Note

In Deep Water: A Common Law Solution to the Bulk Water Export Problem

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The end of a world without large-scale bulk water exports may be near.[1] Although previously deemed economically inconceivable, the growing problem of global water scarcity makes the sale of bulk water—large-scale international shipment of water by man-made diversion[2]—a potentially profitable enterprise.[3] An American company recently announced its plan to enter this newly developing market through its completion of a contract with the town of Sitka, Alaska.[4] The company plans to export 2.9 billion gallons of freshwater per year from the Blue Lake Reservoir to an unannounced water hub on the west coast of India.[5] If this venture is successful, the company will not only become the first in the United States to ship large-volume exports of water by tanker, but the first in the world.[6] Since

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1. *See, e.g.*, Brett Walton, *Alaska City Set to Ship Water to India, U.S. Company Announces*, CIRCLE OF BLUE WATERNEWS (July 11, 2010, 2:49 PM), http://www.circleofblue.org/waternews/2010/world/north-america/alaska-city-set-to-ship-water-to-india-u-s-company-announces/.

2. This definition of bulk water will be used throughout this Note.

3. *See* Ariel Dinar & Aaron Wolf, *International Markets for Water and Potential for Regional Cooperation: Economic and Political Perspectives in the Western Middle East*, 43 ECON. DEV. & CULTURAL CHANGE 43, 43, 61–62 (1994) (finding that, with developments in technology, the application economic models to trade in water resources may show increased regional developments in some areas of the world). *See generally* U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2006: BEYOND SCARCITY 134–37 (2006), *available at* http://hdr.undp.org/en/media/HDR06-complete.pdf (discussing the current and future problems relating to water scarcity around the world).

4. Walton, *supra* note 1.

5. *Id.*

6. *Id.*

this plan was announced, the Alaska Department of Natural Resources received three new applications to remove Alaskan water for international trade.[7] These permit applications illustrate a growing international trend: as water resources are depleted, water-poor areas around the world will search for opportunities to purchase water as a commodity.[8] This new thirst for bulk water will undoubtedly encourage the expansion of this industry, creating new conflicts between the states' traditional authority to regulate their water resources and the limits placed on water resources if subject to international trade agreements.

Many scholars hypothesize about the impact international agreements may have on traditional water right structures in the United States. One concern is that the actual export of water internationally may cause "bulk water" to be defined as a "good" or "product" subject to the North American Free Trade Agreement[9] (NAFTA) and the General Agreement on Tariffs and Trade[10] (GATT).[11] This categorization may result in the potentially serious domestic consequence of limiting a state's ability to regulate its water resources.[12] Other consequences may include: discouraging investment by domestic companies; injuring ecosystems;[13] and infringing upon the availability to the public of its most valuable resource.[14]

7. Brett Walton, *Alaska Receives New Applications for Bulk Water Removal*, CIRCLE OF BLUE WATERNEWS (July 8, 2010, 11:45 AM), http://www.circleofblue.org/waternews/2010/world/north-america/alaska-receives-new-applications-for-bulk-water-removal/.

8. Cynthia Baumann, *Water Wars: Canada's Upstream Battle to Ban Bulk Water Export*, 10 MINN. J. GLOBAL TRADE 109, 109 (2001).

9. North American Free Trade Agreement, U.S.-Can.-Mex., art. 301, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

10. General Agreement on Tariffs and Trade art. xi, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

11. *See* Scott Philip Little, *Canada's Capacity to Control the Flow: Water Export and the North American Free Trade Agreement*, 8 PACE INT'L L. REV. 127, 139–41 (1996).

12. *See* Noah D. Hall, *Protecting Freshwater Resources in the Era of Global Water Markets: Lessons Learned from Bottled Water*, 13 U. DENV. WATER L. REV. 1, 2–7 (2009) (discussing the potential harm to society and the environment through the removal of water for bottling).

13. *See* POLICY RESEARCH INITIATIVE, SUSTAINABLE DEVELOPMENT BRIEFING NOTE: EXPORTING CANADA'S WATER I: OUTSIDE OF NAFTA, at 3 (2005), *available at* http://www.horizons.gc.ca/doclib/SD_BN_ExportingWater_E.pdf (describing the potential environmental risks associated with bulk water shipment).

14. *See* Baumann, *supra* note 8, at 129.

The power to protect water resources under international trade lies largely in the hands of state governments because water rights are a form of property.[15] States' police powers allow them to control property rights in water resources through statute, regulation, and permitting systems.[16] Traditionally, state legislative power restricts the amount of water that becomes an article of commerce because a resource must be extracted, used, and incorporated into a product before it becomes a "good" for the purposes of trade law.[17] However, state and local governments also have an incentive to allow the export of bulk water for short-term financial gain.[18] This Note argues that because the legislature both holds the power to distribute water rights and possesses the potential to benefit financially by selling those rights in international trade, further protections are needed to prevent the allocation of state water resources for bulk export.

In Part I, this Note provides a brief overview of NAFTA and GATT, and their potential interference with the state regulation of water resources. This Part also supplies a brief overview of global water scarcity, American water law, and the public trust doctrine. Part II discusses the circumstances under which state and federal courts have applied the public trust doctrine and how this movement is applicable to bulk water exports. Part III asserts that the best remedy to solve the tension between international-trade law and state regulation of water resources is for state courts to apply the public trust doctrine to the allocation of permits for international trade.

I. PROPERTY RIGHTS IN WATER AND THEIR INTERPLAY WITH INTERNATIONAL TREATIES

Global water scarcity is the fuel driving the new market of bulk water export.[19] This Part describes this growing problem. As the bulk water market grows, exporting this resource will impact both the economic and political spheres of countries around the world. In the United States, the export of bulk-

15. *See* Scott S. Slater, *State Water Resource Administration in the Free Trade Agreement Era: As Strong as Ever*, 53 WAYNE L. REV. 649, 651–54 (2007).

16. *See id.*

17. Hall, *supra* note 12, at 3.

18. The city of Sitka, Alaska, for example, has the potential to make $90 million per year by exporting bulk water. Walton, *supra* note 1.

19. *See* Baumann, *supra* note 8.

water forms the intersection of three large bodies of law: first, state water rights[20] under the police powers giving state legislatures the authority to regulate and permit the waters within their territories; second, international trade law under NAFTA and GATT; and third, common law doctrines, specifically the public trust doctrine. This Part provides a discussion of these areas of law and describes how each applies to bulk water exports.

A. GENERAL OVERVIEW OF GLOBAL WATER SCARCITY

Water is a unique natural resource in both the variety and importance of the needs it satisfies.[21] Water's array of essential functions include: providing sustenance to humans, crops, and livestock; creating habitat for fish and other aquatic organisms; fulfilling both recreational and aesthetic needs; and purifying the air.[22] This diversity of uses creates competition among water users, especially since, as one commentator noted, "there is not always enough water of the right quality in the right place at the right time."[23] Uneven geographical distribution is exacerbated by population growth, climate change, and overpumping domestic resources causing global water scarcity in certain regions of the world.[24] As a result, the World Health Organization estimates that over one billion people lack access to a basic water supply.[25] This number is expected to increase to three billion people by 2025 as water stress increases in parts of China, India, and Sub-Saharan Africa.[26] As a consequence, lack of this essential resource drives the new market for bulk water.[27]

As this market develops, American legislators and courts must determine how domestic law and policy will respond to

20. *See generally* WILLIAM GOLDFARB, WATER LAW 10–11 (2d ed. 1988) (explaining that water rights are legal rights and that "a legal right is a legally enforceable expectation," meaning "that other people have enforceable duties toward a rightholder").

21. *See, e.g.*, DAVID H. GETCHES, WATER LAW IN A NUTSHELL 1 (3d ed. 1997).

22. *See, e.g.*, *id.*

23. *Id.*

24. Note, *What Price for the Priceless?: Implementing the Justiciability of the Right to Water*, 120 HARV. L. REV. 1067, 1070 (2007).

25. *See* WORLD HEALTH ORG. & U.N. CHILDREN'S FUND, GLOBAL WATER SUPPLY AND SANITATION ASSESSMENT 2000 REPORT 1 (2000), *available at* http://www.who.int/water_sanitation_health/monitoring/jmp2000.pdf.

26. U.N. DEV. PROGRAMME, *supra* note 3, at 14.

27. *See* Baumann, *supra* note 8.

the growing international need for freshwater resources. In relation to state rights, water exports will interact with both statutory water rights and judicial common law doctrines as water is redefined within this new market and by the terms of international treaties.

B. GENERAL OVERVIEW OF WATER RIGHTS IN THE UNITED STATES

Two fundamental aspects of American water law are essential to a discussion of bulk water exports. First, water rights are a species of property rights[28] and are subject to the police powers of a state.[29] As a result, state common and statutory law determines the terms and conditions by which water rights are obtained.[30] Second, water rights are usufructuary rights, meaning other people have the right to the benefits of another's water.[31] This means a legal right to remove water must be exercised with deference to the impact of one's use upon other water right holders,[32] the public at large,[33] and the environment.[34] This Section explains these two aspects of water law.

28. *See, e.g.*, Fed. Land Bank of Spokane v. Union Cent. Life Ins. Co., 29 P.2d 1009, 1011 (Idaho 1934) ("A water right is real property . . . ." (citation omitted)); N. Ohio Traction & Light Co. v. Quaker Oats Co., 152 N.E. 5, 9 (Ohio 1926) ("A water right is a species of property in and of itself . . . ." (citation omitted)).

29. *See* Slater, *supra* note 15, at 661.

30. *Id.* at 665–66.

31. BLACK'S LAW DICTIONARY 1685 (9th ed. 2009); *see also, e.g.*, Eddy v. Simpson, 3 Cal. 249, 252 (1853) ("[T]he right of property in water is usufructuary . . . ." (emphasis omitted)).

32. *E.g.,* Bernard v. City of St. Louis, 189 N.W. 891, 893 (Mich. 1922) (holding that right holders are required only "not to interfere with an adequate supply of water for the plaintiffs' reasonable use"); *see also* RESTATEMENT (SECOND) OF TORTS §§ 850, 850A (2010).

33. RESTATEMENT (SECOND) OF TORTS § 850A (1979); *see also, e.g.*, Diack v. City of Portland, 759 P.2d 1070, 1078 (Or. 1988) (holding the commissioner must consider "[t]he prevention of wasteful, uneconomic, impracticable or unreasonable use of waters involved" when looking at the public interest); State v. Bleck, 338 N.W.2d 492, 498 (Wis. 1983) (holding that the subordinate rights of riparian owners are "subject to the public's paramount right and interest").

34. *See, e.g.*, Shokal v. Dunn, 707 P.2d 441, 448–49 (Idaho 1985) (citing Idaho law requiring environmental considerations when issuing permits for water rights); *In re* Eigenheer, 453 N.W.2d 349, 354 (Minn. Ct. App. 1990) (holding that the Minnesota permitting system must conserve the "valuable resource" (citation omitted)); Stempel v. Dep't of Water Res., 508 P.2d 166, 172 (Wash. 1973) (applying Washington law to find that permits may be issued only if conditioned on the protection of the health of the natural environment).

Under the state police powers, a person obtains water rights in a variety of ways.[35] Generally, water-right regimes can be split into three categories: (1) common law riparian; (2) riparian with administrative permitting; and (3) prior appropriation.[36] The basic premise of riparian common law is that a riparian owner—a person owning land which borders a stream or lake—has the right to take water for use on her land.[37] The right to extract water is a consequence of riparian land ownership.[38] As a result, water rights cannot be lost by disuse because the right is tied to the ownership of a specific kind of property.[39]

The nature of the riparian system puts non-riparians with water needs at a severe disadvantage because water rights are attained through property ownership and are not transferable.[40] Thus, many common law riparian states have enacted administrative-permitting systems to allocate water outside the common law regime.[41] Under this riparian-with-administrative-permitting system, non-riparians can acquire water right by obtaining permits from a state administrative agency.[42]

The last major water allocation system is known as the prior appropriations doctrine.[43] Under common law prior appropriations, water rights are not obtained through land ownership; instead, taking water and applying it to a beneficial use is the only way to acquire it.[44] Most prior appropriation states have adopted this doctrine by statute.[45] Generally, these statu-

35. *See* Slater, *supra* note 15, at 664.

36. *See* GOLDFARB, *supra* note 20, at 26, 33.

37. J.W. Milliman, *Water Law and Private Decision-Making: A Critique*, 2 J.L. & ECON. 41, 42 (1959).

38. *Id.* Within this general category, owners of riparian water rights may be subject to one of two allocation theories, natural flow or reasonable use. *See* GOLDFARB, *supra* note 20, at 22–24. These allocation methods are the terms by which a riparian owner's right is impinged by the public's usufructuary rights, discussed later in this section. *See id.*

39. *See* JOSEPH L. SAX, WATER LAW, PLANNING & POLICY: CASES AND MATERIALS 1 (1968).

40. GOLDFARB, *supra* note 20, at 24.

41. *See* George William Sherk, *Eastern Water Law*, 1 NAT. RESOURCES & ENV'T, Winter 1986, at 7, 9.

42. *See* GOLDFARB, *supra* note 20, at 26.

43. *See* SAX, *supra* note 39, at 2.

44. *See* Milliman, *supra* note 37, at 42–43.

45. *See* Amber L. Weeks, Student Article, *Defining the Public Interest: Administrative Narrowing and Broadening of the Public Interest in Response to Statutory Silence of Water Codes*, 50 NAT. RESOURCES J. 255, 259 (2010)

tory formulations approve appropriations in water, determine priorities for allotment, and administer the right to distribute water.[46] Regardless of the type of system used, each state prescribes a set of terms and conditions by which a person may obtain water rights.[47]

Once an individual obtains a water right, it is not absolute because water is usufructuary and therefore remains subject to public ownership to a certain degree.[48] As one commentator noted, "[w]ater is legally and historically a public resource,"[49] meaning that water in its natural state is considered public property and belongs to the citizens of the state collectively.[50] This gives the state power to regulate water use against its own citizens and the federal government regardless of whether that party owns the right to remove water.[51] Therefore, a property right in water is distinguishable from that in land because the owner has a right to the use of the resource, but not to the actual property itself.[52]

Therefore, the state has customarily housed the power to regulate water resources through both allocation methods and enforcement of other citizens' rights. With the development of the bulk water export market, this structure may change as it is forced to interact with international agreements. The next

("Every prior appropriation state except for Colorado has delegated quasi-judicial authority to state administrative agencies or state engineers to administer both new allocations, or permits, and changes in water rights, or transfers.").

46. *See* SAX, *supra* note 39, at 2–3.

47. Slater, *supra* note 15, at 665.

48. *See id.* at 650, 662–63 ("[W]hether water rights are derived as an incident of land ownership or by compliance with common law or statutory requirements, they are usufructuary property rights in a shared public resource and vest only to make use of the common supply and, even then, not without regard to the impact of one's use upon others and the environment.").

49. GETCHES, *supra* note 21, at 11.

50. GOLDFARB, *supra* note 20, at 11; *e.g.*, State v. Bleck, 338 N.W.2d 492, 498 (Wis. 1983) (holding that the subordinate rights of riparian owners are "subject to the public's paramount right and interest").

51. GOLDFARB, *supra* note 20, at 11. It should be noted that the states are subject to the Takings Clause if they appropriate water once water rights are vested in a private party. *See* Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot., 130 S. Ct. 2592, 2601 (2010) (holding that the Takings Clause applies to the taking of a landowner's riparian rights); Yates v. Milwaukee, 77 U.S. 497, 504 (1870).

52. *See* Town of Chino Valley v. Prescott, 638 P.2d 1324, 1328 (Ariz. 1981) (holding that the right to groundwater is usufructuary); Rock Creek Ditch & Flume Co. v. Miller, 17 P.2d 1074, 1076–77 (Mont. 1933) (holding that the owner of a water right does not own the corpus of the stream).

Section will discuss two major trading agreements and how they may impact the current American water-rights structure.

C. IMPLICATIONS OF GATT AND NAFTA ON AMERICAN WATER RESOURCES

Historically, water has not been exported in bulk and, therefore, concern that international agreements would interact with domestic regulatory regimes was minimal.[53] However, with the spawning of a new market in bulk water export, the potential interaction of these two bodies of law could reduce the ability of domestic law to regulate resources over which it traditionally had full control.

1. Application of GATT to Bulk Water Export

Originally designed to provide an international forum to encourage free trade and resolve trade disputes, GATT was the initial step toward the development of a worldwide trade regime.[54] With the formation of the World Trade Organization (WTO) in 1994, GATT now provides the basic legal structure that governs international trade between WTO members.[55] GATT defines all commodities that may be traded by WTO members in the "Harmonized Tariff Schedule" (HTS).[56] Freshwater is included under Section 2201.[57] This inclusion is relevant to the discussion of bulk water because "[t]he existence of an HTS number means that there is a mechanism under which shipments of fresh water can be processed by . . . customs or-

53. *Cf.* Dinar & Wolf, *supra* note 3, at 43 (finding that technology allows an export market in water).

54. Rona Nardone, *Like Oil and Water: The WTO and the World's Water Resources*, 19 CONN. J. INT'L L. 183, 198 (2003).

55. Slater, *supra* note 15, at 655–56. At the time this Note was written, the agreement governs the trade relations between 153 countries. *Members and Observers*, WORLD TRADE ORG. (July 23, 2008), http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

56. PETER H. GLEICK ET AL., THE NEW ECONOMY OF WATER: THE RISKS AND BENEFITS OF GLOBALIZATION AND PRIVATIZATION OF FRESH WATER 16 (2002), *available at* http://www.pacinst.org/reports/new_economy_of_water/new_economy_of_water.pdf; *see also* Jerome Hinkle, *Troubled Waters: Policy and Action in the Great Lakes*, 20 T.M. COOLEY L. REV. 281, 299 (2003).

57. Section 2201 defines water as "including natural or artificial mineral waters and aerated waters, not containing added sugar or other sweetening matter nor flavored; ice and snow." U.S. INT'L TRADE COMM'N, PUB. NO. 4201, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, at ch. 22-3 (1st rev. ann. 2011), *available at* http://www.usitc.gov/publications/docs/tata/hts/bychapter/1101htsa.pdf.

ganizations . . . ."[58] Therefore, at least in theory, GATT already has a structure to support trade in bulk water.[59]

With the formation of a new bulk water market, it is feared that GATT Article XI may supersede state regulation of water once one member allows exportation.[60] Article XI, Section 1 states:

> No prohibitions or restrictions other than duties, taxes or other measures . . . shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.[61]

Article XI, Section 1, then prevents states from prohibiting or restricting the export of the "good" and requires continued trading even if exports are damaging to the environment.[62] If a nation decides to allow private companies to ship water in bulk, as currently written, Article XI would play a major role in determining the ability of governments to regulate their own freshwater resources.

Other portions of GATT may also apply to the export of bulk water because the treaty creates exceptions for "exhaustible" resources.[63] For example, Article XX, Sections (b) and (g) allows domestic protection of freshwater resources for "'exhaustible natural resources' or resources that are 'necessary to protect human, animal, or plant life or health.'"[64] However, to limit exports in this manner, the national government must also restrict domestic consumption to show the policy is in defense of natural resources and not at matter of economic protectionism.[65] Therefore, even with the provisions intended to protect

58. GLEICK ET AL., *supra* note 56.

59. *See id.*

60. *See* Slater, *supra* note 15, at 657–59.

61. GATT, *supra* note 10, 55 U.N.T.S. at 224–26.

62. Robert J. Girouard, *Water Export Restrictions: A Case Study of WTO Dispute Settlement Strategies and Outcomes*, 15 GEO. INT'L ENVTL. L. REV. 247, 252 (2002).

63. Nardone, *supra* note 54, at 200. *See generally* GLEICK ET AL., *supra* note 56, at 5 (articulating how water can be both a renewable and nonrenewable resource).

64. Nardone, *supra* note 54, at 200 (quoting GATT, *supra* note 10, 55 U.N.T.S. at 262).

65. *Id.* at 200–01. GATT Article XX must be read in conjunction with the introductory clauses of the Article, so exceptions cannot be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries." PAUL B. STEPHAN ET AL., INTERNATIONAL BUSINESS AND ECONOMICS LAW AND POLICY 912–13 (3d ed. 2004) (quoting and discussing GATT, *supra* note 10, 55 U.N.T.S. at 262).

exhaustible resources from exploitation, GATT may limit the ability of states to regulate their waters for the benefit of citizens at large.

However, the shipment of bulk water not only implicates GATT, but also NAFTA. The next Subsection will discuss how application of NAFTA to bulk water export is both related to and different from application under GATT.

2. Application of NAFTA to Bulk Water Export

NAFTA is an international trade agreement between Mexico, Canada, and the United States.[66] This agreement is essentially a regional extension of GATT[67] that seeks to lower trade barriers, promote fair competition, increase cross-border investment, and create a forum for dispute resolution.[68]

Chapter Three of NAFTA requires that each party "accord national treatment to the goods of another Party in accordance with Article III" of GATT.[69] This incorporation of GATT "require[s] the national treatment of goods and prohibit[s] quantitative restrictions on imports and exports of products."[70] This language could prevent all three members of NAFTA from enacting import-export restrictions on water traded in bulk, regardless of damage to the environment or limitations on the local population's water supply needs.[71]

Chapter 11 of NAFTA also has implications for bulk water, because it forces nations to afford foreign and domestic investors equal treatment under trade law.[72] Under Article 1102 of NAFTA, parties are required to "extend treatment no less favorable to investors and investments of another Party than that which is accorded to similar [domestic] interests."[73] Thus,

66. Slater, *supra* note 15, at 656.

67. GLEICK ET AL., *supra* note 56, at 18.

68. Slater, *supra* note 15, at 656.

69. NAFTA, *supra* note 9, 32 I.L.M. at 299–301.

70. Slater, *supra* note 15, at 656.

71. *See* Baumann, *supra* note 8, at 114–17, 119–23 (analyzing the potential effect of GATT and NAFTA on Canada's efforts to ban bulk water exports); Sanford E. Gaines, *Fresh Water: Environment or Trade?*, 28 CAN.-U.S. L.J. 157 (2002); J. Owen Saunders, *Trade Agreements and Environmental Sovereignty: Case Studies from Canada*, 35 SANTA CLARA L. REV. 1171 (1995); Marcia Valiante, *Harmonization of Great Lakes Water Management in the Shadow of NAFTA*, 81 U. DET. MERCY L. REV. 525, 534 (2004).

72. Brian D. Anderson, *Selling Great Lakes Water to a Thirsty World: Legal, Policy, & Trade Considerations*, 2 BUFF. ENVTL. L.J. 215, 241 (1999).

73. Little, *supra* note 11, at 144; *see also* NAFTA, *supra* note 9, 32 I.L.M. at 639.

each state must accord the same rights to remove water to foreign investors as it does to domestic investors if bulk water is subject to NAFTA.[74] This provision will restrict the number of permits available to domestic parties because the state must distribute only a finite number of permits to ensure they do not damage the local water supply.[75]

After the passage of NAFTA, the Canadian government asserted their concern that the language of the agreement would subject both the United States and Mexico to "unlimited access to [the country's] fresh water resources."[76] In order to assuage this concern, the federal governments of Canada, the United States, and Mexico made a joint public statement in 1993 stating that NAFTA does not apply to bulk water exports.[77] However, this joint statement is "completely non-binding upon the parties."[78] The U.S. Department of State has said "governments may agree on joint statements of policy or intention that do not establish legal obligations."[79] Thus, the 1993 joint statement does not bind the United States, Mexico, and Canada, and the NAFTA provisions still apply to the export of bulk water.[80]

Provisions of both NAFTA and GATT could impact the states' traditional legal authority to regulate water resources. By creating this new tension between international and domestic frameworks, it is necessary to develop a solution to ensure that citizens of the United States are protected from the potential local impact.

D. HISTORY OF THE PUBLIC TRUST DOCTRINE AND MODERN CONCEPTIONS

State governments in water rich states have an economic incentive to sell water in bulk to private enterprises.[81] Nothing,

74. Little, *supra* note 11, at 146.

75. *Id.*

76. *Id.* at 127.

77. Christopher Scott Maravilla, *The Canadian Bulk Water Moratorium and Its Implications for NAFTA*, CURRENTS: INT'L TRADE L.J., Summer 2001, at 29, 35. To view the actual joint statement itself, see David Johansen, *Water Exports and the NAFTA*, CAN. (Mar. 8, 1999), http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/EB/prb995-e.htm.

78. Maravilla, *supra* note 77.

79. Memorandum from Robert E. Dalton, Assistant Legal Advisor for Treaty Affairs, U.S. Dep't of State, International Documents of a Non-Legally Binding Character 1 (Mar. 18, 1994), *available at* http://www.state.gov/documents/organization/65728.pdf.

80. Maravilla, *supra* note 77.

81. *Cf.* Steve Maich, *America Is Thirsty*, MACLEAN'S MAG., Nov. 28, 2005,

however, assures that legislative or administrative officials adequately consider the public interest when determining whether to issue permits for bulk water export.[82] As a result, the public trust doctrine is viable remedy to the potential consequences of bulk water export.[83] This conflict illuminates a potential public trust concern: government may have economic motives that are not in the best interest of the public. This Section will first describe the establishment of the American public trust doctrine. The Section continues to describe the scope of the public trust doctrine, specifically, how the Supreme Court has given state courts the discretion to determine what resources are protected by the doctrine and how jurisdictions vary from traditional to broad interpretations.

1. Establishment of the American Public Trust Doctrine

The underlying premise behind the public trust doctrine is that some resources are always subject to ownership and protection by the state in trust for the benefit of the public.[84] The public trust doctrine was assimilated into United States law from English common law.[85] Early English decisions assumed this doctrine was limited to property rights in rivers, seas, and seashores that were to be preserved for the public to navigate, fish, or use for other purposes.[86] The existence of this doctrine was confirmed in 1892 by the Supreme Court in *Illinois Central Railroad Co. v. Illinois*.[87] The Court held that the public trust doctrine limited the state's ability to sell or relinquish control over submerged lands because they are held "in trust" for the

at 28–30 (reporting that various businesses wanted to buy water from Canada to sell to the United States).

82. *Cf.* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 495 (1970) ("[I]t will often be the case that the whole of the public interest has not been adequately considered by the [government] whose conduct has been brought into question.").

83. *Cf. id.* at 495–96 (discussing how the public trust doctrine would "create through the courts an openness and visibility which is the public's principal protection against overreaching").

84. Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 702 (2006).

85. *See generally* 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. 799, 828 (2004) (discussing the English common law and its application to states).

86. Klass, *supra* note 84.

87. 146 U.S. 387, 452 (1892).

public.[88] Most importantly, the case explicitly stated that the public trust doctrine can override a state statute.[89]

2. Contemporary Scope of the Public Trust Doctrine

Once a court holds that specific natural resources are held "in trust," the sovereign has specific duties that are judicially enforceable by the public.[90] A ruling of this kind creates a state duty to preserve and protect the public's interest in the resource.[91] The doctrine protects these interests by restricting government authority in three ways:

> first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses.[92]

Even though the public trust doctrine affords a resource broad protection under the common law, the Supreme Court held that each state defines the reach and application of the public trust doctrine within its borders.[93] As a result, the scope of the doctrine varies considerably from state to state.[94] Whereas some states have taken a restricted view of the doctrine, others have interpreted it more broadly.[95]

Some state courts have limited the scope of the public trust doctrine to the historically recognized areas of navigation and fishing.[96] The traditional arguments for maintaining this narrow scope are the doctrine's "undemocratic nature," the power

88. *Id.*

89. Klass, *supra* note 84, at 705.

90. 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, 75 (2005).

91. *Id.* at 77.

92. Sax, *supra* note 82, at 477.

93. *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 483 (1988) (citing Shively v. Bowlby, 152 U.S. 1, 24 (1893)).

94. *See* Kanner, *supra* note 90, at 78 ("[A] state has the right to define the nature and extent of its property under the common law relating to water interests."); Klass, *supra* note 84 (finding that the public trust doctrine allows "variations in scope among the states").

95. Kanner, *supra* note 90, at 78.

96. *See, e.g.*, Dep't of Natural Res. v. Mayor of Ocean City, 332 A.2d 630, 637–38 (Md. 1975) (refusing to extend the public trust doctrine to dry land although the land at issue was legally considered a part of the waterfront and had been improved at the public's expense); Op. of the Justices, 313 N.E.2d 561, 566 (Mass. 1974) (refusing to extend the public trust doctrine to beach walking).

it gives "noncompetent" courts over highly complex administrative decisions, and the danger that courts will undervalue private property rights.[97] Other state courts have chosen to expand the public trust doctrine beyond the traditional view.[98] Expansions have included defending use, access, and preservation of waters which are used for wildlife habitat,[99] drinking water,[100] recreation,[101] and inland wetlands.[102] Most relevant to this Note, some states have also applied this doctrine to resolve water appropriation issues and have limited preexisting water rights to prevent impermissible limitations on public access, as well as harm to the environment, aesthetics, or other natural resources.[103]

Although the public trust doctrine has been significantly broadened in some states, other jurisdictions are reluctant to protect resources outside the traditional scope.[104] Because the

97. 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, 403 (1997).

98. Klass, *supra* note 84, at 707–08.

99. *See, e.g.*, Pullen v. Ulmer, 923 P.2d 54, 61 (Alaska 1996) (holding that wildlife "occurring in their natural state" were "public assets of the state which may not be appropriated by initiative"); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (describing tidelands as belonging within the public trust because they are "environments which provide food and habitat for birds and marine life").

100. *See, e.g.*, Mayor of Clifton v. Passaic Valley Water Comm'n, 539 A.2d 760, 765 (N.J. Super. Ct. Law Div. 1987) ("[T]he public trust doctrine applies with equal impact upon the control of our drinking water reserves."), *aff'd*, 557 A.2d 299 (N.J. 1989).

101. *See, e.g.*, Mont. Coal. for Stream Access v. Curran, 682 P.2d 163, 171 (Mont. 1984) (protecting surface waters capable of recreational use under the public trust doctrine, "without regard to streambed ownership or navigability for nonrecreational purposes").

102. *See, e.g.*, Just v. Marinette Cnty., 201 N.W.2d 761, 769 (Wis. 1972) (finding that swamp lands "adjacent to or near navigable waters" were subject to regulation under the state public trust powers).

103. *See, e.g.*, CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1121 (Alaska 1988) (finding "continuing public easements" to protect public access to tidelands); *In re* Wai'ola O Moloka'i, Inc., 83 P.3d 664, 694 (Haw. 2004) (holding that reservations of water by a state agency were entitled to protection under the public trust doctrine); Shokal v. Dunn, 707 P.2d 441, 450 (Idaho 1985) (finding that the aesthetic and environmental impacts of a permit grant may be given "great consideration" where those priorities match local needs); United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n, 247 N.W.2d 457, 463 (N.D. 1976) (finding that the public trust doctrine requires some evidence of "an analysis of present supply and future need" before water resources are allocated).

104. *See* Kanner, *supra* note 90, at 78 (introducing different jurisdictions' approaches to applying the public trust doctrine).

sale of bulk water implicates many of the concerns hallmarked in traditional public trust precedent, the central argument of this paper focuses on jurisdictions that narrowly interpret the public trust doctrine. This Note posits that expansion of the public trust doctrine to bulk water exports is narrower than more liberal extensions because it is tailored to resolve traditional *concerns*. As such, this Note encourages conservative jurisdictions to apply the public trust doctrine to bulk water exports.

II. JUDICIAL APPLICATION OF THE PUBLIC TRUST DOCTRINE

The Supreme Court gave state courts the discretion to extend or limit the public trust doctrine.[105] Therefore, the use of the public trust doctrine to protect a state's natural resources varies by jurisdiction.[106] In order to convince jurisdictions to extend the public trust doctrine to the appropriation of water rights for bulk export, it is necessary to understand the circumstances where courts have extended the doctrine and how the concerns of more conservative jurisdictions can be alleviated. This Part first discusses circumstances under which courts have extended the doctrine to protect the public interest in a resource and provides support for these extensions. Next, it argues that the concerns cited by jurisdictions following the traditional approach are not implicated by extension to bulk water exports. Finding that bulk water exports implicate traditional *concerns* about public resources, the Part concludes that applying the public trust doctrine is in keeping with the traditional application of the doctrine by courts.

A. CIRCUMSTANCES IN WHICH COURTS HAVE APPLIED THE PUBLIC TRUST DOCTRINE

An assessment of the circumstances where courts apply the public trust doctrine is necessary to argue that this doctrine should be applied to bulk water sales. This Section outlines

105. *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 483 (1988) ("[T]here is no universal and uniform law upon the subject; but . . . each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy." (quoting Shively v. Bowlby, 152 U.S. 1, 26 (1894))).

106. Ivan M. Stoner, Comment, *Leading a Judge to Water: In Search of a More Fully Formed Washington Public Trust Doctrine*, 85 WASH. L. REV. 391, 399–400 (2010).

(1) how using the doctrine would prevent the government from selling a public resource for temporary economic gain, and (2) why some states have already applied the public trust doctrine to the appropriation of water.

1. Federal Application of the Public Trust Doctrine: Prohibition of the Export of a Traditionally Public Resource for Temporary Economic Gain

In *Illinois Central Railroad Co. v. Illinois*, the Supreme Court affirmed the enforceability of the public trust doctrine against state legislative actions regarding submerged lands.[107] There are two reasons this case has important implications for bulk water. First, the case articulated that the doctrine can override state legislative actions, unlike most common law principles which can be superseded by statute.[108] Second, the case houses significant parallels to bulk water exports in the kind of legislative power used and the effect that power had on the public's future use of the resource.

Illinois Central addressed an 1869 grant, by the Illinois legislature, of an interest in more than one thousand acres of submerged land within the Chicago Harbor to Illinois Central Railroad.[109] In 1873, lawmakers changed their minds and repealed the grant, and the State brought a quiet title action against the railroad in 1883.[110] The Supreme Court upheld the State's ability to repeal the 1869 grant, deeming the initial grant invalid under the public trust doctrine.[111]

Although the Court affirmed the State's title to the lands under Lake Michigan,[112] the Court determined that title was "different in character" from other state-owned lands that can be sold to private parties.[113] As a result, the Court found that "the state's control of such lands, for purposes of the trust, 'can never be lost,' unless conveyed for uses promoting the interest

107. *See supra* notes 87–89 and accompanying text.

108. *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453, 455 (1892) (making broad references to "the State" and that "[a]ny grant of the kind is necessarily revocable").

109. *Id.* at 438–39, 454; *see also* Klass, *supra* note 84, at 703–04; Sax, *supra* note 82, at 489.

110. *See Ill. Cent. R.R.*, 146 U.S. at 433, 449, 460–61.

111. *Id.* at 454–55, 463–64; Klass, *supra* note 84, at 704.

112. The Court expressly found that submerged lands included not only tidelands, but also the Great Lakes and other key inland water bodies. *Ill. Cent. R.R.*, 146 U.S. at 435–37.

113. *Id.* at 452.

of the public."[114] The Court did not, therefore, prohibit the State from selling the land to private parties.[115] Instead, the Court decreed that "[w]hat a state may not do . . . is to divest itself of authority to govern the whole of an area in which it has responsibility to exercise its police power."[116] Like *Illinois Central*, a state's action to allow water to be shipped in bulk also involves governments rescinding control over a previously regulated resource to achieve a short-term economic gain.[117] By permitting bulk water shipments, a state government may potentially renounce its right to allocate water resources as it deems fit.[118] Consequently, the state loses a right which was solely under its control.[119] Thus, the state "divest[s] itself of authority to govern the whole of an area in which it has responsibility to exercise its police power;" a circumstance not permitted under *Illinois Central*.[120]

The state grant in *Illinois Central* also resembles the potential consequences of bulk water export because the legislative action did not create public developments or produce more efficient services for the public.[121] Likewise, issuing bulk water permit for export does not provide the benefits to the public for several reasons. First, bulk water exports operate with little long-term labor.[122] Thus, relative to other water allocation industries, such as bottled water, the bulk water industry would

114. Klass, *supra* note 84, at 704 (quoting *Ill. Cent. R.R.*, 146 U.S. at 453).

115. *See Ill. Cent. R.R.*, 146 U.S. at 453 ("[T]he control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest . . . .").

116. Sax, *supra* note 82, at 489.

117. *Cf.* Klass, *supra* note 84, at 705 ("Putting aside its legal groundings, *Illinois Central* stands as an early invocation of the public trust doctrine to prevent a state from placing public trust lands into private hands for short-term economic gain to the detriment of the long-term preservation of the resource for the public.").

118. *See* Jamie W. Boyd, Note, *Canada's Position Regarding an Emerging International Fresh Water Market with Respect to the North American Free Trade Agreement*, 5 NAFTA: L. & BUS. L. REV. AMS. 325, 336 (1999) (arguing that under certain provisions of NAFTA "Canada could lose control over future water export projects, however large or small").

119. *See* GOLDFARB, *supra* note 20, at 11.

120. *See* Sax, *supra* note 82, at 489.

121. *See id.* at 490.

122. *See* ANDREW NIKIFORUK, PROGRAM ON WATER ISSUES, ON THE TABLE: WATER, ENERGY AND NORTH AMERICAN INTEGRATION 19 (Sept. 4, 2007), http://www.powi.ca/pdfs/events/powi20070910_9am_On_the_Table.pdf (discussing how and why the number of jobs created in a bulk water market for Canada would be "minimal").

provide very few jobs to members of the public.[123] The operation of exporting bulk water could also depress development in the domestic economy by limiting the number of available permits for domestic industries.[124] Therefore, the government's permission to sell water in bulk is similar to Illinois's decision to sell the land under its harbor because the water permit would not properly promote the interest of the public.

The parallels between *Illinois Central* and the developing issues related to bulk water export illustrate how this new market implicates traditional public trust *concerns*. As discussed below, applying the doctrine to bulk water export does not force a state court to make highly complex environmental decisions or frustrate private property rights to the same degree as other extensions. Jurisdictions that apply the doctrine to water appropriation more extensively do, however, provide compelling arguments for why conservative state courts should extend the doctrine to bulk water export.

2. Application of the Public Trust Doctrine to Water Uses

The extension of the public trust doctrine is especially important in the area of water law.[125] Because water is necessary for survival and critical for economic development,[126] it is obvious that states must regulate the tensions between appropriation for historical uses and for modern development.[127] How-

123. *Id.* ("The number of jobs created [through bulk water exports] would be minimal and would be largely confined to the maintenance of ships or pipelines."); *cf.* POLICY RESEARCH INITIATIVE, SUSTAINABLE DEVELOPMENT BRIEFING NOTE: IS THERE A BUSINESS CASE FOR SMALL-SCALE AND LARGE-SCALE WATER EXPORT TO THE UNITED STATES? 4 (2007), *available at* http://www.policyresearch.gc.ca/doclib/BN_SD_BulkWater2_200610_e.pdf ("Relative to the value-added bottled water and beverage industries, bulk water export would employ very few Canadians per [cubic meter of water] exported. Thus, beyond the initial construction phase, bulk exports would bring little employment to Canadians.").

124. *Cf.* NIKIFORUK, *supra* note 122 (discussing how exporting water would be a detriment to the Canadian economy because their major industries, such as agriculture, automobile manufacturing, wood, oil, and electricity are water dependent, and how reducing the water supply would reduce the water at home available to create jobs and maintain those industries).

125. *See* Charles F. Wilkinson, *Western Water Law in Transition*, 56 U. COLO. L. REV. 317, 336 (1985).

126. *E.g.*, GLEICK ET AL., *supra* note 56, at ii.

127. *See* David Aladjem, *The Public Trust Doctrine: New Frontiers for Sustainable Water Resources Management*, 25 NAT. RESOURCES & ENV'T, Summer 2010, at 17 ("[T]he chief task of the next quarter century will be to attempt to balance the various needs for water resources against each other."); Wilkinson, *supra* note 125 ("The recognition of the public trust doctrine in water law is

ever, given water's usufructuary nature,[128] it makes particular sense to extend the public trust doctrine's scope to the *use* of the resource.[129] Indeed, many jurisdictions apply the public trust doctrine to management of water resources.[130]

The first major decision to apply the public trust doctrine to water appropriation was *National Audubon Society v. Superior Court of Alpine County*.[131] In this case, the Supreme Court of California expanded the public trust doctrine to include the allocation of water rights in specific circumstances, even when water had already been appropriated to a private party.[132]

In holding that the public trust doctrine applied in these circumstances, the court looked both at the purpose and the scope of the doctrine within the state.[133] The court discussed how the public's interest in water resources was not limited simply by the traditional triad of uses.[134] Instead, the goal of the court in applying the doctrine was to protect water resources for their current public use.[135] In their assessment of

the single strongest statement that historic uses must accommodate modern needs.").

128. As discussed *supra* in the text accompanying notes 31–34, an interest in water is usufructuary—meaning that it "incorporates the needs of others." Sax, *supra* note 82, at 485. It is thus necessary for the government to regulate water use for the benefit of the public and to take account of the public nature of the resource. *See id.*

129. *See* Sax, *supra* note 82, at 485 (noting that the usufructuary nature of the resource makes it necessary for the government to regulate public uses and that no other legal doctrine "comes as close as does the public trust concept to providing a point of intersection for the" relevant interests (footnote omitted)).

130. *See* Alexandra B. Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 U. COLO. L. REV. 283, 320 n.184 (2006).

131. 658 P.2d 709 (Cal. 1983); *see also* Aladjem, *supra* note 127 (describing the use of the public trust doctrine in *National Audubon Society* to expand public water protections).

132. *Nat'l Audubon Soc'y*, 658 P.2d at 728; *see also* Erik Swenson, Comment, *Public Trust Doctrine and Groundwater Rights*, 53 U. MIAMI L. REV. 363, 369 (1999) ("[T]he court . . . further expands the scope of the public trust doctrine to include the allocation of water rights.").

133. *See Nat'l Audubon Soc'y*, 658 P.2d at 719.

134. *Id.* (defining the traditional triad as including navigation, commerce, and fishing).

135. *Id.* (finding that "one of the most important public uses of the tidelands" was "the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area" (quoting Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971))).

the scope of the doctrine, the court held, as most American jurisdictions do, that "the public trust is not limited by the reach of the tides, but encompasses all navigable lakes and streams."[136]

Since the court found that the public trust applied to navigable waterways, so long as the application was for modern public uses, the court thought that integrating the appropriation system and the public trust doctrine was necessary.[137] In doing so, the court found that the public trust doctrine can override the appropriations of waters both before and after a permit is allocated.[138] It also found that the state has a duty to take the public trust into account when distributing permits under the state's system of water appropriation.[139] Courts in other jurisdictions have followed the reasoning of the California Supreme Court;[140] however, this extension of the doctrine is primarily in the western part of the country.[141]

In states that have extended the public doctrine to the area of water appropriation, the legislature has a mandate to consider the public trust when distributing permits.[142] However, this is a limited remedy. Such application of the doctrine would not solve the problems faced by bulk water export.[143] In this circumstance, the issuance and use of one permit could have serious ramifications for the individual state, as well as the rest of the country, because one permit could cause states to lose traditional legal authority over water resources if NAFTA and GATT are applied to bulk water export.[144] Therefore, along with illuminating traditional concerns associated with the pub-

136. *Id.*

137. *Id.* at 727–28.

138. *See* Swenson, *supra* note 132, at 371 ("According to the court, all property rights in water are nonvested rights subject to revocation by the state if trust resources are harmed.").

139. *See Nat'l Audubon Soc'y*, 658 P.2d at 727–28.

140. *See e.g.*, CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1118 (Alaska 1988); *In re* Wai'ola O Moloka'i, Inc., 83 P.3d 664, 693 (Haw. 2004); Shokal v. Dunn, 707 P.2d 441, 450–52 (Idaho 1985). For a case that dealt with this issue prior to *National Audubon Society*, see United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n, 247 N.W.2d 457, 463 (N.D. 1976).

141. *See* Aladjem, *supra* note 127, at 20 (discussing how "the public trust doctrine has become an accepted part of the legal landscape" in western states).

142. *See id.* (describing the status of the public trust doctrine in several states).

143. *See id.*

144. *See id.*

lic trust doctrine, a more traditional remedy—nullifying this type of sale—would also be necessary to solve the developing problem.[145] If the state must simply take the doctrine into account, the doctrine still allows the state to lose traditional authority over a resource which it holds for the people in trust.

Although there are shortcomings to the application of the public trust doctrine in some states, progressive jurisdictions provide important illustrations of how the doctrine can extend beyond traditional water uses, as well as how a system can integrate a water rights regime with the public trust doctrine. Regardless of the arguments made for extensions of this doctrine, there are many commentators and state courts that are reluctant to extend the doctrine beyond its traditional use. The next Section articulates that, while state courts rightly take a limited approach to the public trust doctrine, in the context of bulk water invocation of the doctrine is entirely consistent with conservative judicial application.

B. JUDICIAL RELUCTANCE TO EXTEND THE PUBLIC TRUST DOCTRINE BEYOND THE TRADITIONAL AREAS OF NAVIGABLE AND TIDAL WATERS

Some state courts are disinclined to expand the public trust doctrine beyond the traditional doctrine enunciated in *Illinois Central*.[146] Critics have lodged three typical complaints against extension of the public trust doctrine, including a concern that: the application undervalues the right to private property; the doctrine gives a court authority over complex administrative decisions where it lacks expertise; and that the doctrine has an undemocratic nature.[147] However, traditional concerns over the extension of this doctrine do not apply to the same extent when discussing bulk water export.

A typical argument against extension of the public trust doctrine is its unnecessary intrusion on both private property rights and private conduct.[148] For example, the New York

145. *See, e.g.*, Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 455 (1892) (stating that the contract was revocable because the land was held in trust).

146. *See* Kanner, *supra* note 90, at 78, 81.

147. Araiza, *supra* note 97, at 402–03.

148. *See, e.g.*, George P. Smith II & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within a Penumbra*, 33 B.C. ENVTL. AFF. L. REV. 307, 322–41 (2006) (arguing that expansion of the public trust doctrine to environmental protection not grounded in natural law traditions would unnecessarily interfere with private property rights and result in improper judicial activism).

Court of Appeals refused to extend the public trust doctrine to nonnavigable waters because it feared injecting uncertainty into the investment of private property.[149] Similarly, the Connecticut Supreme Court ruled that the public trust doctrine does not extend to the use of public parks, citing a concern for unreasonable intrusion on private conduct.[150]

This concern does not, however, apply to the extension of the public trust doctrine to the bulk water context for two reasons. First, because this is a developing market, courts would not "inject uncertainty" because there is always ambiguity and uncertainty when new markets are created.[151] In fact, courts would achieve the opposite end. By applying the common law to this water use, a court would create stability by ensuring the current permitting system is not interrupted by international agreements. Second, this intrusion is not "unreasonable" because a right to water is usufruct, and private parties are on notice that water rights are subject to the beneficial interest of the public.[152] Since permit applicants are on notice that the state may limit the manner and method of appropriation for the benefit of the state, it is reasonable for an applicant to assume that state power extends to the courts in ensuring the public's interest is protected.[153] Therefore, by extending the doctrine to bulk water export, a court is simply enforcing both the interest of other water right holders and the public generally by protecting the current legal water rights structure.

Another argument against the extension of the public trust doctrine is that it gives courts with very little expertise the authority to affect and overrule technical administrative deci-

149. *See* Douglaston Manor, Inc. v. Bahrakis, 678 N.E.2d 201, 203–05 (N.Y. 1997).

150. Leydon v. Greenwich, 777 A.2d 552, 564 n.17 (Conn. 2001) (confirming the private right to beach access but objecting to the claim that the doctrine extends to town parks).

151. *Cf.* Michael Korybut, *Article 9's Incorporation Strategy and Novel, New Markets for Collateral: A Theory of Non-Adoption*, 55 BUFF. L. REV. 137, 168–72, 177 (2007) (discussing how new markets create legal uncertainty about "commercial reasonableness" in the Article 9 context).

152. *See supra* notes 31–34 and accompanying text.

153. *See* Geoffrey M. Craig, *House Bill 1041 and Transbasin Water Diversions: Equity to the Western Slope or Undue Power to Local Government?*, 66 U. COLO. L. REV. 791, 819 (1995) ("[W]ater right holders have always been on notice that the police powers of the state may be reasonably exercised to limit the manner and method of appropriation in furtherance of legitimate state interests such as health, welfare, and safety.").

sions.[154] The structure of state legislative systems places a significant amount of authority in administrative agencies because of their knowledge and expertise in the field.[155] Consequently, according to some commentators, when judges weigh in on technically complex decisions in the application of laws, judges should defer greatly to the expertise and decision-making capacity of administrative agencies.[156]

Fundamentally, this criticism does not apply to bulk water exports because it is not necessary for courts to make expert administrative assessments when applying the doctrine in this circumstance. Instead, a court follows a more traditional approach because issuance of a permit for bulk water risks state divestment of authority over water resources because of international treaty.[157] This is similar to *Illinois Central* in that it is not the effect on the environment that initiates the protection, but the reality that the decision could result in the government losing its ability to regulate a resource under its control.[158] Thus, judges need not make complex scientific determinations and courts can freely apply the doctrine based on the effect on the public.

The third argument against extending the public trust doctrine is that it is undemocratic in nature.[159] It has been argued that the doctrine, when extended beyond traditional uses, becomes a tool to override the democratic process.[160] Although the problems with bulk water could be resolved within the state legislative branch, the fact that one legislative or administrative decision could forever change the water-rights system tips the scales toward application of the doctrine because it is applied to rectify the traditional concerns that traditionally call for the use of the doctrine to protect the interest of the public. This is true for two reasons.

154. Araiza, *supra* note 97, at 402–03.

155. *See* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 688 (1986).

156. *Id.*

157. *See supra* Part I.B & C (discussing water rights in the United States and placing these rights in the context of GATT and NAFTA).

158. *See* Klass, *supra* note 84, at 705.

159. Araiza, *supra* note 97, at 402–03.

160. *See* James L. Huffman, *Trusting the Public Interest to Judges: A Comment on the Public Trust Writings of Professors Sax, Wilkinson, Dunning and Johnson*, 63 DENV. U. L. REV. 565, 583 (1986) (concluding that the doctrine is a "tool[] for political losers or for those seeking to avoid the costs of becoming political winners").

First, this doctrine was applied by the Supreme Court in a circumstance where the state government was going to divest itself of authority to govern "the whole of an area in which it has responsibility to exercise its police power."[161] Therefore, the Court invoked the doctrine as a check on legislative power that would have damaging effects on the public's ability to use specific kinds of resources.[162] Since the legislative power in this case would result in an unchangeable outcome,[163] this circumstance seems well suited for application of the public trust doctrine.

Second, permitting bulk water exports puts both historical and future needs at risk because the industry does not provide major benefits to the public.[164] The international export of water does not provide significant infrastructure to improve regional economies or accommodate for increasing water needs.[165] In addition, the export of bulk water may have serious environmental consequences leading to water shortages for the people of a state.[166] This is the foundation of traditional public trust doctrine case law. The decision to offer full control of the harbor in *Illinois Central* was particularly extreme because it did not create any public development or produce more efficient services for the public.[167] This also favors application of the public trust doctrine to bulk water exports because of the minimal benefits provided to the public in exchange for the state's control of water resources.

161. Sax, *supra* note 82, at 489.

162. *See, e.g.*, Danielle Spiegel, Student Article, *Can the Public Trust Doctrine Save Western Groundwater?*, 18 N.Y.U. ENVTL. L.J. 412, 438 (2010).

163. Unless a change was made to GATT or NAFTA.

164. *See* POLICY RESEARCH INITIATIVE, *supra* note 123.

165. *See* GLEICK ET AL., *supra* note 56, at 11–12 (arguing that resources like water that are sold as "raw" goods, as opposed to value-added goods such as bottled water, "involve much less investment" in the home nation because "little or no additional inputs are needed"); NIKIFORUK, *supra* note 122 (exporting water in its raw form means "less water at home to create jobs and less water to sustain ecological services").

166. *See* MAUDE BARLOW, INT'L FORUM ON GLOBALIZATION, BLUE GOLD: THE GLOBAL WATER CRISIS AND THE COMMODIFICATION OF THE WORLD'S WATER SUPPLY 5–14 (rev. ed. 2001) (discussing some of the consequences of overusing water). Although there is no guarantee that applicability of water resources would impact the environment, especially with the exceptions in the GATT for "exhaustible resources," Nardone, *supra* note 54, at 200 (quoting GATT, *supra* note 10, 55 U.N.T.S. at 262), this Note posits that the potential harm to water resources is increased when a state loses its full ability to regulate the resource for the benefit of the public.

167. Sax, *supra* note 82, at 490, 495.

Therefore, the distribution of water rights for bulk water export provide the proper opportunity for courts to apply the public trust doctrine because arguments against its use are not sufficiently persuasive. Additionally, the issuance of a permit for bulk water export echoes many traditional legal reasons to protect the public from a legislative action. The extension of the public trust doctrine would provide the most efficient manner of avoiding the permanent consequences generated by the export of bulk water.

III. EXTENSION OF THE PUBLIC TRUST DOCTRINE TO DENY APPROPRATION OF WATER RIGHTS FOR BULK WATER EXPORT

The export of bulk water calls for the extension of the public trust doctrine to protect the public from the potential consequences associated with international trade agreements. First, the decision of state courts to extend the doctrine is appropriate because water is already a public good for the purposes of water allocations, therefore parties are on notice that their rights are impacted by the public generally.[168] Second, state courts decisions to extend the doctrine assuage the concern that government would distribute permits for a temporary financial gain that is not in the best interest of the public.[169] Last, the extension is supported by Supreme Court precedent because the state is potentially divesting its traditional authority to regulate water resources to a foreign entity.[170]

A. EXTENSION OF THE DOCTRINE IS APPROPRIATE BECAUSE WATER IS ALREADY A "PUBLIC" GOOD FOR THE PURPOSES OF WATER ALLOCATION AND PARTIES ARE ON NOTICE OF THOSE PUBLIC RIGHTS

The public nature of water lends itself to application of the public trust doctrine.[171] Because an interest in water is usufruct, it is necessary for the government to regulate water use

168. *See generally* Sax, *supra* note 82, at 485 (discussing water and property rights outside the framework of bulk water).

169. *See generally* Klass, *supra* note 84, at 705 (discussing the public trust doctrine as a check on government mismanagement of public resources outside the framework of bulk water).

170. *See generally* Sax, *supra* note 82, at 489 (discussing state authority over public areas outside the framework of bulk water).

171. *See id.* at 485.

for the benefit of the public.[172] In other words, most jurisdictions traditionally view water as "public property subject to a private use."[173] While the use of the public trust doctrine has customarily been defined under the terms of navigation, commerce, and fisheries, many scholars argue that trust theory is sufficiently broad to encompass water rights more generally.[174] In the case of bulk water, use of the doctrine is necessary to protect the public's interest to the extent the state and local governments fail to fulfill the their duty to the public.[175] The doctrine would protect the public from government decisions that affect the long-term prosperity of the state's water resources by mandating the state fulfill its duty to issue water rights only to the extent they do not hurt the rights of other users or the public.

B. EXTENSION OF THE DOCTRINE IS APPROPRIATE BECAUSE THE GOVERNMENT'S APPROPRIATION OF THE RIGHT TO A PRIVATE PARTY MAY NOT BENEFIT THE PUBLIC

Bulk water exports illustrate an instance where the government may provide a benefit for a private party for short-term economic gain that does not create significant benefits to the public. This is similar to *Illinois Central* because there is no indication the public would benefit from sale of the resource.[176] The increase in demand for freshwater resources around the world, coupled with the potential for water-rich areas to increase their revenue, will likely create the perfect storm for the development of this market.[177] As the market grows and technology develops, smaller public entities like Sitka, Alaska will feel pressure to issue water permits to private companies to

172. *See id.*

173. Ronald B. Robie, *The Public Interest in Water Rights Administration*, 23 ROCKY MTN. MIN. L. INST. 917, 923 (1977).

174. *See, e.g.*, *id.* at 926–28. Some courts already extended the doctrine to water rights. *See supra* Part II.A.2.

175. Robie, *supra* note 173, at 927–28.

176. *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892) ("The control of the State . . . can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."); Gould v. Greylock Reservation Comm'n, 215 N.E.2d 114, 126 (Mass. 1966) ("[W]e find no express grant to the Authority of power to permit use of public lands and of the Authority's borrowed funds for what seems, in part at least, a commercial venture for private profit.").

177. *See generally* GLEICK ET AL., *supra* note 56, at 2 (describing the developing water crisis).

profit from their resources. However, with a resource as valuable as water, it is necessary to ensure governmental bodies take all relevant factors into account when determining whether the financial incentives provided by shipping water overseas are truly in the best interest of the state.

It is true that state and local governments can make money when allocating permits for bulk water export.[178] However, there is no evidence that bulk water exports would actually pay the true worth of water to the people of the state.[179] Nor is it clear that exportation would provide jobs for people within the state.[180] Moreover, it may limit the economic opportunities for citizens to build domestic industries.[181] Therefore, the problems created by bulk water allocation resemble those in *Illinois Central* in which the state's economic gain did not provide any tangible benefits to the community.[182] Thus, extension of the public trust doctrine is the most reliable way to ensure allocation of water rights provides some kind of benefit to the community and that state governments properly address the impacts this export would have on society.

178. *See, e.g.*, MARCEL BOYER, FRESHWATER EXPORTS FOR THE DEVELOPMENT OF QUEBEC'S BLUE GOLD 25 (2008), *available at* http://www.iedm.org/files/cahier0808_en.pdf (finding that a project to export water at $0.65 per cubic meter could generate more than $16 billion in annual income for the province of Quebec).

179. *Cf.* Kristin M. Anderson & Lisa J. Gaines, *International Water Pricing: An Overview and Historic and Modern Case Studies*, *in* JEROME DELLI PRISCOLI & AARON T. WOLF, MANAGING AND TRANSFORMING WATER CONFLICTS 249, 249–65 (2009) (discussing how the true cost of water must be measured through consideration of operational and maintenance costs, capital costs, opportunity costs, resource costs, social costs, environmental damage costs, and long run marginal costs).

180. *See* James Feehan, *Export of Bulk Water from Newfoundland and Labrador: A Preliminary Assessment of Economic Feasibility*, *in* MINISTERIAL COMM. EXAMINING THE EXP. OF BULK WATER, GOV'T OF NFLD., EXPORT OF BULK WATER FROM NEWFOUNDLAND AND LABRADOR 35, 62 (2001) ("For a bulk-export-only operation, the employment levels would be quite modest, perhaps in the tens of jobs, even in a moderately large operation."); NIKIFORUK, *supra* note 122 (discussing how the number of jobs created in a bulk water market for Canada would be "minimal").

181. *See* NIKIFORUK, *supra* note 122 (discussing how reduced water may mean reduced domestic industry).

182. *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892).

C. EXTENSION OF THE DOCTRINE IS APPROPRIATE BECAUSE A STATE IS POTENTIALLY DIVESTING ITS TRADITIONAL AUTHORITY TO REGULATE WATER RESOURCES TO A FOREIGN ENTITY

When it comes to jurisdictions that declined to expand the public trust to general water allocation, they should apply the doctrine to bulk water export because of the serious consequences that may result from the state's divestment of a portion of its allocation power to a foreign entity.[183] A government's issuance of a water right for bulk water export has more serious consequences because the state action may result in the transaction being regulated by NAFTA and GATT, resulting in the loss of a state's ability to supervise the extraction of its water supply without outside interference.[184]

Again, this situation is similar to *Illinois Central*[185] because of the state's loss of authority over the resource.[186] When applying the public trust doctrine to cases of general water allocation, a court simply requires a state to consider the public trust when distributing water rights.[187] The public trust is not asserted to prevent the harm to the public caused by the loss of regulatory control.[188] When, however, it comes to bulk water export, the State's authority to control water resources is in jeopardy because one decision to export water could cause limitation of a state's authority to regulate water transfers within its borders.[189] It is, therefore, more similar to the sale of a har-

183. *See supra* Part I.C (arguing that international treaties may result in a diminution of the state's traditional allocation power).

184. *Id.*

185. *See supra* Part II.A.1.

186. *Compare Ill. Cent. R.R.*, 146 U.S. at 453 (voiding the grant of the harbor), *with* CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1117–18 (Alaska 1988) (stating that the regulatory agency must consider the public trust when issuing permits), *and* Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 727–28 (Cal. 1983) (stating that when issuing permits the regulatory agency must consider the public trust doctrine), *and In re* Wai'ola O Moloka'i, Inc., 83 P.3d 664, 690–94 (Haw. 2004) (stating that the public trust doctrine must be considered by a regulatory agency when issuing permits), *and* Shokal v. Dunn, 707 P.2d 441, 450 (Idaho 1985) (discussing Idaho's permit application system), *and* United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n, 247 N.W.2d 457, 463 (N.D. 1976) (articulating that the regulatory agency must consider the public trust when issuing permits).

187. *See, e.g.*, *Nat'l Audubon Soc'y*, 658 P.2d at 727–28.

188. In water allocation cases the state retains the right to regulate. *See, e.g.*, *id.* at 728 (stating that after the state approves a water appropriation, the "public trust imposes a duty of continuing supervision over the taking and use" of the water and that the state is "not confined by past allocation decisions").

189. *See supra* Part I.C.

bor in that the State cannot regain control of the resource without alternative means.[190] As such, more traditional jurisdictions should extend the doctrine because of the more serious consequences associated with bulk water export.

Therefore, the public trust doctrine should be extended to bulk water sales in order to protect the public from the potential consequences associated with international trade agreements. Expansion is warranted in even the most conservative jurisdictions because: water is already a public good for the purposes of water allocations;[191] state court decisions to extend the doctrine assuage the concern that government would distribute permits for a temporary financial gain;[192] and the extension is supported by Supreme Court precedent because the state is potentially divesting its traditional authority to regulate water resources to a foreign entity.[193]

CONCLUSION

If NAFTA and the GATT become applicable to United States water resources, states may lose their authority to regulate these important resources. The best method for preventing this limitation is for states to deny permits for extraction of the resource for bulk water sale. However, because state governments have a short-term financial interest in selling permits, an additional check is necessary to protect the public's interest in these resources. Therefore, even more conservative jurisdictions should apply the public trust doctrine to prevent the issuance of bulk water permits. This is the best solution because water is already "public" for the purposes of water allocation, the benefits provided to society by the state's issuance of this kind of permit are minimal, and the consequence of permitting could result in the divestment of traditional authority to regulate water resources. Additionally, this application is different from liberal extensions for water allocation because it does not implicate concerns about undervaluing private property, giving courts authority over complex administrative decisions, or being too "undemocratic." As such, even conservative jurisdictions should apply the public trust doctrine to protect the water resources of the United States from this dramatic loss of authority.

190. *See Ill. Cent. R.R.*, 146 U.S. at 453.
191. *See supra* Part III.A.
192. *See supra* Part III.B.
193. *See supra* Part III.C.