy, not to serve the interests of Pfizer, Corcoran Jennison, or any other private party.” *Id.* at 2670 (Kennedy, J., concurring).

⁸⁴ *Id.* at 2665.

⁸⁵ *Id.* at 2660.

⁸⁶ *Id.*

⁸⁷ *Id.* at 2661.

⁸⁸ *Kelo*, 125 S. Ct. at 2663.

view steadily eroded over time. Not only was the “use by the public” test difficult to administer . . . but it proved to be impractical given the diverse and always evolving needs of society. Accordingly, when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as “public purpose.”

Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the “great respect” that we owe to state legislatures and state courts in discerning local public needs.⁸⁹

The *Kelo* Court articulated a “traditionally broad understanding of public purpose”⁹⁰ and simultaneously acknowledged the dynamic nature of the public interest. It also emphasized its deference to the states’ legislative and judicial decision-making pertaining to safeguarding the public.⁹¹ The Court expressly held that the individual states retained authority to impose public use restrictions that were more stringent than those of the federal government.⁹²

These same principles apply to the inherently public nature of state water resources, the states’ non-delegable responsibility to safeguard these public resources, and the important role of the public trust doctrine as a tool to aid states in meeting their obligations.

Relatedly, Carol Rose noted a decade ago in her seminal work, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*,⁹³ that courts are often attracted to the public trust doctrine as a means of protecting public rights in resources imbued

⁸⁹ *Id.* at 2662, 2664

⁹⁰ *Id.* at 2666.

⁹¹ *Id.* at 2664.

⁹² *Id.* at 2668.

⁹³ Rose, *A Dozen Propositions*, *supra* note 19, at 265.

with public attributes because some legislatures place public rights in a precarious position.⁹⁴ Professor Rose stated that public choice literature makes the case that legislatures can be vulnerable and highly sensitive to the concentrated and intense bargaining advantages of special interest groups.⁹⁵ This literature indicates that legislatures are likely to favor well-funded and organized developers of natural resources particularly when their opposition tends to be “large and diffuse.”⁹⁶ Once special interests successfully target legislators and acquire usufructuary entitlements for their constituents, what Professor Rose calls the ““endowment effect”” potentially arises.⁹⁷ The endowment effect simply describes the phenomenon which holds that people place greater value on entitlements they actually possess compared to entitlements they might possess in the future.⁹⁸ This ranking of preferences suggests that once the legislature has transferred away public rights, these transfers are particularly difficult to reverse.⁹⁹ Judicial use of the public trust doctrine may help protect against unwarranted diminutions in public rights through excessive privatization of public resources.¹⁰⁰

⁹⁴ *Id.* at 294.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Rose, *A Dozen Propositions*, *supra* note 19, at 294.

⁹⁹ *Id.*; see also Brown, *A Time to Preserve*, *supra* note 6, at 118-19 (discussing the “endowment effect” but in the context of efficiency gains attending the negotiation of perpetual conservation easements contrasted with government-forced transfers of conservation interests by the power of eminent domain). “[P]roperty owners generally demand more in the way of compensation when asked to surrender an entitlement already in their possession than they would be willing to pay to acquire the very same entitlement had it not been originally assigned to them.” *Id.* (citations omitted). While referring to a different type of property interest and within a different context (private parties versus the government), my observations in the context of conservation easements are consistent with Professor Rose’s observations of the different dynamics attending legislative versus judicial decisions in regards to allocating natural resources, the public commons.

¹⁰⁰ *Id.* Professor Rose also provides a thoughtful discussion of the helpful role legislatures in protecting public rights and public resources. *Id.* at 295-97; see also *supra* Part II and accompanying text in which this author also acknowledges the beneficial role of legislatures, historically, in protecting endangered species and conserving public resources.

States retain the authority to interpret the public trust doctrine more broadly than the federal public trust doctrine.¹⁰¹ “[W]ater rights have always had some elements of communal management and responsiveness to change ‘built in’. . . . [W]ater’s development, use, and transfer unambiguously implicate many other users and types of use, and thus the legal regimes for water rights have tended to evolve in such ways as to incorporate greater concern for diversity and changes in use.”¹⁰² An evolving, broader notion of the public trust is consistent with the sensitivity to changed conditions that has historically attended water law. Changed conditions warrant the continued monitoring and adjustment of water management and access; modification of the public trust doctrine’s scope is one means of achieving this end.

The public trust doctrine, applied responsibly and more expansively, promises to be a useful tool in the effort to better prioritize water uses. The public trust power implies the power not only to reactively protect resources but to also proactively respond to changing societal conditions before crisis situations arise.¹⁰³ Public access to adequate water supplies is necessary for the creation of sustainable communities and the promotion of citizenship.¹⁰⁴ Responsible public management of water resources furthers good stewardship of an essential natural resource and of the global environment.¹⁰⁵

¹⁰¹ *Supra* Part II and accompanying text; *see also Kelo*, 125 S. Ct. at 2668 (stating the same in the context of the Fifth Amendment’s public use requirement and the state exercise of the power of eminent domain).

¹⁰² Rose, *Takings, Public Trust, Unhappy Truths*, *supra* note 39, at 354.

¹⁰³ *See, e.g., In re Water Use Permit Applications*, 94 Haw. 97, 189 n.107 (2000) (citing Stand. Comm. Rep. No. 77, in 1 Proceedings, at 688).

¹⁰⁴ *See, e.g., Brown, A Time to Preserve*, *supra* note 6, at Part V (discussing the important role of decentralization of property ownership and of access to property in a democratic society and noting its importance to sustaining complex social relationships).

¹⁰⁵ *See, e.g., Brown, A Time to Preserve*, *supra* note 6, at Part III (discussing the importance of decentralization of real property ownership and access to conservation and preservation of scarce resources).

The public trust doctrine offers a flexible approach to the water shortage dilemma.¹⁰⁶ The doctrine facilitates dialogue concerning why various parties want usufructuary rights to valuable water resources and what are the best and highest uses of limited water reserves.¹⁰⁷ Thus, the public trust doctrine offers solutions for the often competing needs of government, landowners, environmentalists, and other groups.¹⁰⁸

2. An Analysis of the Effect of a More Robust Public Trust Doctrine on Existing Water Disputes

A general assertion that the public trust doctrine should be expanded is made more compelling by express examples of the types of waters, currently unprotected by the public trust doctrine, that would be covered under the expanded doctrine. Also, it is helpful to ask the question, what public benefits would be created by the inclusion of such waters within the public trust? The following examples are intended to illustrate the benefits inherent in an expanded public trust doctrine.

(a) Tulare Lake Basin Water Storage District v. United States¹⁰⁹

The plaintiffs in *Tulare* alleged that the federal government took their contractually-conferred usufructuary rights in violation of the Fifth Amendment's Takings Clause¹¹⁰ when it

¹⁰⁶ *Infra* Part III and accompanying text.

¹⁰⁷ Rose, *Keystone*, *supra* note 62, at 354 (acknowledging that diverse and numerous users are affected by changes in water development, transfer, and use).

¹⁰⁸ Carol M. Rose, *Environmental Lessons*, 27 LOY. L.A. L. REV. 1023, 1042-43 (1994); Neuman, *supra* note 73, at 976-97; Frank J. Trelease, *Government Ownership and Trusteeship of Water*, 45 CAL. L. REV. 638 (1957) (discussing the interest of various stakeholders, including environmentalists, in the continuing debate over who owns the waters).

¹⁰⁹ 49 Fed. Cl. 313 (2001). For an in-depth summary of the *Tulare* case, see Melinda Harm Benson, *The Tulare Case: Water Rights, The Endangered Species Act, and the Fifth Amendment*, 32 ENVTL. L. 551 (2002). Defendants asserted California state public trust doctrine as the source of their right to restrain and limit the extent of the plaintiffs' property interest. *Tulare*, 49 Fed. Cl. at 322.

¹¹⁰ U.S. CONST. amend. V ("nor shall private property be taken for public use without just compensation").

restricted their water use pursuant to the Endangered Species Act.¹¹¹ Plaintiffs, traditional water users, were successful in arguing that the environmental restrictions imposed on their water use constituted a physical occupation¹¹² of their private property resulting in a per se taking under the Fifth Amendment and thus requiring just compensation.¹¹³

The *Tulare* plaintiffs' contractual agreements with the Department of Water Resources (DWR), the actual water permit holder,¹¹⁴ entitled them to specified water allotments during the 1992-1994 irrigation seasons.¹¹⁵ Earlier, Congress passed the Endangered Species Act¹¹⁶ (ESA) which was designed to remedy species extinction.¹¹⁷ Pursuant to its duties under the ESA, the National Marine Fisheries Service (NMFS) issued a biological opinion that continued operation of the State Water Project (SWP) and of the Central Valley Project¹¹⁸ (CVP) under existing conditions would endanger the existence of the winter-run Chinook salmon.¹¹⁹ The U.S. Fish and Wildlife Service also identified the delta smelt as being at risk in its own biological

¹¹¹ *Tulare*, 49 Fed. Cl. at 314.

¹¹² Robert H. Freilich, *Time, Space, and Value in Inverse Condemnation: A Unified Theory for Partial Takings Analysis*, 24 U. HAW. L. REV. 589 (2002). "[A] physical taking constitutes actual physical intrusion or regulations mandating that owners make physical improvements to property. . . ."

¹¹³ For a discussion of the various types of takings, see Brown, *Taking the Takings Claim*, *supra* note 18, at 7.

¹¹⁴ *Tulare*, 49 Fed. Cl. at 315.

¹¹⁵ *Id.*

¹¹⁶ 16 U.S.C. §§ 1513-1544 (1994).

¹¹⁷ *Tulare*, 49 Fed. Cl. at 315.

¹¹⁸ The SWP and CVP are water systems built to facilitate the transportation of water from northern California, a water-rich area, to more arid parts of the state. *Tulare*, 49 Fed. Cl. at 314.

¹¹⁹ The United States Fish and Wildlife Service and the National Marine Fisheries Service determined that these species of fish were in danger of extinction. *Tulare*, 49 Fed. Cl. at 314-15. The winter-run Chinook salmon were listed as endangered in 1994. Newsroom: Delta Water Export Pumps Killing Two Protected Fish Species, <http://www.earthjustice.org/news/display.html?ID=287> (Jan. 11, 2002) (last visited Aug. 30, 2005). The next year, the NMFS issued a second biological opinion in which it again found the winter-run Chinook salmon jeopardized by state and federal water export pumps.

opinion.¹²⁰ As a result of these findings, water that the DWR otherwise would have made available for distribution was no longer available.¹²¹

The court found that plaintiffs' contract with DWR entitled them to exclusive use of the amount of water prescribed in their contracts.¹²² The court determined that the plaintiffs' contractual rights were superior to all competing interests¹²³ and held "that the federal government, by preventing plaintiffs from using the water to which they would otherwise have been entitled, . . . rendered the usufructuary right to that water valueless, [thus effecting] a physical taking."¹²⁴

The defendant responded by asserting the public trust doctrine as a limitation on the plaintiffs' private property rights.¹²⁵ The court found the defendant's common law justification unavailing because the water allocation system in effect specifically permitted the level of allocation that the defendant was then seeking to modify based upon a finding of unreasonableness in light of the biological opinions discussing the detrimental impact of the water diversions on protected species.¹²⁶

The water rights contested in *Tulare* provide an excellent example of the potential impact of a more robust public trust doctrine on water rights. The *Tulare* court's finding of a physical taking of property in the face of evidence of important public concerns emphasizes that while

¹²⁰ *Tulare*, 49 Fed. Cl. at 315. The delta smelt were listed as a threatened species in 1993. Newsroom: Delta Water Export Pumps Killing Two Protected Fish Species, <http://www.earthjustice.org/news/display.html?ID=287> (Jan. 11, 2002) (last visited Aug. 30, 2005).

¹²¹ *Tulare*, 49 Fed. Cl. at 315.

¹²² *Id.* at 318. Under California state law, title to water use is always with the state, the DWR receives, by permit, the right to the water's use and then by contract, transfers use rights to end-users such as the plaintiffs. *Id.*

¹²³ *Tulare*, 49 Fed. Cl. at 318.

¹²⁴ *Id.* at 319.

¹²⁵ *Id.* at 321.

¹²⁶ *Id.*; Benson, *Tulare*, *supra* note 109, at 564.

water is officially treated as a public resource, states are increasingly moving toward a tendency to “recognize[] permanent property rights in the private use of that resource.”¹²⁷ The *Tulare* court evidently believed that the plaintiffs’ contractually conferred water rights antedated the government’s right to modify water use entitlements, in the manner proposed, in order to fulfill public trust objectives of avoiding species extinction.

The public trust doctrine is based upon the premise that appropriators do not acquire vested rights to violate public trust principles based upon their historical use of water.¹²⁸ Especially in those states where legislators refuse to restrain existing water rights in a meaningful way for the benefit of the environment,¹²⁹ a more expansive and flexible public trust doctrine could help the judiciary block appropriators from exercising the fullness of the legal limits of their usufructuary rights when doing so would pose extreme harm to the water source and dependent species.¹³⁰ An expanded public trust doctrine could provide for a healthier Tulare Lake Basin where at-risk species are protected and without the cost of just compensation under a

¹²⁷ Benson, *So Much Conflict*, *supra* note 3, at 35. Professor Benson also notes that “Colorado – which practices western water law in its purest and most traditional form – still allows no public interest consideration as to new appropriations.” *Id.* at 50.

¹²⁸ Johnson, *supra* note 7, at 504.

¹²⁹ *Id.* at 511.

The major advantage to use of the public trust doctrine is that it can be the basis of judicial as well as legislative action. If applied by courts, the doctrine can sometimes give greater recognition to public interests at times when legislatures are under excessive pressure by special interest lobbyists. . . .

. . . One disadvantage of the police power is that legislative bodies are often subject to excessive pressure by special interest groups, and as a result, provide less-than-adequate protection to the more diffuse public interests. At such times court decisions often lead the way toward legitimate changes, encouraging legislative bodies to follow with broadly conceived police power regulations.

Id.

¹³⁰ See Benson, *So Much Conflict*, *supra* note 3, at 37 (discussing states that refuse to impose meaningful constraints on water appropriators); Frazier, *supra* note 41, at 354-57 (discussing proposals to broaden the definition of public trust doctrine and also discussing deficiencies of the doctrine); Brown, *A Time to Preserve*, *supra* note 6, at 131 (discussing the ability of private-party standing to counteract pressure by private or special interest groups).

takings regime. The *Tulare* decision is a clear example of the public trust doctrine, the prior appropriation scheme, and the police power intersecting at the crossroads where increasingly limited water supplies and ever-growing demands for water meet.¹³¹ These moments of conflict are certain to increase in frequency and as they do, the public trust doctrine should, more often than not, prevail.¹³²

(b) *Klamath Irrigation District v. United States*¹³³

The United States Court of Federal Claims in *Klamath Irrigation District v. United States* ruled against the plaintiffs, irrigators who held water right permits and claimed a vested use interest in the delivery of irrigation water from the Klamath Basin.¹³⁴ Plaintiffs argued that their water interests were cognizable property rights entitling them to compensation under the Fifth Amendment Takings Clause resulting from temporary reductions in their water use for irrigation by the Department of Interior's Bureau of Reclamation.¹³⁵ The Bureau of Reclamation decided to reduce water allotments after determining that continued operation at existing levels would likely have an adverse effect on certain species of fish in violation of the Endangered Species Act (ESA).¹³⁶ The court considered three potential sources of the plaintiffs' rights: (1) Section 8

¹³¹ Johnson, *supra* note 7, at 505. The prospect that by 2025 fresh drinking water will be inaccessible to two-thirds of the world's population is incredulous to some. THE CORPORATION (Zeitgeist Films 2003) (Chapter 18, Expansion Plan). For others, sometimes called visionaries, the limitations and stresses on water resources and the decline of sustainable water systems are all too evident. *Id.* (Chapter 9, Trading on 9/11). Water resources may seem limitless but even in the United States evidence to the contrary abounds.

¹³² Johnson, *supra* note 7, at 505.

¹³³ 67 Fed. Cl. 504 (2005). For a detailed and informative discussion of the history of the Klamath Basin litigation, see Brian E. Gray, *The Property Right in Water*, 9 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1 (2002). The plaintiffs asserted that federal contracts were, at least in part, the source of their right to divert water; therefore, federal public trust doctrine would be the source of law for restraining their entitlement.

¹³⁴ *Klamath*, 67 Fed. Cl. at 504.

¹³⁵ *Id.*

¹³⁶ *Id.* at 513 (citing ESA, 16 U.S.C. § 1531 et seq.).

of the federal Reclamation Act of 1902;¹³⁷ (2) the state laws of Oregon and California; and (3) contract law.¹³⁸

First, the plaintiffs claimed that their water rights derived from the Reclamation Act.¹³⁹ They argued that because their land was appurtenant to the Klamath Basin waters, Section 8 of the Reclamation Act vested in them a property interest in those waters.¹⁴⁰ Thus, according to the plaintiffs, their water interests derived from federal law and not from the state laws of Oregon and California.¹⁴¹ The United States Court of Federal Claims rejected their arguments and clarified that state law is the controlling authority governing the appropriation of project water such as that involved in the Klamath Basin water reclamation project.¹⁴²

¹³⁷ 32 Stat. 388 (1902) (codified at 43 U.S.C. §§ 371 et seq., as amended). Section 8 of the Reclamation Act states:

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, *That the right to use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.*

43 U.S.C. §§ 372, 383 (2000) (emphasis added).

¹³⁸ *Klamath*, 67 Fed. Cl. at 516.

¹³⁹ *Id.* (stating that according to the relevant Senate Report, section 8 of the Act was not intended to interfere with irrigation laws developed by the states and territories). They referenced “cases describing water rights associated with reclamation projects and arising out of appurtenancy as ‘the property of the land owners,’ . . . or a ‘property right’” *Id.* at 518.

¹⁴⁰ *Id.* Section 8 of the Reclamation Act provides that the Act is not to be construed as interfering with vested water use rights acquired in connection with irrigation. 32 Stat. 388, 390 (1902) (codified at 43 U.S.C. §§ 372, 383). Section 8 requires the Secretary of the Interior to comply with state law governing the “control, appropriation, use or distribution of water.” 32 Stat. 388, 390 (1902) (codified at 43 U.S.C. §§ 372, 383). In his capacity as a water appropriator pursuant to section 8, the Secretary is thus bound to acquire his water rights in accordance with relevant state law. *Klamath*, 67 Fed. Cl. at 518.

¹⁴¹ *Klamath*, 67 Fed. Cl. at 516.

¹⁴² *Id.* at 518 (noting two exceptions when the Reclamation Act governed as against inconsistent state law: section 5 establishing limitations on the sale of reclamation water, and section 8 requiring water rights to be appurtenant to irrigated land and applying the beneficial use doctrine).

Second, the court addressed the parties' competing claims pursuant to California and Oregon state law. The United States predicated its assertion of controlling rights to the Klamath Project water on reclamation legislation passed by California and Oregon.¹⁴³ The court concluded that the federal government was vested with the unappropriated water rights associated with the Klamath project.¹⁴⁴ Plaintiffs countered by asserting the beneficial use doctrine and argued that this concept limited the scope of the water rights acquired by the United States, thereby leaving room for their assertion of contrary rights under state law.¹⁴⁵ The court rejected the plaintiffs' claims and then undertook to determine if they held water rights predicated on contracts with the federal government.¹⁴⁶

Last, the court addressed the various contract claims and takings claims.¹⁴⁷ It concluded that the remedy for any alleged infringement of the plaintiffs' contract rights lay in the form of a contract claim, not a Fifth Amendment taking claim.¹⁴⁸ Notably, the extent of the contract claims remained unclear for the court particularly in regard to contracts absolving the government from

¹⁴³ *Klamath*, 67 Fed. Cl. at 523. California's statute authorized the United States to lower the water levels of designated lakes, one of which was the Lower or Little Klamath Lake. 1905 Cal. Stat., p. 4 (Feb. 3, 1905); *Klamath*, 67 Fed. Cl. at 523. The purpose of the authorization was to facilitate irrigation and reclamation by the Irrigation Service of the United States. *Id.* By the same statute, the state conveyed to the federal government all of the state's interest to any land uncovered as a result of lowering the water levels and which the state had not disposed of already. *Id.* Oregon enacted a similar statute allowing the United States to appropriate certain waters within the state. Or. Gen. Laws, 1905, Chap. 228, § 2, p. 401-02 (Feb. 22, 1905); *Klamath*, 67 Fed. Cl. at 523. In a separate law, Oregon's legislature "authorized the raising and lowering of Upper Klamath Lake . . . allowed the use of the bed of Upper Klamath Lake for storage of water for irrigation" and again conveyed to the United States any claim the state had in land uncovered as a result of lowering the water levels (or draining the lakes) which had not previously been disposed of by the state of Oregon. Or. Gen. Law, 1905, ch. 5§§ 1-2, p. 63-64; *Klamath*, 67 Fed. Cl. at 523.

¹⁴⁴ *Klamath*, 67 Fed. Cl. at 524.

¹⁴⁵ *Id.* at 525.

¹⁴⁶ *Id.* at 526.

¹⁴⁷ Regarding pre-1905 potential interests vested in plaintiffs, the United States asserted that any such rights had been acquired by the Bureau of Reclamation and integrated into the Klamath Irrigation Project. *Klamath*, 67 Fed. Cl. at 526. Plaintiffs did not seriously contest this assertion. *Id.*

¹⁴⁸ "Taking claims rarely arise under government contracts because the Government acts in its commercial or proprietary capacity in entering contracts, rather than in its sovereign capacity. . . . Accordingly, remedies arise from the contracts themselves, rather than from the constitutional protection of private property rights. . . ." *Klamath*, 67 Fed. Cl. at 531.

liability for shortages in water delivery resulting from causes such as drought.¹⁴⁹ In the event of contracts not containing the “broad water shortage clauses,” the court opined that the sovereign acts doctrine could protect the federal government from contract liability.¹⁵⁰ The court noted judicial authority for a finding that the federal government’s enactment of the ESA and its enforcement of the Act were and are sovereign acts that override contractual obligations of the Bureau of Reclamation to provide water.¹⁵¹

Private water users sometimes attempt to elevate their long-term reliance on water access to a legal entitlement to a certain amount of annual water appropriation.¹⁵² When private water users cause “substantial impairment of the public interest in the . . . waters”¹⁵³ though, the private interest should yield to the overwhelming public character of the property.¹⁵⁴ The *Klamath* court did not apply a public trust analysis to settle the question of whether the plaintiffs had cognizable usufructuary interests in the subject waters. Had it done so, it could have, perhaps, avoided some of the needless blurring between contract rights and water use rights.¹⁵⁵

The first question in *Klamath* and in any takings case is whether the plaintiff has any property right or entitlement as against the government.¹⁵⁶ The second and equally important inquiry, in the case of water law, is what is the nature of one’s property right in water? If

¹⁴⁹ *Klamath*, 67 Fed. Cl. at 535.

¹⁵⁰ *Id.* at 536.

¹⁵¹ *Id.* at 537.

¹⁵² See, e.g., *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892). More than 100 years ago, the United States Supreme Court held in *Illinois Central Railroad Co. v. Illinois* that states cannot contract away management or control of public trust property. And while the issue of a Fifth Amendment takings claim arose in that case, it was based upon unique facts causing the Court to anticipate the possible result under a takings analysis if the railroad company could prove it had made valuable improvements to the subject property. *Id.* at 455.

¹⁵³ *Illinois Cent. R.R.*, 146 U.S. at 453.

¹⁵⁴ *Id.*

¹⁵⁵ Gray, *supra* note 133, at 3-4.

¹⁵⁶ *Id.*

contract rights are the source of a water user's rights, as was asserted, at least in part in *Klamath*, it seems a public trust doctrine approach would have provided a more expeditious and direct analysis.

B. A Lesser Alternative: Stricter Adherence to the Prior Appropriation Doctrine¹⁵⁷

Because of the historic shortage of water in the West, water law in those states developed differently than in the eastern states.¹⁵⁸ In the East, the riparian rights doctrine dominated and water was “treated as a kind of common property. . . .”¹⁵⁹ The western states rejected this doctrine in favor of the prior appropriation doctrine, one of the primary engines for the commodification of water.¹⁶⁰ According to this system of water distribution and entitlement, water is treated as a form of private property and loses the communal qualities with which it is imbued under a riparian rights regime.¹⁶¹

During the early history of the western states, water rights based upon the appropriative system “were affixed with sweeping generosity.”¹⁶² The development of water law has ushered in a period of “increasing toughness”¹⁶³ in the administration of appropriative water rights but, as

¹⁵⁷ *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

The rule generally recognized throughout the states and territories of the arid region was that the acquisition of water by prior appropriation for a beneficial use was entitled to protection; and the rule applied whether the water was diverted for manufacturing, irrigation, or mining purposes. The rule was evidenced not alone by legislation and judicial decision, but by local and customary law and usage as well.

Id. at 154.

¹⁵⁸ Andreen, *supra* note 1, at 4

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Cohen, *supra* note 1, at 1853.

¹⁶³ *Id.*

in most areas of the law, the pendulum may yet swing in the direction of the past, one in which the casual affixation of private usufructuary rights resulted in costly mistakes.¹⁶⁴

Stricter adherence to the prior appropriation doctrine, meaning a move toward the more generous approach to appropriative rights characteristic of the past, is a less beneficial alternative to this Article's suggestion to adopt a more robust public trust doctrine.¹⁶⁵ A rigorous application of prior appropriation principles can result in the *de facto* privatization of a community's water resources and also to waste, defined quantitatively as the over-appropriation of a state's surface waters.¹⁶⁶ The private property model of ownership for real property is generally recognized as inapposite to the realities of natural water resources.¹⁶⁷ Water's fluidity and migratory nature, as well as its indispensability to societal growth and development, compel the rejection of a real property, absolute ownership model, and favor a use model in which interested parties enjoy a right of use that is less complete than the more familiar fee simple absolute ownership model of real property.¹⁶⁸

¹⁶⁴ *Id.*

¹⁶⁵ Roy Whitehead, Jr. et al., 9 ALB. L. ENVTL. OUTLOOK J. 313, 318-19 (2004).

¹⁶⁶ Cohen, *supra* note 1, at 1833-34 (discussing the public trust doctrine as a means of addressing over-appropriation). Of course, waste can also be understood and discussed from the perspective of water quality. *See, e.g.,* Mary Ann King & Sally K. Fairfax, *Beyond Bucks and Acres: Land Acquisition and Water*, 83 TEX. L. REV. 1941, at IVA (2005) (discussing water quality concerns in the context of conservation easements); Cohen, *supra* note 1, at 1817-19 (discussing water markets); *infra* notes (218, 240) and accompanying text (discussing water privatization).

¹⁶⁷ *In re* Water Use Permit Applications, 94 Haw. 97, 180 (2000). For a thoughtful discussion of the pro and anti-market positions operating in the debate on water law policy, see Cohen, *supra* note 1, at 1809.

¹⁶⁸ *In re* Water Use Permit Applications, 94 Haw. at 180-81; Cohen, *supra* note 1, at 1819.

But the elemental fact fueling the issues that scarcity serves up is that water is the basis for life. Where there have been failed experiments in privatization and weak political regimes, the stakes that have brought distributive justice questions into the water delivery arena have proven to be feverishly high. Where allocative decisions regarding water have been linked to class injustice on a national scale, as in South Africa and Brazil, these societies, in the midst of their recent experiences with political molt, have included egalitarian water rights within their new democratic-constitutional schemes.

Id.

“The basic rules of prior appropriation effectively lock in established water uses and allow them to continue without change. . . . [W]ater rights last forever, and their terms are rarely amended to reflect changed conditions.”¹⁶⁹ Water rights vest when the appropriator diverts water for what is considered to be a beneficial use, making the beneficial use doctrine one of the few constraints on the first appropriator.¹⁷⁰ But, the beneficial use doctrine as initially conceived was a weak constraint because western states applied the doctrine by defining “beneficial use in terms of diversions of water out of streams and considered water left in a stream as effectively wasted.”¹⁷¹

The first appropriator has an absolute right, subject to the beneficial use doctrine, to take an unlimited quantity of water, for use at any location, no matter how distant from the water source, even if it causes the water source to be completely depleted.¹⁷² The first water appropriator obtains an exclusive use right regardless of the number of junior would-be claimants or the meritoriousness of their proposed uses relative to those of the first claimant.¹⁷³ “These water rights typically last forever as long as they are used”¹⁷⁴

¹⁶⁹ Benson, *So Much Conflict*, *supra* note 3, at 51.

¹⁷⁰ Whitehead et al., *supra* note 165, at 318-19.

¹⁷¹ Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257, 258 (1990).

¹⁷² There is no requirement that property bordering the water source receive any form of benefit or entitlement. *Id.*

¹⁷³ Whitehead et al., *supra* note 165, at 318-19; *Nevada v. United States*, 463 U.S. 110, 125-26 (1983); *Irwin v. Phillips*, 5 Cal. 140 (1855) (one of the first cases upholding the doctrine of prior appropriation).

¹⁷⁴ Benson, *So Much Conflict*, *supra* note 3, at 35; “When something as important as water is scarce, those who control it can be powerful indeed. The fear of concentrated power and control over resources in the developing West shaped water law generally and the beneficial use doctrine [an indispensable component of the prior appropriation doctrine] in particular.” Neuman, *supra* note 73, at 963.

The requirement of actual beneficial use to the vesting of appropriated water rights was intended to prevent monopolization and water speculation.¹⁷⁵ But the basic elements of the prior appropriation doctrine, even when tempered by beneficial use requirements, present strong indicia of a private property regime with the accompanying rights of private control over access and alienation.

In *National Audubon Society v. The Superior Court of Alpine County*¹⁷⁶ (the Mono Lake case), the California judiciary, for the first time, considered the interplay between the public trust doctrine and the prior appropriation doctrine.¹⁷⁷ The court's decision, finding that Los Angeles's water rights could be reduced by the public trust doctrine, was an exception to the trend favoring economic considerations over environmental concerns in the developing conflict between water appropriators and conservationists.¹⁷⁸ "[O]ne old tool – the public trust doctrine – [was employed] to revise rights granted under another – the doctrine of appropriative rights."¹⁷⁹

Mono Lake was at the center of the *National Audubon* dispute. It is one of North America's oldest lakes being at least 760,000 years old and one of the largest lakes in the State of California.¹⁸⁰ In 1940, the California Water Resources Board granted permission to the

¹⁷⁵ Neuman, *supra* note 73, at 964; State Dep't of Ecology v. Grimes, 121 Wash. 2d 459, 467-68 (Wash. 1993). Determining whether the beneficial use doctrine has been complied with requires consideration of two elements of water law. *Id.* at 468. First, beneficial use refers to the types of activities and purposes for which water is being used. *Id.*

Second, one must consider whether the appropriator is engaging in a reasonable use of water meaning, once the beneficial use has been established, the question becomes what amount of water is necessary to achieve the beneficial use. *Id.*

Use in excess of this determined amount would potentially constitute a breach of the doctrine. *Id.*

¹⁷⁶ 658 P.2d 709 (Cal. 1983).

¹⁷⁷ *Id.* at 712.

¹⁷⁸ Benson, *So Much Conflict*, *supra* note 3, at 50-51.

¹⁷⁹ Cohen, *supra* note 1, at 1833.

¹⁸⁰ <http://www.monolake.org/naturalhistory/stats.htm> (last visited Aug. 1, 2005); *National Audubon*, 658 P.2d at 711.

Department of Water and Power of the City of Los Angeles to “appropriate virtually the entire flow of four of the five streams flowing into the lake.”¹⁸¹ The diversions lowered the lake’s water level and diminished the lake’s surface area by one-third.¹⁸² Between 1940 and 1983, the year *National Audubon* was decided, lake levels fell from 6,417 feet above mean sea level to 6,378.6 feet above mean sea level.¹⁸³ Continued diversions at projected amounts were certain to threaten the scenic and ecological conditions of the lake.¹⁸⁴

National Audubon sued to enjoin the diversions alleging that Mono Lake’s bed, waters, and shores were protected by the public trust doctrine.¹⁸⁵ For the first time in California’s history, the court had to determine the relationship between the public trust doctrine and the appropriative water rights system that had dominated the state’s water law since the era of the California gold rush.¹⁸⁶ The court began by noting that the public trust doctrine and the appropriative rights system represented a clash of values and ideologies, all highlighted by the case before it.¹⁸⁷ Mono Lake, a natural resource of scenic and ecological significance of national proportions, would certainly be harmed by continued diversions of water.¹⁸⁸ Yet, at the same time, the court could not ignore the City of Los Angeles’s apparent need for water, “its reliance

¹⁸¹ *National Audubon*, 658 P.2d at 711.

¹⁸² *Id.*

¹⁸³ <http://www.monolake.org/live/lakelevel/yearly.htm> (last visited Aug. 1, 2005); *see also* Kootenai Env’tl. Alliance, Inc. v. Panhandle Yacht Club, Inc. 105 Idaho 622, 630-31 (1983) (discussing lake diversions and their impact on Mono Lake).

¹⁸⁴ *National Audubon*, 658 P.2d at 711.

¹⁸⁵ *Id.* at 712.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

on rights granted by the [Water Resources Board], [and the substantial] cost of curtailing diversions”¹⁸⁹

The court described California’s water law as an integration of the public trust doctrine and of the appropriative rights doctrine and held that in striking the balance between the two, state authorities must be afforded the right to grant usufructuary rights to divert water from the tributaries of navigable bodies such as Mono Lake.¹⁹⁰ In holding that the public trust doctrine is not subordinate to vested water rights, the court stated the following:

[T]he foregoing . . . 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 or to the enforcement of the trust against lands long thought free of the trust. . . . except for those rare instances in which a grantee may acquire a right to use former trust property free of trust restrictions, the grantee holds subject to the trust, and while he may assert a vested right to the servient estate (the right of use subject to the trust) and to any improvements he erects, he can claim no vested right to bar recognition of the trust or state action to carry out its purposes.¹⁹¹

Importantly, the court acknowledged the dual nature of the state’s water rights system with the public trust doctrine safeguarding important community values and access to community resources, and the prior appropriation doctrine helping to insure the continued economic development of the state.¹⁹² The court structured a resolution according to which, “[o]nce the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be *incorrect in light of current knowledge or inconsistent with current*

¹⁸⁹ *National Audubon*, 658 P.2d at 712.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 723; *Kootenai*, 105 Idaho at 631 (affirming that the public trust doctrine takes precedent over vested water rights).

¹⁹² *National Audubon*, 658 P.2d at 727-28.

needs.”¹⁹³ Thus, when the interests protected by the prior appropriation doctrine undermine public trust purposes, *National Audubon* stands for the proposition that the state’s public trust duties impose not only a duty of continuing supervision, but even a duty to reallocate previously designated resources.¹⁹⁴

The first in time is first in right philosophy that underlies the prior appropriation doctrine was essential to early western interests as it assured developers that they would continue to enjoy their exclusive access to waters put to beneficial use, undisturbed by those coming later.¹⁹⁵ But, this philosophy “is a rule of capture, a blunt instrument, one of the most primitive forms of property ownership.”¹⁹⁶ Expansion of the public trust doctrine does not threaten beneficiaries of the prior appropriation doctrine as long as they do not benefit at the expense of the public interest.¹⁹⁷ “State trusteeship means that in so allocating waters, the state authorities must act in the public interest.”¹⁹⁸

Historic uses of water must be flexible enough to accommodate present needs.¹⁹⁹ Though the balance is a delicate one, the current resistance to change that may attend my proposal should

¹⁹³ *Id.* at 728 (emphasis added).

¹⁹⁴ “[T]he state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.” *National Audubon*, 658 P.2d at 728.

¹⁹⁵ *Arizona v. California*, 460 U.S. 605, 620 n.11 (1983).

¹⁹⁶ *Wilkinson*, *supra* note 24, at 469.

¹⁹⁷ Innumerable sources are ripe for citation in support of this proposition. One of the most eloquent expressions is Professor Carol Rose’s discussion of public rights and private property in the context of then recent regulatory takings legislation.

Just as a private owner should not suffer expropriation for the neighborly act of allowing the public to use his land when it caused him no inconvenience, neither should the public’s rights be expropriated simply because a private party used common resources at a time when those resources were not scarce or congested and when it would have been “churlish” for public officials to try to prevent private use.

Id.

¹⁹⁸ *Trelease*, *supra* note 108, at 648-49.

¹⁹⁹ MARC REISNER & SARAH BATES, *OVERTAPPED OASIS: REFORM OR REVOLUTION FOR WESTERN WATER* 137 (1990).

not be discouraging. The development of water laws in the West required a breaking of traditions – cultural, legal, and economic.²⁰⁰ The resulting dismantlement of the traditional doctrine of riparian water law and the embrace of the new doctrine of prior appropriation water law was, for the times, a radical change.²⁰¹ Such changes were and are still viewed by many as necessary to the development and transformation of the American West into what it has become today.²⁰² The doctrine of prior appropriation benefits those who are both intolerant of change and presently entitled to appropriate the full extent of water resources they desire.²⁰³ The deficiencies of the prior appropriation doctrine require another transformation of western water law, in the same spirit of the transformation that ushered in the prior appropriation doctrine as a replacement to the doctrine of riparian rights.²⁰⁴ The doctrine of prior appropriation encourages inefficiencies in water consumption and is often inapposite to environmental protection and conservation.²⁰⁵ “[A]lthough western water law has been modernized in some respects, prior

²⁰⁰ *Id.* at 145.

²⁰¹ *Id.*; see also *State ex rel. State Game Comm'n v. Red River Valley Co.*, 182 P.2d 421 (N.M. 1945) (discussing the doctrine of prior appropriations as superseding the doctrine of riparian water rights in many western states, including New Mexico).

²⁰² *E.g.*, REISNER & BATES, *supra* note 199, at 145; *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

²⁰³ REISNER & BATES, *supra* note 199, at 146.

²⁰⁴ Over time, government has begun to perceive that

property rights in water are not only restrictively defined, but the definitions *open anticipate changes* that may diminish or abolish uses that were once permitted. For example, the requirement that uses be reasonable and beneficial, and not wasteful, is central to water law doctrine. In a leading California case . . . , the California Supreme Court noted: “What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.”

Joseph L. Sax, *Rights that “Inhere in the Title Itself”*: *The Impact of the Lucas Case on Western Water Law*, 26 LOY. L.A. L. REV. 943, 951 (1993) (citations omitted); Sax, *Constitution, Property Rights*, *supra* note 171, at Part I (discussing the constitutional status of water rights as less protected than other forms of property rights). “It is not unconstitutional for regulation to constrain pre-existing uses or rights that were legal when initiated. Retroactivity is *not* the test of compensability.” Sax, *Constitution, Property Rights*, *supra* note 171, at 260.

²⁰⁵ REISNER & BATES, *supra* note 199, at 146.

appropriation presents a classic example of how the passage of time and a changed social consciousness can make legal rules archaic.”²⁰⁶

The public trust doctrine strongly supports public claims of access to scarce water resources.²⁰⁷ Water, perhaps more than any other resource, has an inherently public essence due to its very nature as essential to life and to development.²⁰⁸ Water is a vital common resource and government intervention to protect its quality, quantity, and to insure its most socially beneficial use is appropriate.²⁰⁹ Water’s public essence “leads to a public, nontransferable obligation to maintain water resources for the benefit of the public purposes [it] serve[s].”²¹⁰ Enhancing government’s role through broader application of the public trust doctrine is an efficient means of using an existing and familiar doctrine to reach a necessary result.²¹¹

III. IMPLICATIONS OF A MORE ROBUST PUBLIC TRUST DOCTRINE

A. Public Ownership Allows for Greater Decentralization Without Infringing on Properly Vested Private Property Rights

Public rights are equally important as private rights in a democratic government because the ultimate goal of democratic institutions is the maximization of the sum of all resources, both

²⁰⁶ Wilkinson, *supra* note 24, at 469.

²⁰⁷ See Rose, *Comedy of the Commons*, *supra* note 24, at 722 (discussing traditional uses of the public trust doctrine).

²⁰⁸ See *id.* at 713 (discussing increased public access to waterways and what some consider to be a public need for greater public access to water resources); Neuman, *supra* note 73, at 964 (discussing concerns about speculation and monopoly that influenced the development of many western states’ water codes).

²⁰⁹ See, e.g., Neuman, *supra* note 73, at 949 (discussing government’s role in safeguarding common resources); Sax, *Constitution, Property Rights*, *supra* notes 171, 271-277 (discussing water appropriators as a source of water pollution and supporting the right of the public to have state government sustain and protect the waters within its boundaries); Rose, *A Dozen Propositions*, *supra* note 19, at 265-98 (discussing the changing nature of private rights in water to reflect changed societal conditions).

²¹⁰ Cohen, *supra* note 1, at 1847 (discussing John D. Leshy’s article, *A Conversation About Takings and Water Rights*, 83 TEX. L. REV. 1985 (2005)).

²¹¹ See Brown, *A Time to Preserve*, *supra* note 6, at VI.D. (discussing the numerus clauses principle). Expansion of the public trust doctrine’s scope as discussed above does not violate this ancient civil law doctrine that has become widely respected in the American common law tradition).

public and private.²¹² Decentralization of real property disperses the benefits of property access among a broad segment of the public; this type of decentralization is the hallmark of a democratic system that affords its citizens both dignity and liberty in reasonable amounts.²¹³ Just as with property rules governing real property, water law must evolve to give citizens increased access to bodies of water that hold a legitimate potential for public use and enjoyment.²¹⁴

“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.”²¹⁵ Citizens should have guaranteed access to biologically diverse, highly functioning, and healthy ecosystems; a broader application of a public trust doctrine with redefined purposes has the potential of creating this access.²¹⁶

²¹² Rose, *A Dozen Propositions*, *supra* note 19, at 298; Brown, *Taking the Takings Claim*, *supra* note 18, at 35-36 n.165 (quoting Richard A. Epstein for the proposition that one of the most important purposes of democratic institutions such as governments is maximizing social welfare).

²¹³ Brown, *A Time to Preserve*, *supra* note 6, at Part V; Brown, *Taking the Takings Claim*, *supra* note 18, at 46-47; Carol Necole Brown, *Casting Lots: The Illusion of Justice and Accountability in Property Allocation*, 53 *BUFF. L. REV.* 65, 66 n.1 (2005).

²¹⁴ *Infra* Part III and accompanying text.

²¹⁵ Sax, *Public Trust Doctrine*, *supra* note 30, at 474 (1970); Rose, *A Dozen Propositions*, *supra* note 19, at 277-82 (discussing the significant traditional role of federal and state courts in evolving the scope of public rights and resources and stating that courts were generally willing to intervene when legislatures seemed inclined to cede public rights to private interests). Of course, the public trust doctrine is judicially constructed law and as such varies among the various states as well as at the federal versus state level. Brown, *A Time to Preserve*, *supra* note 6, at 145-46 n.274.

²¹⁶ Brown, *A Time to Preserve*, *supra* note 6, at Part VI.C.2.; Frazier, *supra* note 41, at 356. Professor Frazier also discusses deficiencies of the public trust doctrine as a tool for achieving biological diversity:

- (1) as judge-made law, the particulars of the public trust doctrine vary widely from state to state;
- (2) the public trust doctrine is developed in a piecemeal fashion, as a result of the vagaries of litigation, without the unifying structure of a statute or a constitutional provision;
- (3) the public trust doctrine, in its present form, is not well suited for the protection of plants; and
- (4) courts currently use the public trust doctrine to protect public use of a resource, not to protect the resource itself.

Id. at 356-57 (citing the work of Holly Doremus). Of course, in the context of water law, the public’s interest in waters governed by the public trust doctrine would be usufructury in nature; thus, item number four in Professor’s Frazier of public trust shortcomings would not be a drawback in the context of water law. *See, e.g., National*

The expansion of public rights of water access will, as with most environmental law disputes, engender conflicts between the expectations of private property owners, or in the case of water law, prior appropriators engaged in beneficial use of waters,²¹⁷ and the expectations of the public, or common property owners.²¹⁸ A more robust public trust doctrine is not synonymous with the destruction of *properly vested*²¹⁹ private property rights and well-settled, private-party investment expectations.²²⁰ “Property rights emerge when it becomes economically rational for affected persons to internalize external costs and benefits.”²²¹ Past extensions of the public trust doctrine have resulted in increases of the public’s welfare over an extended period of time.²²² Further applications of public trust principles, as set-forth herein, hold the same promise for long-term maximization of the public welfare.²²³ The essentiality of water to individual survival and societal growth compel close consideration of the notion that

Audubon, 658 P.2d at 723-24 (Cal. 1983) (discussing the ecological and biological diversity dependent upon the sustenance of Mono Lake for its continued survival).

²¹⁷ *E.g.*, *Galt v. Montana*, 225 Mont. 142 (1987). “The real property interests of private landowners are important as are the public’s property interest in water. Both are constitutionally protected. These competing interests, when in conflict, must be reconciled to the extent possible.” *Id.* at 148; *Brown, A Time to Preserve*, *supra* note 6, at Part IV (discussing expectations of future generations in the context of real property and perpetual conservation easements).

²¹⁸ *Frazier*, *supra* note 41, at 299 n.4; *e.g.*, *National Audubon*, 33 Cal. 3d at 440 (discussing vested rights in the context of the public trust doctrine).

²¹⁹ *National Audubon*, 658 P.2d at 723.

Except for those rare instances in which a grantee may acquire a right to use former trust property free of trust restrictions, the grantee holds subject to the trust, and while he may assert a vested right to the servient estate (the right of use subject to the trust) and to any improvements he erects, he can claim no vested right to bar recognition of the trust or state action to carry out its purposes.

Id.

²²⁰ *Infra* Part III.B. and accompanying text.

²²¹ *Brown, A Time to Preserve*, *supra* note 6, at Part IV.A.

²²² *Id.* (discussing rule-utilitarianism which focuses on long-term welfare maximization); *supra* Part II.A.1. (discussing the history of broadening the scope of the public trust); *supra* Part II.B. (stating that when public trust purposes conflict with the prior appropriation doctrine, public trust purposes must prevail).

²²³ *See Brown, A Time to Preserve*, *supra* note 6, at Part IV.A. (discussing the appropriate measure of efficiency gains in the context of scarce resources).

water use interests should lie more in the public property/“public domain”²²⁴ than in the realm of private property.

The tradition of publicly held rights is well-established in the United States. Care must be taken to insure that the public interest in inherently public resources is not lost sight of in the effort to define the nature of private interests in these very same resources.²²⁵ Roman lawyers recognized the nature of some tangible property as being that of *res communes*, possessing a character that made such tangibles as the ocean difficult if not impossible to exclusively appropriate.²²⁶ Relatedly, and at times confusingly,²²⁷ Roman law recognized other tangibles as *res publicae*, things that belonged to the public and to which the public gained access by operation of law.²²⁸ Examples included ports, harbors, and perpetually flowing rivers.²²⁹ The prevalent idea in American jurisprudence of a public trust securing for its citizens an interest in certain resources is closely akin to resources belonging to Roman law’s *res publicae*.²³⁰ Neither

²²⁴ Carol M. Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, 66 LAW & CONTEMP. PROBS. 89 (2003).

²²⁵ Rose, *A Dozen Propositions*, *supra* note 19, at 268; Leshy, *supra* note 74, at 1985 (discussing, generally, the dynamic conflict between private parties in protecting usufructuary water interests and government in reallocating water to fulfill important public purposes and without the need to pay compensation).

²²⁶ WILLIAM A. HUNTER, INTRODUCTION TO ROMAN LAW 65 (rev. 9th ed. 1934); Daniel R. Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 CORNELL L. REV. 761, 800-02 (1979); compare Rose, *Romans, Roads*, *supra* note 224, at 93 (discussing *res nullius* (things belonging to no one), *res communes* (things open to all by their nature), and *res publicae* (things belonging to the public and open to the public by operation of law) as examples of non-exclusive types of property according to Roman law), with Brown, *A Time to Preserve*, *supra* note 6, at 147 (discussing the *jus privatum* (the private property right), *jus publicum* (the public trust), and *jus regium* (the power of regulation) in the context of the public trust doctrine). The Roman law forms of nonexclusive properties captured by Professor Rose are rough analogous to the distinct interest in trust resources identified by the United States Supreme Court in the seminal public trust case, *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892).

²²⁷ Rose, *Romans, Roads*, *supra* note 224, at 96.

²²⁸ WILLIAM W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 184 (rev. 3d ed. 1963); WILLIAM A. HUNTER, INTRODUCTION TO ROMAN LAW 59-60 (rev. 9th ed. 1934); ANDREW BORKOWSKI, TEXTBOOK ON ROMAN LAW 143 (1994); Rose, *Romans, Roads*, *supra* note 224, at 96.

²²⁹ Rose, *Romans, Roads*, *supra* note 224, at 96.

²³⁰ *Id.* at 97; *supra* notes 226-232 (discussing the relatedness between Professor Roses’ discussion of Roman law categorization of nonexclusive property and the categorizations as developed within the public trust doctrine).

doctrine is inapposite to traditional notions of private property as developed in the American legal system.²³¹ The proper balance between safeguarding private property entitlements and securing public access to resources inherently public in nature increases efficiency gains for the masses of people by balancing society's need to protect essential natural resources and citizens' needs for structured and stable property regimes.²³²

B. Analogies: Conservation Easements,²³³ Water Trusts, and the Public Trust Doctrine

Until it becomes a commodity, many in the market will not pay attention to the environmental condition; it is not part of the public's psyche.²³⁴ "Many interest groups, from conservative business leaders to environmental groups, are calling for water to move more freely in response to market forces. It appears, then, that the twenty-first century goals regarding . . . the treatment of water as an economic commodity . . . may be somewhat mixed and even conflicting."²³⁵ We have begun to experience the consequences of efforts to commodify water

²³¹ Rose, *Romans, Roads*, *supra* note 224, at 103.

²³² Brown, *A Time to Preserve*, *supra* note 6, at Part VI; *see, e.g.*, Neuman, *supra* note 73, at 963 (noting that control of water resources creates dangers of concentrated power and, inferentially, power imbalances).

²³³ For a detailed discussion of conservation easements, *see* Brown, *A Time to Preserve*, *supra* note 6, at 85. My approach to the water law dilemma through exploration of and reference to the conservation easement, an increasing popular tool for land conservation, is not novel. For an extremely detailed and thoughtful discussion of the convergence and linkages between land and water systems and the methods of conserving both, with reference to conservation easements and water trusts, *see* King & Fairfax, *supra* note 166, at 1941 (discussed *infra*).

²³⁴ THE CORPORATION, *supra* note 131 (Chapter 9, Trading on 9/11 and paraphrasing Carlton Brown, Commodities Trader); *see also* King, *supra* note 52, at 497 (discussing the support and opposition to water trusts as a market-based approach to solving environmental concerns regarding water quality and abundance). Water trusts as a "public-private partnership[] have . . . rais[ed] questions of their democratic legitimacy, [and] the appropriateness of the use of public funds for private purposes. . . . *Id.*; *see also* Brenden O' Shaughnessy et al., *Water Company Awash in Controversy; Veolia Hasen't Broken Rules, Its President Says*, INDIANAPOLIS STAR, Oct. 7, 2005, at 1A (discussing objections and problems attending the hiring of a private company by the city of Indianapolis to run the city's water utility). "[O]fficials hailed the public-private partnership as a victory for customers. *Id.* "[E]nvironmental groups, . . . and [others] say water should be treated as a public trust rather than a commodity." *Id.*

²³⁵ Neuman, *supra* note 73, at 974; Cohen, *supra* note 1, at Part IV.B. (articulating the case for and against a market-based solution to the water dilemma).

through privatization; we are beginning to see a private taking of the water commons.²³⁶ Clean, abundant water is a form of wealth and is created by forces external to mankind.²³⁷ “Capturing it, bounding it through privatization, is not wealth creation but rather wealth usurpation.”²³⁸

Water is too essential to the public good to be commodified and treated as mere business opportunities; it rightfully enjoys a history of protection through public regulation and tradition.²³⁹ Emerging new boundaries for the public trust doctrine can help respond to our changing societal condition by further protecting the water commons.

In the natural environment, land and water are inextricably mixed; it is impossible to experience one, at least for any significant amount of time, without the other.²⁴⁰ But when it comes to conservation, real property conservation tools differ significantly from those available for water conservation.²⁴¹ And it is sound to acknowledge these inherent differences by addressing them through mechanisms specific to the essence of the particular resource. In a recent article, Sally K. Fairfax and Mary Ann King explored the propriety of using conservation

²³⁶ THE CORPORATION, *supra* note 131 (Chapter 10, Boundary Issues, Jeremy Rifkind, President, Foundation on Economic Trends commenting and discussing forms of environment commodification: air commodified through division of air into private air corridors for flight privileges, great land masses converted into private property; entitlements to exclusive exploitation of the oceans within determined distances from their borders allocated to countries and Elaine Bernard, Executive Director, Trade Union Program, Harvard, discussing wealth creation and usurpation and privatization of the public commons); Cohen, *supra* note 1, at 1817-19 (discussing privatization of water and some of the negative attending consequences).

²³⁷ See Brown, *Taking the Takings Claim*, *supra* note 18, at Part IV.C.1. (discussing definitions and conceptualizations of wealth); THE CORPORATION, *supra* note 131 (Chapter 10, Boundary Issues, Elaine Bernard, Executive Director, Trade Union Program, Harvard, discussing wealth creation and usurpation and privatization of the public commons).

²³⁸ THE CORPORATION, *supra* note 131 (Chapter 10, Boundary Issues, Elaine Bernard, Executive Director, Trade Union Program, Harvard).

²³⁹ THE CORPORATION, *supra* note 131 (Chapter 10, Boundary Issues); *but see* King, *Getting Our Feet Wet*, *supra* note 52, at 495 (discussing the advantages of water markets, specifically water trusts).

²⁴⁰ Arnold, *supra* note 29, at 10160.

²⁴¹ See *id.* at 10168 (discussing the disconnections in the American legal system between property in water and property in land).

easements to address water law problems.²⁴² They concluded that numerous problems attend using conservation easements to address water quality and quantity concerns.²⁴³ My assertions are consistent with those of Fairfax and King.²⁴⁴

In the realm of real property, conservation easements²⁴⁵ have been used in the United States for more than a century to preserve and protect the environment.²⁴⁶

The concept of land transactions aimed at promoting land conservation emanated from two historical developments. The first was the creation of land trusts, which are nonprofit organizations that seek to conserve open space for the public benefit. . . . The second development in the land conservation movement was the creation, by state enabling legislation, of the conservation easement, which allowed land trusts to acquire preservation rights without purchasing use or possessory rights.²⁴⁷

Conservation easements limit the permissible uses of real property for the purpose of protecting and preserving natural resources and sensitive habitats.²⁴⁸ They produce public goods in the form of preservation and conservation of historic sites, endangered plant and animal life, natural ecosystems and landscapes, and agricultural lands.²⁴⁹

Parties interested in creating and conveying conservation easements do so in writing, typically by an instrument called either a conservation deed or easement.²⁵⁰ Grantors often own real property in fee simple absolute and contract with their grantees or holders to legally restrict

²⁴² King & Fairfax, *supra* note 166, at 1941.

²⁴³ *Id.*

²⁴⁴ *Infra* notes 245-272 and accompanying text. For a more detailed discussion of conservation easements, see Brown, *A Time to Preserve*, *supra* note 6, at 85.

²⁴⁵ For an in-depth discussion of conservation easements, see Brown, *A Time to Preserve*, *supra* note 6, at Part II.

²⁴⁶ Brown, *A Time to Preserve*, *supra* note 6, at Part II.

²⁴⁷ *Id.* at 96-97.

²⁴⁸ *Id.* at 95.

²⁴⁹ *Id.* at 92 (citing RESTATEMENT (THIRD) OF PROPERTY § 1.6 cmt. B (2000)).

²⁵⁰ See, e.g., Uniform Conservation Easement Act, National Conference of Commissioners on Uniform State Laws, § 2 (1982) (*hereinafter* UCEA) (Creation, Conveyance, Acceptance, and Duration).

the type and/or amount of development that may occur on the land that is the subject of the grant.²⁵¹ The conservation easement may impose affirmative duties on either the easement holder, the grantor of the conservation easement, or both.²⁵² “Failure to fulfill an affirmative duty may result in suits by owners of real property affected by conservation easements, holders of conservation easements, those possessing a third-party right of enforcement, or such other parties as authorized by applicable state law.”²⁵³

The conservation trust model, incorporating land trusts and conservation easements, has worked well as a tool for protecting real property and perhaps provides some explanation for the relatively recent emergence of the water trust as a tool for water resource protection.²⁵⁴ Water trusts are private organizations operating mostly in the western United States. They function

²⁵¹ THE CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS 5 (Janet Diehl & Thomas S. Barrett eds., 1988); RESTATEMENT (THIRD) OF PROPERTY § 1.6(1) (2000). Grantors may convey conservation easements to private parties and noncharitable entities as well as to governmental entities and charitable conservation organizations that qualify as conservation easement holders for purposes of the Uniform Conservation Easement Act. RESTATEMENT (THIRD) OF PROPERTY § 1.6 cmt. a (2000); Uniform Conservation Easement Act, 12 U.L.A. 70 § 1 cmt. (1981); Jon W. Bruce & James W. Ely, Jr., *Evolving and Prospective Issues*, in THE LAW OF EASEMENTS AND LICENSES IN LAND § 12:2, at 12-4, 12-5 (2001). Conveyance of a conservation easement to other than a “qualified organization,” however, will not qualify for certain tax benefits. *See, e.g.*, IRC § 170(h)(3).

²⁵² *E.g.*, UCEA § 4 (comment); Mahoney, Conservation Easements, *supra* note 24; *Richmond v. United States*, 699 F. Supp. 578, 579 (E.D. La. 1988). Plaintiffs conveyed a facade easement to the City of New Orleans to be administered by the Vieux Carre’ Commission (VCC), a governmental agency responsible for historic preservation in the French Quarter. “Before accepting the facade donation, the City of New Orleans, acting through the VCC, required a commitment that certain renovations be made to the real property.” *Id.* The plaintiff’s share of the renovation cost was nearly \$59,000. *Id.* *Missouri Coalition for the Env’t v. Conservation Comm’n of Mo.*, 940 S.W.2d 527, 530 (Mo. Ct. App. 1996). Plaintiff argued, unsuccessfully, that the public had a right to compel the state conservation agency to maintain property as “an unimproved ‘greenbelt’ area” for public use. *Id.* at 528, 530. The property had been restricted for this purpose by federal court decree as a result of litigation commenced nearly twenty years earlier. *Id.* at 528. The court found that the deed did not dedicate the property to the public; “[r]ather, it merely reiterated the restrictions set forth in the federal decree and conveyed the property to the Commission.” *Id.* at 531.

²⁵³ *Brown, A Time to Preserve*, *supra* note 6, at 96 (citing UCEA § 3(a)(1)-(4)); *see, e.g.*, VA. CODE § 10.1-1013 (2004) (stating that actions affecting conservation easements may be brought by, among others, “person[s] with standing under other statutes or common law”); TENN. CODE § 66-9-307 (2004) (stating that conservation easements may be enforced by “holders and/or beneficiaries of the easement” which phrase was interpreted to include residents of Tennessee; *Tennessee Env’tl. Council*, 2004 Tenn. App. LEXIS 155, at *3-*4, *7-*8).

²⁵⁴ *King*, *supra* note 52, at 507-11; *Cohen*, *supra* note 1, at 1826, 1835-36 (discussing the use of conservation easements “as a private-party device for placing water resources under perpetual state control).

under the assumption that the conservation land trust model may be imported to apply to certain water resources²⁵⁵ and they promote private organizations' acquisition and transfer of certain water rights.²⁵⁶

Water trusts are similar to land trusts; they are private, typically non-profit organizations that engage in market transactions to acquire water (as opposed to land) for conservation purposes by enhancing instream flows and protecting minimum flows.²⁵⁷ The idea behind water trusts has been to import the privatization model of land trusts and their conservation easements into water law. Water trusts engage in private transactions to buy consumptive usufructuary rights and convert these to instream flow water rights.²⁵⁸ Water trusts, though still relatively new and almost exclusively used in the western states, are representative of a growing trend toward a “market-based approach[] to address environmental concerns. . . .”²⁵⁹

Many prior appropriation states are already using instream flow rights as a means of addressing water conservation.²⁶⁰ Before instream uses can be incorporated into the prior appropriation system, they must be legally recognized as beneficial uses.²⁶¹ Once instream use

²⁵⁵ King, *supra* note 52, at 496-98.

²⁵⁶ *Id.* at 518; *but cf.* Janet C. Neuman & Cheyenne Chapman, *Wading into the Water Market: The First Five Years of the Oregon Water Trust*, 14 J. ENVTL. L. & LITIG. 135, Part IIIC (1999). Neuman and Chapman discuss the private versus public holding of instream rights using the State of Oregon and the Oregon Water Trust as an example. Trusts can find themselves “relegated to being only a 'broker,' merely arranging deals whereby willing sellers would turn over water rights to the State of Oregon.” *Id.* at 168. Ultimately, the Oregon Water Trust succeeded in getting the Water Resources Department to issue a form of water right in the Trust's own name. *Id.* at 170. The article nicely details some of the complexities of the public/private trade in water rights.

²⁵⁷ Neuman & Chapman, *supra* note 256, at Parts I-II.

²⁵⁸ *Id.* at 136; King, *supra* note 52, at 495 (stating that “water trusts rely upon market transactions to acquire and transfer water rights to instream uses”).

²⁵⁹ King, *supra* note 52, at 496.

²⁶⁰ *Id.* at 505 (discussing Washington and Oregon specifically); Neuman & Chapman, *supra* note 256, at 135, 170 (discussing the Oregon Water Trust in great detail and providing insights into the challenges of using market mechanisms to acquire instream rights and also noting other states such as Alaska and Arizona).

²⁶¹ King, *supra* note 52, at 505; Johnson, *supra* note 7, at 488-89 and accompanying text (discussing the beneficial use requirement as a constraint on the prior appropriation doctrine).

obtains the legal status of a beneficial use, states may then allow instream rights to be appropriated and/or they may allow existing rights to instream flows to be transferred.²⁶²

Appropriated instream flow rights “possess the priority date of [their] appropriation, while the transfer would allow the instream right to retain the senior priority date of the original right.”²⁶³

The advantage of the water trust model for many is that it pacifies many consumptive water users by using the market rather than regulation to achieve environmental protection.²⁶⁴ Importing tools from the land conservation movement into the water arena can be appealing but it ignores the deep historical and environmental distinctions between the property paradigms governing real property and water.

Ownership of land in a fee simple sense of that term is very well understood and embraced within the American property system. Water though has always been recognized as so distinct as to be outside of this understanding of property ownership. Water itself cannot be owned or privatized; rather, only the right of use, the usufruct, may be acquired. Even the most ardent private property advocates concede water’s uniquely communal nature. This concession certainly does not translate into a rejection of water markets as an appropriate means of allocating water but it can often lead to the type of conundrum encountered by the Oregon Water Trust, the first water trust in the United States.²⁶⁵

The Trust’s founding Board was . . . somewhat surprised at the amount of resistance it encountered to the voluntary sale of water rights within the community of agricultural water rights holders. It appears that some segments of the farming and ranching community hold firm to the private property rights claim when resisting government regulation or environmentalists’ criticism,

²⁶² King, *supra* note 52, at 505.

²⁶³ *Id.*

²⁶⁴ Neuman & Chapman, *supra* note 256, at 140.

²⁶⁵ *Id.* at 185.

but are more willing to consider water rights a communal resource when one of their neighbors proposes to sell a right for conversion to instream flows. In that case, the individual's right to make a voluntary deal with his own property takes a back seat to the neighbors' and interest groups' view that the water should stay on the land in irrigation rather than go in-stream to help fish.²⁶⁶

Water trusts can play a role in responding to changing environmental needs²⁶⁷ but using water trusts and water markets "to convert significant amounts of water to instream flows will be a fairly expensive proposition"²⁶⁸ and undervalues the public's entitlement to modify private usufructuary rights (without paying compensation) when exercise of these rights imposes an undue burden on the public.²⁶⁹

Requiring the public to pay to maintain instream flows in bodies of water that are important public resources allows prior appropriators to profit from water conservation efforts at significant public expense.²⁷⁰ Some contend that this result is analogous to the land trust movement with its privately negotiated conservation easements. But land and water are inherently different; these differences make the water trust, privatization model, inappropriate as the dominant model for protecting water resources.²⁷¹

²⁶⁶ *Id.* at 177; Brown, *Taking the Takings Claim*, *supra* note 18, at 52 n.246 and accompanying text (discussing shifting presumptions of value in the context of takings challenges).

²⁶⁷ For a detailed and thoughtful discussion of the benefits of water markets and of how they work, see King, *supra* note 52, at 495; Neuman & Chapman, *supra* note 256, at 137-38 (discussing the use of markets to acquire instream rights with "valuable senior priority dates"). *Id.* at 138. Neil D. Hamilton, *Plowing New Ground: Emerging Policy Issues in a Changing Agriculture*, 2 DRAKE J. AGRIC. L. 181, 194 (1997).

²⁶⁸ Neuman & Chapman, *supra* note 256, at 183.

²⁶⁹ *Supra* Part III.A. (discussing recent regulatory takings decisions and their impact on the ability of states to modify usufructuary rights without engaging in a compensable event).

²⁷⁰ John R.E. Bliese, *Conservative Principles and Environmental Policies*, 7 KAN. J.L. & PUB. POL'Y 1, 35 (1998).

²⁷¹ Reed D. Benson, *Whose Water is It? Private Rights and Public Authority Over Reclamation Project Water*, 16 VA. ENVTL. L.J. 363, 384 (1997) (stating both sides of the debate on this issue); King, *supra* note 52, at 5.

"The central idea of the public trust is preventing the destabilizing disappointment of expectations held in common but without formal recognition such as title."²⁷² The public trust doctrine is a more appropriate public model for conserving water and addressing the fresh water crisis as a human health issue than water markets.

IV. CONCLUSION

What constitutes reasonable use of water resources changes over time.²⁷³ Craig Arnold expressed most eloquently the societal struggles accompanying change and the attending benefits once the impulse to resist is overcome. I can think of no better way to conclude than with his words.

Transitions are difficult. They involve costs. They redistribute power and resources. They require adaptation to changing and perhaps unforeseen conditions. They involve letting go of some old ways of thinking and adopting new mental constructs, while not losing indiscriminately the best of existing ideas, principles, and ways of life. They involve uncertainty and ambiguity. But they are necessary and inevitable aspects of life. It is common for those who are bearing the greatest burdens of change to complain loudly and assertively but ultimately to adapt to the change.²⁷⁴

In both the distant and more recent pasts, decision-makers made “systemic mistakes involving water conservation and delivery. . . .”²⁷⁵ The present generation has inherited the consequences of these mistakes and so will future generations unless needed changes are implemented.

²⁷² Sax, *Liberating the Public Trust Doctrine*, *supra* note 30, at 188.

²⁷³ Benson, *Tulare*, *supra* note 109, at 574-75; Sax, *Constitution, Property Rights*, *supra* note 171, at 268 (stating that “change is the unchanging chronicle of water jurisprudence”).

²⁷⁴ Arnold, *supra* note 29, at 10178.

²⁷⁵ Cohen, *supra* note 1, at 1814.