

The Public Trust Doctrine in Environmental and Natural Resources Law

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CAROLINA ACADEMIC PRESS

Durham, North Carolina

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Library of Congress Cataloging-in-Publication Data

Blumm, Michael C.

The public trust doctrine in environmental and natural resources law / Michael C. Blumm and Mary Wood.

pages cm

Includes bibliographical references and index.

ISBN 978-1-61163-378-8 (alk. paper)

1. Conservation of natural resources--Law and legislation--United States. I. Wood, Mary Christina. II. Title.

KF5505.B58 2013

344.7304'6--dc23

2013017185

CAROLINA ACADEMIC PRESS
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

Dedication

Throughout the ages, the public trust has come to life as a result of extraordinary vision and courage on the part of jurists, lawyers, and scholars. We dedicate this book to all of the pioneers, past and present, with particular recognition of the contributions of Justinian,¹ Sir Matthew Hale,² Justice Andrew Kirkpatrick,³ Justice Stephen J. Field,⁴ Justice Stanley Mosk,⁵ Justice Alan Broussard,⁶ Justice Paula Nakayama,⁷ Justice Presbitero Valasco, Jr.,⁸ Judge Gisela Triana,⁹ and Professor Joseph Sax.¹⁰ And, too, we dedicate it to our own children, all children on Earth, and to future generations—all of whom have a stake in the legal evolution of a doctrine that advances their inalienable rights to a balanced and healthy ecology.

1. For his influential code, the Institutes of Justinian, *see* J. INST. (T. Sandars trans., 4th ed. 1867).

2. For his treatise, *De Jure Maris*, reprinted in STUART MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO (3rd ed. 1888).

3. For *Arnold v. Mundy*, 6 N.J.L. 1 (N. J. 1821).

4. For *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892).

5. For *Marks v. Whitney*, 6 Cal.3d 251, 491 P.2d 374, 98 Cal.Rptr. 790 (1971).

6. For the “Mono Lake” opinion, *National Audubon Soc. v. Superior Court of Alpine Cty.*, 33 Cal.3d 419, 189 Cal.Rptr. 346, 658 P.2d 709 (1983).

7. For the “Waiahole Ditch” opinion, *In re Water Use Permit Applications*, 9 P.3d 409 (Haw. 2000).

8. For *Metropolitan Manila Development Authority v. Concerned Citizens of Manila Bay*, 574 S.C.R.A. 661 (Phil. S. Ct. 2008).

9. For a decision recognizing atmosphere as a trust asset, *see Angela Bosner-Lain, et al. v. Texas Commission on Environmental Quality*, No. D-1-GN-11-002194 (201st Judicial District Court, Tx., Aug. 2, 2012).

10. For his path-breaking article, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970).

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Preface

The public trust doctrine (PTD) is an ancient doctrine of property law that governs sovereign stewardship of natural resources. First surfacing in Roman law through the Justinian Code, it was revived in medieval England largely through the efforts of Sir Mathew Hale and became entrenched in American law in the nineteenth century through the process of statehood. In the twentieth century, the doctrine became a favorite of the law professoriate and the environmental community for its potential to recognize public rights in private property. The doctrine both promotes public access to trust resources and justifies government protection of them. It also equips the public—the beneficiaries of the trust—with the right to challenge government on the management of their ecological assets. This doctrine, remarkable for its endurance through the ages, now brings populist overtones and human rights underpinnings to the modern fields of environmental law and property law.

We offer the first casebook on public trust law. In it, we have endeavored to capture the rich history and considerable diversity of the field. Although the PTD is often characterized as a doctrine of state law, we think the perception is erroneous because the PTD is an inherent attribute of sovereignty and, accordingly, should apply to both the federal and state governments. The origins of the American PTD lie in bilateral federal-state agreements admitting states to the Union, but the doctrine is also recognized in countries as far-flung as India, the Philippines, Kenya, and Brazil. We survey the PTD's application from the local to global level.

The wellspring of the American PTD lies in a distinctive antimonopoly sentiment that, widespread in the nineteenth century, continues to inspire a vibrant body of case law concerning public access to trust resources. That case law—as well as state constitutions and statutes—has expanded the scope of trust assets from lands submerged beneath navigable waters to wetlands, beaches, parklands, wildlife, air, and groundwater. Internationally, the doctrine has advanced concepts of sustainable development and the precautionary principle, and thus is frequently linked to the public's right to life, health, and environmental protection. There are ongoing efforts to use the PTD to combat climate change by applying it to curb carbon emissions.

While the origins of the PTD date to Roman times, the PTD carries enormous importance today, as many statutory systems fail in their basic purpose of protecting public resources from private exploitation. A course in public trust law allows students to break out of the narrow confines of statutory law and immerse themselves in fundamental principles that provide a fulcrum for sustainable environmental management. The course can, and we think should, delve into the most basic questions of constitutionalism and the role of the judiciary, legislatures, and courts in allocating natural resources.

At only roughly 400 pages, we think this book is ideal for an advanced course or seminar in environmental, natural resources, or property law. The casebook is accompanied by a teachers' manual as well. We have designed the text not only as a set of teaching materials, but also as a research platform for further inquiry into public trust law. We have relied

heavily on the rich scholarship in public trust law and have tried to supplement it. Students in our classes have produced multiple summaries of state public trust law as well as law review notes and articles analyzing some of the most intriguing questions generated by the doctrine. We encourage you to send us cases and materials and as well as your contributions to the law of the public trust, which we will use in new editions of this text and in a treatise on the subject.

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Acknowledgments

We wish to thank Lorena Wisehart for outstanding editorial and research assistance and Jovana Anderson for invaluable help in preparing the manuscript for this text. We also benefitted greatly from the assistance of Marianne Ober, Kelly C. Bauer, and Adam Walters. We're grateful to the Rocky Mountain Mineral Law Foundation for a grant that funded research assistant work. We also appreciate the support from our respective law schools for research stipends that supported this effort. And finally, we wish to thank our deans, Robert Klonoff (Lewis and Clark Law School) and Michael Moffitt (University of Oregon School of Law) for their continued support of scholarship at our schools.

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