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Preserving Stream Flows in Montana through the Constitutional Public Trust Doctrine: An Underrated Solution

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COMMENTS

PRESERVING STREAM FLOWS IN MONTANA THROUGH THE CONSTITUTIONAL PUBLIC TRUST DOCTRINE: AN UNDERRATED SOLUTION

Matt Clifford*

I. INTRODUCTION

In the summer of 1994, Montanans were once again brought face to face with the failure of their water laws to protect the state's rivers as functioning natural systems. The situation was both tragic and familiar: Record-low winter snowfalls over much of the state left spring snowpacks in some areas at less than fifty percent of normal.[1] To make things worse, warm spring temperatures and rains melted the snowpack rapidly, causing flows in many rivers to peak well above normal levels and then plummet.[2] By early summer, when agricultural users began making the usual withdrawals to irrigate summer crops, flows in major rivers such as the Big Hole and Clark Fork were at roughly half of normal levels.[3] At about the same time, the rains stopped, causing water levels to drop even further.

By late July, the situation in many streams was critical. The most visible threats occurred in the Ruby River in southwestern Montana, where sediment flushed from the bottom of the empty Ruby Reservoir killed at least 2500 rainbow and brown trout,[4] and in the Big Hole, where low flows threatened a repeat of the disastrous summer of 1988, when the reproductive season of the last remaining population of fluvial grayling in the lower forty-eight states was devastated.[5] Under normal conditions, the trout fisheries of both rivers may take years to recover. Although stopgap

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1. Greg Lakes, *Low Snow Raises Fire Fears*, MISSOULIAN, May 3, 1994, at A1.
2. *Id.* at A10; Bob Anez, *Drought Danger Remains*, MISSOULIAN, May 20, 1994, at B1.
3. Greg Lakes, *Already Montana's Rivers Are Running Dangerously Low*, MISSOULIAN, July 6, 1994, at B1.
4. *Fisheries Fiasco*, MISSOULIAN, September 10, 1994, at B2.
5. Telephone Interview with Pat Byorth, fisheries biologist, Mont. Department of Fish, Wildlife and Parks (June 20, 1995).

efforts by state wildlife officials and some local landowners managed to save the grayling from disaster, their long-term prospects for survival are also uncertain.[6]

The cause of these dewatering problems is also familiar. As it is currently interpreted, the law of Montana, like that of most other western states, gives water users the right to withdraw water with no regard for the effect their actions will have on the condition of the stream, even in times of shortage when withdrawals will essentially dry up a stream altogether.[7] Even when some of the withdrawn water manages to find its way back to the river as underground return flows—often warmed and polluted after percolating through chemical-rich farm soils—it is again subject to recapture and use by downstream irrigators.[8]

This problem, of course, is not unique to Montana. All thirteen arid Western states recognize the prior appropriation doctrine in some form.[9] In these states, including Montana, two major tools have been developed to protect stream flows. The first is instream flow legislation, which in its various incarnations allows rights holders to leave their water in the stream without losing it to other appropriators.[10] The second is a hybrid common law/constitutional remedy called the public trust doctrine.

In Montana, conservation groups have focused their recent efforts on pushing for instream flow laws in the legislature.[11] The primary reasons for this approach are probably practical: the groups may well perceive that the state supreme court is unlikely to render opinions seen as hostile to irrigators,[12] and in seeking legislative instream flow reform the groups

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6. *Id.*

7. *See* A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 5.05(2) (1994). *See also* Deborah Beaumont Schmidt, *The Public Trust Doctrine In Montana: Conflict At the Headwaters*, 19 ENVTL. L. 675, 676 (1989).

8. Baker Ditch Co. v. Dist. Court, 824 P.2d 260 (Mont. 1992).

9. *See* TARLOCK, *supra* note 7, § 5.05(1).

10. Montana has at least two statutory schemes that could be placed in this category. Under one, the state may reserve water for instream flows. MONT. CODE ANN. § 85-2-316 (1993). However, it may only do so prospectively; that is, it may preclude future water rights, but not existing ones. *Id.* Therefore, the law provides no relief to streams that are already over-appropriated. Under another, the state may lease water for instream flows on certain rivers. *See* MONT. CODE ANN. § 85-2-436 (1993).

The Montana Legislature recently expanded the state's leasing scheme, allowing private parties to lease water from irrigators on any stream in the state. Act effective Oct. 1, 1995, ch. 322, 1995 Mont. Laws (allowing an existing appropriative water right to be temporarily changed to instream flow for the benefit of the fishery).

11. Following the election in November 1994, conservation groups dropped plans to introduce a bill in the upcoming legislative session that would have allowed the outright sale of water rights. Instead, the groups planned to direct their full efforts toward a less controversial proposal to expand the state's water leasing program. Telephone interview with Bruce Farling, Executive Director, Trout Unlimited (Aug. 8, 1995). Although these efforts ultimately met with some success, at least one prominent environmental advocate doubts that leasing alone will prove sufficient to guarantee adequate summer flow levels in Montana streams. *Id.*

12. *See, e.g.*, Brian Morris, *When Rivers Run Dry Under a Big Sky: Balancing Agricultural*

can ally themselves with market-oriented conservatives such as the Political Economy Research Center in Bozeman, thereby tapping a considerable source of intellectual horsepower and rhetoric. In addition, at least one legal commentator has decided that the public trust doctrine in Montana does not provide a basis for the protection of instream flows.[13]

Whatever may be the practical merits of seeking legislative relief for Montana's stream flow problems, as a legal proposition the public trust doctrine deserves a second look. In the first place, interpreting the doctrine to provide some protection for stream flows would be a logical extension of the principles the Montana Supreme Court laid out in several decisions in the mid-1980s. More fundamentally, the doctrine may provide a different and more widespread sort of relief to the state's creeks and rivers than would market-oriented instream flow laws. Ultimately, this is because the two approaches rest on fundamentally different theoretical views of the status of rivers and water in our legal system.

This Comment assesses the prospects for protecting stream flows through the public trust doctrine in Montana. Part II describes the history of the doctrine and its current status in the western states. Part III examines the current state of the doctrine in Montana, including its relationship to provisions in the state constitution as announced by the state supreme court. Part IV briefly analyzes a common objection to the application of the doctrine, that it violates the eminent domain clause of the federal constitution. Finally, Part V responds to claims, often made by economists and economic-minded legal commentators, that market solutions necessarily provide substantively better or fairer allocations of water than do public rights.

II. THE HISTORY OF THE PUBLIC TRUST DOCTRINE

In order to understand the role of the public trust doctrine in modern American law, it is essential to know something of its history. Fortunately, the surge of interest in the public trust doctrine following Professor Joseph Sax's groundbreaking 1970 article[14] has produced a wealth of literature describing and debating the origins and history of the doctrine.[15] Drawing

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Claims to Scarce Water Resources in Montana and the American West, 11 STAN. ENVTL. L. J. 259, 274 n.78 (1992) (noting changes in the Montana Supreme Court after *Galt*).

13. *See* R. Mark Josephson, Comment, *An Analysis of the Potential Conflict Between the Prior Appropriation and Public Trust Doctrines in Montana Water Law*, 8 PUB. LAND L. REV. 81 (1987).

14. Joseph R. Sax, *The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

15. *See, e.g.* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 633-43 (1986). For an exhaustive bibliography of the relevant literature through 1986, see *id.* at 643 n.75.

heavily on this literature, this Comment will briefly trace the history of the doctrine, noting the more controversial points.

A. *Roman and English Law*

Scholars uniformly trace the original germ of the public trust doctrine to Roman law, specifically to a statement in the Institutes of Justinian: "By natural law, these things are common property of all: air, running water, the sea, and with it the shores of the sea."[16] They have debated the significance of this simple statement at length. Some argue that it was meant as an abstract statement of general principle—or even as an idealized description of a hypothetical state of nature[17]—and point out that the Romans allowed the transfer of extensive coastal areas into private hands.[18] Others regard it as an important principle of Roman law, and counter that the Romans never settled the question of who owned ocean and river shores.[19]

In any event, no one disputes that the Roman concept found its way into feudal English law. There, it was used to justify the proposition that the crown held title to the lands beneath all tidal waters, subject to the public's right to use them for navigation, commerce, and fishing.[20] The crown lacked the power, according to this theory, to convey this public right to private holders.[21] Again, two characterizations of this doctrine have emerged. Professor Sax sees it as an extension of Roman and medieval natural law principles protecting public access and use.[22] Richard Lazarus and others take the more cynical view that it was an attempt to expand the reach of the king's taxing authority.[23] Importantly, all agree that the English public trust doctrine was not an *absolute* prohibition on the crown's power of alienation; it could grant title to a private holder if

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16. J. INST. 2.1.1-2.1.6.

17. *See* Patrick Deveny, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13, 26-29 (1976).

18. *Id.* at 33-34.

19. *See, e.g.*, Note, *Private Property Rights Yield to the Environmental Crisis: Perspectives on the Public Trust Doctrine*, 41 S.C. L. REV. 897, 898-99 (1989).

20. *See* TARLOCK, *supra* note 7, §§ 3.09[3], 3.36.5.

21. *Id.*

22. Some note that the public trust doctrine was prevalent in Europe throughout the Middle Ages. For example, Spanish codes and French law provided that "the public highways and byways, running water and springs, meadows, pasture, forests, heaths and rocks . . . are not to be held by lords, . . . nor are they to be maintained . . . in any other way than that their people may always be able to use them." *See* Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 429 (1989) (quoting M. BLOCH, FRENCH RURAL HISTORY 183 (1966)).

23. Lazarus, *supra* note 15, at 635.

Parliament, the people's representative, consented to the transfer.[24] This would later become important to the debate over what role, if any, the doctrine should have in the United States, where the separate voices of the sovereign and the people became merged into a single entity, the state.

B. *Early American Doctrine*

After the American Revolution, the newly independent states became the successors of the crown, and adopted the English common law. Early on, American courts began applying the public trust doctrine, quickly expanding its reach to include all navigable rivers and lakes, not just those influenced by the tide. In *Carson v. Blazer*,[25] for example, the Pennsylvania Supreme Court held that a private owner could not have exclusive rights to fish in a section of the Susquehanna River.[26] Shortly thereafter, in *Arnold v. Mundy*,[27] the New Jersey Supreme Court held that the state could not grant a private party the exclusive right to use oyster beds on tidal lands.[28]

Without a doubt, the seminal case in the history of the American public trust doctrine was *Illinois Central Railroad v. Illinois*,[29] where the U.S. Supreme Court held that Illinois could not grant part of the Chicago harbor to a private railroad.[30] To understand *Illinois Central*, however, one must first understand the "equal footing doctrine," an implied rule of constitutional law which provides that all new states enter the union on a status equal to the original thirteen. The Court first articulated this doctrine in the 1845 case of *Pollard's Lessee v. Hagan*,[31] where it ruled that the federal government holds the land beneath navigable waters in U.S. territories in trust for the benefit of future states. Upon statehood, each state takes title to the land beneath navigable waters within its borders, just as the original colonies took title to the land underlying their waters from the English crown after the revolution.[32] If the federal government were allowed to retain title after statehood, the new state would be denied an important benefit upon entering the union that the original thirteen had received.[33]

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24. *See, e.g.*, Deveny, *supra* note 17, at 49; Sax, *supra* note 14, at 476.
25. 2 Binn. 475 (Pa. 1810).
26. *Carson*, 2 Binn. at 484.
27. 6 N.J.L. 1 (N.J. 1821).
28. *Arnold*, 6 N.J.L. at 78, 93.
29. 146 U.S. 387 (1892).
30. *Illinois Cent.*, 146 U.S. at 460.
31. 44 U.S. (3 How.) 212 (1845).
32. *Pollard's Lessee*, 44 U.S. (3 How.) at 230.
33. *Id.* More specifically, *Pollard* is based on the theory that the federal government could not hold clear title because the Constitution does not grant it sovereign power over lands. When the Court

In *Illinois Central*, the Illinois Legislature passed a law granting a large part of the bed of Lake Michigan to the railroad, then passed a second law repealing the grant.[34] The issue before the U.S. Supreme Court was whether the second law was an unconstitutional impairment of a contract obligattion. The Court upheld the second law, on the grounds that the original conveyance was void.[35] The Court found that Illinois did not hold absolute title to the bed of the harbor, but instead held it in trust for the benefit of its people.[36] Any state attempt to sell off the lands was void to the extent it hindered the purpose of the trust, namely public use by the citizens of Illinois.[37] Because the transfer would remove a section of the harbor from public navigation, the Court held, it was void.[38]

Illinois Central firmly established in American law the proposition that certain waters are inherently important to the public, and therefore their removal from the public domain requires something more than the ordinary majoritarian workings of state government. Because the public's interest in waters was primarily focused on their use as highways for navigation and commerce, courts portrayed the public trust doctrine in the context of easements.[39] As waterways took on new meaning and importance to American society, however, this began to change.

C. *The Modern Public Trust Doctrine*

In 1970, Professor Joseph Sax rekindled interest in the public trust doctrine with the publication of his now-famous article in the *Michigan Law Review*.[40] If the success of a law review article can be measured by the sheer number of court decisions it inspires, this article is surely one of the most successful in history. On its heels came a number of court decisions expanding the scope of both the waters covered by the public trust doctrine and the uses the doctrine protects.[41] Courts have found that it applies to all waters, not just navigable ones,[42] and that it protects not

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later acknowledged federal plenary power over public lands, it found it necessary to distinguish between submerged lands, to which the federal government retained title, and dry lands, title to which passed to the states. *See* TARLOCK, *supra* note 7, § 8.02[5]-[6].

34. *Illinois Cent.*, 146 U.S. at 405 n.1, 410-11.

35. *Id.* at 460.

36. *Id.* at 454-55.

37. *Id.* at 455-56. The Court held the trust purposes to be the traditional triad of navigation, commerce, and fishing. *Id.* at 452.

38. *Id.* at 459-60.

39. *See, e.g.*, Drake v. Hudson River R.R., 7 Barb. 508, 547 (N.Y. App. Div. 1849) (holding that railroad has right to use public street as a route).

40. Sax, *supra* note 14.

41. The most exhaustive list of modern public trust cases through 1986 is found at Lazarus, *supra* note 15, at 644 n.77.

42. *See, e.g.*, Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 721 (Cal. 1980) [herein-

just the traditional triad of navigation, commerce, and fishing, but also wildlife, scenic beauty, and other environmental attributes.[43]

Several modern cases have pitted the public trust doctrine directly against appropriative water rights. The best known of these—and the one in which the doctrine has been given the greatest effect against appropriative rights—is a California decision, *National Audubon Society v. Superior Court (Mono Lake)*.[44] In that case, environmental groups challenged the extent of the city of Los Angeles's right to divert water from four inlet streams of Mono Lake.[45] Although these tributaries are nonnavigable, the city's diversions had contributed to serious drops in the level of the lake, which is navigable.[46] The California Supreme Court recognized that the city had acquired a right to divert the water, but also found that the state had a continuing duty, founded in the common law public trust doctrine, to supervise the allocation of waters held in trust for the public.[47] Because the state had failed to consider the effects on wildlife and scenery when it granted the city's water rights in 1940, the court ordered it to reconsider the rights, taking these values into account.[48]

Mono Lake is a landmark case in several ways. First, it stands as a recognition that the public trust doctrine can apply to nonnavigable tributaries, in effect recognizing that watersheds are interconnected systems rather than mere isolated bodies of water of varying size and importance. Second, the *Mono Lake* court required, for the first time, a re-examination of previously existing water rights to allow for modern trust values. Third, the court suggested a workable remedy for public trust cases—remand to an administrative agency—which allows a branch of government with undeniably greater technical expertise than the judiciary to determine the appropriate balance of rights. This sort of "procedural" remedy has become a trend in modern public trust cases.[49]

In the arid West, where local lore often associates water disputes with violence, the modern public trust doctrine has naturally generated a good deal of controversy. Its advocates champion it as a means to prevent vital

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after *Mono Lake*] (trust applies to non-navigable tributaries of navigable waters); Montana Coalition for Stream Access, Inc. v. Hildreth, 684 P.2d 1088 (Mont. 1984) (doctrine applies regardless of ownership of underlying streambed).

43. *See, e.g., Mono Lake*, 658 P.2d at 720.

44. 658 P.2d 709 (1980).

45. *Mono Lake*, 658 P.2d at 712.

46. *Id.* at 711, 720.

47. *Id.* at 728.

48. *Id.* at 728-29.

49. *See* Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 589-97 (1989).

public resources from being monopolized by an elite few.[50] Its detractors decry it as an unprincipled way to "sacrifice the rights of some to create rights for others."[51] Even the advocates, however, have expressed concern over the curious, quasi-constitutional status the doctrine has seemingly acquired. Why, some have asked, should a creature of the common law be allowed to prevent the democratically elected legislature from alienating public resources, when the legislature ordinarily has the power to change common law rules?[52] This reasoning has led even an enthusiastic environmental advocate such as Michael Blumm to conclude that the doctrine is on truly firm ground only when it has a constitutional basis:

> [T]he common law must be subject to legislative correction. However, the trust may constrain the legislature where it is implied in a state's constitution, and there are some intriguing constitutional possibilities, especially in western states, regarding water.[53]

Montana's constitution is one that contains such possibilities regarding water.

III. THE PUBLIC TRUST DOCTRINE IN MONTANA

In the mid-1980s, the Montana Supreme Court recognized and applied the public trust doctrine in three landmark decisions involving stream access. Importantly, the court based the decisions not on the doctrine standing alone, but also on provisions in the state constitution governing water.

A. *Montana Constitutional Provisions*

The Montana Constitution states that "[a]ll surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."[54] Similar provisions are found in the constitutions of most western states.[55] These provisions have traditionally been read as establishing the prior appropriation system and

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50. *See, e.g., id.* at 598.

51. James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527, 567 (1989).

52. *See, e.g.* Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239, 273-74 (1992) ("Responsible government is constantly changing the allocation of such [public] property and with every change there is a potential public trust cause of action—for what and subject to what rules I cannot determine.").

53. Blumm, *supra* note 49, at 576.

54. MONT. CONST. art. IX, § 3.

55. *See, e.g.*, ALASKA CONST. art. VIII, § 3; WYO. CONST. art. VIII, § 1.

the usufructuary nature of water rights—in other words, as providing that any member of the public may use water, but only if she obtains a water right under the rules established by the legislature.[56] However, western courts have not universally limited the words to this meaning. The supreme courts of New Mexico[57] and Wyoming[58] have read these sorts of provisions as creating a public right to use lakes and streams for recreation. These decisions predate the adoption of the 1972 Montana Constitution by a good many years.

In addition, the Montana Constitution contains language confirming all existing appropriative rights.[59] Presumably, this language elevates existing water rights to constitutional status.[60]

Finally, the Montana Constitution contains a provision that guarantees individuals a right to a "clean and healthful environment."[61] The exact meaning of this language is not clear. Some have regarded it as a mere statement of principle meant to guide the legislature, while others have argued that it creates a substantive, self-executing right.[62] Unfortunately, the Montana Supreme Court has done little to clarify the matter.[63]

B. Curran *and* Hildreth

The Montana Supreme Court first recognized the public trust doctrine in the 1982 case of *Montana Coalition for Stream Access, Inc. v. Curran*.[64] Curran, a landowner along the Dearborn River in central Montana, had attempted to prevent recreationists from floating down the river through his land, claiming that they were trespassers. The coalition sued, claiming a public right to use the river, and won partial summary judgment from the district court.[65] On appeal by the landowner, the Montana Supreme Court ruled for the coalition in a sweeping decision recognizing the public's right to use for recreation all waters capable of such use.[66]

Although the court based its decision on both the public trust doctrine and the constitutional language declaring public ownership of water, the

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56. *See* TARLOCK, *supra* note 7, § 8.04[1].

57. State v. Red River Valley Co., 182 P.2d 421 (N.M. 1945)

58. Day v. Armstrong, 362 P.2d 137 (Wyo. 1961).

59. The constitution provides, "All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed." MONT. CONST. art. IX, § 3(1).

60. *See* General Agric. Corp. v. Moore, 534 P.2d 859, 861-62 (Mont. 1975).

61. MONT. CONST. art. IX, § 1.

62. *See generally* Tammy Wyatt-Shaw, Comment, *The Doctrine of Self-Execution and the Environmental Provisions of the Montana State Constitution: "They Mean Something,"* 15 PUB. LAND L. REV. 219 (1994).

63. *Id.* at 235.

64. 682 P.2d 163 (Mont. 1984).

65. *Curran*, 682 P.2d at 165.

66. *Id.* at 172.

exact relationship between the two is not entirely clear in the opinion. The court began with a detailed analysis of the question of title to the riverbed, concluding that title to the bed vested in the state because the Dearborn was navigable at the time of statehood under the federal log-floating test.[67] Then, citing the public trust doctrine as expressed in *Illinois Central*, the court determined that title to the bed remained in the state.[68] Finally, the court declared that ownership of the river bed was irrelevant to the question of the public's right of use, concluding:

> In essence, the question is whether the waters owned by the State under the Constitution are susceptible to recreational use by the public. The capability of use of the waters for recreational purposes determines their availability for recreational use by the public. Streambed ownership by a private party is irrelevant. If the waters are owned by the State and held in trust for the people by the State, . . . [t]he Constitution and the public trust doctrine do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters.[69]

According to the court, then, its holding rested on both the public trust doctrine and the constitution. But because its discussion of the doctrine is in the section addressing navigability for title, it was not clear that the doctrine was relevant to the state's trust duties in waters when the state did not own the bed under the federal navigability test, although it seemed clear that such waters were governed by the constitution. Did the state have a lesser trust duty in streams when it did not hold title to the underlying land?

The court dispelled any remaining doubts on this question later the same year in *Montana Coalition for Stream Access, Inc. v. Hildreth*,[70] a case with virtually identical facts except that the stream in question was the Beaverhead River in southwestern Montana. The lower court ruled that the defendants could not prevent the public from floating down the river because it was navigable under the federal "pleasure boat" test. In upholding this ruling, however, the Montana Supreme Court rejected the use of such a "narrow" test.[71] The court essentially reiterated its holding in *Curran*, stating:

> As we held in *Curran*, supra, under the Public Trust Doctrine and the 1972 Montana Constitution, any surface waters that are capable of recre-

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67. *Id.* at 166-68. A river is navigable in law that is navigable in fact; the fact that logs have been floated down a river is evidence of navigability. *Id.* at 166.

68. *Id.* at 168.

69. *Id.* at 170.

70. 684 P.2d 1088 (Mont. 1984).

71. *Hildreth*, 684 P.2d at 1091.

> ational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes.[72]

Again, the trust duty seems to be rooted in both the public trust doctrine and the constitution, but the exact contribution of each is unclear. The court was explicit, however, in stating the extent of the public right: The public could engage in water-related recreation up to the ordinary high-water mark, and could go above the high-water mark onto private property to portage around barriers in the least intrusive manner possible. The public could not, however, cross private property to gain access to the stream.[73]

C. Galt

Following *Hildreth*, the Montana Legislature enacted legislation intended to codify the two decisions and further define the scope of the public right.[74] This legislation allowed the public to camp and build duck blinds and boat moorings below the high-water mark, and to hunt big game below the high-water mark under severely limited circumstances.[75] In addition, it required landowners to pay the cost of building portages around artificial barriers in the stream.[76]

This legislation was challenged in *Galt v. State Department of Fish, Wildlife and Parks*,[77] in which the plaintiffs sought a declaratory judgment that the law was unconstitutional as a taking of private property without just compensation.[78] The court reaffirmed its holdings in *Curran* and *Hildreth*, and struck down portions of the statute it felt went beyond those decisions.[79] It rejected the duck blind, camping, and big game hunting provisions as unnecessary to ensure recreational use in all waters.[80] In addition, it found that requiring landowners to pay for portages would go too far and indeed constitute a taking.[81] The court affirmed the balance of the statute. Importantly, the court stressed the need for an approach balancing competing constitutional rights:

> The real property interests of private landowners are important as are

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72. *Id.* at 1093.
73. *Id.* at 1094; *see also Curran*, 682 P.2d at 172.
74. Act of Apr. 10, 1985, ch. 429, 1985 Mont. Laws 805; Act of Apr. 19, 1985, ch. 556, 1985 Mont. Laws 1127 (codified at MONT. CODE ANN. §§ 23-2-301 to 322 (1993)).
75. MONT. CODE ANN. § 23-2-302(2)(d)-(f) (1985).
76. MONT. CODE ANN. § 23-2-311(3)(e) (1993).
77. 731 P.2d 912 (Mont. 1987).
78. *Galt*, 731 P.2d at 913.
79. *Id.* at 915-16.
80. *Id.* at 916.
81. *Id.*

> [sic] the public's property interest in water. Both are constitutionally protected. These competing interests, when in conflict, must be reconciled to the extent possible.[82]

D. *Making Sense of* Curran, Hildreth, *and* Galt

As interpreted in *Curran*, *Hildreth*, and *Galt*, Article IX, Section 3 of the Montana Constitution creates two separate sets of rights to use the water held in trust by the state. The first set consists of the rights of private appropriators, whose limits are set by the rules established by the legislature. The second set consists of the public's rights, the content of which derives from the language of the constitution as informed by the public trust doctrine. When these sets of rights come into conflict, the court must attempt to strike a balance that protects each to the extent possible.

E. *Future Possibilities*

Although the Montana public trust cases are commonly described as dealing with the issue of access,[83] on their face they recognize the public's right not just to pass over the water that it owns, but to *use* it for recreation. Courts cannot simultaneously protect this right and allow appropriative right holders to remove all water from a stream, destroying most of their capacity to support recreational use. For example, one of the most important recreational uses of water in Montana (and one of the oldest protected by the public trust doctrine) is fishing.[84] Even if dewatering is temporary, as it often is, it can ruin a river's potential to sustain a viable fishery. For example, stretches of the Jefferson and Gallatin Rivers, normally fertile streams, are practically fishless because their largest fish are killed off every few years in times of even moderate shortage.[85] A right to use a resource has little meaning unless it carries with it at least a minimal assurance that the resource will not be destroyed.

Although this sort of reasoning may seem radical to some, in fact the Montana Supreme Court has already engaged in it. In *Curran*, it found that the right to recreational use of waters necessarily implies the right to cross private property to portage around barriers.[86] The court balanced the

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82. *Id.*

83. *See, e.g.*, John E. Thorson et al., *Forging Public Rights in Montana's Waters*, 6 PUB. LAND L. REV. 1, 25-27 (1985).

84. In 1987, the estimated recreational value of stream fishing in Montana was over $122 million. MONT. DEP'T OF FISH, WILDLIFE AND PARKS, THE NET ECONOMIC VALUE OF FISHING IN MONTANA 28 (1987).

85. MICHAEL S. SAMPLE, THE ANGLER'S GUIDE TO MONTANA 73, 81 (3d ed. 1989).

86. *Curran*, 682 P.2d at 172. Importantly, this provision appears to apply to natural as well as

public's constitutional right to water use against landowners' real property right to exclude, and found that the latter must yield a small amount to preserve the former.[87]

Similarly, one can argue persuasively that appropriative rights must yield a small amount to protect the public use right. Currently, the aggregate diversions of appropriators effectively destroy the public right to fish in parts of many rivers and creeks. As currently interpreted, the balance of rights is entirely in favor of appropriators, at the expense of the public right. Although some may point out that the public may still fish on other stretches of these streams, or catch a few fish that wander in at times of higher flow, this simply amounts to an observation that private users have not completely destroyed the public right. It does not change the proposition that they have been required to give up nothing, while the public has given up a great deal.

A more equitable balance would require each appropriator to temporarily reduce his diversion in times of shortage. Of course, this idea enrages agriculturalists, many of whom fear losing their ranches as it is. Yet surely some balance is possible. Some rivers are tantalizingly close to levels they need to sustain diverse life, and many are relatively healthy except in years of true drought. For example, the Montana Department of Fish, Wildlife and Parks estimates that the Big Hole grayling need a minimum flow of only 60 cubic feet per second (c.f.s.) in the Wisdom area to prosper, and can survive flows as low as 20 c.f.s. in occasional drought years.[88]

This sort of balancing approach is exactly what the California Supreme Court required in *Mono Lake*.[89] However, its legal basis is different—and perhaps more secure—in that it rests on the state constitution rather than the common law. This distinction is crucial, and a failure to recognize it has led some to conclude that any balancing of public and private water rights is precluded under Montana law.[90] Admittedly, it is uncertain whether the *Mono Lake* analysis could apply directly to Montana

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artificial barriers. The law upheld in *Galt*, MONT. CODE ANN. § 23-2-311 (1985), necessarily contemplated portage rights around both, since it originally required landowners to pay for portages around only artificial barriers. MONT CODE ANN. §§ 23-2-311(1), (3)(e) (1985). Thus, it cannot be argued that portage rights exist only where the landowner has acted to block passage over a stream.

87. *See Galt*, 731 P.2d at 916.

88. Telephone Interview with Pat Byorth, *supra* note 5. In 1988, this stretch of river went dry for several weeks. *Id.*

89. *See supra* notes 44-49 and accompanying text. For a discussion of the effects *Mono Lake* has had on water allocation in California, see Gregory S. Weber, Articulating the Public Trust: Text, Near-Text and Context, (June 1995) (unpublished manuscript, on file with the *Public Land Law Review*).

90. *See, e.g.*, Josephson, *supra* note 13, at 105-08.

law, since the California court based its reallocation of rights on a common-law feature of the California public trust doctrine—the "continuing duty of supervision"—that has no current parallel in Montana, and which would arguably be foreclosed by Article 9 of the Montana Constitution, which affirms existing water rights.[91] However—and again, this is crucial—the Montana Supreme Court articulated the public rights set forth in *Curran*, *Hildreth*, and *Galt* as *constitutional* rights. Thus, it is not clear that they should be regarded as poor cousins of appropriative rights, to be automatically trumped in the event of conflict, since both kinds of rights derive from the same source, the Montana Constitution. When one accepts the language of the Montana public trust decisions at face value—that is, as creating a constitutional public trust doctrine—one can argue persuasively that the Montana Constitution does indeed call for some measure of balance.[92]

IV. THE TAKINGS ISSUE

The previous section suggests that appropriators may be required to forego some of the water to which they now consider themselves entitled in favor of public rights. Naturally enough, many have argued that such assertions of public rights to the detriment of private water users constitutes a compensable taking under the Fifth Amendment.[93]

The issue has been debated in the legal literature,[94] but the discussion has been largely a theoretical one about whether such an action *ought* to be considered a taking, since the federal courts have yet to find that it is. The debate has become arguably more relevant following recent turns in federal takings jurisprudence.[95] As this Comment is being prepared,

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91. *See id.* at 106-09; *but see* Department of State Lands v. Pettibone, 702 P.2d 948, 956-57 (Mont. 1985) (in the context of school trust lands, citing *Mono Lake* for the proposition that "anyone who acquires such [trust] property do[es] so subject to the trust").

92. Two further objections to a recognition of public instream rights are likely to be raised. The first comes from a statement in *Curran* that "Curran has no right to control the use of the surface waters of the Dearborn to the exclusion of the public except to the extent of his prior appropriation for irrigation purposes, . . . *which is not at issue here.*" 682 P.2d at 170 (emphasis added). This statement is, on its face, dictum; the appropriative right was not at issue. The second objection comes from *Baker Ditch Co. v. Dist. Court*, which held that return flows must be made available to downstream junior water users if upstream senior water users will not be affected. 824 P.2d 260 (Mont. 1992). This case was decided on a technical point of appropriation doctrine and did not address the issue of public rights.

93. *See, e.g.*, James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENVTL. L. 171 (1987).

94. *See, e.g., id.*; Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473 (1989).

95. *See, e.g.*, Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161 (1990) (holding that denial of a permit for mining on 98 acres of a 1560-acre parcel was a compensable taking); Loveladies

James Huffman and Hertha Lund are preparing to publish an article arguing that recent decisions support the proposition that any alteration to existing water rights is a Fifth Amendment taking.[96]

The traditional analysis in public trust cases is that recognition of the public trust does not effect a taking of private rights because any rights contained in the trust were never part of the landowner's estate to begin with. In *Phillips Petroleum v. Mississippi*,[97] for example, the Supreme Court held that title to certain submerged lands was never vested in the appellant, even though his predecessors in title (and the state) had assumed it was and paid taxes on the lands for more than 150 years. Although Huffman and Lund object to this analysis on fairness grounds, they seem to admit that no court has agreed with them as yet.[98]

To the extent that public rights come from state constitutions, their exercise is not considered a taking because the court is balancing co-equal constitutional rights against each other.[99] Again, Huffman and Lund object that any change in the interpretation of property law should constitute a taking; Huffman has even suggested that a constitutional amendment abolishing the eminent domain clause would be a taking requiring the government to compensate existing property holders.[100] Again, they cite no court decisions that agree with this proposition.

The ability of courts to protect public rights through state constitutions and the public trust doctrine seems especially secure after the 1992 case of *Lucas v. South Carolina Coastal Council*.[101] The *Lucas* opinion instructs courts to look to state property law to determine whether government action has interfered with the reasonable expectations of rights holders and therefore taken their property.[102] Looking to Montana water law, one sees that Montana recognizes and takes seriously the public trust

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Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990) (holding that denial of permit to fill 11.5-acre wetlands was a compensable taking).

96. James L. Huffmann & Hertha Lund, Constitutional Protections of Property Interests in Western Water (January 1995) (unpublished manuscript, on file with author).

97. 108 S. Ct. 791 (1988).

98. Huffman & Lund, *supra* note 96.

99. *See Hildreth*, 684 P.2d at 1094; *Galt*, 731 P.2d at 916. In *Mono Lake*, the analysis was somewhat opposite, but the result the same: the court found that because *neither* the public trust doctrine nor prior appropriative diversions created absolute rights, the state could strike a balance between the two without effecting a taking. *See Mono Lake*, 658 P.2d at 726-27.

100. Huffman, *supra* note 51, at 547 n.84 (1989). *See also* Josephson, *supra* note 13, at 108 (arguing that any change in water allocation effected by the 1972 Montana Constitution would be a Fifth Amendment taking). Yet surely a sovereign people can change the existing scope of property rights through constitutional reformation. If not, the Thirteenth Amendment to the Constitution (abolishing slavery) should have been a very expensive proposition for the federal government.

101. 112 S. Ct. 2886 (1992).

102. *Lucas*, 112 S. Ct. at 2900; *see also* J. Prescott Jaunich, *Post-Lucas Privatization of the Public Trust*, 15 PUB. LAND. L. REV. 167, 168-69 (1994).

doctrine, and that its constitution provides that all water belongs to the state in trust for the use of the people. The Montana Supreme Court, the final arbiter of Montana law, has interpreted this provision as creating public constitutional recreational use rights.[103]

V. PUBLIC VERSUS PRIVATE RIGHTS: WHICH OFFER BETTER PROTECTION?

Even if public rights are a legally plausible source of environmental protection, some argue that they are inferior to laws providing for instream flow rights. These laws allow a rightholder to leave her water in the stream rather than divert it for consumptive use.[104] Some states have enacted such laws, but to date they allow only the state to hold instream rights.[105] Some scholars have suggested taking this concept to its logical conclusion and allowing rightholders to sell their rights to private conservation organizations such as the Nature Conservancy that wish to hold them as instream flows.

This notion of water marketing has found great favor with legal scholars who advocate so-called "free market environmentalism."[106] They argue that environmentalists have been wrong to place so much faith in "top down" public solutions—whether they be legislative ones such as "command and control" environmental laws, or judicial ones such as the public trust doctrine.[107] If the public has developed an increased appetite for nonconsumptive uses of water, they say, fine—but why allow a legislature or judge to guess at the proper balance between public and private demands? Why not instead establish a free market in water rights and let the public put its money where its mouth is? This approach, they argue, will actually lead to more environmental protection, not less, since people tend to take better care of what they own personally than what they hold in common with others.[108] And certainly there is no shortage of environmental groups able to raise money to buy instream rights.[109] On a practi-

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103. *See supra* notes 64-82 and accompanying text.

104. Under current prior appropriation law, of course, water left in the stream is subject to diversion by other water users, and the rightholder who leaves it in the stream risks losing her right to abandonment. TARLOCK, *supra* note 7, § 5.18(1).

105. *See, e.g.*, MONT. CODE ANN. § 85-2-316 (1993); OR. REV. STAT. § 536.325 (1987) (allowing the state to reserve instream water for future uses).

106. *See generally* TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM (1991).

107. *Id.* at 1-23, 112-114.

108. *See id.* at 108-09; Jaunich, *supra* note 102, at 189-95. The notion of the protection afforded through private rights has been heavily influenced by Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

109. *See, e.g.*, ANDERSON & LEAL, *supra* note 106, at 94.

cal level, water marketing is certain to be less controversial than public rights, since existing users need give up water only if they choose to sell.[110]

At a fundamental theoretical level, private rights solutions are based on a particular world view: The natural world consists of a collection of resources that are to be divided up among human users in the most efficient way possible. Leaving water in a stream to preserve the river as a functioning system is just one possible "use" of the water—no better or worse than any other—that some humans might prefer. If those humans truly prefer to have the water used in this way, they will express this preference by paying money to buy the right to use the water in this way. If they cannot raise the money, or are outbid by competing users, it must mean that they did not truly want their use as badly as others wanted theirs. In economic jargon, it would be "inefficient" to give them the water right; that is, it would produce greater happiness in the hands of others.[111]

Many environmental advocates object to this view of the natural world. Instead, they believe that natural systems should be given an inherently higher status than competing human uses.[112] In particular, they decry the use of willingness to pay as the measure of how much environmental protection is justified.[113] Instead, they believe that human actions should be taken with an awareness of their effect on natural systems, and should be tailored so as not to destroy those systems.[114] To such advocates, public rights offer important advantages over private ones: First, they apply in all areas, not just those in which a number of humans hap-

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110. Of course, private rights schemes are not without controversy. Most notably, agricultural interests oppose them because they might alter the traditional agricultural character and economy of entire regions. *See, e.g.*, Morris, *supra* note 12, at 286 n.125.

111. *See* ANDERSON & LEAL, *supra* note 106, at 14-15 (arguing that lack of a market system leads consumers to demand "too much" protection for the Arctic National Wildlife Refuge). *See also* Jaunich, *supra* note 101, at 190-91.

112. The seminal figure in this line of thought is Aldo Leopold. *See, e.g.*, ALDO LEOPOLD, A SAND COUNTY ALMANAC (1966). *See also* Charles F. Wilkinson, *Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine*, 24 LAND & WATER L. REV. 1 (1989).

113. Professor Mark Sagoff has articulated a particularly compelling attack on the notion of willingness to pay as a catch-all measure of public resolve. He posits that when people express political views they act in the role of "citizens," as opposed to the quite different role they play as "consumers" in the marketplace. To measure the political will of citizens by the willingness to pay they express as consumers is to commit a "category mistake"—that is, to compare apples and oranges. *See* MARK SAGOFF, THE ECONOMY OF THE EARTH 92-95 (1988). Other attacks on willingness to pay focus on the sometimes considerable difference between what people are willing to pay to obtain a new benefit and what they will pay to keep a benefit they already have. This discrepancy suggests that the notion of willingness to pay is determined more by the existing distribution of resources than anything else. *See id.* at 185 n.24.

114. *See* Mark Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205 (1974).

pen to be interested at a given time. Moreover, they reflect the public's reasoned collective expression of what rights ought to be, rather than simply a measure of the shifting whim of consumer demand.[115] Finally—and this is crucial—they represent a formal acknowledgment by the state government that it considers its waters to be more than mere spoils to be divided up among private parties. It is impossible to know the full effect such an acknowledgment has on shaping public attitudes, but it may be considerable.[116]

Theory aside, what sorts of environmental relief would private and public rights solutions provide? Private rights would certainly provide relief on large, well-known streams that currently receive heavy human use. For example, fly-fishing organizations such as Trout Unlimited—surely among the major interested conservation groups—tend to focus their attention on certain sections of major streams such as the Big Hole, Bitterroot, and Madison Rivers. These stretches would likely be protected, as would those containing well-known "poster child" species such as the fluvial grayling. But would anyone protect the myriad smaller creeks where only a few solitary fishermen go, or where no one currently goes because they are usually dried up and no one is used to thinking of them as fisheries at all?[117] If not, says the market, then good—protecting these streams would not be efficient. But conservationists may not be satisfied with this answer.

Public rights, on the other hand, seem much better poised to provide widespread protection of stream flows. The flow of virtually every stream in the state is monitored by irrigation districts,[118] and the state Department of Fish, Wildlife and Parks has extensive knowledge of what conditions fish and other animals need to survive. This knowledge could be harnessed to determine what minimum summer levels are necessary to preserve the public right, and which irrigators would be required to forego how much water in the adjudication process to guarantee these levels. This might well lead to the preservation of all, or most, of the state's river

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115. *See* SAGOFF, *supra* note 113, at 51-57. Free market advocates belittle such notions as thin disguises for the public's real motivation: greed. For example: "Why not pay? . . . [t]he only explanation is that it is expensive to pay and we would rather get our public benefits for nothing." Huffman, *supra* note 93, at 572.

116. *See* Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936 (1991). "[P]rivate preferences and public values are not static, but rather partially forged by the ongoing content and experience of public policy itself." *Id.* at 937.

117. For a comprehensive catalogue of such streams—whether healthy, damaged, or destroyed—see JOHN HOLT, A MONTANA FLYFISHING GUIDE (1995).

118. Admittedly, the current system of data collection would have to be greatly expanded, since Montana does not require appropriators to install measuring devices on their individual diversions. *See* Morris, *supra* note 12, at 292 n.150.

systems.

VI. CONCLUSION

Whatever the political merits of the public trust doctrine and public water rights in general may be in Montana, as a legal proposition they represent a viable extension of principles endorsed by the state supreme court. Because they are consistent with constitutional principles, and because they may be the best way to preserve and restore the health of the countless streams that are so important to the state and its citizens, public rights should be given a closer look in Montana.