

WATERS OF THE STATE

INTRODUCTION

The Southern Nevada Water Authority, the agency that provides Las Vegas with water, is in the process of building a massive pipeline from the eastern-central part of Nevada to Las Vegas.¹ “This pipeline is a nearly-unprecedented feat of engineering and water distribution and stands to move over 27 million gallons of water [a] year.”² Once completed, the pipeline will be one of the largest of its kind in human history.³

If the state of Nevada authorizes the state authority to push this project forward, it would help solve a pressing water supply problem for its largest population center: Las Vegas. But it will do so at the expense of less water for existing rural users. This includes Native American tribes who have fought mightily for decades to protect many of Nevada’s rural water sources—including water that plays important cultural roles for the tribes.⁴

You might imagine that there would be a clear answer to how the law regulates these critical interests. However, that is not the case. The nature of state powers and rights over the water within their territorial boundaries is unclear—that includes the states’ rights when it comes to its private citizens, neighboring states, and the federal government.

Take Nevada itself which, by statute, has declared that “[t]he water of all sources of water supply within the boundaries of the State whether above or

* Associate Professor of Law, William S. Boyd School of Law; J.D., summa cum laude, University of Michigan Law School, 2013; B.A., summa cum laude, University of Nevada, Reno, 2010.

** Professor of Law, Wayne State University Law School and Director of Scholarship, Great Lakes Environmental Law Center; J.D., University of Michigan Law School, 1998; B.S., University of Michigan School of Natural Resources & Environment, 1995. This article was presented at the Searle Law of Property in Ecology Workshop, sponsored by the Property and Environment Research Center and Center for Business Law & Regulation at Case Western Reserve University School of Law, organized by Jonathan Adler. We are grateful for the input of all workshop participants, and have incorporated ideas and suggestions from Vanessa Casado Perez, Victor Flatt, Peter Gerhart, Jim Huffman, Donald Kochan, Dean Lueck, Julia Mahoney, and Katrina Wyman. An early version of this article was presented at the Association of Law, Property, and Society 8th Annual Meeting at the University of Michigan, with helpful commentary by Sally Brown Richardson, Christine Klein, and Rhett Larson.

1. Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., No. 2:14-cv-00226-APG-VCF, No. 2:14-cv-00228-APG-VCF 2017 WL 3667700, at *2 (D. Nev. Aug. 23, 2017), appeal dismissed sub nom. Ctr. for Biological Diversity v. Bureau of Land Mgmt., No. 17–17152, No. 17–17252, No. 17–17263 2017 WL 7036679 (9th Cir. Dec. 21, 2017).

2. *Id.*

3. *See Id.*

4. *Id.* at 9 (addressing in part dispute over water that will impact Native American cultural sites).

beneath the surface of the ground, belongs to the public.”⁵ As the waters of Nevada belong to the public, the state can presumably regulate water use (part of the state’s police power), protect water resources for the public (known in water law parlance as the public trust doctrine), and go to court on behalf of the public’s interest in water (referred to as *parens patriae* powers). These sovereign powers and rights would seem to give the state considerable control and even some duties over its water, but not the sweeping ability to reallocate massive amounts of water at will—which is what we might expect if the state actually owned the water.

But what if a similar proposal were floated in a different state facing water allocation challenges, such as Wyoming. Wyoming’s constitution provides: “The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.”⁶ This self-declaration of water ownership sounds like it gives the state fundamentally different rights over water. It suggests that the state has a proprietary power over all water within its territory. Perhaps the state could allocate and reallocate water to private users, denying water use at will so long as it serves some general governmental purpose.⁷

If the water is simply state property, it can sell it off, hoard and store it for future speculative uses, or simply give it away when politically convenient. And if Wyoming owns the water within its borders, can it demand that its neighbors’ water use have no physical transboundary impacts, essentially drawing a property line through the water cycle?

This article addresses some of the fundamental questions related to state waters. First, what exactly is the state’s interest in its territorial waters? Second, what is meant by the oft-used term in water parlance: “waters of the state”? Does “waters of the state” simply mean state ownership of water as a piece of physical property? Or does it refer to the state’s unique role as sovereign and steward over its water, which is a complex regime of overlapping rights and duties stemming from police powers, the public trust doctrine, the equal footing doctrine, and *parens patriae* standing (as you can guess—the authors will argue)? Third, does it matter how a state defines its waters? Finally, do state declarations about their water – from hydrology to ownership – align with our notions of property and sovereignty?

We conclude that declarations of water as state-owned property are fundamentally flawed. The United States Supreme Court long ago rejected assertions of state ownership of natural resources.⁸ From its start, American law has recognized that water by its nature cannot be one’s property.⁹ Thus, states cannot

5. NEV. REV. STAT. § 533.025 (2000).

6. WYO. CONST. art. VIII, § 1; *See also* WYO. STAT. ANN. § 41-3-101 (2017).

7. WYO. CONST. art. VIII, § 3. Wyoming recognizes private appropriative rights based on priority and beneficial use, the state can ultimately deny a private appropriative use when demanded by the public interest.

8. *See, e.g., Toomer v. Witsell*, 334 U.S. 385, 399-403 (1948) (rejecting state ownership theory of wild resources).

9. *See California-Oregon Power Co. v. Beaver Portland Cement Co.*, 73 F.2d 555, 567, 573 (9th Cir. 1934), *aff’d sub nom. California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 55 S. Ct. 725, 79 L. Ed. 1356 (1935) (collecting cases explaining that the corpus of water cannot be owned).

own water. Nor should they. The states can regulate water use pursuant to police powers, protect public interests within our federal system pursuant to *parens patriae*, and must even steward our water pursuant to the public trust doctrine.¹⁰

This article explores the “waters of the state” in three parts. First, we look to what the states say for themselves about water in their constitutions and statutes. This is not intended as a comprehensive survey, but rather a thorough sampling of the diversity in how states assert themselves over territorial water. There is a tremendous range in the scope of state assertions, in terms of both hydrologic (what waters are included) and legal scope (what states can and should do with water). The diversity and distinctions turn out to be of limited importance, though, at least on the ground. Instead, as discussed in the remaining sections, the bounds of a state’s interests in its territorial waters are shaped by numerous other sources and rules that don’t seem to pay much attention to the state’s own declarations, from the quasi-Constitutional equal footing and public trust doctrines to interpretations of Constitutional due process and jurisdiction.

Next, this article examines the rights and powers over “waters of the state” beyond simple statutory assertions. State sovereign authority over territorial water begins with the equal footing doctrine.¹¹ States have a general police power to regulate water use, subject to the rational basis test and due process limitations.¹² States also have a sovereign and quasi-sovereign interest in their waters that they can protect in state and federal courts through *parens patriae*.¹³ And the public trust doctrine serves a dual role of empowering states to protect navigable waters while constraining states from divesting themselves of public water resources.¹⁴

Finally, this article analyzes assertions that “waters of the state” amounts to state ownership of water as property. This notion is an awkward fit with the other state rights and powers over territorial water – at times it is redundant, conflicting, and fundamentally inconsistent with other sovereignty doctrines. It is also undermined by the Supreme Court’s rejection of the state ownership theory of natural resources.¹⁵ And most fundamentally, it is at odds with the very nature of water, which cannot be reduced to what we call “property.” The flow of water transcends space and time, humbling intellectual and physical attempts at ownership. Rather than trying to own water as property, states should focus on fair allocation, long-term stewardship, and cooperative sharing within the federal system.

10. See *infra* notes 11, 13, 14.

11. Kenneth K. Kilbert, *The Public Trust Doctrine and the Great Lakes Shores*, 58 CLEV. ST. L. REV. 1, 19 (2010) (addressing equal footing doctrine in public trust context).

12. See Michele Engel, Comment, *Water Quality Control: The Reality of Priority in Utah Groundwater Management*, 1992 UTAH L. REV. 491, 523 (1992) (discussing police power over water resources).

13. See generally Bradford C. Mank, *Standing and Future Generations: Does Massachusetts v. EPA Open Standing for Generations to Come?*, 34 COLUM. J. ENVTL. L. 1, 77-83, 91-93 (2009) (discussing state standing to sue for public trust violations).

14. See 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, 295 (2013) (discussing limitations and empowerments of public trust doctrine).

15. See *Toomer v. Witsell*, 334 U.S. 385, 399-403 (1948) (rejecting state ownership theory of wild resources).

I. WHAT DO THE STATES HAVE TO SAY FOR THEMSELVES?

A logical place to start when attempting to understand the states' relationship with water is with the sovereign states themselves.¹⁶ The specific enumeration of federal power and reservation of the remaining authority to the state means that states have substantial power when it comes to defining their relationship with resources within their borders.¹⁷ As a negative document, the Constitution uses the specific enumeration of federal power to empower the states with plenary police power over many matters, including their common resources and the wellbeing of their citizens.¹⁸ And the states have traditionally exercised plenary police power over all non-navigable waters within their borders.¹⁹

Further, states are the closest sovereign to the people, so it makes particular sense that they exercise broad authority over important local issues, such as water resource use. Aside from states' constitutional power to proclaim their relationship with water, there are normative reasons to prefer that states have wide latitude to define the nature of their relationship with water.²⁰ One of the oft-cited benefits of the federalist system is that it fosters experimentation.²¹ And when it comes to water, that may just be the silver bullet. States in the U.S. are in the best position to identify specific water needs and experiment with solutions.²² Of course, the state's water agenda may also be motivated by self-interest in maximizing use of a shared national resource. Consequently, while we begin by looking at what the states have to say for themselves, this will not be the last word on the subject.

States have a lot to say about their relationship with water, beginning with their constitutions and statutes.²³ And no two states say exactly the same things. The states are far from uniform in how they approach their relationship with water. States not only say different things about their power over water but also notable is

16. See e.g., Elizabeth W. Leonard, *Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111 (2011).

17. See generally Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 336 (2004) (discussing the reservation of powers to the states).

18. See generally Christopher B. Serak, Note, *State Challenges to the Patient Protection and Affordable Care Act: The Case for A New Federalist Jurisprudence*, 9 IND. HEALTH L. REV. 311, 334-35, 343 (2012) ("Stated another way, if the states are not treated as regulatory sovereigns, then they cannot fulfill their role in the federal system, and the government cannot deliver the social and political values inherent to Constitutional order.").

19. *Kansas v. Colorado*, 206 U.S. 46, 93 (1907) ("It is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters."); See, e.g., *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64, 55 S. Ct. 725, 79 L. Ed. 1356 (1935) ("... all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states ...").

20. See generally Serak, *supra* note 18, 344-345 ("Experimentation and efficiency refer to the value of having multiple, independent regulatory entities and the "economic efficiency [realized] through competition among the states.").

21. *Id.*

22. We will not belabor here either the importance of state experimentation, because it is already well discussed in the literature, or the value of experimentation in water management, for the same reasons.

23. Kilbert, *supra* note 11, at 35.

what some of them do not say. There are obvious gaps in what waters they claim an interest in and what powers they say they have over those waters.

The assertions of state waters can be organized and sorted by both hydrologic and legal scope. The hydrologic scope is physical – does the state include only rivers, streams, and lakes, or does it cover the full path of the water cycle, from rain to ground? Similarly, do waters of the state include artificially created water or waters imported to the state? The legal scope can be even more varied. Does the state claim territorial waters, of whatever hydrologic scope, as property, either of the public or the state itself? Or does the state describe its waters as something different than property, regardless of owner, such as a public trust? To be clear, we do not intend to provide a comprehensive survey of state assertions over water in constitutions and statutes. Rather, our sampling fits with our broader analysis and suggests that state assertions are of limited value and other doctrines and authorities control the bounds and substance of state water rights.

A. What Waters are Waters of the State?

States vary widely in the breadth of waters that they assert control over. Some states claim an interest in every drop of water within their borders, either by broadly saying they have an interest in “all water” or by describing every conceivable type of water imaginable in their statutes.²⁴ This group includes a wide spectrum of states from around the country, including Montana,²⁵ New Hampshire,²⁶ Alabama,²⁷ Hawaii,²⁸ New Jersey,²⁹ Ohio,³⁰ South Dakota,³¹ Wyoming,³² Florida,³³ Pennsylvania,³⁴ Utah,³⁵ Vermont,³⁶ California,³⁷ Delaware,³⁸ North Dakota,³⁹ Virginia,⁴⁰ and Connecticut.⁴¹ Montana’s Constitution even grants

24. For example, California, Nebraska, Georgia, Alabama, Hawaii, New Jersey, Ohio, South Dakota, Wyoming, Florida, Pennsylvania, Utah, and Vermont all claim an interest in all water within their state. GA. CODE ANN. §§ 12-5-1 to 12-5-586 (2017); HAW. REV. STAT. § 174C-3 (2017); N.J. REV. STAT. § 58:1A-3 (2006); OHIO REV. CODE ANN. § 1501.30 (2016); S.D. CODIFIED LAWS § 46-1-1 (2004); WYO. STAT. ANN. § 41-3-101 (2017); FLA. STAT. §§ 373.012–373.71, 373.19 (2006); PA. CONST. art. I, § 27; UTAH CODE ANN. § 73-1-1 (2017); VT. STAT. ANN. tit. 10, § 901 (2007); NEB. REV. STAT. § 46-202 (2014).

25. MONT. CODE ANN. § 85-1-101 (2009).

26. N.H. REV. STAT. ANN. §§ 481:1-488:11 (2013).

27. ALA. CODE §§ 9-10b-1 to 9-10b-30 (2018).

28. HAW. REV. STAT. § 174C-3 (2017).

29. N.J. REV. STAT. § 58:1A-3.

30. OHIO REV. CODE ANN. § 1501.30 (2016).

31. S.D. CODIFIED LAWS § 46-1-1 (2004).

32. WYO. STAT. ANN. § 41-3-101 (2017).

33. FLA. STAT. §§ 373.012-373.71, § 373.1 (2006).

34. PA. CONST. ART. I, § 27.

35. UTAH CODE ANN. § 73-1-1 (2017).

36. VT. STAT. ANN. tit. 10, § 901 (2007).

37. CAL. WATER CODE § 102 (2018).

38. DEL. CODE ANN. tit. 7, §§ 6001, 6081-6084 (2017).

39. N.D. CENT CODE ANN. § 61-01-01 (2013).

40. VA. CODE ANN. § 62.1-10 (2011).

41. CONN. GEN. STAT. § 22a (2015).

“atmospheric waters within the boundaries of the state” as the property of the state.⁴²

One narrow exception to state assertions over all territorial waters is artificial water and/or water held in artificial bodies. This is primarily seen in Western states such as Nebraska,⁴³ Idaho,⁴⁴ Texas,⁴⁵ New Mexico,⁴⁶ Arizona,⁴⁷ Colorado,⁴⁸ and Iowa.⁴⁹ The exceptions may cover water in various artificial water bodies such as built ponds and reservoirs. Alternatively, they may describe water that was artificially introduced. This limitation is also seen in eastern states such as Louisiana,⁵⁰ Indiana,⁵¹ and Maryland,⁵² which have excluded imported water, wastewater, and captured rainwater.

Another common distinction is based on the navigability of the water, a concept that often also relates to the state’s public trust doctrine as well as numerous federal doctrines, discussed below. Some states use the term “public” waters to describe waters under state control.⁵³ Several states distinguish between surface and groundwater, or water that is hydrologically connected to surface water and that which isn’t.⁵⁴ But on balance, this turns out to not be a terribly common problem. Most states either have broadly claimed state ownership over virtually all intrastate waters, or their courts have interpreted the language to effectively mean that. For example, Colorado courts have interpreted the “natural stream” language broadly to mean all tributary waters.⁵⁵

At bottom, states have taken several distinct positions when it comes to defining which waters are part of the “waters of the state.” Next, we consider how states characterize these waters.

B. How Do States Characterize Waters of the State?

Following the range of waters that states assert control over, next comes the diversity of ways that states characterize their water. At one end of the spectrum are states that claim to own the water as state property. This takes the form of an outright statement that the state “owns” the water it claims, it has “title” to it, it is the state’s “property,” or it is the “state’s water.” This includes

42. MONT. CONST. art. IX, § 3.

43. NEB. REV. STAT. § 46-202 (2014).

44. IDAHO CODE ANN. §§ 42-101 to 42-5276 (2006).

45. TEX. WATER CODE ANN. § 11.021 (2017).

46. N.M. STAT. ANN. § 72-1-1 (2015).

47. ARIZ. REV. STAT. § 37-1128(D)(7) (2014).

48. COLO. REV. STAT. 37-92-102 (2004).

49. IOWA CODE §§ 461A.1 to 461A.80; §461A.18 (2013).

50. LA. STAT. ANN. §§ 30:2071 to 2089 (2017); § 30:2073.

51. IND. CODE §§ 14-25-1-1 to 14-25-15-13 (2011).

52. MD. CODE ANN., ENVIR. § 5-101 (2017).

53. For example, Kentucky claims an interest in “public” waters. KY. REV. STAT. ANN. § 151.140 (2009).

54. For example, Colorado. COLO. REV. STAT. 37-92-102 (2004).

55. For example, in *Comstock v. Ramsay*, a Colorado court said that water collected in a ditch was a stream so that the state had complete ownership and control over the water. 55 Colo. 244, 133 P. 1107 (1913).

Alabama,⁵⁶ Hawaii,⁵⁷ New Jersey,⁵⁸ Ohio,⁵⁹ Louisiana,⁶⁰ Maryland,⁶¹ Georgia,⁶² Wyoming,⁶³ and Texas.⁶⁴

A number of states term water as property, but assert that it is property owned by the “public.” These states span the geography of the United States and include Florida,⁶⁵ Pennsylvania,⁶⁶ Utah,⁶⁷ Vermont,⁶⁸ Arizona,⁶⁹ New Mexico,⁷⁰ and Indiana.⁷¹ Some of these states say water is held by the public, but is subject to appropriation, like California⁷² South Dakota,⁷³ and Nebraska.⁷⁴

Other states do not characterize water as property, whether owned by the state or public. Instead, these states recognize water as a public good. For example, Kansas declares that the water within its borders is not owned, but instead “dedicated” to the use of everyone.⁷⁵ Consistent with non-ownership, some states explicitly frame their interest in water in terms of sovereignty and governance instead of property, such as Montana,⁷⁶ Delaware,⁷⁷ North Dakota,⁷⁸ Virginia,⁷⁹ and New Hampshire.⁸⁰ Similarly, some states such as Connecticut assert a public trust doctrine for water as an affirmative alternative to water as property.⁸¹

Finally, states differ in what restrictions they place on themselves when it comes to regulating water or using water. A group of states say that their power over water is expressly limited to benefiting the public either under the public trust doctrine or by listing out specific purposes the state should put the water towards, such as conservation.⁸² Some states have specific restrictions on what the state can

56. ALA. CODE § 9-10B-3 (2018).

57. HAW. REV. STAT. § 174C-3 (2017).

58. N.J. REV. STAT. § 58:1A-3 (2006).

59. OHIO REV. CODE ANN. § 1501.30 (2016).

60. LA. STAT. ANN. §§ 30:2071 to 2089 (2017); § 30:2073.

61. MD. ENVIR. CODE ANN. § 5-101 (2017).

62. GA. CODE ANN. § 12-5-21 (2007).

63. WYO. CONST. ART. VIII, § 1; WYO. STAT. ANN. § 41-3-101 (2017).

64. TEX. WATER CODE ANN. § 11.021 (2017).

65. FLA. STAT. § 373.016 (2006).

66. PA. CONST. art. I, § 27.

67. UTAH CODE ANN. § 73-1-1 (2017).

68. VT. STAT. ANN. tit. 10, § 901 (2007).

69. ARIZ. REV. STAT. ANN. § 45-101 (2012).

70. N.M. STAT. ANN. § 72-1-1 (2015).

71. IND. CODE. § 14-25-1-2 (2011).

72. CAL. WATER CODE § 102 (2018).

73. S.D. CODIFIED LAWS § 46-1-1 (2004).

74. NEB. REV. STAT. ANN. § 46-202 (2014).

75. KAN. STAT. ANN. § 82a-702 (2008).

76. MONT. CODE ANN. § 85-1-101 (2009).

77. DEL. CODE ANN. tit. 7, § 6081-84 (2017).

78. N.D. CENT. CODE § 61-01-01 (2013).

79. VA. CODE ANN. § 62.1-10 (2011).

80. N.H. REV. STAT. ANN. § 481:1 (2013).

81. CONN. GEN. STAT. § 22a-1 (2015).

82. *E.g.*, FLA. STAT. § 373.016 (2006); PA. CONST. art. I, § 27; UTAH CODE ANN. § 73-1-1 (2017); MONT. CODE ANN. § 85-1-101 (2009); N.H. REV. STAT. ANN. § 481:1.

do with water. Idaho, for example, says that the state should consider “all interests” of the public when handling water, but that perfected water rights “shall not” be restricted unless a citizen fails to pay a water assessment.⁸³

There are a few of takeaways here. First, some states have failed to claim any interest in some of their waters. This leaves open questions about what to do with the water that remains. Second, states themselves claim ownership over water in different ways and from different sources—which could inform what they can and cannot do with water. Finally, some states have expressly limited their powers by defining what they can and cannot do with water. What is the significance of these differences and distinctions? Do they define or alter a state’s water rights and powers? As the following section details, these state assertions lose much of their significance when viewed in the overall context of doctrines and authorities that control the balance of powers over “waters of the state.”

II. STATE RIGHTS AND POWERS OVER TERRITORIAL WATERS

In our federal system, states have sovereignty over water within their borders.⁸⁴ Early in American history, the U.S. Supreme Court recognized the sovereign rights of states to territorial waters.⁸⁵ In *Martin v. Lessee of Waddell*, the Court held that the 13 original States, on behalf of the citizens of each, “hold the absolute right to all their navigable waters and the soils under them.”⁸⁶ Throughout the nineteenth century, the Court held that this same principle applied to every state as it entered the Union, vesting each with absolute “rights” to navigable water within their borders, as co-equal sovereigns.⁸⁷ This concept is referred to now as the “equal footing doctrine.”⁸⁸ The equal footing doctrine stands for the simple proposition that as each state entered the Union, it took control of waterbeds and water within its borders as a matter of constitutional law and not as a matter of Congressional vestment.⁸⁹

The states thus have the power to allocate and govern these waterbeds, and the water above, subject to “the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign

83. IDAHO CODE ANN. § 42-101 (2006).

84. See Note, *Federal-State Conflicts Over the Control of Western Waters*, 60 COLUM. L. REV. 967 (1960) (discussing state sovereignty over water at length).

85. See, e.g., *Arnold v. Mundy*, 6 N.J.L. 1, 71 (1821).

86. *Martin v. Lessee of Waddell*, 41 U.S. 367, 410 (1842).

87. See, e.g., *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977); *United States v. Texas*, 339 U.S. 707, 716 (1950); *Knight v. U.S. Land Ass’n*, 142 U.S. 161, 183 (1891); *Pollard v. Hagan*, 44 U.S. 212, 216 (1845); see also *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1219 (2012).

88. See *PPL Montana, LLC*, 132 S. Ct. at 1219.

89. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 484 (1988); see also *Shively v. Bowlby*, 152 U.S. 1, 49 (1894) (“And the territories acquired by congress, whether by deed of cession from the original states, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as states, upon an equal footing with the original states in all respects; and the title and dominion of the tide waters . . . are held by the United States . . . in trust for the future states.”); *Pollard v. Hagan*, 44 U.S. at 216.

commerce.”⁹⁰ Federal reserved rights for both tribal lands⁹¹ and other federal lands further constrain state power over water.⁹² While the Supreme Court has not applied reserved federal rights to groundwater,⁹³ the U.S. Court of Appeals for the Ninth Circuit recently held that a tribe’s rights do extend to groundwater.⁹⁴ But that leaves the important question: what about states’ interests in water generally?

A. State Rights and Duties Over Intrastate Water Use: Police Powers and the Public Trust Doctrine

From state sovereignty comes the state police power, a basic source of state power over water.⁹⁵ States may generally take any act “tending to promote the health, peace, morals, education, good order, and welfare of the people.”⁹⁶ Police power is an attribute of sovereignty, an essential element of the power to govern, and a function that cannot be surrendered. It exists without express declaration.”⁹⁷ Managing, allocating, and regulating waters within a state are clearly within the state’s police power.⁹⁸

But does sovereignty give a state a unique interest in its waters beyond the basic police powers? In *Hudson County Water Co. v. McCarter*, Justice Holmes put forward a special sovereign role for states as stewards of the public interest in water:

Few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. . . . The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.⁹⁹

The view of water as state property and the view that states merely have a power over water are competing and at times inconsistent views of state interests in

90. See *United States v. Oregon*, 295 U.S. 1, 14 (1935); see also *Montana v. United States*, 450 U.S. 544, 551 (1981); *United States v. Holt State Bank*, 270 U.S. 49, 54 (1926); *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 285 (1997).

91. *Winters v. United States*, 207 U.S. 564, 577 (1908).

92. *Cappaert v. United States*, 426 U.S. 128, 145 (1976).

93. The Supreme Court avoided the question by treating the underground water at issue as a surface water below the surface, leaving the question of federal reserved rights for groundwater for a later day. *Id.* at 142.

94. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1270 (9th Cir. 2017).

95. *Shea v. Olson*, 185 Wash. 143, 153, 53 P.2d 615, 619 (1936).

96. *Id.* at 619.

97. *Washington Kelpers Ass’n v. State*, 81 Wash. 2d 410, 417, 502 P.2d 1170, 1174 (1972).

98. *Id.*; see also *Barker v. State Fish Comm’n*, 88 Wash. 73, 152 P. 537 (1915); *State ex rel. Campbell v. Case*, 182 Wash. 334, 339, 47 P.2d 24 (1935).

99. *Hudson Cty. Water Co. v. McCarter*, 209 U.S. 349, 356 (1908).

water. So while a reallocation of private water rights based solely on police powers may require compensation, the state would not owe anything for reallocating what it “owns.”

Next, the public trust doctrine is added to the mix. The Supreme Court has described a state’s rights and interests in water as a trustee for the public, which came to be known as the public trust doctrine.¹⁰⁰ In *Illinois Cent. R.R. Co. v. Illinois*, the state had attempted to transfer a portion of the Lake Michigan shoreline to a private company for economic development.¹⁰¹ The Supreme Court struck down the giveaway of water resources, holding that the state cannot use, dispose, or divest itself of these resources if there is “substantial impairment of the interest of the public in the waters.”¹⁰² This is a stricter standard than the state is subject to when administering its sovereign police powers. The limitation on alienation is totally at odds with administering a proprietary interest in water. Instead, the public trust doctrine offers an alternative theory of state water control, distinct from police powers and property. The Supreme Court explained the difference between title as property and title pursuant to the public trust doctrine:

That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water, by the common law, we have already shown; and that title necessarily carries with it control over the waters above them, whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.¹⁰³

In short, states have significant power to regulate water stemming from their basic sovereignty and their stewardship duties under the public trust doctrine. Next, we consider what happens when these powers conflict with the rights of those of the state’s citizens.

B. When State Powers Conflict with Private Use of Water

State courts have advanced all three bases for state control of water in various disputes, usually with private parties.¹⁰⁴ As described below, some courts

100. “The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.” *Arnold v. Mundy*, 6 N.J.L. 1, 53 (1821).

101. *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 433 (1892). *Illinois Cent. R. Co.* is cited in *Enbridge Annex II* for the proposition “that most classes of natural resources (such as navigable waters) belong to the public, while being held and protected by the government.” This is a fair, if overly simple, description of the public trust doctrine, and as discussed above and further in Part IV, is a fundamentally different concept than ownership as property.

102. *Id.* at 435.

103. *Id.* at 452.

104. See, e.g., *Robinson v. Ariyoshi*, 658 P.2d 287, 310 (Haw. 1982) (discussing state relationship with water as one of police power and sovereignty, as well as the public trust doctrine’s limitations on

limit state rights to police powers, setting up potential takings cases over private water rights.¹⁰⁵ Other state courts follow Justice Holmes' reasoning, giving states sovereign authority over water that does not leave a compensable private interest to be owned.¹⁰⁶ And increasingly, state courts are adopting the public trust doctrine to both empower the state to protect its water and restrict the state from divestment of the public's resources.¹⁰⁷

Private property interests in water can be murky upon first view. Water cannot be privately owned; rather persons merely have rights in the use of water. This means that private water rights are usufructuary (rights of use, not possession), not fixed (they can fluctuate with conditions), and are generally based on either the reasonable use doctrine (rights correlative to other rights) or prior appropriation (rights based on the timing of capture). With these qualifications, states often recognize private property rights in the use of water. States with prior appropriation schemes historically favor private citizens more when it comes to conflicts between the states and private citizens. That is because prior appropriation is a more defined, specific property relationship. There are typically judicial decrees and a specific license to use a specific amount of water. These more definite features make it more likely that courts will support a private claim to water over a state.¹⁰⁸

Setting aside the appropriation versus the riparian distinction, courts have settled state versus private water claims in a few different ways. Some courts have held that states have a superior right to all water within their borders and that all private rights to water are subject to that superior state right.¹⁰⁹ For example, courts like those in Arizona and Minnesota have held that private citizens' usufructuary rights in water mean that the state by definition has the supreme claim to control water generally.¹¹⁰ In other words, states cannot take what they already own. One theory here is that because many states have made it clear that they have broad power over all water in their borders, private citizens have been on notice that any right to water they may have is thus limited.¹¹¹ Thus, private citizens do not have a compensable taking claim for water rights.¹¹²

the state's powers over water); *see also In re Water Use Permit Applications*, 9 P.3d 409, 440-41 (Haw. 2000).

105. *E.g.*, *Phillips v. State ex rel. Dep't of Natural Res. & Envtl. Control*, 449 A.2d 250, 256 (Del. 1982) (recognizing takings claim).

106. *Colo. Ground Water Comm'n v. N. Kiowa-Bijou Groundwater Mgmt. Dist.*, 77 P.3d 62, 77-78 (Colo. 2003) (finding state's sovereign authority valid basis for allocating water); *see generally* Russell M. McGlothlin & Scott S. Slater, *No Fictions Required: Assessing the Public Trust Doctrine in Pursuit of Balanced Water Management*, 17 U. DENV. WATER L. REV. 53, 83-84 (2013) (discussing caselaw finding no takings liability for water allocation).

107. *See generally* Mudd, *supra* note 14 at 330-33 (2013) (discussing use of public trust to limit and empower states over water, and reviewing relevant case law).

108. *See* Ling-Yee Huang, *Fifth Amendment Takings & Transitions in Water Law: Compensation (Just) for the Environment*, 11 U. DENV. WATER L. REV. 49, 59 (2007).

109. *See, e.g.*, *Pratt v. State Dep't of Natural Res.*, 309 N.W.2d 767, 772 (Minn. 1981).

110. *Town of Chino Valley v. City of Prescott*, 638 P.2d 1324, 1328 (Ariz. 1981), *appeal dismissed*, 457 U.S. 1101 (1982); *Pratt*, 309 N.W.2d at 772.

111. *See Dames & Moore v. Regan*, 453 U.S. 654, 674 n.6 (1981).

112. *Fox River Paper Co. v. R.R. Comm'n of Wis.*, 274 U.S. 651, 657 (1927) (finding that the state defines land rights and the state's refusal to grant a riparian owner the right to maintain and repair their dam was not a denial of Fourteenth Amendment rights); *Baumann v. Smrha*, 145 F. Supp. 617, 625 (D.

In contrast, especially in Western states, some courts have had no problem finding that states' interest is limited to police powers and that the state took private water rights within the meaning of the Constitution, thus the private owner was entitled to damages.¹¹³ Alaska, Idaho, Ohio, and Oklahoma courts, for example, have entertained takings claims against the state.¹¹⁴ Courts have interpreted these state Constitutions as vesting water-use property rights in private citizens.¹¹⁵ Consequently, there is an active water market in some of these states, and takings claims are plausible.¹¹⁶

Nebraska's constitution says that "The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest."¹¹⁷ This language suggests that the state would have the power to take water back from private citizens anytime it was in the public interest. But courts have struck down state interferences with private water rights, and noted in dicta, that interference with private water rights would result in "confiscation of the company's property without due process or payment of just compensation."¹¹⁸

In particular, private parties have fared well in the Court of Federal Claims and the Federal Circuit. In *Tulare Lake Basin Water Storage District v. United States*, the Court held that California's reduction of State Water Project deliveries to comply with the Endangered Species Act was a physical rather than a regulatory taking.¹¹⁹ The court reached this conclusion because "the denial of a right to the use of water accomplishes a complete extinction of all value," and "the government has essentially substituted itself as the beneficiary of the contract rights with regard to that water and totally displaced the contract holder."¹²⁰ The Supreme

Kan. 1956), *aff'd per curiam*, 352 U.S. 863 (1956); *Mont. Coal. for Stream Access, Inc. v. Curran* (1984), 210 Mont. 38, 53, 682 P.2d 163, 171 (concluding that since the plaintiff had no claim to the waters at issue there was no basis for a takings claim); *Baeth v. Hoisveen*, 157 N.W.2d 728, 733 (N.D. 1968) (upholding state law limiting water right to beneficial use); *In re Hood River*, 227 P. 1065, 1092-94 (Or. 1924) (limiting the extent of the right of a riparian water user).

113. See *Estate of Hage v. United States* (Hage V), 82 Fed. Cl. 202, 211 (2008) (noting the difference between water ownership as the right to access and use water and landownership as the right to exclude and then finding a taking based on the government fencing around the water and streams); see also *Int'l Paper Co. v. United States*, 282 U.S. 399, 405-08 (1931) (finding a taking of International Paper's water rights).

114. *Wernberg v. State*, 516 P.2d 1191, 1194-95 (Alaska 1973) (finding riparian water rights are subject to the Fifth Amendment and "[t]hese rights are valuable property, and ordinarily cannot be taken for public use by the federal or state governments without payment of just compensation to the landowner."); *Clear Springs Foods, Inc. v. Spackman*, 252 P.3d 71, 79 (Idaho 2011) ("When there is insufficient water to satisfy both the senior appropriator's and the junior appropriator's water rights, giving the junior appropriator a preference to the use of the water constitutes a taking for which compensation must be paid."); *McNamara v. Rittman*, 107 Ohio St.3d 243, 247, 838 N.E.2d 640, 645 (citing *State ex. rel. Andersons v. Masheter*, 1 Ohio St.2d 11, 12-13, 203 N.E.2d 325 (1964)); *Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd.*, 1990 OK 44, ¶ 15, 855 P.2d 568, 576 (1990).

115. See, e.g., *McNamara v. Rittman*, 107 Ohio St.3d 243, 2005-Ohio-6433, 838 N.E.2d 640, ¶ 28.

116. *Wernberg*, 516 P.2d at 1197; *Clear Springs Foods*, 252 P.3d at 79; *McNamara*, 107 Ohio St.3d at 243; *Franco-American Charolaise, Ltd.*, 855 P.2d at 576.

117. *In re Application A-16642*, 463 N.W.2d 591, 599 (Neb. 1990).

118. *Scottsbluff v. Winters Creek Canal Co.*, 53 N.W.2d 543, 547 (Neb. 1952).

119. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 318-19 (2001).

120. *Id.* at 319.

Court in *Dugan v. Rank* held that a government agency interfering with riparian rights could be a taking that warrants repayment to the private owner.¹²¹ The Supreme Court explained that the right was to the “flow of water in the San Joaquin and to its use as it flows along the landowner’s property.”¹²² The court emphasized that “[a] seizure of water rights need not necessarily be a physical invasion of land. It may occur upstream, as here. Interference with or partial taking of water rights in the manner it was accomplished here might be analogized to interference or partial taking of airspace over land.”¹²³

Many state courts have played out the sovereign-interest line in the sand to defeat takings claims.¹²⁴ For example, in *Avenal v. State*, an Alabama court explained that “[t]he State cannot appropriate . . . that which it already owns.”¹²⁵ The court also emphasized, though, that the state was not taking resources to give to another private individual, which supported the state’s position.¹²⁶ Other courts have explicitly held that water is simply so important to the health and welfare of a state that states should have unusually broad sovereign power to regulate water use.¹²⁷

Courts in Kansas and Minnesota have similarly reasoned that constitutional grants of water to the public mean that states have a unique right to allocate and restrict water use.¹²⁸ Additionally, the Supreme Court of Washington explained in the context of a fishery case that the state “in its sovereign capacity, owns [resources] in the waters of the state.”¹²⁹ It further explained that “the people of the whole state” own these resources.¹³⁰

In a similar vein, New Hampshire courts have held that the state has a unique sovereign interest in water that trumps private rights:

No constitutional or statutory ordainment exists by which the plaintiff may be held to have received any endowment of vested rights in public waters. The State’s ownership and control of them arise as an incident of its sovereignty, and not from any taking of private property for public uses.¹³¹

So while some courts have theorized that private citizens have no property rights to water, others have held that there is a property right, but that the state still has a superior claim so long as it is exercising its sovereign powers to ensure

121. *Dugan v. Rank*, 372 U.S. 609, 625 (1963).

122. *Id.*

123. *Id.*

124. *See, e.g., Baeth v. Hoisveen*, 157 N.W.2d 728, 733 (N.D. 1968).

125. *Avenal v. State*, 2003-3521, p. 30 (La. 10/19/04), 886 So. 2d 1085, 1106.

126. *Id.*

127. *Baumann v. Smrha*, 145 F. Supp. 617, 625 (D. Kan.), *aff’d*, 352 U.S. 863 (1956); *Baeth v. Hoisveen*, 157 N.W.2d 728, 733.

128. *See F. Arthur Stone & Sons v. Gibson*, 630 P.2d 1164 (Kan. 1981); *Pratt v. State Dep’t of Nat. Res.*, 309 N.W.2d 767, 771 (Minn. 1981).

129. *Washington Kelpers Ass’n v. State*, 502 P.2d 1170, 1174 (Wash. 1972).

130. *Id.* at 1173; *See also State ex rel. Bacich v. Huse*, 59 P.2d 1101 (Wash. 1936); *Judd v. Bernard*, 304 P.2d 1046 (Wash. 1956); *Wiegardt v. State*, 175 P.2d 969 (Wash. 1947); *McMillan v. Sims*, 231 P. 943 (Wash. 1925); *Vail v. Seaborg*, 207 P. 15 (Wash. 1922); *State v. Tice*, 125 P. 168 (Wash. 1912).

131. *St. Regis Paper Co. v. N.H. Water Res. Bd.*, 26 A.2d 832, 839 (N.H. 1942).

beneficial use of water to its citizens.¹³² Another limitation used by some courts requires the state to give a private water owner a reasonable period before restricting their water rights, thereby implying a reasonableness standard to state ownership of water.¹³³ At one point, the Texas Supreme Court held that after reasonable terms, a riparian's loss of water to the state is not a taking.¹³⁴ However, Texas courts are all over the place. They have historically held that the state has a sovereign power over water, empowering it to take any action to protect water that it believes is necessary for the public, even where a particular statute does not give the state that power.¹³⁵ But more recently, the Texas Supreme Court has held that the state cannot restrict a landowner's groundwater use without compensation.¹³⁶

Wisconsin courts have referred to "virtual state ownership of navigable waters . . . [which] does not implicate questions of eminent domain. The State has no need to take what it already 'owns.'"¹³⁷ This conclusion was also reached by the Court of Federal Claims in *Klamath Irrigation District v. United States*, which stated that "[i]n applying these [takings] principles to water, it is important to understand that the issue here is not who owns the water," making clear that the state is the owner, not any private actor.¹³⁸

California's courts have developed a particularly specific position on state ownership of water. In *State v. Superior Court of Riverside County*, the California Court of Appeal explained the nature of its state's ownership of water at some length.¹³⁹ The court addressed the state ownership issue in an unusual context: it

132. See, e.g., *Scranton v. Wheeler*, 179 U.S. 141 (1900) (finding destruction of riparian water rights did not have to be compensated because purpose was not abrogation, but rather, the improvement of public waters granted by the Commerce Clause); *Rivers and Harbors Act*, Pub. L. No. 75-392, 50 Stat. 844, 850 (1937) (providing that Secretary of the Interior "may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes"); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 294-99 (1958) (recognizing a property right but finding no taking); *Olson v. Idaho Dep't of Water Res.*, 666 P.2d 188, 191 (Idaho 1983); *Goodwin v. Hidalgo Cty. Water Control & Improvement Dist. No. 1*, 58 S.W.2d 1092, 1094 (Tex. App. 1933); *First Nat'l Bank v. Hastings*, 42 P. 691, 692 (Colo. App. 1895) ("Water rights for irrigation are regarded as real property.").

133. See, e.g., *In re Adjudication of the Water Rights of Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 444 (Tex. 1982) ("[A]fter notice and upon reasonable terms, the termination of the riparians' continuous non-use of water is not a taking of their property.").

134. *Id.* at 444.

135. *Goldsmith & Powell v. State*, 159 S.W.2d 534, 535 (Tex. Civ. App. 1942).

136. *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 832 (Tex. 2012).

137. See also *Rock-Koshkonong Lake Dist. v. State Dep't of Nat. Res.*, 2013 WI 74, ¶ 84 n.31, 833 N.W.2d 800, 820 n.31 (Wis. 2013).

138. *Klamath Irrigation Dist. v. U.S.*, 67 Fed. Cl. 504, 515 (2005). See also *People v. Truckee Lumber Co.*, 48 P. 374, 374 (Cal. 1897) (affirming the trial court's injunction against a lumber mill's pollution of water that killed fish within public waters, holding that the people of the state have the right and power to protect and preserve the waters for the common use and benefit); *People ex rel. Roberts v. Russ*, 64 P. 111, 112 (Cal. 1931) (involving the state's interest in navigation, not fish, but saying that "[d]irectly diverting waters in material quantities from a navigable stream" or a non-navigable tributary thereof may be enjoined as a public nuisance).

139. *State v. Superior Court of Riverside Cnty.*, 93 Cal. Rptr. 2d 276, 284 (2000).

was interpreting an ownership policy provision in an insurance contract.¹⁴⁰ In short, the court needed to determine whether the state of California “owned” water.¹⁴¹

The court exhaustively reviewed the nature of California’s sovereign relationship with water, concluding that it regulated water, but did not own it.¹⁴² The court started with the legislative language in the statute, which gave all water to the “people” of California.¹⁴³ The court noted that this language did not empower the state to take water for itself, nor did it empower individual people to take water.¹⁴⁴ This inability of the state to take outright possession of water, indiscriminately, was the lynchpin for the court as this meant that the state did not own the water within the traditional sense of the word. It also meant that the state could regulate water broadly, but that its relationship was different from one of title.¹⁴⁵ Even more interesting, the court emphasized that the state’s rights to regulate water could not be interfered with by private citizens—this also brought the state’s rights to water outside of the “ownership” gambit.¹⁴⁶

Colorado has held that restricting private water use, even in groundwater, is not a taking.¹⁴⁷ The court emphasized that under the state’s prior appropriation scheme “[t]he well owners neither hold title to the water in their wells, nor do they have an unlimited right to use water from their wells. What they possess is a legally vested priority date that entitles them to pump a certain amount of tributary groundwater from their wells for beneficial use.”¹⁴⁸ The court concluded that because there was no allegation that the state had violated its own water laws, there could be no taking.¹⁴⁹ In other words, the state gets to make its own rules, and as long as it follows them, there is no taking.

Minnesota courts follow a similar course, explaining that “it is fundamental, in this state and elsewhere, that the state in its sovereign capacity possesses a proprietary interest in the public waters of the state. Riparian rights are subordinate to the rights of the public and subject to reasonable control and regulation by the state.”¹⁵⁰

New York courts, going back to the early 1900s, have classified the state’s relationship with water as regulatory not title-based. For example, New York’s High Court held that Niagara River was not owned by the state but despite that, the

140. *Id.*

141. *Id.* at 285.

142. *Id.*

143. *Id.* at 280.

144. *Id.* at 282.

145. *Id.*

146. *Id.* at 285. *See also* Bausch & Lomb Inc. v. Utica Mut. Ins. Co., 625 A.2d 1021, 1035 (Md. 1993) (reaching similar conclusions in the context of an insurance dispute).

147. *Kobobel v. State, Dep’t of Nat. Res.*, 249 P.3d 1127, 1129–30 (Colo. 2011).

148. *Id.*

149. *Id.*

150. *State v. Kuluvar*, 123 N.W.2d 699, 706 (Minn. 1963).

state has "dominion and power to regulate" these waters.¹⁵¹ New York courts have held that the state owns all fresh water, private or not, within the state.¹⁵²

New York courts have distinguished between when a state is acting as a sovereign with regard to water or merely as a private actor.¹⁵³ A New York court held that restricting water for a "public use" was not a taking, so long as the water comes from a public waterway.¹⁵⁴ In that case "a sovereign act in the interests of navigation" takes precedence over "the 'ordinary riparian rights' in a navigable river incidental to the land."¹⁵⁵ But these courts have noted that when the waterway is not public, or the state is not acting for a sovereign purpose, the private user wins.¹⁵⁶ More recent cases suggest that the state allocating water in its sovereign status does not invade any private protected interest.¹⁵⁷ For example, Oregon courts have held that "the State, in its sovereign capacity, owns the [resources] in its waters."¹⁵⁸

Hawaii's courts have similarly relied on sovereignty principles to empower the state when it comes to private water rights, with limitations.¹⁵⁹ The Hawaii Supreme Court, in *In re Water Use Permit Applications*, explained that "in granting land ownership interests . . . the Hawaiian Kingdom expressly reserved its sovereign prerogatives '[t]o encourage and even to enforce the usufruct of lands for the common good.'"¹⁶⁰ In another case, the Supreme Court explained that this sovereign power was limited:

[W]e find the public interest in the waters of the kingdom was understood to necessitate a retention of authority and the imposition of a concomitant duty to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses. This is not ownership in the corporeal sense where the State may do with the property as it pleases; rather, we comprehend the nature of the State's ownership as a retention of such authority to assure the continued existence and beneficial application of the resource for the common good.¹⁶¹

In other words, the state can only trump private water rights if it can specifically articulate how the common good is being protected. This rule was applied by a Hawaii appellate court, which held that the state should not be granted a water easement over private property because, although it theoretically had the

151. *Niagara Cty. Irrigation & Water Supply Co. v. Coll. Heights Land Co.*, 98 N.Y.S. 4 (N.Y. App. Div. 1906); *see also* *Pembroke v. Peninsular Terminal Co.*, 146 So. 249, 253 (Fla. 1933) (Florida takes a similar approach); *Farm Inv. Co. v. Carpenter*, 61 P. 258, 260 (Wyo. 1900) (As does Wyoming).

152. *In re City of Johnstown*, 209 N.Y.S.2d 982, 984-85 (N.Y. App. Div. 1961).

153. *Niagara Falls Power Co. v. Duryea*, 57 N.Y.S.2d 777, 783-84 (Sup. Ct. 1945).

154. *Id.*

155. *Id.* at 784.

156. *Id.*; *see also* *Fulton Light, Heat & Power Co. v. New York*, 94 N.E. 199, 203 (N.Y. 1911).

157. *Johns-Manville Sales Corp. v. N.J. Water Supply Auth.*, 511 A.2d 1194, 1195-97 (N.J. Super. Ct. App. Div. 1986).

158. *Union Fisherman's Co. v. Shoemaker*, 193 P. 476, 481 (Or. 1920) ("The preservation of fish and game has always been treated as being within the proper domain of the police power," which includes "the whole sum of inherent sovereign power which the state possesses.").

159. *See, e.g., In re Water Use Permit Applications* 9 P.3d 409, 443 (Haw. 2000).

160. *Id.* at 440-41.

161. *Robinson v. Ariyoshi*, 658 P.2d 287, 310 (Haw. 1982).

power to take one, it was required to articulate how the common good was served by the easement.¹⁶² South Dakota is another example of a state whose courts have held that the state has a sovereign, limited power over water, distinct from the traditional sense of ownership.¹⁶³

Michigan courts have been aggressive about giving the state broad control over water, based largely on public trust principles. The Michigan Supreme Court explains how the public trust doctrine defines the state's interest in waters and what is left for private ownership:

It will be helpful to recall that Michigan was carved out of the Northwest Territory; that the Territory was ceded to the United States by Virginia; that the United States held this territory in trust for future states to be created out of it; that the United States held the waters of navigable rivers and lakes and the soil under them in trust for the people, just as the British crown had formerly held them in trust for the public uses of navigation and fishery; that when Michigan entered the union of states, she became vested with the same qualified title that the United States had; that these waters and the soil under them passed to the state in its sovereign capacity, impressed with a perpetual trust to secure to the people their rights of navigation, fishing, and fowling.

Now, it being the fact that the State of Michigan acquired title to all of the beds of its navigable waters in perpetual trust for the preservation of the public right of navigation, fishing, etc., and Pine river being navigable, how has it come about that the plaintiff, as riparian owner, has secured a title unimpressed with this trust? The answer is that he has no such title. If he has derived his title by purchase and grant from the State, he has taken it subject to the same trust with which it was impressed while vested in the State.¹⁶⁴

Alaska, Arizona, Idaho, Hawaii, Michigan, Montana, Nevada, North Dakota, South Dakota, and Washington recognize “the connection between water rights and the public trust law.”¹⁶⁵ A Hawaii court explained that water is “different in character from that which the state holds in lands intended for sale . . . [i]t is a

162. *In re Will of Campbell*, 307 P.3d 163, 175 (Haw. Ct. App. 2013), as corrected (Aug. 7, 2013).

163. *Parsons v. City of Sioux Falls*, 272 N.W. 288, 291 (1937).

164. *Collins v. Gerhardt*, 211 N.W. 115, 117 (1926); *State v. Venice of Am. Land Co.*, 125 N.W. 770 (1910) (holding that the state of Michigan retained title to the Great Lakes and Lake of St. Clair, and maintained the public trust in both); *State v. McIlroy*, 595 S.W.2d 659, 665 (1980) (“Nonetheless, we can no more close a public waterway because some of those who use it annoy nearby property owners, than we could close a public highway for similar reasons. In any event, the state sought a decision that would protect its right to this stream. With that right, which we now recognize, goes a responsibility to keep it as God made it.”).

165. See *Pullen v. Ulmer*, 923 P.2d 54, 60-61 (Alaska 1996) (recognizing the public trust doctrine as established in the Alaskan Constitution); *San Carlos Apache Tribe v. Super. Ct. ex rel. Maricopa*, 972 P.2d 179, 199 (Ariz. 1999) (rejecting the legislature's intent to abolish the public trust doctrine); *Kootenai Envtl. All., Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1094 (Idaho 1983) (citing the reasoning of *Nat'l Audubon Soc'y* in recognition of the public trust doctrine); *In re Water Use Permit Applications*, 9 P.3d 409, 445, 453 (Haw. 2000) (citing the reasoning of *Nat'l Audubon Soc'y* in recognizing the public trust doctrine, which is also established in the Hawaiian Constitution); *Montana Trout Unlimited v. Beaverhead Water Co.*, 255 P.3d 179, 185-86 (Mont. 2011) (recognizing the existence of the public trust doctrine for recreational use of Montana's waters); *Lawrence v. Clark Cty.*, 254 P.3d 606, 612-13 (Nev. 2011) (acknowledging that water within Nevada belongs to the public and provides grounding for the public trust doctrine).

title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties . . . ¹⁶⁶

These cases paint a mosaic of approaches to state interests in water resources. The bulk of states and state courts recognize that states have some sort of affirmative sovereign power over water that is distinct from either traditional property theories or the limitations of the public trust doctrine. The nature of that power is nebulous and certainly not universal. Indeed, some states do not seem to give the state much power separate from what any private citizen has. But on balance, most states do claim a special sovereign power over water, and for many, it is subject to the public trust doctrine. With that, we turn to the state's powers related to interstate waters and the ability for states to sue on behalf of their citizens under the *parens patriae* doctrine.

C. State Rights to Interstate Waters and *Parens Patriae* Standing

The nature and source of state water rights has also been explored in various federalism disputes and conflicts between neighboring states. The federal government often steps on the states' toes when it comes to water and vice versa. This includes state authorizations of water draws that somehow involve federal lands or waterways and also competing federal water uses.¹⁶⁷ If states have a deeper sovereign ownership interest over their water, perhaps there are reasons to rethink some of our federal water concepts. Thus, the question of state ownership is important to settling state versus state interests in water.¹⁶⁸ The stage was set for this issue in the recent case of *Mississippi v. Tennessee*, which involved a claim that a state actually owned the corpus of its water.¹⁶⁹

Recently, state governments have increasingly advanced social change and protected important interests via the state's *parens patriae* powers which allows a state to sue on behalf of the collective interests of a state's citizens. This vehicle could empower states to further control water within its borders, merely by arguing that someone or something is threatening a state's collective citizens' interest in the water supply or quality.

The doctrine of *parens patriae* originated in English common law and was first incorporated into American law in a series of United States Supreme Court cases early in the twentieth century.¹⁷⁰ *Parens patriae* means "parent of the

166. *Hawaii Cty. v. Sotomura*, 517 P.2d 57, 63 (1973) (internal citation omitted).

167. *See, e.g., State of Ariz. v. State of Cal.*, 373 U.S. 546, 597-98 (1963) (discussing federal rights to reserve water from states).

168. *Mississippi v. Tennessee*, 135 S. Ct. 2916 (2015).

169. *Id.* In a prior work, the co-authors thoroughly analyzed the *Mississippi v. Tennessee* dispute and respective arguments. We concluded that Mississippi's state ownership argument was misguided (at best) given the Court's precedents, including equitable apportionment. *See e.g.,* Noah D. Hall & Joseph Regalia, *Interstate Groundwater Law Revisited: Mississippi v. Tennessee*, 34 VA. ENVTL. L.J. 152, 166 (2016). Christine Klein analyzed the same dispute in a subsequent work as the case progressed further and reached essentially the same conclusions. *See* Christine A. Klein, *Owning Groundwater: The Example of Mississippi v. Tennessee*, 35 VA. ENVTL. L.J. 474 (2017).

170. Justin Pidot & Megan Moses, *Ending Tax Revenue Standing*, 91 DENV. U. L. REV. ONLINE 1, 2 (2013), <http://www.denverlawreview.org/dlr-onlinearticle/2013/8/4/ending-tax-revenue-standing.html>.

country.”¹⁷¹ States have sovereign interests, such as the interest in being recognized as sovereign by other states and the ability to legislate to govern its citizens.¹⁷² States also have private interests, such as its interest in privately owned property or goods. Quasi-sovereign interests stand apart from both sovereign interests and a state’s private interests. They consist of a set of interests that the state has in the well-being of its populace. That a *parens patriae* action could rest upon the articulation of a “quasi-sovereign” interest was first recognized in *Louisiana v. Texas*.¹⁷³ Louisiana unsuccessfully sought to enjoin a quarantine by Texas.¹⁷⁴ The Court explained that “[i]nasmuch as the vindication of the freedom of interstate commerce is not committed to the State of Louisiana,” that this claim did not assert “any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to seek relief in this way because the matters complained of affect her citizens at large.”¹⁷⁵

Today, the doctrine provides an avenue for states to bring a claim to protect its quasi-sovereign interests in water. The *parens patriae* doctrine allows a state to sue to protect any of its quasi-sovereign interests—and courts have extended that to interests in water. States have had some success with *parens patriae* in the water context.¹⁷⁶ Various courts have held that the doctrine specifically protects a state’s interest in water.¹⁷⁷ Notably, this sort of claim does not require the state to have any property interest in water.¹⁷⁸ On the other hand,

171. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 600 (1982).

172. *Georgia v. Penn. R. Co.*, 324 U.S. 439, 450 (1945).

173. *Louisiana v. Texas*, 176 U.S. 1, 19 (1900).

174. *Id.* at 11-12.

175. *Id.* at 19.

176. *South Carolina v. North Carolina*, 130 S. Ct. 854, 856 (2010) (“State’s sovereign interest in ensuring that it receives an equitable share of interstate river’s water is precisely the type of interest that state, as *parens patriae*, represents on behalf of its citizens.”); *Md., Dep’t of Nat. Res. v. Amerada Hess Corp.*, 350 F. Supp. 1060, 1067 (D. Md. 1972) (addressing damage claim in a *parens patriae* capacity for injury to its waters and marine life allegedly resulting from marine oil spills, and holding that the state may care for its own in utilizing the boundaries of nature within her borders because it has “technical ownership” of such boundaries or, when ownership is in no one, because the state may for the common good exercise all the authority that technical ownership ordinarily confers); *State, Dep’t of Env’tl. Prot. v. Jersey Cent. Power & Light Co.*, 351 A.2d 337, 338 (1976) (the state of New Jersey brought an action against defendant public utility to recover damages, as *parens patriae*, because of the death of a large number of menhaden fish, allegedly caused by the sudden flow of cold water into a stream in connection with the defendant’s operation of a nuclear power plant. Affirming the lower court’s judgment in favor of the state, the court rejected the defendant’s contention that the state did not have a proprietary right to the fish in its waters sufficient to support an action.).

177. *See, e.g., Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 559-64 (1851) (holding original jurisdiction appropriate for state plaintiff bringing public nuisance claim against diverse party for obstruction of navigable water due to bridge construction and location).

178. *Missouri v. Illinois*, 180 U.S. 208, 218 (1901) (holding that no property rights were implicated, but that a state could nevertheless challenge the defendant’s pollution of water to protect state citizens); *Kansas v. Colorado*, 185 U.S. 125 (1902) (recognizing that a state had authority to challenge water diversions merely because the state represented its citizens interest in the water); *Hudson Cty. Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (“But it is recognized that the state, as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the . . . water . . . within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned.”); *Wisconsin v. Illinois*, 278 U.S. 367, 400 (1929) (allowing a state to challenge a water

parens patriae is a theory of standing, which requires the state to identify some cause of action it can bring on behalf of its citizens.

In this section, we have explored the complicated relationship between states and water. There was a lot to unpack, including states' police powers over water, their powers over interstate waters, and more. If one thing is clear, it is that states have a robust sovereign power over water. However, as we conclude in the next section, this power is not one of property.

III. DO STATES OWN WATER AS PROPERTY?

State sovereignty over water is well established, and the public trust doctrine is increasingly taking hold, leaving little room for the idea, and application, of state ownership of water as property. Further, state ownership of natural resources has been rejected by the Supreme Court, and the very concept of water as property is flawed.¹⁷⁹ But the language of property, ownership, and related terms (e.g., "title") has enduring power, despite the precedential and logical opposition.

A. The Life and Death of the State Ownership Theory in the Supreme Court

The Supreme Court caused much of the confusion regarding water as property, in cases before and near the turn of the nineteenth century, by using language indicating that states had actual title in water, not just the power to regulate them. For example, in *Donnelly v. United States*, the Court said "that the title of the navigable waters, and the soil beneath them, was in the state, and subject to its sovereignty and jurisdiction."¹⁸⁰ Towards the end of the nineteenth century, a trio of cases addressed ownership of water creatures and water beds, which are resources generally lumped together with the disposition of the water itself.¹⁸¹

draw because of the draw's impacts on the state's citizens); *People of California v. United States*, 180 F.2d 596, 600 (9th Cir. 1950) (Allowing state of California to bring *Parens Patriae* lawsuit in lawsuit quieting title to water. "The State of California is entitled to intervene as of right on each of the claimed grounds, not only in its proprietary capacity as asserted absolute owner of the water in suit, but also in its capacity as *parens patriae*.").

179. See, e.g., *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 950 (1982).

180. *Donnelly v. United States*, 228 U.S. 243, 260 (1913) (emphasis added). Notably, state cases around the nation had already weighed in and often found sovereign ownership of water suspect. See, e.g., *Arnold v. Mundy*, 6 N.J.L. 1, 78 (1821) ("The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.").

181. See *Geer v. Connecticut*, 161 U.S. 519, 525 (1896) (discussing the nature of "the air, the water which runs in the rivers, the sea, and its shores . . . [and] wild animals" all having been relegated to the "negative community."); *overruled by Hughes v. Oklahoma*, 441 U.S. 322 (1979); See also *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987) (discussing "ownership of submerged lands—which carries with it the power to control navigation, fishing, and other public uses of water"); *Gypsum Res., LLC v. Mastro*, 672 F. Supp. 2d 1127, 1139 (D. Nev. 2009) (discussing the disposition of feral resources such as "nature of the air, water, and wildlife resources"); *Washington Kelpers Ass'n v. State*, 502 P.2d 1170, 1172 (Wash. 1972); Dale D. Goble, *Three Cases / Four Tales: Commons, Capture, the Public Trust, and Property in Land*, 35 ENVTL. L. 807, 828 (2005) ("The king's prerogative ownership of royal fishes, in other words, was part of his ownership of navigable waters because the greater

These cases have been the primary ammunition for proponents of state water ownership theories.¹⁸² In these cases, states raised their ownership over resources as a shield against federal doctrines, namely the dormant commerce clause and the privileges and immunity clause.¹⁸³ Thus, the Court was forced to deeply engage with the state ownership question.¹⁸⁴

The facts of these cases are similar: a state wanted to allow its own citizens to have certain privileges over natural resources within their borders, while at the same time withholding these same privileges from citizens of other states.¹⁸⁵ The outsiders responded by citing the privileges and immunity or dormant commerce clause, arguing that a state could not discriminate or burden interstate commerce in this way.¹⁸⁶ The states arguing for control of the water riposted: we own these wild resources, and we can allocate our property to our citizens as we see fit.¹⁸⁷

In 1823, in *Corfield v. Coryell*, Justice Washington explained that New Jersey could prevent citizens of other states from harvesting oyster beds within New Jersey.¹⁸⁸ The Court reasoned that New Jersey owned these beds, and that “in regulating the use of the common property of the citizens of [a] state, the legislature is [not] bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens.”¹⁸⁹

This set the stage for *McCready v. Virginia*, which was decided roughly thirty years later.¹⁹⁰ The Court held that Virginia, on behalf of its citizens, held “a property right, and not a mere privilege or immunity of citizenship” in the water beds.¹⁹¹

Then about twenty years later, in *Geer v. Connecticut*, Connecticut tried to control who could take game birds living within its boundaries, and a challenge was brought under the commerce clause.¹⁹² The Court left little doubt that it believed that the state, on behalf of its citizens, owned the wild game within its

includes the lesser.”); James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL’Y F. 1, 82 (2007).

182. See generally Goble, *supra* note 181, at 833-34.

183. See, e.g., *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1825) (No. 3,230) (analyzing privileges and immunity clause conflict with state ownership of wildlife).

184. Prior cases sometimes referred to state ownership of water, but there was little reason for the Court to figure out what sovereign ownership would mean on the ground. See, e.g., *Martin v. Lessee of Waddell*, 41 U.S. 367 (1842) (not addressing whether states actually owned or could convert each other’s water).

185. For example, in *Corfield*, the state wanted to restrict oyster beds to state citizens. See *Corfield*, 6 F. Cas. at 552.

186. See *id.*

187. See *id.*

188. *Id.* at 551-52.

189. *Id.* at 552 (emphasis added).

190. *McCready v. Virginia*, 94 U.S. 391 (1876).

191. *Id.* at 394.

192. *Geer v. Connecticut*, 161 U.S. 519, 520-21 (1896) (again, this case concerned wild game, not water. But again, courts have largely treated feral resources the same, under theories of public interest and negative community.).

borders, and that this ownership was powerful enough to defeat commerce clause concerns.¹⁹³

Finally, a decade after *Geer*, the Court addressed similar issues, this time directly in the context of water, in *Hudson County Water Co. v. McCarter*.¹⁹⁴ There, the Court upheld a New Jersey statute prohibiting the transfer of waters out of state.¹⁹⁵ The Court reasoned that “the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs.”¹⁹⁶

Some language in *Hudson* explicitly couched the state’s water interest as “property.”¹⁹⁷ Furthermore, the Court relied heavily on *Geer*, which the Court would explain many years later, when it overturned this case, “was premised on the theory that the state owned its wild animals and therefore was free to qualify any ownership interest it might recognize in the persons who capture them.”¹⁹⁸

However, it is worth looking closely at the language the Court used here. Although deferential to the state, the Court spoke about water in *Hudson* very differently than it spoke of other wild resources in *McCready*, *Geer*, and *Corfield*.¹⁹⁹ The Court’s hesitance to attach the “property” label to water, even in this time of extreme deference to state ownership interests, is palpable. The Court does not say that states “have title” to water—as it had when talking about oysters and water beds in *Corfield* and *McCready*.²⁰⁰ Nor did the Court say that states “owned” water, as it had when talking about wild birds in *Geer*.²⁰¹ Instead, the Court was careful to base its decision in *Hudson* on a “principle of public interest and the police power, and not merely as the inheritor of a royal prerogative.”²⁰² The Court repeatedly described state interest as one of “protecting natural resources,” not protecting state title.²⁰³ The Court made this clear by stating “the state, as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory.”²⁰⁴

Although the Court in some early cases used language about state “ownership,” practically, it was not treating state interest in wild resources as a property right.²⁰⁵ As Trelease explains eloquently in his treatise, nothing the Court

193. *Id.* at 529 (Harlan, J., dissenting) (notably, Justice Harlan dissented, arguing that the ownership theory could not allow the state to interfere with interstate commerce (citing *id.* at 542-44)).

194. *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349 (1908).

195. *Id.* at 356.

196. *Id.* at 356-57.

197. *Id.* at 356 (discussing state interest in water, and stating “[w]hat it may protect by suit in this court from interference in the name of property outside of the state’s jurisdiction, one would think that it could protect by statute from interference in the same name within”).

198. See *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 950 (1982).

199. See *Hudson*, 209 U.S. at 356.

200. See *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa.1825) (No. 3,230); *McCready v. Virginia*, 94 U.S. 391, 394-95 (1877).

201. Compare *Hudson*, 209 U.S. at 356 with *Geer v. Connecticut*, 161 U.S. 519, 520-21 (1896).

202. *Hudson*, 209 U.S. at 356 (emphasis added).

203. *Id.* at 355.

204. *Id.*

205. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); *Wyoming v. Colorado*, 259 U.S. 419 (1922); *Kansas v. Colorado*, 206 U.S. 46 (1907).

did during this early period required it to recognize a true ownership interest over water in any state; everything the Court did could better be characterized, as a practical matter, in terms of police power principles and principles of state interest in local affairs, similar to what was happening in the commerce clause jurisprudence at the time.²⁰⁶ Considering the movement for state ownership of the public domain, and the push for commerce clause restrictions on local interests, there is no practical reason to view the contemporary water cases as turning on property principles.²⁰⁷

After the turn of the century, the Supreme Court began to expressly settle the state ownership issue, revealing that states never “owned” water or wild resources at all.²⁰⁸ It was a mere fiction, or stand-in, for the police power that states hold to regulate common resources. McCready ended up being the high water mark for state ownership of wild resources — and even perhaps high above the water mark.²⁰⁹ Every time the states have tried to raise some sort of ownership theory over water and other wild resources since McCready, they have sorely lost.²¹⁰ Indeed, the state wild resources ownership theory has been trounced in a number of different contexts.²¹¹

By the 1940s the Court rejected the state ownership theory altogether.²¹² *Toomer v. Witsell* addressed a challenge to South Carolina’s shrimping statute, which clearly discriminated against citizens of other states.²¹³ The state,

206. Trelease, *infra* note 247, at 644 (“As for interstate rights, the United States Supreme Court has on numerous occasions apportioned the waters of interstate rivers among states without reference to state stream ownership, using instead concepts of sovereignty or *parens patriae*.”). Trelease also points out that states during this early period relied on their plenary police powers to apportion water between their own citizens, not a state title tracing theory. *Id.*

207. See *infra* note 206, *infra* note 208, and accompanying text.

208. See, e.g., *Missouri v. Holland*, 252 U.S. 416, 431 (1920); see also *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158, 163-64 (1935) (stating the act “effected a severance of all waters upon the public domain . . . from the land itself,” and that therefore “all nonnavigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states”).

209. It turns out the U.S. Supreme Court’s modern cases were perhaps more intuitive than even the Court realized. The decision that states can’t own water under the early court’s conceptualization of derivative ownership on behalf of a state’s citizens now makes sense in light of state law cases because, as discussed below: individuals can’t “own” water either.

210. Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority Under Federal Laws Affecting Water Use*, 2006 UTAH L. REV. 241, 254 (2006) (explaining that “[o]ver the years, the states have advanced a variety of arguments to the effect that the Constitution somehow prevents the federal government from intruding on their sovereignty over water” but that these arguments have largely failed).

211. Julia R. Wilder, *The Great Lakes As A Water Resource: Questions of Ownership and Control*, 59 IND. L.J. 463, 473 (1984) (discussing that, under the Supreme Court’s jurisprudence after the turn of the century, it became clear that “[g]overnment ownership of water is actually a legal fiction which supports the state’s regulatory powers, a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource” (citations omitted)); B. Abbott Goldberg, *Interposition—Wild West Water Style*, 17 STAN. L. REV. 1, 9 n.46 (1964) (discussing how the “ownership of water” is a “bit of legal mysticism” and that the “confusion between the attributes of ownership and authority has persisted to this day”).

212. *Toomer v. Witsell*, 334 U.S. 385 (1948).

213. *Id.* at 388.

unsurprisingly, touted McCready, contending that South Carolina's ownership of the shrimp, on behalf of its citizens, was a privileges and immunities shield.²¹⁴

The Court first distinguished McCready because the Court there addressed stationary oysters planted in beds, whereas Toomer addressed migratory shrimp.²¹⁵ Like it did in *Missouri vs. Holland*, the Court found important the fact that the shrimp at issue here were "migratory."²¹⁶ But the Court then went farther, calling into question the entire concept of states owning wild resources: "The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource."²¹⁷ The Court thus explained that when courts say states "own" wild resources, they really mean that states have the power to regulate the resource vis-à-vis their own citizens.²¹⁸

After Toomer, the Court continued to reject state ownership theories over wild resources in dormant commerce clause cases.²¹⁹ The Court also continued to reject state ownership theories when a state violated the privileges and immunity clause.²²⁰ The Court continued to reject state ownership theories where federal powers conflicted with state "ownership" claims.²²¹ Indeed, the fiction of state ownership of wild resources reached even Congress' attention:

[W]hat we really mean by this sort of 'ownership' is sovereignty, not proprietorship One may not shoot the birds or appropriate the water without a permit from the State, in its exercise of the police power. Nevertheless, title does not come from the State's permit, but from the act of reducing the birds or the water to possession with the assent of the State as sovereign, not as proprietor.²²²

In the 1970s, the Court authored several opinions ending what debate was left over the state ownership theory.²²³ In 1977, in *Douglas v. Seacoast Products, Inc.*, the Court rejected the argument that Virginia's "ownership" of fish swimming in its territorial waters allowed the State to forbid nonresidents from fishing.²²⁴ The Court pulled no punches this time:

A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of 'owning' wild fish, birds, or animals.

214. *Id.* at 400–01.

215. *Id.* at 401.

216. *Id.*

217. *Id.* at 402.

218. Indeed, the Court seemed to call into question whether McCready should remain good law: "These considerations lead us to the conclusion that the McCready exception to the privileges and immunities clause, if such it be, should not be expanded to cover this case." *Id.*

219. See *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 8 (1928) (holding that Louisiana could not use an ownership theory to require the local processing of shrimp taken from Louisiana); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420–21 (1948) (holding that an ownership theory over fish could not save California's attempt to prevent certain residents from fishing); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kansas Nat. Gas Co.*, 221 U.S. 229, (1911).

220. *Toomer*, 334 U.S. at 400–01; *Takahashi*, 334 U.S. at 419–21.

221. *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284–85 (1977); *Kleppe v. New Mexico*, 426 U.S. 529, 542–45 (1976).

222. *Toomer*, 334 U.S. at 400–01; *Takahashi*, 334 U.S. at 419–21.

223. See, e.g., *Douglas*, 431 U.S. at 265.

224. *Id.* at 284.

Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures.²²⁵

The Court put the early twentieth century cases in perspective: “The ‘ownership’ language of cases [such as *Geery* and *McCready*] . . . must be understood as no more than a 19th-century legal fiction.”²²⁶ The Court concluded that a state’s interest in wild resources is simply a question of “police power.”²²⁷

Finally, in *Hughes v. Oklahoma*²²⁸ the Court dispelled the ownership theory, then did so again in *Sporhase v. Nebraska*,²²⁹ stating there that the Court had already “traced the demise of the public ownership theory and definitively recast it as ‘but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.’”²³⁰

Sporhase is worth considering further because it addressed a state’s interest in groundwater specifically.²³¹ The Court first recognized²³² that *Geer* had been overturned, which signaled “the demise of the state ownership theory” over wild resources.²³² It then considered whether the nature of groundwater required a different approach.²³³ The Court concluded it did not, explaining that the idea that a state can shield itself by asserting ownership over water “is still based on the legal fiction of state ownership.”²³⁴ The Court recognized the profound interest states, especially western states, have in groundwater resources.²³⁵ But the Court clarified that these interests were just that, interests to be calculated when applying doctrines that settle water and commerce disputes,²³⁶ not ownership interests.²³⁷ The Court also explained that groundwater implicates a number of important interstate and national issues, which further militate against viewing state groundwater as an absolute property interest.²³⁸

225- *Id.*

226- *Id.*

227- *Id.*

228- *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

229- *Sporhase v. Nebraska*, 458 U.S. 941 (1982).

230- *Id.* at 951; *see also* *Hughes v. Oklahoma*, 441 U.S. at 334-35.

231- *Sporhase*, 458 U.S. at 951.

232- *Id.*

233- *Id.*

234- *Id.*

235- *Id.* at 952.

236- *Id.* at 953.

237- *Id.*

238- *Id.*; *see also* Frank J. Trelease, *State Water and State Lines: Commerce in Water Resources*, 56 U. COLO. L. REV. 347, 355 (1985) (noting that *Sporhase* listed several factors which might militate in favor of deferring to state preferences over water: “(1) the state might act to protect the health and safety of its citizens; (2) the state might have legal expectations created by equitable apportionment or compact division of interstate streams; (3) the state’s claim to public ownership of ground water might be strong enough to support a limited preference for its own citizens; and (4) to the extent that conservation made water available, the state might be regarded as a producer of goods and might favor its own citizens in their distribution”); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941) (not recognizing Oklahoma’s sovereign right to water within its borders).

B. Water is Not Property

The Supreme Court's skepticism of state ownership and water as state property is consistent with centuries of English and American water law that has generally rejected the idea that water can be owned as property by anyone.²³⁹ Water rights do not, as a species of property, fall within our normal sense of property in land and chattels.²⁴⁰ Unlike land and buildings, water in natural watercourses is neither static nor well-defined; it moves and it changes. As the famous maxim goes "One cannot step into the same stream twice."²⁴¹ "Running water at one instance is at one place in the river, then it is gone and some other water has succeeded it, without anyone having been able to tag it as his own; a thing in continual motion and ceaseless change, incapable of possession or ownership in that condition."²⁴²

Western civilizations have been wrestling with the question of sovereign ownership of water resources since at least the Roman Code of Justinian.²⁴³ Justinian's Code put sovereign property relationships into two categories: sovereign dominium and sovereign imperium.²⁴⁴ Imperium is an exercise of sovereign authority over something—it may sometimes look like property, but in reality, it is just the government's ability to regulate something.²⁴⁵ Dominium is a tangible property right.²⁴⁶ Courts and scholars have often pointed to Justinian's

239. See Hall & Regalia, *supra* note 169, at 166.

240. An entire article could be devoted to the definition of "property" and what the concept means, filled entirely with prior cited works. We simply refer our readers to two of our favorites: GREGORY S. ALEXANDER & EDUARDO M. PENALVER, *AN INTRODUCTION TO PROPERTY THEORY* (2012), and PETER M. GERHART, *PROPERTY LAW AND SOCIAL MORALITY* (2013).

241. David B. Anderson, *Water Rights As Property in Tulare v. United States*, 38 MCGEORGE L. REV. 461, 473-74 (2007) (citations omitted).

242. *Id.*

243. See, e.g., Gail Osherenko, *New Discourses on Ocean Governance: Understanding Property Rights and the Public Trust*, 21 J. ENVTL. L. & LITIG. 317, 350 (2006). The Justinian Code is worth considering given that legal authorities have often cited it as the basis of U.S. water allocation jurisprudence. See *Caminiti v. Boyle*, 732 P.2d 989, 994 (Wash. 1987) ("The principle that the public has an overriding interest in navigable waterways and lands under them is at least as old as the Code of Justinian" (citations omitted)); *State v. Central Vermont Ry., Inc.*, 571 A.2d 1128, 1130 (Vt. 1989) ("The public trust doctrine is an ancient one, having its roots in the Justinian Institutes of Roman law." (citations omitted)); *Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cty.*, 658 P.2d 709 (Cal. 1983); *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163 (Mont. 1984) ("The theory underlying this doctrine can be traced from Roman Law through Magna Carta to present day decisions."); Cynthia L. Koehler, *Water Rights and the Public Trust Doctrine: Resolution of the Mono Lake Controversy*, 22 ECOLOGY L.Q. 541, 544-45 (1995); Michael Blumm & Thea Schwartz, *Mono Lake and the Evolving Trust in Western Water*, 37 ARIZ. L. REV. 701, 713 (1995) ("The trust doctrine's common law origins can, in fact, be traced back to medieval England and ultimately to Roman law. Consequently, there are sound historical and conceptual reasons for grounding the public trust in common law." (footnote omitted)).

244. Patrick Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13 (1976); Darcy Alan Frownfelter, *The International Component of Texas Water Law*, 18 ST. MARY'S L.J. 481, 492 n.65 (1986) ("Imperium is governmental power to regulate.").

245. See *Avenal v. State*, 2003-3521, p. 30 (La. 10/19/04), 886 So. 2d 1085, 1106; See also *Toomer v. Witsell*, 334 U.S. 385, n.210 (1948).

246. Deveney, *supra* note 244, at 13 ("While on land, governments have both imperium and dominium, the law is quite different with regard to the seas. Both scholarly and lay literatures frequently

Code for the proposition that water cannot be “owned”, or in other words, that sovereigns can only have a relationship of imperium with water, by citing the phrase “all of these things are by natural law common to all: air, flowing water, the sea and, consequently, the shores of the sea.”²⁴⁷ Or, in more contemporary terms discussed above, water is not the state’s property; rather it’s a public trust for which the state is merely a trustee.

Early England tended to view virtually all resources, including water, as the sovereign’s property.²⁴⁸ This theory that states could “own” water was not without critics.²⁴⁹ For example, Lord Hailsham’s famous summary of English law explained that “[a]lthough certain rights as regards flowing water are incident to the ownership of riparian property, the water itself, whether flowing in a known and defined channel or percolating through the soil, is not, at common law, the subject of property or capable of being granted to anybody.”²⁵⁰

As early as the start of the nineteenth century, an increasing number of English authorities began shifting to the tenets that scholars had heralded for centuries: water cannot be owned, even by sovereigns. In 1823, in *Wright v. Howard*, the High Court of Chancery explicitly stated that “there is no property in the water.”²⁵¹ In 1832, in *Mason v. Hill*, Lord Denman noted that “[n]o one ha[s] any property in the water itself,” and explained that England had adopted into the common law this principle that the corpus of water was not the subject of

fail to distinguish between imperium and dominium, thus eroding the distinction between the exercise of authority and the entitlements of ownership.”).

247. Anderson, *supra* note 241, at 475 (“Roman law did not distinguish among the many forms of fresh water in nature: clouds, rain, diffused surface water, stream flow, river underflow, percolating groundwater, vapor, lakes, flood water, seepage, etc. Because of the fugitive and fluctuating character of water in its natural state, Roman law denied the existence of property in water altogether— including running water—and held the use of rivers and lakes to be the common right of everyone, like the sea and the air.”); Frank J. 247247, *Government Ownership of Water*, 45 CAL. L. REV. 638, 640 (1957) (Roman law also distinguished between things which are “res nullius, the property of no one, along with the air, the sea, and wild animals, or as res communes, common things owned by everyone.”); *Geer v. Connecticut*, 161 U.S. 519, 525 (1896), *overruled by Hughes v. Oklahoma*, 441 U.S. 322 (1979) (discussing water ownership in terms of a “negative community of interest”) (More modern scholars often refer to this concept of not recognizing property interests in water and other natural resources as a “negative community of interest.”) (“The first of mankind had in common all those things which God had given to the human race. This community was not a positive community of interest, like that which exists between several persons who have ownership of a thing in which each have their particular portion. It was a . . . ‘negative community,’ which resulted from the fact that those things which were common to all belonged no more to one than to the others . . . That which fell to each one among them commenced to belong to him in private ownership, and this process is the origin of the right of property. Some things, however, did not enter into this division, and remain, therefore, to this day, in the condition of the ancient and negative community These things are those which the juris consults called ‘res communes’ - the air, the water which runs in the rivers, the sea, and its shores.”) (citing ROBERT JOSEPH POTHIER, *TRAITÉ DU DROIT DE PROPRIÉTÉ*, Nos. 27-28 (Chez Debure ed., 1772)).

248. See LORD HALE, *DE JURE MARIS*, chs. 4, 6.

249. See, e.g., HENRICUS DE BRACONA, *DE LEGIBUS ET CONSUEUDINIBUS ANGLAF*, 2 ON THE LAW AND CUSTOMS OF ENGLAND 39 (1968); POTHIER, *supra* note 247, at Nos. 27-28..

250. LORD HAILSHAM OF ST. MARYLBONE, 49(2) HALSBURY’S LAWS OF ENGLAND 62 (4th ed. 2004) (emphasis added).

251. *Wright v. Howard*, (1823) 57 Eng. Rep. 76, 79, Vice-Chancellor’s Courts.

ownership.²⁵² Following this, many English cases continued to conceive of water as incapable of being owned.²⁵³

After the American Revolution and throughout the early and mid-nineteenth century, the United States adopted the English model of sovereign control of water, but with a democratic twist.²⁵⁴ Early United States jurisprudence reasoned that the federal government inherited waterbeds and water, and then transferred title to each state as it entered the Union.²⁵⁵ The twist was that, because the “people” are sovereign in America, the states held title to water and other wild resources on behalf of their collective citizens, not on behalf of the Crown as a sovereign entity.²⁵⁶

American law, relying on English precedents, has always made clear that one cannot own water itself, but merely have a right of use:

Flowing water, as well as light and air, are in one sense ‘publici juris.’ They are a boon from providence to all, and differ only in their mode of enjoyment. Light and air are diffused in all directions, flowing water in some. When property was established, each one had the right to enjoy the light and air diffused over, and the flowing water through, the portion of soil belonging to him. The property in the water itself was not in the proprietor of the land through which it passes, but only

252. *Mason v. Hill*, (1832) 110 Eng. Rep. 114, 117, King’s Bench.

253. *McCarter v. Hudson Cty. Water Co.*, 70 N.J. Eq. 525 (1905); *Embrey v. Owen*, (1851) 155 Eng. Rep. 579, 579, 6 Exch. 353 (“Flowing water is publici juris, not in the sense that it is bonum vacans, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only: that all may reasonably use it who have a right of access to it; that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of possession only.”); *Race v. Ward*, (1855) 119 Eng. Rep. 259, 259 4 E. & B. 702, 702; *Manning v. Wasdale*, (1836) 111 Eng. Rep. 1353, 1354, 5 Ad. & E. 758, 758; *See also* *Challenor v. Thomas*, (1608) 80 Eng. Rep. 96, 96.

254. *See* *Stockton v. Balt. & N.Y. R.R. Co.*, 32 F. 9, 19-21 (C.C.D.N.J. 1887).

255. *Martin v. Lessee of Waddell*, 41 U.S. 367 (1842) (The tide-based navigation distinction was the initial rule in the colonies, but later courts shifted to conclude that states holds presumptive title to navigable waters even if they are not subject to the tide.); *see, e.g.*, *Elder v. Burrus*, 25 Tenn. (1 Hum.) 358, 365-67 (1845); *Bullock v. Wilson*, 2 Port. 436, 444-45 (Ala. 1835); *Wilson v. Forbes*, 13 N.C. (2 Dev.) 30, 30 (1828); *Cates’ Ex’rs v. Wadlington*, 12 S.C.L. (1 McCord) 580, 580 (1822); *Carson v. Blazer*, 2 Binn. 475, 475 (Pa. 1810); *Shively v. Bowlby*, 152 U.S. 1, 31 (1894) (By the late nineteenth century, “the now prevailing doctrine” was that states controlled “title in the soil of rivers really navigable.”); *see generally* Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781, 801-02 (2010).

256. *See* *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420 (1837) (Baldwin, J., dissenting) (explaining that “[b]y the common law, it is clear, that all arms of the sea, coves, creeks, etc. where the tide ebbs and flows, are the property of the sovereign . . . ‘the principles of the common law were well understood by the colonial legislature,’ but that this title is held on behalf of U.S. citizens); *Stockton v. Balt. & N.Y. R.R. Co.*, 32 F. at 19 (“The information rightly states that prior to the Revolution the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the king of Great Britain, as part of the jura regalia of the crown, and devolved to the state by right of conquest. The information does not state, however, what is equally true, that after the conquest the said lands were held by the state, as they were by the king, in trust for the public uses of navigation and fishery, and the erection thereon of wharves, piers, light-houses, beacons, and other facilities of navigation and commerce.”). As we will see below, many states have adopted this position. While some other states have adopted the old English approach.

the use of it, as it passes along, for the enjoyment of his property, and as incidental to it.²⁵⁷

The English law, at least as stated, if not applied, was equally clear that water is not property capable of ownership. The Lord Hailsham of St. Marylebone, in Halsbury's Laws of England,²⁵⁸ stated:

Although certain rights as regards flowing water are incident to the ownership of riparian property, the water itself, whether flowing in a known and defined channel or percolating through the soil, is not, at common law, the subject of property or capable of being granted to anybody.²⁵⁹

Thus, water is not property. It cannot be owned; not by the state, nor anyone else.

CONCLUSION

So what is the legal meaning of "Waters of the State"? We began with state assertions over territorial waters, which differ on what water they claim an interest in, where they claim that interest comes from, and what that interest is. Some states claim that they outright own water and some claim they have limited regulatory rights over their water. Similarly, state courts are also divided over how to practically treat state rights over water. Most states treat their relationship with water as one of sovereign regulation, not traditional property ownership. The state's sovereignty goes beyond general police powers to a more fundamental interest in water that can trump private property rights. Only a small number of states, either statutorily, constitutionally, or judicially, have taken full, property-like ownership over water.

Words have meanings, thus calling state water "property" would have significant doctrinal implications. Private rights flow from state rights to water. If states own the water as property, how can their citizens own it, too? The balance of powers between the federal government and states, as well as the rights of states with respect to neighboring states (i.e., water federalism), could be affected by the question of water as state property. Specifically, the types and nature of legal actions states can take against other states, private entities, and the federal government when their interests in territorial water are impacted depends fundamentally on whether the state is taking legal action as the owner of water as property, or in some other sovereign capacity.

257. *People v. Hulbert*, 131 Mich. 156, 160, 91 N.W. 211, 212-13 (1902) (citing *Wood v. Waud*, 3 Exch. 748). The court relied extensively on the English common law, which similarly made clear that persons cannot own or possess water; LORD HAILSHAM *supra* note 250. Lord Denman wrote: "No one ha[s] any property in the water itself." *Williams v. Moreland*, reported by Sir John Leach in Reports of Cases Decided in the High Court of Chancery (1843), stated: "Flowing water is originally publici juris," and "running water is not in its nature . . . property." *Williams v. Moreland*, (1824), 107 E.R. 620 (K.B.).

258. Lord Hailsham, *supra* note 250, at 62.

259. *Wright v. Howard*, (1823) 57 Eng. Rep. 76, 79, Vice-Chancellor's Courts; *Mason v. Hill*, (1832) 110 Eng. Rep. 114, 117, King's Bench; *see also Manning v. Wasdale*, (1836) 111 Eng. Rep. 1353, 1354, 5 Ad. & E. 758, 758; *Challenor v. Thomas*, (1608) 80 Eng. Rep. 96, 96; *McCarter v. Hudson Cty. Water Co.*, 70 N.J. Eq. 525 (1905).

Calling something “property” also has cultural and legal significance. A long line of scholars have persuasively questioned the significance and meaning of the term to the point that it is nothing but an empty space in which to put various rights and interests. Yet “property” persists. In popular use, property gives its owner special rights, and while first-year law students learn those rights are far from absolute, they are distinct from whatever interest the public has in the thing at issue. Our legal system treats almost every tangible thing, and many intangible things, as property. Our culture, even our language, leaves little room for anything that is not a person or property that a person can own. What would we even call that which is not property and cannot ever be owned? (Lawyers get to rely on Latin).

But water is the exception. The physical and social realities of water – most notably that it is fluid and a public necessity – have rounded its corners such that it would not fit in the square hole of property. Admittedly, we all, from the highest appellate courts to the basest casebook authors, have used the term “property” to describe water. Certainly, in the context of private persons and parties, calling water one’s property is simply legally incorrect. And we conclude the words of ownership and property similarly have no place in “waters of the state.”

Instead, as a matter of both federal and state law, the public trust doctrine best describes state powers over water. Perhaps more than any other legal authority, it creates unique state rights and duties with respect to water. The public trust doctrine makes clear that state title is not one of ownership, and the water itself is certainly not state property. Rather, the water is a public good, the public are its beneficiaries, and the state is merely the trustee, who is empowered to protect and constrain from alienation and degradation. In short, the state does not own water as property but is the lawful steward of the resource for us all. “Waters of the State” is not a claim of ownership, but rather an acknowledgment of the sovereign power to protect and steward our most precious public resource.