Erin Ryan, The Public Trust Doctrine, Private Rights in Water, and the Mono Lake Story
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Excerpt from Chapter 2 (Draft):

I. Legal Doctrines Governing Public and Private Interests in Water Resources

In the *Mono Lake* case, advocates invoked the public trust doctrine to protect public law interests in the environmental values associated with a navigable waterway against private law claims to the actual water within it. To understand how these public and private interests came into conflict at Mono Lake, it's important to understand the different legal doctrines that govern water resources in the United States. This Part introduces the public trust doctrine, which establishes public rights and responsibilities in water, and more cursorily, the law of private water allocation, which assigns private rights to use the water within those waterways. (And as the Mono Lake conflict demonstrates, these two sets of laws won't always play nicely.)

Part IA introduces the public trust doctrine and its historical origins, tracing the public trust principle from ancient Rome through early British law to its formal reception in the United States. Because the law of private allocation also plays an important role in the Mono Lake conflict, Part IB provides a light introduction to the primary doctrines of private water allocation, the riparian rights doctrine of the Eastern United States, and the prior appropriations doctrine that later evolved in the West.

A. Legal Origins of The Public Trust Doctrine

The American public trust doctrine has roots in some of the oldest doctrines of the common law tradition,[1] with many accounts dating it all the way back to ancient Rome.[2]

1. *The Roman and Byzantine Empires*. In the Sixth Century A.D., the Byzantine Emperor Justinian I set to work codifying Roman Common Law of the previous era, for the combined purpose of fortifying legal education and restating the law for enforcement purposes.[3] In the INSTITUTES OF JUSTINIAN, published in 533, he documented the *Jus Publicum*, a principle addressing the common ownership of certain natural resources:

> "By natural law, these things are the common property of all: the air, the running water, the sea, and with it, the shores of the sea."[4]

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[1] *See, e.g.*, Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (laying the seminal academic foundations for the public trust doctrine as a modern legal tool to aid in the protection of natural resources); *but see* JB Ruhl, ____ (forthcoming, 2018) (critiquing this history).
[2] J. INST. PROEMIUM, 2.1.1. (T. Sandars trans., 4th ed. 1867) (translation from the Institutes of Justinian, by the Byzantine Emperor, Justinian I.
[3] H.F. JOLOWICZ & BARRY NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 492-493 (3rd ed. 1972).
[4] *Id.*

Thousands of years later, it's hard to know exactly how these principles helped govern the Roman Empire,[5] but this commanding early statement of public commons has redounded through common law jurisprudence ever since, in both judicial decisions and constitutional affirmations.[6]

In the Mono Lake story that is the focus of this essay, we will hear a lot about the intersection of these public trust principles with water resources, and indeed, the doctrine is most often invoked today in application to waterways. But we might pause here to acknowledge the very first item in Justinian's list—"the air"—as that will become an important proposition in the modern public trust developments reviewed at the end of this essay, now that advocates are attempting to deploy the doctrine in the context of climate governance.[7]

2. *The Magna Carta and Forest Charter*. Some *Jus Publicum* principles were later incorporated into early British law, beginning with Magna Carta. In 1215, King John of England issued the Magna Carta ("Great Charter"), promising his rebellious barons that he and all future sovereigns would operate within the rule of law.[8] Although the Magna Carta was unsuccessful in the first instance, it eventually provided the foundations of the modern English legal system, and it is credited as a progenitor of Western democracy and constitutional law.[9] In addition to declaring the sovereign subject to the rule of law, the Magna Carta also set forth rights to speedy justice, trial by jury, and against unusual punishments.[10] It also received into English common law certain principles of Roman common, including elements of the *Jus Publicum*. For example, Chapter 33 of the Magna Carta required the removal of all weirs in the Thames and Medway Rivers and "throughout all of England" that interfered with fishing or navigation, establishing a proto-public commons over navigable waters for these purposes.[11]

The Charter of the Forest, added to the Magna Carta in 1217 by King Henry III, further protected public rights to access natural resources on certain undeveloped royal lands (not just

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[5] *See* James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 21 (2007) (disputing the conventional account of the role of the public trust doctrine in ancient Roman and British law); JB Ruhl and Tom McGinn, *The True Origins of the Public Trust Doctrine* (forthcoming, 2019).

[6] *See* ERIN RYAN, THE PUBLIC TRUST DOCTRINE, PRIVATE WATER RIGHTS, AND SAVING MONO LAKE (2019) at Chapter VIII ("The Evolving PTD") (tracing the evolution of the doctrine in the U.S. and international jurisdictions). Professor Alex Klass refers to these various statements of the trust as "public trust principles." Alexandra B. Klass, M*odern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006).

[7] *See* Juliana vs. United States, *discussed infra at* ____.

[8] *See* ANDREW BLICK, BEYOND MAGNA CARTA: A CONSTITUTION FOR THE UNITED KINGDOM (Bloomsbury, 2015).

[9] *See* Doris Mary Stenton, *Magna Carta*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Magna-Carta.

[10] *Id.*

[11] Magna Carta, Chapter 33 (Eng. 1215). See also Michael C. Blumm & Courtney Engel, *Proprietary and Sovereign Public Trust Obligations: From Justinian and Hale to Lamprey and Oswego Lake*, 43 Vt. L. Rev. 1, 9 (forthcoming, 2019) (discussing the implementation of Justinian public trust principles in the Magna Carta).

forests), and it remained in effect for centuries thereafter.[12] Re-establishing traditional rights of public commons that had been eroded by William the Conqueror, the Forest Charter promised that the King would not interfere with commoners' rights to graze animals, forage, plant crops, and collect lumber on open lands subject to Forest Law.[13] Notably, this law still governs the New Forest territory in southern England.[14] While these provisions do not follow from the Justinian references to common property in air, water, and coastlines, they do express an early affirmation of the public trust principle of common property or public commons rights in natural resources.

3. *British Common Law*. Early British common law also made reference to public trust principles in a series of cases and authorities affirming sovereign authority over submerged tidelands.[15] In the 1611 *Royal Fishery of River Banne* case, the Kings Bench held that while the beds of nonnavigable waterways could be privately held, navigable waters were owned by the sovereign for public use.[16] Later, in his renowned 1670 Treatise on English Maritime Law, Sir Matthew Hale described sovereign ownership of tidelands in his account of the three different kinds of coastal land: (1) that under the royal right (or police power), (2) that available for public navigational access, and (3) that which was privately owned.[17]

Critics of this conventional historical account, including Professor James Huffman, have pointed out that unlike contemporary statements of the public trust doctrine, Chapter 33 of the Magna Carta protected only the British nobility, rather than the general public, and that the King's prerogatives under British common law did not include trust-like responsibilities until the 19th century.[18] Others, including Professors J.B. Ruhl and Tom McGinn, question the relevance of the Justinian statement of the *jus publicum* to actual Roman legal practice.[19] It may be that the ideals of the Forest Charter come closer to the public trust principles that would ultimately evolve in the United States.[20] Nevertheless, the early American courts that adopted the public trust doctrine referred copiously (and perhaps defensively) to its roots in British law.[21]

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[12] Magna Carta, Chapter 12 (Eng. 1217). *See* Sarah Nield, *The New Forest: Ancient Forest and Modern Playground*, *in* MODERN STUDIES IN PROPERTY LAW, VOL. 2 (E. Cooke, ed. Hart 2003); Anne Bottomley, *Beneath the City: The Forest! Civic Commons as Practice and Critique*, Vol. 5(1) BIRKBECK LAW REVIEW 1 (2018). Nicholas Robinson, *The Forest Charter and the Public Trust* 10 GEO. WASH. J. ENERGY & ENVTL. L. __ (forthcoming, 2018).

[13] *See* Dr. John Langton, *The Charter of the Forest of King Henry III*, in FORESTS AND CHASES OF ENGLAND AND WALES, C. 1000 TO C. 1850, St. John's College Research Center (last visited Aug. 8, 2018), at http://info.sjc.ox.ac.uk/forests/Carta.htm.

[14] *See* Sarah Nield, *The New Forest: Ancient Forest and Modern Playground*, *in* MODERN STUDIES IN PROPERTY LAW, VOL. 2 (E. Cooke, ed. Hart 2003).

[15] *See* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 727–30 (1986).

[16] 80 Eng. Rep. 540 (K.B. 1611).

[17] MATTHEW HALE, A TREATISE DE JURE MARIS ET BRACHIORUM EJUSDEM 370-72 (1670).

[18] James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 21 (2007).

[19] Ruhl and McGinn, *supra* note 5.

[20] Robinson, *supra* note 12.

[21] *Id.*

4. *American Common Law*. The principle of sovereign authority over submerged lands was received in the United States through the individual states' reception of British common law, and began making appearances in litigation in the early nineteenth century. In the United States, the doctrine was expanded to embrace not only the submerged lands beneath coastal tidelands, of principal value in Britain, but also the submerged lands under other navigable waterways to which there were no true British analogs, including America's Great Lakes and enormous rivers.[22] In this way, the American public trust developed beyond its the British origins, although early American cases frequently referred back to Roman and English common law for support.

One of the first cases to do so was the 1821 case of *Arnold v. Mundy*, in which the Supreme Court of New Jersey quoted Justinian and the various limitations on the English crown in holding that the land and resources beneath navigable water—here, oyster beds—were common property.[23] The plaintiff property owner had purchased a farm adjacent to a navigable river, where he planted oysters and staked off the resulting bed.[24] He brought suit against a defendant who had taken oysters from this bed, but the defendant claimed that he and all citizens of the state had the right to take oysters where they would be naturally present in a navigable riverbed.[25] The Chief Justice determined that the Plaintiff must have title to the oyster bed to prevail in his suit,[26] but that his private rights extended only to the high-water mark.[27]

Instead, he found that the land under navigable water is considered common property,[28] and that proprietors have no more power than the English crown to convert lands beneath them into private property.[29] Referencing Justinian, he characterized common property as "the air, the running water, the sea, the fish, and the wild beasts," and held that title to these were in the sovereign, to "be held, protected, and regulated for the common use and benefit."[30] Writing with the strongest tones of judicial gravity, he concluded:

> "The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people."[31]

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[22] *See* Ill. Cent. R.R. Co. v. Illinois (*Illinois Central*), 146 U.S. 387, 453 (1892).
[23] Arnold v. Mundy, 6 N.J.L. 1 (1821).
[24] Arnold v. Mundy, 1821 N.J. Sup. Ct. LEXIS 1, 1-3 (1821).
[25] *Id.*
[26] *Id.*at 10-11.
[27] *Id.*at 67.
[28] *Id.*at 71.
[29] *Id.*at 14. 78.
[30] *Id.*at 71.
[31] *Id.* at 79.

5. *Affirmation by the U.S. Supreme Court*. The United States Supreme Court first formally invoked the public trust doctrine in 1842, in the case of *Martin v. Waddell*, where it affirmed the sovereign ownership of navigable waters and the submerged resources therein in resolving another dispute over oyster beds.[32] There, the Court held that proprietors claiming title to New Jersey oyster beds under a charter originally dating back from the British King Charles to the Duke of York could not prevail, because even a royal grant was subject to public trust rights of common fishery for the common people.[33] In defending its conclusion, the Court referenced the presence of the doctrine in English law as far back as the Magna Carta:

> "The land under the navigable waters within the limits of the charter passed to the grantee as one of the royalties incident to the powers of government, and were to be held by him in the same manner and for the same purposes that the navigable waters of England and the soils under them are held by the Crown.
>
> The policy of England since Magna Carta—for the last six hundred years—has been carefully preserved to secure the common right of piscary for the benefit of the public. It would require plain language in the letters patent to the Duke of York to persuade the Court that the public and common right of fishing in navigable waters, which has been so long and so carefully guarded in England, and which was preserved in every other colony founded on the Atlantic borders, was intended in this one instance to be taken away."[34]

Three years later, in *Pollard v. Hagan*, the Supreme Court reached a similar conclusion on the basis of the same principles in resolving a dispute over the ownership of submerged lands in Alabama and Georgia.[35] Rejecting an argument that territory in Alabama originally ceded by Spain should not be subject to the British rule of sovereign ownership of submerged lands, the Court determined that when Alabama was admitted to the union, it came on "equal footing" as neighboring states, such as Georgia, and succeeded to all the rights of sovereignty, jurisdiction, and eminent domain as other states.[36] It held that the land under navigable water was reserved to the states, and that new states have the same sovereignty and rights over navigable waters as did the original states.[37]

By the late nineteenth century, it was well established among American courts that the state holds navigable waterways in trust for the public.[38] The Supreme Court made its most definitive treatment of the public trust doctrine in *Shively v. Bowlby,* an 1894 case quieting title to submerged lands beneath a state-sanctioned wharf on the Columbia River in Oregon.[39]

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[32] Martin v. Wadell, 41 U.S. 367 (1842).
[33] *Id.* at 407-418.
[34] *Id.* at 414-16.
[35] Pollard v. Hagan, 44 U.S. 212 (1845).
[36] *Id.* at 223, 228-29.
[37] *Id.* at 230.
[38] *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, 580 (1989).
[39] Shively v. Bowlby, 152 U.S. 1 (1894).

There, the Court traced the detailed history of the doctrine from British law through the American Revolution and forward since then, affirming that:

> "[T]hese submerged lands, of singular value for commerce, navigation, and fishery, were held by the English King for the benefit of the public, [and] those rights survived the settlement of the colonies, and upon the American Revolution, became vested in the original States. When territory came into the U.S. by whatever means, the same public ownership of submerged lands below the mean high-water mark passed to the U.S., held 'for the benefit of the whole people and in trust' for the new states that would be carved from this territory."[40]

In so doing, the U.S. Supreme Court affirmed the provenance of all American lands submerged in navigable waters (below the mean high-water mark) as owned by the sovereign and held in trust for the benefit of the public.

5. *Illinois Central Railroad vs. Illinois*. Although *Shively v. Bowlby* was the Court's most definitive treatment of the public trust doctrine, it's most famous statement of the doctrine came from a decision issued two years earlier, the 1892 case of *Illinois Central Railroad vs. Illinois.*[41] There, the U.S. Supreme Court provided a crisp statement of the traditional public trust principles of American law:

> "The state holds the title to the lands under navigable waters in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."[42]

In this seminal decision, the Court not only affirmed sovereign authority over submerged lands, but clarified the nature of its obligation to the public as trustee of those lands.[43] And indeed, the *Illinois Central* case demonstrates just how powerful that obligation can be.

To give a sense of the enormous power the seemingly simple public trust doctrine can pack, consider the striking facts of *Illinois Central Railroad.* Boiling the complicated fact pattern down to its core, in 1869, the state legislature gave the bed of Chicago Harbor, the most valuable submerged lands in all of Lake Michigan, to a private railroad to spur regional economic development. [44] The people were not delighted. While that economic development might have eventually conferred public benefits, the gift smacked of patronage and crony capitalism, and it generated considerable public outrage.[45] The electorate responded by

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[40] Id. at 14-15, 49.
[41] Ill. Cent. R.R. Co. v. Illinois (*Illinois Central*), 146 U.S. 387 (1892).
[42] *Id.* at 452.
[43] Ryan, "The Historic Saga," supra note 2, at 568 (2015).
[44] Ill. Cent. R.R. Co. v. Illinois (*Illinois Central*), 146 U.S. 387, 438–39 (making "a grant by the State, in 1869, of its right and title to the submerged lands, constituting the bed of Lake Michigan").
[45] Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. CHI. L. REV. 805–06, 875 (2004).

throwing the legislators responsible for the controversial gift out of office, and voting in new representatives.[46] And indeed, one of the new legislature's first acts was to repeal the old legislature's gift to the railroad.[47] Now the railroad was not delighted, and this famous litigation ensued.

In court, the Railroad argued that the new legislature lacked the authority to repeal the Chicago Harbor conveyance that the former legislature had made.[48] The conveyance was extremely valuable, and ordinarily, neither the government nor any other owner can simply "take back" a thing of value this way.[49] However, the state defended itself by deploying public trust principles as a novel legal shield. Acknowledging that there might have been a legal problem if there really had been a legal gift, the state argued that in this case, there wasn't an actual problem, because—thanks to the public trust doctrine—there hadn't been an actual gift.[50] While it might have looked as though the previous legislature had conveyed the bed of Chicago Harbor to this private party, that never really happened—because such a thing *could not* have happened, as a matter of law.

The legislature lacked the power to make such a gift, argued the state, because those lands are encumbered by the public trust.[51] Such an act would be *ultra vires*—literally, beyond the authority of the state—at least without taking more heroic measures to clarify why such an unusual conveyance actually did accord its public trust obligations.[52] As a result, there was no actual gift, and accordingly no harm in repealing it, and therefore, no legal foul. The Supreme Court agreed with the state's argument, affirming the public trust doctrine as a foundational element of state natural resources law,[53] and enshrining it among what later 5th Amendment takings jurisprudence would call the "background principles" of state common law.[54]

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[46] *Id.*

[47] *Illinois Central*, 146 U.S. 387, 449 (1892) ("On the 15th of April, 1873, the legislature of Illinois repealed the act.").

[48] *Id.* at 438–39; 450-51.

[49] Indeed—as any self-respecting toddler would know, "no backsies!"

[50] *Id.* at 439.

[51] *Id.* at 439 and 453 ("The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property… The control of the State for the p[urposes of the trust can never be lost…").

[52] *Id.*

[53] *Id.*

[54] *See* Erin Ryan, Palazzolo, *The Public Trust, and the Property Owner's Reasonable Expectations: Takings and the South Carolina Marsh Island Bridge Debate*, 15 SOUTHEASTERN ENVTL. L.J. 121, 123 (analyzing how the public trust doctrine operates as a background principle of law that can constrain the reasonable expectations of a property owner alleging a taking); *id.* at 137–40 (2006) (discussing use of the public trust doctrine to defend takings claims by defusing the reasonableness of claimants' expectations). *See also* J. Peter Byrne, *The Public Trust Doctrine, Legislation, and Green Property: A Future Convergence?*, 45 U.C. DAVIS L. REV. 915, 916 (2012) (suggesting that the doctrine be used as a defense to innovative regulatory takings claims and to "sustain environmental legislation against judicial hostility"); John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931, 931–34 (2012) (analyzing use of the doctrine as a takings defense in light of two California cases that did not allow it). *But see* Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1532–33 (1990) (criticizing use of the doctrine to avoid just compensation for what otherwise looks like a taking).

Illinois Central demonstrates how the public trust doctrine functions not only as a grant of *affirmative state authority* over submerged lands, but also as a *limit on state authority* with regard to the management of those lands, because the state is required to manage them as trustee for the public benefit.[55] And the public, as the beneficiary of this trust relationship, is entitled to call the state to account for errant management choices in the courts. If members of the public believe the state has failed its obligations as trustee, they can sue. Over the years, as plaintiffs across the states have litigated to vindicate and define public trust obligations, the doctrine has developed differently from one state to the next. Some states protect different resources under the doctrine and some assign different levels of protection to common trust resources,[56] but at a minimum, most share the common principle of sovereign authority over lands beneath navigable waters held in trust for the public.[57]

6. *State Constitutions*. Finally, it is worth noting that public trust principles have been incorporated into a number of state constitutions within the United States,[58] even where the doctrine is also part of state common law.[59] Some constitutionalized versions look very similar to the common law statement of the public trust doctrine that was affirmed in *Illinois Central*. For example, Florida's Constitution includes a provision that recognizes public ownership of critical water commons and confers very traditional protections for submerged lands beneath navigable waters:

> "The title to land under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state by virtue of its sovereignty in trust for all the people."[60]

Alternatively, some state constitutions take a more modern approach, applying public trust principles to additional resources, or expanding protections for specific purposes. For example, Article I, Section 27 of the Pennsylvania Constitution states:

> "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural

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[55] Ryan, "The Historic Saga," supra note 2, at (2015).

[56] *See* ERIN RYAN, THE PUBLIC TRUST DOCTRINE, PRIVATE WATER RIGHTS, AND SAVING MONO LAKE (2019) at Chapter VIII ("The Evolving PTD") (describing different versions of the doctrine in different U.S. states). For example, most states protect public access to submerged lands below the high water mark, but New Jersey protects access to dry sand beaches as well. Matthews v. Bay Head Imp. Ass'n., 471 A.2d 355 (N.J. 1984).

[57] *See* ERIN RYAN, THE PUBLIC TRUST DOCTRINE, PRIVATE WATER RIGHTS, AND SAVING MONO LAKE (2019) at Chapter VIII ("The Evolving PTD").

[58] Ryan, "The Historic Saga," supra note 2, at 572-73. *See also* Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 866 (1996) ("[T]he 'public trust' doctrine . . . plays a constitutional role in most states even though less than a handful of states refer to the trust in the constitution itself.").

[59] Alexandra B. Klass, M*odern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006).

[60] FLA. CONST. ART. X, § 11.

> resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."[61]

Constitutionalized versions of the doctrine have provided additional means of protecting public trust resources and expanded recognition for new public trust values beyond those traditionally protected at common law. However, scholars like Alexandra Klass have also worried that the constitutionalization of public trust principles can displace common law versions of the doctrine, undermining the further development of public trust principles through traditional common law processes.[62]

B. The Law of Private Water Allocation

This introduction to the public trust doctrine reveals it as a public commons-based theory of public rights and responsibilities with regard to waterways and other relevant natural resources.[63] However, at least when applied to waterways in the United States, the public trust doctrine is destined to collide with a wholly separate body of law, and one that is often based on a contrasting theory of private rights. The law of water allocation, by which rights are granted for the use or extraction of water from public commons waterways, enables individuals and groups to claim water for specific private purposes. Especially in the Western United States, these allocation laws are generally based on a privatization model.[64]

The problem becomes immediately obvious, because the water governed under both sets of laws is, after all, the very same water! The water to which individuals and other entities can obtain private rights of use under the law of water allocation is the same water that makes up the waterways protected by the public trust doctrine. Yet these two bodies of law—the public trust doctrine and the law of private water allocation—are doctrinally orthogonal. Each developed entirely independently of the other, as though they have no relationship at all.[65]

Like the public trust doctrine, there is regional variation in the law of private water allocation. Water allocation is a feature of state law, and there's a notably different valance to water allocation law in the Eastern and Western United States. Eastern states generally follow a modern version of the original British doctrine of "riparian rights," which assigns correlative rights for reasonable use of water resources among all riparians along a watercourse.[66] Under

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[61] Pa. Const. Art. I, § 27.

[62] Alexandra B. Klass, M*odern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006).

[63] *See* MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW (2013) (discussing application of the public trust doctrine to other resources, including wildlife and atmospheric resources; see also *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016).

[64] Ryan, "The Historic Saga," supra note 2, at 576-78 (2015).

[65] Ryan, "The Historic Saga," supra note 2, at 576 (2015).

[66] *See* Christine Klein et al., *Modernizing Water Law: The Example of Florida*, 61 FLA. L. REV. 403, 406 (2009) ("The wetter eastern states . . . view the right to use water as an attribute of the ownership of riparian land. This is primarily a torts regime, prohibiting one riparian landowner from inflicting unreasonable harm upon another. In

the riparian rights doctrine, reasonableness is contextual, and generally determined by the total set of individual demands for the water.[67] Many riparian rights jurisdictions have modernized the doctrine to de-privilege riparian ownership, allowing water to be exported from the riparian tract and treating all users under the same rubric for assigning claims.[68]

In most respects, however, both traditional and modern riparian rights regimes take a public commons approach to allocating the resource. These laws treats the water subject to allocation as a public commons or a common pool, allocating correlative rights in water in which everyone's right is limited by the rights of others.[69] As a rule, everybody has to share.[70] For example, in the 1888 case of *Mason v. Hoyle*, the Connecticut Supreme Court enjoined one mill owner from impounding a stream to the detriment of other downstream mill operators.[71] Emphasizing the reciprocal nature of rights and duties among riparian claimants, the court articulated the five core principles for "reasonably" allocating water under the common law "reasonable use" doctrine of riparian rights:

(1) All riparians have an equal opportunity to use the stream;
(2) No owner may use his own property so as to injure another;
(3) Adjudicators should consider the character and capacity of the stream;
(4) The burden of foreseeable shortages should be allocated fairly among all riparians; and
(5) Customary practices provide a foundation for evaluating "reasonableness." [72]

Modern riparianism jurisdictions continue to apply the correlative spirit of reasonable use riparianism in considering the interests of all claimants on a waterway before assigning definitive rights to any. For example, in the 2005 case of *Michigan Citizens for Water Consvn. v. Nestle Waters North America*, the Michigan Court of Appeals enjoined some—but not all—of the Nestle Corporation's claims to withdraw water from a stream that also served boating, swimming, fishing, wildlife, and aesthetic purposes.[73] The court emphasized its responsibility to fairly allocate water to preserve as many different uses of a waterway as possible.[74]

Most states in the American West, however, take a different approach. There, water rights are generally allocated under an appropriative rights regime based on priority in time—essentially 'first come, first served.'[75] Under this pure "prior appropriations" doctrine, rights to

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contrast, the arid western states historically have followed the prior appropriation doctrine, protecting the right to use water according to temporal priority of use.").

[67] *Id.*

[68] Ryan, "The Historic Saga," supra note 2, at 576 (2015).

[69] *Id.*

[70] Christine Klein et al., *Modernizing Water Law: The Example of Florida*, 61 FLA. L. REV. 403, 407.

[71] Mason v. Hoyle, 14 A. 786 (Conn. 1888); 56 Conn. 255 (1888).

[72] *Id.*

[73] Michigan Citizens for Water Conservation v. Nestlé Waters North America, Inc., 709 N.W. 2d 174, 194-195 (Mich. Ct. App. 2005).

[74] *Id.*

[75] Christine Klein et al., *Modernizing Water Law: The Example of Florida*, 61 FLA. L. REV. 403, 408-09 (2009) ("[T]he arid western states historically have followed the prior appropriation doctrine, protecting the right to use water according to temporal priority of use.").

appropriate water from the public commons are not correlative, and earlier claims are not diminished by the needs of later-comers.[76] Whoever is the first to take a defined quantity of water out of the watercourse and put it to "beneficial use" (domestic or economically viable use) can claim a right to continue withdrawing the same amount of water for the same purpose, potentially indefinitely, excluding all others who come later.[77]

In contrast to riparian rights, the prior appropriation doctrine takes a privatization approach to resource allocation, the opposite of a public commons approach.[78] Not only does the doctrine reward early movers, granting them a protectable right to exclude those who seek to establish claims afterward, it rewards those who fully remove the water they claim from the waterway. To perfect an appropriative claim, the user must actually withdraw water from the stream; at least historically, appropriative rights were not available for instream uses like fishing, swimming, wildlife, or aesthetic purposes.

For example, in the 1882 case of Coffin v. Left Hand Ditch, the first case to formally apply the doctrine of prior appropriations, the Colorado Supreme Court affirmed the rights of an irrigator removing water from the stream over the claims of a downstream riparian farmer.[79] The irrigator was the first to actually remove water from the watercourse, creating a right to continue appropriating that water for himself regardless of the needs of a downstream user who had failed to perfect an appropriative claim.[80] Similarly, in *Empire Water & Power vs. Cascade Town*, the Eighth Circuit applied the Colorado prior appropriation doctrine to hold that the defendant hydroelectric power company could continue to divert water to its reservoir, even though it would fully dewater the Cascade Creek Canyon and waterfalls around which the plaintiff resort town's economy was centered.[81]

Some modern appropriative rights jurisdictions have added additional statutory criteria, including a public interest analysis, that require consideration of additional factors before new rights are assigned, but the heart of the analysis remains the traditional rules of prior appropriations.[82] Many jurisdictions have also provided greater statutory protections for instream flow values, mitigating the enormous pressure to withdraw from the stream in order to receive a legally protected water right—but even so, very few states treat these the same way they do conventional appropriations, and only three allow private parties to hold them.[83]

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[76] *Id.*
[77] *Id.*
[78] Ryan, "The Historic Saga," supra note 2, at 576 (2015).
[79] Coffin v. Left Hand Ditch. Co., 6 Colo. 443 (1882).
[80] *Id.*
[81] Empire Water & Power Co. v. Cascade Town Co., 205 Fed. 123 (1913).
[82] *See*, *e.g.*, Shokal v. Dunn, 707 P.2d 441 (Idaho 1985).
[83] BARTON THOMPSON, JOHN LESHY, & ROBERT ABRAMS, LEGAL CONTROL OF WATER RESOURCES 216 (5th ed., 2013) (noting that while most states now allow some sort of appropriation to protect instream flows, only Alaska, Arizona, and Nevada allow private entitles to claim them).

Accordingly, while the public trust doctrine requires the state to protect navigable waterways in trust for the public, the doctrines of private water allocation—especially Western prior appropriations—govern how the state gives away the waters within them. And while the public trust doctrine and riparian rights doctrine are grounded in a public commons theory of waterways, emphasizing correlative rights and shared duties, the prior appropriations doctrine tends toward a pure privatization model—first in time rights to exclude others.

For these reasons, a conflict between the public trust doctrine and private water allocation law was inevitable, especially in the arid West. There, state law applies a privatization approach to the allocation of water rights for water taken from waterways at the very same time that it applies a public commons approach to protect the underlying waterways—which are composed of the very same water. These contrasting approaches set in motion a legal collision that was inevitable—and the conflict erupted most spectacularly at Mono Lake.