# Hitching Our Wagon to a Dim Star: Why Outmoded Water Codes and "Public Interest" Review Cannot Protect the Public Trust in Western Water Law

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*"One can sense that modern courts find in the extreme reaches of prior appropriation, both in its substance and its administration, a one-dimensional rule of law, founded in another time, that is ill-suited for this age."*[1]

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1. Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 470 (1989).

## I. INTRODUCTION

The story of the public trust is eternally unfolding. In recent chapters, the public trust has claimed a central role in western water rights law—a development considered the "most significant expansion of public trust principles" in the past few decades.[2] In retrospect, this increasingly close relationship between the public trust and western water rights makes abundant sense. Western states[3] largely adhere to the principle that the waters of the West[4] belong to the states for the benefit of their people.[5] Further, the

2. Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 675 (2012). In 2011, Frank and other scholars presented their analysis at U.C. Davis's public trust symposium. Symposium, *The Public Trust Doctrine: 30 Years Later*, 45 U.C. DAVIS L. REV. 663 (2012) [hereinafter 2012 Symposium]. This symposium revisited U.C. Davis's 1980 public trust symposium, *The Public Trust Doctrine in Natural Resources Law and Management: A Symposium*, 14 U.C. DAVIS L. REV. 181 (1980), wherein participants noted the beginnings of this doctrinal extension toward water rights. 2012 Symposium at 669 n.10 (citing Harrison C. Dunning, *The Significance of California's Public Trust Easement for California Water Rights Law*, 14 U.C. DAVIS L. REV. 357 (1980); Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C. DAVIS L. REV. 233 (1980)). Northwestern School of Law of Lewis & Clark College held a public trust symposium in the intervening years, Symposium, *Public Trust and the Waters of the American West: Yesterday, Today and Tomorrow,* 19 ENVTL. L. 425 (1989), with scholars such as Wilkinson describing the same expansion. Wilkinson, *supra* note 1, at 466.

3. For purposes of this article, the western states encompass those that apply prior appropriation or a hybrid model that includes appropriative principles: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming. *See generally* Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53 (2010) [hereinafter Craig, *A Comparative Guide*]. Craig notes that while states of the East and West exhibit some similarities in their approach to the public trust, the states classified as western have notable distinctions, including differences in their aridity, their tests for determining navigability, their systems of water law, and their declarations of public ownership over waters. *Id.* at 56-57.

4. While many of this article's observations likely apply to states in the East, its analysis is limited to the western states. The West is the locus of the judicial trend extending the public trust to water rights, and it is there that the doctrine of prior appropriation (allowing private water uses to deplete a water source) is arguably in greatest tension with public trust values.

5. Most western states declare ownership of their waters through their constitutions, although a handful do so through statute. *See, e.g.*, ALASKA CONST. art. VIII, § 3 ("Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for the common use."); MONT. CONST. art. IX, § 3(3) ("All . . . waters . . . are the property of

majority of these states recognize that state ownership of waters places a public trust over those waters.[6] It was only a matter of time, then, until some western state courts extended this line of logic: if there is a public trust over waters, that trust must inexorably govern individual rights to *appropriate* those waters for private use. Under this doctrinal extension, the public trust's principles must imbue the state agency process of issuing and amending water use permits.[7] Agencies must assess how proposed water appropriations will impact the public trust, and appropriators must understand that the trust limits their private rights of use.

But this doctrinal extension bucks a centuries-old tradition of treating private water rights as separate from the public trust, and the vast majority of western state water codes still lack public trust provisions today.[8] Particularly concerning has been the assumption that existing "public interest" provisions within water codes can stand in for public trust review. These provisions, which often date to the turn of the nineteenth century, are the very antithesis of the public trust because they are highly discretionary and permit any manner of political interests to be considered in a water use permit decision. A common example is the agency use of public interest provisions to favor water-consumptive mining, irrigation, and municipal projects based solely on their expected economic benefits, without consideration of public trust values.[9] Public interest provisions thus are not a statutory quick fix for bringing water codes into compliance with public trust law. More meaningful reform is needed to truly protect our important water resources.

Part I of this article describes the traditional public trust principles that apply to waters, as well as the modern judicial trend of

the state for the use of its people . . ."); N.M. CONST. art. XVI, § 2 ("The unappropriated water . . . is hereby declared to belong to the public . . . ."); N.D. CONST. art. XI, § 3 ("All flowing streams and natural water courses shall forever remain the property of the state . . ."); NEV. REV. STAT. ANN. § 533.025 (2012) ("The water of all sources of water supply within the boundaries of the State . . . belongs to the public."). *See generally* Craig, *A Comparative Guide*, supra note 3 (providing a comprehensive compilation).

6. *See* Craig, *A Comparative Guide*, *supra* note 3, at 76-80 (summarizing those states' public trust laws). The exceptions are Idaho, Colorado, and potentially Arizona. *See* discussion *infra* notes 11 and 38, and Part II.D (discussing these states' exceptions).

7. While strong arguments exist that the public trust also operates retrospectively on existing water rights, this article focuses prospectively on new permitting and change-of-use decisions. *See, e.g.*, A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 5:57 (2012) (discussing several cases recognizing the trust's application to existing rights).

8. California is the exception, although even its provisions can be strengthened. *See* discussion *infra* Part I.C.4.

9. *See* discussion *infra* Part II.C.

extending these principles to water use permitting in the West. This part also briefly grapples with the unresolved question of whether a state legislature can unilaterally eliminate its public trust obligations—a question that affects the ultimate scope of this article. If, as some scholars contend, states cannot eliminate their public trust obligations, then this article potentially applies to water codes throughout the West.[10] If, as other scholars contend, states can so limit the trust, then this article nonetheless applies to the vast majority of western states that continue to recognize a public trust over waters.[11] Under either scenario, the water codes of the affected states reveal themselves to be outmoded legal regimes that promote private uses without adequately protecting the public trust.

Focusing on an area of particular concern in water codes, Part II analyzes the risky implications of supplanting the public trust doctrine with existing public interest review provisions. While the public interest and the public trust may at first blush appear to occupy common territory, the two are distinguishable in their legal origin, standard of review, purpose, and scope of coverage. Thus, permitting agencies must assess public trust impacts using a distinct analysis grounded in public trust law.

Finally, Part III advances a water use permitting framework that better fulfills the states' public trust responsibilities. Drawing on the best public trust ideas from around the West, this part recommends water codes that include: definitions and criteria that differentiate the public trust from the public interest; procedural requirements that ensure water use applicants demonstrate a lack of substantial impairment to the trust before a use permit issues; and permit conditions that preserve a state's right to modify or revoke a permit if a water use ultimately impairs the trust. Beyond permit-

10. *See* discussion *infra* Part I.B.

11. *See* discussion *infra* Part I.B. Colorado and Idaho are the clearest cases of states that have declared that the public trust does not apply to their waters. Arizona is a third possibility. *See* discussion *infra* Part II.D, regarding legislative attempts in Idaho and Arizona to eliminate or restrict the public trust. In Arizona, the courts have struck down the legislation thus far. In Colorado, the state supreme court made the sweeping conclusion that most Colorado waters are non-navigable and therefore not subject to public trust protections. Stockman v. Leddy, 129 P. 220, 222 (Colo. 1912), *overruled on other grounds by* United States v. City and Cnty. of Denver, 656 P.2d 1 (Colo. 1982). The Colorado Supreme Court also held that the Colorado Constitution does not recognize a public trust over waters. People v. Emmert, 597 P.2d 1025, 1028 (Colo. 1979).

ting laws, this part also explains why the judicial and executive branches play a critical role in creating the larger context for public trust protection. The judiciary should vigilantly guard against confusion of the public trust and public interest, and rigorously scrutinize permitting decisions that implicate the public trust. Likewise, agencies engaged in statewide water planning should squarely address how that planning impacts the public trust, thereby laying the foundation for more informed water use permitting decisions. The article concludes that these affirmative steps are legally necessary to bring the West's water laws into better alignment with the public trust.

## II. THE PUBLIC TRUST'S LOGICAL PATH TOWARD WATER RIGHTS

### A. *The Baseline: Traditional Public Trust Principles*

While states vary in their articulation of the public trust doctrine, water scholars note a common doctrinal baseline to which states adhere.[12] Justice Stephen J. Field articulated this doctrinal baseline in the United States Supreme Court's seminal decision *Illinois Central Railroad Co. v. Illinois*.[13] In that case, the Court held that states have a trust responsibility over "navigable waters and [the] soils under them."[14] That trust responsibility limits a state's legislative powers over trust resources, so that states cannot place them "under the use and control of private parties" if that private use would substantially impair the public's use of the waters.[15] Based on this trust duty, the Illinois Legislature could revoke its prior transfer of Chicago's harbor to Illinois Central Railroad, because such a significant transfer imperiled the public trust purposes of navigation, commerce, and fishing on Lake Michigan.[16]

Although *Illinois Central* concerned the beds beneath navigable waters, the case speaks of both the beds *and their waters* belonging

12. Michael C. Blumm, Harrison C. Dunning & Scott W. Reed, *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794*, 24 ECOLOGY L.Q. 461, 482-93 (1997); Craig, *A Comparative Guide*, *supra* note 3, at 71; Wilkinson, *supra* note 1, at 464 & n.164. *But see* discussion *infra* Part I.B (acknowledging the unresolved question of whether state legislatures can unilaterally eliminate this public trust baseline).

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

14. *Id.* at 453.

15. *Id.* at 453.

16. *Id.* at 463-64. Navigation, commerce, and fishing are the three purposes traditionally protected by the public trust. *See* discussion *infra* note 36 (defining these concepts).

to the public,[17] and it is well established that the public trust doctrine covers both resources.[18] Indeed, it would make little sense to delimit the trust to beds alone if all overlying public waters could be alienated to the detriment of commerce, navigation, fishing, or other state-recognized trust purposes that depend on those waters.

From Justice Field's words have come certain baseline principles traditional to the public trust doctrine. The first principle is that the state, as trustee over the trust resources, has delimited authority to permit private use or control of trust property.[19] State legislatures and administrative agencies cannot avoid this responsibility by simply conveying the trust resource into private ownership.[20] Before allowing private interests to use trust resources, the state must first determine that the public, the trust beneficiary, will not be substantially harmed.[21] In instances when harm will not occur, when harm is insubstantial, or when the trust resources are benefitted, the state may permit private uses.[22] When states do authorize private uses, they often impose conditions to protect the public's trust interests.[23] As trustee, the state's duty is also ongoing—it must engage in oversight throughout the period of private

17. *Id.* at 453.

18. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 556-57 (1969-70) (noting that the historical, "quite narrow" scope of the public trust includes "the waters over [submerged public] lands, and the waters within rivers and streams of any consequence"); *see also* TARLOCK, *supra* note 7, § 5:56 ("All western states declare that some or all water is owned in trust for the public."); 78 AM. JUR. 2D *Waters* § 4 (2012) (stating that the trust covers "natural streams and other bodies of water"); HARRISON C. DUNNING, 4 WATERS AND WATER RIGHTS § 30.02(e) (3d ed. 2011) (recognizing the same). *But cf.* IDAHO CODE ANN. §§ 58-1201 to -1203 (2012) (legislatively nullifying the Idaho Supreme Court's holding that the trust applies to waters); Stockman v. Leddy, 129 P. 220, 222 (Colo. 1912), *overruled on other grounds by* United States v. City and Cnty. of Denver, 656 P.2d 1 (Colo. 1982) (concluding that most Colorado waters are non-navigable and therefore outside the public trust).

19. *Ill. Cent. R.R.*, 146 U.S. at 453-54; HERBERT T. TIFFANY & BASIL JONES, 2 TIFFANY REAL PROPERTY § 659 (2012); 78 AM. JUR. 2D *Waters*, *supra* note 18, § 4; DUNNING, *supra* note 18, § 30.02(c).

20. *Ill. Cent. R.R.*, 146 U.S. at 453-54; DUNNING, *supra* note 18, § 30.02(c).

21. TARLOCK, *supra* note 7, § 8:18 (noting that state decisions to alienate trust interests "must be consistent with trust purposes"); Blumm et al., *supra* note 12, at 465 (discussing how agencies should consider trust impacts and provide mitigating conditions before approving private interests in trust lands and water). *Illinois Central* supports this logic as well in its holding that alienations that substantially impair the public trust are improper. 146 U.S. at 453.

22. *Ill. Cent. R.R.*, 146 U.S. at 453-54; DUNNING, *supra* note 18, § 30.02(d)(3).

23. Blumm et al., *supra* note 12, at 465-66.

use to ensure trust purposes are not substantially impaired.[24]

The second principle is that the party using the trust resource does so subject to the trust. The public trust, in other words, functions as an easement or servitude upon private use interests.[25] Under this servitude, the state retains oversight and can adjust the terms of the private interest, or revoke the interest altogether, to protect trust resources.[26]

A third principle is that the judiciary plays a vital role as gatekeeper of the trust, acting as a check on the legislature and agencies that wield decision making authority over trust resources.[27] In his seminal work on the public trust, Joseph Sax noted: "When a state holds a resource [for] the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties."[28]

24. This logic is supported by *Illinois Central*'s statement that transfers of public trust resources to private parties remain "subject to revocation." 146 U.S. at 453; *see also* DUNNING, *supra* note 18, § 30.02(d)(1) ("[A] legislative grant of state sovereign resources to a private party is inherently subject to revocation . . . .").

25. Wilkinson notes instances where the U.S. Supreme Court has described the trust in such terms. Wilkinson, *supra* note 1, at 450 n.102, 459 & n.138; *see also* DUNNING, *supra* note 18, § 33.01(a) (noting the "conventional understanding" that the trust functions as an easement).

26. *Ill. Cent. R.R.*, 146 U.S. at 453; DUNNING, *supra* note 18, § 30.02(d)(1).

27. TARLOCK, *supra* note 7, § 8:18 (noting that trust limitations "are enforced primarily by the courts").

28. Sax, *supra* note 18, at 490 (original emphasis removed). As argued below, court review of public trust decisions should thus approximate constitutional review, with courts considering de novo those legislative and administrative acts affecting trust resources. *See* discussion *infra* Part III.B. For an explanation of the de novo review that courts generally apply to constitutional questions, see CHARLES H. KOCH, JR., 4 ADMIN. L. & PRAC. § 11:11 (3d ed. 2012) ("[C]ourts have dominant authority over constitutional questions. Courts are free to conduct de novo review of an administrative resolution of a constitutional issue. This means that they are in no sense bound by an agency's constitutional determination.").

B. *A Lingering Question: State Powers to Define the Public Trust*

While scholars are in general accord that there are traditional baseline principles governing the public trust, there remains a critical, unresolved question in public trust jurisprudence: Is a state free to abolish the public trust doctrine or lessen its protections below the traditional baseline?[29] Although full analysis of the question is beyond the scope of this article, a brief discussion is warranted since the extent of state trust powers ultimately dictates the number of western states to which this article applies.[30]

Ultimately, the answer to the question of state trust powers lies in the source of the public trust doctrine, which is a subject of great debate. Many scholars and courts view the source as something beyond mere common law or legislative prerogative. Until recently, one conclusion has been that the doctrine emanates from the U.S. Constitution or some other federal law source.[31] Charles Wilkinson, for example, has previously argued that "the fairest and most principled conclusion is that the public trust doctrine is rooted in the commerce clause and became binding on new states at statehood."[32] But in the 2012 case *PPL Montana, L.L.C. v. Montana*, the U.S. Supreme Court stated in dictum that "the contours of th[e] public trust do not depend upon the Constitution" because "[u]nder accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders."[33]

Relying on principles of federalism, several western states have

29. DUNNING, *supra* note 18, at § 30.01(b)(1) ("From one point of view, to permit a state to abandon a right it held as an incident of sovereignty is to accord that state a freedom of action entirely consistent with its sovereign status in this realm. From another point of view, however, such freedom of action allows a state to defeat the very public right that was the basis for recognition of sovereign ownership of these lands in the first place.").

30. *See* discussion *supra* note 11 and *infra* Part II.D (discussing Idaho, Colorado, and potentially Arizona as states seeking to eliminate the public trust).

31. *See, e.g.*, Blumm et al., *supra* note 12, at 483; Wilkinson, *supra* note 1, at 459; *see also* discussion *infra* Part II.B (discussing state court decisions recognizing the same). *But see* James L. Huffman, *Speaking of Inconvenient Truths: A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 7-9 (2007) (questioning the prevailing view).

32. Wilkinson, *supra* note 1, at 459.

33. PPL Mont., L.L.C. v. Montana, 132 S. Ct. 1215, 1235 (2012). The Supreme Court contrasted the public trust doctrine with the equal-footing doctrine, which does provide a "constitutional foundation for the navigability rule of riverbed title." *Id.*

expanded the scope of the public trust in a couple of key ways. First, a number of states have expanded the resources of the trust to include waters that would not meet the narrower, federal definition of "navigable,"[34] such as groundwater and non-navigable lakes and streams that are capable of recreation.[35] Second, several states have expanded the traditional purposes of the public trust—navigation, commerce, and fishing[36]—to include broader recreational activities, instream flows for fisheries, and habitat protection.[37]

On the other hand, the Arizona and Idaho legislatures have sought to nullify the public trust's application to state waters.[38] While one possible reading of *PPL Montana* might support such actions as part of a state's retained "residual power,"[39] some scholars

34. In the context of state streambed ownership, federal navigability looks at waters "on a segment-by-segment basis" to determine whether those waters were "navigable in fact" at the time of statehood, either because they were used or were "susceptible to being used, in their ordinary condition, as highways for commerce." *Id.* at 1228 (quoting The Daniel Ball, 77 U.S. (1 Wall.) 557, 563 (1870)).

35. Hawaii and Montana are notable examples, with Hawaii's public trust extending to groundwater, and Montana's public trust extending to all waters capable of recreational use, regardless of whether they meet the federal test for navigability. Craig, *A Comparative Guide*, *supra* note 3, at 77, 126. California extends its trust to tributaries of navigable waters. *Id.* at 114.

36. Dunning explains that, historically, navigation and commerce "had in mind the waterborne type—that engaged in by navigating vessels" and that fishing "cover[ed] the gathering of shellfish as well as the taking of floating fish." DUNNING, *supra* note 18, at § 31.01. Related construction of "wharves and other necessary aids to navigation" were typically included as well. *Id.*

37. California (ecological trust for biodiversity), Hawaii (biodiversity, customary and traditional native rights, and domestic drinking water), and Montana (fishing and other recreational uses) again provide notable examples. Craig, *A Comparative Guide, supra* note 3, at 80-88, 123-24, 141; *see also* Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781, 814-28 (2010) [hereinafter Craig, *Adapting to Climate Change*] (discussing the various ways that public trust definitions have evolved in different states).

38. *See* discussions *supra* note 11 and *infra* Part II.D, regarding Idaho's and Arizona's legislative attempts to eliminate or restrict the public trust. The Colorado Supreme Court arguably restricted the public trust baseline as well when it made the sweeping conclusion that most Colorado waters are non-navigable, and therefore not subject to public trust protections. Stockman v. Leddy, 129 P. 220, 222 (Colo. 1912), *overruled on other grounds by* United States v. City and Cnty. of Denver, 656 P.2d 1 (Colo. 1982). The court further held that the public trust is not contained within the Colorado Constitution. People v. Emmert, 597 P.2d 1025, 1028 (Colo. 1979).

39. *See, e.g.*, Stephen H. Leonhardt & Jessica J. Spuhler, *The Public Trust Doctrine: What It Is, Where It Came From, and Why Colorado Does Not (and Should Not) Have One*, 16 U. DENV. WATER L. REV. 47, 80 (2012) ("*PPL Montana* lays to rest much of the debate about the states' ability to define or limit the public trust doctrine."); *see also* discussion *infra* note 192.

believe that reading may go too far.[40] The factual context of the *PPL Montana* decision could be important to resolving the question. In the case, Montana was concerned that the U.S. Supreme Court would *restrict* the state's broader definition of public trust to the narrower, federal navigability test for streambed ownership.[41] The Supreme Court reassured Montana that its state definition, which includes public recreational access to state waters (including non-navigable waters), would remain intact.[42] Notably, the Supreme Court was not considering a case where a state legislature had narrowed or eliminated its baseline trust obligations. Nor did the case involve the question of whether state courts can overrule such legislative acts, as the Arizona courts have done.[43] Thus, it is unclear whether *PPL Montana's* pronouncements can be read to authorize legislative nullification of the public trust.

Richard Frank, writing after the *PPL Montana* decision, offers a cogent analysis.[44] He concludes that, even if the public trust doctrine's source lies outside of federal law, it nonetheless resides in a "fundamental, inherent attribute of state sovereignty" that cannot succumb to state attempts to "limit or eviscerate public trust principles."[45] Others in the past have similarly argued that the public trust is an inalienable "attribute of sovereignty"[46] and that public trust review involves "protection of sovereign rights by courts."[47] Yet another analysis views the public trust doctrine as the functional equivalent of the non-delegable duty principle.[48] Under any of these views, even a legislature exercising residual state powers can-

40. *See, e.g.*, *infra* notes 44-48.

41. PPL Mont., L.L.C. v. Montana, 132 S. Ct. 1215, 1234-35 (2012).

42. *Id.*. at 1234-35.

43. *See* discussion *infra* Part II.D.

44. Frank, *supra* note 2, at 686.

45. *Id.* Wilkinson has similarly reasoned that public trust duties are "an implied condition of statehood," designed to ensure that the important public purposes of the nation's waterways remain safeguarded. Wilkinson, *supra* note 1, at 458-60.

46. Jan Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 196, 200, 213-14 (1980).

47. Blumm et al., *supra* note 12, at 483; *see also* TARLOCK, *supra* note 7, at § 5:59 (reasoning that wholesale legislative abdication of the public trust is "inconsistent with" the requirements in *Illinois Central* and other cases requiring protection of the public's trust interest before alienation of trust resources can occur).

48. William D. Araiza, *The Public Trust Doctrine as an Interpretive Canon*, 45 U.C. DAVIS L. REV. 693, 706-711 (2012) ("At base, both restrict the alienability of a resource thought to reside most appropriately with the public as a whole.").

not disavow its baseline public trust duties.

Adding to the list of possible doctrinal sources, Harrison Dunning suggests that the "most plausible" rationale for treating the public trust as "beyond complete legislative control . . . is the idea that the public trust doctrine . . . has become an implied state constitutional doctrine."[49] Indeed, many state courts have found the public trust echoed within their state constitutions or grounded in concepts of state sovereignty. For instance, the South Dakota Supreme Court has ruled that although a water use code

> displaces common law rules of water use . . . , it does not override the public trust doctrine or render it superfluous. History and precedent have established the public trust doctrine as an inherent attribute of sovereign authority. The doctrine exists independent of any statute. . . .
>
> Thus, while we regard the public trust doctrine and Water Resources Act as having shared principles, the Act does not supplant the scope of the public trust doctrine.[50]

Other state courts have ruled similarly. Drawing on both federal public trust principles, as well as unique water resource trust provisions in its state constitution, Hawaii's supreme court has concluded that the state's water code "does not supplant" the public trust, and that "the doctrine continues to inform the Code's interpretation, define its permissible 'outer limits,' and justify its existence."[51] In addition to federal law, the North Dakota Supreme Court and Montana Supreme Court have also looked to their state constitutions as sources of the public trust.[52] The Nevada Supreme Court, citing its state constitution, has held, "[T]he public trust doctrine is not simply a common law remnant. . . . [It is] inherent from inseverable restraints on the state's sovereign power."[53] The

49. DUNNING, *supra* note 18, at § 30.02(d)(3).

50. Parks v. Cooper, 676 N.W.2d 823, 837-38 (S.D. 2004) (internal citations omitted).

51. *In re* Water Use Permit Applications (*Waiahole Ditch*), 9 P.3d 409, 448-49 (Haw. 2000) (citing HAW. CONST. art. XI, §§ 1, 7).

52. Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 167, 170 (Mont. 1984) (citing MONT. CONST. art. IX, § 3(3)); United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n, 247 N.W.2d 457, 461 (N.D. 1976) (citing N.D. CONST. art. XVII, § 210); *see also* Rettowski v. Dep't of Ecology, 858 P.2d 232, 232 (Wash. 1993) (citing in part WASH. CONST. art 17, § 1). *See generally* Craig, *A Comparative Guide*, *supra* note 3 (providing a comprehensive list of state constitutional provisions).

53. Lawrence v. Clark Cnty., 254 P.3d 606, 612 (Nev. 2011) (citing NEV. CONST. art. 8,§ 9).

California Supreme Court characterizes the public trust doctrine as a form of "sovereign supervision"[54] rooted in the state's "title as trustee" over state lands and waterways.[55] And the Arizona Supreme Court cited its constitution when ruling that legislatures cannot use legislation to "destroy the constitutional limits" of the public trust.[56]

At the end of the day, then, the *PPL Montana* decision leaves unresolved an important question about whether all states remain subject to a public trust baseline, or whether state legislatures can, under the auspices of federalism, absolve themselves of their trust duties. If states can disavow their trust duties, then the scope of this article is necessarily limited to those western states that recognize the public trust over water. Currently, that list would include all of the western states except Idaho, Colorado, and potentially Arizona.[57] If, however, states cannot disavow their trust duties, then the article's arguments more broadly apply to the private appropriation of water in all western states. Under either scenario, the water codes of the affected states fail to reflect the modern legal trend of applying the public trust to water rights.

### C. *The Modern Trend of Applying the Public Trust to Water Rights*

Over the last few decades, courts and legal scholars have begun noting the strong connection between state public trust responsibilities and water use permitting decisions.[58] This "modern trend"[59] has resulted in judicial directives requiring state agencies to consider the public trust when new water uses are permitted, when existing water uses are changed, and, retrospectively, when existing water uses harm the public trust.[60] The following chronol-

54. Nat'l Audubon Soc'y v. Super. Ct., 658 P.2d 709, 728 n.27 (Cal. 1983).

55. *Id.* at 718. The Ccourt also suggests that Spanish and Mexican law, creating rights guaranteed by the Treaty of Guadalupe, may provide an independent source of the public trust doctrine in California. *Id.* at 719 n.15.

56. San Carlos Apache Tribe v. Super. Ct. *ex rel.* Cnty. of Maricopa, 972 P.2d 179, 199 (Ariz. 1999) (citing ARIZ. CONST. art. 9, § 7); *see also* discussion *infra* Part II.D.

57. *See* discussion *supra* notes 11 and 38; discussion *infra* Part II.D. Arizona would be excluded if its legislature recodifies the public trust provisions previously struck down by the courts.

58. *See supra* note 2; TARLOCK, *supra* note 7, § 5:58 n.2 (listing additional leading articles on the public trust doctrine).

59. Craig, *A Comparative Guide*, *supra* note 3, at 77.

60. TARLOCK, *supra* note 7, §§ 5:56-57 ("[T]he public trust may now be a self-

ogy discusses legal developments in those western states giving rise to this modern trend.[61]

1. *Alaska*

Alaska's 1959 constitution contains the first explicit statement of the relationship between public trust principles and water rights. Article VIII notes that water, fish, and wildlife "are reserved to the people for common use" and that appropriations of water are limited by this reservation for fish and wildlife.[62] The Alaska Supreme Court has held that these "common use" rights are a form of public trust.[63] Further, in a 1998 decision involving oil and gas leasing, the Ccourt acknowledged in passing that the state holds water rights "in trust for public use," thus paving the way for future holdings that more explicitly connect the two ideas.[64]

2. *North Dakota*

The North Dakota Supreme Court's 1976 ruling in *United Plainsmen Association v. North Dakota State Water Conservation Commission* is credited as the first judicial decision directly linking the public trust and water rights.[65] There, the Ccourt ruled that the state must consider the public trust before making new appropriations of water. The state's Water Conservation Commission and State Engineer took a traditional, narrow view of the public trust by arguing that it applied only to conveyances of real property and not water rights.[66] The Ccourt disagreed, holding that the public trust doctrine places the state in the "role as trustee of the public waters," and that the trust, at a minimum, "permits alienation and allocation of such precious state resources only after an analysis of present supply and future need."[67] Thus, the State Engineer must

executing judicial or administrative limitation on the acquisition of water rights and the exercise of existing ones."); DUNNING, *supra* note 18, § 33.02.

61. Other western states, while recognizing the public trust over waters, are not discussed here because their jurisprudence has not yet evolved to directly address the public trust-water rights connection.

62. ALASKA CONST. art. VIII, §§ 3, 13.

63. Pullen v. Ulmer, 923 P.2d 54, 60-61 (Alaska 1996).

64. Baxley v. Alaska, 958 P.2d 422, 434 (Alaska 1998).

65. United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n 247 N.W.2d 457, 463 (N.D. 1976).

66. *Id.* at 461.

67. *Id.* at 463.

consider "injury to the public" before granting a use permit.[68] The Ccourt also held that "some planning" by water resource agencies must take place before the states' trust obligation is met,[69] although it did not elaborate on the type of planning required to fulfill this trust obligation.

3. *Idaho*

One year later, the Idaho Supreme Court issued the first in a series of decisions that recognized the public trust's paramount role in water use permitting. First, in *Ritter v. Standal*, the Ccourt held that a water use permit for a fish farm did not trump the public's right of navigability.[70] There, the permit holder built a fish farm on an estuary connected to the Snake River.[71] The Ccourt concluded that the construction illegally interfered with public ownership of the waters.[72] Despite having a water use permit, the landowner had to "remove the fish farm from the estuary and restore the estuary as nearly as practical to its natural condition."[73]

Then in 1983 (on the heels of California's seminal *National Audubon Society v. Superior Court*[74] decision described below), the Idaho Supreme Court reiterated that "the public trust doctrine takes precedent even over vested water rights."[75] In *Kootenai Environmental Alliance v. Panhandle Yacht Club*, the state supreme court upheld the state's grant of an encroachment permit to a yacht club for construction of sailboat slips; however, it held that the "state is not precluded from determining in the future that this conveyance is no longer compatible with the public trust imposed on this conveyance."[76] And two years later, in the water rights case *Shokal v. Dunn*, the Ccourt affirmed in a footnote that "[a]ny grant to use the state's waters is 'subject to the trust and to action by the State

68. *Id.* at 464.

69. *Id.* at 463.

70. Ritter v. Standal, 566 P.2d 769, 773-74 (Idaho 1977).

71. *Id.* at 770.

72. *Id.*

73. *Id.*

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

75. Kootenai Envtl. Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1094 (Idaho 1983) (adopting the reasoning of *Nat'l Audubon Soc'y*, 658 P.2d at 722-24).

76. *Id.*

necessary to fulfill its trust responsibilities.'"[77] As discussed below, the 1995 Idaho Legislature responded by statutorily nullifying these public trust decisions.[78]

4. *California*

In 1983, the California Supreme Court more deeply addressed the legal connection between the public trust and water rights with the landmark decision *National Audubon Society v. Superior Court*, holding that the public trust doctrine is a limit on water rights and that private water uses may not "harm the interests protected by the public trust."[79] The Ccourt ruled that the state's duties include considering impacts to the public trust before approving water uses and conditioning uses to "avoid or minimize any harm to those interests."[80] Further, the Ccourt described this responsibility as ongoing—the state is obligated to modify or curtail the permitted water use if harm to the trust later occurs.[81] Ultimately, the City of Los Angeles had to reduce its existing water rights in tributaries of Mono Lake due to the damaging effects of the lowering lake levels, which imperiled the ecology of the area.[82]

California is the only state that has subsequently codified a portion of its public trust mandate into its water permitting regulations. Each issued water permit contains the following standard language:

> Pursuant to . . . the common law public trust doctrine, all rights and privileges under this permit and under any license issued pursuant thereto, including method of diversion, method of use, and quantity of water diverted, are *subject to the continuing authority* of the State Water Resources Control Board in accordance with

77. Shokal v. Dunn, 707 P.2d 441, 447 n.2 (Idaho 1985) (citing *Kootenai Envtl. Alliance*, 671 P.2d at 1094).

78. IDAHO CODE ANN. §§ 58-1201–1203 (2012). *See* discussion *infra* Part II.D.

79. *Nat'l Audubon Soc'y*, 658 P.2d at 712, 727-28 ("This case brings together for the first time two systems of legal thought: the appropriative water rights system which since the days of the gold rush has dominated California water law, and the public trust doctrine . . . ."); *see also* Craig, *A Comparative Guide, supra* note 3, at 114 n.336 (listing articles about the *National Audubon Society* litigation).

80. *Nat's Audubon Soc'y*, 658 P.2d at 712.

81. *Id.* at 728; *see also* United States v. State Water Res. Control Bd., 227 Cal. Rptr. 161, 201-02 (Cal. Ct. App. 1986) (affirming the same).

82. Dave Owen, *The* Mono Lake *Case, the Public Trust Doctrine, and the Administrative State*, 45 U.C. DAVIS L. REV. 1099, 1103, 1114 (2012).

law and *in the interest of the public welfare to protect public trust uses.*[83]

Under this authority, the State Water Resources Control Board (SWRCB) can "impos[e] further limitations on the diversion and use of water by the permittee in order to protect public trust uses."[84]

While parties protesting an application for water use can raise public trust concerns,[85] there are otherwise no specific procedural requirements for public trust review in California's water code.[86] Importantly, the water code do not expressly *require* the applicant or state agency to specifically address public trust impacts in the absence of a protest.[87] This leaves open the possibility that substantial impacts to the trust may occur after a permit issues. Further, despite the strong limiting language imposed on water use permits, the state does not regularly review water uses after issuing permits.[88] Thus, while California is a leader in incorporating the public trust into its water permitting laws, there is still room for improvement.

5. *Washington*

Washington case law also suggests a link between the public trust and water law in that state. In a 1993 water pollution case, *Rettokowski v. Department of Ecology*, the Supreme Court of Washington held that the state's Department of Ecology, which regulates

83. CAL. CODE REGS. tit. 23, § 780(a) (2012) (emphasis added).

84. *Id.*

85. CAL. CODE REGS. tit. 23, §§ 738, 745(c) (2012).

86. *See* Owen, *supra* note 82, at 1143.

87. Despite the lack of a water code requirement for public trust review, Owen documents that the SWRCB does consider the public trust in certain instances. *Id.* at 1130-32 (estimating that the public trust has been mentioned in roughly fifty percent of agency permitting actions, but served as "a basis for actually taking or requiring some action" in only twelve percent of agency permitting actions). In part, this level of review is due to independent environmental review requirements under the California Environmental Quality Act, although even then there are gaps in coverage between environmental review and water rights permitting. *Id.* at 1143-46. This ad hoc approach to agency public trust review does not ensure a consistent level of review in each instance, as public trust law requires. A better result would be codified review procedures within the state water code.

88. Dave Owen documents that the SWRCB rarely modifies an existing permit, in part due to lack of adequate funding for monitoring. Owen, *supra* note 82, at 1117, 1134-35.

water pollution, was *not* the agency responsible for protecting water uses under the public trust.[89] In so holding, the Ccourt noted in passing that the guiding principles for public trust protection are found in the state's "Water Code,"[90] thus implying that the state's water rights permitting agency is responsible for the public trust.

6. *Arizona*

In 1999, the Arizona Supreme Court struck down legislative attempts to prevent the public trust doctrine from being applied in state water rights adjudication proceedings.[91] In *San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa*, the court held that "[t]he Legislature cannot order the courts to make the doctrine inapplicable to these *or any* proceedings. . . . That determination depends on the facts before a judge, not on a statute. It is for the courts to decide whether the public trust doctrine is applicable to the facts."[92] This reasoning lays the foundation for applying the public trust doctrine to water rights permitting, as well.

7. *Hawaii*

Hawaii's constitution, which recognizes a unique public trust over water and other natural resources,[93] has played a prominent role in that state's water rights jurisprudence. In a 2000 decision commonly known as *Waiahole Ditch*, the Hawaii Supreme Court strongly pronounced:

> [T]he [Water] Code does not supplant the protections of the public trust doctrine.
>
> . . . .
>
> Under the public trust, the state has both the authority and duty to preserve the rights of present and future generations in the waters of the state. . . . The continuing *authority* of the state over its water resources precludes any grant or assertion of vested rights to use water to the detriment of public trust purposes.
>
> . . . .

89. Rettokowski v. Dep't of Ecology, 858 P.2d 232, 234 (Wash. 1993).

90. *Id.* at 239-40.

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

92. *Id.* (emphasis added).

93. HAW. CONST. art. XI, §§ 1, 7 (adopted in 1978).

> This authority empowers the state to revisit prior diversions and allocations, even those made with due consideration of their effect on the public trust. . . .The state also bears an "affirmative *duty* to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible."[94]

Based on this reasoning, the court held that a water rights application for a resort development had to be reviewed for public trust impacts.[95] The potential trust impacts included loss of instream flows for the traditional and customary rights of native tenants, for ecological purposes, and for domestic drinking water supply.[96] The court ruled that the proposed commercial use, although representing an important public interest, was not a protected trust interest.[97] The court also held that additional studies must occur, at the applicant's expense, before the state Water Commission could proceed to assess impacts to the public trust.[98]

8. *Montana*

Two years later, the Montana Supreme Court began making connections between water rights and that state's public trust doctrine, which extends to all waters capable of recreational use. That year, the court issued the landmark decision *In re Adjudication of the Dearborn Drainage*, allowing parties to claim historic water rights for non-diversionary, instream flow uses such as recreational uses.[99] In support of its decision, the court noted that, under the state's public trust doctrine, the public has enjoyed "an instream, non-diversionary right to the recreational use of the State's navigable

94. *In re* Water Use Permit Applications, 9 P.3d 409, 445, 453 (Haw. 2000) (citations omitted) (emphasis in original). The court cited to both *National Audubon Society* and *Kootenai Environmental Alliance* to support its holding. Although the court cited to both the public trust and a water resources trust unique to Hawaii, it appeared to apply similar requirements to both forms of trust. *Id.* at 443. Thus, they will be discussed in similar terms here.

95. *Id.* at 473-74.

96. *Id.* at 448-49.

97. *Id.* at 449-50.

98. *Id.* at 497.

99. *In re* Adjudication of the Dearborn Drainage (*Dearborn Drainage*), 55 P.3d 396, 404 (Mont. 2002) (eliminating the historic requirement that a water right be diverted to be perfected).

surface waters" since statehood.[100]

Building on this statement, the Montana Supreme Court in 2011 recognized that Montana Trout Unlimited had standing to participate in the Big Hole River adjudication based on the public trust and the organization's particularized recreational and fishery interests.[101] Despite not having any water rights of its own, the organization had a right to object to private water rights claims made in the adjudication because "the [1972 Montana] Constitution and public trust 'do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters.'"[102]

Having already applied the public trust doctrine to water rights adjudication, the next logical step would be for the court to apply the doctrine to agency water rights permitting as well. Interestingly, Montana's permitting agency already began grappling with this question in the 1980s, issuing two decisions that note the possibility of an agency obligation to consider public trust impacts in water rights matters, despite the state water code's silence on the subject.[103]

9. *South Dakota*

In 2004, the South Dakota Supreme Court began to outline the public trust's applicability to water rights in that state. In *Parks v.*

100. *Id.* The court also appeared to distance itself from a statement made in dictum in a 1984 public trust case, wherein it opined that a water rights holder "has no right to control the use of the surface waters . . . to the exclusion of the public *except to the extent of his prior appropriation of part of the water for irrigation purposes*, which is not at issue here." Montana Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 170 (Mont. 1984) (emphasis added). In its 2002 decision, the court instead observed that priority dates would determine the competing interests of non-diversionary and diversionary water rights. *Dearborn Drainage*, 55 P.3d at 404.

101. Montana Trout Unlimited v. Beaverhead Water Co., 255 P.3d 179, 185-86 (Mont. 2011).

102. *Id.* at 185 (citing *Curran*, 682 P.2d at 170).

103. *In re* Water Use Permit Application 49573-s43B (*Carter*), Final Order 9-10 (Mont. Dep't Natural Res. & Conservation Jan. 20, 1986), *available at* http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/case_nos_4517249643/049573-4b_carter.pdf; *In re* Water Use Permit Application 43104-s76D (*Garrison*), Proposal for Decision 19-23 (Mont. Dep't Natural Res. & Conservation Dec. 16, 1987), *available at* http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/case_nos_4213344339/043104-76d_garrison.pdf. The agency's final order adopted this proposed finding. Final Order 1 (Mont. Dep't Natural Res. & Conservation Jan. 14, 1988).

*Cooper*, the court held that South Dakota's Water Resources Act, under which the state allocates water use, must embody the principles of the public trust doctrine.[104] In that case, the court considered state ownership and management of certain lake bodies situated on private land, and whether that ownership included public recreational use.[105] While the case did not directly implicate a water rights application, the court stated that the state Department of Environment and Natural Resources, which implements the Water Resources Act, is the agency charged with protecting the public trust in its management decisions.[106]

10. *Nevada*

In the 2011 case *Lawrence v. Clark County*, the Nevada Supreme Court recognized the public trust as a doctrine that applies to the "public land and water" of the state.[107] In that case, the litigants disputed the doctrine's applicability to lands once submerged under the Colorado River.[108] Clark County argued that state legislation conveying title to the county superseded the public trust.[109] The court disagreed, holding that legislation cannot abrogate the state's public trust duties.[110] Notably, although the case dealt with submerged lands and not water rights, the court adopted with approval the following language from a concurring opinion in a prior Nevada water rights case:

> This court has itself recognized that this public ownership of water is the "most fundamental tenet of Nevada water law." Additionally, we have noted that those holding vested water rights do not own or acquire title to water, but merely enjoy a right to the beneficial use of the water. This right, however, is forever subject to the public trust, which at all times "forms the outer boundaries of permissible government action with respect to public trust resources." In this manner, then, the public trust doctrine operates simultaneously with the system of prior appropriation.

104. Parks v. Cooper, 676 N.W.2d 823, 838 (S.D. 2004).
105. *Id.* at 828.
106. *Id.* at 840.
107. Lawrence v. Clark Cnty., 254 P.3d 606, 613 (Nev. 2011).
108. *Id.* at 607.
109. *Id.* at 611.
110. *Id.* at 608, 613.

> . . . .
> If the current law governing the water engineer does not clearly direct the engineer to continuously consider in the course of his work the public's interest in Nevada's natural water resources, then the law is deficient. *It is then appropriate, if not our constitutional duty, to expressly reaffirm the engineer's continuing responsibility as a public trustee to allocate and supervise water rights so that the appropriations do not "substantially impair the public interest in the lands and waters remaining.*" "[T]he public trust is 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." Our dwindling natural resources deserve no less.[111]

These ten western states have thus set the West on a bearing that increasingly recognizes the connection between water rights and public trust law. Considering that this trend began taking hold some three decades ago, statutory and regulatory implementation has lagged inexcusably behind. States that recognize a public trust over waters must now respond by looking deeply at century-old water codes geared toward protecting and maximizing consumptive, private uses of water.

### D. *The Mismatch Between Current Water Codes and the Public Trust*

Historically in the West, the primary legal concerns when developing a water right have been whether there is unclaimed water available to serve the proposed use and whether the proposed use will injure existing water rights.[112] Lawrence MacDonnell aptly characterized the historic bias of western water law as "100 years of effort to put every drop of water to some kind of direct human use, in which water undiverted was water wasted, in which success was measured by how much water was beneficially consumed."[113] Under this calculus, private interests are paramount, even to the ex-

111. *Id.* at 610-11 (emphasis added) (internal citations omitted) (citing Mineral Cnty. v. Nev. Dep't of Conservation & Natural Res., 20 P.3d 800, 808-09 (Nev. 2001) (Rose, J., concurring)). Justice Rose, who authored the concurrence, relied on *Illinois Central*, *National Audubon Society*, and *Kootenai Environmental Alliance* in his reasoning.

112. TARLOCK, *supra* note 7, § 5:44; *see also* Owen *supra* note 82, at 1111 (discussing these traditional requirements). Similarly, with changes of use the primary inquiry revolves around harm to existing users. TARLOCK, *supra* note 7, §§ 5:44, 5:74.

113. Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335, 336 (2009).

tent of the full appropriation of the entire flow of a stream.[114] Thus, prior appropriation principles can stand in direction tension with public trust principles that depend upon stream flows for navigation, commerce, fishing, and other state-recognized trust uses.

When western states moved from common law to statutory water rights systems, these private user protections carried over into water codes. At the same time, varying types of public interest provisions were added as well.[115] As discussed below, public interest provisions originated during an era when private economic development was the highest social value, and well before courts began recognizing a connection to the public trust.[116] Wilkinson has observed that the water permitting agencies applying these code provisions also held a private user bias:

> From the beginning, these were captured agencies in the fullest sense: publicly-funded bodies whose mission was to protect and promote a limited class of private rights. Despite improvements in western water administration during the last decade or so, the interests that created the agencies in the first place, and served as the agencies' sole constituency, had already locked in well over a century of private uses.[117]

Thus, western state water codes and the agencies implementing

114. Owen, *supra* note 82, at 1111 ("[W]ater users perceived pumping a stream dry not merely as an allowed outcome, but a desired one."). Many state legislatures have acknowledged the over-appropriation of waters. Montana, for example, has closed several basins due to lack of available water. MONT. CODE ANN. §§ 85-2-231 to -344 (2011). The Oregon Legislature has also noted an over-allocation of surface waters and a precipitous decline in groundwater. Michael C. Blumm & Erika Doot, *Oregon's Public Trust Doctrine: Public Rights in Waters, Wildlife, and Beaches*, 42 ENVTL. L. 375, 395 n.135 (citing 2009 Or. Laws 3237, 3237). And while many western states now recognize and protect nonconsumptive instream flow rights, those rights are limited in their effectiveness because they do not typically trump senior, consumptive uses. *See generally* MacDonnell, *supra* note 113; Jesse A. Boyd, Student Writing, *Hip Deep: A Survey of State Instream Flow Law from the Rocky Mountains to the Pacific Ocean*, 43 NAT. RESOURCES J. 1151 (2003) (surveying western state instream flow laws, and their modest effectiveness).

115. TARLOCK, *supra* note 7, §§ 5:51, 5:52. Douglas Grant notes that nearly every western state requires public interest review for new appropriations, and more than half of the western states require it for changes of use. Douglas L. Grant, *Two Models of Public Interest Review of Water Allocation in the West*, 9 U. DENVER WATER L. REV. 485, 486 nn.1-3 (2006).

116. *See* discussion *infra* Part II.A.2; Grant, *supra* note 115, at 488, 490, 493 ("The requirement of public interest review of water permit applications dates back in most states to the period between 1890 and 1920.").

117. E.g., Wilkinson, *supra* note 1, at 470.

them were simply not designed to protect the public trust.

Today, these water codes still say little or nothing about the public trust, require no advance review of trust impacts, and (with the exception of California)[118] make no mention of how the trust limits water rights. Montana's permit review criteria, for example, suggest that permits are generally appropriate as long as there is available water and no adverse effect to prior appropriators.[119] The criteria do not mention the public trust or require analysis of stream flows necessary to support the state's public trust uses. Further, the state's permitting agency has taken the position that only state agencies, and not private parties, can object to an application on the basis of harm to the fishery, thus limiting the public's ability to defend recreational trust uses.[120] The water codes of other western states reflect similar permitting preferences and a similar absence of public trust review.[121]

Should western states fail to update their water codes on behalf of the public trust, they risk further litigation alleging breaches of duty to the trust. While the above-discussed states that have explicitly recognized a public trust-water rights connection are most vulnerable, the remaining states that recognize a trust over waters face the potential of similar litigation.[122] As the next part explains, in modernizing permitting laws, states should in particular avoid the temptation of simply relying on existing public interest provisions in their water codes.

118. *See* discussion *infra* Part I.C.4. Although Hawaii is attempting to use instream flow requirements as a proxy for protecting the public trust, its water code also does not explicitly require trust review as a permit criterion. *See infra* note 233 and related text.

119. MONT. CODE. ANN. § 85-2-311 (2012).

120. *In re* Water Use Permit Application No. 49230-s76M (*Hanson*), Proposal for Decision 28 (Mont. Dep't Natural Res. & Conservation Dec. 4, 1984), *available at* http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/case_nos_4517249643/049230-76m_hanson.pdf (allowing a streambed pipeline to be installed for hydropower use and disregarding private objections based on harm to the fishery). The agency's final order adopted this proposed finding. Final Order 1 (Mont. Dep't Natural Res. & Conservation Jan. 2, 1985); *but see* Montana Trout Unlimited v. Beaverhead Water Co., 255 P.3d 179, 185-86 (Mont. 2011) (taking a different position on standing of private parties in water adjudication proceedings based on the public trust).

121. *See, e.g.*, ARIZ. REV. STAT. ANN. § 45-153 (2012) (requiring no "conflicts with vested rights"); NEV. REV. STAT. ANN. § 533.370 (2012) (requiring unappropriated water and no "conflicts with existing rights"); S. D. CODIFIED LAWS § 46-2A-9 (2012) (requiring water availability and no "impairment of existing rights").

122. *See, e.g.*, Blumm & Doot, *supra* note 114, at 395 (arguing that Oregon's public trust should similarly extend to water rights).

## II. PUBLIC INTEREST: A FAULTY THREAD IN PUBLIC TRUST LAW

Considering that the public trust's application to water rights has been one of the most significant developments in trust doctrine, the lack of responsive change in state water codes is both remarkable and troubling. Of particular concern is the prospect of states equating the public trust with the public interest.[123] When these two concepts are treated interchangeably, states may mistakenly assume they can rely on existing public interest provisions in their water codes to fulfill public trust obligations.[124] Public interest provisions, however, are rife with problems[125] and legally unsuitable to protect the public trust. Most notably, legislatures and agencies can easily modify public interest outcomes by favoring various economic or political interests, amending the substantive and procedural requirements of public interest review, or deprioritizing the funding of public interest review. Thus, as a first step in aligning water codes with the public trust doctrine, it is incumbent on the judiciary, state legislatures, and state agencies to distinguish these two legal concepts. In describing this distinction, this part continues to feature states that have made a public trust-water rights connection, along with some additional western states that illustrate the varied uses of public interest review in water use permitting.

123. A couple of scholars have briefly noted the differences between these concepts. Brian Gray recently expressed concern over the California Supreme Court's use of the phrase "public interest" when discussing the public trust. Brian E. Gray, *Ensuring the Public Trust*, 45 U.C. DAVIS L. REV. 973, 982-86 (2012). Reed Benson also characterizes the public trust and public interest as two separate legal principles. *See generally* Reed Benson, *Public on Paper: The Failure of Law to Protect Public Water Uses in the Western United States*, 1 INT'L J. RURAL L. & POL'Y (SPECIAL ISSUE) 9 (2011) (questioning whether either legal approach adequately protects the public) (on file with author).

124. A few states lack public interest provisions. Montana does not consider the public interest for water use unless the use involves out-of-state transfers or quantities exceeding 4,000 annual acre-feet and 5.5 cubic feet per second of water. MONT. CODE ANN. § 85-2-311(3) and (4) (2011). Colorado does not consider the public interest in its judicial system of water rights review. COLO. REV. STAT. ANN. §§ 37-92-301 to -302 (2012). Oklahoma once had a public interest provision, but removed it from its permitting criteria in 1963. Joseph F. Rarick, *Oklahoma Water Law, Stream and Surface Under the 1963 Amendments*, 23 OKLA. L. REV. 19, 50 (1970).

125. *See* discussion *infra* Part II.C.

A. *Distinctions Between the Public Interest and the Public Trust*

Woven into modern public trust law is a faulty thread—a mistaken assumption that public trust purposes are synonymous with public interests and that state agencies considering the public interest are fully protecting the public trust. In reality, these two concepts are distinct in their legal origin, standard of review, purpose, and scope of coverage.

1. *Distinct legal origins and standards of review*

The public trust is a duty-based doctrine that requires the state to protect a delineated set of trust purposes and place those purposes above other private interests.[126] Because courts are the gatekeepers of the doctrine, they closely scrutinize state actions to ensure adequate protection of the public as the beneficiary of the trust.[127]

In contrast, the public interest is a discretionary concept rooted in state police powers, and the government may prioritize among a myriad of interests, receiving broad judicial deference toward its choices. In 1915, the U.S. Supreme Court described the sweeping nature of the police powers:

> It is to be remembered that we are dealing with one of the most essential powers of government[]—one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily.[128]

This deferential language stands in stark contrast to the more constrained authority states exercise in public trust decisions. As an Arizona appellate court aptly summarized:

> Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res, so the legislative and executive branches are judicially accountable for their dispositions of the public trust. . . .The check and balance of judicial review provides a level of protection against improvident dissipation of an irre-

126. *See* discussion *supra* Part I.A and related notes 12–28.

127. *See* discussion *supra* Part I.A; *see also* Wilkinson, *supra* note 1, at 470 ("[At the time of *Illinois Central*], as now, judges can be expected to employ old and honored notions of trusteeship in order to fulfill the interests and expectations of the public.").

128. Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915).

> placeable res . . . .
>
> Final determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary. This is not to say that this court will [substitute] its judgment for that of the legislature or agency. However, it does mean that this court will take a "close look" at the action to determine if it complies with the public trust doctrine and it will not act merely as a rubber stamp for agency or legislative action.[129]
>
> . . . .
>
> The state might sell ordinary property for fair consideration for the public purpose of enhancing the state fisc. Such a showing, however, would not suffice to validate a dispensation from the public trust. Because the state may not dispose of trust resources except for purposes consistent with the public's right of use and enjoyment of those resources, any public trust dispensation must also satisfy the state's special obligation to maintain the trust for the use and enjoyment of present and future generations.[130]

The Washington Supreme Court similarly announced that "courts review legislation under the public trust doctrine with a heightened degree of judicial scrutiny, 'as if they were measuring that legislation against constitutional protections.'"[131] And in *Waiahole Ditch*, the Hawaii Supreme Court further distinguished generalized police powers from the public trust:

> The State unquestionably has the power to accomplish much of [its administration of waters] through its police powers. We believe however that the king's reservation of his sovereign prerogatives respecting water constituted much more than restatement of police powers, rather we find that it retained on behalf of the people an interest in the waters of the kingdom which the State has an obligation to enforce and which necessarily limited the

129. Ariz. Ctr. for Law in the Pub. Interest v. Hassell, 837 P.2d 158, 168-69 (Ariz. Ct. App. 1991) (citing Kootenai Envtl. Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1092 (Idaho 1983)) (involving legislative relinquishment of title in riverbed lands and asserting that "court[s] will subject legislative dispensations of state natural resource holdings to a 'high and demanding' standard of review"); Opinion of the Justices, 437 A.2d 597, 607 (Me.1981)) (other citations omitted).

130. *Id.* at 170.

131. Weden v. San Juan Cnty., 958 P.2d 273, 283 (Wash. 1998) (quoting Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521, 525-27 (1992)).

creation of certain private interests in waters.[132]

The broad discretion attendant with state police powers becomes broader still when considering that legislatures have delegated to agencies the ultimate question of what constitutes the "public interest."[133] Depending on the specificity of a public interest statute, an agency may use rulemaking to *define* what the term "public interest" means, and, in specific matters, *weigh the evidence* and ultimately *decide* under the facts what actions promote the public interest. These determinations are ordinarily subject to judicial deference under administrative law,[134] and thus are not subjected to the more rigorous judicial scrutiny called for under the public trust doctrine.

2. *Distinct purposes and scope*

As if legal origin and standard of review were not enough to differentiate the concepts of public interest and public trust, the purpose and scope of the two concepts provide yet further distinctions. The public trust covers the traditional uses of navigation, commerce, and fishing,[135] along with those additional, unique purposes that a state has recognized as part of its trust.[136] Regardless of the public trust's scope in a particular state, the law intends to insulate the trust corpus from the vagaries of changing legislative and agency prerogatives.

The scope of the public interest, on the other hand, is intended to be far-ranging, highly discretionary, and responsive to changing political, economic, and social priorities. As the legislative machinations of *Illinois Central* illustrate, political priorities and

132. *In re* Water Use Permit Applications (*Waiahole Ditch*), 9 P.3d 409, 441 (Haw. 2000) (citations and original emphasis omitted).

133. Grant, *supra* note 115, at 487 (observing that "important specifics about the function and scope of public interest review" are determined by the permitting agency); *see also, e.g.*, Pyramid Lake Paiute Tribe of Indians v. Washoe Cnty., 918 P.2d 697, 700 (Nev. 1996) (citations omitted) (holding that because the State Engineer is charged with administering Nevada's water appropriation statutes, that person is also "impliedly clothed with power to construe [them] as a necessary precedent to administrative action").

134. KOCH, JR., *supra* note 28, §§ 11:22, 11:33; *see also, e.g.*, *Pyramid Lake Paiute Tribe* , 918 P.2d at 700, 702 (citations omitted) ("'[G]reat deference should be given to the [administrative] agency's interpretation when it is within the language of the statute.' . . . Moreover, as a general rule, a decision of an administrative agency will not be disturbed unless it is arbitrary and capricious.").

135. *See supra* note 36.

136. *See supra* notes 34-37 and related text.

trust purposes can occupy entirely different spheres.

Moreover, historical evidence does not reveal a connection between the public trust and public interest provisions in state water codes. Douglas Grant observes that "public interest review of water permit applications dates back in most states to the period between 1890 and 1920,"[137] well before the recent era of connecting the public trust and water rights.

The driving purpose behind public interest review was to help state agencies decide between competing proposals for water use based on which proposal most benefits the public interest[138]—a phrase that Grant characterizes as "vacuous" and "bog[ged] down in ambiguity and subjectivity."[139] Indeed, throughout much of western water law, agency officials (and reviewing courts) have relied on "unwritten public policy" to equate public interest with "maximum economic development."[140] Grant notes that several courts have not only sanctioned, but have gone so far as to require that public interest review "maximize economic benefits from the water resource."[141]

As a classic example, the Wyoming State Engineer in 1908 used public interest review to limit a hydroelectric power generation permit so that it would not interfere with "economically more valuable mineral development in the region."[142] In 1943, the Utah State Engineer similarly used the state's "public welfare" provision to choose between competing proposals. A larger proposal to transfer the waters of several rivers out of their basins for municipal, irrigation, and industrial supply prevailed over a smaller hydropower proposal involving only the Provo River because the larger proposal was perceived to have broader economic benefits.[143] In these and countless other instances, state agencies have

137. Grant, *supra* note 115, at 488.

138. *Id.* at 506.

139. *Id.* at 487, 491.

140. *Id.* at 490, 493.

141. *Id.* at 493 & n.38.

142. *Id.* at 492-93 & n.37 (discussing Big Horn Power Co. v. State, 148 P. 1110, 1112-13 (Wyo. 1915)). Wyoming has an undefined, open-ended public welfare requirement. WYO. STAT. ANN. § 41-4-503 (2012).

143. Tanner v. Bacon, 136 P.2d 957, 959-60, 963-64 (Utah 1943) (citing 1919 Utah Laws ch. 67, §10 (current version at UTAH CODE ANN. § 73-3-8(1)(b) (2012))); *see also* Grant, *supra* note 115, at 494 (discussing the case).

resolved the question of public interest based on economic, social, and political priorities falling outside the scope of the public trust.[144]

B. *Judicial Confusion of the Concepts*

Based on the clear legal distinctions between the public trust and the public interest, it is disconcerting that courts have used the terms interchangeably and inconsistently, even citing public interest provisions in state water codes as indicators of the public trust.[145] Until the judiciary better clarifies these distinctions, there is little incentive for legislatures and agencies to modify water permitting practices and great incentive for them to simply apply existing public interest review.

For example, in *Waiahole Ditch*, the Hawaii Supreme Court commingled public trust principles with the public interests listed in the Hawaii Water Code.[146] Although the code's public interest provision lists non-trust uses such as irrigation, power development, commercial, and industrial uses, the court nonetheless declared that the provision "generally mirrors the public trust principles."[147] Later, the court used the phrase "public interest" again in a slightly different way to promote non-trust interests, ruling that "the Commission must duly consider the significant *public interest in continuing reasonable and beneficial existing offstream uses.*"[148] Later still, the court stated: "[T]he criterion of 'consistent with the public interest' demand[s] examination of . . . public *and private uses* . . . ."[149] The court's use of imprecise language thus leaves the false impression that the two concepts are synonymous.

In *Shokal*, the Idaho Supreme Court created confusion by stating in a footnote that Idaho's statutory public interest provision is "related to the larger doctrine of the public trust," without ex-

144. Grant, *supra* note 115, at 493 & n.38; *see also* discussion *infra* Part II.C (providing additional examples).

145. As Gray observes, even when the courts do not expressly cite to statutory public interest provisions, they by implication suggest that "the public trust is little more than a reiteration" of such provisions. Gray, *supra* note 123, at 983.

146. HAW. REV. STAT. § 174C-2 (2012).

147. *In re* Water Use Permit Applications (*Waiahole Ditch*), 9 P.3d 409, 457 (Haw. 2000). Hawaiian trust purposes include instream flows for ecological purposes, native traditional and customary rights, and domestic drinking water. *See supra* notes 96-97 and related text.

148. *Id.* at 462 (emphasis added).

149. *Id.* at 473 (emphasis added).

plaining the relationship.[150] The North Dakota Supreme Court also cited to that state's public interest provision when holding that the State Engineer, "consistent with the public interest," must determine impacts on the public trust.[151] And in *Lawrence*, the Nevada Supreme Court, when discussing "public trust purposes," imprecisely observed that "when the Legislature has found that a given dispensation is in the *public's interest*, it will be afforded deference."[152]

The South Dakota Supreme Court created similar confusion when it held that the state is obliged to protect the public trust, but also stated that the legislature must consider "public interest" and the "best use of these public waters in the interest of the 'general health, welfare and safety of the people.'"[153] And California's *National Audubon Society* decision discussed the state's "power to allocate water resources in the public interest," while also holding that water allocation decisions must be based on the "effect on the public trust."[154] Brian Gray's observation about that decision could apply to nearly all state court decisions discussing the public trust: "Although it is unlikely that the supreme court intended to create this array of inconsistent standards for effectuating the public trust, the court's failure to articulate a single standard (or at least a cohesive set of standards) was confusing and threatened to diminish the public trust."[155]

In the context of public trust jurisprudence, the fairest and most accurate reading of the judiciary's use of "public interest" must be as a public *trust* interest or public *ownership* interest in the trust. This reading is supported by the U.S. Supreme Court's characterization of "public interest" in *Illinois Central*, wherein it used the phrase "public interest *in the lands and waters remaining*" to describe the public's legally protected interest in trust resources.[156] In *National Audubon Society*, the California Supreme Court used similar phrasing when it required the state to protect "the public in-

150. Shokal v. Dunn, 707 P.2d 441, 447 n.2 (Idaho 1985).

151. United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n, 247 N.W.2d 457, 462 (N.D. 1976).

152. Lawrence v. Clark Cnty., 254 P.3d 606, 616-17 (Nev. 2011) (emphasis added).

153. Parks v. Cooper, 676 N.W.2d 823, 841 (S.D. 2004).

154. Nat'l Audubon Soc'y v. Super. Ct., 658 P.2d 709, 728 (Cal. 1983).

155. Gray, *supra* note 123, at 985.

156. Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 453-54 (1892) (emphasis added).

terest *in the trust res.*"[157]

To ensure accuracy in public trust jurisprudence, courts must be far more precise in their use of public interest and public trust terminology. When courts suggest that public interest statutes are a vehicle for considering the public trust, the appropriate reading of those judicial statements must be one where the public trust overlays and defines the outer limits of those statutes.[158] If courts blur trust doctrine with legislative public interest prerogatives, they will relinquish their role as ultimate gatekeeper of the public trust. As discussed next, the risks of deferring to such public interest prerogatives are simply too great.

### C. *Opening the Door to All Manner of "Public" Interests*

When courts imply that statutory public interest provisions can stand in for public trust review, they open the door to any number of public interest justifications offered by legislatures and the administrative agencies that implement water use permitting. As Gray concludes, under such an approach "the public trust is subsumed within the wide-ranging and amorphous public interest standard."[159] The checkered history of public interest provisions reveals some common concerns, including public interest statutes that lack definition, far-ranging public interest lists that include non-trust purposes, and public interest priority statements that prioritize non-trust purposes.

#### 1. *Open-ended public interest provisions*

Several state water codes use the phrase "public interest," "public purpose," or "public welfare" without defining the term. Nevada provides one example. There, the water code simply states that the State Engineer "shall reject the application and refuse to issue the requested permit" if the application "threatens to prove detrimental to the public interest."[160] This lack of definition signals that the legislature delegated the authority to define public in-

157. *Nat'l Audubon Soc'y*, 658 P.2d at 719 (emphasis added).

158. *See, e.g.*, *In re* Water Use Permit Applications (*Waiahole Ditch*), 9 P.3d 409, 445 (Haw. 2000) ("[T]he doctrine continues to inform the Code's interpretation, define its permissible 'outer limits,' and justify its existence."); *see also* discussion *supra* Part II.A.2.

159. Gray, *supra* note 123, at 983. Benson also critiques public interest provisions for their vagueness, highly discretionary nature, and lack of explanation regarding how to weigh or balance factors. Benson, *supra* note 123, at 9-10.

160. NEV. REV. STAT. ANN. § 533.370(2) (2012).

terest to the State Engineer.[161] In adopting a definition, the State Engineer reviewed the state water code and pulled out thirteen public policy objectives adopted by the Nevada Legislature.[162] Many of the objectives promote private interests, and none expressly address the public trust. Nor are the objectives weighted to prioritize those policies most important to the public trust.[163] Several of the public policies selected by the State Engineer also restate traditional prior appropriation requirements such as beneficial use, no waste, and no injury to other users.[164] This, too, is problematic because it perpetuates the water code's historic bias in favor of private use, thereby elevating water rights above the public trust. The public trust should be held out as a "far higher standard" than traditional water rights principles, which are designed for the convenience of private users.[165]

In other states with open-ended public interest provisions, state engineers have simply considered whatever public interests they deemed relevant to the permitting decision. For example, in South Dakota, the reviewing agency states that public interest "is a determination made by the [agency] based on testimony at the time of hearing."[166]

Grant observes that up until the 1960s, western state agencies

161. Pyramid Lake Paiute Tribe of Indians v. Washoe Cnty., 918 P.2d 697, 698-700 (Nev. 1996).

162. *Id.* at 698-99 (citing Supplemental Rulings 3786A and 3787A). Grant terms this the "other-laws model" of public interest review, when the agency looks to other laws where the legislature has articulated public policy to create a list of public interest issues. Grant, *supra* note 115, at 489. Under this model, only codified public interests are considered, thus limiting the ability to consider other, uncodified interests that fall within the public trust.

163. Grant, *supra* note 115, at 489.

164. As proof that Nevada's public interest essentially replicates traditional appropriative principles, the Nevada State Engineer has used public interest review to deny applications that lack beneficial use, proper places of use, water availability, or due diligence or that contain other technical deficiencies. Amber Weeks, *Defining the Public Interest: Administrative Narrowing and Broadening of the Public Interest in Response to the Statutory Silence of Water Codes*, 50 NAT. RESOURCES J. 255, 264-70 (2010) (citing several case studies).

165. Cynthia L. Koehler, *Water Rights and the Public Trust Doctrine: Resolution of the Mono Lake Controversy*, 22 ECOLOGY L.Q. 541, 567 (1995).

166. S.D. DEP'T OF ENVTL. & NATURAL RES., WATER MGMT. BD., *Summary of South Dakota Rules and Laws*, http://denr.sd.gov/des/wr/summary.aspx#Criteria (last accessed Apr. 21, 2013). Arizona is another state that has an open-ended provision requiring denial of permits when they are "against the interests and welfare of the public." ARIZ. REV. STAT. ANN. § 45-153(A) (2013).

and courts employing this open-ended approach had a "prevailing ethic" that favored economic development.[167] Between two competing water proposals, the one that provided the most economic benefits would be permitted.[168] Washington's public interest review explicitly codifies this ethic, requiring that due regard be given to the "highest feasible development of the use of the waters."[169]

To illustrate how wide-ranging public interest can be, Grant cites several examples of political, economic, and social values that have fallen within the purview of the "public interest," including:

- Odors from a proposed hog farm application;
- Potential flood damage to neighboring property;
- Impacts to local agrarian culture from a proposed lake resort;
- Job creation and impacts to tourism;
- Impacts to mining ventures;
- Impacts on property values; and
- Compatibility with local zoning and planning ordinances.[170]

Clearly, then, a wide variety of interests can qualify as public interests—interests that have little or no bearing on the public's right to navigate, conduct commerce, and fish on public waterways.[171]

167. Grant, *supra* note 115, at 490.

168. *See, e.g.*, discussion *supra* Part II.A.2 (discussing Wyoming and Utah as examples). Grant terms this the "maximization model" of public interest review, where the agency "can look to unwritten public policy for guidance." Grant, *supra* note 115, at 489. Under this model, there is no limit to the types of public interest that the agency can consider, and it may choose to emphasize other interests that fall outside the public trust.

169. WASH. REV. CODE ANN. § 90.03.290 (2012).

170. Grant, *supra* note 115, at 492-93, 498-503, 513 (discussing examples from Utah, Wyoming, New Mexico, Washington, South Dakota, Idaho, and Nevada).

171. There is also the related question of who is the "public" in public interest provisions, with some legislatures and courts concluding that the protected group is the local community living near the proposed water use, rather than the general public. *Id.* at 499-502, 514 (discussing Idaho's former "local public interest" statute and a New Mexico trial court decision that focused on local agrarian culture). This, of course, is a different population segment than the general public protected in rights of navigation, commerce, and fishing on a water body.

2. *Public interest laundry lists*

In a few instances, state legislatures have defined public interest through a list of items or factors that may be considered. Although some listed items may overlap with public trust purposes, the list is not guaranteed to be coterminous. Indeed, it is more likely to sweep in a variety of public considerations that are beyond the scope of the public trust. For example, the Kansas Legislature ends its public interest list with a sweeping catchall that instructs the agency to consider the existing claims of "all persons to use the water" and "all other matters pertaining to" the public interest.[172]

Moreover, to the extent public trust purposes are included within public interest lists, those trust purposes are relegated to being just another factor in a long list of competing interests.[173] In Hawaii, for example, where commercial activities are not a protected trust purpose,[174] its water code declares irrigation, power development, commercial, and industrial uses as important "public interests" alongside other uses more consistent with the public trust.[175] Oregon, in turn, cites a list of beneficial uses that includes navigation but also irrigation, mining, industrial purposes, "or any other beneficial use to which the water may be applied for which it may have a special value to the public."[176] Oregon also lists "maximum economic development of the waters involved" as an important public interest.[177]

Similar observations apply to Alaska's public interest statute, which lists eight separate items that should be considered, including "benefit to the applicant."[178] Arguably, only two of the eight listed items relate to Alaska's public trust: "the effect on fish and

172. KAN. STAT. ANN. § 82a-711(b) (2012).

173. Gray, *supra* note 123, at 983 (observing that equating public trust with public interest "suggests that the public trust is simply one of a multiplicity of factors that must be considered, and somehow balanced, in decisions that allocate the rights to use the state's water resources—factors that include the entire array of consumptive and nonconsumptive uses") Gray also observes that when the courts speak in terms of cost-benefit analyses or balancing of interests, they "risk blending the public trust into a broad pool of [water] allocation factors." *Id.* at 984.

174. *In re* Water Use Permit Applications (*Waiahole Ditch*), 9 P.3d 409, 450 (Haw. 2000).

175. HAW. REV. STAT. § 174C-2(c) (2012).

176. OR. REV. STAT. ANN. § 537.170(8) (2012).

177. *Id.*

178. ALASKA STAT. ANN. § 46.15.080(b) (2012).

game resources and on recreational opportunities" and "the effect upon access to navigable waters."[179] North Dakota also considers recreation and fishery impacts as merely one consideration alongside non-trust interests like the "effect of the economic activity resulting from the proposed appropriation."[180] And Montana has a "public welfare" requirement for larger appropriations that lists "minimum streamflows" as a consideration alongside non-trust topics such as effects on private property rights and existing water users.[181]

Thus, to the extent public trust uses are included among the many public interests recognized by a state, those trust uses are weighted the same as all non-trust interests. This result undermines the paramount nature of the public trust and creates opportunities for trust purposes to be demoted in legal significance.

3. *Prioritized public interests*

A final variation is the legislative prioritizing of uses to determine which proposed use best promotes the "public interest." This type of legislation was the impetus behind the *National Audubon Society* litigation. There, the state permitting agency looked to a California prioritizing statute that stated "domestic use is the highest use."[182] Based on that instruction, the agency erroneously concluded that the water diversions from Mono Lake to Los Angeles were in the public interest and could not be modified to protect the Lake's habitat.[183]

Many states have similar statutory priority statements indicating that certain private, consumptive uses are a high public priority. Utah, for example, identifies "irrigation, domestic or culinary, stock watering, power or mining development, or manufacturing" as the highest beneficial uses.[184] Wyoming lists "water for drinking purposes for both man and beast," "municipal purposes," and "water for the use of steam engines and for general railway use" as top priorities.[185] These types of provisions hearken back to a time

179. *Id.* § 46.15.080(b).

180. N.D. CENT. CODE ANN. § 61-04-06 (2012).

181. MONT. CODE ANN. §§ 85-2-311(3), (4) (2011) (applying to quantities exceeding 4,000 annual acre-feet and 5.5 cubic feet per second of water).

182. Currently codified at CAL. WATER CODE § 1254 (2012).

183. Nat'l Audubon Soc'y v. Super. Ct., 658 P.2d 709, 713-14 (Cal. 1983).

184. UTAH CODE ANN. § 73-3-8(1)(b)(i) (2012).

185. WYO. STAT. ANN. § 41-3-102 (2012).

before the public trust became central to water rights permitting and run counter to *Illinois Central*'s mandate that trust resources be protected above private interests.

Ultimately, regardless of how a state interprets and applies its public interest provisions, there is little assurance that those provisions will protect the public trust. Indeed, scholars question whether such provisions have had any impact on permitting decisions in general. As Reed Benson has observed, "There is no indication that public interest provisions have caused the western states to deny permits or transfers they would otherwise have approved."[186]

### D. *Opening the Door to Legislative Abrogation of the Trust*

Just as the political composition of a legislature can and does change, so too can dramatic shifts occur in public interest priorities. Arizona provides an example of this phenomenon. In response to Arizona officials asserting state title over riverbeds, the state legislature in 1987 passed a law relinquishing state interests in those riverbeds to private ownership, without conducting a particularized assessment of public trust impacts.[187] During the litigation that ensued, the Attorneys General of California, Nevada, Idaho, Washington, North Dakota, Utah, New Mexico, and Alaska filed *amicus curiae* briefs challenging the legality of Arizona's legislation.[188]

On review, the state court of appeals acknowledged that the legislature had a legitimate public purpose for its actions—namely, clearing up ambiguities in record title over extensive amounts of land in the state.[189] The interest in clearing title so that real estate markets can function properly *is* a public interest well within the

186. Benson, *supra* note 123, at 10 (noting the "absence of any reported judicial decision reviewing a denial based solely or primarily" on the public interest).

187. 1987 Ariz. Sess. Laws, ch. 127 (currently codified at ARIZ. REV. STAT. ANN. §§ 37-1101 to 1108, 12-510, 12-529 (2012)) [hereinafter H.B. 2017]. The exception is lands beneath the Colorado River. For a discussion of the events leading up to H.B. 2017, see also Ariz. Ctr. for Law in the Pub. Interest v. Hassell, 837 P.2d 158, 161-63 (Ariz. Ct. App. 1991). In the prior session, the Legislature passed a similar bill that was vetoed by Governor Bruce Babbitt. *Id.* at 162 n.1.

188. *Hassel*, 837 P.2d. at 163.

189. *Id.* at 164.

government's police powers.[190] Nonetheless, the court invalidated the law, holding that the legislature had not met its heightened public trust obligations when alienating the state's interest in trust property. Citing *Illinois Central*, the court noted that the public trust is paramount over legislative acts: "[T]he state's responsibility to administer its watercourse lands for the public benefit is an inabrogable attribute of statehood itself."[191] The Arizona Legislature made subsequent attempts to limit the public trust, but these statutes were also struck down by the courts as impermissible attempts to alienate the state's public trust duties.[192]

As described in Part I, the Idaho Supreme Court in the 1980s made important pronouncements concerning water rights and the public trust.[193] In subsequent years political control of the Idaho Legislature shifted, and the 1995 legislature responded to the court's public trust rulings with H.B. 794,[194] the "Public Trust Elimination" Bill.[195] This legislation, adopted late in the session with little public process,[196] altered the scope of the public trust in Idaho in two important ways: (1) by narrowing the types of resources included in the public trust; and (2) by enlarging the reasons that public trust resources can be alienated to private interests.[197] The first change limited the public trust solely to the beds underlying navigable waters and expressly excluded "water or water rights" from the trust.[198] The second change opened up the

190. *Id.* (citing Opinion of the Justices, 437 A.2d 597, 607 (Me. 1981)).

191. *Id.* at 168 (requiring that the state make particularized assessments about public trust impacts before alienating riverbed ownership).

192. San Carlos Apache Tribe v. Super. Ct. *ex rel.* Cnty. of Maricopa, 972 P.2d 179, 199 (Ariz. 1999) (attempting to preclude the public trust in state adjudications); Defenders of Wildlife v. Hull, 18 P.3d 722, 738 (Ariz. Ct. App. 2001) (attempting once again to alienate streambed ownership without a particularized assessment). Craig posits, "After *PPL Montana*, is the Arizona legislature now free to rid Arizona of its public trust doctrine?" ROBERT W. ADLER, ROBIN KUNDIS CRAIG & NOAH D. HALL, MODERN WATER LAW: PRIVATE PROPERTY, PUBLIC RIGHTS, AND ENVIRONMENTAL PROTECTION 11 (forthcoming 2013); *see also* Leonhardt & Spuhler, *supra* note 39, at 68 (asserting that the answer to Craig's question is "yes").

193. *See supra* notes 70-78 and related discussion Part I.C.3.

194. 1996 Idaho Sess. Laws ch. 342 (currently codified at Idaho Code Ann. § 58-1201 to -1203 (2012)). For an in-depth discussion and critique of this legislation, see generally Blumm et al., *supra* note 12.

195. Blumm et al., *supra* note 12, at 472 (citing an Idaho Conservation League press release).

196. *Id.* at 472-73.

197. *Id.* at 473-74.

198. IDAHO CODE ANN. § 58-1203(1), (2)(b) (2012).

reasons for alienating beds of navigable waters to include non-trust purposes such as "agriculture, mining, forestry, *or other uses*."[199]

The Idaho Legislature's actions undoubtedly compromised baseline public trust requirements.[200] First, the legislature alienated an entire category of public trust resources without making a determination of impacts to the public trust. Second, the legislature subordinated the public trust below other, private interests without any justification for doing so. The legislature also left those private interests open-ended with its "or other uses" language, suggesting, again, that a myriad of possible political agendas can be used to justify alienation of the public trust.

Interestingly, subsequent to H.B. 794's enactment, the Idaho Supreme Court continues to cite its previous public trust holdings without expressly addressing H.B. 794. In 2009, for example, in a trust case involving title to lands under navigable waters, the court stated: "We have also addressed the right of the public to the use of navigable *waters*. . . . This public use and benefit includes navigation, fish and wildlife habitat, recreation, aesthetic beauty, and water quality."[201] Although H.B. 794 has not yet been directly challenged, this recent holding may signal the state court's unwillingness to recognize legislative curtailment of the public trust.

As discussed in Part I, one possible reading of *PPL Montana* would suggest that state legislatures can indeed eliminate state public trust responsibilities as the legislatures of Arizona and Idaho have attempted to do.[202] Another possible reading of the case, however, would support a minimal public trust baseline that state legislatures simply cannot ignore.[203] Regardless of how the question is ultimately resolved, these examples illustrate that the public trust is indeed a target of political interests. Thus, if the public trust is relegated to a mere statutory public interest test, it is all the more vulnerable to legislative abrogation.[204]

199. *Id.* at § 58-1203(3) (emphasis added).

200. *See* Blumm et al., *supra* note 12, at 494-96.

201. Mesenbrink v. Hosterman, 210 P.3d 516, 518 (Idaho 2009) (emphasis added). Notably, the court continues to cite *Kootenai Environmental Alliance*.

202. *See* discussion *supra* Part I.B.

203. *See* discussion *supra* Part I.B.

204. *See* discussion *supra* Part II.A.1 (contrasting the broad police powers to define public interest with the narrow trustee powers related to public trust).

E. *Opening the Door to Procedural Displacement of the Trust*

When the public trust is treated as coterminous with the public interest, there is an additional risk that legislatures will modify procedural requirements to the detriment of the public trust. As noted in Part I, the state has an independent duty to review the alienation of public trust resources for impacts on trust purposes. To be procedurally proper, this review should occur before the transfer of water interests to private parties,[205] which means that the applicant should address public trust impacts at the time of application.

While some state courts have directly addressed this procedural burden, state water codes have not been modified to comply with these judicial directives. For example, the Hawaii Supreme Court has held: "Under the public trust and the Code, permit applicants have the burden of justifying their proposed uses in light of protected public rights in the resource. . . . [T]he public trust effectively creates this burden through its inherent presumption in favor of public use, access, and enjoyment."[206] Nonetheless, the Hawaii Water Code does not mention the public trust among the items an applicant must address.[207] The Idaho Supreme Court also explicitly held that the applicant bears the burden on public trust issues,[208] although that requirement remains uncertain due to subsequent law purporting to remove water rights from the public trust.[209]

By failing to address the issue of advance public trust review, states may de facto shift that burden onto the public itself. For example, California, the only state that mentions the public trust in its water use permitting procedures, does not explicitly require advance public trust review in its water code. The reviewing agency may consider trust impacts *sua sponte*,[210] or an objector may raise

205. *See* discussion *supra* Part I.A.

206. *In re* Water Use Permit Applications (*Waiahole Ditch*), 9 P.3d 409, 472 (Haw. 2000).

207. HAW. REV. STAT. § 174C-49 (2012). Note, however, that the state is attempting to address some public trust issues indirectly through its instream flow program, which is in progress. *See infra* note 233 and related text. This indirect route is arguably less robust than having explicit trust requirements in the application process.

208. Shokal v. Dunn, 707 P.2d 441, 450 (Idaho 1985).

209. IDAHO CODE ANN. § 42-202 (2012); *see also* discussion *supra* Part II.D.

210. Owen, however, points out that environmental review under CEQA allows an opportunity for advance public trust review. *See* Owen, *supra* note 82, at 1143. Again, this indirect route is arguably less robust than having explicit trust requirements in the applica-

those concerns.[211] Absent an objection, however, the regulations do not impose on the agency an independent duty to consider the trust. At the tail end of review, the agency simply requires (which is admittedly more than other states require) that the issued permit expressly state that it is subject to the public trust.[212] Under these procedures, public trust resources may be privately used in ways later discovered to substantially impair the trust.[213] The burden is thus placed on the public trust beneficiaries as objectors, rather than the state as trustee, to step forward and protect trust resources. This burden becomes all the greater when considering that California lacks the funding to routinely monitor and modify water uses that may be harming the public trust.[214]

In the absence of any legislative guidance, Montana's permitting agency has improperly concluded that objectors carry the burden of proving harm to the public trust,[215] thus leaving private parties, rather than the state, with the task of collecting sufficient data to analyze impacts to instream flows. Noting that Montana water law is unclear about whether public trust issues can be considered during permitting,[216] the agency has held:

> [I]f trust issues are to be raised at all, the necessary inference is that they must be raised by the other parties to the matter. Further, because trust issues are not germane to proof of the enumerated [permit review] criteria, they would have to be affirmatively raised in advance of the hearing in order to provide proper

tion process. Indeed, the numbers bear this out. *Id.*; *see also supra* note 87 (discussing the modest percentage of decisions mentioning the public trust and an even lesser percentage where the trust played a role in the decision).

211. CAL. CODE REGS. tit. 23, §§ 738, 745(c) (2012) (allowing the public to protest an application based on trust impacts).

212. *Id.* at § 780(a).

213. Discovery itself depends on proper monitoring, which, as noted in Part II.F, *infra*, is vulnerable to legislative defunding decisions that can erode public trust protection.

214. In California, the permitting agency is underfunded and its "investigation and enforcement resources" have been too inadequate to meaningfully review existing water rights for trust impacts. Owen, *supra* note 82, at 1117 & n.111.

215. Water Use Permit Application 43104-s76D (*Garrison*), Proposal for Decision 21-22 (Mont. Dep't Natural Res. & Conservation Dec. 16, 1987), *available at* http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/case_nos_42133-44339/043104-76d_garrison.pdf. The agency's final order adopted this proposed finding. Final Order 1 (Mont. Dep't Natural Res. & Conservation Jan. 14, 1988).

216. *See infra* notes 229-31 and related text.

> notice that they are at issue, and the party seeking dismissal [of the application], because he is raising a claim independent of the criteria, would "bear the burden of persuasion . . . ."[217]

In that administrative matter, captioned *In re Water Use Permit Application* 43104-s76D (*Garrison*), the agency proceeded to disregard the public trust issues because the objectors were unable to provide hard evidence that reduced water levels would harm recreational uses that had historically occurred on the impacted waters.[218] Ultimately, while such burden shifting may be appropriate for ordinary statutory review criteria such as public interest review, it is inappropriate where the state serves as trustee over public resources.

Along with improper application processes and misplaced burdens of proof, there are commensurate concerns with the standards of review on appeal. If the public trust is simply folded into public interest review, there is a risk that courts will extend too much deference to agency decisions affecting the trust corpus. California courts, for example, have mistakenly held that both legislative and adjudicative actions of the permitting agency receive ordinary agency deference, despite the fact that permitting actions implicate the public trust.[219] While ordinary agency deference is appropriate for public interest review, it falls far short of *Illinois Central*'s mandate for strong judicial scrutiny of state decisions affecting the public trust.[220] As Justice Ronald Robie has expressed, the standard of review is probably "the most important limitation" on the courts' power to protect trust values, and "the deference mandated by the standard of review necessarily restricts the court's power to impose its own judgment."[221]

### F. *Opening the Door to Financial Constraints on Trust Protection*

A final risk worth noting is the legislative prerogative to reduce funding of water resources agencies, which impacts the assessment, monitoring, and enforcement of the public trust. Nevada again of-

217. *Garrison*, Proposal for Decision, *supra* note 215, at 22.

218. *Id.* at 22-23.

219. Justice Ronald B. Robie, *Effective Implementation of the Public Trust Doctrine in California Water Resources Decision-Making: A View From the Bench*, 45 U.C. Davis L. Rev. 1155, 1167-69 (2012).

220. *See* discussions *supra* Parts I.A and II.A.1.

221. Robie, *supra* note 219, at 1167.

fers an example. In the 1980s, Washoe County, Nevada, applied to the State Engineer for a basin transfer that would move 28,588 annual acre-feet of water to the Truckee Meadows metropolitan area.[222] The Pyramid Lake Paiute Tribe and neighboring Lassen County opposed the transfer on environmental and economic grounds, arguing that there were less extreme alternatives than water importation.[223]

The State Engineer granted the applications without independently determining whether the applications harmed the public interest—a statutory criterion under Nevada law.[224] Instead, the State Engineer limited his review to the four corners of the applications, presumed that Washoe County itself must have looked at other alternatives, and deferred to the applicant's choice.[225] The Nevada Supreme Court upheld the permit, citing in part the "lack of resources" available to the State Engineer's "relatively small staff":

> In the present case, the State Engineer recognized his office does not have the resources or personnel to weigh the social and political factors inherent in an economic analysis of competing water projects.
>
> Accordingly, we conclude that the State Engineer did not commit a dereliction of duty by not including a review of economic considerations and alternative projects as part of the guidelines defining the public interest.[226]

In a strong dissent, Justice Springer lamented that the court's decision, affecting a "massive inter-basin water transfer," lacked sound judgment: "It is difficult to accept the contention that the critical public interest issues presented by this case can be resolved merely by inspection of the application documents themselves."[227] The end result is that an applicant made the judgment call concerning whether its own proposal was in the public interest. This holding lays bare the vulnerability of tying the public trust to a

222. Pyramid Lake Paiute Tribe v. Washoe Cnty., 918 P.2d 697, 698 (Nev. 1996).
223. *Id.*
224. *Id.*
225. *Id.* at 703, 707 (Springer, J., dissenting).
226. *Id.* at 702.
227. *Id.* at 707 (Springer, J., dissenting).

public interest statute. If the legislature and water agencies wish to de-prioritize public interest review in economically lean times, they can do so. Such a result is less likely to occur, however, if the public trust remains framed as a fiduciary duty rather than a mere statutory requirement.

### G. *Indicia of Agency Confusion Between the Public Interest and the Public Trust*

If, as noted above, judicial confusion exists concerning the public interest and the public trust, then similar agency confusion is to be expected. Unfortunately, because state water permitting decisions are not readily available and searchable in most western jurisdictions, it is difficult to identify the extent to which agencies currently analyze the public trust in their decisions, or the extent to which they blur the important distinction between the public trust and public interest. Still, the limited evidence available suggests that state agencies are indeed confused concerning their role in public trust protection.

In California, which is arguably the most advanced state in its implementation of the trust, Dave Owen's helpful analysis of agency decisions suggests that the public trust is mentioned in only half of the state's combined decisions, and plays a significant factor in only twelve percent of the state's combined decisions.[228] Montana, which also has a searchable orders database, appears to have only two permit decisions raising public trust concerns; however, in both instances the agency found those concerns did not affect approval of the applications.[229] In those decisions, there is evidence that the agency conflated the public trust with both Montana's basic water code review criteria and its public interest review provision, neither of which mention the public trust.[230] Further, the

228. *See* Owen, *supra* note 82, at 1130-31.

229. *In re* Water Use Permit Application 49573-s43B (*Carter*), Final Order 9-10 (Mont. Dep't Natural Res. & Conservation Jan. 20, 1986) (determining that the required mitigation obviated the need to analyze public trust impacts), *available at* http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/case_nos_45172-49643/049573-4b_carter.pdf; *In re* Water Use Permit Application 43104-s76D (*Garrison*), Proposal for Decision 19-23 (Mont. Dep't Natural Res. & Conservation Dec. 16, 1987) (adopting finding that objectors failed to prove impacts to the public trust), *available at* http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/case_nos_42133-44339/043104-76d_garrison.pdf. The agency's final order adopted this proposed finding. Final Order 1 (Mont. Dep't Natural Res. & Conservation Jan. 14, 1988).

230. *Carter*, Final Order, *supra* note 229, at 10 ("It would appear that the legislature

agency grappled with the question of whether it could even consider the public trust in the absence of a statutory criterion on point.[231] And while Nevada and North Dakota water permitting decisions are not readily searchable, agency officials in those states confirm that the public trust is not specifically addressed during permitting.[232]

In Hawaii, where its permitting agency is working to implement the *Waiahole Ditch* decision through minimum instream flow requirements, the permitting process does not yet expressly address the public trust during permit review.[233] In the meantime, the agency is relying on existing instream flow provisions in state law as a proxy for addressing the public trust.[234] But these instream flow provisions, which predate *Waiahole Ditch*, expressly protect "public interests" that are broader than the public trust, including economic impacts[235] and uses like aesthetics and hydropower, which are not among the state's recognized trust purposes.[236] Indeed, Hawaii regulations state that notwithstanding instream flow impacts, the agency can approve permits "in those situations where it is clear that the best interest of the public will be served, as determined by the [agency]."[237]

Based on this limited information alone, it is fair to infer that the lack of public trust provisions in state water codes translates in-

has already considered the factors it believes are necessary to consider for the public trust, and has set out those factors in [the standard permit review criteria]."); *Garrison*, Proposal for Decision, *supra* note 229, at 19-20 (inquiring whether the small amount of the diversion, to which public interest review does not apply, means that there is no duty to examine the public trust).

231. *Garrison*, Proposal for Decision, *supra* note 229, at 19-21.

232. Telephone Interview with Bob Shaver, Director of Water Appropriations Division, North Dakota State Water Commission, (Sept. 10, 2012) (confirming that state applies only public interest criteria); Telephone Interview with Susan Joseph-Taylor, Chief, Hearing Section, Nevada Division of Water Resources, (Sept. 11, 2012) (confirming public trust has not yet been applied in a water permit proceeding).

233. Telephone Interview with Dean Uyeno, Hydrologist, Hawaii Commission on Water Resource Management, (Apr. 11, 2013) [hereinafter Uyeno Interview].

234. *Id.*

235. HAW. REV. STAT. § 174C-71 (factoring in economic impact when establishing instream flow standards) (2012); *see also supra* note 175 and related text.

236. HAW. ADMIN. R. § 13-169-2 (defining instream use broadly to include both trust purposes such as navigation and non-trust purposes such as hydropower generation); HAW. ADMIN. R. § 13-169-20(6) (2013) (including hydropower generation as an instream use).

237. HAW. ADMIN. R. §§ 13-168-32(e), 13-169-52(c).

to a lack of robust public trust protection by permitting agencies, leaving them to fall back on traditional water code provisions that favor private users and public interests not embodied in the public trust. It is thus incumbent on courts, legislatures, and state agencies to create an explicit, distinct public trust review.

## III. BEST PRACTICES FOR PUBLIC TRUST REVIEW

Because most western states have special trustee obligations relating to water, the reasoned approach is for those states to directly address the public trust in their water codes. By drawing on public trust ideas from around the West, the following set of best practices emerges for conducting public trust review during water use permitting. These recommendations are organized by best practices to be codified into state water laws and regulations, best practices for the judiciary, and best practices for state agencies engaged in water planning. Because of the many variations in state water codes, these recommendations are necessarily discussed in general terms that will require adaptation to meet the unique nuances of each state's water law.

At a minimum, the several states that have already applied the public trust to water rights should be implementing these practices.[238] Beyond this core group of states, it is wise for other western states that recognize the public trust over waters to implement these practices as well.[239] As long as state water codes fail to adequately consider the public trust, states will remain vulnerable to allegations that they are permitting private appropriations of water in derogation of trust resources.[240]

Before embarking on a discussion of best practices, it is important to acknowledge that states, and water use agencies in particular, may face a heavy burden in bringing water codes into compliance with public trust law.[241] Agencies might legitimately argue that the expense and administrative complexity of adding a

238. *See* discussion *supra* Part I.C.

239. State legislatures like Idaho's that have eschewed the public trust may eventually have to face a similar reality if the courts conclude that state public trust obligations cannot be legislatively nullified. *See* discussion *supra* Part I.B.

240. To name one example, advocates argue that Oregon should be implementing public trust protections in its water rights permitting process. *See* Blumm & Doot, *supra* note 114, at 395.

241. Thus is the story of Hawaii, where its state agency has been working for over a decade to determine appropriate stream flow protections called for in the 2000 *Waiahole Ditch* decision. Uyeno Interview, *supra* note 233.

public trust analysis to an already time-consuming permit review process will be substantial. Water use applicants, too, might argue that such a review will further delay agency decisions. As well founded as these arguments may be, they simply do not obviate the state's important trustee obligation. The public trust "cannot be relaxed simply because it may present . . . difficult factual questions,"[242] administrative challenges, or funding concerns.

### A. *Legislative Changes to Water Use Permitting Laws*

#### 1. *Defining the public trust*

To start, state legislatures and permitting agencies must clearly delineate public trust interests from more generalized public interests. This distinction should appear in water codes, implementing regulations, and agency guidance documents. In particular, states must define the precise scope of the trust to be considered. First, the types of waters protected under the public trust must be specified so that agencies can determine whether or not the water permit at issue involves protected trust resources. States adhering to the narrower, federal definition of navigability will thus have fewer protected waters than states applying the public trust to a broader category of waters.[243] Second, the scope of the public trust should include the "trust trilogy" of commerce, navigation, and fishing, in addition to any other specific public trust purposes recognized by the state in question. Guided by a clear trust definition, there is less risk that an agency will consider other public interest matters that fall outside the scope of the trust.[244]

242. Lawrence v. Clark Cnty., 254 P.3d 606, 614 (Nev. 2011). There, the court was referring to challenges facing the courts, but the same observation arguably holds true for government agencies as well.

243. For the federal definition of "navigable," see *supra* notes 34 and 36. For a discussion of various state formulations of "navigable," see Craig, *Adapting to Climate Change*, *supra* note 37, at 809-29. Admittedly, this threshold question may involve the arduous task of classifying public trust waters based on fact-finding specific to each watercourse. What states should avoid are sweeping approaches, such as those used by the Colorado Supreme Court or the Arizona and Idaho Legislatures, wherein waters were classified as falling outside the public trust without any particularized assessment being done. *See* discussion *supra* notes 11, 187-99, and related text.

244. While some might argue that delimiting the universe of protected trust uses reduces the protection of water, it is a more honest application of the law. Moreover, as demonstrated in Part II, "public interest" is politically malleable and, depending on the

2. *Separate public trust analysis as part of permit review*

Next, and most importantly, states must codify a distinct public trust assessment process for water rights permitting.[245] Relying on judicial directives in public trust case law is not enough. As Owen has observed, "individual cases will effect systemic change only if they spawn broadly applicable legislative or regulatory changes."[246] To meet the public trust baseline, agencies should apply this public trust assessment separately from traditional permit criteria so there is less risk of demoting the trust to merely another public interest consideration. Agencies should also conduct the assessment *prior* to issuing new water rights permits or approving changes of use, and make factual findings that demonstrate careful consideration and mitigation of trust impacts.

Idaho's *Kootenai Environmental Alliance* provides a helpful formulation for public trust assessment, holding that "among other things," the following factors should be examined:

- the degree of effect of the project on public trust uses, navigation, fishing, recreation and commerce;
- the impact of the individual project on the public trust resource;
- the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource;
- the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited, such as commerce, navigation, fishing or recreation; and

persons in power, is more likely to be used as a tool to promote consumptive uses of water under the auspices of promoting the public interest of economic development. Here too, arguments might be made that the courts, the gatekeepers of the trust, are just as likely as agencies or legislatures to introduce political bias or subjectivity. While such a risk is possible, it is far more remote than the risks associated with discretionary public interest determinations made at the legislative or agency level. A multi-member state appellate court must reach a majority consensus and locate its public trust rulings within an established body of public trust law that, while sometimes evolving, is not as open-ended as water code "public interest" provisions.

245. In light of legislative recalcitrance on this subject, the impetus for change may lie in further beneficiary litigation that seeks additional court mandates to the legislature. *See, e.g.*, discussion *supra* Part I.C.

246. Owen, *supra* note 82, at 1103. He describes "a more robust procedural framework for public trust analysis" as among the more promising reforms. *Id.* at 1107.

- the degree to which broad public uses are set aside in favor of more limited or private ones.[247]

Courts in Arizona and Nevada have since adopted these same factors.[248] In Arizona, the adopting court added that these factors should be applied as part of a "particularized assessment," rather than a generalized assessment that broadly disposes of trust resources.[249] Thus, states need to subject each water use permit, rather than selected permits or categories of permits, to public trust review.

Some could argue that California's approach of simply imposing a public trust condition on use permits, without necessarily analyzing trust impacts in advance, is adequate because it leaves open the possibility that agencies can later modify or revoke a permit if the public trust is substantially impaired. Returning to the public trust baseline described in *Illinois Central*, however, it is evident that trust law depends upon an advance analysis.[250] To hold that the state cannot alienate trust resources, except under certain conditions,[251] is to require that the state establish *before* alienation that those conditions have in fact been met.

Belatedly conducting public trust review also runs the risk that valuable trust resources are irreparably harmed—a risk that a responsible trustee would not take. In particular, trustees should consider irreparable harm when reviewing water project proposals that will dramatically alter the hydrologic landscape. The City of Los Angeles' long-term impacts to the Mono Lake ecosystem provide a case in point.[252] Recognizing the risks of post hoc review of

247. Kootenai Envtl. Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1092-93 (Idaho 1983) (describing the factors as a non-exclusive list, which leaves open the possibility of other considerations relevant to assessing trust impacts). While the court lists recreation among the public trust purposes for that state, such a purpose is not universally recognized among the western states, and would thus be omitted in some jurisdictions. *See* discussion *supra* Parts I.A and I.B.

248. Ariz. Ctr. for Law in the Pub. Interest v. Hassell, 837 P.2d 158, 170-71 (Ariz. Ct. App. 1991) (addressing riverbed lands); Lawrence v. Clark Cnty., 254 P.3d 606, 616-17. (Nev. 2011).

249. *Hassell*, 837 P.2d at 173 (striking down a law that broadly conveyed trust resources within a single piece of legislation).

250. *See* discussion *supra* Part I.A.

251. Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 455-56 (1892).

252. *See* discussion *supra* Part I.C.4.

trust impacts, the Hawaii Supreme Court observed in *Waiahole Ditch*:

> Where scientific evidence is preliminary and not yet conclusive . . . it is prudent to adopt "precautionary principles" in protecting the resource. That is, where there are present or potential threats of serious damage, lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation. . . . In addition, where uncertainty exists, a trustee's duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource.[253]

There, water users proposed a change in use from irrigation to water supply for a commercial resort development. While Hawaii's water code lists both irrigation and commercial uses as beneficial uses that are in the "public interest,"[254] those uses do not fall within trust purposes. Thus, as a first step the Hawaii Water Resources Board could weigh a broad spectrum of public interests in determining that a resort development would benefit the public. But from there, the agency needed to separately assess how a resort development would impact the *public trust* purposes of the affected waters. Because the agency did not adequately conduct this second, trust-based inquiry, and because it lacked the requisite data to do so, it was inappropriate and premature to permit the change in use.[255]

Importantly, a separate public trust analysis need not replace existing public interest review in the West. As with other permit review criteria, states can continue to weigh a variety of considerations when deciding whether to issue a permit. With a separate public trust analysis, however, those competing considerations will not be allowed to prevail if the impacts are too substantial under public trust law.

253. *In re* Water Use Permit Applications (*Waiahole Ditch*), 9 P.3d 409, 426 (Haw. 2000) (quoting Final Decision of the Commission on Water Resource Management (Dec. 24, 1997)) (emphasis omitted). *But cf.* Owen, *supra* note 82, at 1133 & n.196 (discussing California's use of scientific uncertainty to lift permit restrictions).

254. HAW. REV. STAT. § 174C-2(c) (2012).

255. The Hawaii Supreme Court required further instream flow studies by the applicant before the agency could proceed. *See* discussion *supra* Part I.C.7 and related notes 93-98.

Further, protecting the public trust does not mean that private water uses are inevitably prohibited. Dunning documents that "[m]ost courts have permitted the alienation of state sovereign lands," along with conditions to ameliorate public trust impacts.[256] Additionally, agencies can determine that a private use *promotes* public trust purposes. *Kootenai Environmental Alliance* aptly illustrates this point. There, the Idaho Supreme Court upheld an encroachment permit for a private yacht club on Lake Coeur d'Alene to construct sailboat slips and related facilities.[257] The court agreed with the state agency's finding that the construction would enlarge recreation opportunities and would not substantially impair navigation or fishing.[258] The court observed that the proposal did not violate the trust "at this time," but cautioned that "the state is not precluded from determining in the future that this conveyance is no longer compatible with the public trust imposed on this conveyance."[259]

As another, hypothetical example, a western state might recognize navigation, commerce, fishing, and recreation as public trust purposes. Applications to change water rights or to develop new water rights would thus require an inquiry into whether those trust purposes will be impacted by the proposed use. A consumptive use, such as an out-of-basin transfer, might benefit the "public interest" but nonetheless deplete the water supply to such a degree that recreation is compromised, or require a diversion structure that impairs critical public access to waters. In contrast, an irrigator who seeks to upgrade the efficiency of a diversion and lease a portion of the salvaged water for instream flow might be proposing a private use that contemporaneously benefits recreation. Similarly, a consumptive user who stores water during high spring flows and leaves water instream during low summer flows may be proposing a use that is compatible with trust purposes.

256. DUNNING, *supra* note 18, at § 30.02(d)(2) (citing several examples). *Illinois Central* allows for alienation of trust resources in the situation when there is an "improvement of the navigation and use of the waters" or when there is no "impairment of the public interest in what remains." 146 U.S. at 453.

257. Kootenai Envtl. Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1094 (Idaho 1983).

258. *Id.* at 1095.

259. *Id.* at 1094.

3. *Procedural protections during permit review*

Stronger public trust protection means moving from judicial decisions to on-the-ground agency processes that focus on trust resources. As Owen has discerned, a "more robust procedural framework" is essential for reforming public trust review and for "addressing the information shortages that the agencies charged with protecting trust resources routinely face."[260] Following the directives of the Idaho and Hawaii courts, agency public trust review should place the burden on the water use applicant to show a lack of substantial impairment to the trust.[261] This burden should be expressly codified as part of the permit process to ensure that trust review occurs proactively. By doing so, states eliminate the risk of imposing a de facto burden on trust beneficiaries who attempt to raise trust concerns later in the permitting process.[262]

State codes should also expressly address standing to raise public trust issues during permit review so that interested parties have a clear process for proceeding in water rights cases. In California, for example, "any member of the general public [can] raise a claim of harm to the public trust."[263] And Montana, in the context of water rights adjudication, has recognized a more limited standing for parties with a "particularized interest" in the public trust.[264]

4. *Permit conditions and monitoring*

Western state water laws must also expressly address how states

260. Owen, *supra* note 82, at 1107 (discussing California, but making an observation applicable to all western states). Owen compares the lack of public trust procedure to the extensive procedures in other environmental laws and laments that the California courts have done little to clarify the procedural requirements of the public trust. *Id.* at 1143 & n.244.

261. *See* discussion *supra* Part II.E and related notes 206-09. To the extent state water planning also becomes more robust in its attention to the public trust, applicants will have better access to the types of information relevant to public trust review during permitting. *See* discussion *infra* Part III.C.

262. *See* discussion *supra* Part II.E. Although Owen notes that contemporaneous review under the California Environmental Quality Act (CEQA) has helped fill some of the procedural gaps in that state, Owen, *supra* note 82, at 1143, CEQA's standards and public trust standards do not necessarily align in all cases. *See* discussion *supra* note 87. Further, in other states, environmental review may not apply to all water rights permitting. Ultimately, environmental review cannot take the place of robust public trust procedures set forth directly in state water codes.

263. Owen, *supra* note 82, at 1143 (citing *In re* Water of Hallett Creek Sys., 749 P.2d 324, 337 n.16 (Cal. 1988).

264. Montana Trout Unlimited v. Beaverhead Water Co., 255 P.3d 179, 185-86 (Mont. 2011); *see also* discussion *supra* Part I.C.8.

fulfill their ongoing duty of care for the trust. Public trust authority "empowers the state to revisit prior diversions and allocations, even those made with due consideration of their effect on the public trust."[265] As discussed, California has the only regulations that expressly require a permit condition regarding continuing state oversight of the public trust.[266] This type of notice sets realistic water user expectations, strengthens a state's defense against future takings claims,[267] and ameliorates arguments that the public purposes of the trust resource have been relinquished.

Nonetheless, California's boilerplate permit condition is no substitute for permit conditions tailored to the specific water use proposed.[268] As Arizona courts have held, permits require particularized assessments that include "conditions that may be necessary to any transfer to assure that public trust interests remain protected."[269] In other words, the more tailored the conditions, the better the prospect that the state can enforce trust protections.

Further, permit conditions must exist beyond the paper on which they are printed—they must shift from a "theoretical mandate" to a "real procedural obligation."[270] For this reason, state water codes should also identify the agencies responsible for monitoring trust impacts. And as Owen advocates, legislatures should empower agency oversight by providing appropriate funding and access to data.[271] Using California as an example, he suggests as a starting place that water users "participate in or provide financial support for an ongoing monitoring program" and that agencies be authorized to "demand information from water users whose activities may create significant public trust impacts."[272]

265. *In re* Water Use Permit Applications (*Waiahole Ditch*), 9 P.3d 409, 453 (Haw. 2000).

266. CAL. CODE REGS. tit. 23, § 780(a) (2012); *see also supra* Part I.C.4 (providing the text of the permit condition).

267. *See* Frank, *supra* note 2, at 681-84 (providing an overview of the current legal developments regarding public trust and takings claims).

268. As noted, Owen has found evidence of some permit decisions that substantively address the public trust. *See* discussion *supra* note 87. Nonetheless, express regulatory requirements would make the practice routine and mandatory.

269. Ariz. Ctr. for Law in the Pub. Interest v. Hassell, 837 P.2d 158, 173 (Ariz. Ct. App. 1991) (involving riverbed lands).

270. Owen, *supra* note 82, at 1117, 1144 & n.111.

271. *Id.* at 1149-50.

272. *Id.* at 1149.

B. *Strengthened Judicial Review*

The judiciary, which serves as the gatekeeper of the public trust, can help create the appropriate context for protecting the public trust during permitting. Foremost, judicial discussion of the public trust doctrine should use more precise, careful language that differentiates trust interests from more generalized public interests. While a careful reader of public trust opinions can observe judicial intent to treat the two concepts as separate, judicial decisions can do far more to note the distinction.

Following the court holdings of Idaho, Arizona, Hawaii, and Washington, reviewing courts also should eschew traditional agency deference when considering public trust appeals. Commentators have noted that California courts in particular need to raise their standard of review above ordinary deference when the public trust is at issue.[273] Because states serve as trustee of the public's resources,[274] judges should take a "close look" at agency public trust decisions[275] and apply "a heightened degree of judicial scrutiny, 'as if they were measuring that legislation against constitutional protections.'"[276] Indeed, because many states have grounded their public trust doctrines in their state constitutions, no lesser standard will suffice.[277]

C. *State Water Planning for the Public Trust*

Finally, as the North Dakota, California, and Hawaii courts have indicated, advance water planning is integral to understanding whether proposed water uses will impact the public trust. Thus, state water laws should explicitly require agencies to "take the public trust into account in the planning and allocation of water resources."[278] The North Dakota courts have gone so far as to re-

273. *See* Justice Robie, *supra* note 219, at 1167-69 (critiquing the California courts' deferential review of the State Water Resource Control Board).

274. *See* discussion *supra* Part I.A.

275. Kootenai Envtl. Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1092 (Idaho 1983).

276. Weden v. San Juan Cnty., 958 P.2d 273, 283 (Wash. 1998); *see also* Ariz. Ctr. for Law in the Pub. Interest v. Hassell, 837 P.2d 158, 169 (Ariz. Ct. App. 1991); *In re* Water Use Permit Applications (*Waiahole Ditch*), 9 P.3d 409, 455-56 (Haw. 2000); KOCH, JR., *supra* note 28, § 11:11 (discussing de novo review of constitutional questions).

277. *See* discussion *supra* Part I.B.

278. Nat'l Audubon Soc'y v. Super. Ct., 658 P.2d 709, 728 (Cal. 1983); *see also Waiahole Ditch*, 9 P.3d at 453 (holding that protecting the public trust in planning is the state's "affirmative duty"); United Plainsmen Ass'n v. N.D. State Water Conservation

quire this step, which must consider both existing supply and future demand, before permitting can occur.[279]

Despite North Dakota's mandate, the state's most recent water management plan does not mention the public trust.[280] Other western states fare little better. South Dakota's water plan is silent on the public trust,[281] and Montana's water plan online summary not only ignores the public trust, but also emphasizes that "[c]ontinued economic growth in Montana depends on meeting water demand for population growth and economic development while satisfying existing beneficial uses."[282]

Some state water plans mention the public trust, but mainly in aspirational terms. For example, the preamble to Hawaii's plan generally notes that "offstream uses" are subject to a public trust analysis and that wild and scenic river designations, along with alternative water sources, will be used to protect the trust.[283] Nevada's water plan defines the public trust in its glossary but does not use the term in any substantive provisions.[284] Further, its definition of public trust states that the reader should also see the definitions for "public interest" and "public welfare," thus improperly conflating those concepts.[285] California has by far the most references to the public trust in its plan, noting in general terms, but not specifics, that state water planning must factor in public trust considerations.[286] Thus, on the whole, state water planning laws appear to

Comm'n, 247 N.W.2d 457, 463-64 (N.D. 1976).

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

280. N.D. STATE ENG'R, NORTH DAKOTA 2013-2015 WATER DEVELOPMENT PLAN, *available at* http://www.swc.nd.gov/4dlink9/4dcgi/GetSubCategoryPDF/151/Water%20Development%20Report.pdf (last visited June 6, 2013).

281. S.D. DEP'T OF NATURAL RES., STATE WATER PLAN, http://denr.sd.gov/dfta/wwf/statewaterplan/statewaterplan.aspx#Resources (last visited Apr. 13, 2013).

282. MONT. DEP'T NATURAL RES. & CONSERVATION., MONTANA STATE WATER PLAN, http://www.dnrc.mt.gov/wrd/water_mgmt/state_water_plan/ (last visited Apr. 21, 2013).

283. HAW. COMM'N ON WATER RES. MGMT., HAWAII WATER PROJECTS PLAN vii, 2-3 to -4 (2003).

284. NEV. DIV. WATER PLANNING, NEVADA STATE WATER PLAN (Mar. 2009) 6-7, 8-9 to -10, *available at* http://water.nv.gov/programs/planning/stateplan/documents/NV_State_Water_Plan-complete.pdf.

285. *Id.* at 8-9 to -10.

286. CAL. DEP'T OF WATER RES., CALIFORNIA WATER PLAN UPDATE 2009 (Dec. 2009),

require the same public trust modernizations as state water codes.

While macro-level planning documents will never take the place of particularized public trust assessments during permit review, they are the first step in informing agencies, the public, and prospective water users about the public trust issues associated with particular watercourses.[287] As one important component of planning, Gray proposes the use of best available science to establish a baseline of water needed in a watercourse to fulfill public trust purposes, including an adequate margin of safety to account for changes in hydrology and other variables.[288] Another important component is state funding for public trust initiatives, so that the western states' trustee responsibilities do not remain an unfunded judicial mandate.

Ultimately, this advance planning can serve as a feedback loop that provides state agencies, applicants, and the public with specific public trust data during the water use permitting process. This planning can also guide water management and funding decisions toward state projects that better consider the public trust, thus increasing the likelihood that both public trust and private water use interests can be satisfied through the use of state waters.

## IV. CONCLUSION

As western states have begun to recognize the interrelationship between the public trust and water rights, so too must they begin to update their water codes to reflect public trust principles. In light of their baseline public trust duties, states that recognize a public trust over waters must do more than rely on agencies to divine the role of the public trust in permitting. Further, states should not hitch their wagons to politically expedient but ill-fitting fixes such as statutory public interest review. Ultimately, the job of protecting the trust falls on many shoulders, and includes careful and accurate review by the courts, legislative adoption of required

*available at* http://www.waterplan.water.ca.gov/docs/cwpu2009/0310final/v2_all_cwp2009 .pdf. The Delta Plan and Bay Delta Conservation Plan appear to be an exception, with specific state statutes calling for "new flow criteria for the Delta ecosystem necessary to protect public trust resources." CAL. WATER CODE § 85086 (2012).

287. *See* Gray, *supra* note 123, at 999 (advocating for planning in California as a "prospective feature of the public trust [that] is just as important as its remedial aspects").

288. *Id.* at 1017. Hawaii is working toward this approach to some extent, as it sets its interim and permanent stream flow levels on key watercourses in the state, which in turn limit the extent of new offstream uses. Uyeno Interview, *supra* note 233. California appears to be doing the same in the Bay Delta area. *See supra* note 286.

trust review, and agency implementation in accordance with a state's established trust parameters. By drawing upon the best ideas throughout the West, states can build a public trust framework that becomes standard practice in water use permitting in the West.