owner is the only visible remedy for
these situations.”

Leopold also said that an ethic evolves; it is not written. Thus, a wetland ethic need not be restricted to private landowners or even to landowners. All people in all organizations benefit from wetlands; in return, we can all respect wetlands and facilitate their ecosystem services. Here are four ways to facilitate the evolution of a wetland ethic: (1) acknowledge that wetlands provide multiple functions that enhance human well-being at rates far greater than their global area indicates; (2) accept obligations along with benefits of wetlands; (3) support conservation and restoration of wetland biota and natural functions for posterity; and (4) realize that watersheds upstream will also need restoration, in order for downstream wetlands to be more restorable.

A wetland ethic would foster understanding that protection means more than setting regulations and promising enforcement. A wetland ethic would add voluntary responsibility for ecosystems because they provide services well beyond the small area of earth that they occupy. At the same time, wetland restoration efforts could expand and strengthen.

—Joy Zedler

LAW & POLICY

The Trust Abides

Powerful, persistent, and perpetually surprising. Four words that describe the public trust doctrine (PTD) in American law. Most lawyers never encounter it, and it is quite possible to complete three years of law school without ever hearing of it. Nonetheless, if ever it was a mistake to equate obscurity with irrelevance, the PTD would be a blazing example.

The PTD, reduced to its essence, stands for the proposition that some aspects of our natural world have to be managed for the benefit of the public at large. It both limits what sovereigns can do with those resources and imposes affirmative stewardship duties on governments. Since these duties and limits generally are not found in statute books or constitutions, it is often surprising when the PTD comes to the table. What is this doctrine, where does it come from, and why should it matter to you?

The PTD’s first mention in American jurisprudence did not come until 1892 in the U.S. Supreme Court’s landmark decision in Illinois Central Railway v Illinois.1 The state of Illinois conveyed, via an act of the legislature, a swath of Lake Michigan to the railroad so it could fill in the lake, build rail lines, and make money. Later, the state rethought the deal and decided it wanted the lake back. Seller’s remorse in this case worked. It worked because, though the state owned the lake bottom, the Supreme Court concluded the state, as a matter of law, could not transfer that land into private hands. Under what law? After all, there was nothing in the Illinois Constitution forbidding it, and the legislature had specifically authorized the transfer. According to the Court, the state’s title to the lake bottom was not the same as its title to land that is high and dry, but was held in trust for the public—a trust that the state could not abrogate.

The trust character of public water bottoms, while often reduced to statute these days, is a background principle of American law, coming to us from our English, French, and Spanish legal traditions. Simply put, not even kings could own the seas, navigable rivers, their banks, and shores in ways that excluded certain public uses such as fishing, sheltering, and the maintenance of boats and nets. In a world organized around maritime navigation, this was a fundamental part of the bargain between sovereign and subject. Allowing navigation, but denying the use of waters, banks, and shores, would be akin to allowing people to live, but denying them the right to breathe because the air was the king’s private property. This, the Court said, was the PTD.

It is important to stress that the Court did not conjure the PTD out of thin air, but from fundamental principles of sovereignty that predated, and were not supplanted by, American independence and the U.S. Constitution. It is even more important to stress that, though navigable water bottoms were the context for first

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describing the PTD, they are neither the measure nor limit of the doctrine. Mapping the contours and boundaries of the PTD remains elusive. The trust has variably been described as a state-law doctrine and a universal principle of law. It has been used to curtail development, while at other times accommodating it.

And it has been described as applying only to navigable waters/water bottoms as a matter of state law and as a flexible doctrine that changes with time, manifests as federal law, and that covers non-navigable tributaries, the right to fish, wildlife, and even air. This confusion is more a reflection of the infrequent manifestation of the doctrine than of an actual lack of coherence and vitality. These occasional glimpses of the PTD do not allow for seeing the fullness of the doctrine. Another factor may be that for much of our nation’s life, the relationship between people and nature did not lend themselves to trust discussions. When we were fewer in number and natural assets were more plentiful and less understood, the conflicts and decisions that today might trigger the application of the PTD just did not present themselves often or well, but times change, and the PTD abides.

Since the mid-20th century, the PTD has taken on a broader role, though not always by name. Whether one is talking about the federal navigation servitude, state levee servitudes, the “paramount interest doctrine” (that allowed the federal government to claw back coastal oil and gas lands from the states in the late 1940s), or the inclusion of tidal waters, when presented with fundamental societal interests in natural resources, the courts have shown a remarkable willingness to ground governmental action or jurisdiction on a reserved property or administrative interest rather than on some constitutional clause or statutory authorization. Private rights can and do exist in those same natural assets, but they are always subject to a sovereign interest that is limited in scope and purpose.

That dominant sovereign interest—and duty—rarely shows up in title searches, statute books, or lien records. Therefore, many believe that the PTD is contrary to private-property rights and is somehow un-American. Even the very sovereigns it constrains or compels often resist the PTD because it limits what they thought had been their legal and political prerogatives. Indeed, the PTD persists even when those who would benefit from it are unaware of it. It persists even when governments and private interests want to make a deal involving assets within the trust. And it persists through changing conditions that result in the trust being asserted in a given case even though it was not asserted in the past. The PTD is a fundamental check on the power of sovereigns to alienate or manage natural resources within its reach.

“The public trust doctrine is a fundamental check on the power of sovereigns to alienate or manage natural resources within its reach.”

Endnotes

8. E.g., Illinois Cent., 146 U.S. at 387.
12. E.g., Pa. Const. art. I, §27 (to wit, the people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people); Sanders-Reed v. Martinez, Case No. 33110 (N.M. Ct. Mar. 12, 2015) (a recent case that held that its PTD extends to the atmosphere).