

Public Trust and Water Rights: A Western States Update

Karrigan Bork,^{*} Anna Gard,^{**} and Julia Homaechevarria^{***}

Just over four decades ago, the California Supreme Court fused the state's emerging public trust doctrine with its intricate water rights system in the watershed Mono Lake decision. Perhaps most notably, the ruling allowed for the reevaluation and reduction of older water rights to protect public instream water uses. The decision rippled throughout other Western states, and scholars continue to grapple with its implications for water rights. Through a state-by-state review, this Article explores the diverse state responses to the public trust doctrine.

We draw several conclusions based on our analysis. First, this remains a tremendously active area of legal development; the trust is not a historical artifact. Second, states show significant variation in the way that the public trust relates to water law, and the path a state might take is very difficult to predict based on precedent. Third, because of this difficulty, federal courts should certify public trust questions to state courts to allow state courts to determine, in the first instance, what the public trust requires in that state. Fourth, the doctrine continues to play a significant role in preventing ossification of water law by invigorating the common law and providing flexibility for water reallocation by the state; this flexibility is likely to become ever more significant in light of climate change and changing social goals. Finally, we note an emerging convergent legal evolution toward the protection of public trust uses, although states use diverse mechanisms to achieve that goal.

DOI: <https://doi.org/10.15779/Z38W08WJ79>

Copyright © 2024 Regents of the University of California.

^{*} Acting Professor of Law, University of California, Davis. Ph.D. in Ecology (Conservation Biology), U.C. Davis; J.D., Stanford Law School; B.A. in Environmental Policy and B.S. in Biology, University of Kansas. This piece originally appeared in an abbreviated form in the proceedings of the 2023 Foundation for Natural Resources and Energy Law Special Institute. We appreciate feedback from Prof. Jesse Richardson, two anonymous reviewers, and attendees of the Special Institute.

^{**} JD, Class of 2023, UC Davis School of Law; B.S. in Environmental Policy Analysis & Planning and minor in Geographic Information Systems, UC Davis.

^{***} JD, Class of 2023, UC Davis School of Law; B.S. in Ecosystem Science and Sustainability, Colorado State University.

This overdue review provides valuable context for practitioners, scholars, and jurists wrestling with the integration of the public trust and water rights. The article sets the stage for the next forty years of water law evolution in the West.

Introduction.....	522
I. <i>Illinois Central</i> and the Minimum Public Trust	525
A. The Public Trust's Historic Context	525
B. Potential Applications of the Public Trust to Water Rights Law	527
II. States Where the Public Trust Limits Existing Rights.....	531
A. California	531
B. Hawai'i.....	536
III. States Where the Public Trust Does Not Limit Existing Rights.....	538
A. Colorado.....	538
B. Nevada	539
IV. It's Complicated	541
A. States More Likely to Apply the Public Trust	542
1. States That Apply the Public Trust to New Water Rights	542
a. North Dakota.....	542
b. South Dakota	544
c. Texas.....	547
2. States That Recognize an Inchoate Public Trust in Water....	548
a. Alaska	549
b. Oregon	553
c. New Mexico.....	556
d. Utah.....	557
e. Wyoming.....	561
B. States Less Likely to Embrace the Public Trust	563
1. States with Contrary Legislation.....	563
a. Idaho	564
b. Montana	565
c. Arizona.....	567
2. States Otherwise Unlikely to Apply the Public Trust.....	571
a. Washington	571
b. Oklahoma.....	575
c. Nebraska	576
d. Kansas.....	577
Conclusions.....	578

INTRODUCTION

Forty-two years ago, the California Supreme Court issued the groundbreaking Mono Lake decision, integrating California's strong public

trust doctrine with the state's complicated water rights regime.¹ The decision built on both state and federal public trust precedent to find that California's water rights were held subject to the state's public trust obligations.² In short, the decision recognized the state's power to reconsider and reduce older water rights and gave the public the power to challenge existing water uses.³ This presented a particularly enticing opportunity to conservationists who had long struggled to reallocate water on waterways where most of the water was claimed for out-of-stream uses before enactment of modern minimum flow protections.

The long-standing public trust traditionally protected the public's use of tidelands and navigable waterways for commerce, navigation, and fisheries,⁴ but California courts expanded the public trust in the state to include ecological and other uses.⁵ This broader vision, fleshed out in the Mono Lake decision, is often termed the "ecological" or "modern" public trust doctrine: recognition of a sovereign's responsibility to manage water for commerce and navigation, and for ecological purposes.⁶ After the Mono Lake decision, states throughout the West have struggled to determine whether and how the public trust doctrine might affect water rights in their own states.⁷ This article surveys the Western states to provide an update on the integration of the public trust and water rights law.⁸

Most aspects of the public trust defy easy characterization. Like water law, the public trust is a creature of state law, and states have developed their own versions of the public trust.⁹ Some states hew to the traditional public trust,¹⁰ while others embrace California's modern ecological public trust.¹¹ Some courts have embraced the doctrine to create broad citizen suit powers

1. Nat'l Audubon Soc'y v. Superior Ct., 658 P.2d 709 (Cal. 1983).

2. For details on the Court's holding, see *infra* Part II.A.

3. *Id.*

4. Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 435 (1892).

5. See Marks v. Whitney, 491 P.2d 374 (Cal. 1971).

6. Robin K. Craig, *A Comparative Guide to the Western States' Public Trust Doctrine* [hereinafter, Craig, *Comparative Guide*], 37 *ECOLOGY L.Q.* 53, 151–52 (2010).

7. We define Western states as those states in the continental United States on or west of the one-hundredth meridian, a traditional line of demarcation, plus Alaska and Hawai'i. See Karrigan Bork & Sonya Ziaja, *Amoral Water Markets?*, 111 *GEO. L.J.* 1335 (2023). We assume readers are familiar with the general patterns of state water law systems, dominated by appropriative systems in the dryer intermontane Western states and tending toward blended appropriative/riparian right systems in the coastal and Midwestern states. Dave Owen, *Water and Taxes*, 50 *U.C. DAVIS L. REV.* 1559, 1566 (2017). For an overview, see Joseph W. Dellapenna, *United States: The Allocation of Surface Waters*, in *THE EVOLUTION OF THE LAW AND POLITICS OF WATER* 189, 189 (J.W. Dellapenna & Joyeeta Gupta eds., 2009).

8. For other recent work in this area, see generally Craig, *Comparative Guide*, *supra* note 6; Michael Blumm, ed., *THE PUBLIC TRUST DOCTRINE IN 45 STATES* (2014).

9. See PPL Mont., LLC v. Montana, 565 U.S. 576, 603–04 (2012); District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1082 (D.C. Cir. 1984).

10. See, e.g., Kansas and Colorado, *infra* Parts V.B.2.d; IV.A.

11. See, e.g., Hawai'i, *infra* Part II.B.

over natural resource decisions,¹² while others relegate part or all of the doctrine to enforcement by the state.¹³ Some state courts view the public trust as a creation of the traditional common law, such that legislatures can override it or displace it at will, while others consider it a constitutional limit on legislative and executive powers.¹⁴ And a few states treat the doctrine as a preexisting limit on all water rights,¹⁵ while a few others reject it as a limit at all.¹⁶ Most states, however, have yet to address this issue.¹⁷ These differences don't seem to track traditional red-state/blue-state politics or any clear hydrologic differences, making them very difficult to predict. In this article, we focus on when and how the doctrine limits water rights.

In Part I, we discuss *Illinois Central Railroad*, the United States Supreme Court case that reinvigorated the public trust doctrine and set the standard for a minimum public trust that exists in all states.¹⁸ Building on that decision, we extrapolate possible ways that the public trust doctrine *could* interact with water rights law, which provides context for our state-by-state discussion. In Part II, we tell the story of California's public trust doctrine, with special attention to the case law leading up to the Mono Lake decision. The preconditions emerging from this history (broad standing, a paramount public trust interest, and geographic coverage as necessary to protect navigable waters) help explain the emergence of the modern public trust and provide clues as to which other states might embrace a similarly robust doctrine. We continue with a discussion of the trust in Hawai'i, the only state other than California where the trust clearly limits existing appropriative rights. In Part III, we contrast these two states with Colorado and Nevada, the only two states that have largely rejected the public trust as a limit on existing appropriative rights. Part IV continues by introducing the many states where the relationship between the public trust and water rights is more complicated. We separate these into states more likely and states less likely to apply the public trust as a limit to existing rights. Among the "more likely" states, we recognize three states that already apply the public trust to new appropriative rights (North Dakota, South Dakota, and Texas), and five states that recognize a more robust public trust but have not yet resolved how it applies to appropriative rights (Alaska, Oregon, New Mexico, Utah, and Wyoming). Among the "less likely" states, we observe three states with developing conflicts between legislative and judicial takes on the extent of the public trust (Idaho, Montana, and

12. California, for example, allows citizen suits to enforce fish and game laws, deeming them an expression of the public trust. See Karrigan Bork et al, *The Rebirth of Cal. Fish & Game Code 5937: Water for Fish*, 45 U.C. DAVIS L. REV. 809, 858 (2012).

13. See *Wild Fish Conservancy v. Salazar*, 688 F. Supp. 2d 1225, 1238 (E.D. Wash. 2010) (leaving enforcement of laws protecting fish passage to the state's discretion).

14. See, e.g., *infra* Part IV.B.1.c.

15. *Infra* Part IV.A.1.

16. See *infra* Part III.A.

17. See generally *infra* Part IV.A.2.

18. See Michael C. Blumm & Lynn S. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad*, 45 ENV'T L. 399, 419(2015).

Arizona), and four states that otherwise seem unlikely to recognize the public trust as a water right limitation (Washington, Oklahoma, Nebraska, and Kansas). Finally, we draw out lessons from these states and conclude.

I. ILLINOIS CENTRAL AND THE MINIMUM PUBLIC TRUST

Scholars often portray the Mono Lake decision as an unexpected new development in environmental and water rights law.¹⁹ Indeed, the facts seem surprising: the California Supreme Court, in effect, took drinking water from Los Angeles to protect a fishless, saline lake (albeit “a scenic and ecological treasure of national significance”).²⁰ But, taken in the context of federal and California public trust precedent, the decision seems less like an abrupt departure and more like a natural extension of a series of logical steps.

A. The Public Trust’s Historic Context

Wading through the history of the public trust doctrine puts the decision in context and provides some clues for what other states might do in the future. The Institutes of Justinian, a codification of Roman law, offer a sixth-century expression of the public trust: “By the law of nature these things are common to mankind—the air, running water, the sea and consequently the shores of the sea.”²¹ Similar expressions were incorporated into French, Spanish, and Mexican law,²² and the English embraced the concept, adding the idea that these resources could not be alienated by the sovereign but rather should be held in trust for the public.²³ Early U.S. cases—mostly from the U.S. Supreme Court²⁴ but occasionally from the state supreme courts²⁵—embraced a view of the public trust as an inherent aspect of sovereignty, protecting navigation, commerce, and fisheries.²⁶ Perhaps the most famous of these early cases is the U.S. Supreme Court’s decision in *Illinois Central Railroad Co. v. Illinois*.²⁷

In that case, the Illinois State Legislature sought to set aside an outright grant (by a previous state legislature) of most of Chicago’s harbor to the Illinois Central Railroad Company.²⁸ The state argued that, in its role as a

19. See generally ERIN RYAN, *THE PUBLIC TRUST DOCTRINE, PRIVATE RIGHTS IN WATER, AND THE MONO LAKE STORY*, at ch. VII (forthcoming 2026).

20. *Nat’l Audubon Soc’y v. Superior Ct.*, 658 P.2d 709, 711–12 (Cal. 1983).

21. *Id.* at 718 (internal citation omitted). But see James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENV’T L. & POL’Y F. 1 (2007) (arguing that descriptions of the public trust doctrine as rooted in Roman law are inaccurate).

22. See Richard M. Frank, *Public Trust Doctrine*, CALIFORNIA ENVIRONMENTAL LAW & LAND USE PRACTICE §§ 2.01, 2–6 (Bender ed., 2021).

23. *Id.*

24. See Erin Ryan, *From Mono Lake to the Atmospheric Trust: Navigating the Public and Private Interests in Public Trust Resource Commons*, 10 GEO. WASH. J. ENERGY & ENV’T L. 39, 43–46 (2019) (collecting and discussing cases).

25. *Arnold v. Mundy*, 6 N.J.L. 1, 72 (1821).

26. See Ryan, *supra* note 24.

27. 146 U.S. 387, 435 (1892).

28. *Id.* at 438, 450–51.

trustee of the submerged land for the benefit of the public, it lacked the power to totally alienate the property.²⁹ The Supreme Court agreed. First, the Court found that the public trust, traditionally limited to tidal waters, applied with equal force to inland navigable waters.³⁰ Second, the Court held that the lands under the navigable waters were not held as lands “intended for sale,” but rather as a “trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.”³¹ The Court found:

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 . . . The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.³²

In this decision, the Supreme Court laid out the foundational public trust applicable to all the navigable waters and their underlying lands in all states. In short, the Court held that the trust requires management and control of trust property by the state for the public, that the state cannot dispose of trust assets except within narrow limits, and that the legislature *lacked the power* to alienate trust property via the original Illinois legislation.

The public trust is state law,³³ and some states have sought to minimize the application of the trust.³⁴ Nevertheless, all states carry at least some version of this trust; it is the minimum degree of oversight a state must provide, established by *Illinois Central* and myriad other federal precedents.³⁵ With this

29. *Id.* at 452–53.

30. *Id.* at 435 (holding the tidal limit was “now repudiated in this country as wholly inapplicable to our condition.”).

31. *Id.* at 452.

32. *Id.* at 453.

33. See PPL Mont., LLC v. Montana, 565 U.S. 576, 603–04 (2012).

34. See, e.g., Colorado, *infra* Part III.A.

35. Nat’l Audubon Soc’y v. Superior Ct., 658 P.2d 709, 719 (Cal. 1983) (collecting cases). For recent discussion, see Michael C. Blumm & Lynn S. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad*, 45 ENV’T L. 399 (2015); Michael Benjamin Smith, *The Federal Public Trust Doctrine of Illinois Central: The Misunderstood Legacy of Appleby v. City of New York*, 51 ENV’T L. 515, 516 (2021); Robert W. Adler, *Natural Resources and Natural Law Part II: The Public Trust Doctrine*, 10 MICH. J. ENV’T L. & ADMIN. L. 225, 232–33 (2020) (“The Supreme Court has . . . confirmed that each state has authority to determine the scope and applicability of the public trust doctrine in that state. The Court has never held, however, that states are free to abandon the doctrine entirely, suggesting that it has some minimum federal contours. These issues remain unresolved, in part because most state variations in the doctrine reflect policy differences

foundation, we can briefly consider the ways that the public trust might interact with water law.

B. Potential Applications of the Public Trust to Water Rights Law

Public trust law varies significantly from state to state, and understanding these variations is easier if we start with a rough idea of how the public trust doctrine could interact with water rights. Essentially, the possible roles of the trust fall into three broad categories: providing authority, limiting authority, and protecting against takings claims.

First, the trust can provide the state with authority it might otherwise lack. If, as *Illinois Central* mandates, the state is responsible for “the management and control of property in which the public has an interest,”³⁶ then the state should have the power to undertake that management and control. Thus, the state might decide that the doctrine gives it the power to review the trust impacts of new water rights or transfer applications, even where the relevant legislation (or even constitutional provisions) does not anticipate consideration of the navigation or fisheries impacts of water withdrawals. The state might also rely on the doctrine to reconsider and reduce existing water rights, particularly those “first tranche” water rights that predate modern water regulations,³⁷ where those rights impact trust uses. In this role, the public trust doctrine serves as an independent source of authority for the state or its subdivisions.

Second, the trust can be an independent limit on what the state and others can do with trust resources. Returning to *Illinois Central*, if the state generally lacks the power to “abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties,”³⁸ then the doctrine could be a substantial limit on water rights, indeed. A court could rely on the doctrine to find that the state simply cannot convey vested water rights that are free from the trust. That limitation could allow trust beneficiaries to sue the state and force it to consider the trust in water rights decisions or to reconsider past water right decisions that unduly impact trust resources. It could also allow suits against private parties that seem to be using water in ways that unduly “obstruct[] or interfere[]” with public trust uses.³⁹ If the trust serves as a limitation on the state’s power to convey interests in water, then both the state

regarding the geographic scope of the doctrine, or the resources to which the doctrine applies. No state since the *Illinois Central* case has successfully eliminated the doctrine or curtailed it as substantially as the Illinois legislature attempted to do in the original railroad grant before a subsequent legislature revoked the grant.”).

36. 146 U.S. 387, 453 (1892).

37. See Bork & Ziaja, *supra* note 7, at 1352 (describing the water rights obtained simply by using water, with no oversight or review by the state, as the “first tranche” of water rights).

38. *Ill. Cen. R.R. Co.*, 146 U.S. at 453.

39. *Id.* at 452.

and water users could face successful lawsuits if the public trust is not adequately protected.

Third, the public trust may provide significant protection against takings claims if a state does regulate or reduce existing water rights. This grows out of the interaction of the two other categories of public trust doctrine. If the state has the power to regulate water rights to protect trust uses, and generally cannot give up that power with respect to any given water appropriation, then existing water rights would be held subject to the public trust and subject to reductions by the state through water law or other environmental law (e.g., the Endangered Species Act⁴⁰ or the Clean Water Act,⁴¹ among others). This might mean, then, that a party would be unsuccessful in bringing a takings clause claim against a state government that decreased the amount of water the party could remove from a waterway. The state would be able to defend against the takings claim by pointing out that the property alleged to have been taken never belonged to the rightsholder in the first place; the entire water right was always held subject to the public's trust interest.

How a court might consider this third aspect of the trust is particularly difficult to predict. Even in a state where the courts have roundly rejected the trust as an independent grant of or limit on state power, it remains possible that a state legislature could enact laws protecting trust uses by, for example, mandating minimum instream flows. Here, if a given navigable river was losing too much water from permitted water withdrawals, the state might reduce the amount of water that could be withdrawn under existing water rights to protect the people's navigation interest. This would present a situation analogous to *Illinois Central*, in that the state would be clawing back trust resources it had previously granted to private parties, perhaps because it lacked the power to fully alienate those resources in the first place. This line of reasoning would seem to safely avoid the takings claim.

This third aspect can be phrased in more conventional constitutional takings terms: the public trust doctrine may serve as a background principle of state law that insulates state actions curbing existing appropriative rights from takings challenges. The argument goes like this: Under the Fifth Amendment to the Constitution,⁴² incorporated against the states by the Fourteenth Amendment,⁴³ the government cannot physically take private property or go "too far"⁴⁴ in regulating property without providing just compensation to the property owner.⁴⁵ The Supreme Court cautioned, however, that an uncompensated regulation or physical taking is *not* unconstitutional if the action merely implements conditions that "inhere in the title itself, in the restrictions that background principles of the State's law of property and

40. Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544.

41. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387.

42. U.S. CONST. amend. V.

43. *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 415 (1897).

44. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

45. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992).

nuisance already place upon land ownership.”⁴⁶ These background principles are often termed *Lucas* background principles. The public trust doctrine is an ancient doctrine, inherited by the independent colonies and the United States, and present in every other state under the “equal footing” doctrine.⁴⁷ So, the argument goes, in either the classic or modern form, the public trust doctrine inheres in the title of all trust property, from tidal lands to land under navigable waterways to rights in the water itself. Regulations that would otherwise take property in ways requiring compensation are constitutional if they only implement these public trust protections that already inhere in the title itself.

Indeed, this argument is not merely theoretical. In many instances, the public trust and trust-adjacent principles have served as background principles to negate takings claims.⁴⁸ California has embraced this approach with respect to water rights,⁴⁹ and Hawaiian courts have made clear that all water rights there must give way to public trust claims.⁵⁰ Washington has used the trust as a background principle with respect to shoreline development, per both Washington Supreme Court and Ninth Circuit decisions.⁵¹ Oregon’s closely related custom of shoreline access plays a similar role.⁵² The U.S. Supreme Court has embraced the federal navigable servitude, a sort of federal public trust focused on navigation, as a background principle.⁵³ The Supreme Court has even applied the federal navigation servitude to limit state appropriative rights in nonnavigable waters, where appropriation might affect downstream navigation.⁵⁴ Recognition of the public trust’s “background principles” role is especially timely given the increasing challenges that states and the federal

46. *Id.* at 1029. The *Lucas* Court “assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the land owner’s title,” citing the example of a navigational servitude held by a sovereign. *Id.* at 1028–29 (citing *Scranton v. Wheeler*, 179 U.S. 141 (1900)).

47. *Pollard’s Lessee v. Hagan*, 44 U.S. 212, 229 (1845); *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195–96 (1987).

48. For a contrary view, see Scott Andrew Shepard, *The Unbearable Cost of Skipping the Check: Property Rights, Takings Compensation & Ecological Protection in the Western Water Law Context*, 17 N.Y.U. ENV’T L.J. 1063, 1110 (2009).

49. See *Nat’l Audubon Soc’y v. Superior Ct.*, 658 P.2d 709, 723 (Cal. 1983); *Light v. SWRCB*, 226 Cal. App. 4th 1463, 1480 (2014).

50. See *In re Water Use Permit Application*, 9 P.3d 409 at 437 (Haw. 2000).

51. *Orion Corp. v. State*, 747 P.2d 1062, 1072 (Wash. 1987), *abrogated by* *Chong Yim v. City of Seattle*, 451 P.3d 675 (Wash. 2019), *and* *Chong Yim v. City of Seattle*, 451 P.3d 694 (Wash. 2019); *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 985–87 (9th Cir. 2002).

52. *City of Cannon Beach*, 854 P.2d 449, 456–57 (Or. 1993).

53. *E.g.*, *Greenleaf-Johnson Lumber Co. v. Garrison*, 237 U.S. 251, 260 (1915). For more recent collected citations, see *Boone v. United States*, 944 F.2d 1489, 1493–94 (9th Cir. 1991). See also *Pennzoil Producing Co. v. Offshore Exp., Inc.*, 943 F.2d 1465, 1470 (5th Cir. 1991) (“It is certainly true that the right to navigate is paramount”); *Van Deursen v. Dunlap Towing Co.*, 17 Wash. App. 281, 285 (1977) (noting “the primacy of navigation”).

54. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 701–02, 706 (1899); see also Craig, *Comparative Guide*, *supra* note 6, at 151–52.

government face in protecting instream flows in an era of climate change, shifting societal values, and a biodiversity crisis.⁵⁵

We pause here to note that the public trust is but one potential background principle among many in water law. Public use rights (often conflated with public trust rights) may provide a stand-alone avenue to protecting or reclaiming instream flows.⁵⁶ Many authors and courts have highlighted the reasonable or beneficial use doctrines as limits to existing appropriative rights;⁵⁷ the shifting nature of what is reasonable or beneficial is well documented.⁵⁸ Almost all Western states also recognize the public interest as a limit to new water rights, and the public interest test may also limit existing rights.⁵⁹ Similarly, state ownership of water supports many determinations about when and where the public can use waters flowing over private lands in the West, and it may provide states with significant regulatory power.⁶⁰

Finally, the states' innate police power gives states control over existing rights of all kinds, from rights in land to water rights, and there are many ways states can exercise these rights without running afoul of takings protections.⁶¹ These other limits are worth mentioning for at least two reasons. First, although this Article focuses on the public trust as the background principle, the Article should not be read as definitive on background principles in water law outside of the public trust context. Second, many of these other doctrines are intimately tied to the public trust, and deciphering the true basis for a court's decision or for a legislative action can be impossible, so these topics necessarily surface throughout this article.

Returning to our main theme, then, the public trust doctrine can interact with water law as (1) an independent source of authority for the state to regulate water rights; (2) an independent limit on what the state and others can do with water; and (3) a protection against takings claims if a state does regulate or reduce existing water rights. On the other hand, a court might

55. See generally Karrigan Bork, *Time Limits for Water Rights*, 37 NAT. RES. & ENV'T. 17 (2022).

56. Jeffrey S. Silvyn, *Protecting Public Trust Values in California's Waters: The Constitutional Alternative*, 10 UCLA J. ENV'T L. & POL'Y 355, 357 (1992).

57. See generally Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENV'T L. 919 (1998).

58. *Id.*

59. Mark Squillace, *Restoring the Public Interest in Western Water Law*, UTAH L. REV. 627, 646–45 (2020) (noting, despite the author's belief that "public interest" and "public trust" are two different doctrines, that there is significant overlap between the two doctrines and the terms are often used interchangeably); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (using the phrase "public interest" fifty-nine times in the context of the public trust doctrine). The trust approach generally recognizes an inalienable aspect of state control, while the public interest approach may not. *Id.*

60. Reed D. Benson, *Public Ownership, Public Rights: Recreational Stream Access Decisions in the Mountain West*, 23 WYO. L. REV. 73, 106 (2023) (noting that "most of the Mountain West recreational access cases did not mention" the public trust doctrine).

61. See, e.g., 29A C.J.S. *Eminent Domain* § 8 ("[C]onstitutional provisions against taking private property for public use without just compensation impose no barrier to the proper exercise of the police power.").

decide that the public trust is either subsumed into the state's water rights system or entirely displaced by it, depending on how the court understands the nature of the trust. Some states embrace more of these approaches, some less, and some none at all, and it is unclear which of these aspects are mandated by the mandatory minimum public trust doctrine established in *Illinois Central*. Many state courts have not yet had to determine which, if any, of these approaches they will embrace.

In this Article, we attempt to both describe the doctrine, in states where there is some certainty, and to provide predictions by reading the tea leaves in states where there is not. In many states, courts have avoided developing the public trust doctrine by relying on other approaches to protect public trust interests. These alternative approaches include the state ownership of water doctrine, a strong interpretation of the public interest test, and aggressive enforcement of existing statutes. We note states where courts have embraced these approaches, but we do not consider these approaches to be part of the public trust, except in states where courts explicitly relied at least in part on the public trust when using these approaches.⁶² In our survey of Western states' approaches to the public trust and water law, we begin with two states that have embraced many aspects of the public trust doctrine: California and Hawai'i.

II. STATES WHERE THE PUBLIC TRUST LIMITS EXISTING RIGHTS

A. California

California courts have adopted much of *Illinois Central* into state law. Indeed, in the years preceding the Court's landmark Mono Lake decision, the State Supreme Court repeatedly addressed mini-*Illinois Central* disputes, where the state granted tidelands to private owners and then later sought to determine the nature of the interest it had granted. The court consistently held that the state's sovereign interest in the lands could not be extinguished outside of narrow circumstances.⁶³ The most well-known statement of the principle in these cases came in *People ex inf. Webb v. California Fish Co.*, where the court held that lands under navigable waters "belong to the state in its sovereign character, and are held in trust for the public purposes of navigation and fishery. [Even when those lands are sold,] a public easement and servitude

62. For example, the South Dakota Supreme Court explicitly stated that the state's Water Resources Act codifies some public trust principles, so we conclude that the public trust applies to new appropriations in that state. *Parks v. Cooper*, 676 N.W.2d 823, 837 (S.D. 2004); *infra* Part IV.A.1.b. On the other hand, the Alaska Supreme Court has not made a similar determination, in spite of the state's strong trust doctrine, and has not otherwise applied the public trust to the state's water rights, so we cannot draw a similar conclusion for Alaska. *See infra* Part IV.A.2.a.

63. *See, e.g., Forestier v. Johnson*, 127 P. 156, 160 (Cal. 1912) (noting that a private purchaser of trust lands "takes subject thereto, and he has no right to enjoin or prevent any citizen from exercising the public rights incident thereto"); *Oakland v. Oakland WaterFront Co.*, 50 P. 277, 285 (Cal. 1897) (recognizing an inalienable public right in trust lands).

exists over these lands for those purposes.”⁶⁴ The court explained that, for statutes implicating trust interests, “if any interpretation of the statute is reasonably possible which would not involve a destruction of the public use or an intention to terminate it in violation of the trust, the courts will give the statute such interpretation.”⁶⁵

The next major development came in *Marks v. Whitney*, a California Supreme Court decision concerning a dispute over tidelands on Tomales Bay.⁶⁶ Marks, an owner of property in the tidal zone, filed a quiet title action seeking to clarify the ownership of his tideland properties. In response, Whitney, who owned land up-shore from Marks’ tidal property, sought to assert “that Marks’ title was burdened with a public trust easement.”⁶⁷ The trial and appellate courts found that Whitney had no standing to assert the public’s trust interest, and required that a representative of the state assert those concerns, instead of a private citizen.⁶⁸ The California Supreme Court reversed, explicitly holding that “Whitney had standing to raise this issue [and t]he court could have raised this issue on its own.”⁶⁹ Beyond the standing issue, the court in *Marks* also expanded the interests protected by the California public trust. The court first explained the traditional trust:

Public trust easements are traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes.⁷⁰

The court then explained its understanding of the trust:

The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. . . . There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area. It is not necessary to here define precisely all the public uses which encumber tidelands.⁷¹

64. *People ex inf. Webb v. Cal. Fish Co.*, 138 P. 79, 82 (Cal. 1913); *see Boone v. Kingsbury*, 273 P. 797, 816 (Cal. 1928) (holding state may remove private buildings it previously permitted on trust lands if “they substantially interfere with navigation or commerce.”).

65. *Webb*, 138 P. at 88.

66. 491 P.2d 374 (Cal. 1971).

67. *Id.* at 377.

68. *Id.*

69. *Id.* at 381.

70. *Id.* at 380.

71. *Id.*

This is the first statement in any court of what some commentators call the “ecological public trust”⁷² and others the “modern public trust.”⁷³

Together, these cases set the stage for the Mono Lake decision: They established that property owners held their property subject to the trust and that the trust protected broader environmental concerns. Thus, when Los Angeles used its water rights to divert water headed to Mono Lake and the diversions damaged the ecology of the lake itself, environmental organizations were primed to assert that the public trust required a reconsideration of Los Angeles’ water rights.

Under a state-issued permit, Los Angeles diverted the flow of four of the five nonnavigable tributaries to Mono Lake, a salt lake with no outflow.⁷⁴ The lake ecosystem relies on brine shrimp and other insects adapted to the lake’s salty waters.⁷⁵ It forms nesting and rest habitat for several species of migratory birds, and its shores, when dry, can produce dust storms containing alkali and other chemicals that make breathing difficult and damage airways.⁷⁶ By the 1970s, it was apparent that Los Angeles’ diversions threatened the survival of the brine shrimp, the destruction of the lake’s ecosystem, and extensive air quality impacts due to blowing dust.⁷⁷ National Audubon and other environmental groups filed suit, seeking reconsideration of Los Angeles’ water rights based *solely* on the public trust doctrine.⁷⁸

The court faced several issues. First, Los Angeles was diverting from nonnavigable streams, not from the navigable lake itself, and it was unclear if the nonnavigable waterways were protected by the public trust. Nevertheless, the court found that “the public trust doctrine, as recognized and developed in California decisions, protects navigable waters from harm caused by diversion of nonnavigable tributaries.”⁷⁹

Next, the court faced a test of its broad ecological trust declaration from *Marks v. Whitney*, because the petitioners were asserting claims based primarily on these modern trust interests.⁸⁰ The court found that the public trust covered ecological values, protecting “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.”⁸¹

72. Craig, *Comparative Guide*, *supra* note 6, at 86.

73. See generally Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006).

74. Nat’l Audubon Soc’y v. Superior Ct., 658 P.2d 709, 716 (Cal. 1983).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 732.

79. *Id.* at 721 (citing *People v. Gold Run Ditch & Mining Co.*, 4 P. 1152, 1158–59 (Cal. 1884) (barring gold mining on nonnavigable tributaries where the mining made the lower river unnavigable); *People ex rel. Roberts v. Russ*, 64 P. 111, 112–13 (Cal. 1901) (holding that diverting waters directly or indirectly may be enjoined as a nuisance where it renders a navigable stream nonnavigable)).

80. Nat’l Audubon Soc’y, 658 P.2d at 719.

81. *Id.*

The court then turned to the question of whether the public trust could coexist with the state's statutory and common law water rights systems. Based on its rules of interpretation for statutes affecting the public trust, the court determined that the public trust was not "subsumed in the California water rights system"⁸² and that the two could coexist together. Specifically, the court found that:

both the public trust doctrine and the water rights system embody important precepts which make the law more responsive to the diverse needs and interests involved in the planning and allocation of water resources. To embrace one system of thought and reject the other would lead to an unbalanced structure, one which would either decry as a breach of trust appropriations essential to the economic development of this state, or deny any duty to protect or even consider the values promoted by the public trust.⁸³

To determine how the systems fit together, the court relied extensively on *Illinois Central*, as indorsed in *People v. California Fish Co.*, and found the state had a duty to protect the public trust. The court recognized "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."⁸⁴ However, instead of the public trust simply granting the state the power to "use public property for public purposes," the court held that the public trust was "an affirmation of the *duty* of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."⁸⁵ Thus, the state recognized two primary aspects of the public trust: the trust as state power and the trust as restraint.

Translating these principles into the water rights system, the court held that:

as a matter of current and historical necessity, the Legislature, acting directly or through an authorized agency such as the Water Board, has the power to grant usufructuary licenses that will permit an appropriator to take water from flowing streams and use that water in a distant part of the state, even though this taking does not promote, and may unavoidably harm, the trust uses at the source stream.⁸⁶

But in doing so,

[t]he state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible . . . [T]he state must bear in mind its duty as trustee

82. *Id.* at 732.

83. *Id.* at 727.

84. *Id.* at 723.

85. *Id.* at 724 (emphasis added).

86. *Id.* at 727.

to consider the effect of the taking on the public trust and to preserve, so far as consistent with the public interest, the uses protected by the trust.⁸⁷ Once 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 needs. The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust.⁸⁸

The court clarified that these reconsiderations did not raise taking concerns:

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.⁸⁹

This is the third broad aspect of the trust: an insulation against takings claims arising from the reconsideration or regulation of existing private property rights.⁹⁰ In sum, then, the California Supreme Court recognized a public trust doctrine, enforceable through citizen suits, that imposes a continuing obligation on the state to “take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible,”⁹¹ and which allows reconsideration of past water rights decisions without the specter of takings lurking in the background.

Although California’s public trust has continued to develop since the Mono Lake decision,⁹² we mention only four developments here. First, the trust appears to apply to all surface water rights in California, including federally held rights,⁹³ rights that predate the state’s permitting process,⁹⁴ and riparian rights.⁹⁵ Second, public trust standing extends to citizen suits under at least some sections of the Fish and Wildlife Code. In 1989, a California Court of Appeal held that individuals could sue to enforce section 5937 of the Fish

87. *Id.* at 728.

88. *Id.*

89. *Id.* at 723.

90. For additional discussion, see Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701, 735–36 (1995) (finding “six basic tenets of the public trust in water” in the *National Audubon* decision).

91. *Nat’l Audubon Soc’y*, 658 P.2d at 728.

92. See Frank, *supra* note 22, §§ 2-42 to 2-45.

93. See generally, e.g., *United States v. State Water Res. Control Bd.*, 182 Cal. App. 3d 82 (1986). This may not apply to federal reserved water rights; no case addressing this has yet been brought.

94. *Light v. State Water Res. Control Bd.*, 226 Cal. App. 4th 1463 (2014).

95. *In re Water of Hallett Creek Stream Sys.* 749 P.2d 324, 337 n.16 (Cal. 1988); *Stanford Vina Ranch Irrigation Co. v. State*, 50 Cal. App. 5th 976 (2020).

and Wildlife Code (requiring below dam flows for fish),⁹⁶ and many other courts have followed suit.⁹⁷ Third, when evaluating public trust concerns, the best approach is to consider all applicable uses in the basin.⁹⁸ Finally, in *Environmental Law Foundation v. State Water Resources Control Board*, California's Third District Court of Appeal held that the public trust doctrine extends to groundwater, where groundwater use affects traditional public trust waters.⁹⁹

B. Hawai'i

Hawai'i's public trust is codified in the state's Constitution¹⁰⁰ and legislation, and is supported by the state judiciary.¹⁰¹ Hawai'i recognizes two different trust doctrines, the more traditional navigable waters doctrine and a unique constitutional "water resources" public trust requiring particular management actions by the state, described below.¹⁰² Together these provide expansive protections, and both must be considered when granting water rights and on an ongoing basis after the initial grant.

Citing the Mono Lake decision, the Hawai'i Supreme Court held that the public trust "empowers the state to revisit prior diversions and allocations, even those made with due consideration of their effect on the public trust."¹⁰³ Thus, the state retains lasting control over trust resources. Moreover, courts have held that the continued regulation of those resources would not amount to an unconstitutional taking, as the public trust is part of the background principles of Hawai'i law.¹⁰⁴

Hawai'i's Constitution articulates a strong recognition of the public trust. Pursuant to Article XI, Section 1 of Hawai'i's Constitution, for example, "[a]ll public natural resources are held in trust by the [s]tate for the benefit of the people."¹⁰⁵ The state has an affirmative duty, "for the benefit of present and

96. *Cal. Trout, Inc. v. State Water Res. Control Bd.*, 207 Cal. App. 3d 585 (1989).

97. *See generally* Bork et al., *supra* note 12.

98. *See* *State Water Res. Control Bd.*, 182 Cal. App. 3d at 135–36; *see also* *Santa Barbara Channelkeeper v. City of San Buenaventura*, 19 Cal. App. 5th 1176, 1193 (2018). This does not apply to public trust suits based on violations of 5937 or other relevant code provisions, where the legislature has made apparent the minimum trust requirements.

99. *Env't L. Found. v. State Water Res. Control Bd.*, 26 Cal. App. 5th 844, 859–62 (2018); *see* *Auto Equity Sales, Inc. v. Superior Ct. of Santa Clara Cnty.*, 57 Cal. 2d 450, 455 (1962) ("Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state").

100. *See* HAW. CONST. art. IX § 8; XI §§ 1, 2, 6, 7, 9, 11; *id.* art. XII § 4, 5, 6, 7; XVI § 7.

101. *See generally* *In re Water Use Permit Applications*, 9 P.3d 409, 441 (Haw. 2000).

102. *Id.*; *see also* Craig, *Comparative Guide*, *supra* note 6, at 86.

103. *In re Water Use Permit Application*, 9 P.3d at 409; *see also* *Robinson v. Ariyoshi*, 658 P.2d 287, 312 (Haw. 1982) ("[U]nderlying every private diversion and application there is, as there always has been, a superior public interest in the natural bounty."); *Lana'ians for Sensible Growth v. Land Use Comm'n*, 463 P.3d 1153, 1165 (Haw. 2020) (noting state actions regarding trust resources, are "inherently limited by and subject to the [s]tate's public trust duties").

104. *In re Water Use Permit Application*, 9 P. 3d at 409.

105. HAW. CONST. art. XI, § 1.

future generations” to “conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources.”¹⁰⁶ Additionally, the state is charged with “promot[ing] the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the [s]tate.”¹⁰⁷ Article XI, Section 7 strengthens the public trust water resource protections and provides that the “[s]tate has an obligation to protect, control and regulate the use of Hawai‘i’s water resources for the benefit of the people” and requires that the state create a water resources agency and comprehensive system for managing and conserving its waters,¹⁰⁸ including groundwater resources.¹⁰⁹ The trust, on its own and as expressed through these constitutional requirements, grants the state significant powers to regulate water resources.

Consistent with Article XI, Section 7, the legislature enacted several statutes meant to protect the state’s water resources, including the state water code.¹¹⁰ The state water code and its implementing agency, the Commission on Water Resource Management (“Commission”), do not override the public trust doctrine. Rather, the doctrine exists separately and informs the code’s interpretation.¹¹¹ The public trust “compels” the Commission “to consider the cumulative impact of existing and proposed diversions on trust purposes and to implement reasonable measures to mitigate this impact, including using alternative resources.”¹¹² Therefore, the “state may compromise public rights in the [water] resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of Hawai‘i.”¹¹³

Although the Commission plays a major role in protecting Hawai‘i’s public trust water resources, the state’s judiciary has the ultimate authority to interpret and defend the public trust, and it appears to take its job seriously.¹¹⁴ If, for example, the Commission does not appropriately consider the state’s water resources and public trust interests before issuing a water use permit, the court will vacate the permit.¹¹⁵ Additionally, if part of the state’s comprehensive regulatory scheme is at odds with the public trust doctrine, the court will invalidate the statute.¹¹⁶ But these resource conservation protections

106. *Id.*

107. *Id.*

108. *Id.* § 7.

109. *In re Waters of Waiahole Ditch*, 9 P.3d 409 (Haw. 2000).

110. HAW. REV. STAT. ANN. § 174C (West).

111. *In re Waters of Waiahole Ditch*, 9 P.3d at 473.

112. *Id.* at 455.

113. *In re Water Use Permit Applications*, 93 P.3d 643, 658 (Haw. 2004).

114. *In re Waters of Waiahole Ditch*, 9 P.3d at 431.

115. *In re Water Use Permit Application*, 93 P.3d at 645 (vacating a water permit where the water commission failed to “prioritize among public trust resources” and therefore “failed to fulfill its duty, under the water code and the public trust doctrine”).

116. *Id.* at 443; *see also* *Lana’ians for Sensible Growth v. Land Use Comm’n*, 463 P.3d 1153, 1158 (Haw. 2020) (citing *In re Water Use Permit Application*, 93 P.3d at 443).

are not granted an “absolute priority,” but rather must “receive special consideration or scrutiny” when the Commission decides to issue a water use permit.¹¹⁷ Thus the doctrine, in Hawai‘i, serves as a limit to the state’s power to regulate.

In summary, Hawai‘i has fully embraced all three possible applications of the public trust to water rights. The public trust protections are extensive and appear to both empower and limit state decisions about water resources, and the trust allows the state to reallocate water that has already been allocated without being subject to takings claims.

III. STATES WHERE THE PUBLIC TRUST DOES NOT LIMIT EXISTING RIGHTS

Colorado and Nevada sit at the far end of the public trust spectrum from California and Hawai‘i. While many Western states have either embraced or left the door open to applying the public trust doctrine as a limit to appropriative rights, courts in Colorado and Nevada have generally rejected applying the public trust to limit appropriative rights.

A. Colorado

The Colorado Supreme Court has asserted that the only existing basis for recognizing the environmental value of water in Colorado law is the state’s instream flow program, foreclosing application of the public trust to appropriative rights as an independent grant of authority for state agencies. In *Board of County Commissioners v. United States (Union Park)*, the court held that the inquiry required for a water right does not include environmental factors like impacts to fisheries and wildlife habitat, recreation, and water quality.¹¹⁸ The court rejected the assertion that “beneficial use” should consider a broad public policy of protecting the natural and built environment, instead indicating that Colorado’s instream flow legislation is the sole mechanism for addressing environmental protection.¹¹⁹ The Colorado Supreme Court has consistently held that, although environmental considerations might provide a reasonable and sound basis for altering existing law, “if a change in long established judicial precedent is desirable, it is a legislative and not a judicial function to make any needed change.”¹²⁰

Colorado’s instream flow legislation recognizes the need to protect the environment and grants the Colorado Water Conservation Board “exclusive authority” to appropriate minimum stream flows in natural streams and minimum levels for natural lakes.¹²¹ In doing so, the Colorado Water Conservation Board has the authority to “correlate the activities of mankind

117. *In re Water Use Permit Application*, 9 P.3d at 443.

118. *Bd. of Cnty. Comm’rs v. United States*, 891 P.2d 952, 971 (Colo. 1995).

119. *Id.*

120. *Id.* at 972; *People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979) (quoting *Smith v. People*, 206 P.2d 826, 832 (Colo. 1949)).

121. COLO. REV. STAT. § 37-92-102(3) (2022).

with some reasonable preservation of the natural environment.”¹²² The General Assembly also adopted the Colorado Water Quality Act in 1981, which provides that the state is to prevent injury to beneficial uses of state waters and to develop waters to which Colorado and its citizens are entitled.¹²³ However, the Act was careful not to endorse an application of the public trust to water rights, stating that “no provision of this article shall be interpreted so as to supersede, abrogate, or impair rights to divert water and apply water to beneficial uses”¹²⁴ Ballot initiatives—including one proposed in 2012, which would have adopted a constitutional amendment establishing a Colorado public trust doctrine for all water—have also been unsuccessful.¹²⁵

Colorado thus appears to reject the first two potential aspects of public trust law: The doctrine does not provide the state with non-statutory authority to consider trust interests, and nor does it stand as an independent limit on the power of the state or private individuals. The legislature might have the power to reclaim trust resources by reducing water rights without facing takings claims, but there is no indication as to how the Colorado courts would address such an action.

B. Nevada

Nevada’s Supreme Court has expressly adopted the public trust doctrine,¹²⁶ but the way it has applied it to water rights has vitiated the trust as a restraint on state power. It remains possible, however, that future decisions could find some role for the trust in addressing water use.

In *Lawrence v. Clark County*, Nevada’s Supreme Court “expressly adopt[ed] the [public trust] doctrine,” in a land ownership setting.¹²⁷ It held that “public trust principles are contained in Nevada’s constitution and statutes and are inherent from inseverable restraints on the state’s sovereign power,”¹²⁸ such that the legislature cannot override the trust. The court also established a framework for determining whether a conveyance of trust land was valid: “(1) whether the dispensation was made for a public purpose, (2) whether the state received fair consideration in exchange for the dispensation, and (3) whether the dispensation satisfies the state’s special obligation to maintain the trust for the use and enjoyment of present and future generations.”¹²⁹ In making this

122. *Id.*

123. *Id.* § 25-8-102(1) (2002).

124. § 25-8-104.

125. Stephen H. Leonhardt & Jessica J. Spuhler, *The Public Trust Doctrine: What It Is, Where It Came from, and Why Colorado Does Not (and Should Not) Have One*, 16 U. DENV. WATER L. REV. 47, 48, 82–88 (2012).

126. 254 P.3d 606, 607 (Nev. 2011).

127. *Id.*

128. *Id.* at 612–13 (“[T]he doctrine constitutes an inseverable restraint on the state’s sovereign power.”).

129. *Id.* at 616 (internal citations and quotation marks omitted).

evaluation, “when the Legislature has found that a given dispensation is in the public’s interest, it will be afforded deference.”¹³⁰

Almost a decade later, the court once again confronted the public trust doctrine, this time in the appropriative water rights setting, in *Mineral County v. Lyon County*.¹³¹ On certification from the Ninth Circuit, the court considered two questions. First, “[d]oes the public trust doctrine permit reallocating rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?”¹³² Second, “[i]f the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudicated or vested rights constitute a ‘taking’ under the Nevada Constitution requiring payment of just compensation?”¹³³

In that case, Mineral County itself had intervened in an ongoing adjudication to assert a public trust interest in water for Walker Lake for fishing and other trust purposes. The court began by embracing the trust, holding “that the public trust doctrine applies to all waters of the state, whether navigable or nonnavigable, and to the lands underneath navigable waters.”¹³⁴ The court also “explicitly recognize[d] that the public trust doctrine applies to rights already adjudicated and settled under the doctrine of prior appropriation, such that the doctrine has always inhered in the water law of Nevada as a qualification or constraint in every appropriated right.”¹³⁵

The court continued, however, “that Nevada’s comprehensive water statutes are already consistent with the public trust doctrine because they (1) constrain water allocations based on the public interest and (2) satisfy all of the elements of the dispensation of public trust property that we established in *Lawrence*.”¹³⁶ The court recognized a continuous public trust duty on the state but held that the state engineer, in following the state statutes, was discharging those duties.¹³⁷ Further, the court held the “statutory water scheme in Nevada therefore expressly prohibits reallocating adjudicated water rights that have not been abandoned, forfeited, or otherwise lost pursuant to an express statutory provision,”¹³⁸ such that the public trust could not allow for reallocation of adjudicated water under existing law.¹³⁹

After *Mineral County*, it is clear that the public trust applies to water rights in Nevada, and that litigants can challenge state decisions if the state

130. *Id.* at 617.

131. 473 P.3d 418 (Nev. 2020).

132. *Id.* at 421.

133. *Id.*

134. *Id.* at 425.

135. *Id.* at 427 (citing *Lawrence*, 254 P.3d at 616); see NEV. REV. STAT. ANN. § 533.025 (West).

136. *Min. Cnty.*, 473 P.3d at 426.

137. *Id.* at 427.

138. *Id.* at 429.

139. *Id.* at 421–22.

fails to consider the public trust when making water right decisions.¹⁴⁰ But previous water right decisions do not appear to be vulnerable to new challenges by private litigants who allege that the decisions do not address the public trust, given the court's interpretation of existing statutes. Further, it is unclear what protections from a taking challenge the trust might provide, because the court declined to address the second question certified by the Ninth Circuit. Because it declined to address the question, we do not yet know whether the trust would allow the legislature to change the statutes or reallocate existing rights to protect the public trust.¹⁴¹ The litigation in *Mineral County* is ongoing,¹⁴² and it remains possible that a court will determine that the trust has some effects on *how* a right holder can use their right, imposing requirements like lining for ditches or other efficiency requirements.¹⁴³ In light of the Nevada Supreme Court decision in *Mineral County*, the Ninth Circuit remanded the case to the federal district court, noting that the county "may pursue its public trust claim to the extent that the County seeks remedies that would *not* involve a reallocation of such rights."¹⁴⁴

Currently, water rights in Nevada appear to be effectively unrestrained by the public trust. In short, the *Mineral County* decision leaves little room for reallocation of water from existing rights absent legislative action. Further, it leaves many rights out of the public trust purview, even on the decision's own terms, as it does not address those rights granted before the state's statutory framework allowed regulators to consider public trust uses of water.¹⁴⁵ Thus, we have placed Nevada in the category where the public trust does not serve as a restraint on existing water rights. This conclusion may need reconsideration when the federal district court eventually rules on Mineral County's non-reallocation public trust arguments.¹⁴⁶

IV. IT'S COMPLICATED

Outside of these first four states, most state courts have not definitively addressed the interaction of their water rights laws and the public trust

140. *Id.* at 427 (citing NRS 533.450; *Pyramid Lake Paiute Tribe of Indians v. Washoe Cnty.*, 918 P.2d 697, 709 (Nev. 1996) (Springer, J., dissenting)).

141. Some of the language in the decision suggested the court would be open to such an action. For example, the court noted that Nevada "[w]ater rights are given 'subject to existing rights,' given dates of priority, and determined based on relative rights," and that "the doctrine has always inhered in Nevada's water law." *Id.* at 426. This seems to leave the door open to a legislative determination that public trust-derived rights exist and predate any other grants of water rights.

142. *United States v. Walker River Irrigation Dist.*, 986 F.3d 1197, 1206 (9th Cir. 2021).

143. Prof. Bret Birdsong, personal communication with the author.

144. *Walker River Irrigation Dist.*, 986 F.3d at 1206 (emphasis in original).

145. Older water rights were granted when the state lacked statutory authority to address trust interests. *See Mineral Cnty.*, 473 P.3d at 426 (explaining that fish and wildlife were not considered beneficial uses until sometime in the 1960s or perhaps the 1980s); *Application of Filippini*, 202 P.2d 535, 537 (Nev. 1949) (explaining Nevada's historic approaches to granting water rights).

146. For recent updates, see *Mono Cnty. v. Walker River Irrigation Dist.*, No. 373CV00128MMDCSD, 2022 WL 3143993, at *3 (D. Nev. Aug. 5, 2022).

doctrine, and many have not addressed it at all. We nevertheless review the relevant history and attempt to predict the ultimate outcomes if such cases were brought in these states. We divide the states into two broad groups: those more likely to apply the public trust to existing rights and those less likely to do so. However, we must temper our predictions; in many cases, this is somewhat akin to reading the tea leaves before drinking the tea.

A. States More Likely to Apply the Public Trust

1. States That Apply the Public Trust to New Water Rights

The states in this group (North Dakota, South Dakota, and Texas) apply the public trust to new water rights, but they have not yet addressed how they might apply the doctrine to existing rights or to reallocate water. Many early water rights decisions were ministerial, allowing for appropriation of water regardless of the public impacts, with many states paying their public interest tests only lip service.¹⁴⁷ Further, as the climate changes, as we learn more about the long-term hydrology of watersheds, or as public priorities change, protecting public trust resources might require changes to existing water uses. Under either scenario, public trust uses may be severely constrained or even eliminated without the state ever having made an explicit decision to allow the trust impacts of older water rights. Thus, the question of whether private litigants or states can reallocate water using the power of the public trust is an important aspect of the doctrine's role.

a. North Dakota

In North Dakota, courts have held that the public trust doctrine must be considered when an appropriative right is initially granted, but it is unclear whether the doctrine limits existing appropriative rights.

The public trust is not explicitly acknowledged in the state's constitution, but the constitution appears to adopt relevant trust principals in Article XI, Sections 3 and 27. Section 3 prohibits the alienation of the state's "flowing streams and natural watercourses," as they "shall forever remain" state property for "mining, irrigating and manufacturing purposes."¹⁴⁸ Recognizing that "hunting, trapping, fishing and taking of game" are a "valued part of" the state's heritage, Section 27 declares that these activities "will be forever preserved for the people and managed by law and regulation for the public good."¹⁴⁹

Moreover, the North Dakota legislation explicitly acknowledges the public interest, albeit not the public trust, and provides for water resource protections. Under the state's water resources code, most waters within its

147. Squillace, *supra* note 59, at 646–45.

148. N.D. CONST. art. XI, § 3.

149. *Id.* § 27.

boundaries belong to the public, including groundwater.¹⁵⁰ The code also creates a permitting scheme for appropriative rights and charges the State Engineer with the duty to issue appropriative permits for beneficial uses in the public interest.¹⁵¹ In determining whether a right meets the public interest test, the State Engineer must consider several factors: the benefit to the applicant; the effect of supported economic activity on the economy; the diversion's effect on fish and game resources and public recreation; the effect of loss of alternate uses of water; harm to others from use; and the ability of an applicant to complete an appropriation.¹⁵²

North Dakota's courts have also developed the doctrine. In *United Plainsmen*, North Dakota's State Engineer was accused of inadequate consideration of public trust resources in water development. In response, the North Dakota Supreme Court held that the public trust doctrine applied to water rights and "requires, at minimum, a determination of the potential effect of the allocation of water on the present water supply and future needs of" the state.¹⁵³ Thus, the doctrine limits the State Engineer's authority to allocate North Dakota's water resources.¹⁵⁴ However, in other cases, the court noted that this limitation does not prohibit the state from authorizing degradation of aquatic ecosystems.¹⁵⁵ To date, the extent to which state actors may expend trust resources before the judiciary will step in is not clear.

In *United Plainsmen*, the court held that the public trust doctrine "confirms the State's role as trustee of the public waters . . . [and] permits alienation and allocation of such precious state resources only after an analysis of present supply and future need."¹⁵⁶ Although the doctrine places affirmative duties on the state, the extent to which the trust may be used to adjust existing rights is unclear. On the one hand, the court has recognized that the state may approve decisions that negatively impact the trust, but on the other, the court has held the state cannot entirely abdicate its trust interests in land.¹⁵⁷ On the whole, it seems likely that water right holders take their interest subject to the public trust, such that the state could revisit past allocation decisions. It is more doubtful that a court would entertain second-guessing by private litigants, having already found power in the state to burden the public's trust interest.

150. N.D. CENT. CODE § 61-01-01; *see also* *United Plainsmen Ass'n v. N.S. State Water Conservation Comm'n*, 247 N.W.2d 457 (N.D. 1976).

151. N.D. CENT. CODE § 61-03-01.3 (2023) (noting that the State Engineer is responsible for oversight of water rights); N.D. CENT. CODE § 61-01-01 (2023) (explaining use of public waters must be beneficial); N.D. CENT. CODE § 61-04-01.2 (2023) (restating the beneficial use requirement). *See generally* N.D. CENT. CODE, ch. 61-4 (2023) (permitting statutory scheme).

152. N.D. CENT. CODE § 61-04-06.

153. *United Plainsmen Ass'n*, 247 N.W.2d at 462. This appears to be the first decision integrating the public trust into a water right system. Frank, *supra* note 22, at 2-40.

154. *See* [need more clarification since two cites in previous footnote].

155. *In re Application for Permits to Drain Related to Stone Creek Channel Improv. Etc.*, 424 N.W.2d 894, 900-02 (N.D. 1988).

156. *United Plainsmen Ass'n*, 247 N.W.2d at 463.

157. *State ex rel. Sprynczynatyk v. Mills*, 523 N.W.2d 537, 540 (N.D. 1994); *Reep v. State*, 841 N.W.2d 664, 667 (S.D. 2013).

On the whole, though, North Dakota law appears to embrace all three aspects of the trust's application to water rights.

b. South Dakota

South Dakota courts have not yet squarely faced integration of the public trust doctrine and appropriative water rights, but South Dakota Supreme Court precedent¹⁵⁸ and state statutes¹⁵⁹ suggest that the trust is a restraint on existing appropriative water rights and a background principle of South Dakota law.

First, South Dakota's statutes recognize and implement the public trust doctrine. In 1973, the South Dakota legislature passed the Environmental Protection Act, which provided for broad standing to sue the state or private parties "for the protection of the air, water, and other natural resources and the public trust therein from pollution, impairment, or destruction."¹⁶⁰ In these cases, if "administrative, licensing, or other proceedings are required or available to determine the legality of the defendant's conduct, the court shall remit the parties to such proceedings,"¹⁶¹ but the court can issue an injunction pending resolution of the issue, and thereafter "shall adjudicate the impact of the defendant's conduct on the air, water, or other natural resources and on the public trust therein in accordance with [the Environmental Protection Act]."¹⁶² In both the proceeding and under judicial review:

any alleged pollution, impairment, or destruction of the air, water, or other natural resources or the public trust in the resources shall be determined. No conduct may be authorized or approved which does, or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in the resources, if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.¹⁶³

In resolving these cases, a court "may grant temporary and permanent equitable relief, or may impose conditions on the defendant that are required to protect the air, water, and other natural resources or the public trust therein from pollution, impairment, or destruction."¹⁶⁴ South Dakota's Supreme Court

158. *Parks v. Cooper*, 676 N.W.2d 823, 838 (S.D. 2004).

159. For a general overview, see John H. Davidson, *South Dakota's Public Trust Doctrine: Conserving Natural Resources in the Twenty-First Century*, 62 S.D. L. REV. 397 (2017); Bradley P. Gordon, *The Emergence of the Public Trust Doctrine as a Public Right to Environmental Preservation in South Dakota*, 29 S.D. L. REV. 496, 506–07 (1984).

160. S.D. CODIFIED LAWS § 34A-10-1 (2023). ("This section does not confer a right of action to challenge the issuance of a permit or license where the plaintiff has been notified of an agency proceeding in which the issues of environmental harm complained of might have been considered unless the agency refused to hear the complaint at such hearing.").

161. *Id.* §§ 34A-10-5, 7.

162. *Id.* § 34A-10-7.

163. *Id.* § 34A-10-8.

164. *Id.* § 34A-10-11.

noted that this statute, which provides both standing and standards for suits to address water use, is a manifestation of the public trust doctrine.¹⁶⁵

Provisions of South Dakota's Water Resources Act also "depart from common law notions of private water ownership, and, although they regulate the appropriative and consumptive uses of water . . . reflect an aspect of the public trust doctrine, requiring the State to preserve water for public use."¹⁶⁶ These provisions declare "the people of the state have a paramount interest in the use of all the water of the state and that the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection";¹⁶⁷ that protecting "the public interest in the development of the water resources of the state is of vital concern to the people of the state and that the state shall determine in what way the water of the state, both surface and underground, should be developed for the greatest public benefit;"¹⁶⁸ and that "all water within the state is the property of the people of the state, but the right to the use of water may be acquired by appropriation as provided by law."¹⁶⁹

The South Dakota Supreme Court held that these sections "embody the core principles of the public trust doctrine,"¹⁷⁰ and that the statute does not "override the public trust doctrine or render it superfluous."¹⁷¹ Thus, while the Act may supplement the public trust doctrine, it cannot supplant it.¹⁷² South Dakota's water statutes themselves suggest an ongoing aggressive beneficial use requirement, defined as use "consistent with the interests of the public of this state in the best utilization of water supplies,"¹⁷³ applied in perpetuity.¹⁷⁴ These statutory measures alone suggest a strong public trust doctrine in South Dakota, extending to all waters in the state, both surface and groundwaters,¹⁷⁵ with an individual right of enforcement.

Second, beyond the statutory measures, South Dakota's Supreme Court has explained "the public trust doctrine [is] an inherent attribute of sovereign authority,"¹⁷⁶ separate from any statutory pronouncements. The state holds trust assets "not in a proprietary capacity, but in trust for the people that they may enjoy the use of navigable waters for fishing, boating, and other public

165. *Parks v. Cooper*, 676 N.W.2d 823, 838–39 (S.D. 2004). Prof. Robin Craig describes this as an embryonic discussion of an ecological public trust. Craig, *Comparative Guide*, *supra* note 6, at 170.

166. *Parks*, 676 N.W.2d at 837.

167. S.D. CODIFIED LAWS § 46-1-1 (2023).

168. *Id.* § 46-1-2.

169. *Id.* § 46-1-3.

170. *Parks*, 676 N.W.2d at 838.

171. *Id.* at 837.

172. *Id.* at 838.

173. S.D. CODIFIED LAWS § 46-1-6 (2023).

174. *Id.* § 46-5-5.

175. *See also* S.D. Op. Att'y Gen. no.75-192 (1989) (noting jurisdiction over groundwater).

176. *Parks*, 676 N.W.2d at 837.

purposes freed of interference of private parties.”¹⁷⁷ Additionally, in addressing trust lands, the court noted that a private owner has

the right of access to and use of such waters [and] the right to use such shore in all ways that [they] may desire, so long as and with the exception that he does not interfere with or prevent the public from also using or having access to the same for the purposes for which the public has a right to use it, viz., navigating, boating, fishing, fowling, and like public uses.¹⁷⁸

The court has also deferred to legislative expansions of the trust,¹⁷⁹ suggesting a degree of deference to the legislature in balancing public uses of the trust. To wit:

[T]he public trust doctrine imposes an obligation on the State to preserve water for public use. It provides that the people of the State own the waters themselves, and that the State, not as a proprietor, but as a trustee, controls the water for the benefit of the public. In keeping with its responsibility, the Legislature has designated the Department of Environment and Natural Resources to manage our public water resources. However, it is ultimately up to the Legislature to decide how these waters are to be beneficially used in the public interest.¹⁸⁰

In particular, the court has stated “it is not for us now to proclaim the highest and best use of these public waters in the interest of the general health, welfare and safety of the people. Decisions on beneficial use belong ultimately to the Legislature.”¹⁸¹ But in that case, the court was considering whether the public trust included “the right to use the waters for recreational purposes,”¹⁸² not applying trust protections to established uses like navigation, commerce, or fisheries. Despite this broad language,¹⁸³ it is unclear how far the court would go in deferring to the legislature’s determinations about the state’s public trust duties.

In all, South Dakota precedent and legislation indicate that water rights permitting decisions incorporate the public trust doctrine, both empowering and restricting state action. It also seems very likely that state regulatory or legislative actions to restrict water rights based on the public trust would survive judicial takings challenges, even, perhaps, based on a broad ecological public trust. The question of whether private individuals could use the trust to directly address water rights in South Dakota is harder to answer, but the broad statutory powers suggest that such an approach should not be dismissed out of hand.

177. *Id.* at 841 (citing *Hillebrand v. Knapp*, 274 N.W. 821, 822–23 (S.D. 1937)).

178. *Flisrand v. Madson*, 152 N.W. 796, 801 (S.D. 1915).

179. *See Duerre v. Hepler*, 892 N.W.2d 209, 220–21 (S.D. 2017).

180. *Parks*, 676 N.W.2d at 841.

181. *Id.*; *see also Duerre*, 892 N.W.2d at 220–21.

182. *Duerre*, 892 N.W.2d at 220–21 (internal citations and quotation marks omitted).

183. *See id.* (“[T]he State holds these waters in trust *for the public* and controls these waters for the benefit of the public. Therefore, the Legislature . . . must ‘decide how these waters are to be beneficially used in the public interest.’”); *see Danielle Spiegel, Can the Public Trust Doctrine Save Western Groundwater?*, 18 N.Y.U. ENV’T. L. J. 412, 446–47 (2010).

c. Texas

The Texas Constitution and Texas statutes and case law recognize a robust public trust doctrine, but to date, its application to water rights remains uncertain.

Article XVI, section 59(a) of the Texas Constitution declares: “The conservation and development of all of the natural resources of this State . . . [are] public rights and duties.”¹⁸⁴ Courts have determined that this “*mandate[s]* the conservation of public waters.”¹⁸⁵ This is an expression of the public trust.¹⁸⁶ The Texas Court of Appeals found that water appropriation laws must be construed in light of the constitutional amendment’s explicit and implied water conservation and protection objectives.¹⁸⁷ Further, “there is implicit in these provisions of our laws, constitutional and statutory, a vesting in the [Texas water agency] the continuing duty of supervision over the distribution and use of the public waters of the State.”¹⁸⁸ Thus, the state water code implicitly includes the public trust doctrine, under the noted constitutional provision.

The water code covers the public waters of the state, broadly defined to include most surface waters.¹⁸⁹ The state also holds title to the beds of navigable waterways in trust for the public,¹⁹⁰ with “navigable” again defined very broadly. By statute, navigable waterways include any “river or stream that retains an average width of 30 or more feet from the mouth or confluence up.”¹⁹¹ Thus, “statutory navigable streams in Texas are public streams, and . . . their beds and waters are owned by the state in trust for the benefit and best interests of all the people, and subject to use by the public for navigation, fishing, and other lawful purposes.”¹⁹²

While the foregoing factors suggest Texas’s public trust doctrine can meaningfully limit water rights, other factors indicate this may not be the case. For example, the Texas legislature has some authority to convey trust interests to private owners with no implied reservation in favor of the public trust in

184. TEX. CONST. art. XVI, § 59(a); *Clark v. Briscoe Irrigation Co.*, 200 S.W.2d 674, 680 (Tex. Civ. App. 1947).

185. *In re Adjudication of the Water Rights of Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 440 (Tex. 1982) (emphasis added); R. Walton Shelton, *Stewardship and the Reuse of Texas Water*, 48 TEX. TECH. L. REV. 829, 835 (2016); see *Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 633 (Tex. 1996); see also *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 803 (Tex. 1955).

186. See *Cummins v. Travis Cnty. Water Control and Improvement Dist.*, 175 S.W.3d 34, 49 (Tex. Ct. App. 2005).

187. *Clark v. Briscoe Irrigation Co.*, 200 S.W.2d 674, 680 (Tex. Civ. App. 1947).

188. *Id.* at 682.

189. TEX. WATER CODE ANN. § 11.021 (2017) (West).

190. *Natland Corp. v. Baker’s Port, Inc.*, 865 S.W.2d 52, 59–60 (Tex. Ct. App. 1993) (citing *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473, 481–84 (1988)); *Shively v. Bowlby*, 152 U.S. 1, 26 (1894); *City of Galveston v. Menard*, 23 Tex. 349 (1859); *Texas v. Lain*, 349 S.W.2d 579 (Tex. 1961); *TH Invs., Inc. v. Kirby Inland Marine, L.P.*, 218 S.W.3d 173, 182 n.7 (Tex. Ct. App. 2007).

191. TEX. PARKS & WILD. CODE § 90.001; see TEX. NAT. RES. CODE § 21.001.

192. *Diversion Lake Club v. Heath*, 86 S.W.2d 441, 445 (Tex. 1935).

particular circumstances.¹⁹³ Trust resources are presumed to be owned by the state and the state is presumed not to have divested itself of the resources,¹⁹⁴ but “express and positive language can suffice to evidence the intention to grant exclusive private privileges or rights in that [which is generally] held for the common use and benefit.”¹⁹⁵

The Texas Supreme Court’s holding in *Edwards Aquifer Authority v. Day* may also restrict application of the trust, by recognizing a constitutionally protected interest in groundwater.¹⁹⁶ However, two factors may mitigate the holding’s impact. First, the decision explicitly limited its holding to groundwater, not surface water, and explained that surface water rights are not protected in the same way as groundwater rights.¹⁹⁷ Second, the decision made no mention of public trust issues, leaving intact prior precedent and statutory authority for the protection of navigable waters discussed above.

We conclude that Texas limits new water rights under the public doctrine, as incorporated into the water code. Whether the state would apply the doctrine to limit existing water rights is an open question. The legislature’s ability to alienate the trust weighs against it, but such alienation requires explicit language indicating such an intent, and a court might find that the water code lacks such language.¹⁹⁸ We deem it possible, though perhaps not likely, that a Texas court would apply the trust to limit existing water rights.¹⁹⁹ Given the constitutional nature of the trust in Texas, the legislature itself probably has the power to apply the trust to reallocate water rights.

2. States That Recognize an Inchoate Public Trust in Water

Five states (Alaska, Oregon, New Mexico, Utah, and Wyoming) have all recognized some form of a public trust in state waters, but they have not yet applied the trust to appropriative rights. We review the relevant history for each and offer our best analysis of where the state might go with the doctrine in the future.

193. *State v. Lain*, 349 S.W.2d 579, 583 (Tex. 1961); *Bush v. Lone Oak Club, LLC*, 601 S.W.3d 639 (Tex. 2020); *Lorino v. Crawford Packing*, 175 S.W.2d 410, 413 (Tex. 1943).

194. *TH Invs.*, 218 S.W.3d at 182 n.7.

195. *Landry v. Robison*, 219 S.W. 819, 820 (Tex. 1920); see generally Alexis Andima, *The Public Trust Doctrine in Texas*, in Michael Blumm, ed., *THE PUBLIC TRUST DOCTRINE IN 45 STATES* (2014).

196. 369 S.W.3d 814, 822 (Tex. 2012).

197. *Id.* at 842 (unlike groundwater rights, “riparian rights are usufructuary, giving an owner only a right of use, not complete ownership.”) (internal citations and quotation marks omitted).

198. *Severance v. Patterson*, 370 S.W.3d 705, 716 (Tex. 2012).

199. But see *id.* at 710 (noting that constitutional “limitations on property rights may be by . . . pre-existing limitations in the rights of real property owners that have existed since time immemorial.”) (internal quotations omitted).

a. Alaska

Alaska is, on average, fairly dry,²⁰⁰ but very few of its waters have been altered for human use, and “most water bodies in Alaska are unregulated and currently have sufficient volumes of good quality water to sustain fish and wildlife production, other ecological purposes, and satisfy the majority of present water demands for various human needs.”²⁰¹ As a result, most mechanisms to protect instream flows in Alaska remain untested,²⁰² including the public trust doctrine.²⁰³

Alaska does recognize a public trust, however, applicable both to traditional trust assets and to other natural resources. The Alaska Supreme Court has held “the public trust doctrine provides that the State holds certain resources (such as wildlife, minerals, and *water rights*) in trust for public use, and that government owes a fiduciary duty to manage such resources for the common good of the public.”²⁰⁴ This duty stems in part from Alaska’s unique common use constitutional provisions.²⁰⁵ The constitution provides that “[f]ree access to the navigable or public waters of the State . . . shall not be denied . . . except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes”²⁰⁶ and reserves fish, wildlife, and waters in their natural state “to the people for common use.”²⁰⁷

The Alaska Supreme Court briefly departed from this reading of the constitutional provision in the late 1990s: “Instead of recognizing the creation of a public trust in these clauses per se, we have noted that the common use clause was intended to engraft in our constitution certain trust principles guaranteeing access to the fish, wildlife and water resources of the state.”²⁰⁸ But even that decision recognized the court had “applied the public trust doctrine to cases involving exclusive grants of natural resources by the

200. Spiegel, *supra* note 183, at 414.

201. CHRISTOPHER ESTES, ALASKA DEP’T OF FISH & GAME, ADF&G INSTREAM FLOW AND LAKE LEVEL (RESERVATION OF WATER PROTECTION REPORT 1 (2009)).

202. *Id.*

203. *Id.* Still, “most Alaska population centers experience[ed] local shortages of water supplies during the past 30 years,” and challenges are looming. *Id.* at 48.

204. Baxley v. State, 958 P.2d 422, 434 (Alaska 1998) (citing McDowell v. State, 785 P.2d 1, 16 n.9 (Alaska 1989)) (emphasis added); see also Pullen v. Ulmer, 923 P.2d 54, 60 (Alaska 1996); Metlakatla Indian Cmty., Annette Island Rsrv v. Egan, 362 P.2d 901, 905 (Alaska 1961); Herscher v. State, Dep’t of Com., 568 P.2d 996, 1003 (Alaska 1977).

205. McCavit v. Lacher, 447 P.3d 726, 732 (Alaska 2019). The Supreme Court has suggested that “[t]his constitutional right does not create a private cause of action; rather, the constitutional right of free access to and use of navigable or public water is a right shared by the public and enforced by the State,” but the many cases cited here where a private entity is suing to enforce the trust belie that statement. See *id.* (internal quotation marks omitted).

206. State Dep’t of Nat. Res. v. Alaska Riverways, Inc., 232 P.3d 1203, 1211 (Alaska 2010) (citing ALASKA CONST. art. VIII, § 14); see also AS 38.05.126(c).

207. ALASKA CONST. art. VIII, § 3.

208. Brooks v. Wright, 971 P.2d 1025, 1030, 1033 (Alaska 1999); see Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781, 844 (2010); Steven M. Fink, *The Public Trust Doctrine: The Development of New York’s Doctrine and How It Can Improve*, 34 TOURO L. REV. 1201, 1218–19 (2018).

state,”²⁰⁹ and all of the court’s decisions since then have consistently found public trust duties ensconced in the constitutional language.²¹⁰ Thus, “common law principles incorporated in the common use clause impose . . . a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people in Alaska.”²¹¹

The Alaska Constitution also subjects water appropriations to a general reservation for fish and wildlife,²¹² although the exact meaning of the reservation is unclear.²¹³ Some commentators suggest the general reservation requires that water appropriations leave sufficient water in streams for fish and wildlife,²¹⁴ while others suggest that the reservation has more to do with the fish and wildlife itself that is contained in private lakes and other private water.²¹⁵ The materials from Alaska’s Constitutional Convention seems to favor this latter view, although they too are somewhat unclear.²¹⁶ Alaskan courts have not yet interpreted the provision, relying instead on statutory limits,²¹⁷ but we mention it here because it appears to be an expression of the public trust doctrine.

Regarding conveyances, the Alaska Supreme Court followed the general trend by holding that “any state tideland conveyance which fails to satisfy the requirements of *Illinois Central* will be viewed as a valid conveyance of title subject to continuing public easements for purposes of navigation, commerce,

209. *Brooks*, 971 P.2d at 1030.

210. *Pebble P’ship ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1074 (Alaska 2009) (citing *Pullen v. Ulmer*, 923 P.2d 54, 60 (Alaska 1996)); *Owsicheck v. State Guide Licensing*, 763 P.2d 488, 495 (Alaska 1988); *Alaska Riverways, Inc.*, 232 P.3d at 1211; *Kanuk ex rel. Kanuk v. State Dep’t of Nat. Res.*, 335 P.3d 1088, 1099–100 (Alaska 2014) (citing *Baxley v. State*, 958 P.2d 422 (Alaska 1998) (reiterating the public trust approach to natural resources)).

211. *Owsicheck*, 763 P.2d at 495.

212. “Except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife.” ALASKA CONST. art. VIII, § 13.

213. *ESTES*, *supra* note 201, at 8–9.

214. Michelle Bryan Mudd, *Hitching Our Wagon to A Dim Star: Why Outmoded Water Codes and “Public Interest” Review Cannot Protect the Public Trust in Western Water Law*, 32 STAN. ENV’T L. J. 283, 296 (2013) (suggesting “appropriations of water are limited by this reservation for fish and wildlife”).

215. *ESTES*, *supra* note 201, at 8–9.

216. Alaska Constitutional Convention Files, Committee on Resources, Miscellaneous (Folder 210), Commentary on Article on State Lands and Natural Resources, <https://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Folder%20210.pdf> (“Appropriations are subject to the general reservation of fish and wildlife provided in Section 3 so that reservoirs shall not exclude fish and wildlife remaining in natural states from coming under the provision of their general reservation to the people.”); *see also* MINUTES OF THE ALASKA CONSTITUTIONAL CONVENTION 2477 (“And that the last sentence as to fish and wildlife, that you cannot contaminate the waters such as to kill off the fish or ducks or any other wild animal? RILEY: Right. That was our thinking.”); *id.* at 3709–10 (“This wording, “general reservation”, does that mean that fish and wildlife will be given first consideration among beneficial users? RILEY: No, I should say not . . . This doesn’t set up an order of beneficial uses. The legislature in its wisdom may some day do that.”).

217. *Tulkisarmute Native Cmty. Council v. Heinze*, 898 P.2d 935, 952 (Alaska 1995).

and fishery.”²¹⁸ It is also possible that a conveyance satisfying these requirements would still offend the Alaska Constitution.²¹⁹ This suggests a continuing state regulatory power in most resources subject to the public trust doctrine.²²⁰

Finally, the Alaska Supreme Court has considered and rejected atmospheric public trust claims. In the 2014 decision *Kanuk ex rel. Kanuk v. State Department of Natural Resources*, minors argued that Alaska violated its public trust duties by failing to adequately address climate change. The court held that the minors’ remedy—that the state set and enforce carbon dioxide emission standards—raised nonjusticiable political questions.²²¹ The court also clarified that sovereign immunity does not bar public trust claims, although that holding did not help the plaintiffs in their suit.²²² Similarly, in the 2022 decision *Sagoonick v. State*, the court held that a declaratory judgment on whether the state violated its public trust obligations would have no practical effect, making it a nonjusticiable claim without an actual controversy.²²³

In sum, then, Alaska recognizes a public trust in traditional trust assets and other natural resources. The state “owes a fiduciary duty to manage such resources for the common good of the public as beneficiary.”²²⁴ The waters covered by the trust are defined broadly, including every imaginable surface and subsurface water short of a puddle.²²⁵ Moreover, Alaskan courts have restricted the conveyance of trust assets. However, due in part to strong provisions in the water code that have generally been sufficient to resolve

218. *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1118–19 (Alaska 1988); *see also* *City of Saint Paul v. State Dep’t of Nat. Res.*, 137 P.3d 261, 263 n.8 (Alaska 2006).

219. *CWC Fisheries, Inc.*, 755 P.2d at 1120 n.10.

220. *See* *State Dep’t of Nat. Res. v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1211–12 (Alaska 2010) (citing *Hayes v. A.J. Assocs., Inc.*, 846 P.2d 131, 133 n.6 (Alaska 1993)).

221. *Kanuk ex rel. Kanuk v. State Dep’t of Nat. Res.*, 335 P.3d 1088, 1090–91 (Alaska 2014).

222. *Id.* at 1095–96.

223. *Sagoonick v. State*, 503 P.3d 777, 798–800 (Alaska 2022), *reh’g denied*.

224. *Baxley v. State*, 958 P.2d 422, 434 (Alaska 1998) (citing *McDowell v. State*, 785 P.2d 1, 16 n.9 (Alaska 1989)).

225. ALASKA CONST. art. VIII, § 13; ALASKA STAT. ANN. § 46.15.030 (2004); *id.* §§ 38.05.965(13) & (18) (2004); *see* *Harrison v. State*, No. A-13276, 2022 WL 1769132, at *3–4 (Alaska Ct. App. June 1, 2022).

water use conflicts,²²⁶ it is difficult to parse out exactly what this all means for appropriative water rights in the state.²²⁷

The court has put down a few additional markers about what the public trust means generally in Alaska, however, which provide some illumination. The court held that Alaska's public trust doctrine "is intended to provide independent protection of the public's access to natural resources; provide protection of the public's use of natural resources distinct from that provided by other constitutional provisions; [and prohibit] any monopolistic grants or special privileges."²²⁸ Further, the public trust doctrine's purpose is "to prevent the state from giving out exclusive grants or special privilege as was so frequently the case in ancient royal tradition, to avoid *public* misuse of these resources as to avoid the *state's* improvident use or conveyance of them."²²⁹ The doctrine thus serves as a limit on private rights in trust resources²³⁰ and to "permit the broadest possible access to and use of state waters by the general public."²³¹

To effectuate these purposes, the court subjects "grants of exclusive rights to harvest natural resources listed in the common use clause . . . to close scrutiny."²³² Generally, however, the court's "past application of public trust principles has been as a restraint on the State's ability to restrict public access to public resources, not as a theory for compelling regulation of those resources."²³³

It would seem, then, that the public trust provides some additional protections for public use of Alaska's waters for both traditional and other

226. See *Tulkisarmute Native Cmty. Council v. Heinze*, 898 P.2d 935, 951–53 (Alaska 1995); see also ALASKA STAT. ANN. §§ 46.15.035, .080, .145 (2022). The water code also provides for reservations of water instream, by the state, state or federal agencies, and private citizens, to protect fish and wildlife, navigation, recreation, or other instream uses. ALASKA STAT. ANN. § 46.15 (West). These reservations have been processed very slowly, and many remain outstanding. See JOE KLEIN, JARROD SOWA ET AL., ALASKA DEP'T OF FISH & GAME, SPECIAL REPORT NO. 18-10 INSTREAM FLOW PROTECTION IN ALASKA, 2017 (2018); Adell L. Amos & Christopher R. Swensen, *Evaluating Instream Flow Programs: Innovative Approaches and Persistent Challenges in the Western United States*, 61 ROCKY MTN. MIN. L. INST. 22-1, 22-7–8 (2015); see generally George A. Kimbrell, *Private Instream Rights: Western Water Oasis or Mirage? An Examination of the Legal and Practical Impediments to Private Instream Rights in Alaska*, 24 PUB. LAND & RES. L. REV. 75 (2004).

227. See John F. Klein-Robbenhaar, *Balancing Efficiency with Equity: Determining the Public Welfare in Surface Water Transfers from Acequia Communities*, 36 NAT. RES. J. 37, 44–45 (1996).

228. *Owsichek v. State Guide Licensing & Control Bd.*, 763 P.2d 488, 495–96 (Alaska 1988) (cleaned up).

229. *Brooks v. Wright*, 971 P.2d 1025, 1030–33 (Alaska 1999) (emphasis in the original) (citing *Owsichek*, 763 P.2d at 493 (cleaned up)).

230. *State Dep't of Nat. Res. v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1211–12 (Alaska 2010) ("The right to wharf out, like all riparian rights, is not absolute, but is limited by the state's exercise of its authority under the public trust doctrine.").

231. *Wernberg v. State*, 516 P.2d 1191, 1198–99 (Alaska 1973).

232. *Brooks*, 971 P.2d at 1032.

233. *Kanuk ex rel. Kanuk v. State Dep't of Nat. Res.*, 335 P.3d 1088, 1101–02 (Alaska 2014). A 1998 decision barred tort and public trust actions against the state for damages based on forest decline due to bark beetle infestation, although the decision seemed to suggest that other relief might be available under the public trust doctrine. *Brady v. State*, 965 P.2d 1, 16–17 (Alaska 1998).

public trust uses. While a private litigant might not be able to compel state action based on a public trust claim, they would likely be able to challenge an individual water right as violating the doctrine. Further, the state legislature likely has broad powers under the doctrine and the constitutional common use clause to restrict existing water rights to protect trust uses without running into a constitutional takings problem.²³⁴

b. Oregon

Oregon's strong public trust precedent suggests that the trust could serve as a restraint on existing appropriative water rights and as a protection against takings claims predicated on government regulation of those rights,²³⁵ but the state has not yet explicitly established how its public trust doctrine should interact with appropriative water rights.²³⁶ Several recent Oregon Supreme Court cases lay out the contours of Oregon's public trust law.

First, in *Kramer v. City of Lake Oswego*, the Oregon Supreme Court held that "the people of each State, based on principles of sovereignty, hold the absolute right to all their navigable waters and the soils under them, subject only to rights surrendered and powers granted by the Constitution to the Federal Government."²³⁷ The court wrote that when

title passed to the state to lands underlying the navigable waters of the state, the state's rights were merely those of a trustee for the public; in its ownership of those lands, the state represents the people, and the ownership is that of the people in their united sovereignty, while the waters themselves remain public so that all persons may use the same for navigation and fishing.²³⁸

234. The Alaska Constitution specifically addresses takings of developed natural resources. ALASKA CONST. art. VIII, § 16. ("No person shall be involuntarily divested of his right to the use of waters, his interests in lands, or improvements affecting either, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law."). See *Alaska Riverways, Inc.*, 232 P.3d at 1213–14; *Tulkisarmute Native Cmty. Council v. Heinze*, 898 P.2d 935, 941 (Alaska 1995); § 46.15.100. These rights remain limited by state police powers. *Wernberg*, 516 P.2d at 1193–95 ("[A]llowing riparian rights to be taken without compensation if the taking is in aid of navigation."). Further,

every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.

Id. at 1195. Other limits come from the Alaska Constitution, e.g., the common use and public trust provisions discussed. *Alaska Riverways, Inc.*, 232 P.3d at 1211–12.

235. See generally Scott B. Yates, *A Case for the Extension of the Public Trust Doctrine in Oregon*, 27 ENV'T L. 663 (1997).

236. Michael C. Blumm & Erika Doot, *Oregon's Public Trust Doctrine: Public Rights in Waters, Wildlife, and Beaches*, 42 ENV'T L. 375 (2012); see also *Waterwatch of Or., Inc. v. Water Res. Comm'n*, 112 P.3d 443, 446 (Or. 2005) (declining to consider whether the public trust should be considered in groundwater permitting, because other issues were dispositive).

237. *Kramer v. City of Lake Oswego*, 446 P.3d 1, 9 (Or. 2019) (internal quotation marks and citations omitted).

238. *Id.* at 13.

Thus, generally, “the state can make no sale or disposal of the soil underlying its navigable waters so as to prevent the use by the public of such waters for the purposes of navigation and fishing, but must hold them in trust for the public.”²³⁹ The state can, however, make tradeoffs between various public uses of trust resources,²⁴⁰ and may convey out some trust lands, “at least if the impairment is not ‘substantial’ and serves a greater public need.”²⁴¹

The Oregon Supreme Court further clarified Oregon’s public trust in the 2020 case of *Chernaik v. Brown*. In *Chernaik*, plaintiffs sought to address climate change by extending the public trust to the atmosphere.²⁴² The court held “that the public trust doctrine currently encompasses navigable waters and the submerged and submersible lands underlying those waters,”²⁴³ and emphasized “the navigable waters themselves are a public trust resource,” but rejected efforts to expand the coverage.²⁴⁴ The court held the state is not subject to “the same fiduciary duties that a trustee of a common-law private trust would have, such as a duty to prevent substantial impairment of trust resources,”²⁴⁵ but reiterated the state’s rights in the trust resources are “merely those of a trustee for the public.”²⁴⁶ The court also emphasized the doctrine’s malleability, though it noted that the changes “all resulted from disputes involving a specific body of water and furthered the primary purpose of the doctrine—protecting the public’s right to use navigable waters for fishing and navigation.”²⁴⁷

In *Chernaik*, the court found the state had no affirmative public trust obligation to address climate change, but it remains an open question if or when the state may be obliged to take affirmative action for more traditional purposes under the public trust doctrine.²⁴⁸ The language from *Kramer* suggests such an obligation in some circumstances: The “trustee has a duty to protect trust property and to ensure, consistently with any requirements and prohibitions specific to the trust, that trust property is managed in a way that

239. *Id.* at 14; see *Brusco Towboat Co. v. State, By & Through Straub*, 567 P.2d 1037, 1044 (Or. 1977), *aff’d in part, rev’d in part*, 589 P.2d 712 (1978) (“[S]uch title, even in the hands of a private party, remains subject to the paramount power of the state to intervene on behalf of the public interest.”); *Morse v. Or. Div. of State Lands*, 581 P.2d 520, 524 (Or. Ct. App. 1978), *aff’d* 590 P.2d 709 (Or. 1979) (“[T]he law has historically and consistently recognized that rivers and estuaries once destroyed or diminished may never be restored to the public and, accordingly, has required the highest degree of protection from the public trustee.”); *Hume v. Rogue River Packing Co.*, 92 P. 1065, 1073 (Or. 1907).

240. *McCormick v. State By & Through Or. State Parks & Recreation Dep’t*, 466 P.3d 10, 20–21 (Or. 2020).

241. *Kramer*, 446 P.3d at 14 (citing *Morse*, 590 P.2d.).

242. *Chernaik v. Brown*, 475 P.3d 68, 71–72 (Or. 2020).

243. *Id.* at 72, 76. (“[W]e reject plaintiffs’ contention that . . . the public trust doctrine extends to all the waters of the state, wild fish and other wildlife, and the atmosphere in Oregon.”).

244. *Id.* at 77.

245. *Id.* at 72.

246. *Id.* at 76.

247. *Id.* at 80.

248. See *id.* at 85–86 (Walters, C.J., dissenting).

will benefit all trust beneficiaries.”²⁴⁹ The *Chernaik* court emphasized “the core purpose of the doctrine: to obligate the state to protect the public’s ability to use navigable waters for identifiable uses,”²⁵⁰ and it emphasized the “[judicially-]recognized duty that the state has to protect public trust resources for the benefit of the public’s use of navigable waterways for navigation, recreation, commerce, and fisheries.”²⁵¹

From this precedent, we can try to extrapolate how Oregon courts might react to claims that assert the public trust in the water rights context. The water code makes one reference to the public trust,²⁵² but generally, it references public uses, not the public trust. Nevertheless, Oregon courts are clear that the public trust extends to the corpus of navigable waters, and that trust properties cannot be alienated by the state “so as to prevent the use by the public of such waters for the purposes of navigation and fishing.”²⁵³ This suggests that the public trust itself can serve as a limit on water appropriations, although standing issues and the integration of the public trust with appropriative water rights remain significant hurdles.

Determining how the Oregon courts would react to the public trust as a takings defense in the water right context seems more straightforward. The Oregon Supreme Court has held that Oregon’s common law doctrine of custom (itself closely related to the trust) served as a *Lucas* background principle to defeat a takings claim:

When plaintiffs took title to their land, they were on notice that exclusive use [of the lands in question] was not a part of the “bundle of rights” that they acquired, because public use of [the] areas “is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed.”²⁵⁴

In other words, plaintiffs were on notice that they acquired their lands subject to public use. As a result, “plaintiffs have never had the property interests that they claim were taken by defendants’ decision and regulations.”²⁵⁵ One older Oregon Supreme Court case seems to suggest that public use rights limit water users’ ability to divert navigable-in-fact rivers,

249. *Kramer v. City of Lake Oswego*, 446 P.3d 1, 17 (Or. 2019) (cleaned up); *see also* *Or. Shores Conservation Coal. v. Or. Fish & Wildlife Comm’n*, 662 P.2d 356, 364 (Or. Ct. App. 1983) (“The state, as trustee for the people, bears the responsibility of preserving and protecting the right of public use of the waters for those purposes.”).

250. *Chernaik*, 475 P.3d at 79.

251. *Id.* at 83.

252. As part of Oregon’s provision for instream flow rights in the 1980s, the law made clear that the recognition of an instream right should did not fully address the public’s trust interests. “The people of the State of Oregon find and declare that . . . [t]he recognition of an in-stream water right under ORS 537.336 to 537.348 shall not diminish the public’s rights in the ownership and control of the waters of this state or the public trust therein.” OR. REV. STAT. ANN. § 537.334 (2023) (West).

253. *See Kramer*, 446 P.3d at 440 (quoting *Winston Bros Co. v. State Tax. Comm’n*, 62 P.2d 7 at 9).

254. *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456–57 (Or. 1993); *see* note 45–46 and accompanying text for a discussion of *Lucas* background principles.

255. *Stevens*, 854 P.2d at 456–57.

although the precise reasoning of the decision is unclear.²⁵⁶ Even more on point, Oregon

[w]ater rights . . . are subject to such reasonable regulations as are essential to the general welfare, peace, and good order of the citizens of the state, to the end that the use of water by one, however absolute and unqualified [they] right thereto, shall not be . . . injurious to the rights of the public.²⁵⁷

Taken together, then, the court's decisions make it likely the public trust is a background principle of state law, such that reallocating old rights using the public trust would not implicate the takings clause.

These decisions, coupled with Oregon's public trust precedent—which establishes that public trust assets like the state's navigable water cannot be fully alienated²⁵⁸—suggest that a court would likely find that Oregon water right holders take their rights subject to the state's continuing trust interests.

c. New Mexico

New Mexico courts recognize a strong public trust doctrine in the context of public access to waters for recreational and other uses,²⁵⁹ relying heavily on public ownership principles.²⁶⁰ However, the courts have not yet had to determine whether New Mexico's public trust doctrine applies to appropriative water rights.

Article XVI, Section 2 of New Mexico's Constitution declares all unappropriated waters "belong to the public."²⁶¹ In 1947 the judiciary interpreted Article XVI, Section 2 as creating a public right to recreate and fish in public waters.²⁶² The decision noted that "the public waters and the fish therein are held by the state for the benefit of the people of the state, subject to such regulation of the use thereof as the lawmaking power may provide."²⁶³ The decision notably left out the term "public trust," however.²⁶⁴ A few years later, the court in *Bliss v. Dority* remedied that deficit, stating that the "public waters of [New Mexico] are owned by the state as trustee for the people."²⁶⁵ Finally, in a 2022 access case,²⁶⁶ the court clarified that the public ownership

256. See *Shaw v. Oswego Iron Co.*, 10 Or. 371, 383 (1882).

257. In re Willow Creek, 144 P. 505, 514 (Or. 1914), *modified on reh'g*, 146 P. 475 (Or. 1915).

258. See *supra* note 239 (collecting cases); *Corvallis & E.R. Co. v. Benson*, 121 P. 418, 422 (Or. 1912); *State By & Through State Land Bd. v. Corvallis Sand & Gravel Co.*, 582 P.2d 1352, 1363 (Or. 1978).

259. Stephen J. Leonhardt, Steven M. Nagy & Morgan L. Figuers, *The Public Trust Doctrine and Environmental Rights Initiatives: A Tectonic Shift in Colorado Property Rights in Natural Resources?*, 53 ROCKY MTN. L. FOUND. J. 1, 20 (2016).

260. This includes some groundwaters. See, e.g., *Bliss v. Dority*, 225 P.2d 1007 (N.M. 1950).

261. N.M. CONST. art. XVI, § 2; see also Craig, *Comparative Guide*, *supra* note 6, at 149–51.

262. *State ex rel. State Game Comm'n v. Red River Valley Co.*, 182 P.2d 421, 467 (N.M. 1947).

263. *Id.* at 428 (quoting *Ex parte Powell*, 70 So. 392, 396 (Fla. 1915)). The constitutional public ownership provision was "merely declaratory of the prior existing law obtaining before New Mexico came under American sovereignty and continuing thereafter." *Id.*

264. *Id.*

265. 225 P.2d at 1010.

266. *Adobe Whitewater Club of N.M. v. N.M. State Game Comm'n*, 519 P.3d 46, 49 (N.M. 2022).

doctrine was rooted in the public trust. That court held that “the beds to both navigable waters and nonnavigable waters—whether title is vested in the state or the United States—are still subject to state law under the ‘public trust doctrine.’”²⁶⁷ The court then relied on the doctrine and prior state court decisions to conclude “that state law governs the scope of the public’s right to use waters and that public use within New Mexico includes fishing and recreation.”²⁶⁸

New Mexico also has a constitutional Environmental Rights provision which requires the state to prevent the despoilment of air, water and other natural resources and protect New Mexico’s “beautiful and healthful environment.”²⁶⁹ The New Mexico Court of Appeals has read this provision as creating a public trust duty in the state for the protection of New Mexico’s natural resources, including water.²⁷⁰ On the other hand, the state legislature has constrained the state’s ability to limit water rights in the state water plan context.²⁷¹ This means that the administrative agencies cannot limit existing water rights when implanting the water plan goals of promoting stewardship of the state’s water resources, protecting the water supply and quality, and meeting the basic needs of state residents.²⁷² The extent to which this legislation may be interpreted as barring the application of the public trust to appropriative rights is unclear. Of note, the New Mexico Supreme Court’s 2022 access decision struck down a statute attempting to limit access as unconstitutional,²⁷³ suggesting that the court is willing to see the constitutional trust provisions as a limit on state power.

In summary, New Mexico has developed a strong public trust in the river access context, and several decisions discuss a public trust in water. The New Mexico Supreme Court has not yet confronted a case that pits the public trust interests motivating the public access decisions against the water rights law, but state courts have recognized the doctrine as both a source of and a limit on state authority. Because the court finds a constitutional (or even pre-constitutional) basis for the public trust, it would seem likely to insulate actions reallocating water against takings claims. As a result, we deem it likely that New Mexico’s public trust doctrine could limit appropriative rights in the future.

d. Utah

Utah courts have extensively developed the state ownership of water doctrine to serve in ways that many other states have used the public trust

267. *Id.* at 52.

268. *Id.*

269. N.M. CONST. art. XX, § 21.

270. *Sanders-Reed v. Martinez*, 350 P.3d 1221, 1225 (N.M. Ct. App. 2015).

271. N.M. STAT. § 72-14-4.1(I).

272. *See id.* § 72-14-3.1.

273. *Adobe Whitewater Club of N.M.*, 519 P.3d at 58.

doctrine.²⁷⁴ For example, under the state ownership doctrine, the waters of the state belong to the public, and the public has an easement to use the water wherever it flows, over both public and private lands,²⁷⁵ with some limits.²⁷⁶ Notably, the public ownership doctrine in Utah is statutory, not constitutional.²⁷⁷ In one decision in the 1980s, the Utah Supreme Court suggested that the state “regulates the use of the water, in effect, as trustee for the benefit of the people,” under the public ownership doctrine.²⁷⁸ It suggested that:

Public ownership is founded on the principle that water, a scarce and essential resource in this area of the country, is indispensable to the welfare of all the people; and the State must therefore assume the responsibility of allocating the use of water for the benefit and welfare of the people of the State as a whole.²⁷⁹

But the court has not further developed this line of reasoning, and other state ownership cases generally have not included public trust language.²⁸⁰ Thus, unlike in New Mexico (which explicitly ties its public ownership law to the public trust),²⁸¹ it remains difficult to parse out what relationship, if any, the public ownership doctrine has with the public trust in Utah.

Because Utah courts have not generally relied on the public trust doctrine, it is difficult to predict how they might rule on a conflict between the public trust and state water rights.²⁸² Nevertheless, dicta in a few Utah Supreme Court decisions dealing with trust lands gives some indication. First, in a concurring

274. See Benson, *supra* note 60, at 90–91; Teresa Mareck, *Searching for the Public Trust Doctrine in Utah Water Law*, 15 J. ENERGY NAT. RES. & ENV'T L. 321, 343 (1995).

275. *J.J.N.P. Co. v. State, By & Through Div. of Wildlife Res.*, 655 P.2d 1133, 1136 (Utah 1982); *Conatser v. Johnson*, 194 P.3d 897, 899–900 (Utah 2008), *overruled in part* by the Public Waters Access Act (PWAA), UTAH CODE § 73-29-101 *et seq.*

276. See *Utah Stream Access Coal. v. Orange St. Dev.*, 416 P.3d 553, 555 (Utah 2017) (noting that the Public Waters Access Act, UTAH CODE § 73-29-101 *et seq.*, “cuts back on the easement right recognized in *Conatser*”); *Utah Stream Access Coal. v. VR Acquisitions, LLC*, 439 P.3d 593, 596 (Utah 2019).

277. UTAH CODE ANN. § 73-1-1 (2022); see Benson, *supra* note 60, at 96.

278. *J.J.N.P. Co.*, 655 P.2d at 1136 (citing *Tanner v. Bacon*, 136 P.2d 957, 966–967 (Utah 1943) (Larson, J., concurring)). The same decision cited *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971) as support for the statement “The doctrine of public ownership is the basis upon which the State regulates the use of water for the benefit and well being of the people.” *Id.*

279. *Id.* =

280. See Benson, *supra* note 60, at 74.

281. See *supra* notes 259 to 273 and accompanying text.

282. Brandon S. Fuller, *Pure As Running Water: A Constitutional Argument for Utah's Public Trust Doctrine*, 2019 UTAH L. REV. 481, 502 (2019) (noting “[a]s of today, public trust law in Utah is unclear”); Mudd, *supra* note 214, at 318–19 (suggesting that some aspects of Utah's water code may “run counter to *Illinois Central's* mandate that trust resources be protected above private interests”). The Utah Supreme Court in *Utah Stream Access Coalition* briefly stated that “if the scope of the [access] easement established in *Conatser* is rooted only in common-law trust principles then the legislature is free to override our analysis,” but the context and citations make clear that this is a misstatement; the court meant “common-law easement principles.” *Utah Stream Access Coal. v. VR Acquisitions, LLC*, 439 P.3d 593, 610 (Utah 2019). This is not a statement about the legislature's ability to overrule the public trust doctrine.

opinion in *Tanner v. Bacon*, Justice Larson argued that the public ownership of water made the state a trustee for the people.²⁸³ He argued:

The state, as trustee for the people, must so administer its trust as not to permit its misuse, or its use in any way adverse to the interest of the public. As such, the state engineer and the court are made the guardians of the public welfare in the appropriation of the public waters of the state, and this necessarily involves a large discretion in such matters.²⁸⁴

Almost forty years later, the court in *J.J.N.P. Company v. State* agreed, indicating:

The State regulates the use of the water, in effect, as trustee for the benefit of the people Public ownership is founded on the principle that water, a scarce and essential resource in this area of the country, is indispensable to the welfare of all the people; and the State must therefore assume the responsibility of allocating the use of water for the benefit and welfare of the people of the State as a whole.²⁸⁵

The *J.J.N.P. Co.* court cited *Tanner* and the seminal California case *Marks v. Whitney* for support, further suggesting a public trust tie.²⁸⁶ Several more recent cases seem to reiterate this responsibility, without explicitly mentioning the public trust. *HEAL Utah v. Kane County Water Conservancy District*, for example, noted that “[i]t is essential that putting water to the highest and best beneficial use should not only be encouraged, but carefully safeguarded,”²⁸⁷ and that “the State must therefore assume the responsibility of allocating the use of water for the benefit and welfare of the people of the State as a whole.”²⁸⁸

Second, in the context of trust lands,²⁸⁹ the Utah Supreme Court noted that the public trust doctrine “protects the ecological integrity of public lands and their public recreational uses for the benefit of the public at large.”²⁹⁰ As other commentators have noted, this ruling recognizes a nascent ecological public trust,²⁹¹ but the Utah Supreme Court has not yet spelled out what, exactly, that might mean, especially in the water context.

Third, the public trust also arose in *Colman v. Utah State Land Board*.²⁹² In that case, Colman owned an underwater brine canal in the Great Salt Lake, which was destroyed by a state action. Colman claimed the destruction was an

283. 136 P.2d 957, 966–67 (Utah 1943) (Larson, J., concurring).

284. *Id.*

285. *J.J.N.P. Co. v. State, By & Through Div. of Wildlife Res.*, 655 P.2d 1133, 1136 (Utah 1982).

286. *Id.*; see Mareck, *supra* note 274, at 335–37.

287. 378 P.3d 1246, 1249 (Utah Ct. App. 2016) (citing *Green River Canal Co. v. Thayn*, 84 P.3d 1134 (Utah 2003)).

288. *Id.* (citing *J.J.N.P. Co.*, 655 P.2d at 1136).

289. UTAH CONST. art. XX, § 1. This constitutional provision *may* offer protection for the access easement associated with the publicly owned water of the state, although the litigation is not yet resolved. *Utah Stream Access Coal v. VR Acquisitions, LLC*, 439 P.3d 593, 596–97 (Utah 2019).

290. *Nat’l Parks & Conservation Ass’n v. Bd. of State Lands*, 869 P.2d 909, 919 (Utah 1993); see also Mareck, *supra* note 274, at 333–34.

291. See Craig, *Comparative Guide*, *supra* note 6, at 91.

292. *Colman v. Utah State Land Bd.*, 795 P.2d 622, 623 (Utah 1990).

unconstitutional taking. The state asserted the public trust doctrine as a defense to the taking claim, arguing that Utah could take “any action relating to the lake that is in the public interest and be immune from liability for that action.”²⁹³ Relying on *Illinois Central*, the Utah Supreme Court determined that the state was “essentially argu[ing] that it originally acted without authority in granting the lease to Colman.”²⁹⁴ In making that determination, the court stated, “[t]he Supreme Court made clear that a state can grant certain rights in navigable waters if those rights can be disposed of without affecting the public interest in what remains.”²⁹⁵ The court found the question of whether the trust invalidated the original grant to Colman to be a question of fact for the trial court and remanded the case for a determination on that issue.²⁹⁶ In a more recent decision, the court revisited this depiction of *Illinois Central* and suggested in dicta that *Illinois Central* may allow dispositions of trust assets only when the dispositions “enhance the public’s use and enjoyment of [the trust] property.”²⁹⁷

Colman is perhaps more frequently cited for its description of what the public trust requires, which comes from the case’s dicta: “The essence of this doctrine is that navigable waters should not be given without restriction to private parties and should be preserved for the general public for uses such as commerce, navigation, and fishing.”²⁹⁸ The Utah Supreme Court has not revisited this aspect of the public trust doctrine.²⁹⁹

Lastly, in response to an earlier Utah Supreme Court decision recognizing a broad public right to touch private lands while recreating on public waters flowing over those lands,³⁰⁰ Utah’s legislature passed new laws potentially protecting private water rights.³⁰¹ In the legislation rolling back that decision, the legislature added language protecting private property rights from claims based on public ownership of water. However, the language and context

293. *Id.* at 635.

294. *Id.*

295. *Id.* at 635–36.

296. *Id.* Some commentators have badly misconstrued this holding. Scott Andrew Shepard, *The Unbearable Cost of Skipping the Check: Property Rights, Takings Compensation & Ecological Protection in the Western Water Law Context*, 17 N.Y.U. ENV’T L. J. 1063, 1110 (2009) (arguing that “Utah has also explicitly recognized that application of the public trust does not extinguish the state’s obligation to pay takings compensation”).

297. *Utah Stream Access Coal. v. VR Acquisitions, LLC*, 439 P.3d 593, 608–09 (Utah 2019); see *Adams v. Portage Irrigation, Reservoir & Power Co.*, 72 P.2d 648, 653 (Utah 1937).

298. *Colman*, 795 P.2d at 635–36.

299. Utah’s water code does require the state engineer to consider whether a proposed appropriation or transfer of water will “unreasonably affect public recreation or the natural stream environment, or will prove detrimental to the public welfare,” which may have helped the court avoid getting into public trust issues. UTAH CODE ANN. § 73-3-8(1) (1989); Mareck, *supra* note 274, at 345.

300. *Conatser v. Johnson*, 194 P.3d 897, 898 (Utah 2008).

301. UTAH CODE ANN. § 73-29-103.

suggest that the legislation was aimed at recreational use of water over private land, not water rights more generally.³⁰²

In sum, Utah courts have not yet determined whether the public trust doctrine acts as a limit on water rights,³⁰³ though a current lawsuit related to the Great Salt Lake may clarify the law in this regard.³⁰⁴ There is some suggestion from the cases that the state could use the public trust doctrine to invalidate past legislative grants without raising takings concerns, and courts seem likely to extend these decisions to water rights. However, the extent to which private litigants could employ this power is unknown. Future litigants might follow New Mexico's lead and base the public ownership of water in the public trust, making the statutory public ownership laws a statement of pre-existing law, but there is little evidence to predict how a Utah court would respond to this argument.

e. Wyoming

It is difficult to ascertain what role the public trust might play in Wyoming water right decisions. Wyoming courts have discussed the public trust doctrine, and the Wyoming Supreme Court has relied on public ownership of waters by the state as trustee for the people to protect public use of waterways of all kinds, but Wyoming courts have not applied the doctrine in an appropriations context. We briefly discuss the applications of the public trust in Wyoming below.

Wyoming's Constitution gives the state control and ownership of water in the state and provides for consideration of the public interest in allocation decisions. First, Article I, Section 31 provides that "[w]ater being essential to industrial prosperity, of limited amount, and easy of diversion from its natural channels, its control must be in the state, which, in providing for its use, shall equally guard all the various interests involved."³⁰⁵ Article 8, Section 1 further declares "[t]he water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state."³⁰⁶ Finally, Article 8, Section 3, provides that "[n]o appropriation shall be denied except when such denial is demanded by the public interest."³⁰⁷ Other provisions establish the governance structure for water rights.³⁰⁸

302. *Id.* §§ 73-29-103(1)–(2) (2023). *But see* Jonathan S. Clyde, *Limiting the Public Trust Doctrine As Applied to Appropriative Water Rights*, ABA WATER RES. COMM. NEWSL., 6, 7 (Feb. 2013).

303. *See* Mareck, *supra* note 274; Fuller, *supra* note 282, at 502.

304. Samantha Hawkins, *Legal bid to save Great Salt Lake tests public trust doctrine*, BLOOMBERG L. (Oct. 20, 2023), <https://news.bloomberglaw.com/environment-and-energy/legal-bid-to-save-great-salt-lake-tests-public-trust-doctrine>.

305. WYO. CONST. art. 1, §31.

306. *Id.* art. 8, §1.

307. *Id.* art. 8, §3.

308. *See, e.g., id.* art. 8, §§ 2, 5; *Id.* art. 13, § 5; *id.* art. 16, § 10.

Most of Wyoming's public trust-related jurisprudence builds on the Article 8, Section 1's declaration of state ownership of water.³⁰⁹ The Wyoming Supreme Court has consistently held that the state owns the water as a sovereign,³¹⁰ "merely as trustee for the public and not in a proprietary capacity."³¹¹ It is unclear whether this trust relationship prevents total alienation of water rights, that is, whether the legislature could use the public trust doctrine to restrain water rights that had already been granted under state or territorial laws. The Wyoming Supreme Court has frequently remarked that water rights are subject to reasonable regulation,³¹² but there are some rumblings that restraining previously granted rights might go too far.³¹³ The court has not yet had to confront this issue.

Notably, there is also some suggestion that the state's interest in water is held *subject to* the right of appropriation:

The public ownership . . . is subject to a particular trust or use, specially defined in the statutes and in the Constitution. And that trust or use, in the absence of statute, is just as prominently and intrinsically attached to such public ownership. The waters are held subject to appropriation for beneficial uses.³¹⁴

If this were true, the state could not rely on its role as trustee to dial back existing water rights.³¹⁵ On the other hand, Wyoming decisions have recognized a broad regulatory role for the state in the water context,³¹⁶ predicated on state ownership of water and the constitutional public interest limitation on water rights.³¹⁷ We believe this means it is unlikely that a court

309. *Farm Inv. Co. v. Carpenter*, 61 P. 258, 264–65 (Wyo. 1900) (noting that, "at the modern common law, public waters are generally confined to those which are navigable, and public rights therein to navigation and fishery, and privileges incident thereto," and holding that the constitutional provision broadened the set of public waters in support of appropriation, among other uses).

310. *Willey v. Decker*, 73 P. 210, 221–22 (Wyo. 1903).

311. *Merrill v. Bishop*, 287 P.2d 620, 625 (Wyo. 1955), *overruled by* *In re Gen. Adjudication of All Rts. to Use Water in the Big Horn River Sys.*, 753 P.2d 76 (Wyo. 1988); *see also* *Hunziker v. Knowlton*, 322 P.2d 141, 145 (Wyo. 1958) ("[W]ater is the property of the State of Wyoming, is under the State's control, and is in fact held by the State in trust for its people."); *Day v. Armstrong*, 362 P.2d 137, 145 (Wyo. 1961) ("This court has interpreted the State's title to the waters to be one of trust for the benefit of the people.").

312. *Willey*, 73 P. at 222 ("[A]ccrued rights may be regulated by subsequent legislation, and a compliance with such regulations, if not unreasonable, may be required."); *Farm Inv. Co.*, 61 P. at 265–66.

313. *Quinn v. John Whitaker Ranch Co.*, 92 P.2d 568, 571 (Wyo. 1939); *see also* Douglas L. Grant, *Western Water Rights and Public Trust Doctrine: Some Realism About the Takings Issue*, 27 ARIZ. ST. L. J. 423, 465 (1995).

314. *Willey*, 73 P. at 22; *see also* *Lake De Smet Reservoir Co. v. Kaufmann*, 292 P.2d 482, 486 (Wyo. 1956) ("It has been said at various times by our courts that State ownership of the water is subject to a trust, the right of appropriation by anyone for beneficial use.").

315. *See* Grant, *supra* note 313, at 465.

316. *Lake De Smet Reservoir Co.*, 292 P.2d at 486 ("[I]rrigation water and more especially surplus water cannot be treated as the absolute property of any individual.").

317. *Willey*, 73 P. at 221 (noting the constitutional requirement that "no appropriation shall be denied, except the same be demanded by the public interests"); *Farm Inv. Co.*, 61 P. at 266.

would find the state's interest in water is held subject to the right of appropriation.

Wyoming courts have not had cause to consider what public ownership actually means for appropriative rights. They have interpreted the public ownership provision to protect broad access and use of the waters of the state. In 1961, for example, the Wyoming Supreme Court held that “[i]rrespective of the ownership of the bed or channel of waters, and irrespective of their navigability, the public has the right to use public waters of this State for floating usable craft and that use may not be interfered with or curtailed by any landowner.”³¹⁸ The “[s]tate’s right to control and use its own waters as it sees fit is paramount.”³¹⁹ The court noted that the legislature was aware that the waters of the state were used for more than just consumptive or power uses, and that it sought to protect those uses.³²⁰

In short, the waters of even the nonnavigable rivers “are the property of the State and are held by it in trust for the equal use and benefit of the public.”³²¹ All of this, though, is in the access and use setting, not in the appropriative rights or reallocation setting. At some point, the court may confront a situation where the instream uses and consumptive uses are in conflict, but the precedent thus far provides little guidance as to how the court might reconcile them.

B. States Less Likely to Embrace the Public Trust

1. States with Contrary Legislation

The Idaho, Montana, and Arizona legislatures have attempted to limit the application of the public trust doctrine to appropriative rights. However, legislatures may not have the authority to limit the doctrine, especially as it pertains to the traditional public trust purposes of navigation, commerce, and fishing.³²² As briefly explained above, under *Illinois Central*, states have an unavoidable obligation to protect the public’s use of navigable waters for public trust purposes of navigation, commerce and fishing.³²³ Accordingly, states may not relieve themselves of these duties or privatize a trust resource at the expense of the public unless it passes the *Illinois Central* test.³²⁴ For

318. *Day v. Armstrong*, 362 P.2d 137, 151 (Wyo. 1961).

319. *Id.* at 144.

320. *Id.* at 143 (Noting that several “statutes indicate the Legislature was aware that . . . its waters were usable for purposes other than irrigation, consumption, power or mining, and the waters might be used for transportation by flotation.”).

321. *Id.* at 151.

322. See generally Jonathan S. Clyde, Limiting the Public Trust Doctrine as Applied to Appropriative Water Rights, ABA WATER RES. COMM. NEWSL., 6, 8 (Feb. 2013).

323. See *supra* Part I; *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 451 (1892); see *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158, 161–62 (Ariz. Ct. App. 1991).

324. *Ill. Cent. R.R. Co.*, 146 U.S. at 452 (In deciding whether to dispose of a public trust resource, a state must ask itself, whether by doing so it is “promoting the interests of the public therein, or can

example, a state may not be *able* to permanently alienate all of the waters of a navigable river, leaving it no longer navigable, unless doing so passes the *Illinois Central* test.

In this respect, any per se rule that public trust doctrine does not apply to water rights, such as Idaho Code section 58-1203, discussed below, appears to be at least arguably inconsistent with federal law. However, this principle likely does not extend to all state waters, only the navigable waters identified under *Illinois Central*, and states are empowered to determine the extent of navigability within the state for public trust purposes.³²⁵ Nevertheless, *Illinois Central* seems to recognize some mandatory minimum set of trust responsibilities, and state laws attempting to avoid those trust responsibilities are likely invalid.³²⁶

a. Idaho

The Idaho Supreme Court laid out a strong public trust doctrine with a series of implications for appropriative water rights in the 1980s. The court defined covered waters very broadly, holding that it applied to “[a]ny stream which, in its natural state, will float logs or any other commercial or floatable commodity, or is capable of being navigated by oar or motor propelled small craft for *pleasure* or commercial purposes.”³²⁷ The court also adopted a balancing test in determining whether the alienation or impairment of a public trust resource violates the public trust doctrine;³²⁸ and recognized a broad list of trust uses, including navigation, commerce and fishing, recreation, fish and wildlife habitat, aesthetic beauty, and water quality.³²⁹ The judiciary affirmed the state’s continuing public trust obligations as trustee³³⁰ and clarified that the court is responsible for making the final determinations as to whether “the alienation or impairment of a public trust resource violates the public trust doctrine.”³³¹ Finally, the court found that the “doctrine takes precedent even

be disposed of without any substantial impairment of the public interest in the lands and waters remaining.”).

325. PPL Mont., LLC v. Montana, 565 U.S. 576, 604 (2012).

326. For a more detailed discussion, see Michael C. Blumm et al., *Renouncing the Public Trust Doctrine: An Assessment of the Validity of the Idaho House Bill 794*, 24 ECOLOGY L. Q. 461, 481–83 (1997); Crystal S. Chase, *The Illinois Central Public Trust Doctrine and Federal Common Law: An Unconventional View*, 16 HASTINGS W.-N.W. J. ENV’T L. & POL’Y 113, 150 (2010) (describing *Illinois Central* as “a federal common law floor”); James M. Kearney, *Closing the Floodgates? Idaho’s Statutory Limitation on the Public Trust Doctrine*, 34 IDAHO L. REV. 91, 92 (1997).

327. Selkirk-Priest Basin Ass’n, Inc. v. State ex rel. Andrus, 899 P.2d 949, 953 (Idaho 1995) (citing *Idaho Forest Indus. v. Hayden Lake Watershed Improvement Dist.*, 733 P.2d 733, 739 (Idaho 1987)) (cleaned up); see also *In re Sanders Beach*, 147 P.3d 75, 85 (Idaho 2006) (affirming the expansion of the state’s public trust protections).

328. *Kootenai Env’t All. v. Panhandle Yacht Club*, 671 P.2d 1085, 1092–93 (Idaho 1983).

329. *Id.* The court declared a more expansive trust than the traditional one. As applied to water rights, parts of the decision were invalidated by Idaho Code § 58-1203, but the expansion of the trust to additional values appears to be good law. *Sanders Beach*, 147 P.3d at 85 (2006).

330. *Kootenai Env’t All.*, 671 P.2d at 1094.

331. *Id.* at 1092–94.

over vested water rights,”³³² and explicitly stated that “[t]he state may impose restrictions, conditions, and limitations upon the exercise of water rights in service of the public interest.”³³³ This strong version of the modern ecological trust mirrored the California approach in many regards.³³⁴

In 1996, the Idaho legislature reacted to the series of pro-public doctrine judicial decisions by enacting Idaho Code sections 58-1201-03.³³⁵ Pressure from water users concerned with their private interests prompted the legislature to “clarify the application of the public trust doctrine”³³⁶ in section 58-1203, which explicitly states that the public trust doctrine does not apply to water rights.³³⁷ To date, no reported decisions address the validity of these statutes, and so it is not clear whether the statutes are consistent with federal law, the Idaho constitution, or the inherent public trust limits on sovereign power. Some legal scholars argue that the judiciary should find at least part of the statute impermissible,³³⁸ and we agree that the legislature appears to have violated federal law because the statute attempts to entirely relinquish the public’s trust interest in water.³³⁹

b. Montana

Montana’s courts and the state legislature have relied on the public trust to protect broad public use of the waters of the state, but statutes and precedent applying those statutes bar application of the public trust to water rights.

In the mid-1980s, the Montana Supreme Court developed the state’s public trust to protect public use of waters that run over private land. In *Montana Coalition for Stream Access v. Curran*,³⁴⁰ the court held that, “under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational

332. *Id.* at 1094.

333. *Idaho Conservation League, Inc. v. Idaho*, 911 P.2d 748, 749–50 (Idaho 1995) (“[A]ll water rights . . . are impressed with the public trust.”).

334. *See* Teresa Mareck, *supra* note 274, at 329–31.

335. ID S.L. 1996, ch. 342, § 1.

336. IDAHO CODE §§ 58-1201(4)–(6); *see also* Blumm et al., *supra* note 326.

337. “[T]he public trust doctrine shall not apply to . . . the appropriation or use of water, or the granting, transfer, administration, or adjudication of water or water rights.” IDAHO CODE ANN. § 58-1203(2) (West).

338. *See* Blumm et al., *supra* note 326. In the interim, it appears that Idaho water permitting decisions do consider some trust values, through the state’s broad public interest test. Klein-Robbenhaar, *supra* note 227, at 45–46 (citing R. Keith Higginson, *The Public Interest: A Matter of Discretion?* (Innovation in Western Water Law and Management Conference, 1991)).

339. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892) (“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 state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.”).

340. 682 P.2d 163, 170 (Mont. 1984).

purposes.”³⁴¹ Although the court held that “no private party may bar the use of those waters by the people [and that t]he Constitution and the public trust doctrine do not permit a private party to interfere with the public’s right to recreational use of the surface of the State’s waters,”³⁴² in dicta the court also appeared to limit the public’s right based on private water rights. That is, the court stated that the property owner “has no right to control the use of the surface waters of the [river in question] to the exclusion of the public except to the extent of his prior appropriation of part of the water for irrigation purposes, which is not at issue here.”³⁴³ In reaching this conclusion, the court relied on Article IX, Section 3 of the Montana Constitution, which states that “[a]ll surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.” The court seemed to read the “subject to appropriation” language to allow water right holders to acquire water rights in a way that puts them beyond public use. A second decision less than a month later reiterated substantially the same points, although it did not discuss water rights.³⁴⁴

In statutes addressing navigation, streambed modification, and instream flows, Montana’s legislature has added several laws that seek to protect water rights from reallocation.³⁴⁵ For example, it is the policy of the state that its “fish and wildlife resources and particularly the fishing waters within the state are to be protected and preserved to the end that they be available for all time, without change, in their natural existing state . . .”³⁴⁶ But, this policy “shall not operate or be so construed as to impair, diminish, divest, or control any existing or vested water rights under the laws of the state of Montana or the United States.”³⁴⁷ Building on this history, some scholars believe that adoption of the Mono Lake rationale in Montana would violate state constitutional provisions if it actually reallocated, without compensation, an amount of water from a vested water right in favor of a broad recreational use.³⁴⁸

The legislature also tried to create expansive privileges for the public under the public trust doctrine by enacting statutes that would allow the public the right to “build duck blinds, boat moorages, and camp overnight, so long as

341. *Id.* at 171.

342. *Id.* at 170.

343. *Id.*

344. *Montana Coal. for Stream Access, Inc. v. Hildreth*, 684 P.2d 1088, 1091 (Mont. 1984); *see also In re Adjudication of Existing Rts. to the Use of All the Water*, 55 P.3d 396, 404 (Mont. 2002) (affirming the public’s right, under the state constitution and public trust doctrine, to an “instream, non-diversionary right to the recreational use of the State’s navigable surface waters”).

345. MONT. CODE ANN. §§ 75-5-705, 75-7-104, 85-1-111, 87-5-506 (West).

346. *Id.* § 87-5-501.

347. *Id.* § 87-5-506.

348. *See* R. Mark Josephson, *An Analysis of the Potential Conflict Between the Prior Appropriation and Public Trust Doctrines in Montana Water Law*, 8 PUB. LAND. L. REV. 81, 111–12 (1987).

not within sight of or within 500 yards of an occupied dwelling.”³⁴⁹ The Montana judiciary found the statute unconstitutional because the right it afforded was broader than what was necessary for the constitutionally-protected public to enjoy public waters.³⁵⁰

To summarize, Montana courts have recognized a powerful public trust for waterway use purposes, but state law and perhaps the state constitution appear to limit efforts to reallocate water using the public trust. It’s not clear how Montana courts would rule if directly confronted by a claim that the public trust overrode that constitutional limit on reallocation, especially given the language above that seems to recognize the independent power of the public trust, apart for the state constitution. It is also not clear how the court would rule if the legislature sought to use the public trust to reallocate water rights absent additional decisions.

c. Arizona

Arizona’s public trust doctrine is complicated due to passage of a series of laws restricting the doctrine and subsequent court decisions overturning many of those laws. Most of the conflict has focused on public ownership of stream beds,³⁵¹ but it has extended to water rights as well.³⁵² The legislature has tasked an administrative entity, the Arizona Navigable Stream Adjudication Commission, to determine which Arizona rivers and streams are navigable. The Commission’s determinations have been the subject of extensive litigation.³⁵³ In the most recent of these decisions, an Arizona appellate court upheld the Commission’s determination that most waterways in the state are nonnavigable.³⁵⁴ This will sharply limit the trust’s application in the state. We provide a brief overview here.

In 1985, the Arizona Attorney General asserted state ownership of the Verde River as a way to limit sand and gravel mining in the riverbed.³⁵⁵ This was the state’s first effort to claim riverbed ownership beyond the Colorado River, and it spurred an outcry from property owners.³⁵⁶ In response, the legislature passed a law largely disclaiming the state’s public trust interest in most navigable waterways in the state.³⁵⁷ An Arizona appellate court, however, found the law unconstitutional in *Arizona Center for Law in the*

349. *Galt v. State*, 731 P.2d 912, 915 (Mont. 1987).

350. *Id.*

351. *See generally* Benson, *supra* note 60.

352. *Ariz. Ctr. for L. in Pub. Interest v. Hassell*, 837 P.2d 158, 161–62 (Ariz. Ct. App. 1991).

353. *See* Sharon Megdal et. al., *The Forgotten Sector: Arizona Water Law and the Environment*, 1 ARIZ. J. ENV’T L. & POL’Y 243, 262 (2011).

354. *Def’s. of Wildlife v. Arizona Navigable Stream Adjudication Comm’n*, 525 P.3d 641, [pincite] (Ariz. Ct. App. 2023).

355. For a detailed overview of this early history, see Tracey Dickman Zobenica, *The Public Trust Doctrine in Arizona’s Streambeds*, 38 ARIZ. L. REV. 1053, 1059–68 (1996).

356. *Id.* at 1059.

357. *Id.* at 1060 (citing Act of Apr. 21, 1987, ch. 127, 1987 Ariz. Legis. Serv. 293–98 (West)).

Public Interest v. Hassell,³⁵⁸ holding that “on February 14, 1912, at the instant it achieved the constitutional status of a state, Arizona acquired title to the lands below high-water mark in all navigable watercourses within its boundaries.”³⁵⁹ Relying on *Illinois Central*, judicial review as an aspect of the state separation of powers doctrine, and the state’s constitutional gifts clause,³⁶⁰ the court held that “the state may not dispose of trust resources except for purposes consistent with the public’s right of use and enjoyment of those resources, [and] any public trust dispensation must also satisfy the state’s special obligation to maintain the trust for the use and enjoyment of present and future generations.”³⁶¹

In 1992, the Arizona legislature created the Commission to determine which rivers and streams were navigable and so owned by the state.³⁶² Since then, court decisions have generally pushed back on legislative and Commission determinations that limit application of the trust.³⁶³ For example, the court rejected a narrower navigability definition, requiring the state to apply the federal navigability test.³⁶⁴ The Commission has now made determinations for most rivers in the state, generally determining them to be nonnavigable;³⁶⁵ a recent decision from the Arizona Court of Appeals largely upheld those determinations, and the parties elected not to appeal.³⁶⁶

The Commission’s determinations matter a great deal for understanding the interactions between the public trust and water rights. First, the public trust in Arizona applies only to those waterways determined to be navigable, and the Commission decisions and subsequent judicial reviews determine navigability. Second, for the few waterways deemed navigable, legislation requires the commission to “identify and make a public report of any public trust values associated with the navigable watercourse.”³⁶⁷ Legislation also limits the way the state may reserve the water required to support these trust values within the state’s appropriative rights system.³⁶⁸ Given that most Arizona waterways are already over-appropriated, this approach severely

358. 837 P.2d 158, 161 (Ariz. Ct. App. 1991).

359. *Id.* at 162.

360. *Id.* at 169.

361. *Id.* at 170.

362. ARIZ. REV. STAT. § 37-1121.

363. *Defenders of Wildlife v. Hull*, 18 P.3d 722, 727 (Ariz. Ct. App. 2001); *State ex rel. Winkleman v. Ariz. Navigable Stream Adjudication Comm’n*, 229 P.3d 242, 248 (Ariz. Ct. App. 2010).

364. *Defenders of Wildlife*, 18 P.3d at 727.

365. *Defs. of Wildlife v. Ariz. Navigable Stream Adjudication Comm’n*, 525 P.3d 641, 648 (Ariz. Ct. App. 2023) (The Commission “has resolved title for most of Arizona’s rivers based on navigability, finding all but the mighty Colorado to be nonnavigable. Three rivers remain, the Verde, the Salt, and the Gila. This appeal promises to be the last step in the streambed litigation, which began in the 1980s. As relevant to this case, ANSAC found 20 segments of the 3 rivers nonnavigable (6 segments of the Verde, 6 segments of the Salt, and 8 segments of the Gila). Of the 20 segments, 17 are the subject of this appeal.”).

366. *Id.*

367. ARIZ. REV. STAT. § 37-1128(B).

368. *Id.* § 37-1130.

limits the state's ability to provide waters for trust uses. Third and finally, the legislation offers affected landowners several avenues to mitigate the impacts of a navigability determination, including allowing for petitions asking the state "to disclaim, release, relinquish or dispose of the property from public trust land status as no longer necessary or materially useful for the purposes of the trust"³⁶⁹ and refunding past property taxes, money spent on improvements, and the purchase price, plus interest, paid to the state for any trust property obtained from the state.³⁷⁰ Based on past practices, the determination of trust values and the subsequent wrangling over water for those trust values are likely to produce extensive litigation and continuing changes to Arizona's public trust laws. For example, the refunds and other provisions may violate the state's constitutional gift clause.³⁷¹

We do have some indications from Arizona courts about how they may rule on the interaction between water rights and the public trust doctrine. Most prominently, Arizona's Supreme Court rejected the state's effort to limit application of the public trust to water rights.³⁷² In 1995, the legislature passed a law stating that:

The public trust is not an element of a water right in an adjudication proceeding held pursuant to this article. In adjudicating the attributes of water rights pursuant to this article, the court shall not make a determination as to whether public trust values are associated with any or all of the river system or source.³⁷³

The court struck down the law, holding that:

[The] doctrine is a constitutional limitation on legislative power to give away resources held by the state in trust for its people. The Legislature cannot order the courts to make the doctrine inapplicable to these or any proceedings . . . That determination depends on the facts before a judge, not on a statute. It is for the courts to decide whether the public trust doctrine is applicable to the facts. The Legislature cannot by legislation destroy the constitutional limits on its authority.³⁷⁴

On the other hand, the Arizona Supreme Court in 2015 held that the state water right agency's "authority to deny a properly filed application for the severance and transfer of water rights is defined by the 'limitations and conditions' set forth in" state statutes.³⁷⁵ "Accordingly, [the agency] did not abuse its discretion, act arbitrarily or capriciously, or act contrary to law in denying the County's objections to the proposed transfers, when those

369. *Id.* § 37-1128.

370. *Id.* § 37-1132.

371. *See* *Ariz. Ctr. for L. in Pub. Interest v. Hassell*, 837 P.2d 158, 170 (Ariz. Ct. App. 1991).

372. *San Carlos Apache Tribe v. Superior Ct. ex rel. Cnty. of Maricopa*, 972 P.2d 179, 199 (Ariz. 1999).

373. ARIZ. REV. STAT. § 45-263(B) (1995) (invalidated by *San Carlos Apache Tribe v. Superior Ct.*, 972 P.2d 179 (Ariz. 1999)).

374. *San Carlos Apache Tribe*, 972 P.2d at 199.

375. *Ariz. Dep't of Water Res. v. McClennen*, 360 P.3d 1023, 1027 (Ariz. 2015).

objections did not identify any violation of [the statute].”³⁷⁶ The county had raised public interest objections to a transfer, but the court ruled that the agency lacked authority to consider them.³⁷⁷ The decision does not mention the public trust, so it is unclear whether the court would rule the same way with respect to a public trust objection. Currently, Arizona law requires the public trust to be considered in the initial appropriative right permitting process,³⁷⁸ but once the right is granted, protections may be minimal.

Although “no Arizona court has applied the public trust doctrine to limit water rights,”³⁷⁹ two Arizona Court of Appeals decisions suggest that the public trust could insulate the state from takings claims in the water right context.³⁸⁰ In 2001, the Court of Appeals refused to recognize that a taking had occurred when the state used the natural channel of a water way, which flowed through private property, for the purpose of delivering water appropriations.³⁸¹ The court explained that the property owner “took its title subject to the inherent limitations arising from the state’s reservation of the natural channels to move and store water.”³⁸² A similar case appeared before the Court of Appeals in 2008, in which the court, relying on the 2001 case, held that a taking did not occur because the state took its property “subject to Arizona’s reservation of natural channels to move and store water.”³⁸³ These cases suggest that the state is willing to recognize public trust principals in order to determine that a taking has not occurred in the context of water rights.

Finally, we note that Arizona courts have not included groundwater under the public trust doctrine, holding instead that the statutory Arizona Groundwater Management Act provides the exclusive factors for consideration, at least in the context of designating basins and sub-basins under the Act.³⁸⁴

Taken together, this history shows that Arizona has many of the elements in place that have led to a public trust restraint on water rights in other states. On the other hand, as others have noted, “the narrow *McClennen* decision and the conservative political culture of the state” suggest trust expansion is

376. *Id.*; but see Janet M. Howe, *Arizona Water Law: A Parched Public Interest*, 58 ARIZ. L. REV. 541, 556 (2016).

377. *Arizona Dep’t of Water Res.*, 360 P.3d at 1026–27.

378. ARIZ. REV. STAT. § 45-153(A) (“The director shall approve applications . . . but when the application or the proposed use conflicts with vested rights, is a menace to public safety, or is against the interests and welfare of the public, the application shall be rejected.”).

379. Megdal et al., *supra* note 353, at 264.

380. *W. Maricopa Combine, v. Ariz. Dep’t of Water Res.*, 26 P.3d 1171, 1180 (Ariz. Ct. App. 2001) (noting that the property owner took “title subject to the inherent limitations arising from the state’s reservation of the natural channels to move and store water. No taking can arise by this pre-existing limitation.”); *S.W. Sand & Gravel, v. Cent. Ariz. Water Conserv. Dist.*, 212 P.3d 1, 5 (Ariz. Ct. App. 2008) (same).

381. *W. Maricopa Combine*, 26 P.3d at 1180.

382. *Id.*

383. *S.W. Sand & Gravel*, 212 P.3d at 5–6.

384. *Seven Springs Ranch v. State ex rel. Ariz. Dep’t of Water Res.*, 753 P.2d 161, 165–66 (Ariz. Ct. App. 1987).

unlikely.³⁸⁵ Given the state's ongoing efforts to narrow the scope of navigability and the recent appellate court decision upholding those efforts, we consider it unlikely that the public trust doctrine will play a significant role in Arizona water rights law in the near term.

2. States Otherwise Unlikely to Apply the Public Trust

Washington, Oklahoma, Nebraska, and Kansas are unlikely to apply the public trust in water rights decisions in the near term. Washington has long recognized the public trust but has not applied it in the context of water rights. Oklahoma does not appear to have developed the public trust in the context of water rights. Similarly, Nebraska, has not developed the geographic scope of the public trust beyond the English common law, the rivers subject to the ebb and flow of the tides. Finally, Kansas, too, is unlikely to recognize the public trust in the context of water rights as its courts are reticent to apply the doctrine absent constitutional or legislative direction.

a. Washington

Washington's public trust currently has no role in water right decisions. Although, as in most states, the public trust doctrine would likely insulate legislative reordering of water rights if the legislature chose to act. Washington's long history of public trust decisions has focused primarily on shoreline development³⁸⁶ but we begin with the few cases addressing water rights. In these cases, the Washington Supreme Court determined that Washington's Department of Ecology (which administers water rights) does not have the authority to assume the state's public trust duties.³⁸⁷

In the 1980s, Washington's Department of Ecology tried to rely on the public trust for authority to restrain several irrigators from pumping groundwater that was depriving a group of downstream ranchers of their access to surface water.³⁸⁸ The Washington Supreme Court noted that "[t]he doctrine prohibits the State from disposing of its interest in the waters of the state in such a way that the public's right of access is substantially impaired, unless the action promotes the overall interests of the public."³⁸⁹ However the court held that "the duty imposed by the public trust doctrine devolves upon the State, not any particular agency thereof."³⁹⁰ Because the Department of Ecology's

385. Howe, *supra* note 376, at 556.

386. For detailed discussions of this history, see Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521, 545 (1992); F. Lorraine Bodi, *The Public Trust Doctrine in the State of Washington: Does It Make Any Difference to the Public?*, 19 ENV'T L. 645, 652 (1989); Ivan M. Stoner, *Leading a Judge to Water: In Search of a More Fully Formed Washington Public Trust Doctrine*, 85 WASH. L. REV. 391, 403 (2010).

387. See generally *Rettkowski v. Dep't of Ecology*, 858 P.2d 232 (Wash. 1993); see also *R.D. Merrill Co. v. State Pollution Control Hearings Bd.*, 969 P.2d 458, 467 (Wash. 1999).

388. *Rettkowski*, 858 P.2d at 234.

389. *Id.* at 239.

390. *Id.*

enabling statute did not contain the “statutory authority to assume the State’s public trust duties and regulate in order to protect the public trust,” the court held that the Department of Ecology could not rely on the doctrine for regulatory power.³⁹¹ Thus, the doctrine was not “germane to resolving the issues before” the court.³⁹² In the case, the court also declined to extend the public trust doctrine to nonnavigable waters or groundwater.³⁹³

Similarly, in a 1999 decision, the Washington Supreme Court rejected claims that the Department of Ecology’s decision on another matter violated the public trust doctrine.³⁹⁴ The court reiterated its previous holding that public trust obligations “[devolve] upon the State, not any particular agency. The Department [of Ecology]’s enabling statute does not grant it authority to assume the public trust duties of the state.”³⁹⁵ The court further clarified that, although “the state water codes contain numerous provisions intended to protect public interests . . . , the public trust doctrine does not serve as an independent source of authority for the Department [of Ecology] to use in its decision-making apart from the provisions in the water codes.”³⁹⁶

The court has also made clear that, due to limits in the current water codes, “impacts to the water source and its flora and fauna . . . cannot operate to impair existing water rights.”³⁹⁷ The state’s two major water laws, the Water Code of 1917 and the Water Resources Act of 1971, provide that nothing in the statutes “shall affect or operate to impair any existing water rights.”³⁹⁸ Thus, Washington minimum flows, established beginning in the late 1960s in a process that continued over decades and is still ongoing, do not reduce preexisting rights and so often go unmet.³⁹⁹ Because Washington courts have allowed the state to reduce water rights through other mechanisms,⁴⁰⁰ the issue

391. *Id.* at 239–40. The Court also noted that the doctrine provided no guidance as to how to choose among potential water uses: “That guidance . . . is found only in the Water Code.” *Id.*

392. *Id.*

393. *Id.*

394. *See generally* *R.D. Merrill Co. v. State, Pollution Control Hearings Bd.*, 969 P.2d 458 (Wash. 1999).

395. *Id.* at 467. This is in spite of language in the water code which provides for “base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values,” subject to existing water rights. RCW 90.54.020(3). The court thus seems very resistant to reading the public trust into water appropriation decisions in the state, absent clear legislative guidance.

396. *R.D. Merrill Co.*, 969 P.2d at 467. The court also rejected using the public trust doctrine as a canon of construction for the water codes. *See also* *Postema v. Pollution Control Hearings Bd.*, 11 P.3d 726, 744 (Wash. 2000); *State v. Lawrence*, 6 P.2d 363, 364 (Wash. 1931). The decision does leave some room for the doctrine’s future development; the court seemed to leave some room for the possibility that groundwater might fall under the public trust, if Ecology had authority to implement the doctrine. *See Lawrence*, 6 P.2d at 365, n.9; *see also* Devra R. Cohen, *Forever Evergreen: Amending the Washington State Constitution for A Healthy Environment*, 90 WASH. L. REV. 349, 364–65 (2015).

397. *State Dep’t of Ecology v. Grimes*, 852 P.2d 1044, 1053 (Wash. 1993).

398. *Id.* at 1048.

399. *Swinomish Indian Tribal Cmty. v. State Dep’t of Ecology*, 311 P.3d 6, 16–17 (Wash. 2013).

400. *See, e.g.*, reductions under the Clean Water Act; Pub. Util. Dist. No. 1 of Pend Oreille Cnty. v. State Dep’t of Ecology, 51 P.3d 744, 747 (Wash. 2002); and for unreasonable use, *Grimes*, 852 P.2d at 1055.

appears to be one of missing *statutory* authority to reduce water rights under the public trust doctrine,⁴⁰¹ not an inherent lack of underlying potential authority to restrict water rights.⁴⁰²

Some Washington court decisions describe a strong form of property in water rights,⁴⁰³ but, because the court has not considered whether the public trust could be applied to these water rights, the decisions provide little guidance on what the court might do if faced with legislation applying the public trust to existing property rights. For guidance on that issue, we turn to several public trust decisions in the shoreline development context that confronted the issue more squarely.

Both the Washington Supreme Court and the Ninth Circuit have relied on the public trust doctrine to insulate Washington regulatory actions from unconstitutional takings claims in the shoreline development context. In *Orion Corporation v. State*, the Washington Supreme Court acknowledged that:

[D]uring the early part of the twentieth century, state policy included the widespread sale of tideland property and the encouragement of diking and filling. Nevertheless, while the state has authority to convey title to these properties, the Legislature has never had the authority . . . to sell or otherwise abdicate state sovereignty or dominion over such tidelands and shorelands.⁴⁰⁴

Thus, “the sale of . . . trust property is subject to the paramount public right of navigation and fishery.”⁴⁰⁵ The court noted that “[t]he public trust doctrine resembles ‘a covenant running with the land (or lake or marsh or shore) for the benefit of the public and the land’s dependent wildlife,’”⁴⁰⁶ such that a developer “could make no use of the tidelands which would substantially impair the trust.”⁴⁰⁷ As a result, the court held that the developer never had the right to “dredge and fill its tidelands, and since a property right must exist before it can be taken, [the state legislation at issue did not affect] a taking by prohibiting Orion’s dredge and fill project.”⁴⁰⁸ Relying on *Orion* and *Lucas*, the Ninth Circuit later held that “Washington’s public trust doctrine ran with the title to the tideland properties and alone precluded the shoreline residential

401. See *Pub. Util. Dist. No. 1 of Pend Oreille Cnty.*, 51 P.3d at 751–54 (holding that the Department of Ecology cannot consider the public interest when reviewing a water right change petition because it lacks statutory authority to do so).

402. Two cases on an adjacent issue both enjoined water withdrawals from a nonnavigable lake when the withdrawals reduced lake levels so as to impair riparian uses (including boating and fishing). See *In re Martha Lake Water Co. No. 1*, 277 P. 382, 383 (Wash. 1929); *Litka v. City of Anacortes*, 9 P.2d 88, 88 (Wash. 1932).

403. *Grimes*, 852 P.2d at 1052–53 (“This court has consistently held that rights of users of water for irrigation purposes are vested rights in real property.”).

404. *Orion Corp. v. State*, 747 P.2d 1062, 1072 (Wash. 1987)

405. *Id.*

406. *Id.* at 1072 (citing Scott W. Reed, *The Public Trust Doctrine: Is it Amphibious?*, 1 ENV’T L. & LITIG. 107, 118 (1986)).

407. *Id.*

408. *Id.* at 1073. The court also declined to “decide the total scope of the doctrine,” which suggests that the doctrine’s outer limit is as yet unreached. *Id.*

development.”⁴⁰⁹ Based on these decisions, it seems likely that the public trust would insulate Washington against takings claims based on restrictions on existing water rights, if those restrictions were predicated on trust interests.

Two additional categories of cases provide some guidance as to how Washington courts would react to other public trust suits related to water rights.

First, litigants might claim that the public trust doctrine should invalidate the water rights scheme as a whole in Washington since it does not protect public trust interests.⁴¹⁰ If faced with such a challenge, the court would likely apply a test described in its shoreline public trust cases:

The test of whether or not an exercise of legislative power with respect to tidelands and shorelands violates the ‘public trust doctrine’ is . . . (1) whether the state, by the questioned legislation, has given up its right of control over the *jus publicum* and (2) if so, whether by so doing the state (a) has promoted the interests of the public in the *jus publicum*, or (b) has not substantially impaired it.⁴¹¹

In applying the test, “courts review legislation under the public trust doctrine with a heightened degree of judicial scrutiny, as if measuring the legislation against constitutional protections.”⁴¹² Washington courts have not invalidated any laws based on this test and would be unlikely to do so in the water rights context.

Second, litigants might claim that the legislature lacked authority to alienate water rights in a way that impacted public trust interests. Certainly, many Washington cases proclaim that the public trust doctrine “prohibits the State from disposing of its interest in the waters of the state in such a way that the public’s right of access is substantially impaired, unless the action promotes the overall interests of the public.”⁴¹³ Under the state constitution,

Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes.⁴¹⁴

409. *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 985–87 (9th Cir. 2002); *but see* Cohen, *supra* note 396, at 363 (“[T]he duties imposed by the public trust doctrine as codified in article XVII of the State Constitution are imposed only on the state, and therefore can be utilized only by the state and not by a municipality.”).

410. *See, e.g.*, Johnson et al., *supra* note 386, at 545. (“The Water Code is potentially inconsistent with the public trust doctrine in that it purports to issue water consumptive use rights that sometimes damage and destroy public trust interests.”).

411. *Caminiti v. Boyle*, 732 P.2d 989, 994–95 (Wash. 1987).

412. *Citizens for Responsible Wildlife Mgmt. v. State*, 103 P.3d 203, 205 (Wash. Ct. App. 2004); *see* Richard L. Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don’t*, 12 U. PUGET SOUND L. REV. 339, 402 (1989).

413. *Rettkowski v. Dep’t of Ecology*, 858 P.2d 232, 239 (Wash. 1993); *see Caminiti*, 732 P.2d at 992; *Weden v. San Juan Cnty.*, 958 P.2d 273, 283 (Wash. 1998) (“[T]he [public trust] doctrine has always existed in Washington law.”).

414. WASH. CONST. art. 17, § 1.

“[U]nder the foregoing constitutional provision the state of Washington has the power to dispose of, and invest persons with, ownership of tidelands and shorelands subject only to the paramount public right of navigation and the fishery.”⁴¹⁵ But despite the language, this limitation is not universal,⁴¹⁶ and Washington courts might deem the water rights system an allowable method of alienation. Whether Washington courts make this determination in the future, however, is unclear; the courts have not yet tackled this issue head on and may be influenced by the rise in water issues as the impacts of climate change and other challenges continue to manifest.

Finally, several efforts to apply the public trust doctrine to the atmosphere in Washington failed at the appellate court level and, although the decisions have some broad language, it is likely inapposite for more traditional trust interests in Washington’s waters.⁴¹⁷ As reflected in these cases, however, “it is still not known whether and to what extent the state will be accorded any affirmative duties under the doctrine, or even whether the state has trust responsibilities owing to the general public and to future generations.”⁴¹⁸

As a whole, then, Washington courts have read the state water statutes to preclude any role for the public trust in water right decisions. However, other precedent suggests that the doctrine could serve as a source of authority for the state or insulate it from takings claims if the legislature chose to embrace the doctrine.

b. Oklahoma

Oklahoma’s public trust is largely undeveloped. The state constitution does not adopt any relevant public trust or public ownership language.⁴¹⁹ Similarly, the legislature does not appear to have adopted public trust principles in the context of water,⁴²⁰ and the statutes do not empower the state

415. *Caminiti*, 732 P.2d at 992–93. Later decisions recognized that these rights extended to include “boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters.” *Id.* at 669, 994 (citing *Wilbour v. Gallagher*, 462 P.2d 232 (Wash. 1969)). Several appellate court cases recognize an even broader trust, which would reach “environmental quality.” *Citizens for Responsible Wildlife Mgmt.*, 103 P.3d at 205–06 (internal citation omitted).

416. *Chelan Basin Conservancy v. GBI Holding Co.*, 413 P.3d 549, 561 (Wash. 2018).

417. *See Svitak ex rel. Svitak v. State*, 178 Wash. App. 1020 (2013); *Aji P. By & Through Piper v. State*, 480 P.3d 438, 458 (Wash. Ct. App. 2021).

418. *Bodi*, *supra* note 386, at 653. There is at least some suggestion that the trust imposes obligations on the state.

[U]nder the public trust doctrine, DNR must protect various public interests in state-owned tidelands, shore lands and navigable water beds . . . This necessarily obligates the state to balance the protection of the public’s right to use resources on public land with the protection of the resources that enable these activities.

State Geoduck Harvest Ass’n v. Wash. State Dep’t of Nat. Res., 101 P.3d 891, 895 (Wash. Ct. App. 2004); *see Lake Union Drydock Co. v. State Dep’t of Nat. Res.*, 179 P.3d 844, 851 (Wash. Ct. App. 2008).

419. *See generally* OKLA. CONST.; *see also* Craig, *Comparative Guide*, *supra* note 6, at 158.

420. *See* OKLA. STAT., tit. 82. Waters and Water Rights (chs. 1–25).

to consider the public interest when approving or denying appropriations.⁴²¹ One trust-adjacent decision from the Oklahoma Supreme Court found that the public has a right to boat, recreate, and fish—even in waters that are not navigable under the federal test—at least in some cases,⁴²² but the decision did not use the term “public trust.” Only two Oklahoma Supreme Court decisions cite *Illinois Central*, and neither cites it for public trust purposes.⁴²³

In 1990, in another trust-adjacent case, the Oklahoma Supreme Court held that a riparian owner “enjoys a vested common-law right to the reasonable use of the stream.”⁴²⁴ Emphasizing that this right is a “valuable part” of the property owner’s “bundle of sticks,” the court declared that this riparian right cannot be “taken for public use without compensation.”⁴²⁵ Thus, if the state would like to require that a riparian water right holder reduce its use, it must fairly compensate them or risk violating the Oklahoma Constitution, Article 2, Section 24.⁴²⁶ Whether the court would similarly find that Article 2, Section 24 applies to appropriative rights is not clear. The opinion suggests similar logic would apply to appropriative rights since the court also defines appropriative rights as “vested property right[s]” not “subject to permanent divestment except for nonuse” or failure to “beneficially use the water.”⁴²⁷

The decision offers water rights strong protection under the Oklahoma Constitution. However, it also seems to protect some trust interests in minimum flows through its protection of flows for riparian use, and some have suggested “the public trust was floating unseen beneath the majority opinion’s surface.”⁴²⁸ Certainly, the dissent advocated for the explicit adoption of the doctrine, arguing that “public interests are paramount to both riparian and appropriative interests and may be limited by proper legislation aimed at protecting these paramount public interests.”⁴²⁹ Still, the dissenting opinion has not been adopted by subsequent courts. As with other states in this category, the minimum public trust articulated in *Illinois Central* likely still applies, but we believe it is unlikely that Oklahoma will adopt a robust public trust doctrine in the near term.

c. Nebraska

Like Oklahoma, Nebraska has also not developed its public trust doctrine to any meaningful degree. This may be because, early in the state’s

421. See 82 OKLA. STAT. § 105.12 (West).

422. *Curry v. Hill*, 460 P.2d 933, 935–36 (Okla. 1965).

423. See *Coyle v. Smith*, 113 P. 944, 957 (Okla. 1911); *Sublett v. City of Tulsa*, 405 P.2d 185, 196 (Okla. 1965).

424. *Franco-American Charolaise v. Okla. Water Res. Bd.*, 855 P.2d 568, 571 (Okla. 1990).

425. *Id.*

426. *Id.*; OKLA. CONST. art. 2, § 24.

427. *Franco-American Charolaise*, 855 P.2d at 580–81.

428. Drew L. Kershen, *An Oklahoma Slant to Environmental Protection and the Politics of Property Rights*, 50 OKLA. L. REV. 391, 392–93 (1997).

429. *Franco-American Charolaise*, 855 P.2d at 580–81.

development, the Nebraska Supreme Court followed the English common law in limiting the navigable waters of the state to those subject to the ebb and flow of the tides.⁴³⁰ In a landlocked state, this means most rivers are nonnavigable and thus fall outside of the traditional public trust.⁴³¹

In lieu of the public trust doctrine, Nebraska has developed the public interest test as a meaningful limit on water rights. The state constitution, legislation, and case law protect fish, recreation, and wildlife, as aspects of the public interest. Nebraska's state constitution declares that the "use of the water of every natural stream within the State of Nebraska" be "dedicated to the people of the state for beneficial purposes."⁴³² Under Article XV, Section 6, "[t]he right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest."⁴³³ Thus, "Nebraska's constitutional right to appropriate can and must be limited by the demands of the public interest."⁴³⁴ Other state laws make clear that "it is *in the public interest* to preserve, protect, perpetuate, and enhance [nongame, threatened, and endangered species] of this state through preservation of a satisfactory environment and an ecological balance."⁴³⁵ It is clear, then, that the state can significantly limit water rights based on the public interest.⁴³⁶

On the whole, we believe that Nebraska is unlikely to change course and adopt a meaningful public trust doctrine independent from the public interest approach it has taken thus far. Questions remain about the degree to which the public interest qualification in the constitution and case law will allow the reallocation of existing rights, but some Nebraska precedent suggests that most water rights are malleable in times of shortage.⁴³⁷

d. Kansas

Kansas likewise seems unlikely to recognize a public trust limit on appropriative water rights. Kansas has not constitutionalized the public trust

430. *Kinthead v. Turgeon*, 109 N.W. 744, 744 (Neb. 1906).

431. The court found that, nevertheless, "[t]he public retains its easement of the right of passage along and over the waters of the river as a public highway. This is the interest of the public in connection with such rivers which is paramount, and which is, and should be, protected by the courts." *Id.* at 747. Nebraska courts have not addressed whether this easement protects a particular minimum flow.

432. NEB. CONST. art. XV, § 5.

433. *Id.* § 6.

434. *In re Application A-16642*, 463 N.W.2d 591, 604 (Neb. 1990).

435. *Cent. Platte Nat. Res. Dist. v. City of Fremont*, 549 N.W.2d 112, 117–18 (Neb. 1996) (emphasis in original); *see also* *In re Applications A-16027, A-16028, A-16031, A-16032, A-16033, A-16036, A-16038, A-16039, A-16600, A-16603, & A-16606*, 499 N.W.2d 548, 552 (Neb. 1993) (collected cases).

436. *Hill v. State*, 894 N.W.2d 208, 217 (Neb. 2017) (quoting *State v. Birdwood Irrigation Dist.*, 46 N.W.2d 884, 887 (Neb. 1951)) ("The right to use stream water is a 'vested right,' but it is inherently 'subject to the law at the time the vested interest was acquired and such reasonable regulations subsequently adopted by virtue of the police power of the state.'"); *Kirk v. State Bd. of Irrigation*, 134 N.W. 167, 168–69 (Neb. 1912).

437. *See Hill*, 894 N.W.2d at 217 (collecting cases).

doctrine,⁴³⁸ and no state court decisions have applied the public trust to water rights. All water within the state of Kansas is “dedicated to the use of the people of the state, subject to the control and regulation of the state,”⁴³⁹ but the state has not developed this provision into a robust state-ownership doctrine. Some decisions have allowed regulation of water rights without finding a taking, but these do not rely on the public trust doctrine.⁴⁴⁰ One decision from 1914 appears to embrace the public trust, as described in *Illinois Central*, although the doctrine does not seem to have developed beyond that minimum public trust.⁴⁴¹

The Kansas courts have repeatedly held that questions of navigability for access and use purposes are controlled by the federal navigability standard, not a separate state standard.⁴⁴² Thus, in analyzing navigability, Kansas courts apply the American navigable-in-fact test and the federal title test of navigability.⁴⁴³ Under these tests, the state does recognize several navigable waterways.⁴⁴⁴ The Kansas Supreme Court refused to extend public trust concepts to nonnavigable streams based on state ownership of the water and on state statutes.⁴⁴⁵

Given this history, Kansas seems very unlikely to recognize a strong public trust doctrine. Given the recognition of the minimum public trust, however, the Kansas legislature might have the power under the trust to reallocate water from water rights on navigable waters that no longer contain enough flow to support navigation, like the Arkansas River in the western portion of the state. There is little to go on in determining whether a Kansas court would deem such a reallocation an unconstitutional taking, or whether a Kansas court would entertain a claim from a private litigant to similar effect.

CONCLUSION

The Western states take myriad approaches to integrating the public trust and water rights law, and many state courts have not yet considered the issue. Nevertheless, several aspects of the relationship between public trust and water rights emerge through this review.

First, this remains an active area of legal development, with many states clarifying the relationship within the last five to ten years. Examples abound.

438. Craig, *Comparative Guide*, *supra* note 6, at 133.

439. *Hawley v. Kan. Dep't of Agric.*, 132 P.3d 870, 888 (Kan. 2006); KAN. STAT. ANN. § 82a-702 (2008).

440. See *F. Arthur Stone & Sons v. Gibson*, 630 P.2d 1164, 1166 (Kan. 1981).

441. *Winters v. Myers*, 140 P. 1033, 1037 (Kan. 1914) (holding that “the trust upon which such submerged lands are held for the public purposes of navigation, fisheries, and the like cannot be relinquished to individuals, at least not without some equivalent public consideration” and extensively citing *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892)).

442. *Wear v. Kansas*, 245 U.S. 154, 157–58 (1917).

443. Craig, *Comparative Guide*, *supra* note 6, at 134; *State v. Akers*, 140 P. 637, 648 (Kan. 1914).

444. *Akers*, 140 P. 637 at 640, 650.

445. Craig, *supra* note 53, at 136; *State ex rel. Meek v. Hays*, 785 P.2d 1356, 1364–65 (Kan. 1990); see KAN. STAT. ANN. § 82a-702 (2008).

As we discussed, the Nevada Supreme Court's 2020 decision marked a watershed moment in that state's public trust history, when the court limited the application of the public trust to water rights in the state.⁴⁴⁶ California courts continue to develop California's public trust doctrine, most dramatically with the extension of the doctrine to groundwater in 2018.⁴⁴⁷ Hawai'i's trust is still under active development in the water context,⁴⁴⁸ while Arizona is in the midst of determining where and how the public trust may interact with water rights law.⁴⁴⁹ Many states have yet to face lawsuits that pit the public trust against established water rights, and many states in this position have precedent that limits the state's ability to alienate trust resources. For example, both Oregon and Utah courts have recognized the public trust as a limit on legislative actions, and both face water shortages limiting trust uses, but neither state has squarely addressed a trust-based challenge to water rights.⁴⁵⁰ In short, even though California's Supreme Court ushered in the modern public trust era over forty years ago, the influence of the public trust on water rights remains largely unsettled and an area of active scholarly, judicial, and legislative development.

Second, in many states we find it difficult or impossible to predict from precedent what a court will decide regarding the public trust. For example, Nevada's Supreme Court in 2020 could have invigorated a broad ecological public trust in *Mineral County*.⁴⁵¹ Its 2011 decision in *Lawrence* put the court in a position to embrace a strong public trust doctrine.⁴⁵² *Lawrence* expressly adopted the trust, recognized it as an inherent limitation on the state's power to alienate certain property, and laid out a demanding three-part test to determine whether a state grant of trust property violated the trust.⁴⁵³ The decision's strong language seemed to presage an integration of public trust restraints into water law:

[T]hose holding vested water rights do not own or acquire title to water, but merely enjoy a right to the beneficial use of the water. This right . . . is forever subject to the public trust, which . . . 'forms the outer boundaries of permissible government action with respect to public trust resources.' . . . [T]he public trust doctrine operates simultaneously with the system of prior appropriation.⁴⁵⁴

But, when the court faced this question just one decade later, it held that the state's public trust obligations were met by the state engineer's decisions under the existing water code.⁴⁵⁵ This is a very different outcome than

446. *Mineral Cnty. v. Lyon Cnty.*, 473 P.3d 418, 421 (Nev. 2020).

447. *Env't L. Found. v. State Water Res. Control Bd.*, 26 Cal. App. 5th 844, 856–59 (2018).

448. *Lana'ians for Sensible Growth v. Land Use Comm'n*, 463 P.3d 1153, 1165 (Haw. 2020).

449. *See supra* Part IV.B.1.c.

450. *See supra* Parts IV.A.2.b and IV.A.2.d.

451. 473 P.3d at 421.

452. *Lawrence v. Clark Cnty.*, 254 P.3d 606, 607 (Nev. 2011).

453. *Id.* at 616.

454. *Id.* at 610–11.

455. *Mineral Cnty.*, 473 P.3d at 428.

California Supreme Court's Mono Lake decision and is surprising given that the engineer's decisions (and many older water rights) never explicitly considered the public trust.⁴⁵⁶ Similarly, although, as we noted above, both Oregon and Utah seem judicially positioned for a strong public trust, it is very difficult to predict with any confidence how a court in those states might react to a Mono Lake or *Lawrence* scenario.⁴⁵⁷ This uncertainty is, perhaps, inherent in the public trust approach to addressing water issues, given its basis in court decisions, and it makes life more difficult for both water users and organizations seeking to return water to instream uses.

Third, because of this difficulty, we conclude that federal courts should certify public trust questions to state courts. Some of the most impactful public trust decisions (Mono Lake, *Mineral County*, and *Severance*) have resulted from disputes in federal court that the federal court certified back to the state.⁴⁵⁸ When federal courts attempt their own integration, they may end up with failed analyses like that in the *Casitas* decision.⁴⁵⁹

In *Casitas*, a water user alleged that Endangered Species Act restrictions on water extraction amounted to an unconstitutional taking, and the government argued that the restrictions were protected by *Lucas* background principles of state water law.⁴⁶⁰ The court of federal claims recognized that "the consideration of such background principles of state law is an antecedent inquiry in a takings analysis, one this court is charged with conducting,"⁴⁶¹ and that "federal courts . . . have concurrent jurisdiction to apply and enforce the public trust doctrine as to particular water rights."⁴⁶² But the *Casitas* court ultimately declined to determine what state law actually required, and so found the background principles defense unavailing.⁴⁶³ Because it did not make the determination, the court found itself "unable to conclude, on this evidence, that the operating restrictions imposed on plaintiff under the biological opinion duplicate the result that would have been achieved under state law."⁴⁶⁴

While it is understandable that the court decided not to pin down the state requirements, as that requires a careful balancing of state interests and a determination of issues generally left to the state, making such a determination was essential to applying the *Lucas* background principles analysis. By failing to articulate state law requirement, the court abdicated its responsibilities to determine a key question of the legal case. In order to avoid this pitfall, federal courts should certify these questions to state courts rather than decline to

456. See *supra* Part IV.B.

457. See *supra* Parts IV.A.2.b and IV.A.2.d.

458. See, e.g., *Nat'l Audubon Soc'y v. Superior Ct.*, 658 P.2d 709, 712 (Cal. 1983); *Mineral County v. Lyon County*, 473 P.3d 418, 421 (2020); *Severance v. Patterson*, 370 S.W.3d 705, 707 (Tex. 2012).

459. See *Casitas Mun. Water Dist. v. United States*, 102 Fed. Cl. 443, 448–49 (2011).

460. *Id.* at 450–55.

461. *Id.* at 456.

462. *Id.*

463. *Id.*

464. *Id.* at 461.

engage in a full *Lucas* analysis. Both water law and public trust law are state law, and so federal courts should generally leave the development and explication of the relationship between the two to state courts. There is some nuance here, of course—if state courts decline to apply the minimum public trust laid out in *Illinois Central*, federal courts may need to clarify more fully the limits on state power under the doctrine.

Fourth, the trust continues to serve a vital role in allowing courts and legislatures to remake water law to meet twenty-first-century challenges. The core water challenge is reallocating water to meet changing human needs.⁴⁶⁵ This is, perhaps, easiest to recognize in the instream flow context; most water rights were awarded without consideration of instream flow needs, and protecting those needs after the fact is tremendously difficult.⁴⁶⁶ The public trust provides another tool for both legislatures and courts to open the door to water reallocation without running afoul of takings jurisprudence. Certainly, courts and legislatures may not embrace the trust, but it leaves open the possibility of future changes in policy or law based on the “felt necessities of the time.”⁴⁶⁷ The trust counters the ossification of the law due to entrenched property rights and preserves the traditional role of the court in a common law system. While there are many methods of water reallocation, in our view this aspect of the trust is essential to preserve a water law system flexible enough to meet society’s changing water needs.

Fifth and finally, we note the many ways that states have begun to recognize instream water uses, both through the public trust doctrine, and through other avenues like state ownership of water, robust public interest tests, water markets, or other constitutional and statutory provisions. We observe this inchoate trend has not yet borne fruit in many places; most states are marked more by their shared failures to protect instream flows than by shared successes. But this convergent legal evolution is, perhaps, not surprising.

Western states face a very similar set of water law challenges founded on water over-extraction and entrenched water use, and states borrow new approaches from each other. Utah, Nevada, and California, for example, are all struggling with drying terminal lakes, lakes that receive water with no outflow.⁴⁶⁸ Examples include the Great Salt Lake, Walker Lake, and Mono or Owens Lake, among others.⁴⁶⁹ As these lakes shrink, their water quality worsens, exposed and drying lake beds generate toxic dust storms, and the lake ecosystems face collapse; all three states are struggling to find ways to address these challenges.⁴⁷⁰

465. See Bork & Ziaja, *supra* note 7.

466. *Id.*

467. Oliver Wendell Holmes, *THE COMMON LAW* XIV 5 (Mark DeWolfe Howe ed., 1963).

468. Brigham Daniels et al., *Utah’s Legal Risks and the Ailing Great Salt Lake* (forthcoming 2025).

469. *Id.*

470. *Id.*

Other universal problems across Western states include overallocated streams that run low or dry during portions of the year, reduced water quality, and reduced aquatic species and ecosystem health. This tendency is apparent beyond water rights, particularly in the recreational stream access context.⁴⁷¹ States are meeting (and failing to meet) these challenges in a wide variety of ways, including developing water rights for instream use, water banks, protecting waters through public use rights, and, as discussed here, through the public trust doctrine.⁴⁷² These developments demonstrate the continuing changes in water law away from historical water use patterns. The public trust is not the only method to make this transition, but it is likely to play a vital role in the eight states we have identified with strong public trust doctrines. Across the entire western United States, states will face continued struggles and inevitable conflict as they reallocate water. But this review suggests that states are seeking to meet that challenge and many have begun to remake their property laws in pursuit of more balanced water use, if only at the margins.

471. See Benson, *supra* note 60, at 74.

472. See generally Amos, *supra* note 226, at 22-11.

We welcome responses to this Article. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.