WATER MARKET INSECURITY AND INSTABILITY: THE CASE AGAINST THE PUBLIC TRUST DOCTRINE

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Is a dream a lie if it don't come true
or is it something worse
that sends me down to the river
though I know the river is dry
— Bruce Springsteen, *The River*

ABSTRACT

The prior appropriation system has been around for more than a century. Entire economies and livelihoods have been built and rely upon the certainty and stability that the prior appropriation system provides. For example, farmers can expect a certain allocation of water to irrigate their crops each year and industries can rely on a dependable supply of water to function, bringing jobs and improving local and state economies. Overlaying the public trust doctrine onto the allocation system of prior appropriation will destabilize what has been a very stable allocation system for over a century. The public trust doctrine, with its continuous supervision of water rights, stands for the proposition that a state can change or even eliminate water uses, on a whim, if it finds that the current water use is no longer in what the state considers to be in the public's best interest. The consequence is simple: both public and private interests will be less willing to invest in water rights and water infrastructure, which is crucial to the continued growth and economic well-being of cities and towns throughout the western United States.

I. Introduction

One of the hot topics in water law over the last several decades has been emerging and varying attacks on the prior appropriation regime, which grew organically with the arid West and has provided the necessary security to incentivize economic investment in water rights and costly water infrastructure projects making an otherwise inhospitable desert, habitable. The economic security rooted in the public appropriation doctrine is in serious peril if states continue to allow the public trust doctrine to overtake and supplant prior appropriation.

Instead of seeking legislative changes that could better protect the environment, those leading the charge—mostly scholars and environmental groups—are, instead, placing all their proverbial marbles on a common law doctrine, known as the public trust doctrine, to supersede the prior appropriation regime in the western United States. Utah, for example, is but the most recent state where those seeking to undo—or at least unsettle—more than a century of water rights in the name of protecting the environment or ensuring recreational access to non-navigable waters in even the most remote areas of private property, have presented the issue to their state's highest court.

To set the stage, consider the following examples. A farmer, who is dependent on both the availability and certainty of water to keep his farm operational, depends on water rights his family secured over a century ago. The state in which the family farm is located just recognized the public trust doctrine as supervisory to its prior appropriation system. The state determines that the water being used to irrigate the farm should be reallocated to other uses. The state thus, in the name of the public trust doctrine, decreases or eliminates entirely the water rights serving the farm. The farmer, unable to obtain just compensation because the water rights were apparently always subject to the public's trust, has been stripped of the water rights and the livelihood it provided.

Meanwhile, a large corporation is interested in establishing a data processing center. The data processing center, however, requires large amounts of water to cool thousands of servers. Acquiring the rights to use the amount of water required will likely cost hundreds of thousands of dollars, in addition to the millions of dollars to construct the data processing center. Prior to acquiring the water rights and building the data processing center, which will, in turn, produce jobs and improve the state's economy, the corporation learns that the state recognizes the public trust doctrine, meaning that the state could eliminate or change the corporation's water rights at any point in the future if the public trust so dictated. What the company perceived as a stable investment in water rights, doesn't seem so stable anymore.

These, and many other similar examples, illustrate the real world problems, if and when, a judiciary decides to overlay the public trust doctrine onto the prior appropriation system. It doesn't matter who the water right holder, or prospective holder is—small family, large corporation, farmer, municipality, etc.—the recognition of the public trust doctrine will subject water rights, recognized as a type of property right, to the public's ever-changing perspectives and thus disincentive future growth and economic prosperity in cities and towns in the West that are dependent upon investments in water rights and the underlying water infrastructure for sustainable growth.

To be clear, the purpose and intent behind this article is not to dismiss or discredit the important environmental issues in the West. Instead, the purpose and intent of this article is to put forth practical and workable solutions that protect investments in water rights while also providing avenues to strengthen the environmental protections—already embedded—within the prior appropriation system. To that end, states interested in

protecting their water infrastructure systems and individual water rights should steer clear of the far-reaching and ever-changing tentacles of the public trust doctrine.

II. The Prior Appropriation System was Designed to Foster Economic Development in the Arid West

To this day, the large network of rivers and streams and plentiful ground water of the eastern United States provide an almost endless supply of fresh water to the cities, towns, and residents living in those areas. Riparian water rights, the water allocation system used in the plentiful water areas of the eastern United States, is a system regulated by a sharing doctrine, mostly referred to as reasonable use, whereby those who own land adjacent to a water system (e.g., river, stream, or lake) may use as much water as they want so long as it does not reasonably detriment the other riparian users. *E.g., Harrell v. City of Conway*, 271 S.W.2d 924, 926–27 (Ark. 1954). Thus, cities, industries, and residents in the eastern United States, for the most part, do not have to invest vast amounts of money in water rights and infrastructure, such as dams, canals, and ditches just to make the areas habitable.

With the growth in population in the early history of the United States, and the ensuing push westward, the people quickly discovered that the water that was so plentiful in the east was equally as scarce in the west. Consider the following illustration of the differences in scenery the westward settlers experienced:

> When western expansion reached the arid lands beyond the Mississippi flood plans, however, the riparian system suddenly found itself dying of thirst in the endless acres of America's great central plains, at that time known, quite accurately, as the Great American Desert. Further west lay even drier land supporting little beyond sagebrush, mesquite, and Joshua trees. The vast majority of land in the West had no appreciable water associated with it. It was clear that the West required an entirely different water-allocation paradigm from the riparian approach.

J. Craig Smith & Scott M. Ellsworth, *Public Trust vs. Prior Appropriation: A Western Water Showdown*, National Resources & Environment, Summer 2016, at 18. Needless to say, prior appropriation quickly became the entirely different water-allocation paradigm in the West.

Prior appropriation is a system based on certainty and stability that is created by staking a claim to water by putting it to beneficial use. Once claims are established, and a priority date is attached to the water right, the water rights, recognized as a form or real property, provide stability to support families, farms, and businesses because the water rights provide a measure of how much water one can expect and when such water can be used during the year. Indeed, this "first in time, first in right" methodology originated in the early gold mining camps of California where gold miners dug small ditches to divert water from streams to the gold mines and relied upon the diversions so that they could effectively mine for gold. *Irwin v. Phillips*, 5 Cal. 140 (1855).

While early western settlements were necessarily close to the comparatively fewer fresh water rivers and streams, the continual expansion in population and agriculture meant that population centers, and expanding agriculture remote from water sources, would require ever increasing volume of water transported further and further. In other words, unlike those living in the eastern United States, where a person's claim to water was dictated by owning land adjacent to a water source, cities, towns, farmers, businesses, residents, miners—you name it— in the western United Sates relied on the ability to transport water to arid land far from rivers and streams. *See Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 449–50 (1882) ("[W]e think that the right to water acquired by priority of appropriation thereof is not in any way dependent upon the locus of its application to the beneficial use designed."). The prior appropriation system thus made it possible to irrigate and make habitable vast areas of otherwise uninhabitable desert now known as Salt Lake City, Phoenix, Las Vegas, and Los Angeles, among many others, with very few rivers and streams nearby.

Therefore, since its inception, more than a century ago, prior appropriation has become the bedrock principle of water law in the western United States, providing millions of people, thousands of businesses, and many cities and towns across the western United States the stability to invest in and develop water resources and infrastructure necessary for settlement and economic growth. Recently, however, the public trust doctrine threatens to destabilize more than a century of water right certainty and the resulting economic growth.

III. The Public Trust Doctrine and the Resulting Instability in the Water Markets

A. The Public Trust Doctrine's Scope was Limited to Navigable Waters.

The public trust doctrine is a common law doctrine that some claim extends as far back as Roman law, although there is a dispute about the doctrine's origins. *See e.g.*, James R. Rasband, *The Public Trust Doctrine: A Tragedy of the Common Law*, 77 Tex. L. Rev. 1335, 1335–39 (1999). Nevertheless, the public trust doctrine, as most famously articulated in *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452–53 (1892), stands for the most basic proposition that a state holds the lands underneath navigable waters in trust for the public.

In *Illinois Central*, for example, the State of Illinois had previously granted away title to a large portion of the submerged lands of the Chicago Harbor to a railroad company that had then constructed "tracks, depots, warehouses, piers, and other structures." *Id.* at 433. A few years later, however, the state's legislature changed its mind, realizing the economic benefit of controlling the Chicago Harbor, and decided that it wanted control over the very lands it had granted away to the railroad company. *See id.* at 433–34. The United States Supreme Court sided with the State of Illinois and held that the lands underneath the navigable waters of Lake Michigan were held in trust for the benefit of the public and that the State of Illinois was thus prohibited from granting away such a large

portion of the land that was to be held in public trust. *Id.* at 452–53. In so holding, the Court defined the scope of the public trust doctrine:

> [T]he state holds the title to the lands under the navigable waters [in trust] . . . . The 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 in the lands and waters remaining. *Id*.

As determined in *Illinois Central*, therefore, the public trust doctrine was limited to navigable waters and those lands—and only those lands—that were underneath navigable waters. At its core, then, the public trust doctrine prohibited the privatization and monopolization of navigable waters, which were critical public resources, for navigation, commerce, and fishing, as well as the soil underneath the navigable waters.

Notwithstanding this limited holding, scholars and environmental advocates have been on a long crusade urging judiciaries to expand the public trust doctrine from the lands underneath navigable waters, to the use of the water (and any other resource that they want to protect without pursuing such changes through legislation). *See e.g.,* Karl S. Coplan, *Public Trust Limits on Greenhouse Gas Trading Schemes: A Sustainable Middle Ground?* 35 Col. J. Env. Law 287 (2010) (discussing the public trust doctrine's potential to curb climate change).

B. The Potentially Dangerous Intersection of the Prior Appropriation and the Public Trust Doctrine

One such expansion of the public trust doctrine occurred in California when California's highest court decided to overlay the public trust doctrine onto its water rights system. One of the principle reasons—among many—why states should reject the expansion of the public trust doctrine into the water right context is that it will destabilize investments in water rights and water infrastructure. Consider, for example, how California's recognition of the public trust doctrine into the water rights context in *National Audubon Society v. Superior Court*, 658 P.2d 709 (1983) will cause such disruption and disincentive investment. Understandably, *National Audubon Society* is the high water mark of the incorporation of the public trust into the water rights context. Nevertheless, it is a judicial decision beholden to scholars and the environmental movement in their efforts to advance their environmental agenda at the expense of security in water rights.

At issue in *National Audubon Society* was the City of Los Angeles's appropriation of several non-navigable tributaries to California's second largest lake, Mono Lake. *Id.* at 424–25. In order to serve its large population, Los Angeles applied for and received water rights—the right to appropriate—"virtually the entire flow of four of the five streams flowing into the lake." *Id.* at 424. Upon obtaining the water rights, Los Angeles "promptly constructed facilities to divert about half the flow of these streams" and later, in 1970, invested substantial amount of money in and completed a second diversion tunnel. *Id.*

As a result of Los Angeles's appropriations, the level of water in Mono Lake continued to decrease to the point where an island in the lake became a peninsula, exposing the nests of various migratory birds to predators and exposing and damaging various vegetation along the shores, which had long been a tourist attraction for its scenic beauty. *Id.* at 424–25. Consequently, an environmental group filed suit seeking to enjoin Los Angeles from diverting any more water notwithstanding Los Angeles's right to do so, a right that California had provided to them. The environmental group's weapon of choice: the public trust doctrine.

Notwithstanding *Illinois Central*'s limited holding that the public trust applies only to "navigable waters and [the] soils under them," *Illinois Central*, 146 U.S. at 453, California's Supreme Court extended the public trust doctrine to apply to the non-navigable tributaries of navigable lakes, reasoning that if California's public trust responsibilities did not extend to non-navigable tributaries, it could not possibly protect its public trust responsibilities regarding the navigable lakes. *Id.* at 435–37.

California's unprecedented expansion of the public trust doctrine unfortunately did not stop at applying to non-navigable tributaries; instead, California's highest court also extended the public trust doctrine to apply to the water itself, meaning that any and all water rights within the state were subject to the state's trust responsibilities. *Id.* at 438–40. In other words, every water right in California could, and can be, changed at a whim if the bureaucrats in California decide that the water is not being used the way that they determine would benefit the public. And because the water is subject to the public trust, the state has continuing supervisory authority over the "proper" allocation of water rights. Not to be misunderstood, the court, seemingly pouring salt over the wound inflicted upon water right holders, explained that any such decrease or change in a person's water right—rights, in some instances, which had been held for over a century—was not a taking because the water right holders always held their rights subject to California's public trust. *Id.* at 440.

Although the court did not actually determine whether Los Angeles's water rights in the non-navigable tributaries to Mono Lake should be decreased or eliminated, California's subsequent enforcement of the public trust responsibilities significantly reduced Los Angeles's appropriation, costing Los Angeles, and its residents, millions of dollars. In the eyes of California's highest court, the antiquated views of over a century of stability in water rights must concede to the ever changing sensibilities of the public. In other words, California's issuance of water rights to Los Angeles in the early 1940s was simply a mistake that required fixing—continual supervision and fixing.

Never mind the millions of dollars that were invested in water infrastructure to provide water to the thirsty desert that is Los Angeles. Never mind, too, the clear message California's highest court sent to local governments, businesses, and even residents seeking to obtain water rights or invest in water infrastructure projects in California.

IV. The Public Trust Doctrine Should not be Incorporated into Prior Appropriation Systems

To be fair, California, like any other state, has an important interest in protecting the environment and providing recreational opportunities on its waterways. But in many ways, California's statutes and prior case law (as well as its reputation of a progressive judiciary) made the incorporation of the public trust doctrine into the water rights system almost a certainty. California, for example, has never been a strict prior appropriation state, but instead incorporates both the riparian and prior appropriation systems side-by-side. In addition, California's constitution, statutes, and judicial precedents were favorable to the incorporation of the public trust. *See* Cal. Const. art. X, § 2; *National Audubon Society*, 658 P.2d at 724–29 (summarizing the California Water Rights system).

Other, even drier, western states, however, do not have hybrid water allocation systems and do not have constitutional provisions, statutes, or case law that are favorable to incorporating the public trust doctrine into their respective water rights systems. Incorporating the public trust doctrine into water rights systems in these states, therefore, will cause major public policy and economic repercussions. A better approach for these western States is to strengthen the existing mechanisms within the prior appropriation system to better plan for, control, and maintain positive environmental protections while strengthening the security, and the consequent investment in, water rights and the related water infrastructure.

A. The Public Trust Doctrine Will Destabilize Important Investment in Water Infrastructure and Water Rights.

In the proverbial bundle of sticks (think first year property law), water rights, may not include as many sticks as ownership in land. Water rights are, for example, often referred to as usufructuary rights, which, is the right to perpetually use water rather than the actual ownership of water. *E.g.*, *Santa Fe Trail Ranches Property v. Simpson*, 990 P.2d 46, 54 (Colo. 1999). Indeed, the California Supreme Court, in *National Audubon Society*, showed how the California courts have never viewed water rights akin to property rights to bolster its decision to incorporate the public trust doctrine into California's water allocation regime: "It is laid down by our law writers, that the right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use," and that "the cases do not speak of the ownership of water, but only of the right to its use." 658 P.2d at 724 (internal quotation marks and citations omitted).

Unlike California, however, many western states view water rights as a protectable property interest. *E.g.*, *Spears v. Warr*, 44 P.3d 742, 750–51 (Utah 2002) (recognizing that water rights constitute a real property interest because they can be bought and sold and must be obtained by deed), *overruled on other grounds Tangren Family Trust v. Tangren*, 182 P.3d 326; *Utah Dep't of Transp. V. G. Kay, Inc.*, 78 P.3d 612, 616 (Utah 2003) (same); Utah Code Ann. § 57-1-1(3) ("'Real property' or 'real estate' means any right, title, estate, or interest in land, including . . . all water rights."); *Dallas Creek Water Co. v. Huey*, 933

P.2d 27, 39 (Colo. 1997) ("Water rights are decreed to structures and points of diversion, . . . in recognition that a water right is a right of use and constitutes real property in this state.").

Scholars, environmentalists, and even judiciaries find the public trust doctrine convenient and powerful because it provides a pathway to "correct" the "misallocations" and consequent "overconsumption" of natural resources that took place decades ago, and also allows the taking of water rights without addressing the thorny issue of just compensation. This is because the principle premise of the public trust doctrine is that a state cannot give away parts of its trust *res* if doing so would violate its public trust. In other words, if a conveyance by the state is deemed inviolate of its public trust responsibilities, the grant is effectively void *ab initio* thus precluding any claim to just compensation under the Fifth Amendment. *E.g.*, *National Audubon Society*, 658 P.2d at 723 ("We do not divest anyone of title to property; the consequence of our decision will be only that some landowners whose predecessors in interest acquired property under the 1879 act will, like the grantees in *California Fish*, hold it subject to the public trust.") (Internal quotation marks omitted).

This fundamental understanding of the public trust doctrine, however, is contrary to the foundational underpinnings to societal and economic growth, especially in the arid West where some have likened a drop of water to a drop of gold. *Longley v. Leucadia Fin. Corp*., 2000 UT 69, ¶ 15, 9 P.3d 762. Water and water infrastructure costs are rising significantly. In 2014, for example, a report for the State of Utah declared that "[o]ur state will need more than **$32 Billion** for new water demand and existing facility repair and replacement costs through 2060." Jeremy Aguero, *Utah's Water-dependent Economy*, Prepare60 (last visited February 24, 2017), available at http://prepare60.com/Content/EconomicsWater.pdf (citing the Roadmap of Utah's Future Water Development and Infrastructure prepared for Governor Gary Herbert). Think about that. The relatively small State of Utah projects that it needs—not desires—$32 billion dollars for water infrastructure over the next several decades. What about larger populated states like Colorado? Or Arizona?

And what about a state's responsibility to encourage economic growth through attracting business and industry? Recall the data processing company example at the beginning of this article. If you are the CEO of that company, which is looking to acquire water rights likely worth hundreds of thousands, if not millions, of dollars to run the data processing center, in addition to the daunting monetary investments in building the data processing center, would you invest large amounts of money if there was no certainty that you could perpetually maintain those water rights because of the state's ongoing and ever-changing perspective of what is in the public's interest? The logical and rationale answer to this question is seemingly obvious: without assurances that such a large investment will not be revoked or in any way altered—or at least provided just compensation when the water rights are eliminated—no reasonable CEO would make this investment.

And what about the smaller businesses and entities—e.g., farmers, ranchers, irrigation companies, special districts, etc.—that make up a significant part of the overall state economies in the Western United States? And the cities, towns, and businesses that must invest substantial amounts of money to build the necessary water infrastructure to allow the cities and towns to grow economically?

If states incorporate the public trust doctrine into their prior appropriation systems, it will inhibit the state's ability to grow and attract business and industry and the resulting revenue that states so desperately rely on. Thus, from solely an economic perspective, incorporation of the public trust doctrine will sacrifice economic development for environmental protection. But, importantly, the inverse is not true: protecting the prior appropriation system, and the stability of water rights, will not necessarily lead to environmental digression. This is because the prior appropriation system, and many other environmental regulations, already have mechanisms embedded within them to protect the environment.

B. The Prior Appropriation System is Already Equipped to Protect the Environment.

Contrary to the doom-and-gloom rhetoric of the public trust advocates, the prior appropriation system is already equipped, and may be further adapted, to encourage and protect conservation and other environmental issues. For example, many western states require the public's interest to be taken into account whenever there is an application for appropriation or when a water rights holder seeks to change use on the water rights. *E.g.*, Utah Code Ann. § 73-3-8(1); *Bonham v. Morgan*, 788 P.2d 497, 502 (Utah 1989). The public interest tests are flexible enough to prevent appropriations or change applications when the use of water would harm the environment.

To the environmentalist, however, the public interest inquiries—both at the time of appropriation and whenever there is a change in use—are insufficient to quell the negative impacts that the prior appropriation system places on the environment. Michelle Bryan Mudd, *Hitching Our Wagon to a Dim Star: Why Outmoded Water Codes and 'Public Interest' Review Cannot Protect the Public Trust in Western Water Law*, 32 Stan. Envtl L.J. 283, 307–19 (2013). And instead of pursuing legislation to strengthen the public interest tests, the environmentalists gravitate to the public trust doctrine, which allows continuous supervision of water rights and the ability to decrease, change, or eliminate the water rights entirely. *National Audubon Society*, 658 P.2d at 723. Thus, to use an old metaphor, the scholars and environmentalists don't want just one, or even two bites of the water rights apple: they want to continuously bite the apple until the apple is eliminated and their desired uses—at least what their desired uses are at the time—are protected.

The logical and practical step forward, however, is not to destabilize decades of water rights and curtail future investments in water infrastructure and water rights; the logical step forward is to work with state legislatures to strengthen the public interest tests

both at the time of appropriation and when a water right is changed. Indeed, the public interest inquiries allow the water division's to control water allocation and environmental concerns upfront—before a local government entity or business invests millions of dollars into the necessary infrastructure to divert the water where it needs to go—thus taking comprehensive planning measures upfront, but providing security to water rights once the water rights are issued.

Most Western states also have permitted the purchase of in-stream flow rights by state agencies. *E.g.*, Idaho Code Ann. § 42-1501; Mont. Code Ann. § 82-2-316(6); Colo. Code Ann. § 37-92-102(3). Because much environmental conservation dealing with rivers and streams is about leaving the water in the streams or rivers, in-stream flow rights can go a long way in protecting the environment. In-stream flow rights are advantageous, too, because they allow stability in water rights while allowing environmentalists to seek precautionary measures to protect the environment by purchasing in-stream flow rights.

C. State Legislatures are Better Equipped to Make Water Allocation and Management Policy.

To the extent that such environmental measures need to be strengthened, the judiciary certainly isn't the branch of government to establish and re-establish public policy. The public trust doctrine is therefore dangerous for yet another reason, namely, that it allows a few judges to decide complex policy issues based on limited information presented by the parties in a particular dispute. Scholars and environmentalists have looked to the judicial branch because of the clear path to controlling this critical resource as compared to advocating environmental change through legislation.

But judiciaries simply do not have the time or resources to resolve the complex tasks of proper water allocation in the arid West. State legislatures, or proposed amendments to state constitutions, provide opportunities for public debate so that many competing interests can be weighed in what is in the respective state's best interest. In addition, many western states approach the public trust issue differently because they have different issues at stake. Some, for example, have imposed the public trust doctrine into their constitutions. *e.g.*, Haw. Const. art. XI, §§ 1, 7; Alaska Const. art. VIII, §§ 3, 13. Others, including Utah and Idaho, have enacted legislation seeking to curb the effects of the public trust doctrine, recognizing the complexity of the water allocation problems, and the severe impacts the public trust doctrine would have on water rights. Idaho Code § 58-1203(2) ("[The public trust doctrine shall not apply to: . . . [t]he appropriation or use of water . . . ."); Utah Code Ann. § 73-29-103.

Regardless of which approach a state pursues, the decision should be left to the legislatures, or people through constitutional amendments, rather than the judiciary. In the public trust case recently argued in the Utah Supreme Court, for example, several of the justices voiced strong concerns about the Stream Access Coalition's argument that the Utah legislature's stream access law, which limits access to non-navigable streams to floating on the water, impermissibly closed off recreational use of thousands of miles of

streams. Oral Argument at 38:05–42:40, *Utah Stream Access Coalition v. VR Acquisitions*, No. 20151048 (Utah Jan. 9, 2017). Specifically, several of the justices questioned how a common law doctrine could override legislative intent. *Id.* The justices, therefore, clarified with the Stream Access Coalition's counsel that the only way the public trust doctrine could override legislative intent is if the public trust was embedded in Utah's constitution. *Id.*

Judiciaries should likewise defer to legislative intent to define the scope and applicability of the public trust doctrine into water rights as this is a complicated policy issue that should be subject to legislation and not judicial fiat. And as has been discussed throughout this article, there is a reason why state legislatures have been hesitant to incorporate the public trust doctrine into their water rights allocation systems: they realize that the public trust would replace centuries of stability in water rights with the unknowing, and ever-changing, views of what is considered to further the public trust, and economic progress would be at risk over an unknown and ever-changing perspective of what is considered the public's interest in the trust *res* of water.

V. Conclusion

The prior appropriation system has been the hallmark of economic progress and stability in the western United States for more than a century. From its origins in the placer mines in California, the prior appropriation system has been a foundational component to economies throughout the western United States. The public trust doctrine, with its far-reaching and ever-changing perspectives of what constitutes the public's benefit, will disrupt investment-backed expectations and inhibit economic growth in western states whose growth depends on investments in water rights and water infrastructure. Although a convenient vehicle for change, the public trust doctrine is unnecessary for environmental protections given the many legislative mechanisms that are already in place to protect the environment. In sum, the public trust doctrine and prior appropriation, like proverbial oil and water, do not, and should not, be mixed.