"The Public Trust Doctrine and Texas Groundwater"

presented by

Susana Canseco, Esq., Manager
Rancho Ojo de Agua
Boerne

This paper explores whether the public trust doctrine can help address perceived problems in Texas groundwater law.

A concern is that *Day* will inhibit groundwater-conservation-district efforts to achieve policy goals that require leaving groundwater in the ground for now.[1] Examples of such goals include keeping rivers flowing, protecting smaller pumps from bigger pumps, and conserving groundwater for the future. A related concern is that in areas of the state outside district boundaries, the unfettered rule of capture applies.[2] The Legislature authorized creation of groundwater conservation districts (districts) in part so that Texans could alter the rule of capture and manage groundwater to achieve these types of goals.[3] But some landowners argue that such regulation is a taking of private property without constitutionally-required compensation.[4]

Edwards Aquifer Authority v. Day confirmed that they may be right.[5] In 2012, the Texas Supreme Court held that landowners have a property right in groundwater in place, and a taking may occur if district regulation "goes too far."[6] Our courts are still sorting out what "too far" means in the context of groundwater regulation.[7] Courts may be sorting this out for decades as various fact scenarios are presented and resolved at the speed of justice.

As takings litigation proceeds, there is a concern that *Day* may have a chilling effect on management by districts. Regulation intended to protect any number of interests inevitably keeps someone from pumping as much water as he might have in the absence of such regulation. Now that it looks like takings litigation might be productive under certain facts, districts may be inhibited from regulating in a meaningful way.

When problems caused by the rule of capture are measurable in dollars, market solutions may be all that are necessary. For example, when a large subdivision pumps its neighbors' wells dry, the company at fault may

[1] Another concern is that members of the public have no claim to groundwater under Texas law. As I discuss in this paper, I do not think the public trust doctrine can work around groundwater ownership in place after the *Day* decision. I therefore focused on a problem for which I could find an intersection with the public trust doctrine.

[2] The rule of capture protects a groundwater pumper from liability for harm caused by his groundwater pumping. Sipriano v. Great Spring Waters of Am., 1 S.W.3d 75, 75 (Tex. 1999).

[3] *See* Tex. Water Code Ann. § 36.0015; *see also Sipriano*, 1 S.W.3d at 79-80; *see generally* Tex. Water Code Ann. §§ 36.001 *et seq.*

[4] *See* Tex. Const. Art. I, section 17(a); Edwards Aquifer Auth. v. Bragg, 421 S.W.3d 118, 126 (Tex.App.—San Antonio, 2013, pet. filed) (commercial pecan growers sued Edwards Aquifer Authority for takings when it denied permit application for one well and granted smaller-than-requested permit for another).

[5] 369 S.W.814, at 817, 843 (holding landowners own groundwater in place and analyzing plaintiffs' takings claim).

[6] *Id.* at 838 (quoting Sheffield Dev. Co. v. City of Glenn Heights, 140 S.W.3d 660, 670 (Tex. 2004), quoting in turn Pa. Coal Co. v. Mahon, 260 U.S. 393, 413, 416 (1922)).

[7] *See, e.g.* Edwards Aquifer Auth. v. Bragg, No. 13-1023 (Tex. filed Dec. 23, 2013).

mitigate the harm by paying to deepen wells.[8] In other circumstances, analogy to oil-and-gas law may provide a framework to compensate landowners for their groundwater.

But money will not solve all groundwater problems, and not every aggrieved person will be a candidate for landownership-based remedies. It exacerbates the problem that our legal system treats groundwater and surface water as separate substances when they are often interconnected.

The irony is that the property right recognized in *Day* is still only good against the government, not against a bigger pump next door. Groundwater does not respect property lines. So groundwater ownership in place is an admitted legal fiction.[9] When the Texas Supreme Court accepted the fiction for oil and gas in 1914, it enabled the state to tax the minerals in place as real property.[10] Railroad Commission rules and related case law developed, creating a regulatory scheme to protect landowners' rights in their oil and gas. When the Texas Supreme Court accepted the fiction for groundwater in 2012, it enabled landowners to bring takings claims, but it has possibly hampered the only system for protecting landowners' rights in groundwater as against their neighbors. It also rejected as legally insignificant the differences between oil and water, chief among them that groundwater and surface water are often the same water.[11]

In this paper I explore the public trust doctrine and whether there is a place for it in Texas groundwater law. Can we use this common-law doctrine to address the problems that arise under the rule of capture in an atmosphere where district regulation that is actually effective at protecting some interests often results in litigation?

The public trust doctrine has been discussed extensively in academic literature, and many states have a considerable body of public-trust law. Texas's public-trust law, however, is sparse and has been little discussed in any medium. I therefore describe in some detail here what I understand to be the high points of Texas case law and public-trust principles. I contrast it with other states' public-trust law, focusing specifically on California's *Mono Lake* case and that case's recent application to groundwater. I also discuss how Texas plaintiffs might bring a public-trust case and describe the challenges they would face. I conclude that if a Texas court is ever to apply the public trust doctrine, it will be because public and political attitudes have changed regarding natural-resource protection, and the court feels it is the right thing to do.

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[8] *See, e.g.* Neena Satija, *Hays Water Fight Portends Battles to Come*, Tex. Tribune (Feb. 11, 2015), http://www.texastribune.org/2015/02/11/hays-water-fight-highlights-issues/ (describing water company's plans to mitigate impacts of its groundwater pumping).

[9] *Cf. Day*, 369 S.W.3d at 828 (analogizing to gas, stating "ownership of gas in place did not entitle the owner to specific molecules of gas that might move beneath surface tracts but to volumes that, while they could be diminished through drainage, with 'proper diligence', could also be replenished through drainage." *Id.* (quoting Stephens Cnty. v. Mid-Kan. Oil & Gas Co., 254 S.W. 290, 292 (Tex. 1923)).

[10] *See* Tex. Co. v. Daugherty, 176 S.W.717, 719-20, 22 (holding that oil and gas are owned in place despite their fugitive natures, and such interest in land was taxable as real estate).

[11] *Day*, 369 S.W.3d at 831. Before holding them legally insignificant, the court recognized many differences between how we use and regulate oil and gas versus water, but it did not mention the interconnectedness of ground- and surface water. *Id.*

I. What is the Public Trust Doctrine?

A. Origins

The public trust doctrine holds that some resources are so important to the public generally that neither the sovereign nor private parties have full power to control them.[12] The doctrine has purportedly ancient origins and made its way into English common law.[13] At English common law, the king held tidally-influenced waters and the submerged lands under them in trust for the people for purposes of navigation and fishing.[14] These rights passed to the original American states after the American Revolution, subject to federal power over such waters for navigation under the Commerce Clause.[15] New states admitted to the union received the same rights under the equal footing doctrine.[16] Development and administration of the doctrine is a matter of state property law, and each state has developed its own body of public-trust law.[17] The extent of the property covered by the doctrine varies from state to state, especially regarding the significance of navigability versus tidal influence.[18]

B. *Illinois Central Railroad Co. v. Illinois*

Illinois Central Railroad Co. v. Illinois marked the birth of the American public trust doctrine as well as being considered its "lodestar."[19] The case concerned title to the shore and bed of Lake Michigan east of Chicago, with the State of Illinois, the Illinois Central Railroad, the City of Chicago, and the United States government all claiming the right to build the city's harbor.[20] The railroad had been gradually working toward that end since its incorporation in 1851, and it had constructed substantial improvements just offshore of the lake. In 1869, the Illinois Legislature passed the "Lake Front Act," confirming the railroad's rights to the land where its improvements were situated and granting the railroad over 1000 acres of submerged land in the lake for further

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[12] *See generally* Ill. Cent. R.R. Co. v. Ill., 146 U.S. 387 (1892) (*Illinois Central*); Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. LAW REV. 471, 475-77 (1970) (describing English origins and American interpretations of doctrine).

[13] *See* Nat'l Audubon Soc'y v. Superior Ct. of Alpine Cnty., 658 P.2d 709 (Cal. 1983) (*Mono Lake*) (quoting J. Inst. 2.1.1); Melissa Kwaterski Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees, and Political Power in Wisconsin*, 27 ECOLOGY L.Q. 135, 140, n.4 (2000) (describing Roman origins); *cf.* Dave Owen, *The Mono Lake Case, The Public Trust Doctrine, and the Administrative State*, 45 U.C. DAVIS 1099, 1107 (2012) (calling doctrine's roots disputed).

[14] Phillips Petroleum Co. v. Miss., 484 U.S. 469, 473 (1988); see also Alexandra Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 702 (2006).

[15] *Phillips Petroleum*, 484 U.S. at 473-74, 476; Carrithers v. Terramar Beach Cmty. Imp. Ass'n, Inc., 645 S.W.2d 772, 774 (Tex. 1983).

[16] *Phillips Petroleum*, 484 U.S. at 474 (quoting Shively v. Bowlby, 152 U.S. 1, 57 (1894)); Klass, *supra* note 14, at 703.

[17] *Phillips Petroleum*, 484 U.S. at 483-84. Court opinions vary in how they categorize the public trust doctrine, and the topic of categorization is much-debated in scholarly literature. Scholars have argued that it belongs with property law, constitutional law, trust law, or others. *See e.g.* James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527, 527-29, 550-51 (1989) (concluding the original public trust doctrine was a matter of property law and arguing the doctrine should remain so today).

[18] *See generally Phillips Petroleum*; *cf.* Severance v. Patterson, 370 S.W. 3d 705, 722, n.20 (Tex. 2012) (describing how states apply the law of avulsion differently).

[19] *See* 146 U.S. 387 (1892); Sax, *supra* note 12, at 489; 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, 800 (2004).

[20] *Illinois Central*, 146 U.S. at 413; Kearney & Merrill, *supra* note 19, at 800.

improvements and a harbor.[21] Four years later, the Illinois Legislature repealed the act, and the ensuing controversy was resolved by the United States Supreme Court in the now-famous 1892 decision.[22]

The parties sought a judicial determination of the title to the shore and bed of Lake Michigan. Justice Field analyzed the railroad's claim to own the submerged lands in Lake Michigan as granted to it in the Lake Front Act, asking whether the legislature was competent to make such a grant. He characterized the grant as giving the railroad a monopoly over the harbor and the circumstances surrounding the passage of the Lake Front Act as improper.[23] He held that the state's title to submerged land can never be fully alienated, because it is held in trust for the public for navigation, commerce, and fishing. Although the state may grant submerged land to private parties to further trust objectives, the state may not abdicate its duty to manage and control such land for the public interest.[24] He contrasted such a grant in furtherance of the public interest with the one before him, which "sanction[ed] the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay . . . ."[25] He therefore held that the Lake Front Act was "necessarily revocable."[26]

Justice Field's opinion forms the core of the public trust doctrine – the idea that if the state grants land submerged under navigable waters, it retains rights in that land that it can exercise at any time in favor of the public interest. *Illinois Central* therefore changed the public trust doctrine from one creating an easement in favor of the public for navigation and fishing to a doctrine of inalienability. Or it did so to the extent that states adopt and apply the holding; as we will see, the Texas Supreme Court has never followed *Illinois Central.*

C. The Birth of the Modern Public Trust Doctrine – Joseph Sax's 1970 article

For the greater part of the twentieth century, the public trust doctrine's use remained confined to submerged coastal lands, other navigable watercourses, and the waters that covered them.[27] Then in 1970, concurrent with the dawn of modern environmental law, Professor Joseph Sax published an influential article that instigated the modern application of the doctrine.[28] The main point of Sax's article was that courts should use the public trust doctrine to actively participate in natural-resource management. Although Sax devoted the bulk of his article to describing the scope of the doctrine and analyzing past cases, he also suggested that the doctrine could be expanded and applied to other natural-resource protection issues, such as air quality, pesticide use, locating utility rights of way and mining or wetland-filling."[29]

In effect, the public trust doctrine, instead of acting as an easement to protect the public's right of access to certain waters, would protect the waters themselves. States adapt the doctrine as cases come before them, because "[t]he rules developed in order to protect public water bodies and submerged lands for public access and use, . . . do not

[21] *Illinois Central*, 146 U.S. at 405; Kearney & Merrill, *supra* note 19, at 800.
[22] 146 U.S. 387; Kearney & Thomas, *supra* note 19, at 800-01.
[23] *Illinois Central*, 146 U.S. at 450-452.
[24] *Id.* at 452-53.
[25] *Id.*
[26] *Id.* at 455.
[27] Sax, *supra* note 12, at 556.
[28] Sax, *supra* note 12; Klass, *supra* note 14, at 706-07 (describing the timing of Sax's article and the influence it has had on public-trust case law since).
[29] Sax, *supra* note 12, at 556-57.

readily apply in the context of water resources valued for consumptive purposes, where competing uses are more often mutually exclusive."[30]

D. The Modern Public Trust Doctrine in State Constitutions and Statutes

In the modern age of the public trust doctrine, the doctrine has expanded beyond common law into state constitutions and statutes, some of which expressly recognize the public's rights to certain environmental conditions.[31] However, courts have only rarely analyzed these constitutional provisions in the context of providing a cause of action to protect the environment, and it is thought they have been ineffective at doing so.[32] Similarly, environmental-rights statutes (as opposed to citizen-suit provisions in state environmental law) "are not a complete solution" to environmental protection.[33] Instead, in recent opinions, courts have synthesized various sources of legal authority to reach their public-trust decisions, including common law, state environmental statutes, and state constitutional provisions.[34]

II. The Public Trust Doctrine in Texas Law

A. Generally

Texas statutes and case law emphatically proclaim that the state owns the beds of tidelands and navigable waters, and the waters themselves ~~itself~~. The Conservation Amendment declares that it is the state's right and duty to preserve and conserve its natural resources and directs the legislature to pass laws to effect that duty.[35] There is some evidence that an author of the Conservation Amendment intended the amendment to preserve the state's water resources for future generations, in the spirit of the public trust doctrine.[36] The amendment enumerates certain resources for "conservation and development", including "the waters of its rivers and streams," but leaves the list of resources the state must preserve and conserve open-ended."[37] Such resources include groundwater; the legislature authorizes the creation of groundwater conservation districts under the powers given to it in the Conservation Amendment.[38]

The state holds the waters of the state in trust for the public, and "the right to use state water may be appropriated only as expressly authorized by law."[39] Texas owns "the water of the ordinary flow, underflow, and tides of every

[30] *In re Water Use Permit Applications*, 9 P.3d 409, 448 (Haw. 2000) (*Waiahole Ditch*).
[31] See Klass, *supra* note 14, at 714, 20-21 (stating forty-two state constitutions at least mention natural-resource protections).
[32] *Id.* at 718-19.
[33] *Id.* at 725-36.
[34] *Id.* at 727-30.
[35] Tex. Const. Art. XVI, section 59(a). The Conservation Amendment was added to the Texas Constitution in 1917, after years of drought. *Sipriano*, 1 S.W.3d at 77.
[36] *See generally* Thales Smith, "In the Interest of All the People": The Writings of Leonard Tillotson on Texas's Conservation Amendment (Sept. 28, 2014) (unpublished internship paper for Save Our Springs Alliance) (on file with author). The paper argues Leonard Tillotson was a key author of the Conservation Amendment and that he viewed the amendment as promoting the public welfare.
[37] Tex. Const. Art. XVI, section 59(a).
[38] Tex. Water Code Ann. § 36.0015 (West 2008).
[39] Tex. Water Code Ann. § 11.0235(a) (West 2008).

flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed . . . ."[40]

In addition to owning the water, the State owns the soil underlying navigable waters, "'such as navigable streams, as defined by statute, lakes, bays, inlets, and other areas within tidewater limits within its borders.'"[41] These lands constitute public property that is held in trust for the use and benefit of all the people."[42]

In Texas, all streams which retain "an average width of 30 feet from the mouth up" are considered navigable in law and their beds are owned by the state.[43]

B. Case Law

Texas courts have not often discussed the public trust doctrine, and when they have, it has almost exclusively been in the context of navigable waters. One case applied the public trust doctrine in support of a regulation protecting water quality. In other cases, courts protected public rights in state waters without expressly mentioning the public trust doctrine. Courts have protected public rights to navigate and fish in state waters, have supported the power of governmental entities to construct water projects in the public interest, and have prevented encroachment on state-owned land by private parties. Courts reacted negatively, however, to *Illinois Central*-type arguments that the state retains an easement on privately-owned land in favor of the public. This rejection of *Illinois Central* seems to have prevented further development of the public trust doctrine in Texas.

In addition to Texas's body of public-trust case law addressing navigable waters, in one recent case a group of individuals sued the Texas Commission on Environmental Quality (TCEQ), attempting to regulate greenhouse-gas emissions with the public trust doctrine.

1. *A Case Applying the Public Trust Doctrine By Name* – Cummins v. Travis County Water Control & Improvement District No. 17

In *Cummins*, Defendant Travis County Water Control and Improvement District No. 17 (District) was charged with providing drinking water from Lake Travis and managing water and wastewater facilities.[44] To those ends, the District wrote rules establishing a "clear zone" around the District's raw-water intake barge that prohibited within 200 feet of the barge "'all activity not related to maintenance of the barge or intake.'"[45] The Cumminses owned land on a bluff overlooking Lake Travis, part of which fell within the 200-foot "clear zone."[46] The Cumminses applied to the District for a license to build a boat dock, which the District denied. The Cumminses

[40] Tex. Water Code Ann. § 11.021(a) (West 2008); *see also* Cummins v. Travis Co. Water Control & Improvement Dist. No. 17, 175 S.W.2d 34, 48 (Tex.App.–Austin, 2005, pet. denied).
[41] City of Galveston v. Mann, 143 S.W.2d 1028, 1033 (Tex. 1940) (quoting State v. Bradford, 50 S.W.2d 1065, 1069 (Tex. 1932)) (italics omitted); *see also* Carrithers v. Terramar, 645 S.W.2d 772, 774 (Tex. 1983).
[42] *Severance*, 370 S.W. 3d at 715.
[43] Tex. Nat. Res. Code § 21.001(3); *see also* Diversion Lake Club v. Heath, 86 S.W.2d 445 (Tex. 1935) (applying statute to Medina River); Tex. River Barges v. City of San Antonio, 21 S.W.3d 347, 352 (Tex.App.—San Antonio 2000, pet. denied) (applying "navigability in law" to the San Antonio River, despite it not being navigable in fact within the city limits).
[44] *Cummins*, 175 S.W.2d at 49-50.
[45] *Id.*
[46] *Id.* at 40.

sued the district, seeking among other claims a declaratory judgment that they had a right to build a boat dock as littoral owners of land on Lake Travis.[47]

The District asserted the Cumminses were not littoral owners and that the submerged land of Lake Travis was owned by the state and subject to the public trust doctrine.[48] The court agreed, holding first that the Cumminses' property included no littoral rights.[49] The court additionally held that under the public trust doctrine, the state owned the bed and waters of Lake Travis and the District could regulate to protect such resources.[50]

The *Cummins* court's holding is not unique for what it does. It simply recognizes state ownership of the bed and waters of a lake and holds that a subdivision of the state may regulate to protect those resources. However, *Cummins* is unique in pinning its holding on the "public trust doctrine." In so doing, it takes a small step beyond cases citing state ownership of waters and expressly pronounces why the state maintains title - "to protect the public's interest in those scarce natural resources."[51] The court recognizes the public's interest, it recognizes water scarcity, and it cites the Conservation Amendment as proving the importance of the state's duty to protect its natural resources.[52]

2. *Cases Applying the Spirit of the Public Trust Doctrine*

a. A Public Right to Fish in State Waters

In *Diversion Lake Club v. Heath*, plaintiff Diversion Lake Club (Club) owned the bed of a man-made lake on either side of the Medina River channel.[53] It stocked the lake with fish and operated as a fishing and boating club. The Club sued to enjoin defendant members of the public from fishing on the lake.[54]

The Club urged the court to apply English common law, which would have given the owner of the land along navigable rivers above the ebb and flow of the tide the exclusive right to fish in such rivers.[55] The court held that the common-law rule did not apply in Texas, where the state owned the beds and waters of statutorily-navigable rivers such as the Medina River, and the rule was inappropriate to the circumstances and legal history of Texas, which had "been touched by the civil law."[56] The court held that the Club could not exclude the public from fishing in the lake. It did not matter that an artificial change made the waters cover more than the state-owned river channel; the waters themselves retained their public character.[57]

The courts in both *Hix v. Robertson* and *Port Acres Sportsman's Club v. Mann* relied on *Diversion Lake Club* to reach similar holdings. In *Port Acres* the plaintiff club sought to keep members of the public from fishing in waters whose bed was privately owned by the club and which had become navigable through acts of man.[58] In *Hix*, the Robertsons sued to require their neighbor Hix to remove a fence across a lake their properties bordered

[47] *Id.*
[48] *Id.* at 41, 48.
[49] *Cummins*, 175 S.W.3d at 46.
[50] *Id.* at 48.
[51] Cummins, 175 S.W.3d at 49.
[52] *Id.*
[53] *Diversion Lake Club*, 86 S.W.2d at 442.
[54] *Id.*
[55] *Id.* at 443.
[56] *Id.* at 443-44.
[57] *Id.* at 445-46.
[58] Port Acres Sportsman's Club v. Mann, 541 S.W.2d 847, 849 (Tex.Civ.App.—Beaumont 1976, writ ref'd n.r.e.).

and to keep him from interfering with their access to the lake.[59] Both courts confirmed that under the 1929 "Small Bill," survey lines may cross statutorily-navigable streams and the beds of those streams may accordingly be privately owned.[60] However, the public may still use and enjoy the waters of those streams for navigation and fishing.[61]

b. Limits on Private Rights in State-Owned Submerged Land

Subject to the Commerce Clause,[62] The State of Texas has "the exclusive right to control, impede, or otherwise limit navigable waters . . ." owned by the state.[63] In *Carrithers v. Terramar Beach Community Improvement Association*, this meant a private party could not convey an exclusive easement in navigable waters.[64]

In *City of Galveston v. Mann*, the court overruled the City of Galveston's petition for a writ of mandamus that would have required the Attorney General to approve bonds for the city's proposed pier into the Gulf of Mexico.[65] The court reviewed the history of state ownership of beds and waters of the state and said the court had often "zealously guarded and enforced the rights of this State to the public lands of the State . . . ."[66] Title to such lands may only be acquired by express legislative grant.[67] Therefore the court held that the City's pier would be a "purpresture, which would be subject to be removed at the instance of the State, whether the same would tend to obstruct navigation or otherwise."[68]

c. Facilitating the Public Interest – Flood Control

In *Chicago, Rock Island, & Gulf Railway Co. v. Tarrant County Water Control & Improvement District No. 1*, a water district brought suit to condemn land along which the railroad had roads and tracks.[69] The district planned to dam tributaries of the Trinity River to create a reservoir called Bridgeport Lake which would inundate about four miles of the railroad's tracks. [70] The parties disagreed about whether the railroad could recover compensatory damages for the cost of relocating its tracks.[71]

The court analyzed a statute authorizing a railroad to construct roads "across, along, or upon any stream of water [or] watercourse . . . ." The statute also required a railroad to "restore the stream [or] water course . . . to its former state, or to such state as not to unnecessarily impair its usefulness and [it] shall keep such crossing in repair."[72] The court held that the statute granted the railroad a franchise which remained subject to legislative control and

[59] Hix v. Robertson, 211 S.W.3d 423, 425 (Tex.App.—Waco 2006, pet. denied).
[60] *Port Acres Sportsman's Club*, 541 S.W.2d at 850; *Hix*, 211 S.W.3d at 426 (citing *State v. Bradford*, 50 S.W.2d 1065 and Tex. Rev. Civ. Stat. Ann. Art. 5414a, section 2).
[61] *Hix*, 211 S.W.3d at 426, 428.
[62] U.S. Const. art. I, § 8, cl. 3.
[63] *Carrithers*, 645 S.W.2d at 774.
[64] *Id.*
[65] 143 S.W. 2d 1028, 1033-34 (Tex. 1940).
[66] *Id.* at 1033.
[67] *Id.* at 1034.
[68] *Id.*
[69] Chicago, Rock Island, & Gulf Ry. Co. v. Tarrant Cnty. Water Control & Improvement Dist. No. 1, 73 S.W. 2d 55, 56 (Tex. 1934) (*Chicago Ry.*).

[70] *Id.* at 58.
[71] *Id.* at 59.
[72] *Id.* at 63.

the police power and that the railroad had to bear the cost of relocating its structures.[73] The court also read the statute to preserve "the rights of the public in streams and water courses . . . ,"[74] and held that the statute compelled the railroad to preserve watercourses' usefulness for the public.[75] The court repeatedly emphasized the importance of flood control as a constitutional and legislative mandate implemented by the district.[76]

3. Cases Rejecting the Public Trust Doctrine in Name, Though Some Apply it in Spirit

a. *State of Texas v. Lain*

In *State of Texas v. Lain*, private plaintiffs sued the State in trespass to try title for building and operating a ferry over their submerged land off the Galveston coast.[77] The land was part of the Menard patent, which the Texas Supreme Court had evaluated in an 1859 decision and held was a valid grant from the Congress of the Republic of Texas to Michael B. Menard.[78] In *Lain*, the State did not question the plaintiff's title to the land, but cited *Illinois Central* for the proposition that "plaintiffs' title is a qualified title, subject to certain rights of the public and burdened with a servitude in favor of the public."[79] Additionally, the State argued, "the original grant to Menard did not, and could not, convey these public rights [for navigation and other reasonable purposes] to an individual."[80] Presumably this servitude could be exercised in favor of the public in the shape of a ferry service.

The *Lain* court rejected the State's argument, stating "[t]he power and intent of the Republic to grant the submerged area included in the patent to Menard in derogation of public rights of navigation, etc. was fully considered."[81] To the State's citation of *Illinois Central*, the Texas Supreme Court responded by saying "we need not review the cited case[], for we regard our own decision [*Menard*] as controlling."[82]

As simply as that, the Texas Supreme Court assured there would be little future discussion in Texas common law of the public trust doctrine. Our public-trust jurisprudence has never incorporated *Illinois Central*, which is a state supreme court's prerogative in developing an area of state law.[83] Accordingly, Texas never developed the backdrop against which other states expanded their public trust doctrines to protect natural resources.

b. *Natland Corp. v. Baker's Port*

Despite *Lain*, the state tried again. In *Natland Corp. v. Baker's Port*, Baker sued Natland over defects in title to 2800 acres of coastal land. The State entered the lawsuit, seeking in part a declaratory judgment that 229 acres of the land was subject to the public trust doctrine.[84] Natland had bought the 229 acres of submerged land (salt flats and a lagoon) from the City of Ingleside and the San Patricio Navigation District No. 1 under statutory authority

[73] *Id.* at 66.
[74] *Chicago Ry.*, 73 S.W. 3d at 70.
[75] *Id.* at 67.
[76] *Id.* at 60, 61, 62, 64-65 (quoting Motl v. Boyd, 286 S.W. 458, 470 (Tex. 1926)).
[77] State of Tex. v. Lain, 349 S.W.2d 579, 581 (Tex. 1961).
[78] *Id.* at 583 (describing City of Galveston v. Menard, 23 Tex. 349 (1859)).
[79] *Id.* at 581.
[80] *Id.* at 582.
[81] *Id.* at 583.
[82] *Id.*
[83] *See Phillips Petroleum*, 484 U.S. at 483-84.
[84] Natland Corp. v. Baker's Port, Inc., 865 S.W.2d 52, 55 (Tex.App.—Corpus Christi 1993, writ denied).

for navigation districts to dispose of such lands.[85] Earlier in the chain of title, the navigation district had bought the submerged land from the state pursuant to a statute authorizing the sale of such lands to navigation districts.[86]

The State cited ancient law, common law, and *Illinois Central* as it argued that "although [the State] may sell submerged lands . . . the land so sold must be used for purposes that are consistent with the public interests in land."[87] In response, the court recognized that although other jurisdictions have developed their own public trust doctrines based on *Illinois Central*,[88] in Texas such a question is controlled by *Menard* and *Lain*.[89] "Accordingly," the court held, "there were no implied reservations for the benefit of the public" in the relevant submerged land.[90]

Arguably, the *Natland* court could have construed the *Lain* holding more narrowly. The land at question in *Lain* was the same land that had been at issue in *Menard*, so the *Lain* court had to apply the *Menard* holding. *Illinois Central* was decided after *Menard*, so arguably a subsequent court presented with the public-trust argument and different geographical facts could find implied restrictions in favor of the public based on *Illinois Central* despite *Menard*. But that was not the court's holding.

Despite roundly rejected the public trust doctrine, the *Natland* court recognized public rights in navigable waters under Texas law. Baker had sued Natland for breach of the warranty against encumbrances, arguing among other things that the 229 acres was burdened by an express reservation for recreation.[91] The jury had found encumbrances that caused Baker more than six-million dollars in damages because it could not develop the property as planned.[92] Natland appealed, arguing it had conveyed a full fee-simple estate. The court agreed, holding that the terms of the grant reserved nothing more than what state law already reserved in similar land.[93]

The deed conveying the 229 acres included language reserving "to the State for the benefit of the general public the right to use that portion of the . . . land . . . actually . . . covered by water for hunting, fishing or other recreational purposes . . . ."[94] The court held that the reservation merely clarified existing state law, noting that if Baker left the submerged lands as an inland pond, the reservation would be meaningless, because the public would have no right to trespass over Baker's private property to access the pond.[95] Alternatively, if Baker dredged canals to connect the pond to navigable waters, the public would have the right to use the pond regardless of the reservation. The court discussed both *Diversion Lake Club* and *Port Acres*, which both held that the public may fish in state waters overlying privately-held submerged land.[96]

c. ***Seaway Co. v. Attorney General***

In *Seaway Co. v. Attorney General*, the State Attorney General filed suit against the Seaway Company on behalf of the public under the Open Beaches Act, requesting that Seaway be required to remove three fences it

[85] *Id.* at 58-59.
[86] *Id.* at 59.
[87] *Id.* at 59.
[88] *Id.*
[89] *Natland Corp.*, 865 S.W.2d at 60.
[90] *Id.*
[91] *Id.* at 62.
[92] *Id.* at 60.
[93] *Id.* at 63.
[94] *Natland Corp.*, 865 S.W.2d at 62.
[95] *Id.* at 63 (citing *Diversion Lake Club*, 86 S.W.2d at 445).
[96] *Id.* at 63-64.

maintained between the high-tide line and the seaward side of the vegetation line on the beach. The jury had found, and the trial court judgment confirmed, that there had been a dedication of the beach to the public.[97]

In support of the trial court's judgment, the Attorney General did not argue the "public trust doctrine" in so many words or cite *Illinois Central*, but he argued that Seaway's title in the dry beach was subordinate to the public's right to access the state-owned wet beach.[98] In the appeals court's understanding, the Attorney General's argument was founded on the idea that the sovereign holds the seashore in trust for the people, and any grant by the sovereign necessarily includes rights of ingress and egress for the public to the state-owned beach. The *Seaway* court rejected the argument, claiming it had never heard of such a thing and barely understood the argument.[99]

The Attorney General also sought to uphold the trial court's judgment on the basis of dedication by Seaway's predecessors in title.[100] The court reviewed the voluminous trial-court transcript, finding that both documentary evidence and witness testimony confirmed use of the beach by the public "beyond the memory of living man."[101] Generally, witness testimony revealed that members of the public used the dry beach without permission, in all seasons, as a road and for pleasure, because they thought they had a right to, and with limited exceptions never encountered fences blocking their way.[102] The court found the evidence sufficient to support an implied dedication in favor of the public.[103]

In *Seaway*, as in *Natland*, the court's judgment supported the right of the public to use state-owned natural resources. But the courts refused to accept the argument that the state retained rights on behalf of the public in land that was properly granted to private parties. The upshot is that in Texas, regardless of *Illinois Central*, the state may alienate trust property and no rights will remain in favor of the public. Unless, of course, state law already recognizes such rights in the public's favor, such as the right to fish in state-owned navigable waters or the right to access the wet beach by crossing privately-owned dry beach where a dedication or easement is proved.

d. *Severance v. Patterson*

In *Severance v. Patterson*, Plaintiff Severance sued the state after it sought to enforce a public easement on her beach property. Hurricane Rita had moved the line of vegetation landward, leaving a rental house owned by Severance in the dry beach. The state claimed the house interfered with the public's use of the beach.[104] The state argued that property owners on Galveston Island's West Beach "never had the right to exclude the public from their property in the dry beach,"[105] and that an easement that had existed on a parcel seaward of Severance's "rolled" onto hers after Hurricane Rita left her house in the dry beach.[106]

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[97] Seaway Co. v. Att'y Gen., 375 S.W.2d 923, 926 (Tex.Civ.App.-Houston 1964, writ ref'd n.r.e.).
[98] *Id.* The State owns the "wet beach" in trust for the public. The wet beach is the portion of the beach between the mean higher high tide line (for Spanish or Mexican grants) or the mean high tide line (for Anglo-American grants). *Severance*, 370 S.W.3d at 717. The dry beach is the portion of the beach between the mean high tide line and the vegetation line and can be privately owned. *Id.* at 718.
[99] *Seaway*, 375 S.W.2d at 929.
[100] *Id.* at 930, 935.
[101] *Id.* at 931.
[102] *Id.* at 932-35.
[103] *Id.* at 940.
[104] *Severance*, 370 S.W.3d at 712.
[105] *Id.* at 710.
[106] *Id.* at 721.

The court held that when an avulsive (sudden) event such as Hurricane Rita pushes the dry beach landward, a public easement does not "roll" inland to other parts of an encumbered parcel or other parcels. Instead, the state must prove an easement on the land newly bordering the ocean.[107] The court affirmed that Texas law does not recognize the concept that there are limitations on private title in favor of the public.[108] It contrasted the law of states where such limitations "'inhere in the title itself.'"[109] The court disapproved of specific court of appeals opinions to the extent they held differently about rolling easements.[110]

The *Severance* court does not talk in terms of the "public trust doctrine," and the State must not have presented its position in those terms. Instead, the court discusses "inherent limitations on private property rights," and contrasts the West Beach of Galveston Island with jurisdictions that have inherent limitations in titles to beach properties.[111]

4. *A Case Attempting to Extend the Public Trust Doctrine to the Atmosphere* – Bonser-Lain v. Texas Commission on Environmental Quality

In 2011, Austin-area residents petitioned the TCEQ for a rulemaking on greenhouse gas emissions.[112] The petitioners argued that the public trust doctrine applied to the atmosphere as well as navigable waters. The TCEQ denied the petition for rulemaking for multiple reasons, including that Texas was in litigation with the U.S. Environmental Protection Agency over the same issues and that the public trust doctrine was preempted by the Federal Clean Air Act.[113]

Petitioners asked the district court to review the TCEQ's denial of the petition. At the district court, the TCEQ filed a plea to the jurisdiction, arguing that the legislature had not waived sovereign immunity for denials of petitions for rulemaking. The trial court denied the TCEQ's plea to the jurisdiction but affirmed the TCEQ's denial of petition for rulemaking "in light of other state and federal litigation." The trial court also relied on the Conservation Amendment in stating "the public trust doctrine applies to all natural resources of the State including the air and atmosphere."[114]

The TCEQ appealed, requesting that the appeals court grant its plea to the jurisdiction and dismiss the case. Alternatively, the TCEQ argued that the district court's pronouncement on the public trust doctrine was an improper advisory opinion and requested that the appeals court vacate the statement. The Third Court of Appeals held that there is no right to judicial review of agency denials of rulemaking under the Administrative Procedures Act or section 5.351 of the Water Code, vacated the district court's judgment, and dismissed the case for lack of subject-matter jurisdiction.[115] The Third Court did not opine on the trial court's public-trust statements.

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[107] *Id.* at 708.
[108] *Id.* at 728-31 (quoting and approving of *Seaway*, 375 S.W.2d at 929).
[109] *Severance*, 370 S.W.3d at 727 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1004 (1992)).
[110] *Id.* at 730.
[111] *Id.* at 727.
[112] Tex. Comm. on Env. Quality v. Bonser-Lain, 438 S.W.3d 887, 890 (Tex.App—Austin 2014, no pet); *see also* Memorandum from Stephanie Bergeron Perdue, Deputy Dir. Office of Legal Servs., to Mark R. Vickery, Exec. Dir., Tex. Comm. on Env. Quality, re: Docket No. 2011-0720-RUL, June 11, 2011, at 1 (TCEQ Memo), available at http://www.tceq.texas.gov/assets/public/legal/rules/rule_lib/petitions/11020PET_petex.pdf, last visited Mar. 2, 2015.
[113] *Bonser-Lain*, 438 S.W.3d at 480.
[114] Bonser-Lain v. Tex. Comm. on Env. Quality, Cause No. D-1-GN-11-002194, 201st Dist. Ct., Travis Cnty., Final Judgment, Aug. 2, 2012, available at http://ourchildrenstrust.org/sites/default/files/TexasFinalJudgment.pdf, last visited Mar. 1, 2015.
[115] *Bonser-Lain*, 438 S.W.3d at 895.

Bonser-Lain illustrates some of the hurdles private plaintiffs face when attempting to expand the scope of the public trust doctrine in Texas. As evidenced by the Third Court's sovereign-immunity holding, there are many threshold issues to surmount before a court reaches the case's merits. Even the district court, which was amenable to the public-trust argument to the point of dropping an advisory opinion, ended up deciding the case in the TCEQ's favor.

The case may be a portent for the future, however. If groundwater is one frontier for the public trust doctrine, climate change is the other. Public-trust-doctrine proponents are advocating that litigants use public-trust arguments to tackle climate change, and this is our Texas example.[116] Although there is no precedential value to the district court's statements about the public trust doctrine, *Bonser-Lain* is noteworthy for the boldness of the plaintiffs' arguments and the expansiveness of the district court's statements.

C. In Summary

After reviewing Texas public-trust case law, I agree with Professor Sax's assessment that "the various interpretations of that protective theory are difficult to reconcile [in Texas law]."[117]

Texas courts do not always speak in terms of the public trust doctrine, but they protect public rights to navigate on and fish in navigable waters regardless of ownership of the underlying bed.[118] Courts also protect state-owned submerged land from encroachment or control by private parties.[119] Courts have facilitated use of the police power to achieve the public-interest goals of the time. In 1934 in *Chicago Railway*, that meant supporting a water district's flood-control and water-storage project.[120] In 2005 in *Cummins*, that meant supporting a water district's rule to protect water quality.[121]

This common-law protection of public rights is not without limit. First, the state may grant land that is traditionally state-owned, such as submerged tidal land, to private parties by express legislative grant with the state and public retaining no rights in that land.[122] Second, the public may not access state waters by crossing private land; there are no implied rights of ingress and egress to access state waters that would be available if the public could reach them. In *Diversion Lake Club*, the court held that the public's right to fish in public waters did not include a right to cross privately-owned land to reach the water or a right to fish from privately-owned banks of rivers or lakes.[123] In *Seaway Co.*, the court rejected the argument that the state retained an easement over privately-owned land for the public to reach state-owned tidal lands.[124] In *Severance*, the court held that there is

[116] *See e.g.* Robin Craig, *Climate Change and Public Trust Doctrine*, 120 The Water Report 16, 16 (2014). These cases have not necessarily been successful. *See* Brief of Amici Curiae Tex. Assoc. of Bus., Tex., *et al.*, at 18-21, *Bonser-Lain*, 438 S.W.3d 887 (describing opinions from other states rejecting plaintiffs' efforts to extend the public trust doctrine to the atmosphere).

[117] Sax, *supra* note 12, at 553-54, n.251 (commenting on his analysis of Texas public-trust cases).

[118] *Diversion Lake Club*, 86 S.W.2d at 445-56; *Hix*, 211 S.W.3d at 426, 428; *Port Acres Sportsmans Club*, 541 S.W.2d at 850.

[119] *Carrithers*, 645 S.W.2d at 774; *City of Galveston v. Mann*, 143 S.W. 2d 1028, 1033-34.

[120] *Chicago Ry.*, 73 S.W. 2d at 67.

[121] *Cummins*, 175 S.W.3d at 48.

[122] *Lain*, 349 S.W.2d at 583; *Natland*, 865 S.W.2d at 58-59.

[123] *Diversion Lake Club*, 86 S.W.2d at 444, 447.

[124] *Seaway*, 375 S.W.2d at 929.

no custom in Texas law of public easements rolling onto adjacent private property after an avulsive event moved the vegetation line inland.[125]

As demonstrated in *Bonser-Lain*, proponents of the public trust doctrine must surmount threshold issues, convince a court the doctrine belongs in Texas law, and potentially also expand that doctrine to previously uncovered resources. Doing all three is difficult when Texas public-trust law gives little to build on. How little becomes apparent when Texas's public trust doctrine is compared to that of other states.

III. Comparing Texas's Public-Trust Law to Other States' Public Trust Doctrines

A. *National Audubon Society v. Superior Court of Alpine County (Mono Lake)*

1. The Case

Our main point of comparison will be California law, because California law includes *National Audubon Society v. Superior Court of Alpine County* (*Mono Lake*),[126] which is considered one of the most important modern public trust doctrine cases ever decided.[127] Because of *Mono Lake*'s perceived significance, I describe it thoroughly below.

In short, the court held that "before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests."[128]

The California Supreme Court decided *Mono Lake* in 1983. The facts surrounded Mono Lake, California's second-largest lake and a "scenic and ecological treasure of national significance."[129] Historically, most of the lake's water supply came from five streams originating in the Sierra Nevada. However, in 1940, California's Division of Water Resources granted Los Angeles a permit to appropriate almost the entire flow of those tributaries, and over the years Los Angeles took all the water to which it was entitled.[130]

Plaintiffs filed suit seeking injunctive and declaratory relief. They alleged that Los Angeles's diversion of the tributary water caused Mono Lake's level to drop and harmed the lake's scenic and ecological values.[131] The case was eventually removed to a federal court, which certified questions to the California Supreme Court regarding the status of the public trust doctrine in California law.[132] First, the federal court asked whether the public trust doctrine was "subsumed in the California water rights system . . . or . . . [whether it] function[ed] independently of that system[.]"[133] Second, the federal court asked whether plaintiffs had to exhaust administrative remedies.[134]

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[125] *Severance*, 370 S.W.3d at 730.
[126] 658 P.2d 709.
[127] *See* Owen, *supra* note 13, at 1101-02 (describing the perceived importance of the *Mono Lake* decision, including that in 2001, environmental law professors named it one of the top ten "most excellent" environmental-law cases in environmental-law history).
[128] *Mono Lake*, 658 P.2d at 712.
[129] *Id.* at 712.
[130] *Id.* at 711.
[131] *Id.*
[132] *Id.* at 716-17.
[133] *Mono Lake*, 658 P.2d at 717.
[134] *Id.*

The California Supreme Court summarized the conundrum at hand; "this case brings together for the first time two systems of legal thought: the appropriative water rights system . . . and the public trust doctrine which . . . [e]ver since we first recognized that the public trust protects environmental and recreational values . . . have been on a collision course."[135]

Regarding the origins of the public trust doctrine, the court quoted the Institutes of Justinian and English common law for the concept that the sovereign owns all navigable watercourses and the land under them as a trustee for the benefit of the people.[136] The court stated that California courts had always "recognized and enforced the trust obligation."[137]

Regarding the purpose of the trust, the court recognized that "[t]he objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways."[138] The California Supreme Court had, in the 1971 decision *Marks v. Whitney*, held that the public trust included preservation of tidelands in their natural state "'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.'"[139] The court therefore held that the environmental values the Mono Lake plaintiffs sought to protect fell within the purposes of the trust.[140]

Regarding the scope of the trust, the court held, based on two mining-era cases, that the public trust doctrine "protects navigable waters from harm caused by diversion of nonnavigable tributaries."[141]

Regarding the state's duties and powers as trustee, the court discussed *Illinois Central* and the court's decisions endorsing *Illinois Central*.[142] In California, when a grant of trust property is not made to further trust purposes, the grantees take subject to rights of the public for navigation and commerce and subject to rights of the state to enter and possess the property to advance the public's interest.[143] The power of the state as trustee "extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust."[144] The court held the public trust "is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands . . . ."[145]

The court described how California's Water Board evolved from filling a narrow ministerial role into an agency with "the charge of comprehensive planning and allocation of waters . . . which necessarily affects the board's responsibility with respect to the public trust." The court held the board was required to take public-trust interests into account in discharging its duties.[146]

The court held that the public trust doctrine co-existed with the appropriative water-rights system. "[T]he state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to

[135] *Id.* at 712 (internal citation omitted; citing Marks v. Whitney, 491 P.2d 374 (Cal. 1971)).
[136] *Id.* at 718.
[137] *Id.* at 718-19.
[138] *Mono Lake*, 658 P.2d at 719.
[139] *Id.* at 719 (quoting *Marks v. Whitney*, 491 P.2d at 734).
[140] *Id.* at 719.
[141] *Id.* at 721.
[142] *Id.* at 721-22.
[143] *Mono Lake*, 658 P.2d at 722.
[144] *Id.* at 723.
[145] *Id.* at 724.
[146] *Id.* at 726.

protect public trust uses whenever feasible."[147] To effect this duty, the state may reconsider existing water-allocation decisions, even ones in which the public trust was considered in the first instance. The court recognized that sometimes protecting public-trust uses would not be feasible.[148]

The court held that California superior courts had concurrent original jurisdiction with the water board, and a plaintiff seeking to protect the public trust did not need to exhaust administrative remedies.[149]

The court made no particular allocation of water; instead it wanted to clarify that the public trust doctrine and the appropriative water-rights system co-existed in California law and that the state had the power to protect public trust values.[150]

2. *The Significance of* Mono Lake

Mono Lake was perceived as enormously important to environmental protection in California.[151] However, its perceived importance is not necessarily commensurate with its actual effect on California water law. One study of post-*Mono Lake* California water law concluded that the public trust doctrine has had little significance in the courts since the decision. Instead, the public trust doctrine is primarily used in agency decisions and has had less effect on such decisions than statutory environmental law.[152] The study author concluded that the public trust doctrine is "thoroughly integrated into the state's statutory and administrative environmental law system . . . ."[153] The author therefore cautioned against sweeping pronouncements that the public trust doctrine can act as a "lever to compel systemic improvements in environmental protection."[154]

However, as evidenced by the doctrine's impact on agency decisions, it is probably safe to say that some California water allocations would have turned out differently if *Mono Lake* had never been decided. Perhaps this seemed an anemic result from the vantage point of having a case like *Mono Lake* on the books and having expected it to make a documentable difference in water management. However, from the vantage point here in Texas, where we have no such case, just to get such a case on the books would mark an enormous attitude shift. The study described above could not evaluate undocumented impacts or how the case affected "judges' and administrators' decision-making by informing their ideals of good governance or their basic understanding of the controversies before them."[155] How would judges' and administrators' water-allocation decisions turn out in Texas if our law recognized the public trust doctrine?[156]

3. *Could We Have a* Mono Lake *in Texas?*

When the California Supreme Court decided *Mono Lake*, it drew on a more robust public trust doctrine than exists in Texas. The California Supreme Court had endorsed *Illinois Central* soon after it was decided, and California

[147] *Id.* at 728.
[148] *Mono Lake*, 658 P.2d at 728.
[149] *Id.* at 731.
[150] *Id.* at 732.
[151] Owen, *supra* note 13, at 1101-02.
[152] *Id.* at 1105.
[153] *Id.* at 1106.
[154] *Id.*
[155] *Id.* at 1104.
[156] On the other hand, another takeaway from *Mono Lake* may be that "classic judicial opinions, for all their eloquence and seeming importance, [may have had] little consequence beyond the controversies directly at issue." *Id.* at 1103. Perhaps we can apply that idea to concerns about *Day*.

law therefore included the idea that the state never fully alientated trust lands, even when they had passed into private ownership. The state of California had a continuing duty to monitor private use of trust lands to ensure they were being used for purposes consistent with the trust.

By the 1970's, when *Marks v. Whitney* came before the California Supreme Court, the court had decades of tidal-based public-trust law to extend to environmental and recreational protection.[157] Texas's public-trust law, on the other hand, is sparse. The Texas Supreme Court has rejected *Illinois Central* and the idea of an easement in favor of the public on privately-held land. Land that would be encumbered with the public trust in California is not so encumbered in Texas.[158] The leap to environmental protection in *Mono Lake* was therefore smaller than the leap a Texas court would have to make it if was presented with a public-trust case to protect the environment.

B. The Scott River Litigation – Applying the Public Trust Doctrine to Groundwater

As discussed above, it is difficult to document exactly how the public trust doctrine has made itself felt in California law or water-allocation decisions. It may be that in addition to a case like *Mono Lake*'s impact being greatest at the "attitude" level, its impact makes itself felt in fits and starts. Thirty years after *Mono Lake* was decided, plaintiffs are using the public trust doctrine to help regulate groundwater in California. Under *Mono Lake*, the state and its subdivisions may be required to apply the public trust doctrine to some groundwater resources.

In the Scott River case, plaintiffs are seeking a declaration that the public trust doctrine applies to groundwater that is hydrologically-connected to a navigable river. They also seek an injunction preventing a county from issuing well-drilling permits until it complies with its duties under the public trust doctrine.[159]

The Scott River is a navigable river in Siskiyou County, California, that plaintiffs allege decreases in flow due to groundwater extraction.[160] The plaintiffs are an environmental organization and fishermen's associations. They sued the county in which the river lies, which has authority for issuing well-drilling permits. The plaintiffs allege that the county does not consider the effect of groundwater extraction on the river when it issues well permits.[161] The trial court granted the plaintiffs' motion for judgment on the pleadings, allowing the case to proceed.

The trial court held that as a logical extension of *Mono Lake*, "the public trust doctrine protects navigable waters from harm caused by extraction of groundwater where the groundwater is so connected to the navigable water that its extraction adversely affects public trust uses."[162] The court analogized to *Mono Lake*'s holding that the public trust doctrine applies to nonnavigable tributaries of navigable waters.[163] It rejected the argument that a tributary must be surface water.[164] The court expressly did not hold that the public trust doctrine applied to groundwater itself, because groundwater is not navigable.[165]

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[157] *Marks v. Whitney*, 491 P.2d at 380.
[158] *See Lain*, 349 S.W.2d at 581, discussed *supra* Section II.B.3.a.
[159] Envtl. Law Found. v. State Water Res. Control Bd., No. 34-2010-80000583, Order After Hearing on Cross Motions for Judgment on the Pleadings, at 2 (Sup. Ct. of Cal., Sacramento Cnty., Jul. 15, 2014) (Scott River Order), available at http://www.envirolaw.org/documents/ScottOrderonCrossMotions.pdf (last visited March 9, 2015).
[160] *Id.* at 3.
[161] *Id.* at 4.
[162] *Id.* at 8.
[163] Scott River Order, *supra* note 159, at 7-8; *see also Mono Lake*, 658 P.2d at 721.
[164] *Id.* at 10.
[165] *Id.* at 8-9.

The county argued that it had no duties under the public trust doctrine because the legislature gave it discretion about whether to regulate groundwater at all. The court held that because the public trust doctrine and California's statutory water-rights system co-exist, the county as a subdivision of the state must consider the public trust doctrine if it chooses to regulate groundwater.[166]

The Scott River case is significant because it is one of the first examples of a court extending the public trust doctrine to regulate groundwater. The case is still at its early stages, so it remains unclear if the trial court's ruling will stand. It is also unclear exactly what would happen were the ruling to stand. The Scott River plaintiffs' requested relief is only for the county to consider the public trust doctrine, which is vague and requires no specific result. Presumably the plaintiffs believe there is value in reminding California counties that part of their duty in regulating groundwater is to consider environmental values and in compelling decision-makers to think about whether rivers keep flowing.

C. Other States That Extend the Public Trust Doctrine to Groundwater

This section is not meant to be exhaustive but gives examples of some ways other states have applied the public trust doctrine to groundwater.

1. New Hampshire

New Hampshire, for example, has enacted a public-trust statute that extends to groundwater. It states, in relevant part, "the water of New Hampshire whether located above or below ground should be protected, conserved and managed in the interest of present and future generations."[167] The statute recognizes the state's trusteeship over state waters and directs all levels of state government as well as public and private parties having any control over water use to comply with the policy and the state's comprehensive water-management plan.[168] The New Hampshire Supreme Court in *State of New Hampshire v. Hess* cited the statute as establishing the State's public-trust duties to protect groundwater and as support for the State to bring suit to protect trust resources.[169]

2. Hawai'i

In Hawai'i, the state supreme court endorsed *Illinois Central* in 1899.[170] The principles of *Illinois Central* dovetail nicely with traditional Hawai'ian law, under which the king retained the authority and duty to preserve and protect the waters of the state for future generations. Such authority is similar, though not identical, to that over navigable waters as described in *Illinois Central*.[171] In 1978, the state added a constitutional amendment promoting the public trust, which was "engrafted" in the common-law public trust doctrine.[172] The constitutional provision states:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, air,

[166] *Id.* at 11-13.
[167] N.H. Rev. Stat. Ann. § 481:1 (2001) (quoted in State of N.H. v. Hess, 20 A.2d 212, 17 (N.H. 2011)).
[168] *Id.*
[169] 20 A.2d at 17.
[170] *Waiahole Ditch*, 9 P.3d at 439.
[171] *Id.* at 441.
[172] *Id.* at 442.

> minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.[173]

The constitutional provision embraces ground as well as surface water,[174] and "the maintenance of waters in their natural state constitutes a distinct 'use' under the water resources trust."[175]

IV. Texas Groundwater

The state of Texas owns surface water. State ownership of water is the foundation of both Texas's public-waters case law and California's *Mono Lake* case and Scott River litigation. Texas groundwater, on the other hand, is privately owned.[176] There is no obvious intersection between the public trust doctrine and privately-owned groundwater. Protecting groundwater with the public trust doctrine is an emerging legal development even in states with a robust public trust doctrine.[177] Taking the next step is therefore challenging.

A. Does Texas Need A Public-Trust Cause of Action for Groundwater?

As discussed initially, there is a concern that district regulation will not always result in groundwater staying in the ground.[178] Lack of or lackadaisical groundwater management may result in groundwater extraction that harms surface watercourses to which it is tributary. These drying streams are where we find our intersection.

The state holds such waters in trust for the public.[179] The Texas constitution declares that it is the state's public right and duty to preserve and conserve the natural resources of the state, including the waters of its rivers and streams.[180] However, the existing model for protecting surface water flows is lacking. The Texas Water Code tells us that "[m]aintaining the biological soundness of the state's rivers, lakes, bays, and estuaries is of great importance to the public's economic health and general well-being." But water and land stewardship to protect biological soundness is voluntary, and the Code expressly prohibits the TCEQ from granting water rights to protect public trust values.[181] The Code describes how the environmental-flows legislative regime requires the TCEQ to consider and provide for flows to protect public-trust values,[182] but the requirement is qualified within its own language with the words "to the extent practicable," and requires that relevant permit conditions be subject to suspension in times of emergency for other "essential beneficial uses".[183] The environmental-flows

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[173] Haw. Const. art. XI, § 1.
[174] *Waiahole Ditch*, at 445-47.
[175] *Id.* at 448.
[176] *Day*, 369 S.W.3d at 816.
[177] *See* Jack Tuholske, *Trusting the Public Trust: Application of the Public Trust Doctrine to Groundwater Resources*, 9 Vt. J. Envtl. L. 189, 221-226 (2008) (describing legal changes necessary to extend the public trust doctrine to groundwater).
[178] In my introduction I discussed the concern that fear of takings litigation will inhibit districts from managing groundwater to leave it in the ground. An implication is that they would if they felt they could. Of course, each district is free to choose its own management style. A district may not care if its management leaves groundwater in the ground which may have more to do with its own values than with fear of takings litigation. Except for a brief mention in laying out a public-trust case, discussing that concern is beyond the scope of this paper.
[179] Tex. Water Code § 11.0235(a).
[180] Tex. Const. Art. 16, § 59(a).
[181] *Id.* § 11.0235(b), (d).
[182] *Id.* § 11.0235(c); *see also e.g.* Tex. Water Code Ann. § 11.147.
[183] Tex. Water Code § 11.0235(c).

process has been criticized as being dominated by "short-term economic" interests versus "ecological and recreational needs for freshwater."[184] The takeaway is that although maintaining biological soundness is "important," in Texas's surface-water management, it is not really that important.

Surface water is also vulnerable to the extent its source is interconnected groundwater. Groundwater provides a significant portion of the flows of some watercourses, and groundwater extraction may directly affect the related watercourse.[185] However, Texas water law treats surface and groundwater as legally separate resources,[186] and the rule of capture allows groundwater extraction to dry up springs, rivers, and streams.[187] There is room in Texas law for new causes of action, remedies, and attitudes about how to protect the waters held in trust for the public.

B. A Hypothetical Public-Trust Case to Manage Groundwater

1. Making the Case

a. Plaintiffs

In some contexts, the State of Texas is the appropriate plaintiff to bring a public-trust lawsuit. For example, the state Attorney General brought suit in *Seaway* to ensure beach access for the public.[188] Regarding the groundwater-surface water interconnection, the Attorney General might try suing a district if the cause of surface-water harm was ineffective district groundwater management. If there were no district to sue, it seems doubtful a case would lie against a private party for the same reasons our private plaintiffs cannot sue a private party for extracting groundwater – the rule of capture. It is also so hard to imagine the state bringing a public-trust case in the current political climate that my creative efforts defaulted to private parties bringing the case in a similar posture to the Scott River case.

Like the Scott River plaintiffs in California, Texas plaintiffs could ask a court to apply the public trust doctrine to protect a watercourse so hydrologically connected to groundwater that groundwater extraction harms the state-owned watercourse. For an easy hypothetical, assume that a stream dries up in the summer when residents of a nearby subdivision water their lawns.

Any member of the public who actively uses a harmed watercourse should have standing to enforce its protection under the public trust doctrine. In *Hix*, the court held plaintiffs had standing as members of the general public to enforce rights to use state waters for fishing.[189] The *Hix* court pointed out that in similar cases, "the standing of private individuals was simply assumed."[190] Plaintiffs could be a coalition of affected parties, including affected landowners, fishermen, and recreational users.

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[184] Katherine A. Roach, *Texas Water Wars: How Politics and Scientific Uncertainty Influence Environmental Flow Decision-Making in the Lone Star State* 22 Biodiversity and Conservation 545, 559 (2013).
[185] Ronald Kaiser, *Conjunctive Management and Use of Surface and Groundwater Resources, in* Essentials of Texas Water Resources 5-1, 5-1 – 5-2 (Mary K. Sahs, ed., 2d ed.) (2012).
[186] *See Day*, 369 S.W.3d at 822 (holding that water in lake was state water despite originating as groundwater).
[187] Pecos Cnty. Water Control & Improvement Dist. No. 1 v. Williams, 271 S.W.2d 503, (Tex.Civ.App. —El Paso 954, writ ref'd n.r.e.) (*Comanche Springs*) (holding groundwater owner had no liability for drying up Comanche Springs).
[188] 375 S.W.2d 923.
[189] *Hix*, 211 S.W.3d at 426.
[190] *Id.* (citing *Diversion Lake Club* and *Port Acres Sportsman's Club*).

b.Defendant

This public-trust cause of action brought by private parties is founded on the idea that the state as trustee must proactively protect trust resources on behalf of the public, either through the TCEQ or a smaller subdivision (the district). In the context of protecting public rights such as navigation and fishing, private parties have sued private parties, as occurred in *Hix*. But in the context of preventing groundwater extraction in Texas, suing private parties seems futile in the face of the rule of capture and precedent like *Sipriano*[191] and *Comanche Springs*.[192] So the lawsuit is directed at the state if the state will not act on its own behalf or in response to petitions to do so.

If the groundwater extraction is located within the boundaries of a district, plaintiffs can apply to the district to protect the stream under the district's rules and based on the public trust doctrine. If the district cannot or will not restrict groundwater extraction to protect the stream, plaintiffs could sue the district under the public trust doctrine as subdivision of the state with the right and duty to conserve, preserve, and protect the groundwater within its boundaries.[193]

If the groundwater extraction is outside the boundaries of a district, the TCEQ is the most obvious defendant, despite its lack of jurisdiction over groundwater, because plaintiffs are actually seeking to protect state-owned water. Plaintiffs could petition the TCEQ to take action to protect the stream under its duties to protect the waters of the state that it holds in trust for the public.[194]

c. Threshold Issues

Petitioning a district or the TCEQ provides the plaintiffs with an administrative record and exhausts administrative remedies. In the alternative, plaintiffs could file a public-trust lawsuit directly with the district court as though there were no exhaustion requirement.[195] There is no established way to bring a public-trust cause of action, so it is not clear that exhaustion would be necessary. Plaintiffs could bring suit against the TCEQ under Texas Water Code section 5.352, under which "a person affected by the failure of the commission or executive director . . . to perform any . . . duty with reasonable promptness may file a petition to compel the commission or the executive director to show cause why it should not be directed by the court to take immediate action."[196]

d.The Merits

To establish a public-trust cause of action, plaintiffs would allege that the stream is a public-trust resource because it is a statutorily-navigable or navigable-in-fact stream used for navigation, fishing, recreation, and other lawful purposes.[197] They would allege its flows are dependent on a specific aquifer and that the subdivision's

[191] *Sipriano*, 1 S.W.3d at 80 (where landowners sued Ozarka for drying up their wells, holding that it would not be appropriate to abandon the rule of capture for the rule of reasonable use, because it is the Legislature's duty to regulate groundwater).

[192] *See generally Comanche Springs*, 271 S.W.2d at (where surface-water rights holders sued irrigator for drying up Comanche Springs and destroying their water rights, abstaining from holding irrigators liable).

[193] *See* Tex. Water Code Ann. § 36.0015; *see also* Tex. Water Code Ann. § 36.251 (West 2008) (allowing appeal of district decision).

[194] *See* Tex. Water Code Ann. §11.0235(a).

[195] *See Mono Lake*, 658 P.2d at 729-732 (describing concurrent jurisdiction in California water law between courts and administrative agency).

[196] Tex. Water Code Ann. §5.352 (West 2008).

[197] *See* Tex. Water Code Ann. §11.0235(a); Tex. Nat. Res. Code Ann. §21.001(3) (definition of navigable stream); *Diversion Lake Club*, 86 S.W.2d at 442 (public right to fish in statutorily-navigable streams).

groundwater extraction harms plaintiffs by decreasing flows in the stream they all use or that crosses their property. Plaintiffs have no adequate remedy at law; they want the stream to keep flowing, they are not seeking monetary damages.

They would argue that the Conservation Amendment requires the state to preserve and conserve the water resources of the state.[198] The state has "jealously reserved for the benefit of its citizens the title to the beds of even very small streams,"[199] and the state should likewise act to preserve the waters of this stream for the public. Plaintiffs would ask the district, the TCEQ, or the court to recognize that the subdivision's groundwater extraction harms the stream, whose waters the state holds in trust for the public. Plaintiffs could request an injunction requiring groundwater extraction not to exceed a level that maintains an acceptable level of streamflow.

e. The Question of Takings

The party extracting groundwater would possibly seek to intervene, and it might allege immediately that the requested relief, if granted, would be a taking. Arguably a takings claim would not be ripe, because it depends on the relief being granted and a subsequent finding that the relief causes a taking. But given that plaintiffs would likely face this argument eventually, it might make sense for them to address it head on.

The plaintiffs can respond, or even plead initially, that they're not contesting private rights in groundwater. They can request an order requiring the state to pay for any taking that may occur. Meaning that if the requested relief is granted and is subsequently found to be a taking, the state as trustee of the stream should pay to protect it so that the public can continue to enjoy it.

Inherent in this idea is that we cannot use the public trust doctrine as a workaround *Day*. This is a more concrete example of what was always discussed in relation to groundwater ownership in place – the state may be responsible for a large bill to landowners if it wants them to leave groundwater in the ground.[200] We shift the harm caused by this impaired stream from our plaintiffs to the taxpayers generally. But because we are talking about a state-owned watercourse in which the general public also has rights (to fish, navigate, etc.), perhaps the taxpayers generally should pay to keep the stream flowing and available to all.

In this we have come full circle back to *Day*. To use a public-trust cause of action to protect a state-owned resource and then require the state to pay for it turns the public trust doctrine on its head. But it is hard to see an alternative in the face of *Day*'s holding on groundwater ownership.

Perhaps this leads to the question of whether the public trust doctrine can apply directly to groundwater in place, as opposed to a hydrologically-connected stream. I do not see how. First, even in jurisdictions more friendly to the public trust doctrine, courts have only rarely applied the doctrine directly to groundwater, and Texas has so little public-trust law on which to build. Second, it is unlikely that a Texas court would suddenly declare groundwater a public resource in the face of *Day*, a recent, unanimous Supreme Court decision holding the opposite. The more plausible, though still challenging, option seems to be to use the doctrine to protect state-owned surface water.

[198] *See* Tex. Const. art. XVII, § 59(a).
[199] *Diversion Lake Club*, 86 S.W.2d at 444.
[200] On the other hand, it may not. It may be difficult to prove a taking occurred. Conjecturing much farther about how groundwater takings law will develop is beyond the scope of this paper.

2. Defendant's Responses and Plaintiffs' Hurdles

Our private plaintiffs face numerous hurdles. Possibly the most obvious is summed up in the words "rule of capture." Meaning, a major legal challenge is the separation in Texas law between surface water and groundwater. Under Texas's rule of capture, there are no repercussions for groundwater extraction that dry up a surface stream.[201] A court faced with this argument and no intervening legislative change regarding conjunctive management would have to change Texas law on the matter. If the change was framed as "recognize that groundwater extraction can decrease surface-water flow," perhaps there is a chance a court would bite, but if the change was framed as "reject the rule of capture," there is probably no chance.[202]

In addition to that enormous hurdle of substantive law, plaintiffs would face threshold arguments about exhaustion of administrative remedies, immunity, and statutory law having preempted related common-law causes of action.[203]

Regarding exhaustion, if the subdivision's well is not located within a district, there are no administrative channels through which plaintiffs can begin to petition for relief. If they do not petition the TCEQ first, they might face arguments that they did not exhaust administrative remedies. Presumably the TCEQ would claim a lack of jurisdiction over groundwater extraction and lack of ability to remedy the problem. Plaintiffs could appeal the TCEQ's final decision to the district court but may have to contend with immunity issues there, although Water Code section 5.352 might serve as a sufficient waiver of sovereign immunity.

Another legal challenge is that districts are the state's preferred method of groundwater management.[204] Defendant might argue that Chapter 36 and legislatively-created districts preempt common-law causes of action like the public trust doctrine.[205] Plaintiffs' response to this argument might be easier if the groundwater extraction takes place outside a district, because no statutory law occupies the field outside district boundaries. If the common-law rule of capture applies outside of districts, then other common-law causes of action do too. Defendant might reply that statute preempts common law regardless of whether a district actually exists in that part of the state, because the statute provides an avenue through which a district *could* exist even if it does not.

Even if plaintiffs have a district to petition initially, the district may respond that it has no responsibility or authority to ensure surface-water flows. Plaintiffs can reply that the public trust doctrine requires the state to protect the waters it holds in trust, and the district, as an arm of the state, must help effectuate that protection.

On the merits, plaintiffs also face the hurdle of establishing that the public trust doctrine exists in Texas law. Our hypothetical case is analogous in its facts to the Scott River case proceeding now in California. However, the Scott River petitioners were able to cite to *Mono Lake* and the body of public-trust case law it represents. The trial court's groundwater holding followed logically from *Mono Lake*'s holding about nonnavigable tributaries of navigable waters.[206] Texas law lacks the foundation upon which the California Supreme Court decided *Marks v. Whitney* and *Mono Lake*.

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[201] *See Comanche Springs*, 271 S.W.2d 503 (holding groundwater owner had no liability for drying up Comanche Springs).
[202] *See generally Sipriano*, 1 S.W.3d 75.
[203] *See* TCEQ Memo, *supra* note 112.
[204] Tex. Water Code Ann. § 36.0015.
[205] *See Bonser-Lain*, 438 S.W.3d at 890.
[206] *See* Scott River Order, *supra* note 159, at 8.

The closest case in Texas law to a modern application of the public trust doctrine is *Cummins*, to the extent it can be read to be protecting water quality. But that was a straightforward application of state ownership of the bed of Lake Travis. Another step remains before a court applies the public trust doctrine to protect water quantity. This case would have to be *Marks v. Whitney*, *Mono Lake*, and the Scott River case all in one.

3. Might Texas Courts Ever Apply the Public Trust Doctrine to Groundwater?

If a Texas court applied the public trust doctrine to protect water resources, it would be because it wanted to make policy and protect specific values. It seems unlikely that today's Texas Supreme Court would reach the merits of a public-trust cause of action, but in a few decades the court's outlook may have changed. Our judges are elected and political climates change; values change. The public's awareness of water scarcity and groundwater law may increase as our population grows.[207] What seems unlikely today may be more likely in the future. Looking back, the Supreme Court of the 1930's seems to have been more public-minded than today's.

In *City of Galveston v. Mann*, the court stated it had "in many important decisions *zealously guarded* and enforced the rights of this State to the public lands of the State."[208] By holding that the City's proposed pier would be an encroachment on state land subject to removal,[209] the court seems to have gone a step beyond what was necessary to resolve the case, which would have only required the court to determine that the submerged land was state-owned.

In *Diversion Lake Club*, the court called plaintiffs' desired outcome giving landowners the exclusive right to fish in navigable waters "out of harmony with the basic principles of the jurisprudence of a state which . . . has *jealously reserved* for the benefit of its citizens the title to the beds of even very small streams."[210] Although two of the court's holdings protected private rights—that the public may not trespass on private land to access public waters[211] and that the public may not fish from the banks of the lake,[212] the court did not extol the importance of private property or the right to exclude. On the other hand, the court often emphasized the public nature of the state's waters or riverbeds.

Chicago Railway was a condemnation case, so there was never a question of whether the railroad would be compensated for some element of its loss to Bridgeport Lake. But in concluding that the railroad would be compensated for less than it sought, the court extoled the virtues of managing watercourses in the public interest. It described how the railroad would benefit from the district's work.[213] The court blamed the railroad itself for its structures being in the way of the proposed reservoir[214] and implied that the railroad should have known by the topography where the reservoir would eventually be built.[215] The court dismissed the financial burden on the

[207] *Cf.* Satija, *supra* note 8 (describing current public outcry in Hays County regarding proposed commercial groundwater-pumping project).
[208] *State of Tex. v. Mann*, 143 S.W.2d at 1033 (emphasis added).
[209] *Id.* at 1034.
[210] *Diversion Lake Club*, 86 S.W.2d at 444 (emphasis added).
[211] *Id.* at 445.
[212] *Id.* at 447.
[213] *Chicago Ry.*, 73 S.W. 2d at 61.
[214] *Id.* at 63, 67.
[215] *Id.* at 61, 67.

railroad as insignificant compared to the public benefit that would be achieved through the district's work. The court quoted cases discussing that an incidental burden on private parties is not a taking.[216]

Compare these opinions with *Severance*, in which the court emphasized the importance of private property and the right to exclude.[217] *Severance*'s holding is not surprising given prior Texas cases such as *Lain*, *City of Galveston v. Mann*, and *Seaway* regarding public rights in private beachfront land. But contrasting *Severance*'s rhetoric with that of *Diversion Lake Club*, *City of Galveston v. Mann*, and *Chicago Railway* reveals what seem to be different outlooks on the question of public and private rights in water. We could dismiss this contrast as each court emphasizing the law necessary to its holding, but arguably each court does so more than necessary. The results are cases that have a distinct flavor; one comes away feeling the courts saw the world a certain way.

Taking this speculative train of thought one step further, how would the *Chicago Railway* court have decided *Bragg*? The *Chicago Railway* court was deciding a case with a different legal context and body of law – a condemnation case instead of a takings case – but contrast this court's outlook with the Fourth Court of Appeals' analysis of the economic-impact prong of *Penn Central*.[218] How would today's court decide the *Diversion Lake Club* question if it were one of first impression before it? How would the *Diversion Lake Club* court have decided *Day*?

My point is simply that courts' outlooks change over time, and we do not know how the Texas Supreme Court will regard water law decades from now. Perhaps there will be a place for the public trust doctrine in Texas groundwater law someday.

V. Conclusion

This paper commenced by describing the concern that *Day* may have a chilling effect on district management to achieve goals that require leaving water in the ground. I inquired whether the public trust doctrine could provide a solution to that problem. Having reviewed the origins of the American public trust doctrine and what exists of it in Texas law, and comparing Texas's public-trust law to that of other states, I do not think the doctrine is an immediate or easy answer to any problem in Texas groundwater law.

The best intersection I can find between the public trust doctrine and Texas groundwater is where groundwater extraction harms a surface watercourse and causation can be proved. Arguably the state as trustee of that resource should act to protect it, and private plaintiffs could try to use the state's public-trust duties to compel such protection. The biggest legal obstacle remains the rule of capture. Perhaps someday, if the right facts and parties land before the right judge at the right time, something could be made of the public trust doctrine.

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[216] *Id.* at 67-69.

[217] *See e.g.* 370 S.W.3d at 709, 725.

[218] *Compare Chicago Ry.*, 73 S.W. 2d at 59, 72 (holding that thirty-nine percent difference between damages awarded and damages sought was incidental to exercise of police power) *with Bragg*, 421 S.W.3d at 141 (holding that "ten percent increase in [the Braggs'] irrigation expense . . . weighs heavily in favor of a finding of a compensable taking.").