Hastings Environmental Law Journal

Volume 16 | Number 1 Article 4

1-1-2010

# Debt-for-Development Exchanges: Using External Debt to Mitigate Environmental Damage in Developing Countries

Richard Hurlburt

# The Public Trust Doctrine - A Twenty-First Century Concept

*Michael* C. Blumm*

The public trust, an ancient legal precept of public ownership of important natural resources, has traditionally been moored to navigable waters.[1] But the doctrine has been continuously evolving since it was introduced to American law in the landmark case of *Arnold v. Mundy*.[2] As explained in a recent text, the public trust doctrine is "in motion,"[3] a dynamic vehicle protecting both public access to natural resources and to decisionmakers with the authority to allocate those resources.[4] The doctrine's central purpose may be to serve as a vehicle to avoid monopolization of resources with important public values.[5]

The evolution of the public trust doctrine was evident in mid-nineteenth century America, when the Supreme Court refused to limit the scope of the federal navigation power to tidal waters, as had been the case in England. In *The Genessee Chief*, the Court used the advent of steam power, which opened up inland waterways to commercial navigation, as a reason to expand the scope of the navigation power, noting that the United States had "thousands of miles of public navigable water, including lakes and rivers in which there is no tide,"[6] therefore, the English standard of navigability did

* Professor of Law, Lewis and Clark Law School. I thank David Allen and Surinder Singh, 3Ls, Lewis and Clark Law School, for help with the footnotes.

1. *See* 4 HARRISON C. DUNNING, WATERS AND WATER RIGHTS §§ 29-32 (Robert E. Beck ed., 1991).

2. *Arnold v. Mundy*, 6 N.J.L. 1 (1821) (concluding that that the tidal waters of the Raritan River and the submerged lands beneath were common property, and therefore a riparian owner who planted oysters in the riverbed adjacent to his farm could not claim a private right to harvest the oysters).

3. DAVID C. SLADE, THE PUBLIC TRUST DOCTRINE IN MOTION: EVOLUTION OF THE DOCTRINE, 1997-2008 (2008), building on COASTAL STATES ORGANIZATION, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK (1st ed. 1990 & 2nd ed. 1997).

4. *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, 595 (1989) (contending that the overarching concern of the public trust doctrine was access: access to protected resources and access to decisionmakers allocating those resources).

5. Carol Rose, *The Comedy of the Commons: Custom, Commerce and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986) (explaining that public rights in roadways and waterways, like the public trust doctrine, fostered commerce by producing returns to scale and eliminating dangers of privatization, such as holdouts and monopolies).

6. *The Genessee Chief v. Fitzhugh*, 53 U.S. 443, 457 (1851). The Court thus ratified the rulings of state supreme courts like the Pennsylvania Supreme Court in *Carson v. Blazer*, 2 Binn. 475 (1810) (concluding that it would be "highly unreasonable" to limit

not fit the American continent, with its great rivers and lakes. Thus, over a century-and-a-half ago, navigability - central to the historic public trust doctrine, evolved from a coastal to an inland, upriver concept.

The public trust doctrine's evolution proceeded apace in the twentieth century, both in terms of its scope of applicability and its purposes. The navigability tether was gradually eroded, as numerous courts extended the scope of public rights to all waters suitable for recreation.[7] The California Supreme Court specifically extended the public trust doctrine to include water rights and to non-navigable waters affecting navigable waters.[8] The Hawaiian Supreme Court not only agreed that the doctrine burdened water rights, but extended its scope to groundwater.[9] The New Jersey Supreme Court showed that the doctrine could be amphibious,[10] ruling that it applied to dry sand beaches.[11] The California Supreme Court ruled that the

the scope of navigability to tidal waters). The navigable-in-fact rule meant that, unlike in England, where inland riparian owners owned the submerged land, in America submerged land beneath inland navigable waters was subject to a public easement of free navigation.

7. *See, e.g., State v. McIlroy*, 595 S.W.2d 659 (Ark. 1980) (concluding that a segment of the Mulberry River was navigable because it was and it could be floated by canoes or flat-bottomed boats); *Ark. River Rights Comm. v. Echubby Lake Hunting Club*, 126 S.W.3d 738, 744-45 (Ark. Ct. App. 2003) (determining that lakes and passageways that were created because of flooding due to construction of a new dam on the Arkansas River were navigable because the public had used and could use the body of water recreationally for boating and fishing); *Parks v. Cooper*, 676 N.W.2d 823, 840 (S.D. 2004) (acknowledging the state's test for determining public use is discovering whether water "[i]s capable of use by the public for public purposes" and that South Dakota legislation (§ 43-17-21) defined public purposes to include "boating, fishing, swimming, hunting, skating, picknicking and similar recreational pursuits."); DUNNING, *supra* note 1, § 32.03 (collecting state cases on the "pleasure boat" test for navigability).

8. *Nat'l Audubon Soc'y v. Super. Ct.*, 658 P.2d 709, 712, 727-30 (Cal. 1983). *See, e.g.*, Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701 (1995) (examining the legacy of the Mono Lake case in terms of the public trust doctrine's origin, scope, and purpose; its effect in making water rights non-vested and creating a continuous state supervisory duty; and on public standing).

9. *In re Water Use Permit Application*, 9 P.3d 409, 440-47, 450-52 (Haw. 2000) (concluding that the public trust doctrine is a fundamental principle of constitutional law in Hawaii and applies to all water resources without exception or distinction because of explicit language found in article XI, sections 1 and 7 of the state's constitution; therefore, the state has both the authority and the duty to maintain the flow and purity of the state's water and assure that the waters are put to reasonable and beneficial use).

10. Scott W. Reed, *The Public Trust Doctrine: Is it Amphibious?* 1 J. ENVTL. L. & LITIG. 107 (1986).

11. *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984) (ruling that the public trust doctrine required that the public must be given both access to and use of a privately owned beach); *see also Raleigh Ave. Beach Ass'n v. Atlantis Beach Club*,

purposes of the public trust extended beyond the traditional purposes of navigation and fishing to include recreation and ecological preservation.[12] The expanded purposes seemed only logical, as the fishing purpose would be undermined if the doctrine could not protect fishable waters.

The evolution of the public trust doctrine has been remarkable,[13] but it has been haphazard. Some states have rich histories of public trust doctrine interpretations by their courts; some do not. Some have entrenched the public trust constitutionally. Some have invoked the doctrine in their statutes. But there has not been an enormous amount of learning from one jurisdiction to another. In an effort to assist borrowing among jurisdictions, as well as organize what is a burgeoning area of the law, Professor Mary Wood[14] and I have begun to write a treatise on the Public Trust Doctrine. The treatise will survey the law of every jurisdiction,[15] including numerous recent adoptions by foreign nations.[16] Our project aims not merely to collect the law but to help clarify the doctrine and encourage its development by making it accessible to members of the bar whose practice is not necessarily centered around environmental law.

We also seek to encourage scholarship on public trust law. In the last year, three of our students produced sterling pieces of scholarship, two of which follow in this issue of this journal. Crystal Chase challenges the received wisdom that the public trust doctrine is exclusively a state

879 A.2d 112 (N.J. 2005) (holding that the public trust doctrine required that beach owned by a private beach club be available to the public at a reasonable fee).

12. *City of Berkeley v. Super. Ct.*, 606 P.2d 362, 365 (Cal. 1980).

13. The modern public trust doctrine is surely traceable to Professor Sax's influential article published some thirty years ago. Joseph Sax, *The Public Trust in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); *see also* Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351 (1989).

14. *See, e.g.*, Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43 (2009); Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II) Instilling a Fiduciary Obligation in Governance*, 39 ENVTL. L. 91 (2009); Mary Christina Wood, *Nature's Trust: Reclaiming an Environmental Discourse*, 25 VA. ENVTL. L.J. 243 (2007); Mary Christina Wood, *Nature's Trust: A Legal, Political and Moral Frame for Global Warming*, 34 B.C. ENVTL. AFF. L. REV. 577 (2007).

15. Valuable groundwork concerning eastern states was laid by Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classification of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1 (2007).

16. *See, e.g.*, National Water Act 36 of 1998, 6 JSRSA 1-410 to -467 (2001) (S. Afr.) (abolishing the public/private distinction in water rights and codifying water as a "resource common to all"); M. I. *Builders Private Ltd. v. Radhey Shyam Sahu*, (1999) 6 S.C.C. 464, 506, 530 (India) (using the public trust doctrine to interpret India's constitutional right to life (Art. 21) and finding a violation of the public trust and right to life when a government agency approved the destruction of a public park and market to build a shopping complex).

doctrine.[17] She closely examines several Supreme Court cases, particularly the lodestar *Illinois Central Railroad* decision.[18] Her conclusion is that the core of the public trust doctrine is federal, which means that states are not free to renounce the doctrine, something a few states, captured by extractive interests,[19] have attempted.[20] Crystal's engaging argument may - and should - cause courts to rethink the origins of the doctrine and to reject state attempts to relieve themselves of public trust obligations, since these obligations are fundamental elements of sovereignty that cannot be relinquished.[21]

The second article, by Mackenzie Keith, surveys the part of the public trust doctrine that is clearly amphibious: that is, above the high water mark, on dry land.[22] Mackenzie examines the role of the trust doctrine in state parklands and beaches, revealing a surprisingly vibrant legacy of the doctrine upland of waterways. The future of the doctrine in the twenty-first century almost certainly will include an expansion of its effects above the high water mark.

A third article, published elsewhere,[23] explores the incorporation of the public trust doctrine into the recently enacted Great Lakes Compact.[24] This incorporation may be emblematic of other adoptions of the public trust in other pieces of legislation, or perhaps constitutions. A distinguishing feature of the Great Lakes Compact, as pointed out by Bridget Donegan, may be the fact that the trust doctrine established by it is separate from and in addition to the public trust that exists in the eight Great Lakes Compact

17. Crystal S. Chase, *The* Illinois Central P*ublic Trust Doctrine and Federal Common Law*: A*n Unconventional View*, 16 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 113 (2010).

18. *Illinois Cent.* R.R. C*o. v. Illinois*, 146 U.S. 387 (1892).

19. DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991) (describing how relatively small, but concentrated interest groups have a disproportionate effect on legislation); Michael C. Blumm, P*ublic Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENVTL. L. REV. 405 (1994) (applying public choice theory lessons to public land managers' decisionmaking).

20. IDAHO CODE ANN. § 58-1201(6) (1996); A*riz. Ctr. for Law in Pub. Interest v. Hassel***,** 837 P.2d 158, 170 (Ariz. Ct. App. 1991) (interpreting the gift clause of the Arizona Constitution, article IX, section 7 to grant "judicial review of an attempted legislative transfer of a portion of the public trust.")."

21. S*ee* Michael C. Blumm, Harrison C. Dunning & Scott W. Reed, R*enouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill* 794, 24 ECOLOGY L.Q. 461 (1997) (maintaining that an Idaho statute could not abolish the public trust doctrine in the state).

22. Mackenzie Keith, J*udicial Protection for Beaches and Parks: The Public Trust Doctrine Above the High Water Mark*, 16 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 165 (2010).

23. Bridget Donegan, *The Great Lakes Compact in Michigan and Wisconsin: Establishing a Distinct Public Trust Doctrine*, 24 J. ENVTL. L. & LITIG. (forthcoming, 2009).

24. Act of Oct. 3, 2008, Pub. L. No. 110-342, 122 Stat. 3739.

states.[25]

Professor Wood and I envision these articles as only the first wave of scholarship emanating from our project. The public trust doctrine remains, in the 21st century, a largely mysterious doctrine, with plenty of critics[26] and numerous advocates.[27] As old as Roman law,[28] the public trust doctrine

25. The eight Great Lakes Compact states are Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin. § 1, 122 Stat. at 3739.

26. *See, e.g.*, Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform*, 44 VAND. L. REV. 1209 (1991) (contending that the public trust doctrine is too weak a remedy for broad environmental ills); James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1 (2007) (arguing the public trust doctrine lacks precedent in Roman and English law); James L. Huffman, *A Fish Out of Water: The Public Trust in a Constitutional Democracy*, 19 ENVTL. L. 527 (1988) (claiming that the public trust doctrine has no foundation in the police power or judicial review and concluding that modern judicial interpretations of the doctrine are undemocratic); James L. Huffman, *Trusting the Public Interest to Judges: A Comment on the Public Trust Writings of Professor Sax, Wilkinson, Dunning and Johnson*, 63 DENV. U. L. REV. 565 (1986) (critiquing the potential policy motives of leading public trust scholars); Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986) (maintaining that continued judicial reliance on the public trust doctrine may stifle the evolution of natural resources law); Randy T. Simmons, *Property and the Public Trust Doctrine*, PERC Policy Series-39 (2007) (discussing the potential threat the public trust doctrine poses to private property rights).

27. *See, e.g.*, William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385 (1997) (identifying a foundation for the public trust doctrine in many state constitutions); Dale D. Goble, *Three Cases / Four Tales: Commons, Capture, the Public Trust, and Property in Land*, 35 ENVTL. L. 807 (2005) (explaining the origins and necessity of the public trust doctrine through three early wildlife law cases); Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State's Natural Resources*, 16 DUKE ENVTL. L. & POL'Y F. 57 (2005) (promoting a larger role for the public trust doctrine in contamination cleanups); Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006) (advocating an integrated approach to the public trust doctrine that includes common law, statutory, and constitutional bases); Richard Roos-Collins, *A Plan to Restore the Public Trust Uses of Rivers and Creeks*, 83 TEX. L. REV. 1929 (2005) (calling for an adoption of public trust principles in water rights regulation); J.B. Ruhl & James Salzman, *Ecosystem Services and the Public Trust Doctrine: Working Change From Within*, 15 SE. ENVTL. L.J. 223 (2006) (arguing for the protection of natural capital and ecosystem services through the public trust doctrine); Mary Turnipseed, Stephen E. Roady, Raphael Sagarin & Larry B. Crowder, *The Silver Anniversary of the United States' Exclusive Economic Zone: Twenty-Five Years of Ocean Use and Abuse, and the Possibility of a Blue Water Public Trust Doctrine*, 36 ECOLOGY L.Q. 1 (2009) (calling for an expansion of the public trust doctrine to federal fisheries management); Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269 (1980) (examining the potential role for the public trust doctrine in judicial review of public land management decisions).

evolved to meet the felt necessities of the nineteenth and twentieth centuries. We hope that our efforts - and those of our students - help the doctrine continue to be relevant to imperatives of the twenty-first century.[29]

28. J. INST. 2.1.1. ("By the law of nature, these things are common to humankind: the Air, running Water, the Sea . . . .").

29. As the New Jersey Supreme Court stated in ruling that the public trust doctrine applied to beaches, "[W]e perceive the public trust doctrine not to be 'fixed or static,' but one to 'be molded and extended to meet changing conditions and needs of the public it was created to benefit.'" *Mathews v. Bay Head Improvement Ass'n*, 471 A2d 355, 365 (N.J. 1984), *cert. denied* 469 U.S. 821 (1984), (quoting *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47 (N.J. 1972)).