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The Public Trust Doctrine in Natural Resources Law and Management: A Symposium

FOREWORD

In September 1980, some 650 people gathered in Davis for a two-day conference on "The Public Trust Doctrine in Natural Resources Law and Management." They came to learn about the genesis, applications and future possibilities for this common law doctrine of ancient origin but elusive contemporary meaning. They heard more than thirty law professors, practicing lawyers, resource managers and others discuss both the theory of the doctrine and its practical application in nearly a dozen current lawsuits.

At the outset of the conference, I suggested five groups of questions which seem important for the public trust doctrine today. They are as follows:

> *First,* is there a single "public trust doctrine" in natural resources law? Or are there several public trust doctrines, depending perhaps on the natural resource in question or on whether state law or federal law is involved? What is the historical basis for this doctrine or set of doctrines, and how important is that history today?
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> *Second,* is the public trust doctrine applicable to any natural resource, or is it limited to certain ones? If it is limited to certain natural resources, what is the basis for concluding that it applies to some but not to others? Is the trust, in fact, merely a "tidelands trust" as some have argued?
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> *Third,* what is the nature of the public trust? Does it involve public property rights, or a specialized form of governmental police power, or something else? Does the term reflect more a judicial at-

titude toward legislative and administrative decision-making in the field of natural resources law than any substantive content? Has the legislature the power to terminate the public trust, and if so in what circumstances? To the extent that the legislature cannot freely terminate public trust uses, how is this limitation on sovereignty justified?

Fourth, what kinds of public uses of natural resources are protected by the public trust doctrine? Must these uses somehow be related to navigable waters? What happens if public trust use "A" conflicts with public trust use "B"?

Fifth, what are the implications of the public trust doctrine for the managers of natural resources? Has the doctrine sufficient content actually to influence day-to-day natural resource management decisions? Are there instances where managers find the doctrine counter-productive, in that it interferes with what they regard as sound management practices?

This symposium presents many of the answers to these questions that were suggested during the two days of discussion. The authors have expanded, more fully documented and in some cases rethought their positions. From the conference, the symposium includes the conference keynote address, the three principal papers, and an article based on a panel member's presentation. An additional article and a student note, both on aspects of the public trust doctrine in California law, round out the symposium.[1]

In his keynote address, *Liberating the Public Trust Doctrine from Its Historical Shackles,* Professor Joseph L. Sax of the University of Michigan Law School seeks to "penetrate the core of this unusual legal doctrine." In that core he finds protection against the destabilizing impact of changes that disappoint expectations held in common, but without formal recognition such as title. After reviewing the tradition of the commons in medieval Europe, seen as the historical experience which "most clearly reveals the proper sources for the legal public trust doctrine today," Professor Sax suggests an approach that would integrate legal doctrine with fundamental principles of intelligent resource management.

The principal papers examine the bearing of the public trust doctrine on different natural resources. In *The Public Trust: A*

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[1] A volume of conference proceedings, to be published by the School of Law at U.C. Davis, will contain the papers delivered at the conference, presentations made at the panel discussions on current public trust doctrine litigation and an edited version of the question and answer sessions.

Sovereign's Ancient Prerogative Becomes the People's Environmental Right, Jan S. Stevens of the California Attorney General's Office reviews developments in the public trust doctrine's application to tidelands and submerged lands. In *Public Trust Protection for Stream Flows and Lake Levels,* Professor Ralph W. Johnson of the University of Washington School of Law explores the public trust doctrine as it bears on inland water resources. He attempts to deal with the growing conflict between in-place water users and water extractors and suggests that the public trust doctrine be used as a solution. Next, in *The Public Trust Doctrine in Public Land Law,* Professor Charles F. Wilkinson of the University of Oregon School of Law considers the public trust doctrine in the quite different setting of inland federal lands.

Professor John D. Leshy of the Arizona State University College of Law examines another aspect of the management of inland federal lands in his article on the "Sagebrush Rebellion." The article, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands,* sets out the legal and political sources of the Rebellion and comments on its merits and chances for success in the courts. Following is my article on *The Significance of California's Public Trust Easement for California Water Rights Law* and a note by Craig Labadie, *Increased Public Trust Protection for California's Tidelands—City of Berkeley v. Superior Court.* These two articles, which conclude the symposium, develop aspects of the material presented by Messrs. Johnson and Stevens, with a particular focus on California law.

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