

JUSTINIAN'S LEGACY: SHOULD THE PUBLIC TRUST DOCTRINE BE USED MORE OFTEN TO PROTECT FRESHWATER AND OTHER NATURAL RESOURCES?

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Abstract:

At least since the Illinois Central case it has been clear that public trust rights in the United States are not limited to tidal waters, but use of the doctrine in freshwaters has not been widespread, except as a restraint on alienability. The focus of this presentation is whether there is any value added to using the amorphous public trust doctrine to manage non-tidal resources. To answer whether the public trust should be a more-frequently used public policy tool, this presentation looks at the common issues facing the use of tidal and non-tidal waters (Section I), the usefulness of the doctrine in managing tidal resources (Section II), structural features of the doctrine that may provide an advantage over other policy tools (Section III), examples where the doctrine has been used to protect freshwater resources (Section IV) or other common resources such as endangered species and parklands (Section V). The Public Trust Doctrine does have continuing relevance as a legal device for asserting environmental values, as a defense to takings claims, and as a way to mobilize public support for environmental initiatives using the concepts and language of civil rights and democracy.

I. Common Challenges in the Management of Tidal and Non-Tidal Resources

- A. Extractive uses of finite resources are necessary but potentially incompatible
 - 1. USA will grow from 300 million people in 2005 to 400 million people in 2050
 - 2. Tidal and non-tidal resources are crucial to human existence – this is especially so for freshwater.
 - 3. Both are perceived and (and exploited) as a commons in part, and have significant overlays of private property rights
 - 4. Uses may be inconsistent: tidal and non-tidal waters are used as cooling water for industry, a repository for sewage and human waste, habitat for wildlife, a source of food, for shipping and transportation and for recreation, tourism
 - 5. Non-tidal freshwater systems are also used as a source of drinking water and for energy (hydropower), not yet for aquaculture.
 - 6. Drinking/freshwater shortages are Nationwide, not just in the West, will increase with population pressures
 - 7. Pressure on upland boundaries by dockominiums and other development
- B. Access / opportunity conflicts
- C. Policy themes
 - 1. Need to allocate resources through a reasonable system that provides an equal opportunity to use or benefit from the resource
 - 2. Variety of allocation choices -- should resource be governed as a commons under common property law, privatized (wholly or through TDRs), or regulated?
 - 3. Need to manage growth and plan on a regional basis
 - 4. Need to reconcile different uses (e.g., contaminated sediments)
 - 5. Carrying capacity of the resource as the outer bound of exploitation
 - 6. Use of private property can affect public rights
- D. Public Trust Doctrine contains many of the necessary elements for a governing philosophy of responsible stewardship
 - 1. elements of restraining exploitation
 - 2. elements of guaranteeing equal access
 - 3. elements of harmonizing different uses of the same resource
 - 4. elements of recognizing some public interest (or reservation of rights) in private property
 - 5. elements of prospective, accountable management through monitoring and accounting
 - 6. elements of duty to act to fix past erosion of public trust resources, possibly through restoration efforts
 - 7. procedural and substantive for the public interest, public participation

- E. Continuing relevance of the Public Trust Doctrine as a legal device for asserting environmental values; it has evolved from negative restraint on alienation into a source of positive powers and duties to protect trust resources
 - 1. Establishes goals against which proposals and progress can be measured
 - 2. Provides guiding principles for regulatory programs of duty to investigate problems with corpus of trust, assess status, manage uses, and restore resource
 - 3. Provides test for discretion in enforcement actions, from natural resource damage actions to permit conditions that require land preservation as mitigation.
 - 4. Underscores irrelevance of title to ability to regulate
 - 5. Should be extended to non-navigable waters
- F. Continuing relevance as an organizing to to mobilize public support, harness appeal of civil rights and democracy to environmental issues

II. Lessons from Management of Tidelands Resources Through the Public Trust Doctrine

- A. The Public Trust has a traditional basis in extractive and economic usufructuary rights in trust resources.
- B. Doctrine updated to acknowledge renewable public rights in recreation, other uses that are distinct from ownership of title.
- C. Private, riparian rights are balanced with public, common rights; the public need comes first but must accommodate some private interests.
- D. Inability of states to sell public trust rights or lands if sale will substantially impair the public interests in the lands; states must consider public interest in all sales.
- E. Valid alienation may still be subject or conditioned on reservation of public rights not completely incompatible with private interests.
- F. Reservation of rights includes easement or access for the purpose of using public trust resources, wherever necessary to meet public demand that will not overwhelm the resource.
- G. No windfalls to private individuals from public investments in trust resources.

H.. Modern management tools

1. The CZMA and state coastal plans -- 30 years of (uneven) planning
2. Ocean zoning (e.g. Rhode Island's Greenwich Bay Special Area Management Plan)
3. Marine sanctuaries
4. Conservation easements (e.g. Washington State Conservation Leasing Program)
5. How to reconcile with requirement that holders make "productive use" of submerged lands? Perhaps through seeded oyster reefs or other restoration projects rather than passive preservation, such as shellfish restoration in Puget Sound.

III. Unique Features of the Public Trust Doctrine Complements Other Policy Tools

- A. Provides substantive and procedural protections for the public interest; it is enforceable.
- B. Common law doctrine that evolves with the times (e.g., tidelands/ navigability split upon import of doctrine to the United States), and within control of the judiciary.
- C. Quasi-constitutional rather than simple common law
 1. Limits legislative powers, as a constitution does (e.g., judicially enforced inalienability rule)
 2. All 3 branches have power to affect trust; judiciary will step in where legislative and executive branches leave off
 3. Provides a hortatory/obligatory basis for legislation and regulation
- D. Defeats takings claims as a background principle of state law that "inheres in the title itself".

IV. The Doctrine Has Been Used to Protect Non-Tidal Rivers and Lakes

- A. Many states, particularly in the West, own the beds of all navigable waters under equal footing doctrine, although some of the original states (e.g., New Jersey and Massachusetts) disclaimed any rights to those resources and adopted English rule, as least for title purposes.
- B. Restricted alienability of freshwater trust resources.
- C. Public use may be allowed even where title to streambed properly alienated, based on public trust doctrine and traditional navigability rights.
- D. Montana stream access statute is based on the public trust. The significance of this effort is that it goes beyond navigability as the sole measure of public trust rights in freshwater, and thereby aligns doctrine with application in tidelands, where recreational usage is a valid basis for assertion of public trust rights.
- E. A 1996 Idaho law, HB 794, Idaho Code 58-1201, limits public trust access rights to freshwater resources, tacitly acknowledging rights are the default position.
- F. Protection of “running waters” from diversions.
- G. Statutory protections of freshwater resources based on public trust doctrine or concepts, even in states such as New Jersey that have rejected “navigability” test for public trust and purportedly limit the doctrine to tidal resources.
 - 1. A unifying concept is that significant resources such as wetlands, water supplies and coastal resources cannot be exploited based only on decisions of private parties or local decision-makers.
 - 2. The State is the trustee of surface and groundwater resources.
 - 3. New Jersey Water Supply Law of 1958
 - 4. New Jersey Water Supply Management Act (N.J.S.A. 58:1A-1 et. seq.)
 - 5. New Jersey Water Quality Planning Act (N.J.S.A. 58:11A-1 et seq.)
 - 6. New Jersey Water Pollution Control Act (N.J.S.A. 58:10A-1 et seq.)
 - 7. New Jersey’s Implementation of Clean Water Act programs: Surface Water Quality Standards, TMDL program, antidegradation program (Category One and buffers), application of Section 401 Certification authority, Section 208 program

- 8. New Jersey regional planning acts: Highlands Act, Pinelands Act, Meadowlands Act, CAFRA
 - H. Other states' statutes declare public trust interests in flowing freshwater.
 - I. Public Trust rights in freshwater may be enshrined in state constitutions.
- V. Public Trust Rights in Endangered Species / Parklands / Other Common Resources
- A. The common law applied the Public Trust Doctrine to wildlife.
 - B. Public Trust concepts underlie the New Jersey Endangered and Non-Game Species Conservation Law.
 - C. Parkland protections are based on Public Trust concepts.
 - 1. New Jersey Garden State Preservation Trust
 - 2. New Jersey Natural Lands Trust
 - 3. New Jersey Canal Corporation Law
 - 4. Protections against diversions and other alienation of parklands
 - D. Natural Resource Damages and the duty to restore trust resources
 - 1. New Jersey Water Quality Improvement Act (N.J.S.A. 23:5-28)
 - 2. CERCLA, 42 U.S.C. § 9607(f)(1), authorizes NRD right of action by "public trustees" only
 - E. Mitigation through land preservation as a permit condition