

State Attorneys General Powers and Responsibilities

Edited by
Emily Myers
National Association of Attorneys General

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NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Courtesy Chapter

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*This book is dedicated to Attorneys General
and the men and women who work for them in the
56 jurisdictions. They continue to make an important
contribution to state government and the American legal
system. Without them, there would be no book to write.*

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This book is a collaborative effort, in which different authors with expertise in each substantive area contribute their time and talent. The principal authors are noted on each chapter, but we would like to thank them again here for their hard work and dedication. Many thanks to the following authors:

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CHAPTER 9

Public Lands

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The public lands of the states comprise some of their most sensitive and valuable resources. Such lands include the beds of marine waters, navigable lakes, and navigable rivers as well as school lands, other granted lands and proprietary lands used as parks or state forests or leased for commercial purposes. The responsibilities of attorneys general for these lands are manifold: The attorneys general typically represent and counsel the state agencies charged with the acquisition, disposal, management, and use of state lands, and the regulation of private land uses. The attorneys general represent their states in controversies with the federal government concerning state-federal boundaries, the states' rights to share in federal mineral revenues, and federal development decisions affecting them.

The extent to which land law litigation is specialized within an attorney general's office varies. Customarily, the principal state client agency is a land board, commission or executive officer charged with the administration of state lands. Some attorneys general have established land law sections, assigned to advise the state's land agencies and represent them in litigation over title, leasing, and associated matters. The emphasis of these programs is usually on the production of revenue, which is an important goal and one mandated in the case of school trust lands. Other state agency clients may have more of a conservation mission, such as state fish and game agencies. Even in the absence of a request

from an agency with the statutory mission of managing state lands, establishing public trust rights or enforcing state law, the attorney general, as constitutional or common law representative of the people, may take independent action to achieve such goals on the state's behalf.

The growing significance of public lands issues arises from greater environmental awareness, leading to more responsibilities for state agencies. The realization of the significance of wetland values, developmental pressures, and the pervasiveness of state versions of the National Environmental Policy Act (NEPA) have all led to closer integration of resource, environmental, and lands personnel within the offices of attorneys general. State agencies authorizing projects on the coastline or on lakes and rivers must comply with public trust and environmental reporting requirements. Water agencies may have to determine title to the beds of rivers when coping with proposed hydroelectric projects. State conservancies need help in dealing with complex property law questions. These factors have all served to encourage the integration of land, water, game, and other resource oriented attorneys into one unit to handle these matters.

LEGAL AUTHORITY

State Submerged Lands

The thirteen original states acquired title to the beds and banks of their navigable waters as an inherent attribute of sovereignty.¹ Under the constitutional equal footing doctrine, states subsequently joining the union acquired such lands within the former territories on the same basis as the original states.² Because these lands are “sovereign lands,” there is a “strong presumption” against inferring a federal intent to reserve any such lands when admitting new states unless such intent is “definitively declared or otherwise made very plain.”³ These lands include the beds of navigable lakes and rivers as well as tidal and submerged lands extending for three miles offshore of the coastal states.⁴ Though title to such

1 *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842).

2 *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845).

3 *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195-198 (1987).

4 *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892); *Phillips Petroleum Co. v. State of Mississippi*, 484 U.S. 469 (1988); Submerged Lands Act of 1953, 43 U.S.C. 1301-1305. While the initial title of states' sovereign lands extended to all navigable lakes and rivers as well as to tide and submerged lands, some states such as Michigan subsequently restricted their interests to certain lakes and rivers. *Shively v. Bowlby*, 152 U.S. 1 (1894).

lands belongs to the states, these lands remain subject to the federal navigational servitude.⁵

Whether a state received ownership of the bed of a specific water body at statehood is a federal question.⁶ However, “the State’s title to the riverbed vests absolutely as of the time of its admission”⁷ Therefore, “whenever . . . title shall have passed, [to a state, under federal law] then that property, like all other property in the State, is subject to state legislation”⁸

The federal test of navigability for title purposes is twofold: (1) tidal waters are held to be navigable as a matter of law;⁹ and (2) the navigability of *nontidal* waters for title purposes is based on whether, at the time of statehood, they were “used, or . . . susceptible of being used, in their ordinary and natural condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”¹⁰ “Navigability for title is determined ‘on a segment-by-segment basis to assess whether the segment of the river, under which the riverbed in dispute lies, is navigable or not. . . . [A] segment should be ‘both discrete, as defined by physical features characteristic of navigability or nonnavigability, and substantial, as a matter of administrability for title purposes.’”¹¹ Though “every small creek in which a fishing skiff or gunning canoe can be made to float at high water” may not be navigable under the federal test,¹² use by small craft has sufficed to support a holding of navigability,¹³ as have seasonal log drives.¹⁴

The states are free to establish their own tests of navigability for determination of public rights arising under state law to use waters that may not be

5 *Gibson v. United States*, 166 U.S. 269, 272 (1897) (“[A]lthough the title to the shore and submerged soil is in the various states and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution.”).

6 *United States v. Holt State Bank*, 270 U.S. 49, 55-56 (1926).

7 *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370-71 (1977) (overruling *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973)).

8 *Id.* at 377.

9 A challenge to this rule was rejected in *Phillips Petroleum Co. v. State of Mississippi*, *supra*, n. 4.

10 *The Daniel Ball*, 77 U.S. (10 Wall) 557, 563 (1870). See Rick Frank, *Forever Free: Navigability, Inland Waterways, and the Expanding Public Interest*, 16 U.C. Davis L. Rev. 579 (1983).

11 *North Carolina v. Alcoa Power Generating, Inc.*, 853 F.3d 140, 150-51 (4th Cir. 2017) (quoting *PPL Mont., LLC v. Montana*, 565 U.S. 576, 593, 597 (2012)).

12 *The Montello*, 87 U.S. (20 Wall) 430, 442 (1874).

13 E.g., *Utah v. United States*, 403 U.S. 9 (1971) (livestock barges, tourist excursion craft).

14 *Oregon v. Riverfront Protection Ass’n*, 672 F.2d 792 (9th Cir. 1982). See also *Alaska v. United States*, 754 F.2d 851 (9th Cir.), *cert. den.*, 474 U.S. 968 (1985) which takes a more restrictive view.

navigable under the federal test.¹⁵ Judicial decisions and statutory or constitutional provisions in some states provide that members of the public may use a water body for boating, fishing and other public purposes if the water body is capable of carrying small recreational craft.¹⁶

Regardless of ownership, the lands underlying marine and fresh navigable waters generally are subject to a public trust, which operates like a public easement to protect a variety of water-related activities.¹⁷ The extent and nature of this public trust is a matter of state law,¹⁸ though some courts have held that the federal government administers a separate public trust over lands it owns, such as lands taken by eminent domain and ocean waters under federal control.¹⁹ The law may impose significant restrictions on the use and alienation of lands subject to the public trust.²⁰ Courts have held that the public has the right to use navigable waters and their underlying lands for a variety of purposes, including: commerce, navigation, floating, fishing, hunting, bathing, swimming, boating, bird watching, surfing, pedestrian travel, and environmental study and protection.²¹

15 See *PPL Mont., LLC v. Montana*, 565 U.S. 576, 603-04 (2012); *United States v. Walker River Irrigation Dist.*, No. 3:73-cv-00128-RCJ-WGC, 2015 WL 3439122 (D. Nev. May 28, 2015).

16 See *Montana Coalition for Stream Access v. Curran*, 682 P.2d 163 (Mont. 1984); *Hitchings v. Del Rio Recreation & Park Dist.*, 127 Cal. Rptr. 830 (Cal. Ct. App. 1976); *State v. McIlroy*, 595 S.W.2d 659 (Ark. 1980); *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961); cf. *People v. Emmert*, 597 P.2d 1025 (Colo. 1979); *State ex rel. Meek v. Hays*, 785 P.2d 1356 (Kansas. 1990).

17 *Ill. Cent.*, 146 U.S. 387 (1892); *Illinois Central* has often been described as the leading case regarding public rights in navigable waters.

18 *PPL Mont.*, 565 U.S. at 603-04 (2012).

19 *Juliana v. United States*, 217 F. Supp. 3d 1224, 1274-75 (D. Or. 2016) (quoting *City of Alameda v. Todd Shipyards Corp.*, 635 F. Supp. 1447, 1450 (N.D. Cal. 1986)).

20 See, e.g., *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983), *cert. den.* 464 U.S. 977 (1983); *State v. Superior Court (Lyon)*, 625 P.2d 239 (Cal. 1981), *cert. den.* 454 U.S. 865 (1981); *Kootenai Env'tl. Alliance v. Panhandle Yacht Club*, 671 P.2d 1085 (Idaho 1983); *Lawrence v. Clark County*, 254 P.3d 606 (Nev. 2011); *Caminiti v. Boyle*, 732 P.2d 989 (Wash. 1987), *cert. den.*, 484 U.S. 1008 (1988).

21 See generally *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971); *Kelly v. 1250 Oceanside Partners*, 140 P.3d 985 (Haw. 2006); *S. Idaho Fish & Game Ass'n v. Picabo Livestock, Inc.*, 528 P.2d 1295 (Idaho 1974); *Glass v. Goeckel*, 703 N.W.2d 58 (Mich. 2005), *cert. den.*, 546 U.S. 1174 (2006); *Elder v. Delcour*, 269 S.W.2d 17 (Mo. 1954); *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984), *cert. den.*, 469 U.S. 821 (1984); *Van Ness v. Borough of Deal*, 352 A.2d 599 (N.J. Super. Ct. App. Div. 1975), *rev'd on other grounds*, 367 A.2d 1191 (1976); *Nw. Steelheaders Ass'n v. Simantel*, 112 P.3d 383 (Or. Ct. App. 2005), *cert. den.*, 547 U.S. 1003 (2006); *Conatser v. Johnson*, 194 P.3d 897 (Utah 2008); *Diana Shooting Club v. Husting*, 145 N.W. 816 (Wis. 1914). *But see* *Parm v. Shumate*, 513 F.3d 135 (5th Cir. 2007) (applying Louisiana law), *cert. den.*, 555 U.S. 813 (2008).

The trust imposed on lands underlying navigable waters is often characterized as inalienable,²² though this trust can be overcome and terminated when the federal government properly exercises its right of eminent domain over state property otherwise subject to the trust.²³ Developments on the land must not conflict with trust purposes.²⁴ Even if fee title to state submerged lands has been conveyed, they may remain subject to public trust rights.²⁵ As the U.S. Supreme Court stated in *Illinois Central*: “The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties ... than it can abdicate its police powers in the administration of government and the preservation of the peace.”²⁶ The challenge courts face is determining when alienating the public trust from certain parcels serves the public interest.

Federal Land Grants

The bulk of state-owned lands other than submerged lands came to the states from federal grants. The enabling acts admitting the states into the union included vast grants of public land to the states for the purpose of supporting public institutions. Today, most states manage some federally granted land, using their attorney general as counsel. The largest of these federal grants is commonly described as the “school lands” grant. Typically, the Congress granted sections 16 and 36 in each township to newly admitted states for the support of the common schools. Some of these lands were sold, with the proceeds of the sale placed in

22 *Illinois Central Railroad v. Illinois*, *supra*, n. 4. See also, *San Carlos Apache Tribe et al v. Superior Court*, 972 P.2d 179 (Az. 1999). *Illinois Central* set forth a two part test for determining the validity of a legislative grant of the beds of navigable waters: (1) Does the disposition affirmatively aid or improve the public interest in navigation or other public use of the particular area of the waterway beneath the ordinary high watermark? (2) If the legislative grant does not affirmatively aid or improve the public trust, does the disposition substantially impair the public interest in the remaining land and waters of the particular area of the waterway? *Id.*, 146 U.S. at 452-453. *cf. Opinion of the Justices*, 424 N.E.2d 1092 (Ma. 1981).

23 *United States v. 32.42 Acres of Land*, 683 F.3d 1030 (9th Cir. 2012).

24 See *Nat'l Audubon*, 658 P.2d 709 (Cal. 1983); *State v. Gerbing*, 47 So. 353 (Fla. 1908); *Kootenai Envtl.*, 671 P.2d 1085 (Idaho 1983); *State v. Cleveland & P.R. Co.*, 113 N.E. 677 (Ohio 1916); *Schnittker v. Ohio Dep't. of Natural Res.*, No. 00AP-976, 2001 WL 410280 (Ohio Ct. App. Apr. 24, 2001), *reconsideration den.*, 756 N.E.2d 1239 (2001); *State v. Cent. Vt. Ry., Inc.*, 571 A.2d 1128 (Vt. 1989), *cert. den.*, 495 U.S. 931 (1990); *Priewe v. Wis. State Land & Improvement Co.*, 67 N.W. 918 (Wis. 1896), *aff'd on rehearing*, 79 N.W. 780 (Wis. 1899).

25 *State v. Superior Court (Lyon)*, 625 P.2d 239, *cert. den.* 454 U.S. 865 (1981).

26 *Illinois Central*, *supra*, n. 4, 146 U.S. at 453-454.

a permanent endowment fund, held in trust for the educational system. School lands retained by the states are managed to generate income for the designated beneficiaries. In addition to the common schools, grants were typically made for agricultural, scientific, and mining colleges, the construction of state capitol buildings, and for other public institutions. The states' right of access to their school lands over surrounding public lands was affirmed in *Utah v. Andrus*.²⁷

These federal land grants created a legal, fiduciary trust relationship between the United States and the newly admitted states.²⁸ The United States is the grantor, the state is the trustee, the designated institution is the beneficiary, and the granted land is the corpus of the trust.²⁹ Most states have designated a land management agency such as a state land board or department of natural resources to carry out the state's trustee responsibilities. As counsel to the state land managers, the attorneys general play an important role in helping to define the scope of the state's rights and responsibilities.³⁰

EMERGING ISSUES

State Rights to Navigable Waters

Over the last several decades, the Supreme Court has been asked to review whether nontidal as well as tidal navigable waters are held by the state in public trust;³¹ whether the state's right to a navigable lake was defeated by a pre-statehood reservation;³² whether application of the public trust to water rights constituted a taking in violation of the U.S. Constitution;³³ and whether a state court holding that the public easement on state beaches was a "rolling" one, which moved with the changes in vegetation line caused by hurricanes, violated constitutionally

27 486 F. Supp. 995 (C.D. Utah 1979).

28 *Lassen v. Arizona*, 385 U.S. 458 (1967); *Ervien v. United States*, 251 U.S. 41 (1919).

29 *United States v. 111.2 Acres of Land in Ferry County*, 293 F. Supp. 1042 (E.D. Wash. 1968), *aff'd* 435 F.2d 561 (9th Cir. 1970).

30 See, e.g., *Moon v. State Bd. of Land Comm'rs*, 724 P.2d 125 (Idaho. 1986); *State v. Weiss*, 706 P.2d 681 (Alaska 1985); *Konaly v. State*, 368 N.W.2d 819 (S.D. 1985); *County of Skamania v. State*, 685 P.2d 576 (Wash. 1984); *Berry v. Arizona State Land Dept.*, 651 P.2d 853 (Ariz. 1982); *Oklahoma Educ. Ass'n v. Nigh*, 642 P.2d 230 (Okla. 1982); *Gladden Farms, Inc. v. State*, 633 P.2d 325 (1981); *State v. University of Alaska*, 624 P.2d 807 (Alaska 1981).

31 *State v. Superior Court (Lyon)*, 625 P.2d 239 *cert. den.*, 454 U.S. 865 (1981); *State v. Superior Court (Fogerty)*, 625 P.2d 256, *cert. den.*, 454 U.S. 865 (1981).

32 *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987).

33 *National Audubon Society, supra*.

guaranteed property rights.³⁴ In three of these cases, *State v. Superior Court (Lyon)* and (*Fogerty*) and *Matcha v. Mattox*, the Court declined review, thus upholding the state's position. In *Utah Division of State Lands v. United States*, it upheld the state's right to sovereign lands.

Furthermore, the Supreme Court upheld Mississippi's claim that, upon entry into the Union, it received ownership of all lands under waters that were subject to the ebb and flow of the tide regardless of whether the waters were navigable.³⁵ The Court also declined to hear claims that the state's high-water boundary cannot be raised to a level caused by construction of a dam where the waters reached that level for the prescriptive period.³⁶ The Court, however, rejected Montana's claim that it owned the riverbeds of three rivers where the State failed to perform a segment-by-segment analysis of the rivers to determine whether each segment was navigable in fact at the time Montana entered the Union.³⁷ The Court noted that the appropriate analysis for title purposes was whether a river was navigable in fact throughout its length not whether it was a "navigable water of the United States" for purposes of federal regulation of commerce.³⁸

In the wake of *PPL Montana*, courts have applied its analysis to both find and defeat navigability claims by states. For example, the U. S. Court of Appeals for the Fourth Circuit affirmed a district court decision finding against the State of North Carolina based on expert testimony that the disputed river segment was characterized by waterfalls, boulders, and swift waters and could not have been navigated by craft available at the time of statehood.³⁹

Oregon's intermediate appellate court applied *PPL Montana* to affirm an administrative determination of title navigability. Acknowledging that navigability for determination of state title to a riverbed is a question of federal law, the court noted that the Supreme Court reaffirmed previous cases holding that a river is navigable if it was used, or was susceptible to use, as a highway of commerce at the time of statehood.⁴⁰ Because of the lack of evidence of actual use before

34 *Matcha v. Mattox*, 711 S.W.2d 95 (Tex. Ct. App. 1986), *cert. den.*, 481 U.S. 1024 (1987).

35 *Phillips Petroleum Co. v. State of Mississippi*, 484 U.S. 469 (1988).

36 *Fogerty v. State of California*, 231 Cal. Rptr. 810 (Cal.App.1986), *cert. den.*, 484 U.S.821 (1987).

37 *PPL Montana, LLC v. Montana*, ___ U.S. ___, 132 S. Ct. 1215 (2012).

38 *PPL Montana*, *supra* n. 29, 132 S. Ct. at 1231-32.

39 *North Carolina Department of Administration v. Alcoa Power Generating, Inc.*, 853 F.3d 140 (2017).

40 *Hardy v. State Land Board*, 274 Or. App. 262, 279, 360 P.2d 647 (2015), *rev. den.* 350 Or 550, 368 P.3d 25, *cert. den.* 137 S. Ct. 370 (2016).

statehood in 1859, the court examined post-statehood timber drives and present day recreational use by water craft with a similar draw to dug-out canoes commonly used by indigenous people before white settlement.⁴¹ The Oregon Supreme Court and the United States Supreme Court both denied review.

Although the Oregon case was decided on cross-motions for summary judgment, the New York Court of Appeals held that, notwithstanding the mutual desire of the parties, navigability is an inherently fact-intensive determination, with inconclusive or conflicting evidence regarding historical usage, ease of use by small craft, and other matters relating to use or susceptibility of use of the waterway at issue.⁴²

Public Rights to Navigable Waters

With increasing developmental pressures, the public's interest in navigable waters has received greater attention in recent years. Courts have affirmed the rights of the public to access and use of the waters of the states under a variety of theories, including expansion of the concept of navigability under state law,⁴³ the doctrine of implied dedication,⁴⁴ the public trust,⁴⁵ and the custom doctrine.⁴⁶ Although the traditional rule is that there is no public right of passage over private lands to the waters absent rights arising by implied or express deduction or custom,⁴⁷ the New Jersey courts have implied a right of access to the waters from the foreshore under the public trust doctrine.⁴⁸ On the other hand, an Oregon court held that there is no public right of access across a city-owned park to a water body held in public trust.⁴⁹ Most courts uphold portage as an incident of navigation.⁵⁰ Furthermore, some courts have held that the public rights to these

41 274 Or. App. at 287-288, 360 P.3d at 662-663.

42 *Friends of Thayer Lake LLC v. Brown*, 27 N.Y.3d, 53 N.E.3d 730 (2016).

43 *People ex rel. Baker v. Mack*, 97 Cal.Rptr. 448 (Cal.App. 1971).

44 *Gion v. City of Santa Cruz*, 465 P.2d 50 (Ca. 1970) (overruled by statute). The prescriptive rights doctrine has been linked with implied dedication in several cases. *E.g.*, *Seaway Co. v. Atty. Gen.*, 375 S.W. 2d 923 (Tex.App. 1964). *See Note*, 24 A.L.R.4th 294.

45 *Matthews v. Bay Head Improvement Ass'n*, *supra*; *Gunderson v. State*, 67 N.E.3d 1050 (2016).

46 *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969).

47 *Bolsa Land Co. v. Burdick*, 151 Cal. 254 (Cal. 1907).

48 *Matthews v. Bay Head Improvement Ass'n*, *supra*. Compare *Galt v. Montana*, 731 P.2d 912 (Mont. 1987) in which the Montana Supreme Court invalidated certain legislative expansions of the right to access to include such things as camping and big game hunting on private land.

49 *Kramer v. City of Lake Oswego*, 265 Or. App. 161, 395 P.3d 592, *rev allowed* 362 Or. 38, 403 P.3d 776 (2017). *But see City of Montpelier v. Barnett*, 49 A.3d 120 (Vt. 2012) (city could not enjoin use of a pond for recreation, although it could deny access to its adjacent land).

50 *Moore & Moore, Fisheries*, 96 (1903). *See Note, Water and Watercourses Right of Public*

waters include environmental protection, sun-bathing, surfing, and beach-driving⁵¹ as well as traditional nineteenth century trust purposes such as navigation, fishing and commerce. One court has held that the umbrella of the public trust extends to tributaries of larger rivers and lakes, since diversions or fills even from non-navigable streams will affect the navigable waters below.⁵² A Wisconsin court has applied public trust protections to wetlands bordering a lake.⁵³ The result is a broader than previously believed opportunity for the assertion of public rights in lakes, beaches, and ocean fronts for recreation and ecological preservation.

Application of the Public Trust Doctrine to Water Diversions

Some courts have held that the public trust doctrine requires decision-makers dealing with state water allocations to bear in mind their impact on the fisheries, wildlife, and environmental values on downstream navigable waters.⁵⁴ North Dakota has held that “the Public Trust Doctrine requires, at a minimum, a determination of the potential effect of the allocation of water on the present water supply and future water needs of this State.”⁵⁵

California expanded on this concept by holding that the state has “an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.”⁵⁶ California

Passage Along Great Lakes Beach, 31 Mich. L. Rev. 1134 (1933).

51 See *Van Ness v. Borough of Deal*, 352 A.2d 599 (N.J. Ch. Div. 1975), *rev'd on other grounds*, 367 A.2d 1191 (N.J. App. Div. 1976); *Marks v. Whitney*, 491 P.2d 374, 98 Cal. Rptr. 790 (Ca. 1971); cf. *Diana Shooting Club v. Husting*, 145 N.W. 816 (Wis. 1914); *Nies v. Town of Emerald Isle*, 780 S.E.2d 187 (N.C. App. 2015), *dismissed* 793 S.E.2d 699 (N.C. 2016), *cert. den.* 138 S. Ct. 75 (2017).

52 *National Audubon Soc'y v. Los Angeles Dept. of Water and Power*, *supra*, n.31. This principle logically would seem to apply to groundwater as well, particularly if there is an impact on surface waters. See *In re Water Use Applications: In re Water Use Permit Applications, Waiahole Ditch*, 9 P.3d 409 (Haw. 2000); *Symposium: Managing Hawaii's Public Trust Doctrine*, 24 U. of Hawaii L. Rev. 1 (2001).

53 *Just v. Marinette County*, 201 N.W.2d 761 (1972); H. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence? The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches*, 19 Harv. Envtl. L. Rev. 1 (1995), *but see* R. Ausness, *Regulatory Taking and Wetland Protection in the Post-Lucas Era*, 30 Land & Water L. Rev. 349, 403-404 (1995), suggesting that the Supreme Court's holding in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) is inconsistent with the reasoning in *Just* that a landowner has no inherent right to change the natural character of land.

54 *Waiahole Ditch*, *supra*; *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983), *cert. den.* 464 U.S. 977 (1983); *United Plainsmen v. N.D. State Water Conservation Comm'n*, 247 N.W.2d 457 (N.D. 1976).

55 *United Plainsmen*, 247 N.W.2d at 462 (N.D. 1976).

56 *Nat'l Audubon*, 658 P.2d at 728 (Cal. 1983).

also held that it is the obligation of the state to exercise continued supervision and control over the navigable waters of the state and the lands underlying them.⁵⁷ Going further, California held that in exercising its continuing supervisory power, the state is not confined by past decisions “which may be incorrect in light of current knowledge or inconsistent with current needs.”⁵⁸ California, accordingly, has the inherent power to reconsider past decisions, “even though those decisions were made after due consideration of their effect on the public trust.”⁵⁹

The contours of this doctrine, where it has been established, vary in accordance with each state’s public trust doctrine, which, in turn, varies in accordance with other elements of state law, including the law of real property.⁶⁰ In states where water rights are considered a vested property right, for instance, any impact on such rights occasioned by an application of the public trust doctrine may be adjudged a taking for which the state is required to compensate the owner of such rights.⁶¹ Additionally, where a federal court has exercised continuing exclusive jurisdiction over interstate waters, public trust claims should be brought in front of that court rather than through direct assertion of such interests in state courts.⁶²

The extent to which state legislatures can limit the application of the public trust to water right adjudications also remains an open question in many states. In 1996, for example, the Idaho legislature enacted a measure purporting to eliminate public trust considerations from state land and water allocations and authorize conveyances of submerged public lands.⁶³ While the validity of this measure has been questioned by legal scholars,⁶⁴ Idaho’s appellate courts have not yet weighed in on this statute. In contrast, an Arizona measure purporting to eliminate public trust considerations in water adjudications was invalidated by that state’s supreme court on grounds that the public trust doctrine is a

57 *Id.* at 721 (Cal. 1983).

58 *Id.* at 728.

59 *Id.*

60 To date, many states have not adopted doctrines similar to that in *National Audubon*, leaving uncertainty as to whether and how these doctrines might operate in such states.

61 *United States v. Walker River Irrigation Dist.*, No. 3:73-cv-00128-R CJ-WGC, 2015 WL 3439122 (D. Nev. May 28, 2015).

62 See *Mineral County v. State*, 20 P.3d 800 (Nev. 2001) (holding that the proper forum for redress of asserted failure to honor public trust obligations is the federal court which had issued a decree concerning interstate allocation of the waters at issue and which maintained continuing exclusive jurisdiction pursuant to such decree).

63 H.B. 794, 53d Leg. 2d Sess. (Idaho 1996), codified at IDAHO CODE § 58-1201 (1996).

64 M. Blumm, H. Dunning & S. Reed, *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794*, 24 Ecology Law Q. 461 (1997).

“constitutional limitation on legislative power to give away resources held by the State in trust for its people.”⁶⁵

Understanding Public Rights in Public Land

The nature and extent of the public trust duties imposed on the states has been the subject of extensive litigation.⁶⁶ Generally, courts have held that the trust interest held by the states for their people in lands underlying navigable waters is inalienable except with respect to parcels conveyed as part of a general scheme for harbor development or the overall furtherance of trust purposes.⁶⁷ Some states have ruled that statutes authorizing the conveyance of trust lands are construed strictly, and a legislative intent to extinguish the public trust interest must be express and unambiguous.⁶⁸ As a result, courts have sometimes held that where the fee to such lands has been conveyed they remained subject to the state public trust interest.⁶⁹ These principles have been applied to situations beyond navigable waters in some courts. Thus in *Gould v. Greylock Reservation Commission*,⁷⁰ the court applied a presumption that the state does not intend to divest trust properties (in that case a public park) so as to lessen public uses.

Boundary Determinations

Growing population pressures have led to litigation between state and other landowners, both governmental and private. Litigation has reflected a continuing

65 *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 215 (Ariz. 1999); see also *Defenders of Wildlife v. Hull*, 18 P.3d 722 (Ariz. Ct. App. 2001) (holding a statute unconstitutional because it reduced the scope of the public trust by altering the federal standard for navigability). *Contra Opinion of the Justices*, 424 N.E.2d 1092 (Mass. 1981) (“[T]he transfer or relinquishment of all the Commonwealth’s and the public’s rights in tidelands is not constitutionally beyond the power of the Legislature”).

66 This paragraph specifically focuses on the public trust doctrine as applied to lands under navigable waters and the rights of the public on the waters over such lands. The public trust doctrine should not be confused with the separate fiduciary trust in which a state may hold certain uplands such as school lands or granted lands.

67 See *Illinois Central Railroad v. Illinois*, *supra*; *City of Berkeley v. Superior Court*, 606 P.2d 362, 162 Cal. Rptr. 372, cert. den. sub nom. *Santa Fe Land Improvement Co. v. City of Berkeley*, 449 U.S. 840 Ca. (1980); *State v. Public Service Com’n.*, 81 N.W. 2d 71 (Wis. 1957).

68 *People v. California Fish Co.*, 138 P. 79 (Cal. 1913); *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 547-48 (1837).

69 *People v. California Fish Co.*, *supra*. *Priewe v. Wisconsin State Land & Improvement Co.*, 79 N.W. 780 (Wis. 1899).

70 215 N.E.2d 114 (Ma 1966). For an authoritative and oft-cited discussion of this case and the public trust doctrine generally, see J. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 63 Mich L. Rev. 471 (1970).

tension over whether federal or state rules should apply in boundary disputes. Generally, state law defines real property rights and determines boundaries.⁷¹ However, where the federal government is the adjoining landowner, it has been contended that federal law should govern. At statehood, the initial boundary between a state-owned river or lake bed and the upland is determined by federal law to be the ordinary high-water mark.⁷² Subsequently, a state is free to determine by state law whether to retain this boundary, to establish it at low-water mark, or to apply the doctrines of custom or prescription to extend public rights to the vegetation line.⁷³ The exception may be that federal law determines the boundary of coastal lands owned or patented by the United States prior to statehood.⁷⁴

Land boundary disputes with the federal government occur with some frequency because the United States is owner of one third of the real property within the nation. In the western states, where federal holdings often amount to half or more of the land within a state and lands granted to the states are checked throughout the federal holdings, the opportunity for conflict is intensified.

In line with the growing trend to seek judicial determinations of states' rights versus federal property rights, the federal Quiet Title Act⁷⁵ now facilitates law suits between state and federal governments over property. Prior to passage of that act, the doctrine of sovereign immunity prevented states and private parties from securing judicial determination of their property rights. Even after the Quiet Title Act was passed, applicability of the 12-year statute of limitations to longstanding controversies prevented their resolution. The ability of states to resolve these title disputes with the federal government was greatly facilitated by passage of amendments exempting state sovereign claims and claims to unimproved public lands from the 12-year limitations period.⁷⁶ A special committee of Attorneys General chaired by the Idaho attorney general successfully advocated congressional passage of these amendments.

71 *Shively v. Bowlby*, 152 U.S. 1 (1894).

72 *Barney v. City of Keokuk*, 94 U.S. 324, 338 (1877); *Hardin v. Jordan*, 140 U.S. 371, 381 (1891)

73 Issues relating to title to property are generally governed by state law. *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378-379 (1977). As to boundaries, see *Fogerty v. State*, 231 Cal. Rptr. 810 (Cal.App.1986), *cert. den.*, 484 U.S. 821 (1977) (State trust extends to artificially raised high water line on inland lake under prescriptive principles); *Application of Ashford*, 440 P.2d 76 (Haw 1968) (state trust lands extend to vegetation line); *Thornton v. Hay*, 462 P.2d 671 (Or.1969) (custom doctrine imposes state trust interests over dry sand beaches).

74 *California ex rel. State Lands Commission v. United States*, 457 U.S. 273, 280-81 (1982).

75 28 U.S.C. 2409a.

76 Pub. L. No. 99-598, 100 Stat. 3351 (1985).

State-Federal Relations

Disputes additionally have arisen between some states and the federal government over the extent of land retained by the federal government at statehood. Efforts to accommodate this concern began in 1805, when Ohio was granted public lands as partial compensation for the retention of federal lands within its borders. Since then, an extensive pattern of federal land grants and revenue sharing has emerged. Grants have been made for the support of the public schools, for universities and other institutions, and for the development of swamp, overflowed, desert and other unimproved lands.⁷⁷ In the case of the school land grants, such grants have been characterized as a “solemn agreement,” whereby the states relinquished their claims to the public lands in return for a representative sample of them.⁷⁸

A similar compromise was reached in the Mineral Lands Leasing Act of 1920, under which the states relinquished their claims to mineral-rich federal lands in exchange for their right to receive a share of the federal revenues from leases of the so-called “soft” minerals, e.g., oil, coal, gas, and potash. This has resulted in an enhanced state role in federal land management. As recipients of these not-inconsiderable revenues, states have standing to question leasing decisions of the Secretary of the Interior.⁷⁹ The states’ interest in on-shore federal leases have been recognized by Congress as well in the Federal Oil and Gas Royalty Management Act of 1982,⁸⁰ which provides for the delegation of federal audit functions to states and Indian tribes and authorizes states to sue directly for underpayments.

Offshore Resources

A federal-state dispute concerning ownership of lands underlying coastal waters arose in about 1950 in three cases involving California, Louisiana, and Texas.⁸¹ In the cases, the U.S. Supreme Court recognized that each state had rights and control over inland waters, but that the federal government had rights in and control over the “marginal sea” for the paramount power to protect national

77 A thorough discussion of these issues appears in P. Gates, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* (1968).

78 *Andrus v. Utah*, 446 U.S. 500, 507 (1980).

79 *Arkla Exploration Co. v. Watt*, 548 F. Supp. 466 (W.D. Ark. 1982), *aff’d*, 734 F.2d 347 (8th Cir. 1984).

80 30 U.S.C. 1701 *et seq.*

81 *United States v. California*, 332 U.S. 19 (1947), *United States v. Louisiana*, 339 U.S. 699 (1950), *United States v. Texas*, 339 U.S. 707 (1950).

security and engage in international affairs.⁸² In response, the U.S. Congress enacted the Submerged Lands Act⁸³ which confirmed and vested ownership of lands underlying navigable waters in the coastal states from the line of mean high tide seaward to a line three geographical miles from the coast.⁸⁴ The federal government retained, however, its powers to control commerce, navigation, floods, national defense, and international affairs on navigable waters regardless of whether the waters were inland or part of the marginal sea.⁸⁵

Increased federal pressure to lease the Outer Continental Shelf, submerged lands owned by the federal government seaward of state-owned submerged lands, has resulted in more controversy with the coastal states. Both the Coastal Zone Management Act (CZMA)⁸⁶ and the Outer Continental Shelf Lands Act Amendments of 1978 (OCS),⁸⁷ recognize the interest of states in offshore lease activities and provide for state input in leasing decisions by allowing comments on the decisions made by the Department of the Interior. Under the OCS Act, governors of states affected by a five-year plan or a specific lease sale are provided the right to make recommendations. While the Interior Department is directed to give special consideration to those recommendations, it is not required to accept a governor's recommendations.

The CZMA provides that federal activities "directly affecting" the coastal zone must be consistent with approved state coastal management programs. When the Department of the Interior attempted to extend existing oil leases without subjecting its action to state review under the CZMA, the Court of Appeals required it to do so.⁸⁸ This case appears to conflict with an earlier decision of the Supreme Court, *Secretary of the Interior v. California*,⁸⁹ where the Court held that Congress did not intend to mandate consistency review under the CZMA at the lease stage. Rather, such review would be required before full exploration or development may begin.

States retain considerable authority under the CZMA to review coastal projects requiring federal authorization. Under 307(c)(3) of the CZMA, applicants for federal licenses and permits for activities which will affect land or water uses

82 *United States v. California*, 332 U.S. at 32-8, *United States v. Louisiana*, 339 U.S. at 702-04, *United States v. Texas*, 339 U.S. at 717-18.

83 43 U.S.C. §§ 1301-1356a; see 1953 U.S. CONGRESSIONAL AND ADMINISTRATIVE NEWS 1386.

84 43 U.S.C. § 1301(a) and § 1311.

85 43 U.S.C. § 1311(d) and § 1314.

86 16 U.S.C. § 1451 *et seq.*

87 43 U.S.C. § 1345.

88 *State of California v. Norton*, 311 F.3d 1162 (9th Cir. 2002).

89 464 U.S. 312 (1984).

in the coastal zone must certify that the activity will be conducted in a manner consistent with federally approved coastal management plans. Section 307(c)(3) (B) specifically applies this test to applications for OCS oil and gas permits. If the affected state does not concur or is not conclusively presumed to concur because of the lapse of time, then the federal agencies may not issue permits to the applicant. As the Supreme Court noted in *Secretary of the Interior v. California*,⁹⁰ absent an overriding federal interest, states with approved management programs have a virtual veto over such applications for licenses and permits.

In the field of revenue sharing, Congress recognized the states' interests in offshore lease activities. In 1984, a federal district court in Texas held that states' statutory rights to a "fair and equitable" share of offshore revenues from a three-mile zone adjacent to state waters was intended to compensate states for onshore economic impacts and enhancement in value of federal tracts as well as merely drainage.⁹¹ Congress then amended the Outer Continental Shelf Lands Act to allocate 27 percent of the royalties from this zone of federal waters to the states adjacent.⁹²

Federal Landowner Versus State Regulator

The extent of the states' authority to regulate activities on federal land is frequently a source of dispute. As explained in *Kleppe v. New Mexico*,⁹³ Congress' authority over the public lands under the Property Clause of the U.S. Constitution⁹⁴ has generally been characterized as plenary or "without limitations." The states, however, retain jurisdiction to regulate activity on federal lands within their territory unless preempted by overriding federal legislation.⁹⁵ Thus the Supreme Court upheld the authority of states to regulate federal onshore lands in *California Coastal Commission v. Granite Rock Co.*,⁹⁶ in which the Court held, using traditional preemption analysis, that state environmental regulation was not precluded by federal land use statutes and regulations.

Most of the federal lands not devoted to conservation are managed under policies of multiple use and sustained yield pursuant to statutes like the Federal

90 *Id.*

91 *Texas v. Secretary of Interior*, 580 F. Supp. 1197 (E.D. Tex. 1984).

92 Outer Continental Shelf Land Act Amendments of 1985, Pub. L. No. 99-272, 100 Stat. 151, 43 U.S.C. 1301.

93 426 U.S. 529 (1976).

94 U.S. CONST. art. IV, § 3, cl. 2.

95 *Kleppe*, *supra*, at 543.

96 480 U.S. 572 (1987); *see also* *People v. Rinehart*, 377 P.3d 818 (Cal. 2016).

Land Policy Management Act of 1976 (FLPMA)⁹⁷ and the Multiple-Use Sustained Yield Act of 1960.⁹⁸ These Acts impose extensive federal planning obligations and require federal land managers to cooperate, consult, or coordinate with state and local officials. Nonetheless, the scope of the “coordination” and the required balance between federal versus state interests is highly contested.⁹⁹

FLPMA embodies a basic policy of retention, declaring that public lands may only be disposed of if disposal “will serve the national interest.” A constitutional attack on a moratorium preventing disposal of agricultural lands under this policy was rejected by the district court in *Nevada ex rel. Board of Agriculture v. Andrus*.¹⁰⁰

Land Use Regulation

The authority of state and local governments to regulate land use for aesthetic, health, and safety reasons has been consistently upheld by the courts.¹⁰¹ Even regulations which drastically limit the activities that a private property owner can conduct on property, and substantially reduce its market value, are usually upheld.¹⁰² Such regulations, however, must be rationally related to a legitimate state interest.¹⁰³

It was during the 1920’s that the judiciary first enunciated the view that excessive regulation of land could result in an uncompensated “taking” requiring compensation under the Fifth and Fourteenth Amendments to the U.S. Constitution.¹⁰⁴ Since that time, the Supreme Court has found that:

97 43 U.S.C. § 1701 *et seq.*

98 16 U.S.C. § 528 *et seq.*

99 See, e.g., H.R.J. Res. 44, 115th Cong. (2017) (disapproving “Planning 2.0” rule enacted in 2016 pursuant to FLPMA).

100 512 F. Supp. 166 (D. Nev. 1981), *aff’d on other grounds*, 699 F.2d 486 (9th Cir. 1983).

101 *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Berman v. Parker*, 348 U.S. 26 (1954); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

102 *Murr v. Wisconsin*, ___ U.S. ___, 137 S. Ct. 1933 (2017); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Andrus v. Allard*, 444 U.S. 51 (1979); and *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

103 *Schad v. Borough of Mount Ephraim*, 425 U.S. 61 (1981) (stating “[w]here property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property.”)

104 *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

State Attorneys General Powers and Responsibilities

- Regulations imposing a permanent physical occupation are takings *per se*.¹⁰⁵
- Regulations rendering property valueless are *per se* takings, unless the prohibition was based on “background principles of the State’s law of property and nuisance already placed upon land ownership.”¹⁰⁶

Regulations may be takings based on a weighing of factors articulated in *Penn Central Transportation Co. v. City of New York*.¹⁰⁷ These factors include the economic impact on the property owner, interference with the owner’s investment-backed expectations, and the character of the governmental action.¹⁰⁸ Permit conditions imposed on a case-by-case basis, requiring owners to dedicate real property to the public, may be takings unless there is an “essential nexus” and “rough proportionality” between the dedication and a project’s impacts.¹⁰⁹

To establish a taking, a plaintiff must demonstrate that his property was physically occupied by the government or regulated in such a manner as to be the equivalent of a physical occupation.¹¹⁰ Additionally, a taking occurs if there is a recharacterization of what was once private property as public property.¹¹¹

105 *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). *See also Horne v. Dep’t of Agriculture*, ___ U.S. ___, 135 S. Ct. 2419, 2426-28 (2015) (appropriations of private property whereby the government asserts ownership or absolute dominion, whether or not a physical occupation occurs, is treated a permanent physical occupation).

106 *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (holding that a regulation which completely eliminates the economic use of land is a *per se* taking). *See also Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (providing that moratoria which eliminate all economic use while in effect do not constitute *per se* takings) and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (stating that a total taking may result even when “the landowner is left with a token interest.”). “Background principles” include a wide variety statutes and common law which present “common, shared understandings of permissible limitations derived from a State’s legal tradition.” *Palazzolo*, 533 U.S. at 630 (citing *Lucas*, 505 U.S. at 1029-30).

107 438 U.S. 104 (1978).

108 *Id.* at 124. If the landowner retains more than a token interest, the takings determination is made under the *Penn Central* test. *See Palazzolo*, 533 U.S. at 631. Findings of a taking under this test are rare as the determination of a taking requires an examination of the parcel as a whole. *See Murr v. Wisconsin*, ___ U.S. ___, 137 S. Ct. 1933, 1949 (2017). Moreover, the loss required in order to constitute a taking is severe and a mere diminution in value is insufficient to establish a taking. *Id.*

109 *See Koontz v. St. Johns River Water Mgmt. Dist.*, ___ U.S. ___, 133 S. Ct. 2568 (2013), *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

110 *Lingle*, 544 U.S. at 539.

111 *Stop the Beach Renourishment, Inc. v. Florida Dep’t of Env’tl Protection*, 560 U.S. 702, 713

The Supreme Court has held that it does not matter who the state actor is exercising the authority to impose a taking; rather it only matters that taking has occurred.¹¹² The interference or harm suffered must be the direct result of the challenged government action.¹¹³ Further, when determining whether a taking has occurred, the courts look at the parcel as a whole.¹¹⁴ The remedy for such governmental interference with a property is usually “just compensation.”¹¹⁵ If, however, the governmental action was not taken for the purpose of public use, invalidation may be a potential remedy.

While the Supreme Court has refused to establish a set formula to determine which regulations go so far as to result in a taking, the Court has continually refined what constitutes a taking and how a taking is determined. Ending a decade of judicial confusion, the Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*¹¹⁶ held that property owners are entitled to monetary compensation if their property has been even temporarily “taken” by government regulation.¹¹⁷ *First English* expressly rejected the concept that mere invalidation of the offending measure represented the exclusive and fully adequate constitutional remedy.¹¹⁸ The Court’s holding further provides, however, that a determination that a taking has occurred does not prevent the governmental authority from amending or rescinding the regulation which resulted in the taking, though the government will still be required to provide compensation for the period the taking had occurred.¹¹⁹ Nonetheless, temporary ordinances or moratoria on development, as well as ordinary delays attributable to administrative review, remain valid so long as a demonstrable need is shown and the moratorium period is reasonable.¹²⁰

(2010).

112 *Id.* at 715 (“If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.”)

113 *See Omnia Commercial Co. v. United States*, 261 U.S. 502, 510 (1923).

114 *Murr*, ___ U.S. ___, 137 S. Ct. at 1944.

115 U.S. CONST. amend. V.

116 482 U.S. 304 (1987).

117 This class of takings is also evaluated under the *Penn Central* test. *See Tahoe-Sierra*, 535 U.S. at 321. *See also Arkansas Game and Fish Comm’n v. United States*, 568 U.S. 23, 33–34 (2012).

118 *First English*, 482 U.S. at 321.

119 *Id.*

120 *Tahoe-Sierra*, 535 U.S. at 335. *See also* M. Armand & D. Merriam, *Defensible Moratoria: The Law Before and After the Tahoe Sierra Decision*, 43 *Natural Resources J.* 703 (2003) and Meltz, Merriam & Frank, *The Takings Issue* 272–280 (Island Press 1999).

The United States Supreme Court has also rejected the contention that a regulation could be attacked on the independent ground that the regulation “does not substantially advance legitimate state interests.”¹²¹ In so holding, the Supreme Court found that the “substantially advances” test, while logical in a due process context, is not appropriate for determining whether a taking had occurred.¹²² Rather, the Court held that a takings determination must focus on the “magnitude or character of the burden a particular regulation imposes upon private property rights.”¹²³ In another significant decision, *Kelo v. City of New London*,¹²⁴ the Court reaffirmed its jurisprudence holding that “public use” is to be defined broadly as “public purpose.”¹²⁵ The Court also reaffirmed its policy to defer “to legislative judgments in this field.”¹²⁶

The Supreme Court has also continued to define what constitutes the parcel as a whole. In *Murr v. Wisconsin*,¹²⁷ the Court stated that “property rights under the Takings Clause should be coextensive with those under state law,” however, state law does not control the issue.¹²⁸ Rather, the Court held that many factors should be considered with “substantial weight [given] to the treatment of the land, in particular how it is bounded or divided, under state and local law.”¹²⁹ Courts are also instructed to consider the physical characteristics of the property and “the effect of burdened land on the value of other holdings.”¹³⁰

It should be noted that state constitutions and statutes may afford greater protections than those provided by the United States Constitution.

CONCLUSION

The role of the attorney general in defining and defending public lands is not an easy one. The legal principles are often arcane and complex. They demand invocation of the doctrines of federalism, the police power and takings as well as

121 *Lingle*, 544 U.S. at 531-32.

122 *Id.* at 541.

123 *Id.* at 542.

124 *Kelo v. City of New London*, 545 U.S. 469, 480 (2005).

125 *Id.* at 482-83.

126 *Id.* at 489.

127 ___ U.S. ___, 137 S. Ct. 1933 (2017).

128 *Id.* at 1944.

129 *Id.* at 1945.

130 *Id.*

traditional real property law. But the work can be some of the most important in the attorney general's office because the stakes are high and the results often irreversible. Adding significance to this work is the realization that a great part of these lands and waters are subject to the public trust, a doctrine that, as the California court said in *National Audubon*, is "an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands."

Courtesy Chapter