

The Public Trust Doctrine in Environmental and Natural Resources Law

The Public Trust Doctrine in Environmental and Natural Resources Law

FOURTH EDITION

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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 Chief Justice Ronald Castille,¹⁰ Judge Alfred T. Goodwin,¹¹ Judge Hollis Hill,¹² Judge Ann Aiken,¹³ Associate Justice Michael D. Wilson,¹⁴ and Professor Joseph Sax.¹⁵ 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.

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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” 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 *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013).
 11. For his opinion in *Ex Rel Thornton v. Hay*, 462 P.2d 671 (1969) and for his article, *A Wake-Up Call/or Judges*, 2015 Wis. L. Rev. 785, 785–86, 788 (2015).
 12. For her opinion in *Foster v. Washington Dept. of Ecology (Foster II)*, no. 14-2-25295-152A (Wash. Super. Ct., Nov. 19, 2015).
 13. For *Juliana v. United States*, 217 F.Supp.3d 1224, 1255 (D. Or. 2016), rev’d and remanded, 947 F.3d 1159 (9th Cir. 2020).
 14. For his concurring opinion in *In Re Hawaii Electric Light Co.*, 526 P.3d 329, 336 (2023).
 15. 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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Editors' Note

We edited the case law liberally throughout for readability, eliminating redundant citations and sometimes creating paragraphs. Any footnotes are numbered consecutively throughout chapters; we did not retain the original footnote numbers.

Case citations in the text, the footnotes of judicial opinions, and the writings of commentators have been omitted without so specifying. Footnotes in judicial opinions and articles are also omitted without specifying. Asterisks and brackets are used to designate omissions from the original materials.

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Michael C. Blumm, *The Public Trust Doctrine—A Twenty-First Century Concept*, 14 Hastings W-Nw. J. Env'tl. L. & Policy 105 (2005). Reprinted by permission of Michael C. Blumm and the Hastings West Northwest Journal of Environmental Law & Policy.

- Mary Christina Wood, *Securing Ecology “Capable of Sustaining Human Life”: Invoking the Inherent and Inalienable Public Trust Rights of the People*, 26 U. Pa. J. Const. L. 1212 (2024). Reprinted by permission of Mary Christina Wood and the Pennsylvania Journal of Constitutional Law.
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- John C. Dernbach, *The Value of Constitutional Environmental Rights and Public Trusts*, 41 Pace Env't L. Rev. 153 (2024). Reprinted by permission of John Dernbach and Pace Environmental Law Review.
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- Mary Christina Wood, *Atmospheric Trust Litigation Across the World*, in KEN COGHILL, CHARLES SAMFORD & TIM SMITH, *FIDUCIARY DUTY AND THE ATMOSPHERIC TRUST* (Farnham: Ashgate 2011) pp. 317–328. Reprinted by permission from Mary Christina Wood and Ashgate Publishing.
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- Patrick S. Ryan, *Application of the Public-Trust Doctrine and Principles of Natural Resource Management to Electromagnetic Spectrum*, Mich. Telecomm. & Tech. L. Rev. 10, no. 2: (2004) 285–372. Reprinted by permission of Patrick S. Ryan and the Michigan Telecommunications & Technology Law Review.
- Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 U.C.L.A. L.Rev. 1061 (2005). Reprinted by permission of Kristen A. Carpenter and the University of California at Los Angeles Law Review.
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- Craig M. Kauffman and Pamela L. Martin, *How Courts Are Developing River Rights Jurisprudence: Comparing Guardianship in New Zealand, Colombia, and India* 20 Vermont J. Envtl. L. 261 (2019).

Preface to the Fourth Edition¹

We welcome to this endeavor a new co-author, John Dernbach, the principal analyst of the Pennsylvania Constitution's public trust doctrine and a pathbreaking advocate as to how the U.S. can effectively respond to the challenges of climate change. John is principally responsible for new material on express constitutional trust rights in chapter 4's overview of the constitutionalization of the public trust as well as updating the material on the fast-moving developments in the Pennsylvania courts' interpretation of that state's public trust doctrine.

In addition to the completely new chapter 4, the fourth edition contains quite a bit of new material in chapter 1 outlining the origins, application, and force of the public trust doctrine. There is also considerable new case law applying the public trust doctrine to the atmosphere to combat climate change in chapter 11 and the burgeoning public trust abroad in chapter 12. But there are additions (and a few subtractions) in all chapters as well as a new Afterword in chapter 14.

The pace of events in the public trust world showed no signs of abating in the five years since the publication of the third edition of this casebook. That is perhaps not surprising, given that individual sovereigns decide the scope, application, and meaning of their doctrines. As a result, there are over fifty different versions of the public trust doctrine in the United States, and many more abroad. Yet all share some commonalities: they demand scrutiny of government decisions to privatize or develop public resources, making public access to, use of, and protection of these resources a governmental obligation—for the benefit of current and future generations. Public trust principles of close judicial review, public enforcement, and concern for the rights of future generations inform related doctrines like the right to a clean environment, rights of nature, customary rights, and public dedication. These public trust principles have received some constitutional entrenchment, and we feature the movement toward constitutionalization in a new chapter in this casebook.

Perhaps the most consequential recent case law concerns the effort of youth plaintiffs to expand trust protection to the atmosphere and thereby require governments

1. The editors have altered punctuation and formatted articles, opinions, and excerpts to be consistent with the greater text; thus, excerpts may appear different than their original forms.

to develop viable plans to curb atmospheric greenhouse gas emissions. That effort has met with a mixed response in U.S. courts but has enjoyed considerable success in other countries. We portray both the successes and the setbacks in chapter 11 of the casebook. The internationalization of the trust concept has been flourishing, as we report in chapter 12.

The importance of the public trust doctrine at the close of the first quarter of the 21st century in the U.S. has grown in light of a sustained attack on the regulatory system, including from the Roberts' Supreme Court. As this edition goes to press, the Trump administration is promising regulatory rollbacks of unprecedented scope. If Congress agrees, the body of environmental law that has existed for over the last half-century will be largely dismantled. Federal initiatives to combat climate change will surely be scuttled. In the current political climate, the public trust doctrine—largely a state doctrine, interpreted by state courts—offers a practical and useful response to the threats these deregulatory efforts pose. We hope that students invoke public trust law in their careers as lawyers help create a future in which trust resources, including the atmosphere and the climate system, are protected for the benefit of all, including those yet to be born. We hope, too, that they use the public trust doctrine to help avoid a future in which privatization of trust resources leads to monopoly control and climate catastrophe.

MCB

MCW

JCD

January 2025

Preface to the Third Edition

The public trust doctrine continued to evolve in the five years since the second edition was published. Among the more notable new court opinions was the Pennsylvania Supreme Court's decision in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, recognizing the inherent nature of the public trust doctrine in the state's constitution and applying it to funding decisions; the California Court of Appeal's decision in *Environmental Law Foundation v. State Water Resources Control Board*, extending the public trust to groundwater extraction; the North Carolina Court of Appeals' decision in *Nies v. Town of Emerald Isle*, recognizing the doctrine's application to North Carolina beaches; and *Juliana v. United States* in which a federal district court found a constitutional right under the public trust principle and the Constitution's due process clause to a "climate system capable of sustaining human life;" but a divided panel of the Ninth Circuit dismissed the case on redressability grounds.

Even more startling developments occurred beyond the boundaries of the United States. Perhaps the most noteworthy was the Dutch Supreme Court's affirmation in *Netherlands v. Urgenda Foundation* (p. 417), finding a sovereign duty of care to reduce greenhouse gas emissions in compliance with international climate obligations. Other important court decisions were handed down in Pakistan, Colombia, and more cases in India. A potential pathbreaking decision is the Constitutional Court of Colombia's Atrato River opinion, extending constitutional protection to biodiversity and indigenous culture.

These and other developments are examined in this edition of the casebook. Its publication comes during a time when the world is in the throes of a global pandemic and intensifying climate disasters, and when communities in the United States and around the globe are making renewed demands for justice. In a time of turmoil and transition, the public trust remains an ancient obligation anchoring the fundamental expectations of democracy, ensuring access to and protection of public resources, and providing a steadying force of government accountability. We hope that students of the public trust doctrine will find the third edition to be of value in their study of this dynamic and consequential area of the law.

MCB

MCW

October 2020

Preface to the Second Edition

Our goal in publishing the first edition of this casebook a couple of years ago was to create a systematic approach to the study of the public trust doctrine (PTD), and we think our book has helped to begin the institutionalization of the doctrine in law study.

In this second edition, we have included several significant developments in what is a rapidly evolving body of law. The most notable new decision is *Robinson Township v. Commonwealth*, a decision of the Pennsylvania Supreme Court which has quickly become a foundational decision. We have also included the Wisconsin Supreme Court's opinion in *Rock-Koshkonong Lake District v. Department of Natural Resources*, in which the court narrowly interpreted the scope of that state's PTD, arguably misinterpreting that court's seminal decision of *Just v. Marinette County* in the process. A case which may expand the scope of the PTD in California to groundwater is *Environmental Law Foundation v. State Water Resources Control Board*, although whether California will join states like Hawaii and Vermont that recognize groundwater as a trust resource awaits whether the environmental claimants can prove a link between groundwater pumping and the surface flows of the navigable Scott River.

There have been a considerable number of developments in the cluster of cases that seek to recognize the atmosphere as a trust resource, and we discuss these developments in some detail in chapter 11. A steady stream of case law also continues to arise out of efforts of members of the public to access trust resources, mostly in the context of waterways experiencing monopoly control (chapter 3). We also have updated the text to expand our consideration of the PTD abroad to include considerable case law from Indonesia, a constitutional amendment in Norway, and statutory developments in Britain and the Nordic countries.

There are other changes as well. The above summary reflects only a snapshot of developments in this rapidly expanding area of law. We expect the pace of change to accelerate in the near future, and we pledge to try to keep current with it.

We continue to believe that this course is an ideal upper-level course in environmental law. It offers a common-law-based approach to environmental decision making, a contrast in a field dominated by statutes and administrative regulations. Although there is a role for statutory and regulatory interpretations of the PTD, there

is little doubt that the vibrant center of the PTD lies in a judiciary that understands the importance of trust resources to both present and future generations. That in turn requires courts that are schooled in the doctrine's history, its evolution in other jurisdictions, and the fundamental anti-monopolistic purposes it has always served and continues to serve, including intergenerational equity.

We hope this effort contributes to the evolution of the PTD in the 21st century by educating the next generation of lawyers who must convince judges of the role the PTD can play in a world that is becoming increasingly crowded, experiencing the diminishment of trust resources, and threatened with climate change which will imperil trust resources first.

MCB

MCW

February 2015

Preface to the First Edition

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 less than 500 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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