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THE TIMID APPROACH OF THE FEDERAL COURTS TO THE PUBLIC TRUST DOCTRINE: JUSTIFIED RELUCTANCE OR DERELICTION OF DUTY?

Cathy J. Lewis*

I. INTRODUCTION

Environmentalists are all too aware of the failures and shortcomings of federal natural resource preservation, conservation, and management statutes. The narrow scope,¹ limited applicability,² and conflicting mandates³ of these laws render them weak ammunition in the war against destructive resource extraction and development practices. The weaknesses of the federal statutes are exacerbated by defendants' arsenal of litigation

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1. Concededly, the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1543 (1994), is a formidable tool which has halted, at least temporarily, multi-million dollar projects and industrial practices. *See, e.g.*, *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 172 (1978) (halting a nearly completed dam to save listed fish); *Babbitt v. Sweet Home Chapter of Communities for a Great Ore.*, 515 U.S. 687, 695 (1995) (upholding restrictions on logging of old-growth forests where listed birds nest and live); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1056 (9th Cir. 1994) (halting injurious extractive activities until ESA-mandated biological consultation for listed salmon was completed). However, the ESA reaches only listed species. Because so many endangered species are not listed, and because other creatures which arguably deserve protection are not threatened or endangered by ESA standards, the scope of the ESA is quite limited. *See* J.B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different?*, 66 U. COLO. L. REV. 555, 589 (1995) (explaining that the narrow scope of the ESA renders it too "inflexible" to further a comprehensive "biodiversity conservation policy").

2. Federal statutes control only federal lands and resources, or federally licensed or permitted activities on non-federal land. In permitting cases, courts have limited the potential reach of some federal statutes. *See, e.g.*, *California Trout v. Schaefer*, 58 F.3d 469, 474 (9th Cir. 1995) (holding that a canal project needing a federal wetlands permit, required an EIS only for the wetlands, not for the entire project, based on court's interpretation of 16 U.S.C. § 4332(2)(c) of the National Environmental Policy Act (NEPA)).

3. For example, the Federal Land Policy and Management Act (FLPMA) requires the Bureau of Land Management (BLM) to allow resource extraction activities, yet also requires BLM to protect the environment. *See* 43 U.S.C. § 1702(c) (1994) (requiring BLM to allow multiple uses [mining, grazing, etc.] without "permanent impairment of the quality of the environment"). Such conflicting mandates have frustrated environmentalists and courts for decades. *See, e.g.*, *National Wildlife Federation v. Morton*, 393 F. Supp. 1286 (D.D.C. 1975) (FLPMA challenge to off-road vehicle use on federal lands).

strategies, such as challenges to environmental plaintiffs' standing,⁴ and claims of vested property rights to extraction activities.⁵ Plaintiffs are also frustrated by the highly deferential standards of judicial review of agency actions⁶ and the inadequate relief afforded by the federal statutes.⁷

Enter the public trust doctrine. This judicially-created doctrine, with ancient roots, could provide the ammunition a court may use to prevent private control of waters and associated resources that are needed for public purposes.⁸ Once a court characterizes a resource as a public trust resource, the court may apply the doctrine to protect that resource from environmentally harmful extraction, harvest, diversion, or other use activities immune to statutory redress. The public trust doctrine may survive challenges to standing, defenses such as estoppel, and may even defeat or limit the property rights of long-time property owners, leaving them no claim for compensation. For these reasons, commentators have argued for nearly thirty years that the public trust doctrine should be used more often by plaintiffs and applied more willingly by courts to halt or mitigate environmentally adverse actions.

Professor Joseph Sax, whose 1970 article⁹ is touted as one of the "most cited" law review articles,¹⁰ was the first to argue for the vigorous application of the public trust doctrine to protect natural resources, when

4. See, e.g., *Lujan v. National Wildlife Federation*, 497 U.S. 871, 900 (1990) (denying standing to plaintiffs who wished to challenge the BLM's land withdrawal review procedures because, *inter alia*, plaintiffs were not threatened by imminent injury).

5. See, e.g., *Utah Int'l, Inc. v. Andrus*, 488 F. Supp. 976, 986-87 (D. Colo. 1980) (holding that mining company had a vested right to a preferential coal lease, and that the new regulations under which BLM withheld the lease were impermissibly applied).

6. See, e.g., *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375-76 (1989) (finding Ninth Circuit's use of the "reasonable" standard, when reviewing an agency's decision not to prepare an EIS, as opposed to the more deferential "arbitrary and capricious" standard, was error).

7. For example, despite its sweeping, pro-environment stated purposes, NEPA has been construed as being only a procedural statute, mandating no substantive outcomes. See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989) (finding that NEPA requires agency to fulfill certain procedural requirements, but once those requirements are satisfied, it is irrelevant that a challenged ski resort will annihilate an entire herd of deer).

8. A. DAN TARLOCK, JAMES N. CORBRIDGE, JR. & DAVID H. GETCHES, *WATER RESOURCE MANAGEMENT* 405 (4th ed. 1993).

9. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970) [hereinafter Sax I]. Sax is presently Counselor to Secretary of Interior Bruce Babbitt, was professor of environmental regulation at the University of California, Berkeley, and has authored more than 100 articles on natural resources and property rights. Joseph L. Sax, *Proposals for Public Law Reform: Sorting Out the Good, the Bad and the Indifferent*, 3 HASTINGS N.-N.W. J. ENVTL. L. & POL'Y 187 n.a (1996).

10. Sax's article was included in a list of the 49 most frequently cited law review articles in the 40 years prior to the publication of the list in 1985. See Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CALIF. L. REV. 1540, 1549-53 (1985). In light of the absence of public trust cases prior to the article, and the steady increase of such cases thereafter, it is certainly true that the article was highly influential.

other claims would not suffice. Following in Sax's footsteps, commentators have argued for the application of the public trust doctrine to solve the problems of nonpoint water pollution, a problem not effectively addressed by existing pollution control statutes,¹¹ and as a means of protecting otherwise unprotected, vulnerable wildlife¹² and fish.¹³ Commentators have urged that application of the public trust doctrine could help save entire aquatic or riparian ecosystems.¹⁴ One author boldly argued that through application of the public trust doctrine, courts may change the very presumptions upon which our property laws are based.¹⁵

But not since noted public lands scholar Charles Wilkinson, in 1980, urged the application of the public trust doctrine by federal courts,¹⁶ has the argument for vigorous federal application of the doctrine been made. Perhaps this is because of the continued reluctance of the federal courts to embrace this doctrine. However, as pressures increase upon those dwindling public resources still under federal ownership or control, there is a need for the courts to accept and apply the doctrine now, more than ever before. Therefore, this paper will take up Wilkinson's torch, and argue that the reluctance of the federal courts is unnecessary.

Because the application of the public trust doctrine is most fully developed in cases involving water rights and the right to use water-related resources, this paper will focus upon that aspect of the doctrine, and leave to others to urge its application in cases involving other resources, such as non-aquatic wildlife and arid public lands.

Section II of this paper discusses, briefly, the development of the public trust doctrine in the United States. Section III highlights, again briefly, the successful use of the public trust doctrine in state courts to overcome the shortcomings, for environmental plaintiffs, inherent in statutory claims. Section IV argues that in cases challenging a federal agency's approval or licensing of a private activity, federal courts may utilize the public trust doctrine to protect otherwise unprotected, water-related re-

11. See Ralph W. Johnson, *Water Pollution and the Public Trust Doctrine*, 19 ENVTL. L. 485 (1989).

12. See Gary D. Meyers, *Variation of a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723 (1989).

13. See Scott W. Reed, *Fish Gotta Swim: Establishing Legal Rights to Instream Flows Through The Endangered Species Act and The Public Trust Doctrine*, 28 IDAHO L. REV. 645 (1992).

14. See Ralph W. Johnson & William C. Galloway, *Protection of Biodiversity Under The Public Trust Doctrine*, 8 TUL. ENVTL. L.J. 21 (1994).

15. See Timothy Patrick Brady, "But Most of It Belongs to Those Yet to Be Born:" *The Public Trust Doctrine, NEPA, and the Stewardship Ethic*, 17 B.C. ENVTL. AFF. L. REV. 621 (1990) (arguing that the concept of property interests in such resources as fish could not exist in a public trust doctrine society).

16. Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269 (1980).

sources. As a vehicle for the argument, the New World Mine controversy will be used to address the legal principles which have precluded application of the public trust doctrine in some federal cases. Section IV seeks to demonstrate that these principles need not prevent a federal court from applying the doctrine in appropriate cases. Finally, Section V concludes that environmental plaintiffs should more actively urge, and the federal judiciary should more willingly embrace the public trust doctrine to protect valuable public resources.

II. DEVELOPMENT OF THE PUBLIC TRUST DOCTRINE

Early rumblings of the public trust doctrine in the United States could be heard in two early Supreme Court cases, *Martin v Waddell's Lessee*¹⁷ and *Pollard's Lessee v Hagan*.¹⁸ In those cases, the Supreme Court first held that the "absolute right" to navigable waters, and the soils under them, passed to the states upon admission to the union, for the "common use" of the "people."¹⁹

Any doubts about the responsibilities imposed upon, and the powers lodged in, the states by virtue of the states' sovereignty over their waters, were silenced in *Illinois Central Railroad Co. v Illinois*.²⁰ In *Illinois Central*, the Illinois legislature had granted virtually the entire waterfront area of Chicago to the Illinois Central Railroad. Later, having second thoughts, the legislature sought to rescind the grant, and the lawsuit ensued. The Court found that the state held title to the land under Lake Michigan in trust for the people, so that the people might navigate and fish upon the waters.²¹ Thus, the Court held that the state could not convey the lands in such a manner that the public's right of access was destroyed. The state could, however, convey parcels of trust land to private individuals, but only if the effect of the conveyance was to enhance the public's rights.²² The doctrine, as stated by Justice Field, made clear that the states may only "use or dispose of" the trust land "when that can be done without substantial impairment of the interest of the public in the waters"²³

After *Illinois Central*, the public trust doctrine languished for about fifty years.²⁴ Beginning in the 1940's, the doctrine re-emerged, always

17. 41 U.S. (16 Pet.) 367 (1842).

18. 44 U.S. (3 How.) 212 (1845).

19. *Martin*, 41 U.S. at 410 (as to the original 13 states); *Pollard's*, 44 U.S. at 229 (as to subsequently admitted states).

20. 146 U.S. 387 (1892).

21. *Id.* at 452.

22. *Id.* at 452-53.

23. *Id.* at 435.

24. No public trust cases were reported from 1893-1944.

based on state common law, and always in its traditional form.²⁵ Finally, after the California Supreme Court tested the outer bounds of the doctrine, and especially following the publication of Joseph Sax's influential article,²⁶ the doctrine was creatively applied in state and federal courts. Sax, relying on *Illinois Central*, argued for an expansive version of the doctrine. He argued that when

the government granted to some private interest the authority to make resource-use decisions which may subordinate broad public resource uses, a court might appropriately interpose a flat legal prohibition on the ground that the state has divested itself of its general regulatory power over a matter of great public importance.²⁷

Urged on by environmental plaintiffs, a handful of federal and many state courts embraced Sax's argument, and the era of the modern public trust doctrine began.

III. THE STRENGTH OF THE PUBLIC TRUST DOCTRINE IN STATE COURTS

Beginning in the 1970's, case reporters began to fill with decisions of the states' highest courts fleshing out the modern public trust doctrine. Plaintiffs successfully invoked the doctrine time and time again to stave off the greedy or harmful proposed uses of state water, waterbodies, watercourses, and their related resources. As developed, the doctrine proved to be an effective tool for judicial oversight and mitigation of the environmentally harmful actions of private interests and complacent state agencies.

In 1971, the California Supreme Court boldly and expansively interpreted the doctrine in *Marks v Whitney*.²⁸ In *Marks*, the court held that the filling and development of tidelands, granted to the defendant by the Governor in 1874, did not extinguish the public trust easement. Instead, the land remained encumbered with the servitude to the extent necessary to allow public access to the tidelands.²⁹ What was remarkable about the case was the court's broad-minded statement that the public trust doctrine

25. From 1945 to 1970, the application of the public trust doctrine was quite consistent, if mundane, for the courts did not extend the doctrine's reach. See, e.g., *Niagara Falls Power Co. v. Duryea*, 57 N.Y.S.2d 777, 787 (N.Y. 1945) (finding trust allowed state to charge a private power company for the water it used, without disrupting a vested property right); *Crary v. State Highway Comm'n*, 68 So. 2d 468, 471 (Miss. 1953) (state may build bridge over landowner's oyster bed without effecting a taking because, even though oyster farming was a public use, the bridge was an "additional" public use).

26. Sax I, *supra* note 9; see also *supra* note 10.

27. Sax I, *supra* note 9, at 562.

28. 491 P.2d 374 (Cal. 1971) (en banc).

29. *Id.* at 380.

protects recreational, ecological, and preservation values in tidelands, not merely fishing and navigation rights, as the more limited, traditional view has held:

The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another.³⁰

Building upon the concepts developed in *Marks*, the most well-known and influential of all state public trust cases is *National Audubon Society v Superior Court of Alpine County*.³¹ The City of Los Angeles had diverted water from the eastern slope of the Sierras to such an extent that the water level of the ecologically unique Mono Lake had dropped dramatically. The drop substantially increased the salinity of the lake, turned islands into peninsulas, and otherwise harmed this important nesting and feeding sanctuary for migratory birds.³² The plaintiffs challenged the magnitude of the state's grant of water appropriation rights to Los Angeles. The California Supreme Court found that the public trust doctrine required the state to continuously manage and protect its navigable waters and the lands beneath, and that the doctrine prevented Los Angeles from claiming a vested right to appropriate water, leaving the city without a claim for a compensable taking.³³ Finally, the court held that the public trust doctrine required the lower court, in deciding the amount of water to be diverted from Mono Lake, to balance the needs of Los Angeles and the needs of the lake ecosystem.³⁴

National Audubon opened the floodgates for the public trust doctrine, and the case is cited in nearly all subsequent public trust cases. Almost every state has articulated some version of the doctrine, and many states have enshrined the public trust doctrine in their constitutions³⁵ or statutes.³⁶ State courts rely upon these proclamations or upon a common law

30. *Id.*

31. 658 P.2d 709 (Cal. 1983) (en banc).

32. Nests became vulnerable to predation when land bridges to the islands were formed, and fish, insects, and other aquatic life were perishing from the increased salinity. Beyond that, the surface area of the lake had greatly diminished. *Id.* at 711.

33. *Id.* at 723-24.

34. *Id.* at 732.

35. See, e.g., ALASKA CONST. art. VIII, § 3 (providing that wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for their common use); LA. CONST. art. IX, §§ 1, 7 (requiring state to protect, conserve, and replenish all natural resources, including the wildlife and fish of the state, for the benefit of its people).

36. See, e.g., N.C. GEN. STAT. § 113-133 (1995) (providing that the enjoyment of the state's resources belongs to all of the people of the state); see also *Ravalli County Fish & Game Ass'n. v. Montana Dept. of State Lands*, where the court found, based on Montana's Environmental Policy Act,

articulation of the doctrine, when no state statute or constitution includes the concept.

Subsequent to *National Audubon*, a California court was again called upon to settle a dispute over the diversion of water from Mono Lake. In *California Trout, Inc. v. California Water Resources Control Board*, the court broadened the application of California's public trust doctrine by requiring a reduced diversion of water from Mono Lake's feeder streams, even though the streams were not legally navigable.³⁷ The court rejected the defendants' argument based on the traditional view of the doctrine as covering only navigable streams or coastal water bodies influenced by the tide.³⁸ Moreover, the court held that a statute of limitations may not bar a public trust claim "for the same reasons that one may not acquire an interest in public lands by means of adverse possession."³⁹ The court stated that this concept also applied to the defense of estoppel as against the state, because "[t]he public is not to lose its rights through the negligence of its agents"⁴⁰

Other states' courts have built upon the foundation laid by California. The Idaho Supreme Court utilized the equal access power of the public trust doctrine in *Kootenai Environmental Alliance v. Panhandle Yacht Club*.⁴¹ The court held that the public trust doctrine provided the plaintiffs with the grounds to challenge the state's grant of a permit to build an exclusive club on the shores of Lake Coeur d'Alene. Applying the language of *Illinois Central*, the court articulated a test for the validity of a grant of trust property: the grant must "aid navigation, commerce, or other trust purposes," and must not "substantially impair the public interest in the lands and waters remaining."⁴² The test establishes "the outer boundaries of permissible government action with respect to public trust resources."⁴³ Ultimately, the court found the yacht club passed the two-part test, but cautioned that "the grant remains subject to the 'public trust,'" which allows the state to determine "in the future that this conveyance is no longer compatible with the public trust."⁴⁴ Thus, no vested right to any per-

which places a trust duty on state agencies to protect the environment, that the state must consider the harm to wild sheep when deciding whether to grant a permit allowing potentially disease-carrying domestic sheep to graze near wild sheep on state forest lands. 903 P.2d 1362, 1368 (Mont. 1995).

37. 255 Cal. Rptr. 184, 211, 213 (1989) ("[P]ublic trust interest pertains to non-navigable streams which sustain a fishery.").

38. See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988) (describing the traditional view).

39. *California Trout*, 255 Cal. Rptr. at 211.

40. *Id.* at 212 (quoting *People v. Kerber*, 93 P. 878, 879 (Cal. 1908)).

41. 671 P.2d 1085 (Idaho 1983).

42. *Id.* at 1089 (quoting *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 452 (1892)).

43. *Id.* at 1095.

44. *Id.* at 1094, 1096.

mitted use exists in such property

In another Idaho case, *Selkirk-Priest Basin Association v Andrus*, the court held that the public trust doctrine conferred standing to an environmental group to challenge a timber sale on state forest lands, on the grounds that the sedimentation created by the logging would harm a creek bed and its fish spawning grounds.⁴⁵ This was significant because the court denied standing to the same group based on their asserted status of state school trust land beneficiaries.⁴⁶ Moreover, there was apparently no statute upon which the plaintiffs could have relied.

In a remarkable case from Wisconsin, that state's supreme court held that the public trust doctrine allows the state to protect lakeside ecology.⁴⁷ In *Vander Bloemen v Wisconsin Department of Natural Resources*, the state prevailed over a lakeside owner who challenged past, concededly illegal acts of the state Department of Natural Resources in raising the lake's water level. The court acknowledged that the raised water level had harmed the owners' property. Nonetheless, because the lakeside ecosystem had matured around the new, higher water level, the court held that the state, as fiduciary, properly protected the lakeside environment by maintaining the raised water level.⁴⁸

More recently, in *Aspen Wilderness Workshop v Colorado Water Conservation Board*, the Colorado Supreme Court held that the state's trust duty required the Water Conservation Board to appropriate instream water flows sufficient to preserve the natural environment of Snowmass Creek. Moreover, the state could not allow any needed water to be appropriated by a ski resort for snow-making purposes.⁴⁹

These are but a select few of the hundreds of state cases developing and applying the public trust doctrine to protect ecologically sensitive water-related resources. Unfortunately, the doctrine has not fared as well in the federal courts.

IV THE CHECKERED PAST OF THE PUBLIC TRUST DOCTRINE IN FEDERAL COURTS NEED NOT PORTEND THE FUTURE

Although state courts have developed a formidable body of public trust doctrine common law, the federal courts have not. In only a handful of published cases have federal courts been willing to find a public trust

45. 899 P.2d 949, 953-55 (Idaho 1995).

46. *Id.* at 952 (finding only schools or school districts had standing to challenge the administration of school endowment trust lands).

47. See *Vander Bloemen v. Wisconsin Dep't of Natural Resources*, No. 95-1761, 1996 WL 346266 (Wis. App. June 26, 1996).

48. *Id.* at *2 ("Past illegalities do not matter if the [altered] lake level is within the current public interest.").

49. 901 P.2d 1251, 1257 (Colo. 1995) (en banc).

duty on the part of a federal agency or official. Courts generally give one of two reasons for their unwillingness to find such a duty. Some have cited preemption as the reason, finding that the area of law had been wholly occupied by the numerous federal environmental and natural resource preservation and management statutes.⁵⁰ Others view the doctrine as being more appropriate for state court consideration, or are otherwise reluctant to develop federal common law.⁵¹ It is likely that these decisions have chilled plaintiffs who might otherwise bring such a claim in federal court. Whether that is the reason or not, the doctrine has languished in that venue.

The reluctance on the part of the federal courts to embrace the public trust doctrine is not warranted. There are many areas which have not been wholly occupied by federal statutes to the extent that the doctrine is preempted. In water rights battles, for example, no existing statute addresses the harm which may result from over-appropriation. In challenges to the development of waterfront property, no statute will necessarily give the agency the clout it needs to refuse a permit which impedes the public's access or beneficial use of the waters.

Furthermore, the finding of a duty on the part of a federal agency is entirely appropriate and a proper complement to existing state law where the threatened harm is not addressed by a state resource protection statute. In cases where state agencies are not involved, and where a harm will result unless a federal agency steps in, no interference with the state's interests will result; thus, no abstention is warranted. The citizens of the various states are all U.S. citizens as well, and the federal government owes them a duty to step in where all other legal devices have failed to protect their federal trust resources. The federal courts have a duty to ensure that this federal trust is properly fulfilled.

There are two ways a federal court may apply the public trust doctrine. First, in a diversity suit, the court may apply the appropriate state's common law. This is not problematic, and should raise no objections. In contrast, the second way a federal court may apply the public trust doctrine—by fashioning federal common law—would raise objections on a variety of grounds.

A. Application of State Public Trust Law by Federal Courts in Diversity Cases

Application of the public trust doctrine by federal courts sitting by diversity would not generally be problematic. The court simply applies the

50. See *infra* notes 109-10 and accompanying text.

51. See *infra* note 126 and accompanying text.

state's version of the public trust doctrine.⁵² The duty of the federal courts to apply state law is so well settled, no viable objections could be raised other than a challenge to the court's choice among state law. Of the federal courts which have heard public trust doctrine claims, most have been cases of this nature.⁵³

One such case was *Bunch v Hodel*,⁵⁴ where the United States was called upon to defend its actions pursuant to a state lease. The lease allowed the U.S. Fish and Wildlife Service to draw down the water level of a wildlife refuge lake to improve the lake's ability to support aquatic wildlife. The court was not called upon to apply a federal trust doctrine, but rather held that the state did not violate the state's public trust duties in allowing the draw-down. In fact, the court found that the draw-down properly protected public trust interests.⁵⁵

Even in states without a fully developed public trust doctrine, a federal court may still apply state law by predicting how the highest state court would decide the issue.⁵⁶ Cases requiring the court to apply state law are the easy calls, requiring only that the facts of the case raise a public trust issue under state law. Not as easy is the application of a public trust doctrine resting entirely upon federal law.

B. Application of the Public Trust Doctrine Through the Development of Federal Common Law

There are compelling reasons for the development of a federal public trust common law in cases raising a federal question. Where, under federal statutory law, federal agencies are (or feel) powerless to withhold approval of harmful resource use or extraction practices, the doctrine could give the agency the authority it needs to forbid or limit the proposed use (or the authority the court needs to uphold the plaintiff's demand that the federal agency do so). However, the fashioning of federal common law often meets with opposition, and there are other principles of federal jurisdiction

52. See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

53. See, e.g., *Maryland Dep't of Natural Resources v. Amerada Hess*, 350 F. Supp. 1060, 1065-67 (D. Md. 1972) (holding that state, as trustee, may sue for injury to state waters caused by oil spill); *Capano v. Borough of Stone Harbor*, 530 F. Supp. 1254 (D.N.J. 1982) (holding Borough violated state public trust doctrine by allowing nuns to swim at beach when other members of public were not allowed to swim). But see *Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652, 671 (1st Cir. 1980) (reversing similar holding and declining to decide case on public trust doctrine grounds where recovery on statutory grounds was possible).

54. 793 F.2d 129 (6th Cir. 1986).

55. *Id.* at 133-34.

56. See *Paul v. Watchtower Bible & Tract Soc'y*, 819 F.2d 875, 879 (9th Cir. 1986), *cert. denied* 484 U.S. 926 (1987) ("Federal courts are not precluded from affording relief simply because neither the State Supreme Court nor the state legislature has enunciated a clear rule governing a particular type of controversy.").

which plaintiffs and the courts must confront.

Application of the public trust doctrine through federal common law would require the court to engage in a two-part process. First, the court must find a trust responsibility on the part of a federal agency or official. Second, the court must flesh out that responsibility with common law rules and standards.

The first step has met with reluctance on the part of the courts. Although some federal judges have been willing to find that a federal agency has a trust duty, the courts have generally done so only where a relevant federal statutory scheme implies or expressly states a trust duty.⁵⁷ Therefore, plaintiffs seeking to assert public trust claims would be wise to find statutory grounds to truss up their argument for a federal trust, especially if the statute expresses or implies a trust-like duty.

Furthermore, if a public trust claim is wedded to a federal statutory claim, the court should not have to entertain objections to its federal question jurisdiction.⁵⁸ Unfortunately, the finding of a duty may be problematic where a duty-invoking statute does not apply to a particular case. In those instances, plaintiffs must argue that there is ample basis for the finding of an independent federal common law trust duty.

Charles Wilkinson posits that the *Illinois Central* Court relied not upon state (specifically, Illinois) law in formulating its opinion, but upon federal law.⁵⁹ Wilkinson concludes that the "Court made it clear that the

57. See *Sierra Club v. Dep't of Interior*, 424 F. Supp. 172, 172-73 (N.D. Cal. 1976) (finding that the National Park Organic Act imposed common law trust responsibilities, analogous to state responsibilities under the public trust doctrine, on the Secretary of the Interior); *Sierra Club v. Andrus*, 487 F. Supp. 443, 449 (D.D.C. 1980) (holding that trust responsibilities are statutory, not common-law based). But see Wilkinson, *supra* note 16, at 292-93 (criticizing the reasoning of the *Sierra Club v. Andrus* court).

58. Without a statutory claim, there could be an intense battle over federal question jurisdiction. For example, in *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372 (1977), the Court overruled prior cases which held that federal law controlled issues of ownership of navigable waters. The Court held that once vested in a state at the time of its admission to the Union, riverbed land is not subject to later defeasance by operation of federal common law, in this case the common law of accretion. *Id.* at 372. Thus, absent some other federal question, a claim of state ownership of formerly federal land would not "arise under" the laws of the United States. *Corvallis Sand & Gravel*, however, is limited to its specific holding, where the Court found it had been error to treat "the equal-footing doctrine as a source of federal common law after that doctrine had vested title to the riverbed in the State." *Id.* at 381. *Corvallis* has no application in a controversy over the use of waters or waterbodies located on federal land, where a wholly federal public trust common law question is raised. Moreover, public trust cases involve many more issues than did *Corvallis*, which focused merely on the amount of land the United States owns. Nonetheless, by tying the federal trust claim to a federal statute, federal question jurisdiction is ensured.

59. Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425, 453-54 (1989) (pointing to the *Illinois Central* Court's use of language of general applicability, such as "a state" throughout the opinion, and to the lack of citation to any state law).

trust derives from federal law and is binding on all states¹¹⁶⁰ Wilkinson discusses two possible federal sources of the doctrine. First, the trust may be viewed as deriving from the various statehood acts, which impliedly conditioned statehood upon the states' promise to keep their watercourses "forever free."⁶¹ Second, Wilkinson argues, the trust may be viewed as deriving from the Constitution, as a parallel to the federal navigation servitude, with both resting upon the Commerce Clause; the trust then passed from the United States to the states as an implied servitude.⁶² Although not argued by Wilkinson, others have cited the Property Clause as an additional basis from which a federal trust duty may be said to derive.⁶³ In *United States v. Ruby Company*, the Ninth Circuit adopted the concept that the public trust doctrine is based in the Property Clause.⁶⁴

In *Kleppe v. New Mexico*, where ranchers challenged the Bureau of Land Management's (BLM) authority to protect free-roaming horses and burros, the Supreme Court confirmed the BLM's power, stating:

[W]hile the furthest reaches of the power granted by the Property Clause have not been definitively resolved, we have repeatedly observed that 'the power over the public lands thus *entrusted* to Congress is without limitations' We have noted, for example, that the Property Clause gives Congress the power . . . to protect [the public lands] from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them.⁶⁵

Thus, there are arguably three separate federal sources for a federal public trust doctrine.

In his article, Wilkinson addresses the argument that the public trust doctrine has its basis in state law, citing language from both old and new cases cited to support that argument.⁶⁶ Nonetheless, Wilkinson concludes that the trust should apply to both the states and the federal government, as both have powerful interests in highly valued natural resources which should be impressed with the trust.⁶⁷

If Wilkinson is correct that there is solid federal grounding for the doctrine, no legal impediment exists to the application of the public trust

60. *Id.* at 454.

61. *Id.* at 456-58.

62. *Id.* at 458-59.

63. The Property Clause states that "Congress shall have the Power to Dispose of and make all needful Rules and Regulations respecting . . . Property belonging to the United States." U.S. CONST. art. IV, § 3, cl.2.

64. 588 F.2d 697, 704 (9th Cir. 1978), *cert. denied*, 422 U.S. 917 (1979). Unfortunately, this concept has not been further developed by the courts.

65. *Kleppe v. New Mexico*, 426 U.S. 529, 539-40 (1976) (emphasis added) (citations omitted).

66. Wilkinson, *supra* note 59, at 459-60.

67. *Id.* at 460-61.

doctrine by federal courts, for a federal question is surely implicated when a federal agency or official is charged with a trust duty. Nonetheless, federal courts, displaying a reluctance for defining the trust concept with federal common law, have not generally entertained claims for a federal public trust doctrine.

The second step in applying the public trust doctrine via federal common law requires the court to fashion that common law, either "whole cloth,"⁶⁸ or by "borrowing" state law.⁶⁹ In the first instance, the same law would apply regardless of the state in which the federal court sat.⁷⁰ In the second instance, the federal common law would vary, depending on each state's articulation of the doctrine. Because the existence and scope of a duty of a federal agency or official would be at issue, based on the interests of the United States in its national trust resources, the latter method should be utilized. The Supreme Court has cautioned that federal common law should be developed in those areas:

concerned with the rights and obligations of the United States [and in cases involving] interstate disputes implicating the conflicting rights of States. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate nature of the controversy makes it inappropriate for state law to control.⁷¹

Moreover, development of federal public trust common law, where valuable federal lands are threatened, fits the criteria set forth by the Court in *United States v. Kimbell Foods, Inc.*.

[F]ederal programs that 'by their nature are and must be uniform in character throughout the nation' necessitate formulation of controlling federal rules. Apart from considerations of uniformity, we must also determine whether application of state law would frustrate specific objec-

68. See Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV., 383, 410 (1964). The fashioning of federal common law whole cloth is thought to be constitutionally prohibited "where both the Constitution and Congress are silent." PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 304 (3d ed. 1994). However, because the roots of the public trust doctrine are believed to reach back to the constitution, or to the State Enabling Acts, then the prohibition would not apply. See *supra* notes 59-66 and accompanying text (discussing Wilkinson's theory that the roots of the doctrine reach back to either the Commerce Clause or the Enabling Acts, and also discussing the Ninth Circuit's Property Clause theory).

69. See, e.g., *DeSylva v. Ballentine*, 351 U.S. 570, 580-81 (1956) (applying state definition of "children" to a Federal Copyright Act question).

70. See LOW & JEFFRIES, *supra* note 68, at 320.

71. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

tives of the federal programs. If so, we must fashion special rules solicitous of those federal interests.⁷²

Based upon these standards, a federal court could fashion federal common law for a federal public trust doctrine. In fact, because of the valuable federal interests at stake in many public resource cases, the fashioning of federal common law would seem to be required.

C. *The New World Mine Controversy as a Model for the Application of a Federal Common Law Trust Doctrine*

As a model for the application of the public trust doctrine by a federal court through the development of federal common law, consider the still-boiling controversy surrounding the proposed New World Mine in Montana. The Canadian-owned Crown Butte Mining Company (Company) planned to develop a huge heap-leach gold mine⁷³ upon lands it privately owned in southern Montana. Those private lands are completely surrounded by federal lands—the Absaroka-Beartooth Wilderness Area to the north, the Gallatin National Forest to the west, the Custer and Shoshone National Forests to the east and southeast, and most importantly, Yellowstone National Park just a few miles to the south.⁷⁴ The Company held patented mining claims under the General Mining Law of 1872.⁷⁵ When the Company proposed to impound vast amounts of heavy-metal laden, sulfuric acid producing mine wastes, or tailings, in the Fisher Creek Valley, re-routing the stream in the process, the mine became a *cause celebre* of local and national environmental groups.⁷⁶

All waters which stood to be fouled by the mining operation flowed into pristine “waters of the United States,” as that term is defined by the Federal Clean Water Act (CWA),⁷⁷ and all waters flowed eventually

72. United States v. Kimbell Foods, 440 U.S. 715, 728 (1979) (citations omitted).

73. A heap-leach gold mine requires the extraction, crushing and processing of vast amounts of ore. The crushed ore is bathed with a chemical, often arsenic, which “leaches” the gold from the ore. This process makes mining profitable in situations where non-chemical mining would not be worth the effort, depending upon the price of gold, of course. See Michael Satchell, *A New Battle Over Yellowstone Park: A Natural Wonder A Mine and an 1872 Law*, U.S. NEWS & WORLD REP., Mar. 13, 1995, at 36.

74. Satchell, *supra* note 73, at 34, 36.

75. Now codified at 30 U.S.C. §§ 22-54 (1994). This of course means that the Company holds title to the surface, as well as to the mineral rights below. See CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER AND THE FUTURE OF THE WEST 48 (1992) (explaining patent process and the rights conveyed by patent).

76. When metal-bearing ore is exposed to air or water, the metals react with the oxygen to form sulfuric acid, which then flows into the nearby streams. When the concentrations are great enough, the acid-laced water kills all living organisms in its path. See Satchell, *supra* note 73, at 36, 41.

77. Under the Clean Water Act (CWA), “waters of the United States” is defined broadly and

through Yellowstone Park. ESA listed Grizzlies inhabit the area, as well as many non-listed but rare species. One of the threatened streams is congressionally designated as Wild and Scenic.⁷⁸

The State of Montana was called upon to issue a permit to allow the discharge of heavy metals, sulfuric acid, and other pollutants into those waters which are under the jurisdiction of Montana's Department of Environmental Quality (DEQ), which administers the CWA in Montana.⁷⁹ However, the environmental groups soon discovered that the Montana Legislature had bent over backwards to allow the New World and other mines to be developed in Montana, by passing a law allowing DEQ to permit "temporary" water pollution.⁸⁰ DEQ's involvement would have allowed the plaintiffs to bring a state public trust claim against DEQ, had DEQ ultimately granted a CWA permit. Under the court's duty to apply state law, the federal court would apply Montana's public trust law in deciding whether DEQ had violated its duty by granting the permit. Having federal question jurisdiction over the case, the court's supplemental and pendant party jurisdiction would extend to the DEQ claim.⁸¹ Furthermore, if the plaintiffs had desired to do so, they could have claimed that Montana's state legislature had violated its state trust duties in passing the temporary water quality laws.

But this case provided the plaintiffs with an opportunity to bring a federal public trust claim. The operation of the huge mine depended upon surface use of National Forest lands; thus, the Forest Service was called upon to approve or disapprove of the company's mining plan.⁸² Furthermore, the Forest Service felt powerless to disapprove the mine plan, citing its limited authority to regulate mining:⁸³ "If the plan is in compliance

includes almost all waters. See *Beartooth Alliance v. Crown Butte Mines, Inc.* 904 F. Supp. 1168 (D. Mont. 1995). Someone wishing to legally discharge pollutants into "waters of the United States" must first obtain a permit from the United States. *Id.* at 1173 (citing 33 U.S.C. §§ 1311(a) & 1342 (1994) of the CWA).

78. See Satchell, *supra* note 73, at 36.

79. See *Beartooth Alliance*, 904 F. Supp. at 1173.

80. See Mont. Code Ann. § 75-5-401 (1996).

81. 28 U.S.C. § 1367(a) authorizes the courts to hear claims that are part of the same case or controversy as a claim within the court's original jurisdiction. The statute also grants jurisdiction over claims that involve the joinder or intervention of additional parties, thereby authorizing what is called pendant party jurisdiction. This statute enables litigants to take advantage of the federal forum and avoid multiple litigation. Joan Steinman, *Supplemental Jurisdiction in § 1441 Removed Cases: An Unsurveyed Frontier of Congress' Handiwork*, 35 ARIZ. L. REV. 305, 306-07 (1993). This would be advantageous for a plaintiff who wishes to charge both state and federal agencies with a violation of their respective trust duties, in a case such as the one involving the New World Mine, where a state and the federal government are involved in approving a project.

82. See *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 582 (1987) (describing Forest Service's role in regulating surface use of a mining operation on National Forest land).

83. The attitude of the Forest Service is not surprising. The Surface Resources and Multiple

with [other federal environmental laws], the Forest Service would have no statutory or regulatory authority to deny the plan."⁸⁴ It looked as though the plans for the mine would proceed, despite the enormous threat that it posed to the unique, valuable resources of Montana and the United States, and despite the panoply of federal statutes. This case powerfully demonstrates the need for a federal public trust doctrine.

Although most of us know that the story ends with a negotiated exchange of yet-to-be approved substitute federal land,⁸⁵ let us imagine a different ending. Let us imagine that the land exchange, which came like a *deus ex machina* to prevent this blight upon the land, had not been proposed, let alone negotiated. Imagine instead, that the environmental groups sued, as they actually did,⁸⁶ based on violations of the CWA. But imagine that they also asserted a claim that the Forest Service had violated its National Forest Management Act⁸⁷ (NFMA) duties, and had violated its NEPA duties as well. And finally, imagine a claim based on the federal common law public trust doctrine.

Could a judge for the Federal District of Montana who heard the statutory claims also entertain the public trust claim? Could she rule that the Forest Service, as trustee for the United States, should not have approved the mine plan? Could the judge rule that the DEQ, based on its state trust duty, should not have permitted the discharge of pollutants into waters of the United States?

Based on the CWA, NEPA and NFMA claims, the court clearly would have federal question jurisdiction over the claims relating to the

Use Act, 30 U.S.C. § 612(b), has been interpreted as "a recognition that mining operations 'may not be prohibited nor so unreasonably circumscribed as to amount to a prohibition.'" *United States v. Doremus*, 888 F.2d 630, 632 (9th Cir. 1989) (quoting *United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1981)). Although a claim could be made that the word "unreasonably" allows the Forest Service a certain amount of discretion in regulating mining, the Forest Service has rarely tested the issue. See WILKINSON, *supra* note 75, at 57-58, 66-67 (describing the perception of powerlessness on the part of the Forest Service and BLM to sufficiently regulate mining activities on federal lands, despite what Wilkinson views as some authority to do so); see also *Granite Rock*, 480 U.S. at 598-99 (Powell, J. concurring in part, dissenting in part) (citing Forest Service handbook and manual for the proposition that the Forest Service must balance the policy of promoting mineral development with its responsibility to reasonably protect the environment). It is precisely in such situations that the additional authority of the public trust doctrine is needed.

84. See GALLATIN NAT'L FOREST AND SHOSHONE NAT'L FOREST, U.S. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, AND MONTANA DEP'T OF STATE LANDS, PRELIMINARY DRAFT ENVIRONMENTAL IMPACT STATEMENT, CROWN BUTTE MINES, INC., NEW WORLD PROJECT, 20 (1995).

85. See Brian Kuehl, *Deal Protects Yellowstone, Cleans Up Site and Ensures Public Participation*, GREATER YELLOWSTONE REPORT, Summer 1996, at 6.

86. See *Beartooth Alliance v. Crown Butte Mines, Inc.* 904 F. Supp. 1168 (D. Mont. 1995). Plaintiffs have agreed to drop the suit when the land exchange is completed. Kuehl, *supra* note 85, at 6.

87. 16 U.S.C. §§ 1600-1614 (1994).

actions of the Forest Service. Thus, the first challenge for the court would be finding a federal public trust duty on the part of the Forest Service. Yet here is presented a perfect opportunity for the court to find such a duty, based on the unique role the Forest Service plays in this controversy, as an agent for the United States. For here, the waters which the tailings impoundment would threaten flow across state borders, from Montana into Wyoming. And all potentially befouled waters flow through federal lands, into a unique federal enclave. Thus, the court could find that the United States re-acquired its trust duty, once abdicated to the states, when it reserved the lands that comprise the national forests and the national parks. Fashioning federal common law is especially proper in this case, where interstate waters are effected, and where the rights and duties of the United States are at issue.⁸⁸

Two federal courts have held that the federal government retained its common law trust duty even after the lands in question passed to the state upon statehood. In *United States v 1.58 Acres of Land*, the court held that the United States and the states are co-trustees of public trust lands, where trust land was subsequently conveyed from the state to the United States through condemnation.⁸⁹ Similarly, in *City of Alameda v. Todd Shipyards Corp.*,⁹⁰ the court held that the United States "may not abdicate the role of trustee for the public land when it acquires land by condemnation."⁹¹

There is no reason why condemnation should delimit the reasoning of *1.58 Acres of Land* and *City of Alameda*. Ownership is ownership, regardless of the means of obtaining it. Thus, the rule that the United States may not abdicate its trust duties over its water-related resources should apply with even greater force when the United States retains ownership of public land through reservation. In our imaginary case, the United States' reserved forest lands and the very first National Park.

In *United States v Burlington Northern Railroad Co.*,⁹² the court declined to grant summary judgment in favor of the defendant, where the United States sought to recover for damages caused by a fire at the Harvard Waterfowl Production Area. Relying upon cases such as *1.58 Acres*, the court acknowledged that "the public trust doctrine has traditionally been asserted by the States," but noted that "the doctrine has also been applied to the Federal Government."⁹³ To support its conclusion, the

88. See *supra* notes 71-72 and accompanying text.

89. 523 F. Supp. 120 (D. Mass. 1981)

90. 632 F. Supp. 333 (N.D. Cal. 1986), *aff'd on reconsideration*, 635 F. Supp. 1447 (N.D. Cal. 1986).

91. *Todd Shipyards*, 635 F. Supp. at 1450 (quoting *1.58 Acres*, 523 F. Supp. at 122).

92. 710 F. Supp. 1286 (D. Neb. 1989).

93. *Id.* at 1287.

court noted the long line of Supreme Court cases articulating the trust duties of the United States towards the public lands.⁹⁴ Finding that the federal government may thus function as the states do, in a *parens patriae* capacity, the court found that the United States could maintain an action to recover damages for loss of trust resources.⁹⁵

As the courts held in the above cases, the state and the United States are co-trustees, and "neither government has the power to destroy the trust."⁹⁶ The court could adopt this holding in our imaginary case and create a federal common law trust duty for the Forest Service. As one author so passionately stated, in response to the New World Mine controversy:

We have heard the prevailing assumption under the 1872 Mining Law that permits might have to be issued because of vested mining rights. Whether that assumption is true I will leave to people who know more about that law than I do. That does not necessarily mean, however, that the company may appropriate public waters and convert them to a waste disposal pond. They may own the mining rights, but they do not own the water of the United States.⁹⁷

As trustee for the waters and the related resources, the Forest Service has a duty to protect those resources from threatened, harmful appropriation and pollution in our imaginary case.

But let us assume that our court is reticent to find a duty based upon the as yet under-developed, common law co-trustee concept. In the alternative, the court could find a trust duty somewhere in the penumbra of NFMA. The Ninth Circuit has repeatedly articulated the duty of the Forest Service to "provide for diversity of plant and animal communities," explaining that this duty also entails "ensur[ing] viable, or self-sustaining populations" and "applies with special force to 'sensitive' species."⁹⁸ In our imaginary case, numerous species, some listed, depend on the pristine nature of the potentially affected lands to survive. Clean water is a crucial part of this life-support system. As in *Sierra Club v. Department of Interior*, where the court found that the National Park System Act imposed trust responsibilities on the Park Service beyond its "general fiduciary obligations,"⁹⁹ our imaginary court could hold the Forest Service accountable as

94. *Id.* (citing *United States v. Beebe*, 127 U.S. 338 (1888) and *Light v. United States*, 220 U.S. 523 (1911), among others).

95. *Id.*

96. See 1.58 Acres, 523 F. Supp. at 125.

97. Robert W. Adler, *Symposium: National Parks Workshop; Water Quality Protection*, 15 J. ENERGY, NAT. RESOURCES & ENVTL. L. 311, 316 (1995).

98. *Inland Empire Public Lands Council v. United States Forest Serv.*, 88 F.3d 754, 759 (9th Cir. 1996) (citing *Oregon Natural Resources Council v. Lowe*, 836 F. Supp. 727, 733 (D. Or. 1993)).

99. 376 F. Supp. 90, 93 (N.D. Cal. 1974) (finding that the Park Service violated its duty by

fiduciaries, finding support from the Forest Service's statutory duties under NFMA.

The court could find a trust duty under NEPA even more easily, for NEPA contains express trust language. NEPA's goals include Congress' desire that federal agencies "fulfill the responsibilities of each generation as trustee[s] of the environment for succeeding generations."¹⁰⁰ Although NEPA has been greatly emasculated by the courts when used alone to halt ecologically harmful activities,¹⁰¹ in a case such as our imaginary case, with egregious facts and traditional trust resources at risk, the court could build upon NEPA's trust language to construct a public trust duty for the Forest Service, similar to what the court did in *Sierra Club v. Dept. of Interior*

In *Massachusetts v. Andrus*,¹⁰² the state challenged federally permitted off-shore oil drilling under the Outer Continental Shelf Lands Act. The First Circuit Court characterized the Secretary of the Interior as the "guardian" of the public domain, whose "legal duty embraces a solemn responsibility to see that the great life systems of the ocean are not unreasonably jeopardized by activities undertaken to extract oil and gas from the seabed."¹⁰³ This reasoning should apply with equal force in our imaginary case, relying on NEPA-imposed trust duties, to the great life system of the Greater Yellowstone Ecosystem.

Having found a duty, our court need only now define the scope of that duty. The court could find that, to fulfill its trust duty, the Forest Service should have declined to approve the Company's mining plan, but instead should have conditioned its approval upon compliance with substantial environmental safeguards. Undoubtedly, such compliance would render the operation of the mine less profitable than previously contemplated, indeed it may render it economically unfeasible. Nonetheless, the court may uphold this regulation.

Though it rarely does so, when the Forest Service has imposed such conditions, the conditions have survived judicial review. One example may be found in *Clouser v. Espey*, where the Ninth Circuit upheld extensive conditions upon miners' access to their claims on National Forest land, despite the miners' assertion of a vested right to mine, and despite the

allowing harmful timber practices on private land bordering Redwood National Park).

100. 42 U.S.C. § 4331(b)(1) (1994).

101. See *supra* note 7.

102. 594 F.2d 872 (1st Cir. 1979).

103. *Id.* at 892. Similarly, in *Sierra Club v. Dep't of Interior*, the court found that the Secretary is "guardian of the people of [the] United States over the public lands." 376 F. Supp. at 93 (quoting *Light v. United Land Ass'n.*, 142 U.S. 161, 181 (1891) and *Utah Power & Light v. United States*, 243 U.S. 389, 409 (1916), for a finding that the Secretary has an "obligation to see that none of the public domain is wasted").

recognition that such regulation would "affect claim validity"¹⁰⁴ As the Forest Service did in *Clouser v Espy*, in our case the Forest Service could ban all motorized means of operation and transportation.¹⁰⁵ Additionally, the Forest Service, given its enhanced authority under the public trust doctrine, could refuse approval of the re-routing of Fisher Creek under any circumstances, as such re-routing would certainly upset the balance of the established streamside ecosystem. The Forest Service could also limit the amount of water the Company could use in its operations, where that water is otherwise needed to ensure riparian health in the surrounding streams and rivers. Finally, because of the frequency with which plastic liners leak in heap-leach operations,¹⁰⁶ the Forest Service could refuse to allow dependance on plastic liners alone to protect groundwater.

Because compliance with such conditions would significantly decrease the economic viability of the proposed mine, the Company may argue that the Forest Service has so "unreasonably circumscribed" the mining operation "as to amount to a prohibition," in violation of the law.¹⁰⁷ Nonetheless, our court may uphold these regulations, building upon cases such as *Clouser*, and adding public trust concepts from cases such as *Massachusetts v Andrus*. With the additional authority granted by the trust relationship, our court has solid footing for its affirmation of the Forest Service regulations. There remain, however, other important issues which the Company would surely raise.

1. Has the Public Trust Doctrine been Preempted?

Undoubtedly, the Company would argue that a federal public trust doctrine has no place in this controversy because the problems of pollution and resource management have been preempted by federal statutes. The Company may argue that such a finding constrained a federal court in *Conservation Law Foundation of New England v Clark*.¹⁰⁸ In that case plaintiffs claimed a public trust duty on the part of the Secretary of the Interior to stop off-road vehicle use on National Seashore lands. The court recognized the duty of the Secretary to see that "none of the public domain is wasted," but nonetheless found, in view of congressional and executive mandates concerning the protection of the Seashore, that further consideration of the public trust doctrine was not necessary.¹⁰⁹

104. 42 F.3d 1522, 1529-30 (1994) (citing *United States v. Richardson*, 599 F.2d 290 (9th Cir. 1979) (where "unreasonable destruction of surface resources" was found enjoined)).

105. The *Clouser* court upheld the Forest Service decision as to both wilderness and non-wilderness forest lands. See *Clouser*, 42 F.3d at 1530.

106. See, e.g., Barry Norean, *Open-Pit Mine Clears Final Hurdle on Arduous Path to Approval*, COLO. SPRINGS GAZETTE TELEGRAPH, Sept. 23, 1993, at B1.

107. See *supra* note 83.

108. 590 F. Supp. 1467 (D. Mass 1984).

109. *Id.* at 1480 n.8; see also *District of Columbia v. Air Florida*, 750 F.2d 1077 (D.C. Cir.

Our plaintiffs may counter this preemption defense by reference to the rules developed by the Supreme Court. As explained by the Court, the question of statutory preemption of federal common law "involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law."¹¹⁰ To preempt, the legislative scheme must speak directly to a question; "when Congress has not spoken to a particular issue," federal common law applies.¹¹¹

Applying these concepts to the New World Mine controversy, it is clear that the question of a federal trust duty is not directly addressed by any statutory scheme. To be sure, there are schemes to prevent pollution, to regulate the use of the surface lands disturbed by mining, and to balance the competing uses of the land. However, no statute addresses the problems raised by our imaginary case, where water flows from one state into another, over federal property managed by two different federal agencies, governed by two vastly different statutory schemes. Each agency is constrained by their limited jurisdiction, and the statutes do not clearly speak to the duty of the agencies to protect the federal resources at issue. The issue is not preempted.

The Supreme Court has recognized the need and authority of courts to fashion federal common law in a "few and restricted" instances.¹¹² One such instance is where a federal rule of decision is "necessary to protect uniquely federal interests."¹¹³ A unique federal interest exists where the dispute involves "the rights and obligations of the United States" or "implicat[es] the conflicting rights of states."¹¹⁴ Obviously, both of these situations are presented by our imaginary case: the waters flow over state boundaries, and the question of a federal public trust duty directly involves the rights and obligations of the United States. Thus, because the question of a federal public trust duty is not addressed by any statute and because the development of federal common law is proper in this case, preemption will not operate to deprive the court of jurisdiction.

1984) (declining to decide whether public trust doctrine applies to the federal government, or to D.C.'s attempt to recover for injuries to Potomac River caused by crashed jet, given the "paucity" of precedent and the fact that the issues were not fully developed in lower court. The Court indicated that propriety of applying public trust doctrine to federal waters is a complex issue, requiring the creation of new federal common law in the face of what may be preemption in all areas the public trust doctrine occupies).

110. *City of Milwaukee v. Illinois*, 451 U.S. 304, 315 n.8 (1981).

111. *Id.* at 313, 315.

112. *Texas Industries, Inc. v. Radcliff Material, Inc.*, 451 U.S. 630, 640 (1980).

113. *Banco Nacional de Cuba v. Sabatine*, 376 U.S. 398, 426 (1964).

114. *Texas Industries*, 451 U.S. at 641.

2. Do Plaintiffs Have Standing to Enforce the Federal Public Trust Doctrine?

Certainly the Company would assert that our imaginary plaintiffs do not have standing to sue, arguing that they are merely among a huge, undefined, unmanageable class of citizens, possessing no special right to enforce the public trust. This argument has prevailed for defendants in two jurisdictions. In Louisiana, the courts have found that while each member of the public has an interest in public trust resources, "no one citizen or citizen group has a 'special interest' beyond that enjoyed by the general public."¹¹⁵ To establish standing in Louisiana, the plaintiff must show that his "livelihood, health, welfare, or personal interests will be directly affected by the failure" of the trustee agency.¹¹⁶

In Wisconsin, the public trust doctrine has been held to "merely establish[] standing for the state, or any person suing in the name of the state."¹¹⁷ Instead, it is the duty of the Wisconsin Department of Natural Resources to "represent the public in guarding [the] state's resources."¹¹⁸ The irony of this rule is reflected in the cases where it is precisely that agency which was charged with violating the trust.¹¹⁹

Fortunately, not all states have viewed standing under the public trust doctrine so narrowly. The Illinois Supreme Court has stated:

If the "public trust" doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it. To tell them that they must wait upon governmental action [to enforce the trust] is often an ineffectual denial of the right for all time. The conclusion we have reached is in accord with decisions in other jurisdictions.¹²⁰

States, of course, are free to develop their own standing requirements; however, federal courts must follow the federally articulated rules of standing.¹²¹ Thus, the approach our court might take will likely fall somewhere in between the approaches of the state courts quoted above. Our court may hold that, as long as our plaintiffs have standing under the standards articulated by the Supreme Court in *Lujan v. Defenders of Wild-*

115. *Mouton v. Dept. of Wildlife & Fisheries*, 657 So. 2d 622, 627 (La. App. 1995).

116. *Id.* at 627-28.

117. *State Public Intervenor v. Dept. of Natural Resources*, 339 N.W.2d 324, 328 (Wis. 1983).

118. *Id.* at 329.

119. *See, e.g., id.*

120. *Paepcke v. Public Building Comm'n of Chicago*, 263 N.E.2d 11, 18 (1970) (citing two Massachusetts cases).

121. *See* Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOK. L. REV. 1057, 1117 (1989).

life,¹²² they may enforce the public trust doctrine without showing such specific harm as that required by Louisiana courts. *Lujan* is one of the Court's most recent cases involving the Article III standing¹²³ of environmental plaintiffs. Under *Lujan*, to obtain standing, a litigant must show: 1) that she has suffered a concrete, particularized, actual or imminent invasion of a legally-protected interest; 2) the injury is caused by the conduct of the defendant; and 3) it is likely that the injury will be redressed by a favorable decision.¹²⁴

Our plaintiffs can satisfy these standing requirements. As residents living near the proposed mine or downstream or downgrade from the site, they suffer imminent injury when the waters are allowed to be polluted. In addition, as environmentalists who have an interest in hiking, studying, and observing the area in its natural state, they have a particularized, legally-protected interest in preserving the natural resources. By allowing the mine to go forward, the Forest Service has caused this imminent injury, and a favorable ruling would certainly redress the injuries. Thus, the court would be well within its discretion in holding that our plaintiffs have standing.

3. Do Principles of Abstention Have a Role in Federal Public Trust Cases?

In a further defensive tactic, the Company may ask the court to abstain, arguing that it is solely within the purview of state courts to hear public trust claims. Such an argument prevailed in *United States v. Reserve Mining Co.*, a water pollution case where the court declined to hear a public trust claim, finding that such a claim was best left to the state courts to develop.¹²⁵ However, our imaginary court should not follow the *Reserve Mining* court's poor example. As the Supreme Court has stated:

Abstention from the exercise of federal jurisdiction is the exception, not the rule. It is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it. Abdication can be justified only in the exceptional circumstances where the order to the parties to repair to state court would clearly serve an important countervailing interest.¹²⁶

122. 504 U.S. 555 (1992).

123. Article III of the U.S. Constitution requires the presentation to the court of a live "case or controversy" before a litigant may properly invoke the court's jurisdiction. See *Allen v. Wright*, 468 U.S. 737 (1984).

124. *Lujan*, 504 U.S. at 560.

125. 394 F Supp. 233 (D. Minn. 1974).

126. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959)).

Of the three narrow exceptions developed by the Court, where abstention is thought to be appropriate, none would be presented by the usual public trust case.

The first exception, called *Pullman* abstention, arises "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law"¹²⁷ Such issues are not presented in most public trust cases, and are certainly not presented in our imaginary case. The constitutional underpinning of a federal public trust doctrine would not be mooted nor presented in a different posture in state court, as state law should not control the duties of federal agencies regarding federal trust property

Likewise, the second exception will not result in abstention in our case. Called *Burford* abstention, this exception arises where "difficult questions of state law bearing on policy problems of substantial import whose importance transcends the result in the case then at bar."¹²⁸ Under this exception, it is enough that federal review would be "disruptive of state efforts to establish a coherent policy"¹²⁹ In cases where a federal court is asked to apply state public trust law, *Burford* abstention may be appropriate.¹³⁰ However, this exception does not apply to the determination of a federal public trust doctrine, which, in cases such as ours, should be controlled by federal policy and law

Finally, the third exception, called *Younger* abstention, has no relevance to public trust cases, as it arises only where federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings.¹³¹ None of the narrow categories of abstention is presented in our imaginary case, thus the court clearly has jurisdiction.

4. Do Regulations Imposed Pursuant to Public Trust Duties Effect a Regulatory Taking?

Having failed to prevail on its jurisdictional challenges, the Company is left with one, last, formidable defensive strategy—a takings counterclaim.¹³² The Company will rely on *Nollan v California Coastal Com-*

127. *Id.* at 814 (citing *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941)).

128. *Id.* (citing *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)).

129. *Id.*

130. Such abstention was found proper in *Morris v. City of Santa Cruz*, where the court declined to hear a state public trust claim when a state agency proceeding was still unresolved, and also in the "interest of comity," finding it more proper for the state to hear the claim. 1994 WL 514032 at *5 (N.D. Cal. 1994).

131. *Colorado River*, 360 U.S. at 816.

132. A takings claim asserts that, through burdensome, constricting regulation, the government has "taken" the claimant's property without just compensation, in violation of the Fifth Amendment Takings Clause, by lowering the value of the property or by interfering with its use. *See* GEORGE C.

mission, where the Court held that imposing a public trust easement on Nollan's waterfront property effected a compensable taking.¹³³

However, *Nollan* may be easily distinguished. First, the Court noted that conditioning Nollan's rebuilding permit upon the grant of a public access easement could be lawful land-use regulation if the public purpose justified such action.¹³⁴ However, because the conditions placed on Nollan had no "essential nexus" to building permit requirements, the Court found a taking.¹³⁵ Conversely, in our imaginary case, the essential nexus exists, because the environmental regulations, imposed pursuant to the public trust doctrine, do justify disapproval of the mining plan. Unlike the permit conditions in *Nollan*, where the public trust was used to allow the public unlimited access to and egress upon the claimant's property, the Forest Service in our case would be conditioning its approval of the mining plan upon the restrictions needed to protect the resources.

Because a *Nollan*-type situation is not presented in our case, the court would then look to other Supreme Court takings cases for guidance. The Court has cautioned that compensation for a regulatory taking is only required where regulations prohibit *all* economically beneficial use of the land.¹³⁶ Because the regulations in our imaginary case do not prohibit all beneficial use of the land, but merely make it unprofitable to mine, our court would not find the regulation to be a compensable taking. The land may have other value beyond mining; for example, the Company could charge for hunting access or for camping, or could contract with guide services for excursions into this scenic, rugged landscape.

One aspect of takings jurisprudence is particularly relevant to our imaginary case. The "nuisance exception" allows the government to regulate the use of property without compensation in order to prevent harm to the public. As the Supreme Court explained, "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community, and the Takings Clause did not transform that principle into one that requires compensation whenever the State asserts its power to enforce it."¹³⁷ This exception often raises the issue whether the regulation seeks to confer a public benefit or prevent a public harm.¹³⁸

COGGINS, PUBLIC NATURAL RESOURCES LAW, § 4.03 (1990).

133. 483 U.S. 825 (1987).

134. *Id.* at 834 (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978)).

135. *Id.* at 837; *see also* *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (holding City's conditioning of a building permit upon dedication of portion of property to storm drain system and to bicycle/pedestrian path had the required nexus, but that dedication to public greenway did not have the required reasonable relationship).

136. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (emphasis added).

137. *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 491-92 (1987).

138. *Lucas*, 505 U.S. at 1024-25 (Justice Scalia characterizes the disjunction as often being in the

In *Smoke Rise, Inc. v. Washington Suburban Sanitary Commission*,¹³⁹ the court addressed this distinction. At issue were county orders requiring a property owner to hook up to a county-operated sewer system. The court held that such orders did not effect a taking, because they did not create a public benefit, but rather prevented a public harm to state rivers which the county, by virtue of the public trust doctrine, has a duty to prevent.

The same principles apply to our imaginary case. The Forest Service would not be seeking to set this land aside as an *de facto* wilderness area, nor to enhance the public's access to the land, both of which would confer a benefit to the public. Rather, the Forest Service would be acting in good faith to prevent harm to public resources, just as the county was in *Smoke Rise*.

Finally, the Company has no "investment-backed expectation"¹⁴⁰ to use the property unfettered by regulation. The property interest in a mining claim located on federal land has been characterized by the Court as "a unique form of property"¹⁴¹ Mining claimants "take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests."¹⁴² Thus, our defendant is left without a takings claim, and our imaginary plaintiff has prevailed in the last defensive scrimmage.

V CONCLUSION

Scholars have forcefully argued the existence of a constitutional basis for a federal public trust doctrine. Nonetheless, federal courts have hesitated to embrace the doctrine, presumably because it would entail the development of federal common law in an area some courts view as occupied by federal statutes. Yet the development of federal trust common law is precisely what is needed in cases where no statutory scheme precisely addresses or redresses the harm befalling valuable federal resources. Although the development of a public trust duty on the part of federal agencies and officials will require federal courts to bravely go where few have gone before, no legal principles prevent them from doing so.

Understandably discouraged by the past reticence of federal courts to impress a public trust duty on federal agencies, environmental plaintiffs

eye of the beholder).

139. 400 F Supp. 1369 (D. Md. 1975).

140. Reasonable investment-backed expectations are compensable. See *Lucas*, 505 U.S. at 1019 n.8, 1034.

141. *United States v. Locke*, 471 U.S. 84, 104 (1985) (citing *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1963)).

142. *Id.* at 105.

may be loath to test the waters again. However, the past need not portend the future. As this country's resources become more and more depleted, and as rising demands on those remaining resources add to the pressures placed upon all three branches of the government to protect those resources, plaintiffs may find the courts more willing to embrace the extra authority offered by the public trust doctrine, to preserve those precious national treasures that would otherwise go unprotected. As is often the case in the development of common law, necessity may prove to be the mother of invention.

