# Prospect

# Public Trust Doctrine

By Frederick Steiner and John Roberts

*Snake River, Wyoming, photographed by Phillip Maechling, ASLA.*

In its simplest form, the emerging Public Trust Doctrine imposes an affirmative duty on each state to preserve certain natural resources for some public uses. As each state accepts the doctrine, the courts will depend increasingly upon landscape architects to provide findings about aesthetic conditions and values; land-use suitability; and resource integrity.* We will become advocates to help interest groups secure legislation regarding a state's trusteeship and obligations to public trust lands. These kinds of involvements will require us to develop new means to evaluate public interest and assess public welfare in public trust lands.

The public trust doctrine has evolved from Roman law, "by the law of nature these things are common to mankind—the air, running water, the sea and consequently the shores of the sea," and through English common law, which held that the sovereign owns, "all of its navigable waterways and the lands laying beneath them 'as trustee of a public trust for the benefit of the people' " (189 *California Reporter* 355, 1983). After the American Revolution, all rights previously held by the English Crown were vested in the states.[1] Thus, the states are sovereign in public trust matters: The role of state governments is analogous to that of a trustee.

The U.S. Supreme Court's decision in *Illinois Central Railroad v. Illinois* (146 *U.S.* 387, 1892) has been described as the "lodestar" of American public trust law. This case involved the State of Illinois granting to the Illinois Central Railroad Company "virtually the entire harbor of the City of Chicago" and then repealing the grant.[2] The U.S. Supreme Court held that this repeal was legitimate, "because the state could not abandon its trust . . . in the first place."[3] Further, because Illinois had a duty to "hold and manage" the disputed Chicago harbor lands, "the original grant was comparable to surrendering the police power in the 'administration of government and preservation of the peace' to a private party."[4]

More recently the supreme courts of Wisconsin, Montana and California have "found support in the public trust doctrine for their decision that the states' exercise of police power to prevent use of property was reasonable and that compensation was not required."[5]

The Wisconsin case, *Just v. Marinette County,* "invoked the public trust doctrine to sustain a regulation against a taking challenge" (56 *Wisconsin* 2d 7, 1972). The court observed: "What makes this case different from most . . . zoning cases is the interrelationship of the wetlands, the swamps, and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty" (56 *Wisconsin* 2d 16–17, 1972). Furthermore, the court found that a landowner, "has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."

In two recent decisions, *Montana Coalition for Stream Access v. Curran* (682 *Montana* P.2d 163, 1984) and *Montana Coalition for Stream Access v. Hildreth* (684 *Montana* P.2d 1088, 1984) the Montana Supreme Court has held that the public has a right to wide use of the state waterways for recreation.[6] In the *Curran* decision, the court found:

"The capability use of the waters for recreational purposes determines their availability for recreational use by the public. *Streambed ownership by a private party is irrelevant.* If the waters are owned by the state and held in trust for the people by the state, no private party may bar the use of those waters by the people" (emphasis added) (682 *Montana* P.2d 170, 1984).

In *National Audubon Society v. Superior Court of Alpine County,* the California Supreme Court found:

"The public trust is more than affirmation of state's power to use public property for purposes; it is an affirmation of duty of state to protect people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when abandonment of that right is consistent with the purposes of trust" (189 *California Reporter* 346–347, 1983).

Through the public trust doctrine, the California court held that the state "has an affirmative duty to take the public trust into account in planning and allocation of water resources, and to protect public uses whenever feasible" (189 *California Reporter* 347, 1983).

Within constitutional limits, public welfare is satisfied with the presence of a public benefit or, in the case of public trust lands, satisfied by a proven publicly held need. Such a need may include the public's physical access to water and land,

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*See "Stewards of What" by Richard Chenoweth, *LAM* Vol. 76, No. 1:132

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or as a relatively new definition, the public's visual access and aesthetic needs which constitute a public purpose. As such, the public does not actually need to use land or water, it must simply prove a broad public purpose,[7] such as aesthetics.

As a legally definable social benefit, aesthetics is an elusive and intangible concept containing variable definitions, lacking standards of measurement, and having relatively little precedent in American law. Whenever social values include aesthetics as a need and purpose within the public's welfare, a state may exercise its sovereignty over land or water through a declaration of public trust (189 *California Reporter* 353, 1983). As a pure exercise of the public trust doctrine, a state is limiting or controlling the public or private lands in a manner which provides for the whole of public welfare, including or simply because of aesthetic quality.

The difficulty of defining aesthetics is similar to defining and valuing natural objects existing upon private and public lands. For instance, there is not a commonly recognized right of protection for aesthetics or physical, ephemeral and emotional elements of a landscape. In effect, intangibles such as aesthetics do not always satisfy the criteria of a rights' holder. Because they possess legal standing in their own right, damages to them do not count in determining outcome, and they are not beneficiaries of awards.[8] However, as society and courts debate aesthetics as an openly held value, and such values find their way into the common law definition of public welfare, it is becoming increasingly possible for aesthetic issues to become a possessor of independent rights. Since 1980, a sufficient amount of case law has evolved such that a numerical majority of states regulate land use and do so either partially or solely on the basis of aesthetic conditions.[9]

While aesthetic issues seem to follow social and legislative action regarding ecological and environmental impacts (see for instance, the National Environmental Policy Act, 42 *U.S.C.* 433), there are those who feel the opposite to be true. John Constonis argues that aesthetic concerns may actually be a "surrogate for the debate over environmental change itself."[10] Robert Broughton states that "aesthetics can to some extent be regarded as a proxy for or possibly even an indicator of environmental quality in general."[11] In effect, what may really concern society, in regard to land use, is the emotionally unsettling speed at which the visual environment changes. When a person's visual environment is modified too quickly, social context and visual symbols of continuity are removed; thus an environment is created with modified dimensions and unrecognizable characteristics. Public and landscape architectural interest in the preservation of urban spaces and wildlands is a reaction to instability in the visual environment.

A connection between the public trust doctrine and aesthetics has only recently been made explicit, but the doctrine's relationship with ecological concerns has been clear through its evolution. How does this historical concern for ecological values in the doctrine relate to emerging aesthetical values? The California Supreme Court, in its *Alpine County* decision, provides such a framework.

The *Alpine County* case involved a dispute over the use of Mono Lake, located at the base of the Sierra Nevada escarpment, near Yosemite National Park's eastern entrance. The lake has important wildlife habitat and visual qualities. In the past the City of Los Angeles has diverted water for its own use, thus diminishing the surface area of Mono Lake by one-third and endangering its use by certain bird species. The California court observed, ". . .there seems little doubt that both the scenic beauty and the ecological values of Mono Lake are imperiled" and, furthermore, that "Mono Lake is a scenic and ecological treasure of national significance, imperiled by continued diversions of water [by the City of Los Angeles]" (189 *California Reporter* 348–349, 1983).

In finding that this case was subject to the public trust doctrine, the court had to weigh the need for more water by the City of Los Angeles against the lake's scenic and ecological values. In part, the court found by lowering the lake its value as an economic and recreational resource was diminished. According to the court, such diversions would destroy the lake's shrimping industry as well as its recreational values. "Mono Lake has long been treasured as a unique scenic, recreational and scientific resource. . . , but continued diversions threaten to turn it into a desert wasteland. . ." (189 *California Reporter* 353, 1983).

The California Supreme Court found that the state had a "trust obligation" to protect these resources. As trustee it becomes the state's responsibility to retain continued supervisory control over its navigable waters, including lakes and streams, plus the lands beneath those waters. The scenery, ecology and human use of Mono

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Lake were identified as important considerations of the public trust:

"The human and environmental uses of Mono Lake—uses protected by the public trust doctrine—deserve to be taken into account. Such uses should not be destroyed because the state mistakenly thought itself powerless to protect them" (189 *California Reporter* 369, 1983).

Whether or not the connection between aesthetics and a state's public trust grows increasingly secure depends upon how future courts will view the application of public trust doctrine to inland areas. In general, those states with an operable public trust doctrine have been associated with conflicting land uses along navigable shorelines or tideland situations. As such, these states, especially California, will undoubtedly set the pace and doctrine attributes for other states. However, inland states, notably Montana, have exhibited increased interest.

A major issue in the doctrine's application lies in the nature of rights associated with common lands and privately held lands. Such an issue will involve the particular attitude of each state toward lands controlled by municipalities, the conversion of public lands to private uses, the degree of public trust perceived as vital to citizens during the use and management of natural resources, and the degree of latitude allowed agencies in interpreting and administering legislation and court findings.

The public trust doctrine provides states and landscape architects with the imperative to inventory natural resources; insist upon coordinated planning of both public and private lands; prevent the buying and selling of scenic resources as a marketable commodity; retain resource values in public trust; and preserve visual amenities as public rather than private property. As a doctrine of stewardship, public trust is an opportunity to address questions about how we and governments may affect the landscape.

NOTES

1. Wilson, Sarah E., "Private Property and the Public Trust: A Theory for Preserving the Coastal Zone," *UCLA Journal of Environmental Law and Policy* 4(1, 1984):57–91.
2. Ibid., p.82.
3. Ibid.
4. Ibid.
5. Ibid., p.88.
6. Blood, Tom, "Creation of Common Property Spells Uncertain Future for Montana's Wetlands," *National Wetlands Newsletter* (September–October 1985):11.
7. Wilcox, Charles, "Aesthetic Considerations in Land Use Planning," *Albany Law Review* 35(1970–1971):125–166.
8. Stone, Christopher, *Should Trees Have Standing? Toward Legal Rights for Natural Objects* (Los Altos, CA: William Kaufmann, Inc., 1974):16.
9. Bufford, Samuel, "Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation," *University of Missouri at Kansas City Law Review* 48(Winter, 1980):125–166.
10. Constonis, John L., "Law and Aesthetics: A Critique and A Reformation of Dilemmas," *Michigan Law Review* 80(January, 1982):381.
11. Broughton, Robert, "Aesthetics and Environmental Law: Decisions and Values," *Land and Water Law Review* 8(2, 1972):455. ■