

# PROTECCIÓN DE LA NATURALEZA Y UNA NUEVA CONSTITUCIÓN PARA CHILE: LECCIONES DE LA DOCTRINA DEL **PUBLIC TRUST**

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# Protección de la naturaleza y una nueva Constitución para Chile:

## Lecciones de la doctrina del *Public Trust*.

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# **PROTECCIÓN DE LA NATURALEZA Y UNA NUEVA CONSTITUCIÓN PARA CHILE:** LECCIONES DE LA DOCTRINA DEL *PUBLIC TRUST*

## **THE PROTECTION OF NATURE AND A NEW CONSTITUTION FOR CHILE:** LESSONS FROM THE PUBLIC TRUST DOCTRINE



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## SUMMARY OF KEY POINTS

### PURPOSE OF REPORT

The purpose of this report is to examine the concept of the Public Trust Doctrine and consider whether its principles might be incorporated into the new Chilean Constitution in order to provide greater protection of the natural environment.

### HISTORY OF THE PUBLIC TRUST DOCTRINE

The Public Trust Doctrine is an ancient legal concept that can be traced from Roman law and the British Magna Carta to the present. Initially, in the modern era it applied only to navigable rivers and shorelines. Over the past 60 years courts, legislatures and constitutions throughout the world have expanded the doctrine to extend to a wide range of natural resources, including ecological services.

### THE PUBLIC TRUST DOCTRINE TODAY

The Public Trust Doctrine holds that natural resources are held by the State “in trust”, that is, owned by and for the people for the benefit of all citizens including future generations. The State has a special duty to protect these resources and cannot dispose of them (for example by the granting of “concessions” or “rights”) without also continuing to protect the public interest. Thus, private rights (in fresh water, for example) must “accommodate” the public interest in a healthy, sustainable environment.

### CONTEXT

In response to social unrest and a deep political crisis, including dissatisfaction with current laws for the protection of nature the citizens of Chile initiated a unique, historic process to draft a new Constitution. This has generated high expectations for environmental reform.

### DEFICIENCIES IN THE CURRENT CONSTITUTION

Although the existing Constitution contains several concepts such as “national assets for public use” and the “social function of property” and the “doctrine of public ownership” that bear a similarity with the Public Trust Doctrine, the current Constitution does not clearly establish an affirmative duty on the part of the State to ensure the protection of natural resources for the benefit of the public including future generations. Nor does it ensure that citizens may enforce these existing promises of protection.

### ROLE OF THE COURTS IN THE US AND IN CHILE

Courts in countries such as the United States with a “common law” tradition have been active in expanding the Public Trust Doctrine. Chile has a “civil” or “continental law” tradition where the courts are more constrained and unlikely to apply the Public Trust Doctrine on their own. Therefore, the better course in Chile is to make public trust principles explicit in the Constitution and ensuing enabling statutes and administrative regulations.

### CITIZEN ENFORCEMENT

An essential feature of the Public Trust Doctrine is that it is enforceable in the courts by citizens on behalf of the public.

### PREVENTING MONOPOLIES

Another feature of the Public Trust Doctrine is that it prevents the State from creating private monopolies in public resources.

### COMPATIBLE WITH PRIVATE PROPERTY RIGHTS

The Public Trust Doctrine is compatible with strong private property rights. As with “national assets for public use” and the “social function of property” public and private interests can and do co-exist.

### EXAMPLE OF A CONSTITUTIONAL EXPRESSION OF THE PUBLIC TRUST DOCTRINE

The report gives several examples of constitutional clauses embodying the Public Trust Doctrine, including this language from the U.S. State of Pennsylvania, which could be used as a model:

*“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.”*

### RECOMMENDATION

This report recommends strengthening environmental protection through the inclusion of a clause in the new Constitution that is inspired by the Public Trust Doctrine. Such a clause should (1) establish a duty on the part of the State and its subordinate agencies to protect nature (including the integrity of terrestrial, marine and freshwater ecosystems) for the health and benefit of the public including future generations, and (2) provide that when it is in the public interest to allow the private appropriation of natural resources, the State has a duty to assure that such private use accommodates the public interest. The Constitution should also enable citizens to enforce the public trust in courts and in administrative agencies. It is important that the Constitution specifically establish a duty that binds the government and is enforceable by citizens.

### FOR FURTHER CONSIDERATION

The Public Trust Doctrine is relevant to other topics not explored in the current report, such as indigenous rights, the rights of nature, and adaptation to sea level rise and climate changes.

# INTRODUCTION

This report is the product of a collaboration between legal scholars in Chile and the United States organized by the Chile California Conservation Exchange (CCCX) to examine the Public Trust Doctrine and consider whether the doctrine or something similar might be incorporated into the new Chilean Constitution in order to provide greater protection for nature. (The Chilean authors variously used the terms *medio ambiente* (environment), *recursos naturales* (natural resources), and *naturaleza* (nature). Generally, they preferred the broader term *naturaleza* (nature) when discussing what the Public Trust Doctrine might protect.)

In recent years the CCCX has convened a series of conferences for California and Chilean public officials, academics and NGO staff to exchange information on conservation and environmental issues of mutual interest such as coastal planning, marine conservation, landscape protection and conservation philanthropy. Coincidentally, the third CCCX conference in Marshall, California, convened in late October 2019, just as civil unrest was breaking out in Chile. The social protests which continued into the early months of 2020 and the onset of the covid-19 pandemic led to a constitutional reform process that is now underway. With travel restrictions and the opportunity to explore potential innovations in conservation afforded by the constitutional process, the CCCX proposed this exploration of the Public Trust Doctrine in lieu of a 2020 conference.

The Public Trust Doctrine holds that certain natural resources are inalienable and held by the sovereign “in trust” for the benefit of the public, including future generations. It is a bedrock principle of environmental law in California and many other jurisdictions in the United States and internationally, but is not currently present in Chilean law. This paper addresses the question of whether the Public Trust Doctrine could enhance Chile’s capacity to better protect its extraordinary natural resources.

To address this question a multidisciplinary group of scholars in the United States came together via *videoconferences* from April to September 2020 to produce, under the lead authorship of Prof. Michael Blumm, an informal “white paper” on the Public Trust Doctrine – its history, judicial development, applications, and current constitutional expressions. The white paper was then shared with a group of 16 lawyers from eight universities throughout Chile who produced this report which addresses the challenges and potential benefits of incorporating the Public Trust Doctrine into a new Chilean Constitution.

Meanwhile, the constitutional process is proceeding. The first step was a plebiscite held on October 25, 2020, at which an overwhelming majority of Chilean voters (78%) decided that a new Constitutional Convention will draft a new Constitution. Notably, the level of approval rose to 89% in the so called “sacrifice zones” (designated areas of the Country with a high concentration of polluting industries) thus demonstrating a profound desire for change. Delegates to the Constitutional Convention will be elected in May 2021.

We hope this report is a useful contribution to the national discussion leading to improvement in the use, management and care of nature for the benefit of all Chileans, including future generations.



# **PART ONE**

## ENVIRONMENTAL PROTECTION IN CHILE AND THE CONSTITUTIONAL PROCESS

Salto de Apoquindo, Chile. By Proyecto Protege

## **1. The Opportunity presented by the Constitutional Process**

Considered until recently to be one of the most stable democracies in Latin America, Chile in late 2019 experienced the most radical and violent civil unrest it had seen since democracy was restored in 1990. For many, the crisis was completely unexpected. Others however, had warned of an urgent need for reforms. Deep structural inequalities were subsumed in the promise that democracy alone would deliver well-being to all sectors of society during the first two decades following the return to democracy. However, starting with massive student protests in 2011, the past decade saw a growth in social unrest that finally erupted with the demonstrations in October 2019. These continued into 2020 and were muted only with the onset of the Covid-19 pandemic.

To restore peace and stability, Chile's political parties came together to propose a constitutional process, the result of which could be a new Constitution to replace the existing 1980 Constitution. The Agreement of November 15, 2019, which was later transformed into constitutional reform legislation, sets out a three-stage process. The first stage consisted of a plebiscite to determine whether the public wanted a new Constitution and, if so, what type of body should draft it. The alternatives were a Constitutional Convention made up entirely of delegates elected by the citizens in accordance with a unique electoral system requiring gender parity, or, a mixed Constitutional Convention, comprised of both newly elected delegates and legislators currently in office. On October 25, 2020, Chilean voters decided "yes" by a vote of 78% and also opted for a Constitutional Convention made up of newly elected delegates.

The need for a new Constitution has been hotly debated in Chile for at least the past 10 years. A process of constitutional reform was initiated during the last Bachelet Administration from 2015 to 2018, but it did not replace the current Constitution. In the eyes of its critics, the current Constitution stifles the country's ability to address social needs, including environmental protection, while protecting entrenched economic interests.

In May 2021, elections will be held to select the members of the Constitutional Convention, which will sit for 9 months (with the possibility of a 3-month extension). It has the sole function of drafting a new constitutional text, and then will be dissolved. The text produced by the Constitutional Convention must be approved by two thirds (2/3) of its members. This will give way to the last stage of the constitutional process, namely, a second plebiscite in which the text agreed upon by the Convention will be approved or rejected by the citizens. If approved, the new text will replace the current 1980 Constitution. If rejected, the 1980 Constitution will remain in place.

## **2. The Environment as a Constitutional Issue**

The demand for greater and better protection of the environment has been growing in Chile since at least 2004 following a massive die-off of swans at the Carlos Anwandter Sanctuary in the city of Valdivia caused by contamination from a nearby pulp mill. The incident led to widespread protests and a change in the public's awareness of environmental issues. This sentiment began to be reflected in presidential programs, court rulings, institutional changes, and the emergence of other environmental campaigns – notably, the successful *Patagonia Sin Represas* (Patagonia Without Dams) campaign that stopped construction of the HidroAysén project, which was to include five dams and hydroelectric plants on the Baker and Pascua rivers in Chilean Patagonia. Judicial rulings in favor of the environment also began to occur more frequently. Starting with the well-known Campiche case (2009), in which the Supreme



Court invalidated a permit for a coal-fired power plant in the City of Valparaíso,<sup>1</sup> the courts shifted in their treatment of environmental conflicts by more intensively reviewing records and giving less deference to government experts. Meanwhile, institutional change came with the modification of the National Environmental Framework Law in 2010 (Law 20,417) creating the Ministry of the Environment, the Environmental Impact Evaluation Service, and the Superintendency of the Environment. An additional component of the overhaul was completed in 2012 with the creation of a system of specialized Environmental Courts (Law 20,600).

However, these institutional changes have not generated significantly better results and citizens have continued to demand greater environmental protection. This has been documented in various studies, including Carranza et al. (2020), which identified 238 socio-environmental conflicts generated by investment projects between 2008 and 2018<sup>2</sup>; the map of socio-environmental conflicts of the National Institute of Human Rights, which to date documents the existence of 118 environmental conflicts throughout the country<sup>3</sup>; and a survey that in 2019 placed Chile among the countries in the world with the worst public perception of the state of the environment, with 80% of the public stating that the environment is in a bad or very bad state.<sup>4</sup>

This public perception has manifested itself at the constitutional level with unusual force. Despite the absence of any organized campaign, protection of the environment emerged as one of the highest priority and most selected concepts in the unsuccessful constitutional process initiated during the last Bachelet Administration. More recently, this phenomenon was repeated in the self-convened councils that took place in various parts of the country after the outbreak of social unrest in October 2019, where at least 65% of the councils listed the environment among their priority issues.<sup>5</sup>

### 3. The Current Chilean Constitution and Protection of the Environment

That protection of the environment has emerged as an important issue on the constitutional agenda reflects the perceived weakness of both the current Constitution and the institutional framework for the protection of the natural features of the environment. To understand these deficiencies and identify ways to overcome them in a new Constitution, it is important to understand (1) the existing constitutional provisions relating to the protection of the environment, and (2) the legal regime for the ownership of natural resources.<sup>6</sup> It is also important to note that while the Constitution refers to the environment in its natural or physical aspects, the National Environmental Framework Law (Law 19,300) defines environment more broadly as a system that also includes human and sociocultural components.

With regard to environmental protection, the principal feature of the Constitution is the establishment of a fundamental right to live in an unpolluted environment. Article 19, No. 8(1) states: “The Constitution guarantees all persons the right to live in an environment free of contamination. It is the duty of the State to ensure that this right is not jeopardized and to ensure the preservation of nature.” This individual right is accompanied by a constitutional remedy. Article 20, No. 2 provides for recourse to the courts “when the right to live in a pollution-free environment is affected by an unlawful act or omission attributable to a particular authority or person.” (This remedy is referred to as a *recurso de protección*.)

1 Correa vs. Comisión Regional del Medio Ambiental of Valparaíso, No. 1219-09.

2 Carranza and others (2020).

3 <https://mapaconflictos.indh.cl/#/>

4 <https://www.ipsos.com/es-cl/chile-es-el-pais-en-que-mas-ha-crecido-la-preocupacion-por-el-cambio-climatico>

5 Francisca Reyes in seminar “Una Constitución Ecológica como vía hacia Mejores Políticas Ambientales”. [https://www.youtube.com/watch?v=Gbzfm0SUBmA&ab\\_channel=ONGFIMA](https://www.youtube.com/watch?v=Gbzfm0SUBmA&ab_channel=ONGFIMA)

6 See Hervé (2015); and Hervé and López (2020).

It is important to note in the context of this discussion of the Public Trust Doctrine that while the Constitution directly refers to protection of the environment in the phrase “ensure the preservation of nature,” it is a brief and vague reference within the context of the document that has had very limited application in practice. It applies only to the State, and places no limitations on individuals or private entities, and additionally applies only to the natural elements of the environment. In practice, the State incorporates environmental protection through sectoral legislation for natural resources (such as forestry, fishing, or water) and only when the law and regulations impose specific obligations or duties.

In Article 19, No. 8 the Constitution addresses potential conflicts between environmental protection and other fundamental rights, and establishes that environmental protection may require limitations on these other rights, stating: “The law may establish specific restrictions on the exercise of certain rights or freedoms to protect the environment.” Those “certain rights or freedoms” that may be restricted to prevent environmental contamination include property rights and the right to carry out economic activity.

Finally, the Constitution recognizes a limitation on private property called “the social function of property.” Article 19, No. 24 provides: “Only the law may establish the manner by which property may be acquired, used, enjoyed and disposed of, and the limitations derived from its social function. Said function includes all the requirements of the Nation’s general interests, national security, public use and health and the conservation of environmental patrimony.” Such limitations may be imposed, without compensation, based on the “conservation of environmental patrimony.” Although there have been several judgments of the Constitutional Court applying such limitations, they have been controversial and have not, in practice, established a national legal norm of environmental protection that constrains individual economic rights.

Perhaps the main weakness of the Constitution’s environmental protection provisions is that they do not incorporate a public dimension of environmental protection. That is, they do not establish a collective, general interest in addition to an individual interest. Only individuals can assert claims based on this constitutional regime, and they can only do so if their own interests have been directly affected. Additionally, as will be seen, the Legislature has not imposed many limitations or restrictions on other constitutional guarantees, such as economic freedom and private property rights which are particularly strong in Chile.

With regard to legal ownership of natural resources, it is important to mention the so-called “public economic order” established by the 1980 Constitution. This refers to a short list of fundamental economic principles that enjoy very strong constitutional protection. Especially expansive are the rights to private property and to freely undertake private economic activity, with strict limits on government economic activity and regulation.<sup>7</sup> Article 19, No. 23 of the Constitution provides: “The Constitution guarantees to all persons: Freedom to acquire ownership over all types of property except that which nature has made common to all men or which should belong to the entire Nation, and the law declares it so. ... When the national interest demands it, a law passed by a qualified quorum may establish limitations of requirements for acquiring ownership over specific property.” Through this constitutional provision, the free appropriation of property is enshrined as a general constitutional principle, thus elevating the right of private property over natural resource protection as the general rule of the legal system. The exceptions to this general rule are goods “that nature has made common to all men,” and those “that must belong to the Nation and the law declares it so.” Therefore, the exceptions to the general rule of private acquisition extend only to natural resources that are in the public domain, and the Legislature may determine which categories of property may not be privatized.

7 Carl Bauer (1998) *Against the Current: Privatization, Water Markets and the State in Chile*, pp.11-31, “Blueprint for the neoliberal model: Law, economics, and politics in the 1980 Constitution.”



The Chilean Constitution has special provisions for mineral resources. Article 19, No. 24(6) provides that the State has “absolute, exclusive, inalienable and imprescriptible ownership over all mines.” Water ownership, on the other hand, is not regulated by the Constitution, but instead by the Water Code – as well as the Civil Code from long before – which establishes that water is a “national good for public use.” The same can be said with respect to other categories of natural resources, such as those along the coastline and geothermal energy. A key provision of the Constitution is its guarantee of private property rights to those to whom the State has granted the use of water and mineral resources. In other words, in its role as owner of certain natural resources, the State can allow individuals to use and exploit them through so-called “concessions over public property.” Mineral resources are referred to as “mining concessions.” In the case of water, they are called “water use rights.” The Constitution, in Article 19, No. 24, protects these concessions as private property: “The rights of private citizens over waters, recognized or constituted in conformity with the law, shall grant proprietorship to the owners thereof.”

This constitutional formula is key to understanding the legal regime for the management of natural resources and the protection of the environment, since the privatization it recognizes severely restricts the powers of the State. For example, under the Water Code water use rights are granted free of charge in perpetuity, with no obligation to regulate the use for which they were granted, with no possibility of being reviewed over time, and with no consideration of the continuing public interest.<sup>8</sup> Thus, we have a situation where the State’s power to protect publicly owned natural resources is subordinate to the private property rights of individuals.<sup>9</sup> It has been argued that the Water Code is not actually code for water management, but instead a system for the allocation of private “rights” in water use. At heart, the current water law does not attempt to protect the water resource but instead focuses only on the freedom to use it and its defense as private property.<sup>10</sup>

In sum, Chile faces a scenario of ongoing political crisis leading to the opening of a process for constitutional reform. At the same time there is a proliferation of environmental conflicts and a widespread public sense that there is insufficient protection of the environment, and a diagnosis that the current Constitution is not only too weak in environmental terms, but in practice prevents robust governmental protection of the environment and nature. In the global context, protection of the environment has come to the fore as an urgent priority for the sustainability of life on the planet, and for future generations of humans in particular. The principle of intergenerational justice calls for stronger measures to defend the environment.

The development of environmental protection concepts inspired by the Public Trust Doctrine may offer tools for the design of new constitutional provisions that can adequately respond to the problems we have identified above.

8 Perpetuity that – as Hervé (2015) warns – implies in practice the privatization of the natural resource. Property protection of these rights, in the Constitution, has served as an argument to defend “the protection of the intangibility of water rights” (Vergara, 2002) and, therefore, finally, with few exceptions, the water authority is only endowed with general environmental powers or rather “lateral” protection tools, which has resulted in the government’s protection obligation being “adrift” until now (Costa, 2016).

9 In addition to all the above, it is not uncommon that, accepting interpretations of the law and constitutional jurisprudence, the sphere of private property law is further expanded, thereby reducing the power of the state to protect natural resources. It is what has happened in the matter of regulation of the use of water, where the understanding that the right of private property is an absolute has blocked, most of the time, any reform attempt that seeks to protect the sustainability of this resource. A similar situation has occurred in the area of fishery resources, where the understanding of fishing authorizations as intangible assets protected by private property law has delayed the adoption of reforms necessary for sustainability or has been used as the only criterion to determine allocations (Guiloff, 2015).

10 See Delgado (2019).

## **PART TWO**

### THE PUBLIC TRUST DOCTRINE



Mono Lake, California. By Nicole YC



## 1. Summary and Key Concepts

Having explained the constitutional process underway in Chile and its potential relationship with protection of the environment, we take a closer look at the Public Trust Doctrine and the value of integrating this concept into the Chilean Constitution.

The Public Trust Doctrine is a centuries-old legal concept that can be traced back to Roman law<sup>11</sup> and the British Magna Carta.<sup>12</sup> The doctrine holds that certain elements of nature are subject to a special obligation on the part of the government to administer and protect them for the benefit of the public. This special obligation is called a trust in English law. (Trust, as in “I trust you” translates to “confianza” in Spanish, but trust in the legal sense, as in “this property is held in trust”, has no good counterpart in Spanish. Therefore, this report uses the English words “trust” and “public trust” in both the English and Spanish versions.)

According to the basic principles of common law, a trust has three components: (1) a “res” (Latin word that refers to the assets, resources, or property that are subject to the trust); (2) a trustee (the person or entity that has a special level of responsibility, a fiduciary duty, to administer the res for the benefit of a “beneficiary”); and (3) a “beneficiary.” In the case of the Public Trust Doctrine, the res would be the elements of nature involved; the trustee is the government, whether the nation or state, since both possess sovereignty; and the beneficiary is the public of the nation or state, including future generations. The specific elements of nature that make up the res of the public trust can vary from one jurisdiction to another.

Initially, the Public Trust Doctrine applied only to navigable waters and intertidal areas, keeping them open for public use and avoiding private monopolies. However, over the past 50 years in the United States and in various other countries, the scope and content of the public trust res has expanded to include lakes, wetlands, fish and wildlife, parks, beaches, fresh water, including groundwater, and ecosystem services.

The Public Trust Doctrine derives from the sovereignty of the government, like another power known in the United States as the “police power.” Police power is the power of the government to regulate property rights for purposes of public health, safety, and welfare. The Public Trust Doctrine is a complementary public property right. While the police power gives the government the power and authority to take measures to preserve and protect natural resources, the Public Trust Doctrine imposes obligations on the government to do so.

In many jurisdictions the Public Trust Doctrine is an implicit obligation imposed on the sovereign and recognized by the courts which implies an independent judicial system that allows a wide possibility of cases filed by the public, and thus gives the courts latitude to ensure that the government protects the elements of nature constituting the res of the public trust. In some jurisdictions, the doctrine is variously recognized in constitutional, legislative, or regulatory language. An advantage of explicitly including the Public Trust Doctrine in the Constitution, particularly in Chile, is that all State agencies would oversee its application. Implementation would not depend primarily on the judiciary. This principle warrants some emphasis in light of the differences between the legal systems in Chile and in the United States, as detailed below.

<sup>11</sup> The Institutes of Justinian declared in the 6th century that “these things are by natural law common to all: the air, the flowing water, the sea and, consequently the shores of the sea”. Courts around the world have based their own jurisprudence of the Public Trust Doctrine on the recognized roots in the 6th century Justinian Code and its predecessors in the Roman Empire.

<sup>12</sup> The English Magna Carta of 1215 recognized public rights in navigable waters, initiating an evolution and expansion of the public trusts res that continues to this day. In addition to linking the Public Trust Doctrine to navigable waters, the English introduced the concept of the sovereign as trustee of these waters. The role of the sovereign as trustee and navigable waters as common property to all are pillars of the Public Trust Doctrine in the United States and elsewhere.

This doctrine makes it possible to prevent the establishment of private monopolies, guaranteeing that the natural resources of the public trust are not given away, and that they are protected from significant adverse environmental effects. However, even though the elements of nature subject to the Public Trust Doctrine are inalienable and in public ownership, the doctrine can coexist with certain private rights of use. The relationship and balance between private rights and the public interest are central themes of the Public Trust Doctrine. We present important judicial decisions below to aid in understanding these concepts, their underlying legal reasoning, and their accommodation with private property rights.

## 2. Key Judgments and Judicial Reasoning on the Public Trust Doctrine

The most important case in the jurisprudence of the Public Trust Doctrine in the United States is *Illinois Central Railroad v. Illinois* (1892), in which the U.S. Supreme Court struck down a statute of the State of Illinois that had given a private railroad company control of a large part of the bed of Lake Michigan within the port of Chicago. Four years after passage of the law, the State Legislature approved another law that revoked the earlier transfer of ownership, without compensating the company. The Supreme Court upheld the revocation without compensation on the grounds that the original legislation was void because the State owned the bed under navigable waters, a kind of public domain that cannot be alienated, and because those submerged lands are subject to public duties. This inalienable duty of the government is the public trust.

In its *Illinois Central* decision, the Supreme Court declared that the public trust “requires the government of the state to preserve such [navigable] waters for the use of the public. The trust... can only be discharged by the management and control of property in which the public has an interest, and cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost.... The state can no more abdicate its trust over property in which the whole people are interested...than it can abdicate its police powers in the administration of government and the preservation of the peace.”<sup>13</sup> The Court indicated that the government could not permit “substantial impairment” of trust resources.

This 1892 U.S. Supreme Court decision illustrates the strength of the Public Trust Doctrine by imposing a restriction on the government’s ability to hand over monopoly control of resources subject to the public trust to private industry. Other courts, over time, have expanded trust principles to protect the ecological integrity of those resources.

### California and Mono Lake

Another pivotal case on the Public Trust Doctrine was that of the California Supreme Court in 1983: *National Audubon Society v. Superior Court of Alpine County*, popularly known as the Mono Lake case. The decision illustrates the ability of the doctrine to protect the various services the lake provides as an ecosystem versus the rights of private parties to extract water destined for transport to Los Angeles.<sup>14</sup>

Mono Lake is located in a basin about 300km northeast of the City of Los Angeles on the eastern side of the Sierra Nevada Mountains. It is fed by a number of streams to which the City acquired water rights in the early 1900s. When, in 1940, the City requested water rights to those streams from the State Water Board (an agency analogous to the “Dirección General de Aguas”

13 *Illinois Central Railroad v. Illinois* (1892), 146 U.S. 387, 453-454.

14 *National Audubon Society v. Superior Court of Alpine County* (1983) 33 Cal.3d 419.



in Chile), in order to transport the water south to Los Angeles, the Board thought it lacked authority to deny the City's application, declaring: "It is indeed unfortunate that the City's proposed development will result in decreasing the aesthetic advantages of Mono Basin but there is apparently nothing that this office can do to prevent it." <sup>15</sup> When the export of water from the Mono Basin increased markedly in the 1970s, after Los Angeles built a second aqueduct, the detrimental environmental effects on Mono Lake were quickly evident, as the lake level fell abruptly.

A group of environmental NGOs filed suit and, after losing in the lower court, the California Supreme Court reversed after giving close consideration of the relationship between the state-granted appropriation of water rights system and the State's obligations under Public Trust Doctrine. The court specifically rejected the State Water Board's claim that it lacked authority to protect the lake, citing the State's duties under the Public Trust Doctrine, a doctrine which has always existed in California. The court explained the purpose, scope, and duties imposed by the Public Trust Doctrine as follows:

- Purpose: The doctrine's purposes have changed over time. Historically they were navigation, commerce, and fishing; they now also include recreation and ecology.
- Scope: By protecting navigable waters, the Public Trust Doctrine also affects non-navigable waters that are connected, and whose use could adversely affect navigable waters.
- The government has both the power and the duty to protect navigable waters. "The public trust is more than an affirmation of state power to use public property for public purposes. It is [also] an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands." <sup>16</sup>

Balanced against the trust was the State's system of prior appropriation water rights (first in time, first in right), which the State adopted in the 19th century and codified in the State's Water Commission Act of 1913, which established the Water Board. The Court underlined the importance of an amendment to the State Constitution in 1928, which says that the State does not recognize a right to unreasonable use of water. The constitutional clause remains in effect today, requiring that the use of water be "reasonable and beneficial... in the public interest and for the public welfare." <sup>17</sup> The *Mono Lake* court emphasized that the 1928 Constitutional amendment "establishes state water policy. All uses of water, including public trust uses, must now conform to the standard of reasonable use." <sup>18</sup>

The California court refused to choose between the two doctrines, concluding that both have essential elements for the planning and allocation of waters, and that they are compatible and not contradictory. The court stated that what was required was "an accommodation" between the rules and principles of both doctrines, in a balanced and pragmatic way. On the one hand: "The State as sovereign retains continuing supervisory control over its navigable waters and the lands beneath those waters. This principle, fundamental to the concept of the public trust... prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust." <sup>19</sup>

On the other hand, the court did not question the significant water infrastructure of the State, with long-distance transfers legally authorized by the appropriation rights system, despite their undeniable negative environmental impacts:

15 Ibid., p.428.

16 Ibid., p.441.

17 Constitution of California, Art. 10, sec. 2.

18 National Audubon Society v. Superior Court of Alpine County (1983) 33 Cal.3d, at 445.

19 Ibid.

“As a matter of current and historical necessity, the Legislature... has the power to grant usufructuary licenses that will permit an appropriator to take water from flowing streams and use that water in a distant part of the state, even though...[it] may unavoidably harm the trust uses at the source stream. The population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values.” <sup>20</sup>

In the end, the reconciliation reached by the Court served to make the State’s water rights system more flexible and strengthen a longer-term historical perspective:

“In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs....

“The human and environmental uses of Mono Lake - uses protected by the Public Trust Doctrine - deserve to be taken into account. Such uses should not be destroyed because the state mistakenly thought itself powerless to protect them. ” <sup>21</sup>

According to Prof. Michael Blumm, the reasoning of the *Mono Lake Court* shows that the Public Trust Doctrine does not violate private property but instead seeks to accommodate private rights and public rights in certain resources, especially water bodies. <sup>22</sup>

Since the *Mono Lake* ruling, the Water Board has frequently invoked the Public Trust Doctrine in conjunction with the constitutional article on the reasonable use of water to support its decisions requiring that certain waters remain in a given watercourse for ecological reasons. Over the past decade, especially during recent drought years, the State has employed the Public Trust Doctrine to protect ecological water flows, impose emergency conservation requirements, and develop long-term conservation goals.

### **3. Constitutional Expressions of the Public Trust Doctrine in the United States: Pennsylvania and Hawaii**

Some U.S. states have included the Public Trust Doctrine in their constitutions. We review prominent examples from Pennsylvania and Hawaii below.

#### **Pennsylvania**

The people of Pennsylvania, in a public referendum in 1971, ratified an Environmental Rights Amendment to their Constitution by a margin of nearly 4 to 1. The language, in three sentences, captures the essence of the Public Trust Doctrine:

“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.”<sup>23</sup>

In addition, the Pennsylvania Constitution begins with a declaration of “certain inherent and inalienable rights possessed by all members of the public,”<sup>24</sup> including the rights to property, freedom of religion and expression, and the right to the protection of natural and public resources.

20 Ibid., p.446.

21 Ibid, pp. 446, 452.

22 Blumm (2010), The Public Trust and Private Property: The Accommodation Principle, (2010) 27 Pace Envtl. L. Rev. 649.

23 Pa. Const., art. I § 27.

24 Pa. Const. art. I, § 1.



In 2012, the Pennsylvania court interpreted this constitutional language to restrict the state legislature's revisions to the State Oil and Gas Act. The new legislation sought to promote natural gas "fracking" by preempting (overriding) local government zoning laws. The court decided that the replacement of local control over mineral exploitation violated the Public Trust Doctrine.<sup>25</sup> The Pennsylvania Supreme Court noted the history of environmental degradation in the State that led to the constitutionalizing of the Public Trust Doctrine in 1971.

"The drafters and the citizens of the Commonwealth who ratified the Environmental Rights Amendment, aware of this history, articulated the people's rights and the government's duties to the people in broad and flexible terms that would permit not only reactive but also anticipatory protection of the environment for the benefit of current and future generations. Moreover, public trustee duties were delegated concomitantly to all branches and levels of government in recognition that the quality of the environment is a task with both local and statewide implications...."<sup>26</sup> Thus, in Pennsylvania, all branches of government are public trustees, including local governments.

## Hawaii

The State of Hawaii codified the Public Trust Doctrine in its Constitution in 1978 as follows:

"For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people."<sup>27</sup>

The Constitution adds elsewhere that the "State has an obligation to protect, control, and regulate the use of Hawaii's water resources for the benefit of its people."<sup>28</sup>

Perhaps the most notable interpretation of the Public Trust Doctrine in the Hawaiian Constitution concerned a dispute over the diversion of groundwater for large-scale agricultural use to the detriment of small native Hawaiian farmers. The controversy led to a landmark decision in the *Waiahole Ditch* case, in which the Hawaii Supreme Court ruled that "[the] plain reading of these provisions manifests the framers' intent to incorporate the notion of the public trust into our constitution."<sup>29</sup>

The court decided that the purpose of the trust is "to reserve the resource for use and access by the general public without preference or restriction."<sup>30</sup> The court defined the scope of the public trust to extend beyond the traditional uses of fishing, navigation and commerce to include recreational and scenic uses, protection of the ecology of waters in their natural state, domestic use of water

25 Robinson Township v. Commonwealth, (Pa. 2013) 83 A.3d 901.

26 Id..

27 Hi. Const., art. XI § 1.

28 Id., art. XI § 7.

29 Waiahole Ditch, (Haw. 2000) 9 P.3d 409, p. 443.

30 Id. p. 450.

and the exercise of the traditional and customary rights of the native Hawaiian people.<sup>31</sup> The court emphasized that the purposes of the public trust may change over time, but the “state’s duty to preserve the rights of present and future generations” endures.<sup>32</sup>

The Public Trust Doctrine in Hawaii therefore extends to water rights, including groundwater, as well as all other natural resources: It is “a fundamental principle of constitutional law in Hawaii.”<sup>33</sup>

The importance of constitutionalizing the public trust in Hawaii and Pennsylvania lies in part in the fact that the doctrine is not subject to repeal or abatement by the legislature or government agencies. Constitutionalizing the public trust also will ensure that the public may enforce the governmental obligations it imposes in court.

31       Id. p. 448-49.

32       Id. p. 453.

33       Id. p. 445.



## **PART THREE**

# HOW THE PUBLIC TRUST DOCTRINE CAN HELP PROTECT NATURE IN CHILE

Machali (VI Región), Chile. By Nicolás Lobos

## 1. The Public Trust Doctrine for Chile

As we have pointed out, the ongoing constitutional process is a unique opportunity to incorporate greater constitutional protection for the environment and nature since the 1980 Constitution has not been successful in guaranteeing adequate protection. One way to reinforce this protection is to identify successful experiences used by other countries to achieve more balance between economic activity, respect for private property, and the protection of natural resources and the environment in general. The U.S. experience with the Public Trust Doctrine offers one such example from which we can draw ideas for the protection of nature in a new Chilean Constitution.

The Public Trust Doctrine, as noted in Part Two above, is a form of protection for certain elements of nature considered to be of “public interest” that requires the State and its agencies to exercise a higher level of care of these resources for the benefit of the public, including future generations. If private property rights are affected, the State may do so without paying compensation. The doctrine includes the right of citizens to enforce its obligations in court. For De Armenteras<sup>34</sup> this doctrine evolved from being invoked to avoid the enclosure and privatization of certain assets to become a key legal instrument for environmental protection.

Implementation of the Public Trust Doctrine has occurred mainly through the development of judicial decisions and reasoning, something that is typical of the American common law legal culture. This form of implementation has been a characteristic feature of the Public Trust Doctrine, although there also has been some legislative and administrative implementation. But there are constitutional texts like those of the states of Pennsylvania and Hawaii that expressly recognize this doctrine as a fundamental standard for the protection of the environment and its components.

In considering the potential application within Chile’s civil or continental law tradition, it is important to distinguish between the substantive core of the Public Trust Doctrine on the one hand, and its historic implementation through court jurisprudence in the United States. This is particularly relevant because Chile’s continental legal culture restricts judges to a more limited role in the formulation of public policy than the common law legal culture of the United States. In general, public policies are designed legislatively, and their implementation is assumed by the public administration. Judges tend to adopt an extremely cautious attitude concerning the public effect of their decisions. In general, judicial decisions do not have broad effects beyond the specific case at hand (i.e., there is no doctrine of *stare decisis*).

This distinction between the substantive core of the Public Trust Doctrine and the specific ways in which it has been implemented invites separate analyses, which are the subject of this part of the report. On the one hand we address the substantive policy question of whether the Public Trust Doctrine could serve to strengthen the constitutional protection of the environment and natural resources. On the other hand, given the different institutional contexts and legal cultures of Chile and the United States, we ask how might the Public Trust Doctrine be effectively implemented in Chile?

To address the substantive issues, we identify the provisions of the current Constitution that relate to the protection of the environment and natural resources and that, although not identical to the Public Trust Doctrine, fulfill similar functions. These are the regulations that deal with “national goods for public use” and the limitations on private property based on its “social function”. Both issues have had a doctrinal and jurisprudential development in Chile that allows a comparison with the Public Trust Doctrine and the identification of common elements and differences. This will then allow us to consider the question of whether incorporation of the Public Trust Doctrine in a new Constitution might improve upon the current provisions for the protection of nature.



## 2. Comparing the Public Trust Doctrine and Chilean Regulation

### Doctrine of National Goods for Public Use. (Bienes Nacionales de Uso Público)

The doctrine of public ownership (*dominio público*) in Chile has similarities with the Public Trust Doctrine. Both refer to a group of goods or resources that are held by the State for specific purposes. The public ownership of these assets excludes them from private property, and requires the State to manage them under a distinct legal regime. This doctrine of public ownership implies that the government does not have the discretion to dispose of these resources but must administer them in such a way that they continue to fulfill their public purpose. However, there is an important difference between the public ownership doctrine in Chile and the clauses that in some states of the United States have constitutionalized the Public Trust Doctrine, which is that the public ownership doctrine is not directly established in the Chilean Constitution. Although there is a constitutional reference to goods “that must belong to the entire Nation,” that is merely an exception to the rule that all goods are free for appropriation. This provision does not define the extent of the extent of the State’s role in public ownership. Consequently, the current Constitution does not impose on the government an active duty to protect nature and ensure the public purpose inherent in the natural assets in public ownership. The Constitution simply establishes that the law can exclude certain goods from private appropriation.

Moreover, the Chilean Constitution does not indicate which assets are in public ownership. That determination is left to the Legislature, which can allocate resources to public ownership but can also lift that designation. The only assets that are constitutionally assigned to public ownership are mineral resources, according to Article 19, No. 24, (6). This government property is declared absolute, exclusive, inalienable, and imprescriptible. However, Chilean mining law allows the government to grant concessions to private parties to exploit mineral resources, and these concessions are protected as private property under the 1980 Constitution.

Fernando Atria and Constanza Salgado have recently insisted on the importance of preserving the essential purpose of the doctrine of public ownership. They explain that “public ownership [...] is the designation that the law uses to allocate certain goods for public purposes. Its purpose, in general terms, is that goods that are under public ownership can serve the purpose for which they were specifically destined and that, therefore, they are not subordinated to what eventual owners arbitrarily decide, as is the case with private goods.”<sup>35</sup> They emphasize that this category of goods implies a limitation on private exploitation.

Insisting on what other authors call the normative element of the doctrine, Atria and Salgado explain that “to achieve these [public] objectives, the goods that are part of public ownership (i) are withdrawn from private exchange, that is from the market, and (ii) cannot be appropriated by individuals.”<sup>36</sup> They remind us that these resources are subject to a public regime, not private law, and that they are consequently inalienable, unattachable, and imprescriptible.<sup>37</sup>

Nonetheless, water, although defined as a “national good for public use” (and thereby within public ownership) has effectively been transformed into a private good since water rights are granted in perpetuity and the government has few legal tools available for environmental protection with respect to water. This situation is exacerbated by the very strong private property rights recognized by the Constitution, effectively blocking any reform to the system of water rights in Chile.<sup>38</sup>

35 Atria y Salgado (2015).

36 Ibid, p.50.

37 Chilean literature agrees on the basic characteristics of public ownership doctrine. See for example Vergara (1999) and Montt (2002).

38 Bauer (2004) Siren Song: Chilean Water Law as a Model for International Reform.

### **The social function of property (La función social de la propiedad)**

Another Chilean constitutional principle comparable to the Public Trust Doctrine is the doctrine of the social function of private property. One aspect of the Public Trust Doctrine is its defensive function in that it generally provides government with an argument against private claims of regulatory expropriation (or “taking”).<sup>39</sup> Consequently, restrictions on private rights over a public trust resource do not require compensation if the purpose of the restriction is to serve the public trust. In a similar way, as explained below, the doctrine of the social function of property provides constitutional legitimacy for the regulation of private property.

The Chilean Constitution allows two modifications of private property rights in Article 19, No. 24: expropriation and limitation. The Constitution allows the State to deprive an individual of his property through expropriation for reasons of public utility or national interest authorized by general or special law (Article 19, No. 24, (3). Since expropriation presupposes an enrichment of the State’s patrimony, the Constitution requires compensation (in a manner similar to eminent domain in the United States).

The Constitution also allows the law to impose limitations and obligations on certain private property on the basis of its social function (Article 19, No. 24, (2). Thus, the concept of social function offers support for the legislature to reconcile, or accommodate both public and private interests in regulations. A distinctive characteristic of limitations based on social function is that they are not compensable; that is, they must be borne by the holder of the affected right without financial compensation. However, this recognition does not exclude that, for extreme cases where the limitation is manifestly unfair and disproportionate, the regulation may be unconstitutional for violating the principle of equal distribution of public burdens (similar to a “regulatory taking” in the United States).<sup>40</sup>

In this way, the doctrine of the social function of property serves as a justification for non-compensable property regulation in a way similar to the Public Trust Doctrine. Further, social function incorporates the idea of “conservation of environmental heritage,” accentuating the parallels with the Public Trust Doctrine. However, an important limitation of the social function is that it operates defensively, justifying state property regulations, but without imposing a duty of action. In other words, the social function imposes no fiduciary duty to act to protect the environment or natural resources.

### **3. The Public Trust Doctrine Would Increase Environmental Protection in the New Constitution**

The existing environmental protection gap in the Chilean legal system is evident. There is no clear and unequivocal enforceable duty requiring the government to actively protect the environment or provide public access to and use of the elements of nature. In a country like Chile, with a civil law tradition, the express establishment of such a duty in the Constitution, would provide two possibilities that are currently absent in the Constitution. First, it would require the legislature and administrative bodies to adopt measures that protect the environment and natural resources in the exercise of their regulatory and management powers. Second, it would provide a standard for courts to measure the performance of State agencies whose actions affect these resources.

The incorporation of the Public Trust Doctrine in a new Constitution could establish a duty to preserve the environment and natural resources through the adoption of language such as that found in the constitutions of the States of Pennsylvania and Hawaii in the United States, which provide for the enforceable protection of nature. Since constitutional provisions apply to both the Legislature and administrative bodies, a constitutional public trust would ensure priority for the environment and natural resources protection by the entire government.

39 Rose (1998), p.358.

40 Aldunate (2006), p.298.



## **PART FOUR** IMPLEMENTATION

Lonquimay (Región IX), Chile. By Jorge Garrido

## **1. How to Implement the Public Trust Doctrine in Chile?**

This part of the report examines the differences in the governmental and legal structures and cultures of Chile and the United States in order to consider how the Public Trust Doctrine might be implemented in Chile.

## **2. Comparison of the Legislatures of the United States and Chile**

Historically, the legislature in Chile has been relatively slow to address social problems. In crucial areas of social, economic, and environmental policy, legislative action is often late and weak. For example, the Chilean Water Code has rarely been modified since its enactment in 1981, despite broad agreement on the need for substantive reforms. The private health insurance system is another example of a system in need of reform. Despite thousands of constitutional lawsuits against the healthcare system over the past decade, the legislature has been unable to produce comprehensive reforms. When the legislature acts and regulates a matter, it usually does so by establishing a general framework that then requires supplementation through administrative channels.

Some of the causes of the slowness of the Chilean legislature are related to constitutional restrictions, such as the requirement for high quorums to regulate some aspects of the public administration and the courts (Articles 38 and 77), and the concentration of authority to initiate legislation in the executive branch. Another important cause of relative lethargy in legislative production is the constant threat of intervention by the Constitutional Court that historically has interpreted the scope of what is constitutionally allowed in a restrictive way, especially in economic matters.

The legislative activity of the federal Congress of the United States is also characterized by its relative slowness, due to its particular rules and procedures and various dysfunctionalities of the political system. However, there is an escape valve at the state level, where some legislatures can be quite active in environmental matters, land use planning, and social policy. State action allows for more legislative experimentation, despite obstacles at the federal level. Given the unitary nature of the State in Chile there is no equivalent path to side-step the problems of legislative inactivity of the National Congress.

One cannot therefore assume that a constitutional provision with general language will be swiftly implemented by the Chilean Legislature. It seems necessary to create incentives for legislative activity to take place or establish a standard that is sufficient in the absence of further legislation.

### **The Role of the Executive and the Administration in the United States and Chile**

Both Chile and the United States have presidential systems of government. Chilean presidential power is broader than American presidential power because of the Chilean President's greater influence over the legislative process. However, in both jurisdictions, the presidential system has problems in enacting legislation when Congress and the President are under the control of different political parties.

Strong presidential power in Chile could lead one to think that the office has broad powers to regulate matters independently. There are interpretations of the 1980 Constitution that would give the President extensive autonomous regulatory power and allow the President to issue regulations independently of Congress. However, in practice the President of the Republic rarely has used this power, as it has been interpreted restrictively by the courts and by mainstream legal doctrine. In addition, the Constitutional



Court during the 1990s strictly interpreted the regulatory power of the President (*potestad reglamentaria de ejecución*) through the doctrine of the “reservation of law” (*reserva de ley*); that is, the obligation to regulate certain matters by law and not merely through administrative regulations. Additionally, in Chile regulations must be approved by the Comptroller General of the Republic (*Contraloría General de la República*) before being promulgated. This control has historically been quite formalistic, recognizing limited space for regulatory experimentation and innovation. At times this attitude has been perceived as causing the administration to be insufficiently innovative and proactive in legal matters in order to avoid controversies with the Comptroller’s Office. Consequently, while relevant, the regulatory power of the President is less robust than the strong presidential nature of the Chilean political system would suggest.

Regulatory power in Chile, therefore, contrasts with the United States where the regulatory power of the executive is quite broad. Indeed, it is rare for a court in the United States to consider that it is unconstitutional for Congress to broadly delegate the regulation of a matter to the administrative agencies. In Chile, on the other hand, the risk of being declared unconstitutional due to violation of the reservation of law is a persistent threat to administrative regulation.

Regulatory agencies in Chile are comparatively weaker than in the United States. In recent years, the Chilean Constitutional Court has limited the adjudicative, standard setting, and sanctioning powers of administrative agencies in the fields of consumer protection, water use enforcement and urban planning, among others. A public trust provision in the Constitution would presumably reverse this trend when the agencies are carrying out their constitutional responsibilities. In Chile, there is also no recognition of regulatory agencies with independence from the President of the Republic. Although in recent years protections have been established against undue presidential influence—especially in matters of financial supervision—most Chilean regulatory bodies are heavily subject to the political appointments made by the President of the Republic.

Finally, in Chile there is little stability, professionalization, and training in public service. There are also few incentives to develop permanent administrative careers in administrative agencies, which results in a high degree of turnover in administrative teams with changes of government. Chilean administrative agencies therefore have relatively fewer powers, are technically weaker, and are less independent from political pressure than their counterparts in the United States.

An additional factor is that in Chile there is not a system of courts to resolve disputes between individuals and the administration. As a general rule, the courts in charge of this task are ordinary courts with common jurisdiction. This results in judicial interpretation of administrative law by non-specialist judges, who are not always capable of developing doctrines appropriate to the activity of modern administration. The problem is exacerbated by the fact that the Chilean courts do not use the doctrine of precedent (*stare decisis*) or aim to have consistency in their own decisions. So there is enormous uncertainty concerning judicial interpretation of the law governing the administration agencies. This uncertainty is in notable contrast with the United States, where the doctrine of *stare decisis* ensures a certain consistency in applicable legal requirements.

Given these considerations, a constitutional clause incorporating the Public Trust Doctrine must be sufficiently clear so that the government, with the assistance of the citizen beneficiaries of the trust, can develop the doctrine through regulatory authority. Such a clause would also enable citizens, as beneficiaries of the trust, to claim that government has an active duty to protect nature through its regulatory powers.

## The Environmental Courts and Their Powers

In certain areas Chile has adopted a system of specialized courts of first instance with jurisdiction over labor, family, municipal, tax, or environmental matters. Generally, the decisions of these lower courts are subject to review by the respective Court of Appeals, which act as a second instance. Finally, at the top of the system, is the Supreme Court, which has jurisdiction over the entire national territory and can review judgements, revoke them, and replace them. There is also a separate Constitutional Court with jurisdiction distinct from the Supreme Court.

In the U.S., two judicial systems coexist, the federal judicial system, which deals with matters specific to federal law, and the state judicial systems, with jurisdiction over the law specific to each state. Both systems have three levels of courts: In the federal system, there are district courts, as courts of first instance, with jurisdiction in civil and criminal matters. Then there are the courts of appeal, with jurisdiction in any of the 13 territorial circuits, and ultimately, the United States Supreme Court. In the state judicial systems, although the structures differ somewhat among the states, there are also courts of first instance with general competence, courts of appeals, and a state supreme court.

In Chile there are three specialized environmental courts, with geographic jurisdiction over the north, center and south of the country. These act as courts of first instance. Basically, these courts can order the repair of environmental damage and annul illegal administrative acts. Their jurisdiction is limited to hearing claims 1) for reparation of environmental damage; 2) against executive decrees in various specific matters (emission standards, quality, etc.); 3) against directives of the Superintendency of the Environment (with sanctions or measures of urgency); 4) against authorizations within the Environmental Impact Assessment System for investment projects; and 5) against other administrative acts “of an environmental nature” issued by government Administration bodies.

However, conflicts over the application of sectoral regulations (for example those pertaining to terrestrial or maritime waters, forests, coastal areas, etc.) are considered outside the jurisdiction of the Environmental Courts, unless they are related to situations of environmental damage or to some administrative instrument of environmental management (such as permits issued by the Environmental Evaluation Service). There is a generally positive perception of these courts, especially in trials related to environmental damage, since the processes take less time, there is better review of the evidence, and there has been some effort to expand the criteria for standing. However, the ability of the most vulnerable groups to access these courts is still quite limited due to the high legal costs involved.<sup>41</sup>

Environmental Courts could play an important role in the enforcement of a constitutional clause endorsing the Public Trust Doctrine if the clause imposes a duty on government to guarantee the integrity of all ecosystems. Although the competence of the Environmental Courts is currently limited to environmental management instruments and liability for environmental damage, their jurisdiction could be expanded to matters of natural resource management and these courts could be designated as the primary enforcement mechanism for a Public Trust Doctrine.



### **3. Adaptation and Applicability of the Public Trust Doctrine in Chile**

For the reasons stated above, the best means to implement the Public Trust Doctrine in Chile is through a constitutional clause for the protection of nature. Given the need to establish clear and sufficiently prescriptive rules that affect the action of the Legislature and the executive branch, which in turn influence judicial interpretation, it is important that this clause specifically establish a duty that binds the government and is enforceable by citizens. It is also important that the actions required to fulfill this duty are clearly established for the benefit of the public as a whole and are not dependent upon specific individual injury.

Therefore, a constitutional clause for the protection of nature that is inspired by the Public Trust Doctrine should (1) establish a duty on the part of the State and its subordinate agencies to protect nature including the integrity of terrestrial, marine, and freshwater ecosystems) for the health and benefit of the public including future generations and (2) provide that when it is in the public interest to allow the private appropriation of natural resources the State has a duty to assure that such private use does not substantially diminish public rights and is in the public interest. For such a clause to be effective the Constitution must also enable citizens to enforce the public trust in courts and administrative agencies.

This public trust duty should guarantee all citizens access to vital public assets such as the beaches, which are usually used exclusively by the owners of neighboring properties. At the same time, the public trust should be recognized as a constraint on the government when granting a concession to a private party. Any private use must be in accord with laws and regulations that protect the public interest. Citizens must have the right to challenge in court denials of access to trust resources through privatization.

A public trust clause in the Constitution will certainly have an effect on environmental regulations, management, and enforcement. The decision-making body will no longer be able, as before, to ignore the effects generated by a government action such as the granting of an environmental permit or a water right on the ecosystem affected. When deciding how to act, a governmental decision will no longer focus only on the protection of the private property right of the person who wants to carry out the activity, or who may be affected by the environmental regulation, but also on how the exercise of this right can affect the environment. Over time, this should result in more balanced natural resource management based on ecosystem criteria. For this reason, the clause proposed here is compatible with other environmental protection frameworks such as the guarantee of the right to a healthy environment, or the recognition of principles such as sustainability and environmental justice.

A public trust clause would complement, not conflict with, better regulation of public ownership and private property in the elements of nature recognized in the existing Constitution. As noted above, the public ownership doctrine is not directly established in the Chilean Constitution. The current Constitution neither indicates which goods fall within the public domain, nor does it specify that they must serve the purpose for which they were originally intended, nor does it impose on the government an active duty to protect them, nor does it enable citizens to preserve their public ownership. The clause proposed here incorporates the fundamental elements of the Public Trust Doctrine. The proposed clause is consistent with existing limitations that may be imposed on a property's social function. In effect, constitutionalizing the public trust would elevate the social function principle from a mere factor in the regulation of private property, allowing for the imposition of limits only in exceptional cases, to the fundamental basis of how private property is defined.

This report has sought to analyze the lessons that can be drawn from the Public Trust Doctrine in United States as a constitutional mechanism for environmental protection. We think this experience is relevant to the constitutional process currently underway in Chile. An important aspect of the constitutional crisis in the country is the perception that government institutions have been incapable of properly protecting the environment. Moreover, the current Constitution has functioned to prevent needed reforms.

# CONCLUSION

The Public Trust Doctrine holds that certain elements of nature are subject to a special obligation on the part of the government to manage and protect them for the benefit of the public, including future generations; and that the State obligation is judicially enforceable by citizens.

We have seen that the Public Trust Doctrine has been an important tool for protecting nature in the United States, and has been specifically written into the constitutions of some states – notably Pennsylvania and Hawaii. Constitutional provisions have influenced both the courts and other branches of government to exercise their duty to protect the environment. In addition to being compatible with traditional Chilean legal doctrines and institutions, public trust principles would reinforce the State's duty to protect nature for the benefit of the entire population and the generations to come, while accommodating the different interests at stake with sufficient flexibility.

**Therefore, notwithstanding the significant institutional and cultural differences between Chile and the United States, this report recommends strengthening environmental protection through the inclusion of a clause in the new Constitution that is inspired by the Public Trust Doctrine. Such a clause would (1) establish a duty on the part of the State and its subordinate agencies to protect nature (including the integrity of terrestrial, marine and freshwater ecosystems) for the health and benefit of the public including future generations and (2) provide that when it is in the public interest to allow the private appropriation of natural resources the State has a duty to assure that such private use does not substantially diminish public rights and is in the public interest.**

The Constitution should also enable citizens to enforce the public trust in courts and administrative agencies. It is important that the Constitution specifically establish a duty that binds the government and is enforceable by citizens.

Finally, it is worth noting that the scope of application of the Public Trust Doctrine is broader than what this report raises. It could have application to other socio-environmental issues of profound relevance for the future of Chile. Among these are the potential link between the Public Trust Doctrine and indigenous peoples' rights, the uncertain scenarios that will come as a result of climate change, and other modes of environmental stewardship, such as those set forth in the so-called Rights of Nature.

A public trust clause in the Chilean Constitution will equip the Chilean government with an important legal tool to meet the environmental challenges ahead in the 21st century.

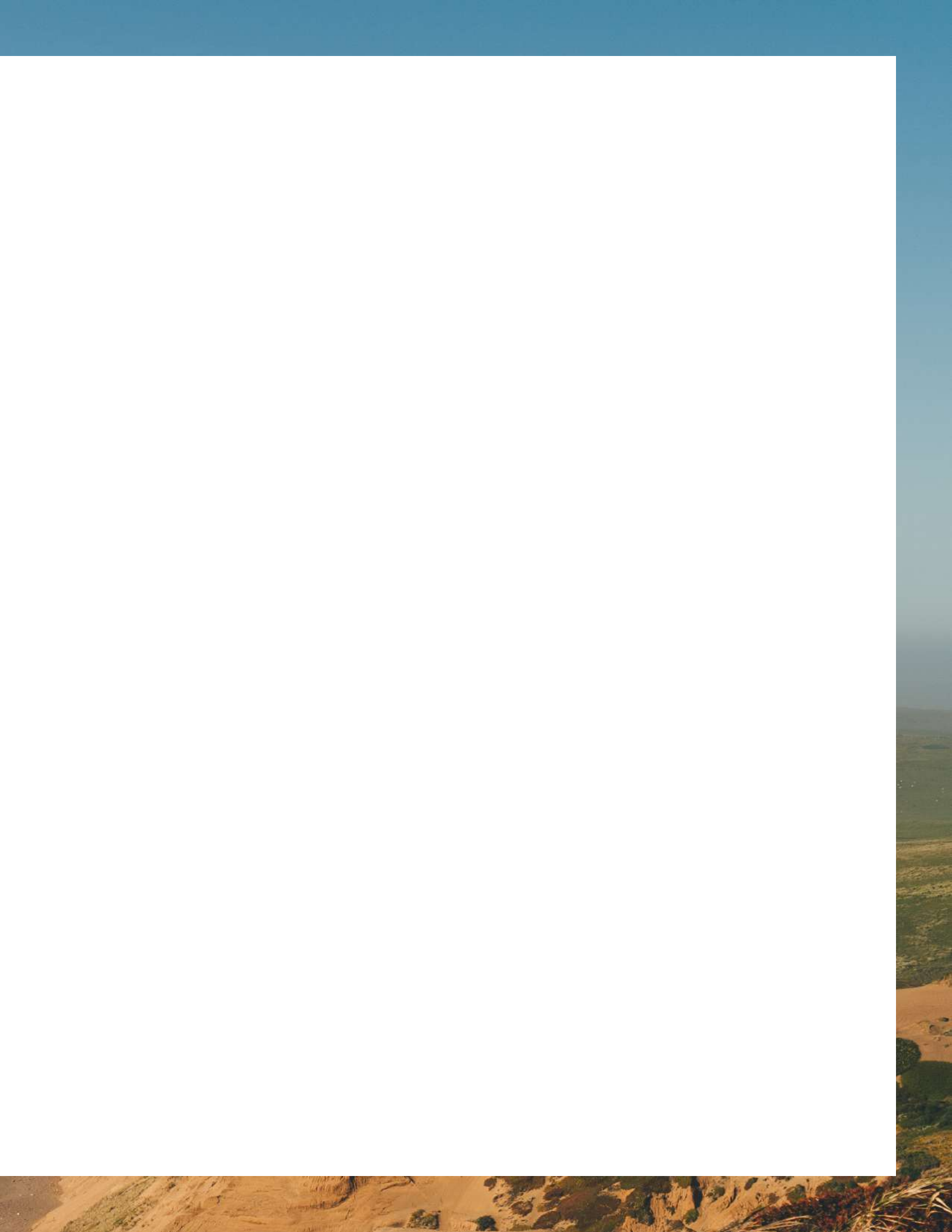


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## NOTES





The purpose of this report is to examine the Public Trust Doctrine and consider whether its principles might be incorporated into the new Chilean Constitution in order to provide greater protection of the natural environment.

