

The Public Trust Doctrine—A Camel’s Nose Under Agriculture’s Tent?

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Overview

Centuries ago, the seas were viewed as the common property of everyone - they weren't subject to private use and ownership. Instead, they were held in what was known as the "public trust." This concept was later adopted in English law, the Magna Carta, and became part of the common (non-statutory) law of individual states in the United States after the Revolution. Over the years, this "public trust doctrine" has been primarily applied to access to the seashore and intertidal waters, although recently some courts have expanded its reach beyond its historical application.

But, any judicial expansion of the public trust doctrine results in curtailing vested property rights. That's a very important concern for agriculture because of agriculture's necessary use of natural resources such as land, air, water, minerals and the like. Restricting or eliminating property rights materially impacts agricultural operations in a negative manner. It also creates an economic disincentive to use property in an economically (and socially) efficient manner.

The impact of an expanded public use doctrine on agriculture – it's the topic of today's post.

In General

The U.S. Supreme Court's first application of the public trust doctrine was in 1842 in *Martin v. Lessee of Waddell*, 41 U.S.367 (1842). In the case, the issue was who had the right to submerged land and oyster harvesting off the coast of New Jersey. The Court, largely based on the language in the charter granted by the King to a Duke to establish a colony and for policy and economic reasons, determined that the land area in issue belonged to the state of New Jersey for the benefit of the people of the state. The Court dealt with the issue again in 1892 in a case involving a railroad that had been granted a large amount of the Chicago harbor. *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387 (1892). The Court determined that the government cannot alienate (interfere with) the public's right to access land under waters that are navigable in fact except for situations where the land involved wouldn't interfere with the public's ability to access the water or impair navigation.

As generally applied in the United States (although there are differences among the states), an oceanfront property owner can exclude the public below the mean high tide (water) line. See e.g., *Gunderson v. State*, 90 N.E. 3d 1171 (Ind. 2018). That's the line of intersection of the land with the water's surface at the maximum height reached by a rising tide (e.g., high water mark). Basically, it's the debris line or the line where you would find fine shells. However, traceable to the mid-1600s, Massachusetts and Maine recognize private property rights to the mean low tide line even though they do allow the public to have access to the shore between the low and high tide lines for "fishing, fowling and navigation." In addition, in Maine, the public can cross private shoreline property for scuba diving purposes. *McGarvey v. Whittredge*, 28 A.3d 620 (Me. 2011).

Other applications of the public trust doctrine involve the preservation of oil resources, fish stocks and crustacean beds. Also, many lakes and navigable streams are maintained via the public trust doctrine for purposes of drinking water and recreation.



Expanding the Doctrine?

As noted above, the public trust doctrine is an ancient concept that guarantees certain rights to the public and causes other rights to be vested in private owners. Indeed, in the United States, one of the fundamental Constitutional rights denoted in the Bill of Rights is that of the ownership of private property. *Fifth Amendment, U.S. Constitution*. As a fundamental Constitutional right, any infringement on the right is subject to “strict scrutiny” by a court. Of course, the government (state and federal) retains the right to “take” private property for a public use, but only upon the payment of “just compensation.” But, any expansion of the doctrine does an “end-run” around the claim that the government has committed a taking that requires compensation – the theory being that the public rights pre-existed and private property rights are automatically subject to them. An expansion would bring non-justiciable political questions into the courts. This technique has been tried with attempts to get the courts to decide allegations of harm and restrict usage of private property based on “global warming.” Largely, the courts have refused citing lack of standing, congressional delegation to administrative agencies and that such claims are non-justiciable political questions. See, e.g., [*American Electric Power Company v. Connecticut*, 564 U.S. 410 \(2011\)](#).

The notion that vested (e.g., settled, fixed, inalienable) rights can be usurped by an expanded application of the public trust doctrine makes it easier for regulation of property rights to occur without any concern that a non-physical taking of the property has occurred that would require the private property owner to be compensated. That’s because the private property taken, the theory is, was a right that the owner never had to begin with. In turn, an expanded public trust doctrine would require state (and, perhaps, federal) governments to take action to preserve public rights. If they failed to do so, the legal system would be used to force action. The courts, then, become a sort of “super legislature” via the public trust doctrine - a “court-packing” technique that is off the radar and out of public view.

How could an expanded public trust doctrine apply? For farmers and ranchers, it could make a material detrimental impact on the farming operation. For instance, many endangered species have habitat on privately owned land. If wildlife and their habitat are deemed to be covered by the doctrine, farming and ranching practices could be effectively curtailed. What about vested water rights? A farming or ranching operation that has a vested water right to use water from a watercourse for crop irrigation or livestock watering purposes could find itself having those rights limited or eliminated if, under the public trust doctrine, a certain amount of water needed to be retained in the stream for a species of fish.

One might argue that the government already has the ability to place those restrictions on farming operations, and that argument would be correct. But, such restrictions exist via the legislative and regulatory process and are subject to constitutional due process, equal protection and just compensation protections. Conversely, land-use restrictions via the public trust doctrine bypass those constitutional protections. No compensation would need to be paid, because there was no governmental taking – a water right, for example, could be deemed to be subject to the “public trust” and enforced without the government paying for taking the right. That’s a much different outcome than the government imposing regulations on property uses that trigger compensation for an unconstitutional regulatory taking. In essence the government, via the doctrine, acquires an easement for the protection of certain designated natural resources (such as wildlife and wildlife habitat) that are deemed to be in the public interest. Instead of elected politicians making these decisions and being accountable to voters, the courts are the enforcers.

Also, an expansion of the public trust doctrine, from an economic standpoint, would have the unintended consequence of diminishing the incentive of landowners to invest in and improve the natural resource at issue. Private property has value because of the ability to exclude others from use and ownership. A fundamental principle of economics is that the ability to exclude others from use and ownership increases the owner’s incentive to use the resource wisely. This was, indeed, borne out in [*Bitterroot River Protective Association v. Bitterroot Conservation District*, 346 Mont. 507 \(2008\)](#).



Recent Case

[*Mineral County v. Lyon County, No. 75917, 2020 Nev. LEXIS 56 \(Nev. Sup. Ct. Sept. 17, 2020\)*](#), involved the state of Nevada's water law system for allocating water rights and an attempt to take those rights without compensation via an expansion of the public use doctrine. The state of Nevada appropriates water to users via the prior appropriation system – a “first-in-time, first-in-right” system. Over 100 years ago, litigation over the Walker River Basin began between competing water users in the Walker River Basin. The Basin covers approximately 4,000 square miles, beginning in the Sierra Nevada mountain range and ending in a lake in Nevada. In 1936, a federal court issued a decree adjudicating water rights of various claimants to water in the basin via the prior appropriation doctrine.

In 1987, an Indian Tribe intervened in the ongoing litigation to establish procedures to change the allocations of water rights subject to the decree. Since that time, the state reviews all changes to applications under the decree. In 1994, the plaintiff sought to modify the decree to ensure minimum stream flows into the lake under the “doctrine of maintenance of the public trust.” The federal district (trial) court granted the plaintiff's motion to intervene in 2013. In 2015, the trial court dismissed the plaintiff's amended complaint in intervention on the basis that the plaintiff lacked standing; that the public trust doctrine could only apply prospectively to bar granting appropriative rights; any retroactive application of the doctrine could constitute a taking requiring compensation; that the court lacked the authority to effectuate a taking; and that the lake was not part of the basin.

On appeal, the federal appellate court determined that the plaintiff had standing and that the lake was part of the basin. The appellate court also held that whether the plaintiff could seek minimum flows depended on whether the public trust doctrine allowed the reallocation of rights that had been previously settled under the prior appropriation doctrine. Thus, the appellate court certified two questions to the Nevada Supreme Court: 1) whether the public trust doctrine allowed such reallocation of rights; and 2) if so, whether doing so amounted to a “taking” of private property requiring “just compensation” under the Constitution.

The state Supreme Court held that that public trust doctrine *had already been implemented* via the state's prior appropriation system for allocating water rights and that the state's statutory water laws is consistent with the public trust doctrine by requiring the state to consider the public interest when making allocating and administering water rights. The state Supreme Court also determined that the legislature had expressly prohibited the reallocation of water rights that have not otherwise been abandoned or forfeited in accordance with state water law.

The state Supreme Court limited the scope of its ruling to private water use of surface streams, lakes and groundwater such as uses for crops and livestock. The plaintiff has indicated that it will ask the federal appellate court for a determination of whether the public trust doctrine could be used to mandate water management methods. If the court would rule that it does, the result would be an unfortunate disincentive to use water resources in an economically efficient manner (an application of the “tragedy of the commons”). It would also provide a current example (in a negative way) of the application of the Coase Theorem (well-defined property rights overcome the problem of externalities). See Coase, “*The Problem of Social Cost*,” *Journal of Law and Economics*, Vol. 3, October 1960.

Conclusion

Clearly, the state and federal governments can regulate natural resources. The power to do so is vested in state legislatures and the Congress. As such, the power is limited by Constitutional protections and by the voting public. But, an expansion of the public trust doctrine would void those constraints on a theory that a property right that doesn't exist cannot be taken. The courts would become a “super legislature” gaining the authority to make public policy decisions. That would further blur the distinction between legislative bodies and the judiciary and the fundamental legal principle of the separation of powers.



An expanded public trust doctrine is a big “camel’s nose under the tent” for agriculture. Farmers and ranchers beware.

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