INFLUENCE OF THE PUBLIC TRUST DOCTRINE AND LOCAL PUBLIC INTEREST CONSIDERATIONS IN THE APPROPRIATION AND REALLOCATION OF WATER RESOURCES

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Abstract: Appropriated water rights are merely a right of use granted or permitted of a state-owned resource. And while the appropriated right gives a degree of exclusivity in the possession and priority of use to a set quantity of water for a specific use from a specific stream or source of supply, at a defined place of use, it is a right that has always been subject to the assertion of broader federal and state interests where the assertion of such public interest considerations are necessary to protect the broader needs of society. These broader public interests have been expressed in terms such as the public trust doctrine and the public interest. The public trust doctrine is grounded in federal common law, whereas public interest standard is a state common law principle. Either or both interests can be asserted by governmental and private interests where necessary to protect the public's interest in water resources and those other public resources dependent upon by water; their assertion of these public interests can displace or modify the so-called vested appropriated water right.

Although beyond the scope of this paper, there is a third over-riding power, the federal navigational servitude that encumbers all water rights that is based on the federal government's supreme Constitutional authority to regulate interstate commerce and control navigation.

ORIGINS OF THE PUBLIC TRUST DOCTRINE-NAVIGABILITY

Water rights, whether riparian or appropriative in nature, are of necessity, correlative in that the water must be shared among a class of fellow users that can be both public and private in nature. Further, the use of certain streams and lakes considered to be public must be shared by accommodating uses by the general public as well as other water right holders in the source.

One of the oldest recognized public right is the right of the public to freely navigate on the navigable waters, and to use them as a highway for commerce, fishing and travel. The public trust doctrine protects the rights of the public to access navigable waters for these purposes; although its reach has been expanded by some states in recent years. It may be helpful to digress

a little and talk about navigability, as it forms the basis of the public trust doctrine and the expanding rights of the public to recreate on waters of the state as part of the public trust.

NAVIGABILITY FOR TITLE

American common law on navigability for title developed in the 19th century and followed English common law tradition regarding public ownership of the beds and banks of navigable bodies of water. Under English common law, the Crown owned only the beds of waters that were below the high water mark, navigable, and affected by the ebb and flow of the tides, but the public had a right to navigate, fish and travel within the navigable waters. Title to non-tidal beds was *prima facie* in the abutting landowners. Because of the unique geography of the United States and its many miles of inland rivers that are navigable and were in fact important as highways of commerce, the United States Supreme Court extended admiralty jurisdiction to non-tidal, navigable waters. [1]

The 13 original American states were deemed to have succeeded to all of the interests of the English Crown, so that navigable waters and submerged lands passed to them in the same sort of trust ownership in which they had been held by the Crown. *Illinois Central Railroad v. Illinois*[2] put it this way:

> The State holds the title to the lands under the navigable waters . . . But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to preemption and sale. It is a title held in 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.

The original 13 states then took on such ownership at the time of establishment of the Union. The federal government was held to take title to the land and water in the lands it acquired in the West again in trust for the people of the later admitted states so that they joined to Union on an "equal-footing" with the original 13 states. The United States in disposing of the public domain, whether on the coast or the interior of the country, retained the navigable waters and the soil beneath them as public highways, and the government could not convey away this public trust during periods of territorial status of the new states. Title was held in trust for the states and vested in the states once they

[1] *The Genesse Chief*, 53 U. S. (12 How.) 443 (1851).

were admitted to the Union. This was true even regarding reservation lands given to Native American tribal groups.[3]

Tribe claimed the beds and banks of all navigable waters within the original boundaries of the reservation had been reserved to them by pre-statehood Executive Order, and therefore did not pass to the State of Idaho. Court reviewed the Equal Footing Doctrine, and concluded that submerged lands were always sovereign lands of the state. Relying on the *Illinois Central Railroad v. Ill.*, case, the court said that the state had no authority to convey away the public's interest in the submerged lands, and "any attempt to do so amounted to abdication of its obligation to regulate, improve and secure submerged lands for the benefit of every individual." This same trust analysis limits the rights of the states once they obtained title to divest the public's interest in these lands and waterways. However as the court said in *Kootenai Environmental Alliance v. Panhandle Yacht club, Inc.,*[4] not all dispositions of public trust assets are void. Transfers will be validated if they meet the following test:

> A two-part test emerges to determine the validity of the grant of public trust property. One, is the grant in aid of navigation, commerce, or other trust purposes, and two, does it substantially impair the public interest in the lands and waters remaining?

Navigability for title has been dealt with in three major United States Supreme Court decisions; *United States v. Oregon,* 295 U.S. 1 (1935); *United States v. Utah,* 283 U.S. 64 (1931); and, *United States v. Holt State Bank,* 270 U.S. 49 (1926). Johnson and Austin conclude in their article *Recreational Rights and Title to Beds on Western Lakes and Streams,* 7 Nat. Resources J. 1, 24-25 (1967) as follows:

> (2) Such navigability is determined by the natural and ordinary condition of the water at that time (statehood), not whether it could be made navigable by artificial improvements. However, the fact that rapids, rocks or other obstructions make navigation difficult will not destroy title navigability so long as the waters were useable for a significant portion of the time.
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> (3) Navigability in intrastate commerce is all that is required, not usability in interstate commerce.

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[2] 146 U.S. 387, 452 (1892).
[3] *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261 (1997).
[4] 671 P.2d 1085 (Idaho 1983).

> (4) The waters must be usable by the "customary modes of trade or travel on water." This may include waters usable for commercial log floating. This includes water as little as three or four feet deep that are geographically located so that they have been, or can be used by canoes and rowboats for commercial trade and for travel. This does not include waters which are difficult to access because of surrounding mud flats or the like, and which are geographically isolated from habitation and transportation routes, and which have never been and are not likely to be used for commercial trade or travel. This probably does not include waters that are geographically isolated from habitation and transportation routes and which have never been and are not likely to be used for commercial trade or travel, even though these waters are deep enough and large enough to float commercial type vessels, and are not physically inaccessible because of mud flats or the like.

SUSCEPTIBLE OF BEING USED IN COMMERCE IN THEIR ORDINARY CONDITION

In *Utah v. United States*[5], the United States Supreme Court sustained Utah's title to the bed of the Great Salt Lake based on evidence that at the time of state-hood, the lake was capable of being used for commerce. Although the Great Salt Lake is an interstate body of water that fact did not affected the State's ownership of the bed of the lake within the State of Utah. The test is that the body of water at the time of statehood must be "navigable in fact when they are used, or are susceptible of being used, in the ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." Citing *The Daniel Ball.*[6] The court says that while the *Daniel Ball* case applied to rivers, it also applied to all watercourses.

Evidence showed that: 9 boats had been used to ferry cattle to Antelope Island; one private boat had been hired to haul livestock to the island; the City of Corinne excursion boat sailed the lake taking tourists on site-seeing trips around the lake; and, commercial ore and salt boats used it for commerce. The court acknowledged that the evidence showed that this use was sporadic but that the "lake was physically capable of being used in its ordinary condition [at the time of statehood] as a highway for floating

[5] 403 U.S. 9 (1971).
[6] 77 U.S. (10 Wall.) 557 (1870), which extended the law of navigability to inland water ways when they are used or susceptible of being used in their ordinary condition, as highways for commerce by customary modes of travel.

and affording passage to water craft in the manner over which trade and travel was or might be conducted in the customary modes of travel on water at the time."

The real fight here was over the right to receive royalties from the production of salt and other minerals from the lake. If the lake was non-navigable at statehood, the federal government retained title, and as the owner of these sovereign lands it would have been entitled to the royalties. If title passed to Utah at statehood under the Equal Footing Doctrine, because it was a navigable body of water at the time of statehood, the royalties, amounting to many millions of dollars belonged to the State. The court held that the lake was navigable at statehood, and that Utah owned the land below the mean or ordinary high water of this inland navigable lake.

NON-NAVIGABLE FOR TITLE WATERS (PRIVATELY OWNED BED)

Title to the streambed of non-navigable streams is held to pass to the owners of the land that owns both sides of the stream. Where different individuals own lands on the opposite banks, they are held to each own to the thread of the stream or its centerline. The centerline is defined as either the mid-point between the banks or the thread of the main channel where there are several braided smaller channels. Deeds that define a river as forming a property boundary are construed to go to the center of the stream.

In *Monroe v. State*[7], the Utah Supreme Court answered the question of what constitutes a navigable lake and ownership of the bed and banks of that lake. The plaintiffs were landowners abutting Scipio Lake, an enlarged natural lake located in central Utah. The landowners and others had constructed a dam and impounded additional waters in this lake that they used for irrigation. As water was drawn out of the reservoir each year, lands would become exposed and a lush water plant that grew there made good cattle feed. The state had leased this exposed land to another for grazing for many years, and the plaintiffs brought suit claiming that as the abutting landowners, that they owned this land. The determining factor according to the court was whether the lake was navigable at statehood. If so, the plaintiffs should fail, as title would have passed to the State. If the lake were not navigable, title would have gone to the abutting landowners as the land passed out of public ownership.

[7] 175 P.2d 759 (Utah 1946).

The court found that at the time of statehood, Scipio Lake was a natural lake. In 1867 a small dam was placed at the outlet to the lake extending the reservoir some distance and the depth was about 4 to 5 feet. The federal government in 1871 had surveyed the meander line. By 1896, statehood, no evidence existed that the lake had been used for commerce. It had no connection with a navigable stream or other navigable body of water, but it had been used by the local population for boating, fishing and swimming. The trial court held that the lake was nevertheless navigable at statehood.

The Utah Supreme Court reversed. The court noted that the lake was small and easier to go around than across at the time of statehood. It was used primarily as a reservoir for irrigation, and that it is improbable that it will ever be used or valuable as a highway for commerce. Such findings are inconsistent with navigability.[8] The court continued:

> To meet the test of navigability as understood in the American law a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient. While the navigable quality of a watercourse need not be continuous, yet it should continue long enough to be useful and valuable in transportation; and the fluctuations should come regularly with the seasons, so that the period of navigability may be depended upon. Mere depth of water, without profitable utility, will not render a watercourse navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable a watercourse must have a useful capacity as a public highway of transportation . . . .
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> It seems fair to say from all of these decisions that navigability is not dependent merely upon the physical capabilities of the particular body of water to support transportation of goods. **The public interest in such a body of water arises only when it is so situated that it becomes or is likely to become a valuable factor in commerce.** (*Emphasis added*)**.**

[8] *See* State v. Rolio, 71 Utah 91, 262 P. 987 (1927), where the court held that Utah Lake was navigable at statehood and that the abutting land owners ownership ended at the high water mark and the State of Utah owned the bed of the lake.

ORIGINAL APPLICATION OF THE PUBLIC TRUST DOCTRINE

Historically the doctrine was applied as in the *Illinois Central Railroad* case that confirmed state ownership of the lands submerged under navigable bodies of water, and that the state held title in trust for the public. The public trust created a limitation on the actions of state government that would prevent the states from divesting itself of trust resources. The only noted exceptions were conveyances that were a grant in aid of navigation, commerce, or other trust purposes, or that did not substantially impair the public interest in the lands and waters remaining. The public trust doctrine has also been used to place limitations on the extent of the public's use of public trust resources. It has been couched in terms of the responsibilities of the state to regulate the use of its navigable waters and the lands beneath them to preserve the public's right to navigate and conduct commerce in the navigable waters of the state.

The public trust doctrine is dynamic. It originally applied only to the proprietary interest the states took in tidal and navigable for title water and the lands beneath them. Its original focus was on navigation, commerce and fishing rights. It has been expanded to include protection of ecological values in water resources whether navigable in fact or not, and has been expanded to non-navigable tributary streams of navigable bodies of water. Most recently, the public trust doctrine has been employed to restrict the quantity of water appropriators may divert from a water source under the lawful, state-created water rights in order to protect the state's trust responsibilities.[9]

PUBLIC TRUST IN APPLICATION

In *Marks v. Whitney*[10] neighboring land owners fought a quiet title action regarding access to beach. Part of Marks' or the plaintiff's property was tide-lands which he claimed to have acquired by patent issued in 1874. A small portion of the tide-lands adjoins the defendant's Whitney's property and constitutes the majority of the boundary of his upland property. Marks asserted complete ownership and sought to bar Whitney from access. Marks also sought to fill the tide lands and develop the land. Whitney challenged contending that Mark's title was encumbered with a public trust easement that

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[9] *See generally*, Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Towards an Ecological Public Trust*, 37 Ecology Law Quarterly, 53, (2010); and Joseph L. Sax, *The Public Trust Doctrine in Natural resources Law; Effective Judicial Intervention*,68 Mich L. Rev. 471 (1970).

[10] 491 P.2d 374 (Calif. 1971).

would prevent him from developing this land. Whitney also claimed that he has private prescriptive rights to cross this land. The court resolved the boundary dispute, but then held that Whitney lacked standing to assert the public trust claim. Issues on appeal were whether Mark's land was burdened by a public trust; and whether Whitney as a member of the public has standing to assert a public trust claim.

The court held that the land was burdened with a public trust easement and that the court could take judicial notice of that fact regardless of the standing of the party asserting the claim. The court noted that the land was patented as tide lands, and that the state owned the land by virtue of the fact that the land was effected by the tide, and thus under the navigability for title rules, title vested in the state. The state could divest itself of the soil, but the buyer of the land receive the title subject to the public right of navigation and in subordination to the right of the state to take possession and use and improve it for that purpose. In this way the public rights will be preserved, and the private right will be given as full effect as public interest will permit.

The court also stated that:

> 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 . . . 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.

The court acknowledged that certain tidelands may not have any particular public trust benefit and in those instances, the Legislature could divest the land without the public trust encumbering the property. Ultimately, the burden is on the Legislature to make the political or public policy decision as to what public trust uses may be modified or extinguished and to free lands conveyed from the trust.

On the second issue of Whitney's standing to assert the public trust interest, the court held that he did have standing as a member of the general public, or the court could have raised it on its own. "Where the issue concerned is one that, as here, constitutes a public burden upon land to which title is quieted, and affects the defendant as a member of the public, that servitude should be explicitly declared."

Critical question often asserted in public trust litigation is whether a facility on trust lands is for a public rather than a private purpose, whether it substantially interferes with public uses of the remaining lands and waters, and whether it needs to be sited or located at the water's edge.[11]

THE NEW PUBLIC TRUST RIGHTS LIMITATIONS ON THE OLD PRIVATE RIGHTS.

Professor Joseph L. Sax wrote the seminal article on the public trust doctrine in 1970.[12] There he states that the public trust is not a new concept. He notes a 1907 decision by Justice Holmes, *Georgia v. Tennessee Copper Co.,*[13] where the court held that "the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." As Sax notes, Holmes left unresolved the question of whether the exercise of such a public interest would require compensation to the landowner whose private interests were pushed aside in deference to the broader public interests in the resource.

a. A year later, in the *Hudson County Water Co. v. McCarter,*[14] Holmes apparently answered this issue. In addressing an issue of instream flows, Holmes said:

> Few public interests are more obvious, indisputable and independent of particularly theory than the interest of the public of a State to maintain rivers that are wholly within it substantially undiminished, except y such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of the opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. . . . The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that is may not substantially diminish one of the great foundations of public welfare and health.

Sax states that "this may be the most important statement the Court has ever made about the constitutional status of water rights." Private appropriated rights are always

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[11] Kootenai Environmental Alliance v. Panhandle Yacht Cl*ub*, 671 P.2d 1085 (Idaho 1985).
[12] *Supra* note 9.
[13] 206 U.S. 230 (1907).
[14] 209 U.S. 349 (1908).

approved subject to the public interest. However, the public interest is not so prevailing that it will preclude reasonable uses of water resources. Sax notes that Holmes addressed this further in the case of *New Jersey v. New York*[15], stating that "A river is a necessity of life that must be rationed among those who have power over it. [Notwithstanding riparian law] New Jersey could not be permitted to require New York to give up its power altogether in order that the River might come down to it undiminished." In other words, New York could not give away the public trust interests in this water resource.

COMPETING USES OF THE WATER RESOURCE: THE TENSION BETWEEN PRIVATE APPROPRIATED RIGHTS UNDER STATE LAW AND THE PUBLIC TRUST. THE *MONO LAKE* DECISION: *NATIONAL AUDUBON SOCIETY V. SUPERIOR COURT, 658 P.2d 709 (S. CT. CALIF. 1983).*

This decision shocked the water lawyers of the nation, because this was the first time the courts had taken a position that state-created vested water rights were not really vested, protected interests in real property after all. Instead, private appropriated water rights were acquired subject to the public trust and the water rights could be modified by the State where necessary to protect the public trust resources. The decision seemed counter-intuitive, because the federal and state courts had held in prior decisions that a state-created appropriated water right was entitled to protection of due process and that if taken by the government, the appropriator was entitled to compensation.[16] However, what the water lawyers overlooked was the age-old rule that even a perfected water right is always subject to prior rights and the possible assertion of dominant federal interest. Historically, that dominant federal interest had been restricted to issues of navigation, commerce and fishing. The departure in *Mono Lake* was that the court held that private appropriated water rights that are valid under state law are also subject to the public trust and that the public trust is a moving target and is whatever the courts or the Legislatures choose to say it is.

Mono Lake extended public trust jurisdiction to non-navigable tributaries of a navigable body of water, rather than restricting its application to the historical use of protecting the public's rights to navigation and all its incidents in navigable in fact waters

[15] 283 U.S. (1931).
[16] *Hunter v. United States*, 388 F.2d 148, 153 (9th Cir. 1967); *Hughes v. Lincoln Land Co.*, 27 F. Supp. 972 (D.C. Wyo. 1939); *Town of Sterling v. Pawnee Ditch Ext. Co.*, 42 Colo. 421, 94 P. 339 (1908).

of the state. Los Angeles thought it had solved all possible disputes by condemning all the riparian land owners surrounding the land and also the tributary streams near its point of diversion so that no riparian could contend that it was entitled to receive the stream undiminished. Once the likely water-use contestants were out of the way, the city filed to appropriate the water of these four tributary streams for municipal use in the city.

The Cal. Water Board, while acknowledging that there was a "public interest" component to Calif. appropriation doctrine, also noted that domestic use was to be given a priority or preference over all other uses under California appropriation doctrine. Therefore it approved the applications over the protests of several recreational interests who complained that the water levels of the lake would be reduced and recreational and surface uses would be impaired approved the applications. The board concluded that it had no authority to deny the applications since the city's proposed use was the highest under state law.

The court noted that this case presented a real "clash of values." "Mono Lake is a scenic and ecological treasure of national significance, imperiled by continued diversions of water; yet the need of Los Angeles for water is apparent, its reliance of rights granted by the board evident, the cost curtailing diversions substantial."

CORE CONCLUSIONS OF THE COURT REGARDING THE PUBLIC TRUST DOCTRINE, AS APPLIED IN CALIFORNIA

1. The State has authority as the sovereign to exercise continuing supervision and control over the navigable waters of the state, and that this authority applies to the lake, which was navigable at statehood, but also applies to non-navigable waters tributary thereto.

The assertion of the Public Trust Doctrine bars the city or any other party from claiming vested right to divert waters once it becomes clear that such diversions harm the interest protected by the public trust. Therefore, the conveyance of property protected by the public trust cannot be conveyed free of the trust, and may trump appropriated water rights that depend upon the diversion and use of water for their validity. The court acknowledged that the prosperity and habitability of much of California required the diversion of great quantifies of water from streams for purposes unconnected to navigation, fishing and commerce; the traditional areas of this retained state control.

> The state must have the power to grant nonvested usufructuary rights to appropriate water even if diversions harm public trust uses. Approval of such diversion without considering public trust values, however, may result in needless destruction of those values. Accordingly, we believe that before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.[17]

2. Individuals acquiring rights that are subject to the trust acquire no vested rights to the use of those rights in a manner harmful to the trust.

3. The exercise of the trust by the State is not a taking. The State does not divest anyone of title. The private rights were always encumbered by the trust and therefore subject to its exercise as necessary to protect the public trust values in the resource.

4. States' power is continuing notwithstanding the granting of a vested water right permit, and that power extends to the revocation of a previously granted right or to the enforcement of the trust against lands long thought free of the trust. The grantee holds subject to the trust, and while he may assert a vested right to the servient estate, he cannot claim a vested right so as to bar the recognition of the trust or state action to carry out its purposes.

5. The California court defined the public trust as more than an affirmation of state power to use public property for public purposes. It is 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.[18]

In the water law context, the California court declined to hold that the public trust is antecedent to and thus limits all appropriative water rights, which the court says if carried to its logical extreme would make the exercise of all diversionary water rights illegal, and in violation of the public trust.[19] Instead the Court held that:

> The state as sovereign retains continuing supervisory control over its navigable waters and the lands beneath those waters. This principle, fundamental to the concept of the public trust, applies to rights in flowing

[17] *Supra* note 12, at p. 712.
[18] *Id*. at 728.
[19] *Id*. at 727.

> waters as well as to rights in tidelands and lakeshores; it prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust.[20]

The State has the power to grant the right to use its trust resources, such as water, in recognition that the economy depends upon the ability to make beneficial use of the water. "It would be disingenuous to hold that such appropriations are and have always been improper to the extent that they harm public trust uses, and can be justified only upon theories of reliance and estoppel."[21] The court reconciled these two positions holding that the state has an affirmative duty to take the public trust into account in planning and allocation of water resources, and to protect the public trust uses whenever feasible. The state must bear in mind its duty to protect the public trust, and to preserve, so far as consistent with the public interest, the uses protected by the trust.

Therefore the State has the power to reconsider allocation of water decisions as a part of the state's continuing duty to supervise the use of appropriated water; even though those decisions were made after due consideration of their effect on the public trust. And that power is even more pronounced, where the allocation decision was made without any consideration of the public trust values that might be impaired by the allocation decision.[22] The court recognized the needs of the city for water for its population, and the cost of pursuing alternative sources of water. The court held only that such concerns do not preclude a reconsideration and reallocation, which also takes into account the impact of water diversions on the Mono Lake environment.

CONCLUSIONS TO BE DRAWN FROM DECISION

The public trust doctrine and the appropriative water rights system are parts of an integrated system of water law. The public trust preserves the continuing sovereign power to protect the public trust uses, and creates a continuing duty on the state to take the public trust values into account in water allocation issues. Where necessary, the public trust doctrine allows if not mandates the modification of prior allocation decisions where public trust values are being harmed.

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[20] *Id*. at 727.
[21] *Id*. at 728.
[22] *Id*. at 728.

In other litigation, the California courts have clearly extended the public trust doctrine to purely non-navigable streams.[23] The courts have also limited its application by holding that the public trust does not apply to artificial bodies of water, such as a man-made storage reservoir where water was withdrawn for irrigation use.[24] However, in an earlier case involving submerged lands at Lake Tahoe, the court held that the lands inundated with water stored by the dam were impressed with a public trust.[25] The probable distinction is that Lake Tahoe was navigable at statehood, and shore land development might have blocked public access to the water in violation of the public's right to navigate, fish and conduct commerce on the lake.

The public trust is susceptible to differing interpretations by the various states, and incorporates not only the legal recognition of the existence of the public trust, but the duty to actively protect the trust values as defined by the individual state.[26]

While California has applied the public trust doctrine expansively, other states have taken steps to restrict its application. The Idaho Supreme Court seemed to adopt the expansive view of the doctrine in a few cases that seemed to merge the public trust and local public interest together.[27] The Idaho Legislature struck back adopting Idaho Code §58-1201- 1203 in 1996, restricting the public trust doctrine's application to navigable in fact streams. It goes so far in section 1203 (2) as to specifically restrict the doctrine's application to:

> (a) The management or disposition of lands held for the benefit of the endowed institutions as set forth in article IX of the constitution of the state of Idaho;
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> (b) The appropriation or use of water, or the granting, transfer, administration, or adjudication of water or water rights as provided for in article XV of the constitution of the state of Idaho and title 42, Idaho Code, or any other procedure or law applicable to water rights in the state of Idaho; or

[23] People v. Truckee Lumber Co., 116 Ca. 397 (1987).
[24] Golden Feather Community Ass'n v. Thermalito Irr. District, 257 Cal. Rptr. 836 (1989).
[25] State v. Superior Court, 625 P.2d 256 (1981).
[26] In re Water use Permit Applications, 9 P.3d 409 (Hawai'i 2000); and Craig, *Supra* note 2.
[27] Idaho Conservation League, Inc. v. State, 911 P.2d 748(Idaho 1995), and Kootenai Envtl. Alliance v. Panhandle Yacht Club, 671 P.2d 1085 (Idaho 1983), applying traditional public trust doctrine to navigable in fact streams or bodies of water under federal law.

(c) The protection or exercise of private property rights within the state of Idaho.

However, if the public trust encumbers lands as they were acquired by the State, and the doctrine bars the state from divesting itself of the public trust in trust resources, one might question the ability of the state to exempt the allocation of water from its application.

EXPANSION OF THE DOCTRINE TO ASSURE PUBLIC ACCESS TO NON-NAVIGABLE WATERS OF THE STATE

In recent years several western states including Utah have used the expanded public trust doctrine to assure the public's right of access to even to non-navigable streams under federal law by defining navigability under state law, and irrespective of ownership of the beds and banks of the stream, impressing the waters of the state with a public trust that assures the public an easement up to the ordinary high water mark of the stream for boating, fishing and other water based recreation.[28] The Utah Legislature attempted to rein in this public recreational easement by passing H.B. 141, 2nd Substitute, codified as Utah Code Ann. §73-29-101 PUBLIC WATERS ACCESS ACT, but deferred the implementation of the provisions that would have stripped the public of most of the judicially recognized right of access to waters of the state pending further Legislative review. I anticipate another bill will be offered this upcoming legislative session seeking to refine the State's position on public access easements.

THE PUBLIC INTERST COMPONENT OF AN APPROPRITED RIGHT
MODERN ACQUISITION OF WATER RIGHTS AND ADMINISTRATION

Wyoming instituted the permit system in 1890, and was the first of the western states to do so. Others followed, and Utah adopted its permit statute in 1903. The Utah statute codified the existing common law and added procedural rules regarding the filing and processing of applications. Colorado is the only appropriation doctrine state that has not adopted a permit system. Water courts administer water rights in Colorado.

[28] Kaiser Aetna v. United States, 444 U.S. 164 (1979); Arkansas v. McIlroy, 595 S.W.2d 659 (Ark. 1980); Southern Idaho Fish and Game Association v. Picabo Livestock, Inc., 528 P.2d 1295 (Idaho 1974); Ritter v. Standal, 566 P.2d 769 (Idaho 1977); Montana Coalition for Stream Access, Inc. v. Curran, 682 P.2d 163 (Mont. 1984); Day v. Armstrong, 362 P.2d 137, 147 (Wyo. 1961); Montana Coalition for Stream Access, Inc. v. Hidreth, 684 P.2d 1088, (Mont. 1984); Galt v. Montana, 731 P.2d 912 (Mont. 1987); J.J.N.P. Company v. Division of Wildlife Resources, 655 P.2d 1133, (Utah 1982); and Conaster v. Johnson, 194 P.3d 897 (Utah 2008).

The basic elements of the system remain in place. There must be unappropriated water available in a natural stream that can be applied to a beneficial use without impairing other established water rights. Permit systems have evolved over time and are no longer simply ministerial functions under which the applicant is assured of a permit as long as unappropriated water is available in the source. Today permitting agencies have broader and more substantive roles.

All permit systems take a two-step approach. The application or permit is granted if it meets the statutory requirements for approval. Once approved the applicant has a period of time to perfect the appropriation by completing the diversion works and applying the water to the intended beneficial use. This time period may be extended upon a showing of due diligence as defined by case law in each state. Once perfected, the water right becomes a vested, protected interest in real property, capable of being conveyed by deed, and subject to prior rights, the assertion of dominant federal interests and must be in the public interest. Priority attaches upon perfection of the right and relates back to the date application for a permit filed, provided the applicant has been diligent in pursuing the appropriation and beneficial use of the water.

The terminology will change from state to state. California refers to the perfected water right as a license. In Utah, a perfected appropriation is called a water right. Prior to being perfected, it is simply a pending application. Regardless of the nomenclature, the process is essentially the same, even in Colorado, where the court grants conditional decrees and then final decreed rights. The approval of a permit or application is usually conditioned by the permitting agency to ensure other water rights are not interfered with by this new use of water. Additional conditions may be imposed that are designed to protect the "public interest" in water. Public interest conditions can take form of leap-frogging priorities to allow a preferred use to take priority over a prior filed application, if the use is deemed to be more in the public interest than the subordinated use. Permits may also be conditioned so as to protect instream flows, and other environmental considerations.

Although a private right to the use of water may be acquired through the permitting process, the states have always reserved the power to limit private uses, and this power extends to the protection of other users and to the enhancement of state or community interests in water allocation.[29] Tarlock, §5:51, p5-82. Most western states have delegated the power to reject

[29] Dan Tarlock, *Law of Water Rights and Water Resources,* p. 9-28, Clark Boardman (1994).

applications that are contrary to the public interest to the state administrative agencies, Tarlock, §5:52, page 5-82. The power allows the state administrative agency to reject a senior application in favor of a junior appropriation or to deny an appropriation even when unappropriated water is available in the source if the proposed use is contrary to the public interest.

Early cases dealt mostly with a cost benefit analysis to compare competing applications and approved the application that appeared to maximize net benefits to the state. An example would be the Utah case of *Tanner v. Bacon,*[30] where the court subordinated a prior hydropower application to a junior multi-purpose application. Colorado remains the exception to the public interest rules, and the public interest component is limited to the water court's imposition of special conditions in conditional decrees to protect vested senior rights, including instream flow appropriations; since it is presumed that the State Engineer will perform his or her administrative duties. [31]

Some states have grafted environmental reviews onto the water appropriation process, and allow the public interest review to play a very heavy roll in the appropriation process. California is prime example of this. Although Idaho has restricted legislatively the application of the public trust doctrine, its supreme court has held that the state water agency may determine whether a proposed appropriation will conflict with the local public interest.[32] Tarlock suggests that this had been interpreted to incorporate a legislative concern for fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation and water quality into the permitting process.[33] In *Shokal v. Dunn,*[34] a commercial trout farm applied to appropriate 100 cfs of water for a hatchery operation. The application was approved and the protesting parties sought judicial review. The Supreme Court held that burden of proof is on the party seeking the permit to show the impact of the project on the public resources, and that requires the applicant to show that the proposed appropriation was in the "local public interest" as required by Idaho statute. The local public interest is defined as the affairs of the people in the area directly affected by the proposed use. Where the appropriation will conflict with that local public

[30] 103 Utah 494, 136 P.2d 957 (1915).
[31] Application of Hines Partnership, 929 P.2d 718, 723 (Colo. 1996), where the Court found that public interest objections are contrary to the doctrine of prior appropriation.

[32] Hardy v. Higginson, 849 P.2d 946 (Idaho 1993).
[33] Tarlock, §5:52, p. 5-84.

interest, the State Engineer is authorized to deny the application. Idaho has weakened its public interest law by enacting Idaho Code §42-222, which precludes environmental groups from raising public interest arguments in contesting change applications in the Snake River General Stream Adjudication.

Most state public interest statutes lack specific guidelines on how the public interest is to be determined and applied, leaving the initial determination to the permitting agencies and subject to judicial review. An example would be Utah Code Ann. §73-3-8, which simply provides that the State Engineer may deny an application if it would be detrimental to the public welfare. Alaska appears to be the exception in that its statute does provide some guidance to the agency in determining the public interest. These include a review of alternative uses that might be precluded by the appropriation, the effect upon access to navigable waters etc.

In my view, the public interest should be read broadly to secure the greatest possible benefit from the public water for the public. Relevant elements and relative weights will vary with the local needs, circumstances and interests. The burden of proof in all cases as to where the public interest lies rests with the applicant. Where the state engineer gives weight to economic benefits, it should also give weight to the economic detriments; should consider the effects on water quality; and look at alternative uses that might be precluded by the proposed used of water. Additionally, the state engineer ought to look at the impact of a proposed appropriation or change of use on scenic, recreation and other factors. Public interest review is not a violation of the appropriator's right to appropriate water, even in those states like Idaho where the right to appropriate is constitutionally guaranteed.

LOCAL AUTHORITY TO DETERMINE WHAT USES ARE IN THE PUBLIC INTEREST.

Traditionally, public interest determinations have been made at the state administrative or legislative levels, which makes sense because water allocation issues have been an exclusive function of the states. However, some commentators suggest that the states should not be the only body making these determinations. Scattered legal precedent exists that suggest that local communities may use land use powers to regulate at least the local environmental consequences of water diversion projects. The limits of this local authority has not been tested or defined.[35] An interesting discussion took place in a New Mexico trial court *In the Matter of Howard Sleeper*, in 1985. The trial judge stated:

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[34] 707 P.2d 441 (Idaho 1985).

> The evidence plainly suggests that such development creates few jobs for local inhabitants, except at menial levels. Over the long run, the local inhabitants lose management level jobs to outsiders and are relegated to service jobs. . . Other local survive on the fringe of the tourists industry by becoming professional "natives".
>
> . . . Northern New Mexicans possess a fierce pride over their history, traditions, and culture. . . The deep-felt and tradition-bound ties of northern New Mexico families to the land and water are central to the maintenance of that culture.

The court found that the proposed ski resort like other developments in the area eroded the community's agricultural subsistence economy by transferring water rights from agricultural use to development without the corresponding economic benefit to the community. Based on these findings, the court denied the transfer of the irrigation rights to ski resort use.

The decision case was reversed by the Court of Appeals in *Ensenada Land & Water Ass'n v. Sleeper,*[36] holding that in New Mexico the public interest review applies only to the original appropriation and not to changes of use on existing water rights. This is not the rule in Utah, where change applications are to be evaluated both under the change application statute of §73-3-3, but also under criteria of §73-3-8, as per the holding in *Bohman v. Morgan.*[37]

The relationship of urban development and water supply is becoming an area of public interest concern, although more often discussed in terms of the exercise of the police powers of a local community to protect the general public, health, safety and welfare. One example would be the water concurrency ordinance adopted by Summit County that forces water suppliers to demonstrate that they have the physical water resources, system capacity and the approved water rights necessary to meet their anticipated demand before a new real estate development may proceed and obtain service from the specific water provider. California has also adopted state legislation that attempts to address the water concurrency issue.

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[35] Tarlock, §5:53, p. 5-86.
[36] 760 P.2d 787 (Ct. App. 1988).

[37] 788 P.2d 498 (Utah 1989).

It is important to remember that the prior appropriation doctrine is a common law doctrine and therefore it is inherently flexible and subject to change as societal values change.[38] Many states recognize a public interest component in a water right.[39] The language is essentially the same in the various statutes, and in general, the initial determination is left to the State Engineer. State Engineers are not necessarily the best judges of what is or is not in the public interest. However, someone must make the initial decision, and that duty is imposed upon the State Engineer as a part of the approval process. State Engineer decisions are subject to judicial review so that an appropriator whose application is denied on public interest grounds may seek redress if they disagree with the State Engineer's determination.

The extent of the public interest power of the State Engineer is largely untested. If used properly, it could be a powerful tool to assist in encouraging conservation and the reallocation of water to new uses, or protecting the area of origin of water against having all available resources stripped and exported to other locations to the economic detriment of the area of origin. California has given its Water Resource Control Board authority to impose conservation measures on even existing, vested water rights.[40] It could be used to complement land use regulation by local planning and zoning authorities. Other states have given their State Engineers broad regulatory powers to protect their groundwater supplies from over-drafting.[41] The Utah State Engineer has done this on a limited scale through the adoption of administrative policies on ground water development, and the adoption of regulations implementing the policies.[42] Other

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[38] *See,* Steven E. Clyde, *Adapting to the Changing Demand for Water Use Through Continued Refinement of the Prior Appropriation Doctrine: An Alternative to Wholesale Reallocation of Water,* Natural Resources Journal, Vol. 29, No. 2 (Spring 1989).

[39] Alaska Stat. §46.15.080; Haw. Const. Art. XI, §§1, 7; Idaho Code §42-208A (5) (1996); Mont. Code Ann., §85-2-311; N. D. Cent. Code Ann. §61-04-06; Neb. Rev. Stat. 1943 §46.233.01; Nev. Rev. Stat. §533.370 (1986); N. M. Stat. Ann. §72-5-7; Texas City of Stephenville v. Texas Parks and Wildlife Dep't, 940 S.W.2d 667 (1996); Utah Code Ann. §73-3-8 (1988); Rev. Code Wash. Ann. §90.03.290; and Wyo. Stat. §41-4-503.

[40] United States v. State Water Resources Control Board, 182 Cal. App. 3d 82, 227 Cal. Rptr. 161 (1986).

[41] Ariz rev. Stat. Ann. §§45-401-637 (West Supp. 1988); Ore. Rev. Stat. §§537.010, 537.515 to 537.620 (1988); Wyo. Stat. §§41-126, 41-127 through 47-131 (1977).

[42] The Utah State Engineer has adopted Groundwater Management Plans for Bountiful Sub-Areas of the East Shore of Great Salt Lake; Cedar Valley; Cache Valley; Northern Juab Valley;

public interest decisions have reached similar results.[43] Colorado remains an exception to the expansion of public interest review. The court there has held that the public interest is limited to the water court's imposition of any special conditions in conditional decrees to protect vested senior rights, including instream flow appropriations.[44]

DENIAL OF CHANGE APPLICATION ON PUBLIC INTEREST GROUNDS TO PROTECT OVER-DRAFTING OF GROUND WATER SUPPLIES: STATE ENGINEER ACTS TO PROTECT MINED AQUIFER.

On July 3, 2000 the Utah State Engineer denied three change applications, in part based on the exercise of his statutory duty to approve only those applications that are not detrimental to the public welfare.[45] Each of the change applications was based on fractional shares of the same underlying water right. Each application sought to move the point of diversion from a long dormant spring to wells. The wells were generally located in "a mined aquifer." The State Engineer concluded that approval of the change applications would be "neither reasonable nor a wise management policy for the groundwater resource given the current overdraft conditions, and the irreparable damage to the acquirer which would occur by allowing these additional diversion."[46]

Pahvant Valley; Salt Lake Valley; Snyderville Basin/Park City; Tooele Valley; Upper Provo River; Utah/Goshen Valley; Weber-Delta Sub-Area; and Monticello Mill Tailings.

[43]County of Inyo v. City of Los Angeles, 139 Cal. Rptr. 396 (Cal. App. 1977); Sempel v. Dep't of Water Resources, 82 Wash. 2d 109, 508 P.2d 166 (1973); Hardy v. Higginson, 849 P.2d 946 (Idaho 1993), holding that Idaho Code §42-211 allows the Department of Water resources to invite protests from third parties beyond those living in the immediate area of the proposed diversion. To have standing, the parties need only to show a nexus to the issues. Public interests protestants need not be water users; In re Application A-15738 of the Hitchcock and Red Willow Irrigation District. 226 Neb. 146, 410 N.W. 2d 101 (1887); Johnson Rancho county Water District, v. State Water Rights Bd., 235 Ca. App. 863, 45 Cal. Rptr. 589 (1965); East Bay Municipal Util. Dist. V. Dep't of Public Works. 1 Cal.2d 476, 35 P.2d 1027 (1934); Shokal v. Dunn, 109 Idaho 330, 707 P.2d 441 (1985); Young & Norton v. Hinderlider, 15 N. M. 666, 110 P. 1045 (1910); City of San Antonio v. Texas Water Comm'n, 407 S. W. 2d 752 (Tex. 1966); Central Platte Natural Resources Dist. V. Wyoming, 245 Neb. 439, 513 N.W.2d 847 (1994); and Big Horn Power Co. v. State, 23 Wyo. 271, 148 P. 1110 (1915).

[44]Application of Hines Highlands Partnership, 929 P.2d 718, 723 (Colo. 1996), (wherein the court held that "a public interest objection is not a valid objection to a decree for new conditional water rights because such an argument conflicts with the doctrine of prior appropriation.")

[45]Change Application Numbers 71-4624 (a23042) and 71-2630 (a23269), and 71-2552 (a23697).

[46]Cite State Engineer memo decisions in the Carter and Circle 4 matter.

FACTUAL BACKGROUND

The base water right upon which the change applications were based allowed the diversion of 1000 acre feet of water from a spring area known as Hay Springs. The springs were located about 4 miles southwest from an area known as the Milford Flat in Beaver County, Utah. The Hay Springs water right had a priority of 1872, making it one of the earliest priority water rights in the area. Ground water development for irrigation use in this area began after World War II and steadily increased for a period of about 40 years thereafter. The heavy pumping of ground water for irrigation use in the Milford Flat appears to have caused a decline in the ground water level and as a result, and may have contributed to the loss of flows of the Hay Springs. Testimony presented at the State Engineer's hearing on these change applications indicated that because the springs ceased to flow, the water from the Hay Springs had not been placed to beneficial use for more than 40 years prior to the filing of the change applications.

The Applicants of two of the contested change applications, Dean and Donna Carter, 71-4624 (a23042) and 71-2630 (a23269), sought to move their point of diversion from Hay Springs approximately four miles to an existing well located in the most heavily pumped area in the Milford Valley. Circle 4 Farms filled the third change application, 71-2552 (a23697), based on the remaining 50% of the base water right in Hay Springs. It sought to move its point of diversion from the springs to a well located at its expansive commercial hog production complex located several miles south of the Milford Flat but in a recharge area for the Milford Flat.

Neighboring farmers who were concerned about insinuating this senior priority water right into the already-depleted ground water aquifer protested the applications. Although the change applications themselves would have a priority no earlier than 1999, during times of shortage, the more senior priority of the underlying water right would enable the Carters and Circle 4 to essentially preempt all of the protesting ground water users from using pumping their wells under their junior priorities to avoid interfering with this prior right. The concern was very real, since the State Engineer had recently threatened to administer this ground water basin on the basis of priorities, which has generally not been the way in which ground water has been regulated in Utah. The Hay Springs water right had not been exercised for more than 40 years, during which time these more junior rights had been perfected and significant investments had been made by them in wells and sprinkler irrigation systems. This investment was at risk if these change applications were approved and the State Engineer began administering the ground water basin on the basis of priority.

PROTESTING PARTIES CONTENTIONS

The protestants complained that applicants' water rights in Hay Spring had been lost due to statutory forfeiture and/or abandonment and that they were no longer valid, subsisting water rights upon which change applications could be based. They also asserted that the applicants

should not be allowed to sit on their water right for 40 years, while the protestants developed their water supplies and economic activities in reliance on the applicants' non-use of this water right, and then attempt to revive these long-dormant water rights and assert a superior priority to the economic detriment of each of the protestants. Lastly, they argued that even if the applicants could overcome the forfeiture and/or abandonment hurdle, approval of these change applications will result in a further lowering of the already mined aquifer, and interfere with the protestants' vested water rights, to the detriment of the aquifer.

APPLICANTS' CONTENTIONS

The applicants countered that their underlying water rights had not been forfeited or abandoned and that the reason for their non-use was over pumping of the ground water resource by the very junior ground water appropriators who were now protesting the change applications. The applicants argued that it was unfair to deny them the right to revive their water rights by changing their points of diversion to new sources of supply, and allow the protesting parties to benefit from their alleged prolonged interference with this senior water right.

FORFEITURE AND/OR ABANDONMENT

The State Engineer acknowledged that non-use caused by the wrongful acts of others is a defense to forfeiture, but tempered that statement by his ruling that the defense would be available only for a reasonable period of time. The protestants argued that 40 years of non-use was an unreasonable length of time, and that the applicants should have either sued to enjoin the interference or exercised reasonable and economic remedies that existed to reestablish their source of supply decades earlier. The State Engineer agreed and held that under Utah law, every appropriator must maintain their own reasonable means of diversion in order to obtain their physical water supply. Evidence presented by the applicants' own expert demonstrated that even though Hay Spring no longer flowed, the water table was only about 15 feet below the surface of the land at the springs. The applicants had reasonable remedies available to them, such as development work on the springs or the drilling of a shallow well, which if exercised, would have restored their source of supply and enabled them to continue using their water rights. Having failed to do that, the State Engineer ruled that the water rights appeared to have been forfeited or abandoned, and therefore the applicants lacked a valid water right upon which they could file a change application.

PUBLIC INTEREST

The State Engineer also noted that even if the applicants could overcome the abandonment and forfeiture issues and establish the existence of a valid water right the state engineer is "keenly aware of the declining groundwater levels in the area known as the Milford Flat." Given this serious decline in water levels, the state engineer stated that approval of these applications "would clearly worsen an already unacceptable condition," and would "impair the

rights of those groundwater users who have been continuously using water since the mid-century." The State Engineer noted that the applicants had done nothing for decades to use the Hay Springs water, while the protestants had developed their water sources and used them continuously without opposition from the applicants.

As to the applicants' argument that they should not suffer the loss of their water rights because their non-use had been caused by the wrongful acts of the protestants, the State Engineer held:

> . . . the State Engineer concurs with the protestants that the applicant and predecessors have allowed an unreasonable period of time to expire without making any demonstrable effort--reasonable or otherwise--to recover the flow of water prior to the filing of this application. The State Engineer recognizes that nonuse of water may result from conditions beyond the immediate control of the appropriator and that such conditions deserve proper administrative notice. It is not reasonable, however, that such nonuse can continue indefinitely without the consequences of statutory forfeiture or abandonment. (73-1-4 U. C. A.) It is the conclusion of the State Engineer that circumstances were not fully beyond the control of the appropriator, in that the applicant and predecessors have not exercised timely, reasonable remedies that were available, and that the underlying water right has ceased for nonuse. The applicants are clearly not entitled to the use of water and the change application must be rejected.

This decision was not further appealed. Although the state engineer did not specifically rule that approval of these applications would not be in the public interest, it is clear he was concerned about the declining ground water in the area, the detrimental economic impact that would result to those junior water users who had expended their money and built their farming economies in reliance of the many years of on-use if these rights.

More recently, the Central Iron County Water Conservancy District filed applications to appropriate essentially all of the remaining groundwater available for development in western Beaver County.[47] Under its applications, the district intends to drill wells and pipe the water from the west desert to Cedar City to provide water for its future economic growth and development. Beaver County and a few hundred local citizens protested the application on the basis that the applications were detrimental to the public welfare in Beaver County in that the exportation of this water would deprive Beaver County of future economic growth opportunities to the detriment of its citizens.

Beaver County is presently experiencing growth in its mining economy, and several alternative energy development projects including wind power, geothermal and solar power generation are either under construction or consideration. Agricultural is part of Beaver County's heritage, and unlike most of the State, its agricultural economic sector is growing rather than

[47] Application to Appropriate Numbers 14-118 (15,000 ac-ft); 19-399 (10,000 ac-ft); and, 69-101 (12,000 ac-ft).

declining. The county does not want to lose its agricultural growth by having all of its ag water converted to M&I use to accommodate the development of new economic sectors within the county. However, if Iron County is allowed to take all of the remaining ground water and pipe it to Cedar City, Beaver County will certainly lose out in that process and the economic trade-off from the loss of its agricultural economy for new growth sectors do not necessarily equate to a 1 to 1 ratio. Beaver County has pending applications to appropriate of its own pending before the state engineer for a portion of this same limited water supply. Expert testimony indicated that there is not an adequate supply of developable ground water in western Beaver County to support both counties' desired appropriations. Iron County has other options including its planned participation in the Lake Powell Pipeline Project with Washington County. It views the Beaver County ground water as a future water supply that is not required by the county in the short term; whereas Beaver County has a present need for this water and really no other options, as participation in the Lake Powell Pipeline would be prohibitively expensive. Two of the three he Iron County applications were heard by the State Engineer this past July in an 11 hour hearing. A decision is pending.

PUBLIC INTEREST IMPOSED UNDER VARIOUS FEDERAL LAWS AND REGULATIONS
FEDERAL REGULATORY CONTROLS:

The federal government acquiesced in the settlement of its Western lands and the appropriation of its water under state law. However, these state-created water rights remained subject to the assertion of dominant federal interests. These federal interests have the potential to curtail and even displace state created-appropriated rights. The disruption may result from the assertion of federal reserved rights, its sovereign powers to regulate commerce and navigation, or through the imposition of federal regulatory controls. The United States Supreme Court rocked the West by holding that water and water rights were commodities that were capable of being bought and sold in the market place,[48] and as commodities, the Court further held that state-created water rights were subject to federal regulatory control in interstate commerce. The *Sporhase*[49] decision heightened the awareness of those who wish to buy and sell water rights of water's inherent marketability, and also state created water rights subordinate position to dominant national interests.

There are three major federal regulatory programs that give the federal government the authority to disrupt if not displace vested state-created water rights. They are Section 404 of the Clean Water Act, The Federal Power Act, and the Endangered Species Act. These regulatory

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48 Sporhase v. Nebraska, 458 U.S. 941 (1982).

49 *Id*. note 27.

programs have in effect created a new class of federal water rights that differ from other federal reserve rights or state-created rights.[50] The principal difference is that they lack any definitive date of priority, which makes their integration into a priority based state system of water rights administration almost impossible. Further, there is no requirement that these regulatory rights ever be beneficially used and they are not subject to forfeiture.[51]

While these regulatory rights have the potential to "take" state created rights, so far that has not proven to be the case. That is because all state-created water rights are appropriated subject to the public interest,[52] and therefore are subject to adjustment to meet the changing demands caused by competing interests for our water resources. Generally vested rights should not be curtailed but merely reduced to protect other public interest values in the water resources. Reductions of use, as distinguished from outright curtailments, may not constitute a taking.[53]

CLEAN WATER ACT, § 404

Section 404 of the Clean Water Act,[54] requires the issuance of a permit by the Corps of Army Engineers for the dredging in or filling of the waters of the United States. It also provides protection for wetlands. The construction of a diversion dam to exercise a state-created water right may require the issuance of a § 404 permit. However, there is no assurance that the permit will be issued. If it is issued, conditions may be attached that may limit the extent of the diversion and thus the use of the right. The Environmental Protection Agency also retains a veto power under its concurrent jurisdiction of the § 404 programs, and it may simply veto a permit if it concludes that granting the permit will be too damaging to the federal interests. All of these

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[50] *See* Tarlock, p. 9-28, *Law of Water Rights and Water Resources*, Clark Boardman (1994).

[51] *Id.*

[52] *See* Sporhase v. Nebraska, 458 U.S. 941 (1982); Hughes v. Oklahoma, 441 U.S. 322 (1979). *See* S. E. Clyde, *Legal and Institutional Barriers to Market Transfers and Reallocation of Water Resources*, 29 S.D.L.R. 232, 243, Spring (1984).

[53] United States v. State Water Resources Control Board, 182 Cal. App. 3d 82, (1986); National Audubon Society v. Superior Court, 33 Cal. 3d 419, 189 Cal. Rptr. 346, 658 P.2d 709, *cert. denied* Los Angeles Dep't of Water & Power v. National Audubon Society, 464 U.S. 977 (1983); *See* Tarlock, p. 9-29, note 34, *infra*., wherein he states: "All water rights are subject to adjustment to meet the changing demands of competing users. In most cases regulatory water rights will not curtail an existing use but will merely reduce the margin of safety built into the right. These reductions are not *per se* taking."

[54] § 404, 33 U.S.C. §1344.

actions may make it impossible for the appropriator to enjoy an otherwise valid state appropriation.[55]

The Clean Water Act contains some exceptions that protect existing farming and timber harvesting activities from having to apply for § 404 permits. They include dredging or filling activities:

> (a) From normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices;
>
> (b) For the purpose of maintenance, including emergency reconstruction of recently damaged parts of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways and bridge abutments or approaches, and transportation structures;
>
> (c) For the purpose of construction or maintenance of farm or stock ponds or irrigation ditches or the maintenance of drainage ditches.

However, these exceptions are clearly limited to existing activities.[56] A farmer seeking to drain a swamp to create new irrigable farm land would be required to obtain a § 404 permit, and in all likelihood would be denied a permit.[57] Similarly, an attempt to characterize a dike that would have blocked the flow of water to wet lands area as an exempt irrigation facility has failed in the federal courts.[58] The Corps has exempted farmland that was drained before December 23, 1985 from § 404 jurisdiction, on the rationale that prior converted cropland no longer supports wet land vegetation, and therefore, no longer qualifies as a wetland.

If a state water right holder cannot fall within one of the limited exceptions to §404, he or she may be prevented from exercising the water right to its fullest potential or at all. This can occur in spite of the impressive language contained in the Act that arguably was intended to protect state-created water rights. The 1977 Wallop Amendment[59] specifically states:

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[55] Wyoming v. Hoffman, 23 F. Supp. 450 (D. Wyo. 1976).

[56] U.S.A. v. Huebner, 752 F.2d 1235 (7th Cir.), *cert. denied* 474 U.S. 817 (1985); U.S. v. Zanger, 767 F. Supp. 1030 (N.D. Cal. 1991); U.S. v. Sinclair Oil Co., 767 F. Supp. 200 (D. Mont. 1990), channel modification to ease flood erosion without benefit of permit violated Section 404.

[57] Avoyelles Sportsman's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983).

[58] United States v. Akers, 785 F.2d 814 (9th Cir. 1986).

[59] 33 U.S.C. § 1251(g).

> [T]he authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is further the policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any state. Federal agencies shall co-operate with state and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

Notwithstanding this broad policy statement, the federal courts have not hesitated to subordinate state water rights to the effect of the Act.[60]

STATE WATER QUALITY CERTIFICATION, § 401 CLEAN WATER ACT

Section 401 of the Clean Water Act provides the States with some means of blocking or at least restricting the activities of federal permit applicants by incorporating into the Act state water quality standards and policies into federal permits. The section requires all federal permittees to obtain a state certification that the proposed activity will comply with any applicable state water quality standards and any other appropriate requirement of state law.[61] This requires compliance with both effluent limitations and water quality limitations. As a result, a federal applicant must comply with state water quality designations including the state's anti-degradation policy.[62] Federal permittees are prohibited from altering § 401 conditions.[63] There is an on-going dispute among federal permittees and the states over the reach of § 401. Permittees argue that it should be limited to pollution discharges (effluent limitations) and it

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[60] U.S. v. Akers, 785 F.2d 814 (9th Cir.) *cert. denied* Riverside Irr. Dist. v. Andrews, 758 F.2d 508 (10th Cir. 1985), held that even if a denial of a nation-wide dredge and fill permit under § 404 of the Act impaired the state's authority to allocate water, the Corps. of Army Engineers was within its authority in denying the permit where the proposed project would have resulted in the depletion of stream flows from increased consumptive use of water that would in turn have adversely affected the critical habitat of the whooping crane. The Court held in National Wildlife Federation v. Gorsuch, 693 F.2d 156, 224 U.S. App. D.C. 272 (1980), that the statement of policy is not intended to take precedence over legitimate and necessary water quality considerations.

[61] 33 U.S.C. § 1341.

[62] Bangor Hydroelectric Co. v. Board of Envtl. Protection, 595 A.2d 438 (Me. 1991); Hi-Line Sportsman Club v. Milk River Irrigation Dist., 786 P.2d 13 (Mont. 1990); Department of Ecology v. Public Util. Dist. No. 1, 849 P.2d 646 (Wash. 1993), *aff'd*, 511 U.S. 700, 114 S. Ct. 1900 (1994).

[63] U.S. Dep't of Interior v. Federal Energy Regulatory Comm'n, 952 F.2d 538 (D.C. Cir. 1992).

should have no application to maintaining minimum stream flows for fishery protection, or the anti-degradation provisions to maintain a designated use of a stream. Some states have taken a broader view,[64] and the United States Supreme Court upheld their determinations.[65]

FEDERAL POWER ACT

An applicant for a Federal Energy Regulatory Commission (FERC) license to construct a hydropower generation facility under the Federal Power Act[66] is required to obtain a state water right permit for its hydro power project.[67] FERC may not adjudicate water rights.[68] Inconsistent state laws are deemed pre-empted by this federal law.[69] FERC may require its licensee to release water from reservoirs at times that are detrimental to downstream water users' interests in order to protect fish and other wildlife resources. These conditions may be made mandatory, as FERC is required to consider the effects of its decisions on fish and wildlife.[70] FERC's right to impose license conditions that may impair state-created vested rights have been upheld as a valid

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[64] Arnold Irr. Dist. v. Dept. of Envtl. Quality, 717 P.2d 1274 (Or. Ct. App. 1986), *reviewed denied*, 726 P.2d 377 (1986); Dep't of Ecology v. Public Utility Dist. No. 1, 849 P.2d 646 (1993) *aff'd*, 511 U.S.700, 114 S. Ct. 1900 (1994), where the Supreme Court upheld the state's imposition of minimum stream flow requirements as a part of a § 401 Certification, holding that § 401 requires permit applicants to comply with both use designations as part of the anti-degradation provisions of the Clean Water Act, as well as the water quality criteria of the state's standards. *But see* Niagara Mohawk Power v. New York Dep't of Envtl. Conservation, 592 N.Y.S.2d 141 (A.D. 3 Dept. 1993), that confined the state's § 401 certifications to the state's water quality standards. *See generally*, Tarlock, 9-33

[65] Dep't of Ecology v. Public Utility Dist. No. 1, 849 P.2d 646 (1993) *aff'd*, 511 U.S. 700, 114 S. Ct. 1900 (1994).

[66] 16 U.S.C. § 791 *et. seq.*, Winnebago Tribe of Neb. v. Ray, 621 F.2d 269 (8th Cir.), *cert. denied*, 449 U.S. 836 (1980).

[67] Escondido Mutual Water Dist. v. La Jolla Band of Mission Indians, 446 U.S. 765, *reh'g denied*, 467 U.S. 1267 (1984).

[68] *Id*. note 46.

[69] California v. FERC, 495 U.S. 490, 506 S. Ct. 2024, 2034 (1990); First Iowa Hydroelectric Co. v. FPC, 328 U.S. 152, *reh'g denied*, 378 U.S. 879 (1946); *but see* PG&E Co. v. State Energy Resources Conservation and Development Comm'n, 461 U.S. 190 (1983); California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987), which has limited the preemption argument in connection with Section 8 of the Reclamation Act of 1902.

[70] Udall v. Federal Power Comm’n. 387 U.S. 428 (1967); Friends of the River v. Federal Energy Regulatory Comm’n., 720 F.2d 93 (D.C. Cir. 1983).

assertion of the federal government's dominant servitude, or its paramount right to regulate commerce and navigation.[71] Arguably where this situation occurs, the states should have the power to protect the vested water rights of its citizens, by conditioning the approval of a FERC licensees' state water right application upon the non-interference with other vested water rights.[72]

THE ENDANGERED SPECIES ACT

The Endangered Species Act[73] imposes an absolute duty on federal agencies to take all required steps to protect threatened and endangered species. This mandatory compliance may well require the subordination of state-created water rights to this federal interest.[74] Section 7 of the Act[75] requires an agency or a federal licensee or permittee to consult with the Secretary of Interior before undertaking any action, which may jeopardize an endangered or threatened species.[76] If the Secretary concludes, after consultation, that the proposed project will jeopardize the endangered or threatened species, the Secretary is to suggest reasonable and prudent alternatives that would not harm the species in question and therefore would not violate the mandate of Section 7 to not jeopardize the species. The Act has been amended to create some general flexibility and economic balancing into the protection process.[77] The burden is not on the agency but the private applicant to demonstrate that the value of the project or activity outweighs the protection of the threatened or endangered species. If after consultation it is concluded that the conflict cannot be resolved, the exemption application is sent to a cabinet level committee for review.[78]

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[71] California v. Federal Power Commission, 345 F.2d 917 (9th Cir.), *cert. denied*, 382 U.S. 941 (1965). FERC denies that the states have any regulatory controls over federal power projects such as the imposition of minimum stream flow releases due to federal preemption in this area. California v. FERC, 877 F.2d 743 (9th Cir. 1989), *aff'd*. Calif. v. FERC, 110 S. CT. 2024, 495 U.S. 490, (1990).

[72] *See* Tarlock, 9-34 through 9-36, *infra.* note 31.

[73] 16 U.S.C. §1531 *et. seq*.

[74] *See generally* Tarlock, *Law of Water Rights and Resources,* 9-30, Clark Boardman Company, N.Y., N.Y., (1990).

[75] 16 U.S.C. §1536.

[76] 16 U.S.C. §1536(a)(2).

[77] P.L. 97-304, 96 STAT. 1417 (1982).

[78] 16 U.S.C. §1536(c)(p).

The alternative of not diverting water or not constructing an impoundment facility is one that may be suggested and/or is a required condition as part of the § 404 permitting process. Restricting diversions or mandating the maintenance of minimum stream flows to sustain a down stream ecosystem under the Act may seriously reduce the water right, and may even make it impossible to enjoy its use.[79]

This is clearly what happened in the case of the proposed Grayrocks Dam on the North Platte River. The Court set aside a § 404 permit for construction of the dam because of the concern that the additional impoundment of water would harm the habitat of the endangered whooping crane.[80] The Endangered Species Act may well require a federal agency to operate a federal reservoir to maximize the protection of the protected species, which may in turn force the subordination of state-created vested water rights.[81]

Other recent federal laws have required the sponsors of federal Reclamation projects to adjust their water supply contracts, to maintain minimum stream flows, to acquire water rights

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[79]Bennett v. Plenert, 63 F.3d 915 (9th Cir. 1995), wherein the 9th Circuit Court of Appeals held that only "plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the Endangered Species Act," and therefore parties claiming economic injury resulting from the implementation of a reasonable and prudent alternative lacked standing to sue the Secretary of Interior and USFWS. *Rev.,* Bennett v. Spear, 117 S. Ct. 1154 (1997), where the United States Supreme Court held that the citizen suit provision of ESA is very broad and that it extended standing to those plaintiffs whose interest were economic and not solely the protection of an endangered species.

[80] Neb. v. REA, 12 Env't Rep. Cas. 1150 (D. Neb. 1978), *appeal vacated and dismissed*, 594 F.2d 879 (8th Cir. 1979). *See also,* Riverside Irrigation Dist. v. Stipo, 658 F.2d 762 (10th Cir. 1981); *on remand*, Riverside Irrigation Dist. v. Andrews, 568 F. Supp. 583 (D. Colo. 1983). The Corps.' authority to impose downstream protection conditions on a section 404 permit was upheld by the Tenth Circuit in Riverside Irrigation Dist. v. Andrews, 758 F.2d 508 (10th Cir. 1985). *See generally* Tarlock, The Recognition of In-stream Flow Rights: New Public Western Water Rights, 25 Rocky Mnt. Min. L. Inst. 24-31 (1979).

[81] Carlson-Truckee Water Conservancy District v. Clark, 549 F. Supp. 704 (D. Nev. 1982), *aff'd in part & rev's in part*, 741 F.2d 257 (9th Cir. 1984), *cert. denied sub nom.,* Nevada v. Hodel, 470 U.S. 1083 (1985); and the Orr Ditch litigation, Carlson-Truckee Water Conservancy District v. Watt, 54 F. SUPP. 704, 7708 (D. Nev. 1982), where all parties agreed that the Secretary of Interior had the duty in operating the Stampede Reservoir to prefer fish to municipal and industrial uses in the allocation of water.

and dedicate them to that purpose and perform additional environmental mitigation to off-set damage caused during construction.[82] These requirements were imposed as a condition to further federal funding of the Reclamation Projects.

Conclusion:

Water law in the West is ever-changing in response to our shifting social values in order to accommodate the changing needs of the society that it serves. Professor Frank Trelease has written:

> In all of the western states, a water right is a property right, defensible and protected, firm enough to give security to investments and enterprises, flexible enough to allow changes to new and more productive uses, subject to governmental controls that insure beneficial use and protect other public interest including the environment. That is what water law is all about.[83]

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[82] Reclamation Projects Authorization and Adjustment Act of 1992, P. L. 102-575, October 30, 1992, and particularly Titles II through IV, the Central Utah Project Completion Act provisions relating to maintenance of minimum stream flows in the Provo River to protect and maintain the blue ribbon trout fishery in the Provo River.

[83] Trelease, Back to Basics-Taking the Politics Out of Water Law, (1979), (unpublished manuscript used with permission of author).