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ESSAYS

Unprecedented water shortages in the Western United States have led to similarly unprecedented attempts to restrict water usage, some of questionable legality. In this article, Ninth Circuit Court of Appeals Judge Milan D. Smith, Jr. surveys the state of water shortages, government responses thereto, and the history of water rights in the United States. He then considers whether the public trust doctrine, which the United States inherited from the English common law, might be employed to change the way water is used and distributed. Judge Smith examines how such a use of the doctrine compares to earlier applications, and how other procedural and substantive laws may affect attempts to litigate water cases employing the public trust doctrine. The article closes with questions about the role of the judiciary, federalism, and the Constitution in the application of the public trust doctrine.

This paper responds to Professor Richard Lazarus's recent and longstanding criticisms of the public trust doctrine, claiming that Richard misunderstands the nonabsolutist nature of the doctrine, which seeks accommodation between public and private property. Although he acknowledges the value of the public trust doctrine as a defense to claims of private takings, he thinks that the "background principles" defense it affords government regulators is a static doctrine. And he fails to see that the public trust doctrine hardly equips courts with the authority to displace legislative and administrative decision makers. Instead, as epitomized in the well-known *Mono Lake* decision, the doctrine—an inherent limit on all sovereigns—requires those more representative branches to exercise

ARTICLES

Global climate change will increase inland and coastal flooding, and strain already stressed flood damage prevention and mitigation systems. In the face of Congressional unwillingness to deal with the increased flood risks, the Obama Administration has undertaken several initiatives to support local resilience in the face of climate change-induced floods and sea level rise. We place these initiatives in the context of existing flood control and insurance programs which encourage moral hazard behavior. We argue that the reforms are promising, but the Obama Administration's approach is severely limited because the existing patchwork of flood-related legislation remains unreformed. The current, competing missions could hinder the reforms' effectiveness. The federal government's lack of a comprehensive climate change response and its retreat from flood control spending pushes the problem to local governments that must cope with increased flood events. Local governments, however, face their own political, fiscal, and legal barriers to adapt to the increased risks of climate change-induced floods. In this constrained environment, the federal government should induce local governments to align their land-use policies with emerging federal policies.

Local governments should lead on flood management because they are on the front lines of flooding; they also can most readily control land-use to manage floodplain development, a key strategy for reducing flood damage. We can no longer rely almost exclusively on structural solutions to coastal sea level rise, storm surges and inland floods. Science does not support this position. The federal and state governments must encourage integrated flood management by providing guidelines and increasing incentives. The proposed federal flood risk management standard, new commitments to regional climate data collection, and existing federal grant programs—such as hazard mitigation planning grants and community block development grants—can provide important direction to local governments. Takings jurisprudence has the potential to chill these efforts. Courts also need to incorporate the moral hazard concept into takings analysis to support beneficial land-use policies that suit a climate-changed world.

Ultimately, the United States should move toward the European Union's risk-based flood management approach and adopt integrated floodplain and coastal management in a comprehensive federal statutory scheme. Federal involvement in flood management can prevent disparity between states and provide an integrated structure that works across states lines.

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